FEDERAL COURT OF AUSTRALIA

KXXH v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1229

Appeal from:	Application for extension of time: *KXXH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 5313
File number:	NSD 205 of 2021
Judgment of:	**COLVIN J**
Date of judgment:	13 October 2021
Catchwords:	**MIGRATION** - application for judicial review of decision of Administrative Appeals Tribunal - where Tribunal affirmed decision of delegate of Minister not to revoke cancellation of applicant's visa - whether Tribunal failed to consider relevant evidence concerning best interests of applicant's fiancée's grandchildren - whether Tribunal failed to undertake required evaluation of weight given to primary and other considerations - whether Tribunal's reasoning and fact-finding unreasonable - application dismissed
Legislation:	*Migration Act 1958* (Cth) ss 499, 501, 501CA
Cases cited:	*Ali v Minister for Home Affairs* [2020] FCAFC 109; (2020) 278 FCR 627 *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; (2017) 248 FCR 456 *Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 172 *BHL19 v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2020] FCAFC 94; (2020) 277 FCR 420 *Bochenski v Minister for Immigration and Border Protection* [2017] FCAFC 68; (2017) 250 FCR 209 *EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681; (2019) 272 FCR 409 *Guclukol v Minister for Home Affairs* [2020] FCAFC 148; (2020) 279 FCR 611 *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628

	MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 *PQSM v Minister for Home Affairs* [2020] FCAFC 125; (2020) 279 FCR 175 *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 *Tohi v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2021] FCAFC 125 *Tsvetnenko v United States of America* [2019] FCAFC 74; (2019) 269 FCR 225 *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15; (2015) 256 CLR 203 *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; (2018) 263 FCR 531
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	91
Date of hearing:	7 October 2021
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr G Johnson
Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

NSD 205 of 2021

BETWEEN:	**KXXH** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**COLVIN J**
DATE OF ORDER:	**13 OCTOBER 2021**

THE COURT ORDERS THAT:

1. The application is dismissed.

2. The applicant pay the first respondent's costs to be assessed on a lump sum basis by a registrar if not agreed.

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

REASONS FOR JUDGMENT

COLVIN J:

1 The applicant is a citizen of New Zealand. He came to Australia with his family in 1988. He was then 2 years old. In November 2019, his visa was cancelled as a result of the imposition of custodial sentences for domestic violence. The applicant was invited to make representations about revocation of the cancellation of his visa and did so. After considering the representations, a delegate of the Minister refused to revoke the cancellation. The applicant then sought review in the Administrative Appeals Tribunal. The Tribunal affirmed the decision of the delegate. The applicant now seeks judicial review. It is accepted that he must demonstrate jurisdictional error in order to succeed on his application.

The statutory task of the Tribunal

2 The Tribunal's task was to decide whether the cancellation decision should be revoked in the exercise of the power conferred by s 501CA(4) of the *Migration Act 1958* (Cth) and to do so standing in the shoes of the delegate of the Minister. Section 501CA(4) provides:

> The Minister may revoke the [visa cancellation 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 [visa cancellation decision] should be revoked.

3 It was not in dispute that the applicant did not pass the character test. In those circumstances, s 501CA(4) required the Minister by his delegate (and the Tribunal when re-exercising the statutory power) to form a state of satisfaction as to whether there is a reason other than passing the character test why the cancellation decision should be revoked. The provision itself does not specify any particular matters to which there must be regard or that must be taken into account in forming the required state of satisfaction. Further, it is only if the Tribunal forms the required state of satisfaction that there is another reason why the cancellation decision should be revoked that there is power to cancel. It is not for this Court on review to substitute its state of satisfaction for that of the Tribunal. The question is whether there was jurisdictional error in its formation.

4 The relevant statutory task to be performed was evaluative in character. Whether a person is satisfied as to whether there is a reason for the exercise of power depends upon that person's assessment of the reasons advanced (and the material presented to support those reasons). In undertaking that task, it is matter for the Minister to determine whether there is material to support a particular reason and whether that reason is persuasive. The only qualification to that position flows from the statutory requirement for the Minister to invite a person whose visa has been cancelled under s 501(3A) (as was the present case) to make representations about revocation of the decision to cancel: see s 501CA(3). The existence of that provision gives significance to the matters raised by those representations in undertaking the evaluative process by which the required state of satisfaction is formed.

5 Recently, I joined with Burley and Jackson JJ in summarising the current state of the authorities concerning the formation of the state of satisfaction as required by s 501CA(4) in the following way (*Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 172 at [27]):

> (1) If representations are made to the Minister, a statutory obligation arises on the part of the Minister to form a state of satisfaction as to whether the person passes the character test or there is 'another reason' why the original decision should be revoked.
>
> (2) The state of satisfaction must be formed by reference to the representations such that a failure to consider the representations as a whole would be a failure to consider a mandatory relevant consideration.
>
> (3) The individual matters raised in the representations are not each mandatory relevant considerations and therefore do not need to be brought to account in the making of the decision such that they must form part of the considerations that give rise to the required state of satisfaction.
>
> (4) However, a state of satisfaction that is formed without considering a substantial or significant and clearly expressed claim made in the representations that there is a particular reason why the visa cancellation decision should be revoked is not a state of satisfaction of the kind required by the statute.
>
> (5) Further, there must be a real and genuine consideration of each such substantial or significant and clearly expressed claim.
>
> (6) If the state of satisfaction is formed that there is 'another reason' why the original decision cancelling the visa should be revoked then the Minister must revoke the cancellation.

6 *Bettencourt* was a case where the Minister personally undertook the statutory task of forming the required state of satisfaction. As has been noted, in the present case it was a delegate of the Minister (and on review the Tribunal) who did so. In such cases it is to be noted that the

Minister has power under s 499 of the *Migration Act* to give written directions (that are not inconsistent with the Act) to a person having functions or powers under the Act. Any such direction must be complied with by that person: s 499(2A). The Minister has given such a direction in respect of the exercise of the power under s 501CA(4). At the time of the Tribunal's decision, the relevant direction was *Direction no. 79 - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* (**Direction 79**). It was binding on members of the Tribunal as an overt fetter on discretion: *Bochenski v Minister for Immigration and Border Protection* [2017] FCAFC 68; (2017) 250 FCR 209 at [65].

7 Direction 79 specifies matters which must be taken into account when exercising the power under s 501CA(4). If the person exercising the power misunderstands the requirements of the direction and thereby embarks upon the wrong task or fails to conform to those requirements by failing to take into account a matter that the direction requires be taken into account then the failure to comply with the direction is jurisdictional: the relevant authorities were collected by Mortimer J in *PQSM v Minister for Home Affairs* [2020] FCAFC 125; (2020) 279 FCR 175 at [31]-[45], noting that it was not in issue in that case that a failure to comply with the relevant direction would be jurisdictional, see Banks-Smith and Jackson JJ at [90].

8 For present purposes, Direction 79 provides that the exercise of the discretion conferred by s 501CA(3) is to be informed by the principles stated in the direction 'and 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': see cl 7. There is further provision that decision-makers 'must take into account the primary and other considerations relevant to the individual case': see cl 8(1). Also, that primary considerations 'should generally be given greater weight than other considerations (cl 8(4)) and 'one or more primary considerations may outweigh other primary considerations' (cl 8(5)).

9 Therefore, when review was sought by the applicant in the Tribunal in the present case, Direction 79 required the considerations specified in Part C to be taken into account by the Tribunal in forming the required state of satisfaction. However, it is to be noted that those primary and other considerations were specified as matters that must be taken into account 'where relevant'. It is perhaps unclear for the purposes of determining whether there has been compliance with Direction 79 whether relevance is a matter to be objectively determined (such that a failure to take into account a matter that was considered by a court on review to be relevant might be jurisdictional) or whether it is a matter for the decision-maker. Having regard

to the nature of the direction as an instrument specifying matters with which there must be compliance, in my view relevance is to be objectively determined. The submissions for the Minister in the present case placed no reliance upon any contention to the effect that it was a matter for the Tribunal to determine whether a specified consideration was relevant. The submissions approached the matter on the basis that the Tribunal was obliged to consider the primary considerations, particularly the best interests of minor children in Australia. This approach reflects the reasoning in *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15; (2015) 256 CLR 203.

10 The reference to greater weight 'generally' being given to the primary considerations and to the possibility that one primary consideration may outweigh another reflects the evaluative nature of process by which the required state of satisfaction must be formed, namely as to whether there is 'another reason' to revoke the cancellation of the visa. The evaluative judgement to be made is entrusted to the decision-maker (in this case the Tribunal).

11 Further, the Tribunal has a statutory process to follow in conducting a hearing. It results in the material that was before the Minister's delegate being considered as well as further evidentiary material and submissions provided to the Tribunal.

12 Therefore, in a case like the present where it is the Tribunal (as distinct from the Minister personally) who exercises the power under s 501CA(4), the required state of satisfaction must be formed on the basis of the material before the Tribunal and by weighing the considerations specified in Direction 79 that are relevant and, in doing so, generally (that is, unless there is some reason not to do so) giving greater weight to the primary considerations.

13 As has been noted, it is Part C of Direction 79 that deals with the exercise of the power under s 501CA(4). The specified primary considerations in Part C are:

> 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.

14 As to the best interests of minor children in Australia, Direction 79 states in cl 13.2:

> (1) Decision-makers must make a determination about whether revocation is in the best interests of the child.
>
> (2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to revoke or not revoke the mandatory cancellation decision is expected to be made.

(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(4) In considering the best interests of the child, the following factors must be considered where relevant:

a) The nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);

b) The extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;

c) The impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;

e) Whether there are other persons who already fulfil a parental role in relation to the child;

f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and

h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

15 Direction 79 also states that 'other considerations' must be taken into account where relevant. It contains a non-exhaustive list of such considerations (cl 14(1)).

16 Therefore, if on the material before the Tribunal there is a child under 18 years of age living in Australia whose interests may be affected then, as to each such child, the Tribunal must make a determination by reference to the specified factors (where relevant) as to whether revocation is in the best interests of the child.

The relevant material before the Tribunal

17 Before the Tribunal was all of the material that had been before the Minister's delegate. It included a Personal Circumstances Form (**Form**). The Form was provided to the applicant to enable him to respond to the cancellation of his visa. The Form was completed by the applicant in his own handwriting and verified by him. Also before the delegate were submissions from

the applicant. It was accepted by counsel for the applicant that none of these documents contained any information to the effect that the removal of the applicant from Australia would be adverse to the interests of any child in Australia other than the applicant's own two children from a previous relationship.

18 In the Form, the applicant responded to the question 'Describe any current impact on your spouse/partner in the event of a negative decision outcome' as follows:

> If I was to get a negative decision with my revocation my partner would not be able to travel to N.Z. as she has chronic emphasema and is a cronic asmatic. She also has 10 children and 6 grandchildren in Australia and is an Australian citizen and was born in Australia.

19 The Form then had a section headed 'Minor Children' and the following request:

> List below all your minor children (including biological children, adopted children, step-children). Provide evidence to support your claims …'

20 At that point in the Form, the applicant listed the names of his own two children and in each case answered 'no' to the question 'Will you live with the child on return to the community?'. Further information was provided as to the circumstances of the applicant's two children and the nature of the applicant's relationship with his children.

21 The Form then had a separate section with the following request:

> List below all other minor children in your life (including grandchildren, nieces/nephews, foster children etc).

22 The table provided in that part of the Form was left blank.

23 There was provision on the Form to respond to the question 'Describe your relationship with each of the other minor children, including how often you contact/see the child/ren and the role you play in their life'. That section was also left blank.

24 Later in the Form there was provision for the applicant to list close family members. The applicant listed an uncle, an aunt, two cousins and a granddad. In response to the question 'Describe any current impact on family members, and/or likely impact on them in the event of a negative s501 decision outcome (i.e. a non-revocation …)', the applicant wrote:

> The impact on my family would be very traumatic as the majority of my family live in Australia and I am very close with my family here. My family live a very busy lifestyle in Australia and are not in positions to be able to come visit me in New Zealand.

25 In the conclusion to the Form which provided for any other information to be provided the applicant referred to his two children and his 'soon to be wife' and otherwise simply to 'my family'.

26 In accordance with the procedures of the Tribunal, the applicant provided a statement of facts, issues and contentions. It too made no reference to children other than the applicant's two children. It began as follows:

> Today I am asking that you please reconsider this decision and reinstate my Visa nor only for myself, my family, friends and fiancée. But mainly for my 2 beautiful children. As they do not deserve to grow up in the Australian community without [their] father by [their] side.

27 The applicant also provided a letter from his fiancée dated 8 November 2020 (**Letter**) which was received as an exhibit by the Tribunal (marked A2).

28 Relevantly for present purposes, it may be noted that the Letter included the following matters:

(1) an opening statement that 'I am writing this letter in regards to the disagreement [the applicant] and myself had on [date redacted]. I am fully aware of the gravity of the crime [the applicant] was charged with however this is not the man I know';

(2) a detailed description of the personal circumstances of the applicant's fiancée and the circumstances of her physical and mental health and the events that took place at the time of the offence;

(3) a reference to the fiancée's grandson with whom the applicant was said to have 'a good relationship';

(4) a statement about their planned marriage followed by the statement:

> My Grandchildren ages 9, 3 and 2 love [the applicant] and have spent a lot of time together as a family they call [the applicant] 'little Pop'. We even have video calls with him up until today and will continue to do so.

(5) later, the following statement:

> [The applicant] is an amazing man, father, grandfather, partner and friend who has worked all his life, been a pillar of our community and always been there to lend an ear and just a helping hand. He like us all has made mistakes, broke the law. However the good outweighs the bad.

29 I would characterise the references to the grandchildren as incidental to the main themes addressed by the Letter which concerned the applicant's relationship with his fiancée and the circumstances of the offending that led to his incarceration. In context, the references to the

grandchildren are provided to illustrate the character of the applicant. There is no detail in the Letter of any particular consequences that would flow to the grandchildren if the applicant was removed from Australia. That is not surprising in circumstances where both their parents and their grandmother would remain in Australia. There was no suggestion in the Letter that the grandchildren depended upon the applicant in any way.

30 There was an oral hearing before the Tribunal at which the applicant was self-represented. The applicant's fiancée gave oral evidence to the Tribunal by telephone during the course of the oral hearing. The reasons of the Tribunal provide references by way of footnotes to portions of the transcript but no transcript of the oral hearing was before the Court on the present application.

The relevant reasoning of the Tribunal

31 The Tribunal's reasons began by setting out those provisions of Direction 79 that deal with the approach to be adopted as to primary considerations and other considerations.

32 The reasons then addressed the evidence before the Tribunal. In that part of the reasons, under the heading 'Children', the reasons:

(1) commenced by saying that the applicant has two minor children (para 78) and described the evidence concerning those children and the extent of the applicant's involvement in their lives (paras 79-81); and

(2) recorded that in the Form (being the form provided as part of his representations to the Minister to revoke the cancellation of his visa), the applicant 'stated he has five nieces and nephews, and his fiancée has 10 children and six grandchildren, who reside in Australia, however he did not provide any information in relation to their ages or his involvement in their lives' (para 82).

33 The reasons then dealt with other evidence under the headings 'Relationship with partner' and 'Family and friends in Australia'. The next heading was 'Evidence of Applicant's fiancée'. Under that heading, the reasons referred to a letter of support provided by the applicant's fiancée (para 89). The reference is footnoted to a document that formed part of the materials before the Minister's delegate. The reasons then refer to a further 'unsigned email in support of the Applicant on 20 November 2020' (para 90). The reference is footnoted to exhibit A2, being the Letter. The reasons then include a number of quotes which reflect the content of the Letter. In those circumstances, notwithstanding the misdescription of the Letter in the reasons,

it was accepted by both counsel that the Tribunal, at this point in its reasons, was dealing with the Letter.

34 Those aspects of the Letter which refer to the grandchildren of the applicant's fiancée were not quoted in the reasons. The reasons then dealt with the oral evidence given by the applicant with material in the next paragraph footnoted to the transcript (para 91). As to these matters, the reasons stated:

> [The applicant's fiancée] told the Tribunal that she and the Applicant have been engaged for 20 months. [She] suffers from chronic emphysema and she provided evidence of a hospital visit. She told the Tribunal that she does not know how long she will live; it may be 12 months or 20 years. The Applicant is her carer and he was doing everything for her before he was incarcerated. She relies on the Applicant's support to attend medical appointments and to assist in her care. If it were not for the Applicant, she would not have attended her appointments and would not have the medications she needs. She had been homeless after she lost her house in 2013 following the death of her daughter, and the Applicant put her *'in a routine'* and gave her *'direction'* and *'discipline'*. He reminded her of the importance of weekly grocery shopping and paying bills. The Applicant gets along well with her eldest daughter and her husband and their children and they have babysat her granddaughters. He also has a very good relationship with her grandson.

35 As to the relationship between the applicant and the grandson, the reasons also reflected the terms of the Letter (although it is not footnoted at that point).

36 Later in its reasons, the Tribunal addressed what it described as 'Primary Consideration B' being the best interests of minor children in Australia affected by the decision. In that part, the reasons began by listing the matters to be considered under cl 13.2(4).

37 After referring to the applicant's own children, the reasons then dealt with their interests by stating:

(1) the applicant 'has had a very limited parental role in his children's lives for the past five years' and that his two children had been removed from his care after he breached a safety plan that had been put in place in respect of their care by allowing an unsupervised visit by his former partner (para 124);

(2) the applicant 'is unlikely to play significant parental role for the children in the foreseeable future' (para 126);

(3) the Tribunal 'has had regard to the impact of the Applicant's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the children' and after referring to the evidence of an incident that caused his former

partner 'to fear for her safety and that of the children', that conduct and his violent offending against three other female partners 'is such that the Tribunal cannot be satisfied that the Applicant's behaviour has not had, and will not in the future have, a negative impact on his children' (para 129); and

(4) addressing in relation to the two children, each of the factors listed in cl 13.2(4) of Direction 79.

38 No complaint was raised about this aspect of the reasons which, as required by Direction 79, addressed the best interests of the applicant's children by reference to the matters in cl 13.2.

39 The reasons of the Tribunal then turned to consider other children and stated (para 134):

> The Tribunal has considered the interests of the Applicant's five nieces and nephews, and his fiancée's children and grandchildren who reside in Australia. There is very limited evidence before the Tribunal of the ages of these children, the nature of the Applicant's relationship with them, and how they may be affected by his removal. Accordingly, the Tribunal has given the impact on these children only limited weight.

40 The reasons then express the following conclusion (para 135):

> Applying the guidance in paragraph 13.2(4) of the Direction, the Tribunal finds that, on balance, this primary consideration weighs in favour of revocation of the Mandatory Visa Cancellation Decision as it is in the best interests of the Applicant's children and his nieces and nephews (individually and cumulatively) for the Applicant to have his visa reinstated and be permitted to remain in Australia.

41 The reasons then dealt with 'Primary Consideration C', the expectations of the Australian community. The conclusion was reached that the consideration 'weighs against revocation of the Mandatory Visa Cancellation Decision'.

42 The reasons then dealt with 'Other Considerations'.

43 The Tribunal's ultimate conclusion was expressed in the following way (paras 163-167):

> In summary, the Tribunal finds that Primary Consideration A weighs against revocation of the Mandatory Visa Cancellation Decision. The nature, frequency and seriousness of the Applicant's violent offending, and the significant risk of him committing future offences, are such that the protection of the Australian community is best served by the non-revocation of the Mandatory Visa Cancellation Decision.
>
> Primary Consideration B weighs in favour of the revocation of the Mandatory Visa Cancellation Decision as it is in the best interests of the Applicant's children and his nieces and nephews (individually and cumulatively) for the Applicant to have his visa reinstated and be permitted to remain in Australia.

> Primary Consideration C weighs against revocation of the Mandatory Visa Cancellation Decision as the expectations of the Australian community are that the Applicant's serious and violent offending should cause him to forfeit the privilege of remaining in Australia.
>
> In regard to the relevant other considerations, only the strength, nature and duration of ties, and the extent of impediments on return to New Zealand weigh in favour of revocation of the Mandatory Visa Cancellation Decision.
>
> The Tribunal is not satisfied that there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked.

44 It may be noted that there is no reference to grandchildren in the conclusion. It may also be noted that the grandchildren referred to in the reasons are those of his fiancée. There is no suggestion in the reasons (or in these proceedings) that the applicant has grandchildren of his own.

The grounds of review

45 The applicant was given leave to amend his grounds. In their expression they are lengthy and include matters to be advanced in support of the grounds. In the applicant's written submissions and in oral argument the grounds were put in terms that may be summarised as follows.

46 *Ground 1* claimed that the Tribunal failed to lawfully consider relevant evidence concerning the applicant's fiancée's grandchildren in Australia and failed to apply cl 13.2(1) of Direction 79 which was said to mandate that decision-makers must decide whether revocation of the cancellation of the visa is in the best interests of the relevant child.

47 *Ground 2* claimed that the Tribunal failed to undertake the required evaluative process in determining the question whether there was another reason to revoke the cancellation decision because it did not evaluate the weight to be given to each of the primary and other considerations which was said to be part of its statutory task.

48 *Ground 3* claimed that aspects of the Tribunal's reasoning and fact-finding concerning the applicant's own children and five nieces and nephews, as well as the grandchildren was defective, illogical or irrational such that the ultimate decision was legally unreasonable.

Ground 1

49 Four aspects of the reasons were said to support ground 1, namely:

(1) the failure to consider the material in the Letter concerning the grandchildren which was said to be material evidence concerning a primary consideration in the case;

(2) the failure to consider the oral evidence of the applicant's fiancée concerning the applicant's relationship with her grandchildren;

(3) there was no finding by the Tribunal that the evidence of the applicant's fiancée was not credible; and

(4) there was no determination as to whether revocation was in the best interests of the grandchildren contrary to cl 13.2(1).

50 The alleged error was said to be material because consideration of the best interests of the grandchildren could have led the Tribunal to give greater weight to the primary consideration related to the best interests of minor children.

51 Therefore, there are two aspects to the ground. First, a claim that the evidentiary material concerning the grandchildren was not considered by the Tribunal. Second, a claim that the Tribunal did not make a determination about the best interests of the grandchildren as required by Direction 79. The first claim turns upon a proper consideration of the approach to the relevant material by the Tribunal as stated in its reasons. The second claim also turns upon the content of the reasons and, in addition, upon the proper construction of what was required by Direction 79.

An alleged failure to consider the material concerning the grandchildren

52 In written submissions, the ground was couched in terms of a failure to consider relevant evidence. In oral submissions, reliance was placed upon the reasoning of Rangiah J in *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; (2018) 263 FCR 531 at [27] to the effect that the Minister was bound to consider critical and relevant information included in representations supporting the exercise of power under s 501CA(4). After referring to authorities concerned with the circumstances in which a failure by the Tribunal to consider important documents or other material may amount to jurisdictional error, his Honour said (at [30], Reeves J generally agreeing):

> 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.

53 The distinction is of importance in the present case because the Tribunal did consider the interests of the children, including the grandchildren. Therefore, this is not an instance where that topic was overlooked. Rather, the nature of the complaint made by ground 1 is that there was a failure by the Tribunal to consider particular material advanced by the applicant concerning the applicant's relationship with the three grandchildren of his fiancée.

54 The applicant placed considerable reliance upon the fact that there is a statement in the reasons to the effect that there is very limited evidence before the Tribunal of the ages of the applicant's five nieces and nephews, his fiancée's children and grandchildren when the Letter gave the ages of the three grandchildren. The applicant also says that the particular information in the Letter to the effect that the grandchildren call the applicant 'little Pop', and had spent a lot of time together as a family and that the applicant has a special relationship with the grandson was not mentioned in the reasons.

55 However, the fact that there is no express reference to this particular material in the reasons does not demonstrate that there was no consideration of the content of the Letter concerning the grandchildren.

56 As has been explained, the Tribunal did not disregard the Letter. It referred to the Letter in its reasons. It also referred to the oral evidence given by the applicant about the three grandchildren. The Letter only made reference to the grandchildren and not to the applicant's nieces and nephews. The only information about the applicant's nieces and nephews was in the Form (where their ages were not provided). Further, in the material provided to the Tribunal no significance was attributed to any relationship between the applicant and his nieces and nephews or his fiancée's children (as distinct from her grandchildren).

57 The relevant statement by the Tribunal in the reasons concerning children other than the applicant's own children is expressed in a rolled up way about all those other children (para 134). The conclusion is reached that there is very little evidence about the ages of those children, the nature of the applicant's relationship with them and how they may be affected by his removal. A finding in those terms was consistent with the material before the Tribunal concerning those children as a group.

58 In effect, the applicant says that it would have been more accurate as to the children to say there was evidence as to the ages of the grandchildren but no evidence as to the applicant's nieces and nephews or the children of his fiancée. Given the rolled-up way in which the

relevant paragraph is expressed it cannot be inferred that the Tribunal had no regard to those parts of the Letter concerning the grandchildren. It was the case, as the Tribunal found, that the information about the ages of the children as a group was limited. The Tribunal did not say there was no evidence about the ages of the grandchildren.

59 Therefore, I do not accept the submission that the Tribunal failed to consider the material about the grandchildren.

An allegation about what was required by Direction 79 (and whether it was done)

60 Reliance was placed upon the decision in *Uelese*. In that case, it became apparent during the hearing before the Tribunal that the applicant (who had referred to his relationship with three children in the material in support of his application) was also the father of two further children. The information was adduced under cross-examination. The Tribunal determined that it could not consider that material because of the terms of a provision in the *Migration Act* to the effect that two days' notice of all material to be relied upon by an applicant at the hearing was required. The issue was whether notice of the information that emerged during cross-examination was required before the hearing in order for it to form part of the material for consideration by the Tribunal. The reasons focus upon the terms of the statutory provision requiring such notice. Having found that the Tribunal could have regard to the material notwithstanding the relevant provision, consideration turned to the relevance of the material.

61 In the reasons of French CJ, Kiefel, Bell and Keane JJ at [61] a submission was advanced for the Minister to the effect that the material was not relevant for the purposes of the direction made under s 499 that applied at the time. The submission depended upon a contention that matters that the applicant did not rely upon in support of his application were not relevant to the decision to be made by the Tribunal. The Minister's submission was rejected at [64]-[68] in the following terms:

> Whether or not the appellant sought to make the interests of those children a positive aspect of his case, the Tribunal was obliged by s 499 of the Act and the terms of Direction 55 to take into account the interests of any minor children of which it was aware in determining his application for review. By virtue of s 499 and Direction 55, one of the primary considerations for the Tribunal concerned the interests of children who were not themselves represented in the proceedings before the Tribunal. The requirement of cl 9.3 of Direction 55 to consider the best interests of minor children in Australia affected by the decision is imposed on decision-makers in terms which are not dependent on whether an applicant for review argues that those interests are relevant as part of his or her 'case'.

> An aspect of the Minister's argument, developed by reference to the view that the Tribunal's functions were confined to a determination of issues relevant to the 'case' presented by the appellant, was the contention that, if the Tribunal did misconstrue s 500(6H) by not considering the information adduced in cross-examination, that error did not affect the outcome of the review. The Minister argued that the paucity of evidence about the appellant's two youngest children in consequence of the way the appellant's case was presented meant that the Tribunal could not be satisfied one way or the other as to where the best interests of the appellant's children lay. This aspect of the Minister's argument must also be rejected.
>
> It is apparent that the paucity of evidence referred to in the last sentence of the passage from the reasons of the Tribunal cited above was not due to the unavailability of material evidence. The Tribunal not only declined to act upon the information which was put before it by Ms Fatai, but it also failed to make even the most cursory inquiry to follow up on this information. This is not a case like *Paerau v Minister for Immigration and Border Protection*, on which the Minister sought to rely; here, the paucity of evidence was a consequence of the view taken by the Tribunal of the preclusory effect of s 500(6H).
>
> It is not necessary here to seek to chart the boundaries of the Tribunal's obligation to inquire after the best interests of the children of an applicant for review. There may be cases, hopefully rare, where the evidence presented by the parties does not alert the Tribunal that minor children in Australia may be affected by the decision. There may also be cases where the evidence is such that the only determination which can be made in obedience to cl 9.3(1) of Direction 55 is that cancellation is neutral so far as the best interests of any minor child are concerned. In this regard, it is to be noted that cl 9.3(1) requires a 'determination *about* whether cancellation is, or is not, in the best interests of the child' (emphasis added). Sometimes the best decision 'about' whether cancellation is, or is not, in the best interests of the child may be that it is neither.
>
> It is not necessary to canvass these possibilities further because the issue in this case is not whether the Tribunal failed to go far enough to discharge its obligation to conduct its review having regard to the interests of all the appellant's children; rather, the point is that the Tribunal, by reason of its misunderstanding of the effect of s 500(6H), failed to address one of the primary considerations affecting the decision required of it. It failed to conduct the review required by the Act, and thereby fell into jurisdictional error.
>
> (footnotes omitted)

62 The present case is not an instance where the extent of the evidence was confined by any failure to inquire by the Tribunal, nor could such failure be suggested. The Tribunal conducted an oral hearing at which the applicant and his fiancée gave oral evidence. Evidence was advanced about the grandchildren. The evidence did not indicate a parental role on the part of the applicant. It did not identify any particular likely effect on the grandchildren if the applicant's visa was not revoked (noting that, on the material, the grandchildren would still have their parents and their grandmother in Australia).

63 Further, the Tribunal did not conclude that the interests of the grandchildren were irrelevant. The reasons stated that the interests of the grandchildren were considered and the impact on

those children was given limited weight. The weight to be given to the consideration was a matter for the Tribunal. The specific factors listed in cl 13.2(4) were only to be considered 'where relevant'. It was open to the Tribunal to approach the matter in the way in which it did. It was not necessary to go through each factor and say that there was no material relevant to the factor. It was open to the Tribunal to find that as to all of the children (other than the applicant's own children) that there was limited evidence. It followed from that finding that there was not material that made the evaluation of the factors listed in cl 13.2(4) relevant.

64 Finally, it is said that in its ultimate conclusion about the interests of relevant children there was no reference to the grandchildren. However, having considered the evidence about all the children it was for the Tribunal to conclude the extent to which the interests of particular children weighed in favour of revocation (noting the finding about limited weight to be given to the interests of children other than the applicant's own children). The Tribunal reached the conclusion that it was the interests of the applicant's children and his nieces and nephews that meant that the primary consideration weighed in favour of revocation. It was a matter for the Tribunal to form that view and jurisdictional error has not been demonstrated because the Tribunal did not include the grandchildren in reaching that conclusion.

Ground 2

65 There were also four aspects of the reasons that were said to support ground 2, namely:

(1) the Tribunal failed to weigh the interests of the grandchildren when considering the best interests of minor children in Australia;

(2) there was no balancing of the competing considerations;

(3) there was no ascription of weight to considerations other than the protection of the Australian community; and

(4) the final conclusion that there was not another reason to revoke the cancellation did not rest on any reasoning balancing the competing considerations.

66 As to (1), the Tribunal found expressly that it gave the impact on the grandchildren limited weight. Therefore, when it came to considering the best interests of minor children affected by the decision, it did not exclude the grandchildren. Rather, it found that the consideration as a whole weighed in favour of revocation as it was in the best interests of the applicant's children, nieces and nephews to have his visa reinstated. This indicates a conclusion that the best interests of the grandchildren did not provide further support to that conclusion. It does not

follow that there was a failure to weigh the best interests of the grandchildren. Such a conclusion would be contrary to the terms of para 134.

67 As to (2), (3) and (4), reliance was placed upon the terms of cl 8 of Direction 79 which included directions as to the weight to be given to primary considerations. Reliance was also placed upon the following passage from my decision in *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 at [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 nonrefoulement 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.

68 It may be accepted that the nature of the task to be undertaken by the Tribunal is evaluative and must involve weighing the considerations which Direction 79 requires the Tribunal to take into account. There must be a real evaluation. The obligation to evaluate is not discharged by resort to 'decisional checklists or formulaic expression'. It is necessary for there to be actual reflection 'upon the whole consideration of the human consequences involved': *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628 at [3] (Allsop CJ, Markovic and Steward JJ agreeing).

69 The reasons of the Tribunal demonstrate that the primary considerations specified in Direction 79 have each been addressed and evaluated. Also, there has been consideration of relevant other considerations. The relevant material concerning each consideration has been addressed and a view has been expressed as to whether the consideration weighs for or against revocation. The evaluation of each consideration by the Tribunal did not involve a checklist or mechanistic approach. The particular circumstances of the applicant have been considered and conclusions expressed.

70 Significantly, in the body of the reasons, the Tribunal expressed the view that 'the very serious nature of the Applicant's criminal offending weighs heavily against the exercise of the

discretion to revoke the Mandatory Visa Cancellation Decision': at para 110. It also made the following further findings as to likely future offending:

(1) as to the potential for future harm (para 112):

> … The Applicant's criminal offending has included actual and threatened physical violence committed against his victims, which include multiple female partners and his fiancée. The potential harm to individuals and the Australian community should he continue to engage in such conduct is very serious. His violent behaviour has caused, and has the potential to cause in the future, substantial harm to victims, being both the psychological and physical impacts of his offending, and significant financial cost to the community associated with emergency services and law enforcement activities.

(2) as to the risk of the applicant reoffending (para 114):

> … On the basis of the evidence before it, the Tribunal finds there remains a real risk of the Applicant relapsing into drug-taking and criminal offending, as the clear warning from the Department in 2017 did not cause him to change his behaviour.

(3) as to his claim that he would not harm his fiancée (para 117):

> … the Tribunal cannot be satisfied that the Applicant will not violently offend against MS in future should he return to live with her, and it finds that the risk of him so doing is ongoing and significant.

(4) as to his claim that potential for increased access to his own children would deter him from future offending (para 118):

> The Applicant's evidence is that he plans to take steps to regain custody of his children and in the interim to move closer to where they reside in Shoalhaven. The Applicant's children have resided at the same location for the past five years and, whereas he visited them regularly, he did not take steps during this period to move to the area or to regain custody of the children. It was during this five-year period that the Applicant committed his most serious violent offences. On the basis of the evidence before it, the Tribunal cannot be satisfied that the potential for increased access to his children will deter the Applicant from further criminal offending.

71 The Tribunal then concluded as to what it described as 'Primary Consideration A', being the protection of the Australian community from criminal or other serious conduct (paras 119-120):

> On the basis of the evidence before it and taking into account available information and evidence on the risk of the Applicant re-offending, the Tribunal finds that the likelihood of the Applicant engaging in further criminal or other serious conduct is significant, and that this level of risk is unacceptable given the nature of the harm he may cause if he does reoffend.
>
> For the reasons above and applying the guidance in paragraphs 13.1.1(1) and 13.1.2(1) of the Direction, Primary Consideration A weighs heavily against the revocation of the Mandatory Visa Cancellation Decision.

72 As to other considerations, the Tribunal expressed its conclusion simply in terms that the consideration weighed either for or against revocation. The force with which the findings in respect of Primary Consideration A was expressed is not to be found in the language used as to the other considerations.

73 As has been noted, the Tribunal's conclusion involved listing the views it has reached as to whether a consideration was for or against revocation and then stated that it was not satisfied that there was another reason why the visa cancellation should be revoked.

74 The applicant says that, in those circumstances, the required evaluative process of weighing the strength of the competing considerations has not been undertaken. I do not accept that submission given the reasons as a whole. It is plain that the Tribunal reached strong views concerning the seriousness of the applicant's past offending and the likelihood of that reoccurring and it was that factor which weighed heavily in its evaluation. In those circumstances, it is not to be inferred that the required evaluative process was not undertaken by the Tribunal. It is tolerably clear that the Tribunal's findings to the effect that the matters considered in relation to Primary Consideration A weighed strongly against revocation carried greater weight in undertaking the evaluative task. The statements in the conclusion are to be read in the context of the body of the reasons.

75 Therefore, ground 2 has not been made out.

Ground 3

76 The final ground advanced by the applicant alleged legal unreasonableness. It was based upon a submission to the effect that there was defective, illogical or irrational reasoning or fact-finding that was of a kind that demonstrated legal unreasonableness. It was not a claim that illogicality or irrationality may itself found a claim of jurisdictional error even if it does not demonstrate legal unreasonableness. It is therefore unnecessary to consider the circumstances in which illogicality or irrationality may found an independent basis upon which jurisdictional error by the Tribunal may be demonstrated. Therefore, the alleged error must rise to demonstrating unreasonableness in the overall decision, that is, in the present case, as to the formation of the required state of satisfaction as a whole: *Tsvetnenko v United States of America* [2019] FCAFC 74; (2019) 269 FCR 225 at [83]-[85] (Besanko, Banks-Smith and Colvin JJ).

77 The contentions for the applicant were developed by identifying particular aspects of the reasoning said to be illogical or irrational and then claiming that as they were material there was unreasonableness. This is not the correct approach. As was recently explained in *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 at [33] (Kiefel CJ, Gageler, Keane and Gleeson JJ):

> There are conditions routinely implied into conferrals of statutory decision-making authority by common law principles of interpretation which, of their nature, incorporate an element of materiality, non-compliance with which will result in a decision exceeding the limits of decision-making authority without any additional threshold needing to be met. The standard condition that a decision-maker be free from actual or apprehended bias is one example. The standard condition that the ultimate decision that is made lie within the bounds of reasonableness is another.

78 Therefore, the question is not whether there is an error that is material that might be said to make the decision unreasonable. Rather, the question is whether the condition that the decision as a whole must be reasonable is met.

79 The applicant advanced four points to support ground 3.

80 The *first point* concerned the reasons at para 129 where the Tribunal said (after referring to an incident that led to the making of a violence restraining order against the applicant):

> This prior conduct, and the Applicant's subsequent violent offending against three other female partners, is such that the Tribunal cannot be satisfied that the Applicant's behaviour has not had, and will not in future have, a negative impact on his children.

81 This was said to be illogical or irrational where the Tribunal also found at para 133 that:

> … there is no evidence before the Tribunal to indicate that the Applicant has abused or neglected the children, or the children have suffered or experienced any physical or emotional trauma arising from the Applicant's conduct.

82 The two findings are not inconsistent. The first concerned whether the past and any future conduct of the applicant was likely to have a negative impact on his children. It was concerned with the consequences for the children of his past violent offending towards women. The Tribunal was not satisfied that this had not already had and would not in the future manifest in a negative way for his children. The second concerned whether the applicant had abused or neglected his own children. The finding is to the effect that the applicant's conduct has not been directed towards his children. It is dealing with whether he has abused or neglected them, not the consequences of the violence that he has directed towards women.

83 The *second point* also concerned the finding by the Tribunal at para 129. It was said to be illogical or irrational by reason of inconsistency with the following finding at para 128:

> The Applicant's evidence is that if his visa is reinstated, he intends to move to … be near his children. He expressed the same intention when he requested the revocation of the cancellation of his visa in 2017. However, following the revocation he lived in Wodonga, and then moved to Liverpool before he began living with his fiancée in Bowral. At no stage did he move to or near [his children]. Further, the Applicant told the Tribunal that he plans initially to live with LB and then to resume living with his fiancée if the AVO is amended to allow him to do so. On the basis of this evidence, the Tribunal cannot be satisfied that the Applicant would, given the opportunity, relocate closer to his children and thereby assume a significant parental role in their lives.

84 It was said to be illogical to find that the applicant could have a negative impact on his children despite the finding that he would not be living in close proximity to his children. There is no inconsistency. The Tribunal's finding at para 129 about negative impact was couched in terms that the applicant's past conduct would have future negative impact. No doubt this reflected a view about the ongoing consequences for the children of the applicant's past behaviour even if the applicant did not have further contact with his children.

85 The *third point* was an alleged inconsistency between the conclusion that the best interests of the applicant's five nieces and nephews would be given little weight when at para 150 the Tribunal found that the applicant had strong family ties in Australia that included his nieces and nephews. The submission overstates the finding at para 150 which was expressed as follows:

> The Applicant has strong family ties in Australia, including his mother, step-father, stepbrother, uncle, aunt, cousins and nieces and nephews. However, there is no evidence before the Tribunal to indicate that his family members or friends have any particular reliance on the Applicant or would suffer any financial or practical hardship if he were removed. Insofar as this consideration weighs in the Applicant's favour, the Tribunal has given it limited weight.

86 The second sentence in the paragraph is consistent with the Tribunal's earlier finding. In context, the finding about strong family ties is simply a finding about the extent of his family in Australia.

87 The *fourth point* repeats the matters relied upon to support ground 1. It is said that the finding about limited evidence concerning the ages of the grandchildren and the nature of the applicant's relationship with them did not reflect the evidence. For reasons that have been

given, I do not accept that submission. It was open to the Tribunal to make the rolled-up finding having regard to the nature of the evidence.

88 It follows that none of the matters said to provide the foundation for the conclusion that the decision was unreasonable has been made out. Therefore, the premise on which the ground is based has not been established and the ground must be dismissed.

89 It was separately submitted that the alleged factual errors by the Tribunal may amount to 'jurisdictional fact error' of the kind referred to by Wigney J in *BHL19 v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2020] FCAFC 94; (2020) 277 FCR 420 at [140] and [142] (in dissent as to the result). His Honour there referred to authorities concerned with the circumstances in which illogical or irrational reasoning or findings of fact in the formation of a view the existence of which may described as jurisdictional may amount to jurisdictional error. The application of those authorities in the context of s 501CA(4) was considered by Derrington J in *EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681; (2019) 272 FCR 409. Different views have been expressed in that regard: see *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; (2017) 248 FCR 456; *Ali v Minister for Home Affairs* [2020] FCAFC 109; (2020) 278 FCR 627; *Guclukol v Minister for Home Affairs* [2020] FCAFC 148; (2020) 279 FCR 611; and *Tohi v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2021] FCAFC 125 (and the cases referred to by Katzmann J in *Tohi* at [3]).

90 As I have concluded that the alleged illogical or irrational findings have not been demonstrated to be illogical or irrational it is not necessary to consider the extent to which a factual finding may amount to jurisdictional error on the basis that some aspect of the formation of the required state of satisfaction is a jurisdictional fact.

Conclusion and costs

91 For the above reasons, the application for judicial review must be dismissed. It was accepted that costs should follow the event. There will be an order for costs to be assessed on a lump sum basis by a registrar if not agreed.

I certify that the preceding ninety-one (91) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate:

Dated: 13 October 2021