FEDERAL COURT OF AUSTRALIA

Kelekci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1000

Review of:	*Kelekci and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 254
File number:	NSD 378 of 2020
Judge:	**LOGAN J**
Date of judgment:	24 June 2020
Catchwords:	**MIGRATION** – review of a decision of the Administrative Appeals Tribunal (**Tribunal**) to affirm the Minister's delegate's decision not to revoke the mandatory cancellation of the applicant's visa – where the Tribunal was obliged to take into account and give effect to ministerial direction no. 79 – whether the Tribunal failed to consider the applicant's relationship with his partner and the consequences which might flow to that relationship if the applicant was deported – whether the Tribunal thereby failed to discharge its review function according to law
Legislation:	*Migration Act 1958* (Cth) ss 499, 501, 501CA
Cases cited:	*Anees v Minister for Immigration and Border Protection* [2020] FCAFC 28 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 *Gaspar v Minister for Immigration and Border Protection* (2016) 153 ALD 338 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 *Jebb v Repatriation Commission* (1988) 80 ALR 329 *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 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 *Singh v Minister for Home Affairs* (2019) 267 FCR 200

Suleiman v Minister for Immigration and Border Protection (2018) 74 AAR 545

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

Date of hearing:	24 June 2020
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	49
Counsel for the Applicant:	Mr J Donnelly
Solicitor for the Applicant:	Tajik Lawyers
Counsel for the First Respondent:	Mr G Johnson
Solicitor for the First Respondent:	MinterEllison
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice, save as to costs

ORDERS

NSD 378 of 2020

BETWEEN:	**DEHA KELEKCI** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
JUDGE:	**LOGAN J**
DATE OF ORDER:	**24 JUNE 2020**

THE COURT ORDERS THAT:

1. The applicant be granted an extension of time within which to file an originating application for the review of the decision of the second respondent dated 20 February 2020.
2. The extension operate *nunc pro tunc* on and from 31 March 2020.
3. The applicant be granted leave to amend the originating application in terms of the draft amended originating application annexed to the affidavit of Ms Nasima Tajik filed on 4 June 2020.
4. The need for the filing and service of the originating application, as so amended, be dispensed with. The draft originating application stand as an amended originating application duly filed and served for all purposes.
5. There issue absolute in the first instance a writ of certiorari directed to the second respondent quashing its decision made on 20 February 2020.
6. 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.
7. The first respondent pay the applicant's costs of and incidental to the application including the application for an extension of time, to be assessed if not agreed.

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

REASONS FOR JUDGMENT

(REVISED FROM TRANSCRIPT)

LOGAN J:

1 The applicant, Mr Deha Kelekci (**Mr Kelekci**), is a citizen of the Republic of Turkey. He was born in Istanbul on 7 February 1983. He is therefore presently 37 years of age. Mr Kelekci came to Australia on 26 March 2004 at the age of 21. He entered Australia lawfully pursuant to a Subclass 570 (Student) visa issued under the *Migration Act 1958* (Cth) (**the Act**). On 29 March 2011 he was granted a different visa, namely a Class BS Subclass 801 (Spouse) visa under the Act (**spouse visa**).

2 On 12 October 2018, Mr Kelekci's spouse visa was cancelled by a delegate of the Minister administering the Act (**Minister**) under s 501(3A) of the Act. That cancellation was a sequel to satisfaction in respect of the failure of the applicant to pass the character test and the related sentence of imprisonment. I shall detail a little later in the reasons for judgment something of Mr Kelekci's criminal history. It has never been disputed by him that there existed a basis for such satisfaction on the strength of which his spouse visa might be cancelled. As the Act permitted, Mr Kelekci made representations on 12 November 2018 seeking the exercise of the discretion found in s 501CA of the Act to revoke that visa cancellation.

3 On 28 November 2019, a delegate of the Minister decided not to revoke the decision to cancel Mr Kelekci's spouse visa. Mr Kelekci, in turn, exercised his right under the Act to seek a review of that refusal to revoke decision by the Administrative Appeals Tribunal (**Tribunal**). On 20 February 2020, for reasons given in writing that day, the Tribunal (Mr S. Evans, Member) decided to affirm the Minister's delegate's decision not to revoke the cancellation of the spouse visa. It was not until 31 March 2020 that Mr Kelekci sought to file in this Court an originating application invoking the jurisdiction conferred on the Court by the Act judicially to review the Tribunal's decision.

4 That application was filed outside the *prima facie* time limit. However, the Court is granted power to extend time. At the time when he filed the originating application, the need for an extension was not apparent to Mr Kelekci. It has though, once he has had the benefit of advice from a solicitor and counsel, become all too apparent. The result is that he has sought an extension of time within which to file the originating application. On 13 May 2020, I made an interlocutory order that the originating application and any related extension of time application

be heard today with arguments in respect of any extension of time application being treated as arguments in respect of the substantive application in relation to grounds of review. The hearing today has proceeded accordingly.

5 Because of the present COVID-19 pandemic and related public health apprehensions, it has been necessary to conduct the hearing via audio visual means using Microsoft Teams. That particular mechanism is satisfactory in an emergency such as the present but one would not ordinarily choose to exercise judicial power via that means.

6 The Minister has, having regard to an affidavit which has come to be filed on the applicant's behalf by his solicitor, Ms Nasima Tajik, adopted the position of not just not opposing but, insofar as permissible, consenting to the granting of an extension of time to the applicant. That, in the circumstances and with respect, is a commendably fair approach for the Minister to take. It is apparent from the affidavit of Ms Tajik, as well as looking at the originating application as filed, that the applicant found himself in the not unusual but nonetheless difficult position of a layman in immigration detention having to come to grips in fairly short order with detailed practices and procedures in respect of seeking judicial review. There is, of course, a discretion to exercise which is not determined by ministerial consent, but that is certainly relevant. I am quite satisfied in the circumstances of the present case that the interests of justice are such that an extension of time should be granted to Mr Kelekci such that the extension take effect *nunc pro tunc* on and from 31 March 2020, the date of filing the originating application.

7 As it happens, and again having had the benefit of advice from counsel and solicitors, Mr Kelekci seeks to amend that originating application in terms of a draft amended originating application which has been filed and served on the Minister in good time. The Minister has addressed the grounds developed in that particular application substantively in submissions and does not put forward, again, with respect, very fairly, any opposition to an amendment. Thus, the applicant ought also have an order which grants leave to amend the originating application in terms of the draft amended originating application which is annexed to Ms Tajik's affidavit. I shall also order that that draft amended application stand as the originating application duly filed and served, dispensing with the need for formal filing and service thereof.

8 The Tribunal quite properly has adopted the position of submitting to such orders as the Court may make, save of course in respect of any adverse costs order. The only active party contradictor is, as one might expect, the Minister.

9 The draft amended originating application pleads, at some length, the nature of the jurisdictional error challenge made to the Tribunal's decision. Indeed, it may do rather more than that but not in the particular circumstances of this case to any unnecessary end in the sense that some of what are described as particulars might strictly be regarded as in the nature of supporting submissions. In any event, it is convenient to set out in full an extract from the draft amended originating application containing what are described as the grounds of application:

> **Ground 1**
>
> **The decision of the Tribunal was affected by jurisdictional error, as the Tribunal failed to perform the function entrusted to it or otherwise did not perform the function in an authorised way.**
>
> Particulars
>
> 1. The Tribunal was bound to give effect to the relevant mandatory considerations in Direction no. 79 as applicable in the applicant's case: *Migration Act 1958* (Cth), s 499.
>
> 2. **First**, under cl 14.2(1)(b) of Direction no. 79, the Tribunal was required to have regard to 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.
>
> 3. In considering cl 14.2 (i.e. strength, nature and duration of ties), the Tribunal failed to have regard to the strength, duration, and nature of family or social links the applicant had with members of the Australian community in cl 14.2(1)(b):
>
>   - When considering cl 14.2, the Tribunal only referred to the effect of cl 14.2(1)(a) in Direction no. 79.
>
>   - No express findings were made by the Tribunal as to the strength, duration, and nature of family and/or social links the applicant had with members of the Australian community.
>
>   - Read in context, the Tribunal's reference to the '[a]pplicant's friends' at paragraph [89] was expressly made about the applicant's remorse, attempts at rehabilitation, and future support he may receive in Australia. However, clause cl 14.2(1)(b) is primarily posited on considering a non-citizen's past and present ties to members of the Australian community.
>
>   - The material before the Tribunal demonstrated that the applicant had developed links and ties with various members of the Australian community over many years: the family of his fiancé, the applicant's cousin, and various Australian friends. The Tribunal failed to engage with this material to consider cl 14.2(1)(b).
>
> 4. **Secondly**, cl 8(3) of Direction no. 79 outlines that both primary and other considerations may weigh in favour of, or against, revocation of the mandatory cancellation decision.
>
> 5. Contrary to the obligation mandated by cl 8(3), the Tribunal failed to decide

whether the other considerations in Direction no. 79 expressly weighed either in favour of, or against, revocation of the mandatory cancellation decision:

- When considering cl 14, the Tribunal found that the other considerations of international non-refoulement obligations, impact on Australian business interests, and impact on victims were all to be afforded no weight in this case.
- The Tribunal made no express findings as to whether cls 14.2 (strength, nature, and duration of ties) and 14.5 (extent of impediments if removed) either weighed in favour of, or against, revocation of the mandatory cancellation decision.
- Oddly, when considering cl 14.5 (extent of impediments if removed), the Tribunal erroneously found: '[T]he Tribunal considers it appropriate to afford the expectations of the Australian community moderate weight in favour of non-revocation'. However, the weight attributable to the primary consideration of expectations of the Australian community had already been decided earlier in the Tribunal's decision when considering that primary consideration.
- When referring to the other considerations in the conclusion section of the decision, the Tribunal failed to 1) outline the weight attributable to the other considerations; and 2) outline whether the other considerations weighed in favour of, or against, revocation of the mandatory cancellation decision.

6. **Thirdly**, Direction no. 79 requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded the greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.

7. An evaluation is required in each case as to the weight to be given to the 'other considerations'. The Tribunal failed to outline the ascription of weight to be given to the other considerations. As such, the Tribunal's purported assessment and evaluative balancing process undertaken in the conclusion section of the decision miscarried.

8. **Fourthly**, a Tribunal charged with "review" may commit jurisdictional error if it does not engage in an active intellectual process or give proper, genuine and realistic consideration to 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.

9. The Tribunal failed to consider the claim raised by the evidence and the contentions before it concerning the emotional and practical hardship non-revocation would occasion to the applicant's partner and the applicant. The material before the Tribunal demonstrated (**emotional and practical hardship claim**):

- The applicant had reconnected with his previous de facto partner of ten years.
- If the applicant is permitted to remain in Australia, the applicant and his partner are determined to build a family together and get married.
- The applicant and his partner are engaged, have unconditional love for each other, and love each other.

- The applicant would be devastated if he could not remain in Australia to be with his partner, have children, and build a family.
- The only way the applicant and his partner can stay together is if the applicant is permitted to stay in Australia.
- The applicant suffers from depression.
- The applicant's partner needs the applicant to remain in Australia to fulfil her dreams of starting a family with him.

10. When assessing the other considerations in Direction no. 79, the Tribunal merely accepted that the applicant and his partner were currently in a relationship and had an intention to marry and start a family. However, the Tribunal failed to engage with the emotional and practical hardship claim intellectually; being a matter that had significant human consequences for the individuals involved.

11. Despite the emotional and practical hardship claim being considered by the delegate of the first respondent at first instance, it was not considered by the Tribunal at all.

[sic]

10 The convenience of setting out the grounds as pleaded above is that it neatly encapsulates the submissions which were advanced on Mr Kelekci's behalf by his counsel. Before turning in detail to those submissions it is necessary to say something about the reasons of administrative tribunals in the context of judicial review. The relevant principle is not in doubt, nor was it in any way sought to be challenged by counsel either for Mr Kelekci or the Minister. It is found in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (***Wu Shan Liang***). Suffice it to say the reasons of the Tribunal, like those of others in the executive branch of government who are obliged by statute to give reasons, should not be scrutinised narrowly and with an eye for error. They ought not be read piecemeal, but fairly and as a whole. It is singularly important that the familiarity of encounter with the observations made in *Wu Shan Liang* in no way diminish on judicial review their force. It is necessary for the judicial branch to exercise a principled restraint when considering reasons given pursuant to a statutory obligation.

11 I say statutory obligation because, at common law, there is no obligation on the part of an administrator to give reasons for a decision: see *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656. In the interests of promoting better administrative decision-making and also better understanding of administrative decisions, parliament has chosen in particular cases, of which the present is one, to alter the common law by requiring the furnishing of statements of reasons having particular qualities in terms of findings on material questions of fact and otherwise exposing the reasoning.

12 That said, one must be careful on judicial review not to counsel perfection and to find jurisdictional error in an absence thereof. Mr Kelekci was astute in the submissions, both oral and in writing, which developed the grounds set out above, not to violate the stricture, the nature of which I was, with respect, rightly, reminded by counsel for the Minister. So, whilst I shall now set out particular parts of the Tribunal's reasons, I do so conscious of the requirement to read the reasons as a whole. The reason why I have set out particular parts of the Tribunal's reasons is so as to expose particular parts thereof which were said to indicate the commission of jurisdictional error in the sense that the Tribunal had not discharged its review function according to law.

13 That was put in different ways as the quoted grounds reveals. In the end, they were all but instances of a way in which, overarchingly, it was put that the Tribunal had not discharged its review function under the act lawfully.

14 The Tribunal commenced, at [6], as follows:

> 6. The Applicant gave oral evidence at the hearing. Further evidence was received from the Applicant's partner, Ms F, and friends of the Applicant Mr A and Mr B. All provided testimony by telephone. The Tribunal also had before it written evidence and submissions. The totality of the evidence has been carefully considered.

15 Something needs to be said in light of submissions about the last sentence of [6]. Such a statement is not a panacea for jurisdictional error. If, truly, the reasons read as a whole disclose that the Tribunal has, for example, materially failed to take into account in the sense of actively engaging intellectually with an integer or a relevant consideration in respect of the application, then no amount of statement, such as [6], will cure that. Equally, a statement such as that given in the last sentence, at [6], may be revealed on a consideration of the reasons as a whole to be accurate.

16 The Tribunal then sets out under the subheadings "The Applicant's evidence", "Evidence of Ms F", "Evidence of Mr B", "Evidence of Mr A", particular evidence, which was given either orally or had earlier been put to the Minister's delegate and was present in the material before it, which collectively comprised the applicant's factual case. It is necessary, given a submission made on behalf of the Minister, to set out that segment of the Tribunal's reasons in full:

> **The Applicant's evidence**
>
> 7. The Applicant is 36 years old and has resided in Australia continuously since arriving as a student in 2004. He worked as a chef prior to starting his own small transport business with a fleet of two trucks between 2010 and 2015. The

Applicant lived with Ms F until shortly before his incarceration.

8. The Applicant writes in his representation seeking revocation of the decision to cancel his visa that "in the first few years while studying and working part-time I had the opportunity and eventually established and managed my own business which I successfully ran for several years".

9. The Applicant met Ms F within two years of his arrival in Australia. They began a long term relationship and the Applicant became close to her family, including Ms F's brother and his two children. The success of his business enabled the Applicant to support Ms F in establishing her own business comprising two hair and beauty salons.

10. In 2015 the Applicant lost his drivers' license, an event which he now determines to be life altering.

> *In 2015 due to my own reckless indiscretions and a moment of stupidity I unfortunately lost my license, my main and only source of income. I also lost my contracts for the Transport Company and the trucks I was paying off. Because I had lost the ability to provide for myself, my workers and my partner, she too felt the ramifications of my misdemeanours. Because of our mounting debt and being unable to meet the mortgage payments not only did I lose everything, she did also.*
>
> *Because of the deterioration of not only my business and my partners [sic] business, this led me to further spiral out of control. It was the first time I had experienced hardship like this in my life. Until now I had been successful at everything I had pursued. I now felt a sense of hopelessness and being a failure to not only myself but to those around me. I became increasingly embarrassed and frustrated and this led to me becoming depressed and feeling lonely.*
>
> *...*
>
> *During the difficult time I started to mix with the wrong people and resorted to drugs to curb my pain. This obviously eventuated in me committing the crimes I have committed and having me incarcerated.*

11. The Applicant submits that he has learnt from his criminal behaviour and now wishes to put it behind him:

> *... loosing [sic] my business and licence and getting on a break with my partner, I did not know how to deal with it all. Depression and starting using drugs in that period got the better of me. I can say that I hit the bottom rock and it cost me a lot. And not all I wanna [sic] do is to be able to prove myself and those around me that I am even stronger than before and learned heaps from my own mistakes.*

12. Drug use was an important factor in the Applicant's offending but he is confident that he has done what is required to ensure he does not use again:

> *I've completed 20 weeks of remand addiction course in Parklea as well. And I put my name down for more Equips and N.A. [Narcotics Anonymous] meetings to work on my problems that made me commit the crime.*

13. The Applicant presented written letters of support to the Tribunal and called

three witnesses to testify in support of his application. The letters of support spoke generally of the Applicant regretting the mistakes he had made and noting him to be a loyal individual and a hardworking member of the community.

Evidence of Ms F

14. Ms F confirmed their relationship between 2006 and 2015. They broke up and later reconciled whilst the Applicant was incarcerated and are currently engaged. She submits that the Applicant is a valued member of her family and "a very good man of excellent character", who had supported her in realising her dream to start her own business.

15. Ms F told the Tribunal that she plans to marry the Applicant and hopes they will start a family together. She said that whilst she is willing to consider moving to Turkey should the Applicant's appeal be unsuccessful, it would be a difficult decision for her. She explained that she is close to her family in Australia including her nieces and nephews. Ms F also told the Tribunal that her parents, who are aging and in relatively poor health, would be an important consideration when determining any future plans to move overseas should the Applicant's visa be cancelled.

16. Ms F testified that after the Applicant started taking "ice" he "turned into a different person". The Applicant "got caught up with the wrong crowd"; and the demands of their respective businesses, the passing of the Applicant's father and the death of one of their dogs added to an already stressful situation. Ms F summed up the situation in the lead up to the Applicant's principal offending and in particular the role of drugs:

> *…we were together for nine and a half years. There was never one incident with the police. But then in this timeframe what I'm telling you about, six months to a year where he was taking ice and I was for a bit, that is the only times we've had these problems. That's also when we lost our businesses and everything. So, you can see that…before then we were running businesses for years, we had a home, you know, we were extremely healthy, we were making money. And then in that short time frame everything fell apart.*

17. Ms F told the Tribunal that she also began using drugs and they both became "like completely different people". The period in which they were both using drugs she described as a "dark place" where they "lost everything" they had been working towards. When asked about the Apprehended Violence Order ("**AVO**") which was in place and subsequently breached by the Applicant, Ms F's was unable to recall specific details of the order which she attributes to "being under the influence at the time". She testified that she had asked for the order to be "dropped".

18. Ms F confirmed that she and the Applicant speak daily whilst the Applicant has been in detention.

Evidence of Mr B

19. Mr B has known the Applicant for 15 years and confirms him to be "a trustworthy, hard-working and reliable man". Mr B owns his own business and has offered full-time work to the Applicant should he be released back into the community.

Evidence of Mr A

20. Mr A confirmed that he too has known the Applicant for 15 years. He praised the Applicant's generosity and strong work ethic. Mr A testified that he had been overseas for approximately five years. Mr A admitted that he and the Applicant used to "have the occasional joints [marijuana] here and there", but said he was surprised when he found out the details of the Applicant's crimes.

21. Mr A did not visit the Applicant in jail because he was overseas at the time. Since his return he has visited the Applicant in detention in addition to keeping in contact through phone calls and messages. Questioned about being refused entry to Villawood Immigration Detention Centre during one of his visits to see the Applicant because he triggered an ion scanner, Mr A conceded that he still "like[s] my joints here and there".

[footnote references omitted]

17 I stated earlier that I would give further detail as to Mr Kelekci's criminal history. That is provided by the Tribunal in its reasons under the heading "The nature and seriousness of the Applicant's conduct to date" with further subheadings thereunder between [37] – [49]. Again, it is desirable, albeit at the price of some length, to set out in full that part of the Tribunal's reasons:

The nature and seriousness of the Applicant's conduct to date

37. The Applicant's offending is recorded in an Australian Criminal Intelligence Commission Check Results Report and spans the period from 2012 until August 2018. The offences, for which he was sentenced to imprisonment, leading to the mandatory cancellation of his visa, occurred in 2015 and 2016 ("**the principal offences**").

Possession offence

38. The Applicant's first recorded offence was a charge of possessing a prohibited drug for which he was fined $500 on 24 January 2012. The Applicant gave evidence that it comprised two tabs of MDMA which were detected at a music festival.

Vehicle related offences

39. Between 2012 and 2015 the Applicant received a number of fines for minor traffic infringements including exceeding the speed limit, failing to wear a seatbelt and failing to stop at a red light on a number of occasions. The Applicant's license was suspended on occasions for not paying outstanding fines. In October 2015 he was fined for driving a vehicle with an illicit drug present in his blood.

40. In June 2016 the Applicant was fined for driving whilst disqualified.

Other offences

41. In February 2016 the Applicant was fined $300 for contravening a restriction in a domestic Apprehended Violence Order. In January 2016 he was fined $600 for destroying or damaging property.

Principal offences:

Supply of prohibited drugs

42. On 23 August 2018 the applicant was sentenced in the District Court of New South Wales after pleading guilty to supply of prohibited drugs. The aggregate sentence was a total term of imprisonment of three years and nine months. He was sentenced to a non-parole period of two years and six months imprisonment. The offending took place in early 2016.

43. The following summary detailing the supply of prohibited drug offences is drawn from the sentencing remarks of the judge:

> *The supply involved nine transactions and the amount of GHB was approximately two thirds of the commercial quantity of that prohibited drug. There were 19 separate transactions to a number of people, all of which were conducted by mobile phone, either through text message or phone call. There was some organisation and planning in these transactions which involved a coded language, and whereby arrangements would be made to meet users of various locations. The offending took place over a period of seven weeks. I find the objective seriousness of the offending was just below the mid-range of objective seriousness for an offence pursuant to s 25(1) of the DMTA. It is still considered serious offending.*
>
> *…*
>
> *The offender was subject to a s 10 bond to be of good behaviour at the time of the offending…*
>
> *…*

Hindering the discovery of evidence

44. On 31 July 2018 the Applicant was sentenced to 11 months imprisonment with a non-parole period of seven months for hindering the discovery of evidence. The offending took place in November 2015.

45. The Supreme Court of New South Wales provides details of the offence committed by the Applicant, including that he disposed of a jacked that an associate, Mr Fazlilar, was wearing after learning that Mr Fazlilar had shot someone whilst wearing the jacket and that the vehicle driven by Mr Fazlilar was implicated in a homicide. Despite knowing that Mr Fazlilar had shot someone, the Applicant denied this when interviewed by police and subsequently admitted to disposing of Mr Fazililar's clothing in the presence of undercover operatives in the custody cells on 9 March 2016.

46. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 13.1.1(1) of the Direction specifies that decision-makers must have regard to a number of factors. Relevant (for present purposes), amongst those factors are:

> *(a) The principle that… violent and/or sexual crimes are viewed very seriously;*
>
> *(b) The principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed;*

> *(c) The principle that crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties, are serious;*
>
> *(d) Subject to subparagraph (b) above, the sentence imposed by the court for a crime or crimes;*
>
> *(e) The frequency of the non-citizen's offending and whether there is a trend of increasing seriousness;*
>
> *(f) The cumulative effect of repeated offending;*
>
> *(g) ...*
>
> *(h) 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);*
>
> *(i) Where the non-citizen is in Australia, that a crime committed while the non-citizen is in immigration detention ... is serious*
>
> 47. There can be no doubt that the offence of supplying prohibited drugs is a serious criminal offence. The Tribunal notes that the supply of prohibited drugs was found by the sentencing judge to be "just below the mid-range of objective seriousness" but that it "is still considered serious offending".
>
> 48. In regards to the matter of hindering the discovery of evidence concerning a serious indictable offence, the sentencing judge stated in her sentencing remarks that "the fact that the serious indictable offence is murder is of some significance". Nonetheless, she was satisfied that the objective seriousness of the offence was towards the lower end of the range of conduct contemplated by the offence.
>
> 49. I take into account that the Applicant's offending has been frequent and with a trend of increasing seriousness. The Applicant was on a good behaviour bond at the time of his drug offending. I consider that the nature and seriousness of the Applicant's offending weighs heavily in favour of not revoking the visa cancellation.
>
> [footnote references omitted]

18 The Tribunal was obliged by s 499 of the Act to take into account and give effect to a direction. In this case, ministerial direction no. 79 issued by the Minister. There is no doubt that the Tribunal was well aware of this obligation having regard to its reasons, in particular, [29] – [34]. It is not necessary to set out those paragraphs but it is necessary to set out the sequel, apprehended by the Tribunal, to its acknowledged obligation to give effect to the Minister's direction in making its decision. At [35], the Tribunal states:

> 35. I will now turn to addressing these considerations.

19 These considerations are those identified in [34] of the reasons and, in turn, in [6.3] of the direction. One of the subjects which the Minister's direction required the Tribunal to consider was the expectations of the Australian community. The Tribunal considered this subject and, at [84], concluded:

> 84. Taking into account the Applicant's participation in the community and the nature of the offending and the risk of reoffending, I find that the expectations of the Australian community weigh in favour of non-revocation of the cancellation decision.

20 Have so done and, again, as the Minister's direction required, the Tribunal turned its mind to other considerations. It is not necessary to set out all that follows in this part of the Tribunal's reasons, only that which appears under the heading "Other consideration B: Strength, nature and duration of ties:

> 88. Paragraph 14.2 of the Direction provides that decision-makers are to have regard to how long the non-citizen has resided in Australia. As noted, prior to his incarceration and detention the Applicant made a productive contribution to the economy. He has demonstrated an entrepreneurial nature and strong work ethic which has enabled him to support his partner in her own enterprise.
>
> 89. References and testimony from Ms F and the Applicant's friends speak generally of the Applicant's remorse for his offending and attempts to rehabilitate. They also speak of the support that he may receive if released from immigration detention and his plans for the future. The Respondent correctly identifies that the Applicant and Ms F separated in 2015 and draws to the Tribunal's attention visitor logs which indicate that she did not visit him in jail at all and has only seen him twice whilst he has been in immigration detention.
>
> 90. Ms F explained the reasons for the infrequent visits included the ability to talk on the phone and the privacy that is afforded by that method of contact. I accept that Ms F and the Applicant are currently in a relationship and that their intention is to marry and start a family together.

21 The references in [89] and [90], and for that matter earlier in the Tribunal's reasons, to a Ms F, is a reference to a lady who was accepted by the Tribunal as currently being in a relationship with Mr Kelekci.

22 The Tribunal sought to draw the various considerations together under the heading "Conclusion". Once again it is necessary to set out in full what appears there. The Tribunal states:

> **CONCLUSION**
>
> 99. As mentioned earlier, s 501CA(4)(b) of the Act stipulates two alternative conditions required to exercise the discretion to revoke the mandatory cancellation of the Applicant's visa: either (i) the Applicant must be found to pass the character test, or (ii) the Tribunal must be satisfied that there is another

reason, pursuant to the Direction, to revoke the cancellation.

100. The Applicant's serious offending precludes him form passing the "character test" in s 501(6) of the Act.

101. I have considered the specific circumstances relating to the Applicant as part of my consideration about whether to revoke the cancellation decision. I am now required to weigh up those considerations.

102. The primary considerations relating to the protection of the Australian community and expectations of the Australian community are in favour of not revoking the cancellation decision. Whilst the Applicant's most serious offending was related to his drug addiction, his earlier convictions also indicate a propensity to disregard the law.

Having regard to these considerations in the Direction, the Tribunal is not persuaded that the Applicant's rehabilitative efforts are satisfactory relative to the risk of future harm to the Australian community should he reoffend.

Whilst I accept that he has made significant progress in relation to his drug use he has done so in the highly structured environments of prison and detention. The Applicant's ability to manage his drug use in the community is untested. Furthermore, he has neither completed, nor has he plans to complete, many of the treatments for his drug use and mood disorders which were recommended prior to sentencing.

The Applicant's relationship with his niece and nephew speaks to his generosity, but there is no evidence of an ongoing relationship with the children, the children live with their parents and there is no evidence about what support he would provide them if released from detention. For this reason the primary consideration concerned with the best interests of minor children carries little weight in favour of revocation.

With respect to other considerations I note that the Applicant is a relatively young man who has proven himself both intelligent and resourceful. I accept he does not wish to serve in the Turkish military, but I do not accept he is genuinely fearful of doing so. There will be challenges in returning to Turkey, but he concedes he has a support network he can rely upon, beginning with his mother and brother.

103. Consequently, the Tribunal does not exercise the discretion to revoke the mandatory cancellation of the Applicant's visa.

A noteworthy feature of this part of the Tribunal's reasons, emphasised in the submissions made on Mr Kelekci's behalf, is the absence of any reference whatsoever to Ms F or the effect which deportation to Turkey might have on the relationship which the Tribunal found to exist between her and Mr Kelekci and the consequences for Ms F of that enforced separation.

23 In one way or another, in that absence was said to lie jurisdictional error. That was developed, as the quoted grounds of review reveal, in a number of ways or "strands" as was put in submissions. But the essence of it is nonetheless to be found in that absence.

24 In what was, with respect, a sagacious observation by a judge who was well placed in light of longstanding Presidency of the Tribunal to make such an observation, Davies J referred in *Jebb v Repatriation Commission* (1988) 80 ALR 329 to the Tribunal's forming part of an administrative decision-making continuum. While the Tribunal stands in place of the decision-maker whose decision is under review, it does not do so in a vacuum. Rather, as Davies J's observation pithily reveals, it does so as part of a continuum. That it does so has many ramifications, but one which is material for the present purposes is that the issues which the Tribunal must confront in terms of discharging its statutory function can be revealed by, indeed dictated by, the continuum of administrative decision-making. In this case, part of that continuum was the representation which Mr Kelekci made, pursuant to statute, seeking that the cancellation be revoked.

25 My attention was drawn in the course of submissions to particular parts of the personal circumstances form dated 12 November 2018 completed by Mr Kelekci in his own handwriting. The form concerned has pre-designated subjects. Two of these are:

> Please describe your relationship with your partner (e.g. how you met, how long you have been together)

Another is:

> Please describe the impact the cancellation of your visa would have, or has had, on your partner

Mr Kelekci, with respect, eloquently and, at quite some length, fulsomely responds to each of these subjects. As to the latter he concludes:

> I would be devistated not to be able to deliver my promises to her [who, I interpolate, is Ms F]. We love each other from the bottom of our hearts and the only way we can be together is if I can stay in this country. Thanks.

26 The relationship with Ms F was squarely addressed as a subject by the Minister's delegate in the delegate's reasons. It was certainly not abandoned in the additional evidence given to the Tribunal. Rather, it was underscored. Against this background, a number of vices was said to be revealed by the Tribunal's reasons; vices in the sense of alleged jurisdictional error.

27 A useful starting point in that regard is to be found in observations concerning s 501CA(4) made by North ACJ in *Gaspar v Minister for Immigration and Border Protection* (2016) 153 ALD 338 (***Gaspar***). His Honour dealt with the construction of s 501CA(4). He stated, at [28]:

> 28. The language of the section is unnecessarily ambiguous. The ambiguity lies in two places. First, the use of "may" in the expression "may revoke" suggests

> that the power conferred on the Minister is a discretionary power. Second, the expression in subs (4)(b)(ii) "that there is another reason why the original decision should be revoked" may refer to a single reason in favour of revocation, apart from satisfaction of the character test referred to in the previous subsection, or it may refer to a conclusion in favour of revocation after consideration of factors for and against revocation.

And later, at [38]:

> 38. The preferable conclusion is that s 501CA(4)(b)(ii) requires the Minister to examine the factors for and against revoking the cancellation. If satisfied, following an assessment and an evaluation of those factors, that the cancellation should be revoked, the Minister is obliged to act on that view. There is a single, not a two stage, process and the Minister does not have a residual discretion to refuse to revoke the cancellation if satisfied that it should be revoked. In this instance the Minister acted in accordance with that construction of the section. He did not apply the wrong test.

28 True it is, as was put by the Minister, that the particular occasion for his Honour's addressing in *Gaspar* the construction of s 501CA(4) was to dispose of a question as to whether there was a residual discretion. Nonetheless, that does not detract from his Honour's statement embraced by the applicant that what s 501CA(4) entails is an evaluation of factors for and against revoking the cancellation.

29 The applicant submitted that one such factor, evident from the material before the Tribunal, notably including the personal circumstances form, was the relationship with Ms F and the ramifications for that relationship, the applicant and Ms F, if Mr Kelekci were deported.

30 From *Gaspar*, the applicant proceeded to *Suleiman v Minister for Immigration and Border Protection* (2018) 74 AAR 545 in which, by reference to a predecessor direction to direction 79, direction 65, Colvin J observed, at [23]:

> 23 The use by the Tribunal of the term 'secondary' indicates that the 'other considerations' are always of lesser importance. However, Direction 65 makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.

31 Direction 65 makes clear that an evaluation is required in each case as to the weight to be given to the other considerations. That same observation may be made in relation to direction 79.

32 That is not to say that the Minister has, in direction 79, designated some sort of mathematical decision-making matrix for delegates or those who stand in the delegate's place, only that an evaluation is required. And that evaluation must be as between primary and other considerations, but not to the extent where a primary consideration must always prevail.

33 The applicant also referred to *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 (***Viane***). Like the present case, *Viane* was a case where one consideration raised by the applicant was the prospect of severance, or at least possible severance, of a relationship as a sequel to deportation. There is, with respect, a very helpful summary of authority pertinent to the consideration of an integer or critical feature of an applicant's case in the judgment of Rangiah J, with whom, relevantly, Reeves J agreed, at [22] – [29]. His Honour then observed, at [30]:

> 30. If the Minister overlooks a substantial, clearly articulated argument advanced as demonstrating a reason why a cancellation decision should be revoked under s 501CA(4) of the Act, which if accepted would or could be dispositive of the decision, the Minister's error may be characterised as a jurisdictional error. Further, if what is overlooked is better characterised as "information" (or "material", or "evidence"), rather than an "argument", there may be jurisdictional error where the "information" is sufficiently important, such that the error is serious enough to be described as jurisdictional. It is not essential that either the argument or information is "critical" in the sense that its acceptance by the Minister would necessarily have resulted in a different outcome.

34 In the circumstances of that case, there was a clearly articulated argument as to the suffering of hardship by the applicant's partner. That was, as Rangiah J noted, at [31], considered in part, but:

> … the Minister overlooked and failed to consider the part of the argument that she would be caused hardship if she moved to Samoa with the appellant.

His Honour then stated:

> The Minister's error can alternatively be characterised as failing to consider information provided in support of a reason for revoking the cancellation decision.

35 The same point was also made by the Full Court in *Singh v Minister for Home Affairs* (2019) 267 FCR 200 (***Singh***), another case to which I was helpfully taken in the course of the applicant's submissions. In *Singh*, at [34] – [36], the Full Court stated:

> 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) 77 ALJR 1088; 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 and Multicultural and Indigenous Affairs (No 2)* (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 Republic of Nauru* (2018) 92 ALJR 1003; 360 ALR 228 (*ETA067*) 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:

> 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]).
>
> (Emphasis in original.)

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.

36 The reference to *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088, at [34], is, with respect, singularly apt in the circumstances of the present case.

There can be no doubt that the relationship with Ms F was a substantial, clearly articulated argument by Mr Kelekci.

37 There are then many ways in which the alleged jurisdictional error might be characterised. It was put that there had been a failure of evaluation, such as was required by [8(3)]. But it might equally be put, and indeed it was put, that that paragraph was, in turn, consistent with the overarching statutory requirement of evaluation as found by North ACJ in *Gaspar*. It might equally be put, and it was, that there was a failure to take into account a consideration made relevant by the Minister by his direction as found in [14.2] thereof.

38 The answer to this was said by the Minister to be found in reading the reasons as a whole and bearing in mind that an absence of reference to a particular subject may mean that the Tribunal did not find it material in the end. The pertinent authorities in this regard were recently collected by the Full Court in *Anees v Minister for Immigration and Border Protection* [2020] FCAFC 28 (***Anees***). These authorities notably include the High Court's judgment in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323. The Full Court stated, at [52] – [54]:

> 52. The Tribunal was not required to mention each item of evidence before it in reaching its conclusion: *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593 at [46]-[47] (French, Sackville and Hely JJ); *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; 267 FCR 320 at [48]-[49] (Besanko, Barker and Bromwich JJ). However, the Tribunal was obliged to set out the reasons for its decision: s 43(2) of the *Administrative Appeals Tribunal Act 1975* (Cth). Section 43(2B) of that Act required the Tribunal to set out its findings on material questions of fact and a reference to the evidence or other material on which those findings were based. The effect of s 43(2B) (like s 430(1) of the Migration Act considered in *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 (***Yusuf***)), is that the Court is entitled to infer that a matter not mentioned in the Tribunal's reasons was not considered by the Tribunal to be material: *Yusuf* at [69] (McHugh, Gummow and Hayne JJ); *Minister for Home Affairs v HSKJ* [2018] FCAFC 217; 266 FCR 591 (***HSKJ***) at [44] (Greenwood, McKerracher and Burley JJ); *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [34(d)] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ); and *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 (***FCFY***) at [90] (Thawley J).
>
> 53. As discussed in *HSKJ* at [44] and *FCFY* at [91], the inference referred to in *Yusuf* is not mandatory. It may be displaced if contrary indications are available.
>
> 54. However, in the present instance there are no contrary indications to suggest that the Tribunal considered the Appellant's character, and in particular any change thereto effected between 2013 and 2018, to be material to its conclusion as to the risk of the Appellant reoffending in the future. We would therefore infer that the Tribunal did not recognise that the character question

> was material to its conditional conclusion, and did not take into account the character evidence in arriving at that conclusion. That failure reveals jurisdictional error: a failure by the Tribunal to take into account a relevant consideration and thereby a failure to carry out the statutory task conferred upon it: *Yusuf* at [44] (Gaudron J) and [69] (McHugh, Gummow and Hayne JJ).

39 As with *Anees*, and giving every deference to a need not narrowly to scrutinise a Tribunal's reasons, the present, in my view, is a case where if one looks to the conclusions part of the Tribunal's reasons there are just no contrary indications to suggest that the Tribunal did consider Mr Kelekci's relationship with Ms F and the consequences which might flow to that relationship and to each of them (and for that matter, through that relationship to wider family of Ms F in Australia) if Mr Kelekci were deported to Turkey.

40 That failure was, in my view, material in the sense described by the High Court in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123. It may, and I emphasise it is enough that it may, have provided "another reason" to be satisfied that the cancellation of the visa should be revoked.

41 Thus, each of the ways in which Mr Kelekci has sought to demonstrate that the Tribunal failed to discharge its statutory review function according to law has been made out. One could describe it as a failure to take into account a relevant consideration. One could describe it as a failure to comply with s 501CA(4) in the sense of a failure to evaluate that relevant consideration. One could equally describe it as ignoring an essential integer, in the particular circumstances of this case, having regard to the administrative decision-making continuum and its revelation of the issues which arose in this case for merits review evaluation.

42 In the end, they all run together and they run together to the end of demonstrating that the Tribunal has not discharged its review function according to law. The consequence is that the Tribunal's decision must be quashed and an order in the nature of mandamus made absolute requiring the Tribunal to discharge its function according to law.

43 It is not part of that order for the Court to express any view whatsoever as to where the merits may lie. So to do would be to exceed the role of the Court in exercising its judicial review jurisdiction: see *Attorney-General (NSW) v Quin* (1990) 170 CLR 1. The Tribunal has not made any adverse credibility finding in relation to the relationship. Indeed, a finding at [90] of the Tribunal's reasons, is in favour of Mr Kelekci in the sense of acknowledging that he and Ms F are currently in a relationship with a mutual intention to marry and have a family together.

44 I was though asked by Mr Kelekci additionally to make an order that the Tribunal be differently constituted for the purpose of considering afresh the review application. I can well understand, with respect, why such a submission might reasonably be made. There is certainly power to make such an ancillary order but it is exceptional nonetheless so to do. The reason for that is that ordinarily the Court would not seek to bind the President of the Tribunal in his administration of the Tribunal.

45 It may be that the President would reach a view that, as a matter of prudence, it would be better if the Tribunal were not constituted for the purpose of the re-hearing by Mr Evans. And that consideration is one which might tell as much in favour of the Minister as Mr Kelekci, in the sense that Mr Evans might feel constrained in some way by the jurisdictional error identified to give it more weight than perhaps one ought to, or in reverse he might feel that in some way he is still wedded to a particular view and must justify that. But these are considerations, in my view, which are best left in this instance to the good sense and judgment of the President in deciding how to constitute the Tribunal.

46 Had there been singularly strong findings of credibility pertinent to the identified jurisdictional error ground, I may well have had a different view about the making of an ancillary order. As it is though, it is not, in my view, necessary.

47 For completeness, I should also indicate that the applicant sought, although, in fairness to counsel, did not actively press for, an order for prohibition. There is nothing in the evidence which would suggest that the Minister would be disposed to act in a way which would be quite subversive of the separation of powers and seek to undo the orders of the Court by seeking to deport Mr Kelekci prior to the judicially ordained reconsideration by the Tribunal of the decision not to revoke cancellation. I therefore decline to additionally order prohibition.

48 It would not do justice to the submissions made in this case not to acknowledge the assistance given by counsel for the applicant who, with his solicitor, appeared *pro bono*, or for that matter, to acknowledge the succinct, candid and pertinent submissions in response made on the Minister's behalf.

49 There is no reason why costs should not follow the event.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment

herein of the Honourable Justice Logan.

Associate:

Dated: 15 July 2020