FEDERAL COURT OF AUSTRALIA

Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1368

Review of:	*Robert Aorta Davis and Minister Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 774
File number:	NSD 420 of 2021
Judgment of:	**BURLEY J**
Date of judgment:	5 November 2021
Catchwords:	**MIGRATION** – application for judicial review of Administrative Appeals Tribunal decision not to revoke visa cancellation under s 501CA(4) of Migration Act 1958 (Cth) – whether Tribunal failed to adequately consider the interests of all minor children under cl 13.4 Direction No. 79 – application upheld
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) ss 43(3)-(5) *Migration Act 1958* (Cth) ss 499, 500(1)(ba), 501, 501(3A) and 501CA(4)
Cases cited:	*Bhangu v Minister for Immigration and Border Protection* [2017] FCA 108 *CCC v Minister for Immigration & Multicultural Affairs* [2001] FCA 682 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; 43 FCR 280 *EQV20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1252 *Foroghi v Minister for Immigration & Multicultural Affairs* [2001] FCA 1875 *Lesianawai v Minister for Immigration and Citizenship* [2012] FCA 897; 131 ALD 27 *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16; 309 ALR 67 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 *Minister for Immigration and Multicultural Affairs v Yusuf*

	[2001] HCA 30; 206 CLR 323 *Paerau v Minister for Immigration and Border Protection* [2014] FCAFC 28 *Politis v Federal Commissioner of Taxation* [1988] FCA 739; 16 ALD 707 *QHRY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 827 *Robert Aorta Davis and Minister Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 774 *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 *SZLPH v Minister for Immigration & Citizenship* [2008] FCA 744 *SZTMD v Minister for Immigration and Border Protection* [2015] FCA 150 *Waterways Authority v Fitzgibbon* [2005] HCA 57; 79 ALJR 1816 *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 619
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	68
Date of hearing:	12 October 2021
Counsel for the Applicant:	Jason Donnelly
Solicitor for the Applicant:	Ghan Migration
Counsel for the First Respondent:	Tim Reilly
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

NSD 420 of 2021

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

ORDER MADE BY:	**BURLEY J**
DATE OF ORDER:	**5 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. A writ of certiorari be issued quashing the decision of the Second Respondent dated 6 April 2021.
2. The matter be remitted to the Second Respondent, differently constituted, for determination according to law.
3. The First Respondent pay the Applicant's costs.

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

REASONS FOR JUDGMENT

BURLEY J:

1. INTRODUCTION

1 The applicant, Robert Aotoa Davis, seeks an order quashing a **decision** of the second respondent (**Tribunal**) (*Robert Aorta Davis and Minister Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 774) for jurisdictional error and an order remitting the matter to the Tribunal for determination according to law.

2 Mr Davis was born on 4 January 1978 and first arrived in Australia in 1981 at the age of 3. He was the holder of a Special Category (Class TY)(subclass 444) **visa** until 5 December 2019 when it was cancelled by a delegate of the **Minister** for Immigration Citizenship, Migrant Services and Multicultural Affairs pursuant to s 501(3A) of the *Migration **Act** 1958* (Cth). Mr Davis was invited to make representations to the Minister about revocation of the cancellation decision, and did so in accordance with s 501CA(4)(a) of the Act. A delegate of the Minister decided not to revoke the cancellation decision and Mr Davis applied to the Tribunal for review of that decision. On 6 April 2021, the Tribunal affirmed the decision of the delegate.

3 Mr Davis now seeks judicial review of the Tribunal's decision not to revoke the cancellation decision. He was represented pro bono by Jason Donnelly of counsel. The Minister was represented by Tim Reilly of counsel.

4 Mr Davis advances the following ground of review:

> **1. The Tribunal failed to complete the exercise of its jurisdiction.**
>
> (a) Clause 13.2(1) of Direction no. 79 (the Direction) expressly requires decision-makers must make a determination about whether revocation is in the best interests of the child.
>
> (b) First, the Tribunal found that the applicant had three grandchildren in Australia. The Tribunal merely found that should the applicant return to New Zealand, the Tribunal would expect it would impact 'both his grandchildren'. No finding was made concerning the third grandchild.
>
> (c) Furthermore, the Tribunal failed to expressly determine whether revocation was in the best interests of the applicant's three grandchildren as required by cl 13.2(1). The Tribunal merely found that the applicant had played a limited role in the lives of his grandchildren on account of his incarceration.
>
> (d) Secondly, the Tribunal accepted that the applicant had performed the role of a father figure to his step-son. The Tribunal found that if the applicant were to return to New Zealand, the Tribunal 'would expect' it would impact the applicant's step-son. The Tribunal found that the applicant had played a limited role in the life of his step-son. The Tribunal failed to expressly determine whether revocation was in the best interests of the applicant's step-son as required by cl 13.2(1).
>
> (e) Thirdly, the Tribunal accepted that the applicant had a minor nephew in Australia. The Tribunal found that should the applicant return to New Zealand, the Tribunal 'would expect' it would impact the applicant's nephew. The Tribunal failed to expressly determine whether revocation was in the best interests of the applicant's nephew as required by cl 13.2(1).
>
> (f) Fourthly, cl 13.2(4)(b) of the Direction mandates that the Tribunal must consider 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. This Tribunal failed to consider this consideration concerning the applicant's step-son (despite finding that the applicant was the 'step-father' to the step-son and had performed the role of a 'father figure' to the child).
>
> (g) Further, the Tribunal failed to have regard to cl 13.2(4)(b) of the Direction for the applicant's two biological children. The Tribunal merely accepted 'that it is in the interests of [the applicant's two biological children] that their father is in Australia and available to be physically present with them'.
>
> (h) Fifthly, the Tribunal concluded that it was 'required to weigh up' relevant considerations in this case. However, when dealing with the primary consideration of best interests of minor children in Australia, the Tribunal concluded that the best interests of the applicant's 'minor children weighs in favour of revocation of the mandatory cancellation decision'. However, the Tribunal entirely ignored whether the best interests of the applicant's three grandchildren, step-son, and nephew weighed in favour of revocation of the mandatory cancellation decision. As a result, the Tribunal's balancing analysis miscarried.

5 For the reasons set out below, I order that the decision of the Tribunal be quashed and remit the proceedings to the Tribunal differently constituted for determination according to law.

2. THE REASONS OF THE TRIBUNAL

6 The Tribunal noted that pursuant to s 501CA(4) of the Act it may revoke the original decision to cancel a visa if it is satisfied: (i) that the person passes the character test as defined by s 501; or (ii) that there is another reason why the original decision should be revoked. It determined that, by reason of his criminal record, Mr Davis did not pass the character test, and that accordingly it was necessary to decide whether there is another reason the original decision should be revoked.

7 The Tribunal noted that s 500(1)(ba) of the Act confers jurisdiction on it to review decisions of the delegate. It also noted that it was obliged to comply with **Direction** 79, being a Direction made by the Minister pursuant to s 499 of the Act. It then quoted from various paragraphs of the Direction, noting that Part C identifies the considerations that decision makers must have regard to when determining whether to exercise the discretion to revoke the mandatory cancellation decision. The Tribunal observed that the three primary considerations identified are: (A) protection of the Australian community from criminal or other serious conduct; (B) the best interests of minor children in Australia; and (C) expectations of the Australian community. It noted that the Direction refers to five "other considerations" to be taken into account.

8 The Tribunal found that Mr Davis arrived in Australia in 1981 as a three year old child and is now the father of six children, all of whom live in Australia. His father and two sisters also reside in Australia. It identified that in addition to Mr Davis, nine witnesses gave evidence at the hearing including:

(a) Raelane Mealey, his sister in law;

(b) Tiara-Marie Mini Davis, his adult daughter;

(c) Kaylan-Joe Davis, his adult eldest son;

(d) Ian Davis, his father;

(e) Cameron Murupaenga, a friend;

(f) Michelle Cooper Mealey, his partner and the mother of his biological child, SD;

(g) Jessica Davis, his eldest child;

(h) Ms JM, the mother of four of his biological children; and

(i) Tui-Davis Wang, his sister.

9 The Tribunal then addressed primary consideration A – protection of the Australian community from criminal or other serious conduct. It had regard to the requirements of cl 13.1(2) of the Direction that requires consideration of, first the nature and seriousness of the conduct to date, and secondly the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

10 In relation to the first, the Tribunal summarised Mr Davis' extensive criminal history. This included a conviction in August 2003 of maliciously inflict grievous bodily harm and contravene apprehended domestic violence order for which he was sentenced to 13 months' imprisonment. The victim was Ms JM. It also identified a series of theft and related offences which included: a sentence in April 2009 to 12 months imprisonment for assisting in the theft of tobacco from a shipping container with a retail value of $918,000; a sentence in April 2012 to 34 months' imprisonment for two break and enter offences committed in 2010; a November 2013 sentence to 20 months' imprisonment for forced entry into a café in a shopping centre; and the August 2019 sentence to 18 months' imprisonment for break and enter.

11 The Tribunal also identified driving offences committed by Mr Davis, including attempting to evade police when they attempted to apprehend him during a December 2013 credit card fraud incident. Mr Davis was sentenced to an aggregate term of three years and six months for the fraudulent use of credit cards and associated driving offences. The Tribunal noted that Mr Davis had been notified that his visa may be cancelled under s 501 of the Act on 17 December 2009 and again on 5 October 2012, and that on 6 June 2017 his visa had been cancelled under s 501, but the cancellation was revoked on 13 February 2018.

12 The Tribunal noted that Mr Davis had been sentenced to terms of imprisonment in each of 2003, 2005, 2006, 2009, 2012, 2013, 2014, 2016 and 2019 and concluded that his conduct is to be viewed very seriously.

13 The Tribunal then considered the risk to the Australian community should Mr Davis' visa not be cancelled. It considered the nature of the harm should he reoffend to include physical, psychological and economic harm. It accepted that his offending has to a significant degree

been driven by substance abuse issues and that his rehabilitation will be a significant determinant of the risk of reoffending. It was not satisfied that Mr Davis had adequately addressed his substance abuse issues relative to the seriousness of his addiction and found that there is a "very real risk" that Mr Davis will reoffend should he be released back into the community.

14 The Tribunal concluded that primary consideration A weighted "heavily against" revoking the cancellation of his visa.

15 The Tribunal's reasons in relation to the primary consideration B – best interests of minor children – are central to the current application and are set out below:

> 91. Subparagraph 13.2.4 of the Direction provides numerous factors that must be considered, where relevant, in considering the best interests of children affected by the decision.
>
> 92. Mr Davis is the father of six children. Though Mr Davis told the Tribunal that he understood one of his sons, Kaylan was 17 years old, Kaylan confirmed at the hearing that he is now 18 years of age and is therefore no longer a minor.
>
> 93. Mr Davis is father to two minor children, his daughter ZD and his son SD. ZD is six years old and lives with her mother. Mr Davis gave evidence that he has had a falling out with ZD's mother and he does not see ZD often as a consequence of the poor relationship he has with her mother. He stated he has not seen ZD for "a few years" and confirmed he has been in prison for four years of her life.
>
> 94. Mr Davis's son SD is two years of age. He currently resides with the sister of his partner Ms Mealey. Mr Davis told the hearing that Ms Mealey's sister is taking care of the child whilst he is in detention. SD's mother is currently undergoing drug rehabilitation and applying for more access to SD. Mr Davis's understanding is that Ms Mealey is slowly re-integrating towards having more care of SD. Mr Davis confirmed that he has not seen SD since 2019.
>
> 95. Though he does not see his minor children often, Mr Davis submits that speaks to them often and helps them financially, though he concedes that he was unable to do so whilst in prison. He told the hearing that whilst he was in prison, his father would take the children out every weekend and provide them anything that they needed.
>
> 96. Mr Davis also notes that SD has indigenous heritage through Ms Mealey and contends that SD is from the Wiradjuri tribe who are the "traditional custodians of the land of Redfern". He contends that the Commonwealth has a responsibility to ensure "first nations" children have access to both parents.
>
> 97. Mr Davis is the grandfather to two other children, one age five and another age two. A third grandchild was born in early 2020. He is also the step-father to Ms Mealey's son AM who is age eight and he also has a nephew of the same age.

> 98. Raelane Mealey, who is SD's guardian, provided evidence at the hearing. She spoke of her desire for Mr Davis to resume his parental responsibilities for SD and told the Tribunal that her own son AM wishes that Mr Davis was his father. I accept that Mr Davis has performed the role of a father figure to AM and he has parental obligations which he is expected to fulfil regarding the care of SD.
>
> 99. It is apparent that Mr Davis has been absent from the lives of both SD and ZD for long periods whilst he has been in prison or detention. The Respondent contends that in light of Mr Davis's extensive criminal history and ongoing substance abuse problems, it is doubtful he would play a positive parenting role in the future of the children.
>
> 100. At the hearing the Tribunal heard from Mr Davis's adult children including his 25 year old daughter JD, his other daughter TD and his 18 year old son Kaylan-Joe Davis. They all spoke with great affection and love for their father. They spoke of his humility and care for his family.
>
> 101. I accept that it is in the interests of ZD and SD that their father is in Australia and available to be physically present with them. Should Mr Davis return to New Zealand, I would expect it would impact both his grandchildren, AM and KM and his nephew JM.
>
> 102. Having considered the evidence in relation to the impact a decision would have on Mr Davis's children, this consideration weighs in favour of revoking the mandatory cancellation of Mr Davis's visa. However, I take into account that Mr Davis has played a limited role in the lives of his two minor children, his grandchildren and step-son on account of his incarceration and in the case of his daughter ZD, his incarceration and poor relationship with her mother. For these reasons, this factor weighs in favour of revoking the cancellation decision, but not as heavily as it might on account of Mr Davis's long periods of absence.

16 The Tribunal next addressed primary consideration C – expectations of the Australian community. It found that Mr Davis had not met those expectations by reason of his failure to obey the laws of Australia and, although it recognised that some tolerance is appropriate given that he has resided in Australia since he was a child, the consideration weighed "heavily against" revoking the cancellation of his visa.

17 The Tribunal then turned to the other considerations identified in the Direction insofar as it considered them to be relevant. In this regard, it found the strength, nature and duration of Mr Davis' ties to Australia to be relevant. It found at [113]:

> Based on their evidence I am satisfied that non-revocation would have a lasting and negative effect on Mr Davis's four adult children, both his minor children, his father, his sister, partner and other family members.

18 The Tribunal concluded that Mr Davis has close and significant ties to the Australian community, which weighed in favour of revocation.

19 The Tribunal also considered that it was relevant that Mr Davis would face impediments if he were removed to New Zealand. It found that, as a middle-aged man who has lived in Australia for his entire adult life and most of his childhood, with no family support in New Zealand and no relationships or friends in New Zealand, Mr Davis is likely to find it challenging to establish himself and maintain his mental health if he were removed to New Zealand, and that this consideration weighs in favour of revoking cancellation of his visa.

20 The Tribunal concluded by observing at [122] that, having considered the specific circumstances relating to Mr Davis, it was next "required to weigh up those considerations". It said:

> 123. Mr Davis's offending is extensive and serious. I accept that his offending has in large part been the consequence of his drug dependency, but it is notable that Mr Davis has been afforded opportunities through the Drug Court program and other interventions to support his rehabilitation. The fact that he previously visa cancelled and the cancellation subsequently revoked yet continued to offend does not reflect well on his application. The primary consideration of the protection of the Australian community weighs heavily against revoking the mandatory cancellation of Mr Davis's visa.
>
> 124. The best interests of Mr Davis's minor children weighs in favour of revocation of the mandatory cancellation decision. However, this consideration is afforded less weight in the circumstances as Mr Davis has had very limited contact with both of his minor children for extended periods of their lives.
>
> 125. The expectations of the Australian community weigh against revoking the cancellation decision given the extent of his offending.
>
> 126. That Mr Davis has spent most of his life in Australia and his deep ties to the Australian community, most notably his family members, that the other consideration of the extent, nature and duration of ties and weighs heavily in favour of revoking the cancellation decision. I place additional weight on this consideration given the young age at which Mr Davis first arrived in the country.
>
> 127. The other consideration which is the extent of impediments if removed weighs marginally in favour of revoking the mandatory cancellation decision, owing to the lack of social support that Mr Davis will have in New Zealand and the need to continue his drug rehabilitation.
>
> 128. Having considered all these factors and the circumstances of this application, I conclude that on balance, the weight of the primary considerations of the risk to the Australian community and the expectations of the Australian community outweigh the combined weight of the primary consideration of the best interests of the minor children and the other considerations of the strength, nature and duration of Mr Davis's ties to the community and the extent of impediments he would face in New Zealand. Consequently, the Tribunal affirms the reviewable decision.

3. THE SUBMISSIONS

21 Mr Davis submits that matters identified in the Direction are mandatory considerations, and a failure to comply with them can constitute jurisdictional error if it could realistically have resulted in a different decision. He identifies several respects where he submits the Tribunal failed to comply with the Direction and submits that taken individually or cumulatively the errors were material such as to amount to jurisdictional error. First, he submits that the Tribunal failed to consider the impact of the decision on his third grandchild, failed to make a determination as to whether revocation was in the best interests of the three grandchildren (contrary to cl 13.2(1) of the Determination), which was contrary to the approach in *Paerau v Minister for Immigration and Border Protection* [2014] FCAFC 28 (Buchanan, Barker and Perry JJ) at [16] (per Buchanan J, Barker agreeing at [53]-[54], and see Perry J at [106] and [118]) and did not consider the grandchildren at all in weighing up the conclusions. Secondly, it failed to determine whether revocation was in the best interests of either his stepson or his nephew or to refer to either in weighing his conclusions. Thirdly, the Tribunal failed to consider the extent to which Mr Davis is likely to play a positive parental role in the future for either his two biological children or his stepson, despite the requirement in cl 13.2(4)(b) that it do so. Fourthly, whilst it acknowledged at [122] that it was required to weigh up relevant considerations, in so doing at [124] the Tribunal omitted to make any reference to any of his three grandchildren, his stepson or his nephew.

22 As a result of these matters, Mr Davis submits that the Tribunal fell into error. He submits that the error was material because had the errors not occurred, compliance with the Direction could realistically have resulted in a different outcome, especially given that this case was a finely balanced one, where two primary considerations were held against him but the other primary consideration was in his favour and the two other considerations were also determined in his favour.

23 The Minister submits that all of the errors contended for by Mr Davis are essentially infelicities in the Tribunal's reasons, citing *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** [1996] HCA 6; 185 CLR 259 at 271-272 (Brennan CJ, Toohey, McHugh and Gummow JJ) and *Collector of Customs v* ***Pozzolanic Enterprises*** *Pty Ltd* [1993] FCA 456; 43 FCR 280 at 287 (Neaves, French and Cooper JJ). He contends that when fairly read the Tribunal did have regard to the interests of all minor children, and that the word "both" in [101] should be understood

as meaning "all of" rather than indicating only two grandchildren. He submits that it is not a fair reading of [124] to consider that the Tribunal was denying its earlier holding at [100] – [102]. He also submits that a fair reading of [101] indicates that the Tribunal takes into account Mr Davis' stepson and nephew and that, having done so, there is no rational basis for considering that it did otherwise in its conclusion at [124]. Furthermore, he submits that it is implicit that the Tribunal found at [100] – [102] that Mr Davis would be likely to play a positive parental role in the lives of all minor children concerned, including his two biological children. He also submits that the fourth complaint, namely that the Tribunal omitted to make any reference to any of his three grandchildren, his stepson or his nephew suggests that at [124] the Tribunal is denying what it had already found at [101] – [102], which is not a fair reading of the decision.

24 The Minister submits that insofar as any error is found arising from a failure to refer to a grandchild or the stepson, that error could not be material having regard to the amount of time that Mr Davis has been in prison and the limited role that he had played in their lives. He accepts, however, that if the error said to arise from [124] of the reasons is made out, then it would involve the Tribunal failing to take into consideration the interests of five out of seven minor children who have a relationship with Mr Davis. That error could be sufficiently material to warrant a conclusion of jurisdictional error.

4. CONSIDERATION

4.1 Relevant Law

25 Subsections 43(3)-(5) of the *Administrative Appeals Tribunal Act 1975* (Cth) provide:

> **43 Tribunal's decision on review**
>
> …
>
> *Tribunal must give copies of its decision to parties*
>
> (3) The Tribunal shall cause a copy of its decision to be given to each party to the proceeding.
>
> *Evidence of Tribunal's decision or order*
>
> (4) Without prejudice to any other method available by law for the proof of decisions or orders of the Tribunal, a document purporting to be a copy of such a decision or order, and to be certified by the Registrar, to be a true copy of the decision or order, is, in any proceeding, prima facie evidence of the decision or order.

> (5) Subsections (3) and (4) apply in relation to reasons given in writing by the Tribunal for its decision as they apply in relation to the decision.

26 These provisions demonstrate that the reasons for the decision of the Tribunal are to be taken to reflect what the Tribunal found. However, it is for the Court to discern what the Tribunal is saying in its reasons. The starting point is that because the Tribunal was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were, in fact, taken in arriving at that result. If something is not mentioned it may be inferred that it has not been considered or taken into account; *Minister for Immigration and Multicultural Affairs v* ***Yusuf*** [2001] HCA 30; 206 CLR 323 at [5] (Gleeson CJ), [37] (Gaudron J) and [69] (McHugh, Gummow and Hayne JJ, Gleeson CJ agreeing at [1]); *Waterways Authority v Fitzgibbon* [2005] HCA 57; 79 ALJR 1816 at [130] (Hayne J, McHugh J agreeing at [26] and Gummow J agreeing at [28]).

27 Whether it is appropriate to draw an inference that something has or has not been considered or taken into account must be determined by reference to the facts of each particular case and the reasons as a whole. The Court will not be concerned with looseness in the language of the Tribunal nor unhappy phrasing of the Tribunal's thoughts, nor are the reasons for the decision under review to be construed minutely and finely with an eye keenly attuned to the perception of error: *Wu Shan Liang* at [30] (Brennan CJ, Toohey, McHugh and Gummow JJ); *Pozzolanic Enterprises* at 287 (Neaves, French and Cooper JJ); *Politis v Federal Commissioner of Taxation* [1988] FCA 739; 16 ALD 707 at 708 (Lockhart J). The nuance of the construction exercise was considered by Stone J in ***SZCBT*** *v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 at [26]:

> The Minister urged a 'beneficial' construction of the Tribunal's reasons and referred to comments made in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, in particular at 271-272. The phrase 'beneficial construction', as used in *Wu Shan Liang* has a specific meaning, and was certainly not intended to mean that any ambiguity in the Tribunal's reasons be resolved in the Tribunal's favour. Rather, the construction of the Tribunal's reasons should be beneficial in the sense that the Tribunal's reasons would not be over-zealously scrutinised, with an eye attuned to error. In this sense a 'beneficial' approach to the Tribunal's reasons does not require this Court to assume that a vital issue was addressed when there is no evidence of this and, indeed, the general thrust of the Tribunal's comments suggest that the issue was overlooked.

28 The Direction provides at cl 13.2:

> **13.2 Best interests of minor children in Australia affected by the decision**

(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.

29 The arguments advanced by the parties pose three broad matters for consideration. First, what is the correct construction of the Tribunal's reasoning insofar as it concerned primary consideration B. Secondly, did the Tribunal engage in a constructive failure to exercise jurisdiction by failing to comply with cl 13.2 of the Direction. Thirdly, was any such failure sufficiently material to amount to jurisdictional error. I address each in turn below.

4.2 Construing the Tribunal's reasons

30 The reasoning of the Tribunal concerning primary consideration B is poorly worded and far from clear. This may stem from the Tribunal's failure to distinguish clearly between the individual members of Mr Davis' family. For instance Michelle Mealey is Mr Davis' partner. Raelane Mealey is Michelle's sister. The Tribunal confusingly refers to the former as "Ms Mealey"; see [94]-[97]. When it comes to the minor children, the Tribunal identifies the following:

(1) Daughter ZD aged 6 years, whom he has not seen for a few years (at [93]);

(2) Son SD aged 2 years who lives with Raelane Mealey (at [94]);

(3) Grandchildren aged 5, 2 and 1 years (at [97]), who may be identified for present purposes as grandchildren A, B and C respectively. However, at [101] the Tribunal appears to refer to two grandchildren by the initials AM and KM, but does not give initials for grandchild C;

(4) A stepson who is also designated by initials "AM" aged 8 years (at [97]); and

(5) A nephew JM aged 8 years, who is Raelane Mealey's son (at [97] and [101]).

31 The confusion is compounded at [98], where the Tribunal identifies a further child "AM":

> Raelane Mealey, who is SD's guardian, provided evidence at the hearing. She spoke of her desire for Mr Davis to resume his parental responsibilities for SD and told the Tribunal that **her own son** AM wishes that Mr Davis was his father. I accept that Mr Davis has performed the role of a father figure to AM and he has parental obligations which he is expected to fulfil regarding the care of SD.
>
> (Emphasis added)

32 Here the Tribunal refers to "AM" as Raelane Mealey's son. However, in the previous paragraph it says "*He is also the step-father to Ms Mealey's son AM who is age eight and he also has a nephew of the same age*". The Ms Mealey being referred to at [97] as the mother of "AM" is Michelle Mealey, and the nephew is someone different. Indeed, later in the decision at [101] the nephew is identified as "JM". This begs the question of whether the Tribunal has found at [98] that Raelane Mealey has a son "AM" for whom Mr Davis has performed the role of a father figure. The evidence discloses that Raelane Mealey has a son JM but no son AM.

33 The parties submitted that the Tribunal had found that Mr Davis played the role of a father figure to AM (regardless of the identity of AM's mother). However, there is considerable

confusion as to whether Raelane Mealey's evidence as to the desires of her son could have meant AM (earlier identified as Michelle's son) or JM, who is her son. The Tribunal does not address this. The structure of [98] suggests that the Tribunal's finding regarding AM was based on Raelane Mealey's oral evidence. It is unclear whether the Tribunal intended to find that Mr Davis performed the role of a father figure towards his stepson AM or nephew JM. Based on the wording and structure of the decision concerning primary consideration B, I cannot be confident about what findings the Tribunal was making about whom at [98].

34 In relation to minor children ZD and SD, the Tribunal found that Mr Davis has been absent from their lives for long periods whilst he has been in prison or detention (at [99]) and that it was in their interests that he be in Australia and available to be physically present with them (at [101]). It found that this consideration weighs in favour of revoking the mandatory cancellation (at [102]).

35 In relation to the remaining five children, the Tribunal's reasons are less clear. It says at [101]:

> Should Mr Davis return to New Zealand, I would expect it would impact both his grandchildren, AM and KM and his nephew JM.

36 This finding is problematic for several reasons.

37 First, it refers to "both" grandchildren "AM and KM", yet the Tribunal has identified *three* grandchildren in [97] (who I have designated A, B and C). Secondly, it does not earlier identify the grandchildren by initials, yet the initials "AM" are ascribed by the Tribunal earlier to the stepson in [97]. As I have noted, confusingly the Tribunal also refers to "AM" at [98] when considering Raelane Mealey's son. The Minister points out that the evidence before the Tribunal indicates that the names of grandchildren A and B would yield the initials "KM" and "AM", which seems to be the case. This suggests (and I find) that the Tribunal intended to refer to those children at [101], being grandchildren A and B.

38 The Minister also submits that the words "both his grandchildren" should be understood to mean "all of his grandchildren". I reject that submission as plainly inconsistent with the language used.

39 Thirdly, the finding that Mr Davis' departure from Australia would "impact" the children identified is a finding of uncertain meaning. It could be positive or it could be negative.

40 Fourthly, there is no reference in [101] to the stepson AM.

41 Fifthly, there is no reference in [101] to grandchild C.

42 In [102] of its reasons the Tribunal "takes into account" Mr Davis' limited role in the lives of "his grandchildren and step-son" because of his incarceration and considers that this factor, although weighing in favour of revocation of the mandatory cancellation, does not do so as heavily as it might. It is ambiguous whether the reference to "grandchildren" in [102] is to the two identified by the initials AM and KM in the previous paragraph, or all three grandchildren referred to in [97]. Given the clear identification of two individuals in [101], the better view is that the "grandchildren" identified in [102] are those in respect of whom the Tribunal made a finding as to the impact that Mr Davis' absence would have upon them, being grandchildren A and B.

43 The Minister submits that any omission to mention grandchild C and stepson AM in [101] and the omission of reference to grandchild C and nephew JM in [102] should are be understood to be infelicities of drafting or slips of the pen, given that all of the relevant children were identified earlier in [97].

44 I am unable to reach that conclusion. Although it must be acknowledged that even the most carefully prepared and proof-read decisions will, from time to time, contain clerical or typographical errors, the reasons actually stated are to be understood as recording the steps that were, in fact, taken in arriving at that result, setting aside infelicities and errors in expression. Various decisions in this Court have considered whether the reasons of a decision-maker contain a typographical error and whether, as a matter of common sense, the reasons should be construed having regard to that fact: *CCC v Minister for Immigration & Multicultural Affairs* [2001] FCA 682 at [28]-[29] (Marshall J); *Foroghi v Minister for Immigration & Multicultural Affairs* [2001] FCA 1875 at [48] (Marshall J); *SZLPH v Minister for Immigration & Citizenship* [2008] FCA 744 at [29]-[32] (Weinberg J); *Bhangu v Minister for Immigration and Border Protection* [2017] FCA 108 at [26] and [30]-[36] (Moshinsky J); *EQV20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1252 at [27]-[29] (Burley J). In each case, it is for the court to determine whether an error does not reflect the true reasoning of the decision maker and is to be understood accordingly.

45 In relation to the stepson AM and grandchild C the following points may be made.

46 Having identified both children in [97], the Tribunal could easily have included mention of stepson AM and grandchild C in [101], but it did not do so. There are aspects of the circumstances of each that suggest that this was a deliberate choice. In the case of stepson AM, the Tribunal found at [98] that AM was a child for whom Mr Davis performed the role of a father figure. I have found at [32] above that I cannot be confident about what findings the Tribunal was making about whom at [98] of the decision. However, assuming that the Tribunal intended to make these findings about Mr Davis' relationship with his stepson AM, as it purported to, then that role is likely to be greater than or at least different to that which he played towards the grandchildren and the nephew identified in [101].

47 In the case of grandchild C, the Minister submitted that the Tribunal may have considered that grandchild C was too young for Mr Davis to have made any impact on C's life, and for that reason chose to omit reference to that child and refer to the older grandchildren AM and KM in [101]. That may be so, having regard to the age of C. However, in the case of each of AM and C, their circumstances are not such that it may be assumed that the Tribunal intended to group them in with the other grandchildren AM and KM or nephew JM who are identified in [101]. This is particularly so given the Tribunal's confusion between JM and AM.

48 The Minister's submissions invite the Court to speculate as to the Tribunal's motivation for omitting them, but I do not consider that this is an appropriate course. The authorities to which I have referred above make plain that it is only in circumstances where it is clear that the true reasons of the decision maker are incorrectly recorded in the reasons that this should be done. That is not the present case. In my view it is opaque as to how the Tribunal intended to reason in relation to AM or C. It would appear that it failed to consider them at all in [101].

49 Paragraph [102] of the Tribunal's reasoning provides conclusions as to the weight to be ascribed to primary consideration B. It refers to "grandchildren", although for the reasons that I have given, this reference does not include grandchild C. It refers to Mr Davis' stepson, but does not include reference to his nephew JM. As dealt with above, earlier in its reasons at [98] the Tribunal may have confused AM and JM. The omission of reference to the nephew at [102] would appear to be another oversight but whether it is in the nature of a slip of the pen or not is unclear having regard to the somewhat unclear treatment of the children and the reasons generally.

4.3 Failure to take into account mandatory considerations

50 The above findings as to how the Tribunal's reasoning may be understood now enable one to turn to whether or not Mr Davis is correct to contend that the Tribunal constructively failed to exercise jurisdiction by failing to comply with the Direction. In my view he is.

51 In ***XJLR*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 619 I said at [102]:

> The case for the applicant proceeded from the premise that a failure to comply with a requirement of the Direction would mean that the Tribunal had failed to undertake its statutory task under s 501CA(4). A failure to comply with a ministerial direction made under s 499 has been held to amount to jurisdictional error: see the analysis in *Williams v Minister for Immigration and Border Protection* [2014] FCA 674; 226 FCR 112 at [34]-[35] (Mortimer J) and the authorities referred to by myself in *VKTT v Minister for Home Affairs* [2019] FCA 1018 at [19]. The Direction does not offer mere guidance or a statement of policy that may be departed from if the circumstances justify departure: see *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 at [42] (Colvin J). The Direction imposes requirements that must be complied with when a decision is made under s 501CA(4).

52 In *Yusuf* Gleeson CJ observed at [7] that the difference between failing to make a finding on a material question of fact, and failing to take a relevant consideration into account, is elusive. The former is narrower than the latter, but most examples of the former could also be presented as the latter. That case concerned the application of s 430 of the Act, which obliges the Tribunal to set out its "findings on any material questions of fact". In the present case, cl 7(1)(b) of the Direction obliges a decision-maker to take into account the considerations in Part C (being considerations A, B and C). Clause 8(1) provides that decision-makers must take into account the primary and other considerations "relevant to the individual case". The Tribunal's identification of what it considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration; *Yusuf* at [69] (McHugh, Gummow, Hayne JJ, Gleeson CJ agreeing at [1]). In *Yusuf* it was held at [69] that the effect of s 430(1) is that the Court is entitled to infer that a matter not mentioned in the Tribunal's reasons was not considered by it to be material. That inference would also be available when considering whether the mandatory considerations in the Direction have been taken into account; see ***SZTMD*** *v Minister for Immigration and Border Protection* [2015] FCA 150 at [17] (Perram J). However, the inference in *Yusuf* is not mandatory, and the manner in which a statement of reasons is drawn, or its surrounding context, may provide material which detracts from or displaces the inference; *SZTMD* at [19].

53 In *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16; 309 ALR 67 (Katzmann, Griffiths and Wigney JJ), the Tribunal's failure to address a particular letter provided by the applicant was held to give rise to jurisdictional error. The Court made observations as to the nature of the exercise in determining whether a matter was considered by the Tribunal or not at [34]:

> The fact that a matter is not referred to in the Tribunal's reasons, however, does not necessarily mean the matter was not considered by the Tribunal at all: *SZGUR* at [31]. The Tribunal may have considered the matter but found it not to be material. Likewise, the fact that particular evidence is not referred to in the Tribunal's reasons does not necessarily mean that the material was overlooked. The Tribunal may have considered it but given it no weight and therefore not relied on it in arriving at its findings of material fact. But where a particular matter, or particular evidence, is not referred to in the Tribunal's reasons, the findings and evidence that the Tribunal has set out in its reasons may be used as a basis for inferring that the matter or evidence in question was not considered at all. The issue is whether the particular matter or evidence that has been omitted from the reasons can be sensibly understood as a matter considered, but not mentioned because it was not material. In some cases, having regard to the nature of the applicant's claims and the findings and evidence set out in the reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the reasons, even if it were then rejected or given little or no weight: *MZYTS* at [52].

54 Mr Davis submits that it may be inferred that the Tribunal failed to take into account the best interests of minor children, being his own two children, his stepson, his three grandchildren and his nephew.

55 I reject the submission that it may be inferred that it failed to take into account the best interests of his minor children ZD and SD. It is apparent from the decision at [91] – [94], [101], and [102] that the Tribunal found that it would be in their best interests for the visa cancellation to be revoked. That consideration was expressly taken into account in the Tribunal's conclusion at [124].

56 However, I do consider that the Tribunal failed to take into account the best interests of Mr Davis' stepson, even though it is apparent that it considered him to be a relevant minor child and accordingly the mandatory requirements of cl 13.2 applied. The Tribunal made no finding as to what AM's best interests are, it did not consider the extent to which Mr Davis would, if he remained in Australia, be likely to play a positive parental role in the future (within cl 13.2(4)(b)) and did not consider the likely effect that any separation would have on the child (within cl 13.2(4)(d)). In my view the rolled up conclusion at [102], which refers to the stepson,

does not provide insight into the reasoning of the Tribunal as to these mandatory considerations.

57 I am also not able to infer that the Tribunal took into account the best interests of grandchild C. Having mentioned that grandchild in [97], it appears to have forgotten to consider it in [101]. Nor may it be inferred that the Tribunal treated grandchild C in the same manner as grandchildren A and B (identified in [101] as AM and KM). That is simply not the way that the Tribunal expressed its reasons, and whereas in some cases a failure to mention may be a simple oversight, here the deliberate reference to "both" and the identification of the grandchildren by their initials suggests that the Tribunal intended to make a separate observation about C, but failed to do so.

58 Mr Davis contends that the finding in [101], that should Mr Davis return to New Zealand it "would impact" the two grandchildren and nephew JM, is not a finding as to what is in their best interests. Although poorly expressed, in context those words should be understood to mean that the Tribunal considers that Mr Davis' return would not be in their best interests, having regard to his relationship with them. I do not consider that this complaint is made out. Mr Davis was not found to be in a parental role in respect of those children. However, the confusion in the reasoning at [98] also suggests that the Tribunal may have mistakenly written the initials "AM" instead of "JM". If so, then the Tribunal intended to find that Mr Davis held a parental role for JM. The reasoning is inadequate in this regard.

59 As a result of the various inaccuracies in the Tribunal's reasons I am not prepared to infer that the failure to mention JM at [102] of the decision was merely an oversight. In my view it is likely that this reflects a failure on the part of the Tribunal to come to grips with the role of JM in Mr Davis' life.

60 Accordingly, I consider that the Tribunal found each of the stepson AM, the three grandchildren and the nephew JM to be relevant children in respect of whom it was necessary for the Tribunal to make findings in accordance with cl 13 of the Direction. That finding is amplified by the passage at [113] of the Tribunal's reasons when it found that non-revocation would have a "lasting and negative effect" not only on his children, but also on "other family members".

61 The final particular appended to the ground of review advanced by Mr Davis is that when weighing up the relevant considerations the Tribunal omitted to consider the best interests of the stepson, the nephew or the three grandchildren. The Tribunal at [122] acknowledges that it is required to weigh up the considerations that it must take into account. It does not purport to identify every aspect of the reasoning to which it has referred earlier. However, it is notable that in [124] it fails to make any reference at all to these minor children. It says only:

> The best interests of Mr Davis's minor children weighs in favour of revocation of the mandatory cancellation decision. However, this consideration is afforded less weight in the circumstances as Mr Davis has had very limited contact with both of his minor children for extended periods of their lives.

62 The Minister submits that it cannot be understood that the Tribunal ignored or overlooked the interests of the other minor children, given that in [102] it had mentioned each of them in terms. He relies on the following reasons of the Full Court in *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 (Perram, Murphy and Lee JJ) at [76]:

> The written reasons of the Minister may, and generally will, be taken to be a statement of those matters considered and taken into account. If something is not mentioned it may be inferred that is not been considered or taken into account: Acts Interpretation Act 1901 (Cth) s 25D; s 501G of the Act; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 (Yusuf) at [5], [37] and [69]; *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; (2014) 220 FCR 1 at [16] per Allsop CJ and Katzmann J. Whether it is appropriate to draw such an inference must be considered by reference to the facts of each particular case and the Minister's reasons as a whole. The reasons must be construed in a practical and common-sense manner and not with an eye keenly attuned to the perception of error.

63 Mr Davis relies on *QHRY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 827 at [41]-[42] (Rangiah J) in which the Court found jurisdictional error where the Tribunal failed to address, refer to or respond to a submission regarding the impact of removal on the applicant's partner and minor children when setting out its reasons regarding the expectations of the Australian community, despite the fact the Tribunal referred to that submission in the preceding paragraph. The Court held at [43]-[44] that the Tribunal plainly did not think that the submission was irrelevant or trivial and that the appropriate inference was that the Tribunal overlooked it in reaching its conclusion.

64 Having regard to the several mistakes and inaccuracies in the decision to which I have referred, I am not at all prepared to infer that the Tribunal took into account the interests of those other children in its overall assessment; see *SZCBT* at [26]. The deliberate and particular reference

in [124] to only two minor children points in the opposite direction. The limited reasoning supplied in [101] and [102] indicates that the Tribunal had already overlooked important aspects of the reasoning concerning grandchild C and, more significantly, the stepson. I am by no means satisfied that [124] does not accurately represent the only weight given to the interests of minor children and that in so concluding the Tribunal neglected to take into account the best interests of all minor children.

4.4 Materiality

65 In *XJLR* I said at [103]:

> However, the failure of the Tribunal to comply with the requirements of Direction 79 will not necessarily involve jurisdictional error. As the High Court said in *Hossain* at [31], jurisdictional error, in the sense relevant to the availability of relief under s 75(v) of the Constitution in the light of s 474 of the Migration Act, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act. Ordinarily, breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision: *Hossain* at [31]. Such a breach will be material only if compliance could realistically have resulted in a different decision: *SZMTA* at [45]. This is a question of fact on which an applicant bears the onus of proof: *SZMTA* at [46]; *MZAPC* at [39]. To determine whether there was a material breach of the requirement that conditioned the valid exercise of power, it is necessary to consider how the Tribunal in fact acted: *SZMTA* at [50]; *MZAPC* at [38]. For present purposes, the requirement is compliance with Direction 79. Keeping in mind that the Court should not intrude into the exercise of the statutory function entrusted to the Tribunal, if the Court was to conclude on the evidence that a failure to comply with the Direction was of "such marginal significance to the issues which arose in the review that the Tribunal's failure to take it into account could not realistically have affected the result" then there was no jurisdictional error: *SZMTA* at [48].

66 It is necessary to consider materiality in the context of the two errors that I have found in [101] and [102]. The first concerns the failure to consider the best interests of the stepson and grandchild C. I consider that a different decision could realistically have been made by the Tribunal had it properly taken into account cl 13.2(1) in relation to both of those children. In this regard I note the finding of the Tribunal at [113] that non-revocation would have had a lasting and negative effect not only on both his minor children but also on "other family members", the importance that could have been placed on the parental role that Mr Davis was found to have in relation to AM, whether that be his stepson or nephew, and the fact that the Tribunal found other factors weighed in favour of revocation. In this regard, the omission to consider grandchild C must be given less weight having regard to the child's youth and the fact

that the Tribunal made no finding to suggest that Mr Davis would have any parental role with that child.

67 A finding of materiality having regard to the error reflected in [124] is less finely balanced. As the Minister properly accepted, and I find, the failure to take into account the best interests of any of the stepson, the nephew or the three grandchildren could realistically have led to a different result.

5. DISPOSITION

68 For the reasons set out above I find that the Tribunal fell into jurisdictional error. I will order that the decision of the Tribunal be quashed and these proceedings be remitted to the Tribunal, differently constituted, to determine the application according to law. The Minister must pay Mr Davis' costs of the application.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Burley.

Associate: 

Dated: 5 November 2021