

FEDERAL COURT OF AUSTRALIA

Minister for Immigration, Citizenship and Multicultural Affairs v RGKY

[2022] FCAFC 177

Appeal from: *RGKY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 750

File number(s): NSD 752 of 2021

Judgment of: **COLLIER, FARRELL AND HALLEY JJ**

Date of judgment: 2 November 2022

Catchwords: **MIGRATION** – where the primary judge allowed an application for judicial review of a decision of the Administrative Appeals Tribunal – where the AAT affirmed the decision of a delegate of the Minister not to revoke a decision to cancel the applicant’s visa under s 501CA(4) of the *Migration Act 1958* (Cth) – where the primary judge set aside the AAT’s decision on the basis that the Tribunal made a jurisdictional error because it had failed to give proper, genuine and realistic consideration to the best interests of minor children affected by the decision individually in compliance with Direction 79 made under s 499 of the *Migration Act* and character evidence on which the applicant relied in support of his contention that his character had changed since his loss of liberty after his last offending and the birth of his son – whether the primary judge erred in so finding – appeal allowed.

Legislation: *Migration Act 1958* (Cth) ss 499, 501, 501CA

Cases cited: *Baker v Minister for Immigration and Citizenship* [2012] FCAFC 145
CAR15 v Minister for Immigration and Border Protection [2019] FCAFC 155; (2019) 272 FCR 131
Carrascalao v Minister for Immigration and Border Protection [2017] FCAFC 107; (2017) 252 FCR 352
Chetcuti v Minister for Immigration and Border Protection [2019] FCAFC 112
Collector of Customs v Pozzolanic [1993] FCA 456; (1993) 43 FCR 280
Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd [1994] FCA 293; (1994) 49 FCR 576
DCR19 v Minister for Immigration Citizenship Migrant

Services and Multicultural Affairs [2020] FCA 501
EGH19 v Minister of Home Affairs [2020] FCA 692
GBV18 v Minister for Home Affairs (2020) 274 FCR 202
Guclukol v Minister for Home Affairs [2020] FCAFC 148;
 (2020) 279 FCR 611
Karan v Minister for Home Affairs [2019] FCAFC 139
Maioha v Minister for Immigration and Border Protection
 [2018] FCAFC 216
Makarov v Minister for Home Affairs [2021] FCAFC 129
McGlade v South West Aboriginal Land & Sea Aboriginal
Corporation (No 2) [2019] FCAFC 238
Minister for Home Affairs v Buadromo [2018] FCAFC
 151; (2018) 267 FCR 320
Minister for Home Affairs v Omar [2019] FCAFC 188;
 (2019) 272 FCR 589
Minister for Immigration and Border Protection v
Sabharwal [2018] FCAFC 160
Minister for Immigration and Border Protection v SZMTA
 [2019] HCA 3; (2019) 264 CLR 421
Minister for Immigration and Citizenship v SZGUR [2011]
 HCA 1; (2011) 241 CLR 594
Minister for Immigration and Citizenship v SZLAI [2009]
 HCA 39; (2009) 83 ALJR 1123
Minister for Immigration and Ethnic Affairs v Wu Shan
Liang [1996] HCA 6; (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Yusuf
 [2001] HCA 30; (2001) 206 CLR 323
Nahi v Minister for Immigration, Citizenship, Migrant
Services and Multicultural Affairs [2021] FCA 1169
Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA
 17; (2022) 400 ALR 417
Plaintiff M64/2015 v Minister for Immigration and Border
Protection [2015] HCA 50; (2015) 258 CLR 173
Ratu v Minister for Immigration, Citizenship, Migrant
Services and Multicultural Affairs [2019] FCA 1710,
 (2019) 167 ALD 449
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RGKY v Minister for Immigration, Citizenship, Migrant
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Sami v Minister for Immigration and Citizenship [2013]
 FCAFC 128
Sebastian v Minister for Immigration and Multicultural
and Indigenous Affairs [2005] FCAFC 31

SZDGC v Minister for Immigration and Citizenship [2008] FCA 1638

Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 125; (2021) 285 FCR 187

Ueese v Minister for Immigration [2015] HCA 15; (2015) 256 CLR 203

Division:	General Division
Registry:	New South Wales
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Number of paragraphs:	210
Date of hearing:	12 November 2021
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Solicitor for the Appellant:	MinterEllison
Counsel for the First Respondent:	Ms De Ferrari SC with Dr J Donnelly
Solicitor for the First Respondent:	Zarifi Lawyers
Counsel for the Second Respondent:	The Second Respondent submitted to any order of the Court, save as to costs

ORDERS

NSD 752 of 2021

BETWEEN: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS**
Appellant

AND: **RGKY**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: COLLIER, FARRELL AND HALLEY JJ

DATE OF ORDER: 2 NOVEMBER 2022

THE COURT ORDERS THAT:

1. The name of the appellant be amended to Minister for Immigration, Citizenship and Multicultural Affairs.
2. The appeal is allowed.
3. The orders made by the primary judge on 28 June 2021 are set aside and in lieu thereof it be ordered that:
 - (a) The application for judicial review of the decision of the second respondent dated 26 October 2020 be dismissed; and
 - (b) The applicant must pay the first respondent's costs as agreed or taxed.
4. The first respondent must pay the appellant's costs of the appeal as agreed or taxed.

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

REASONS FOR JUDGMENT

COLLIER J:

1 Before the Court is an appeal from the decision of a single judge (**primary Judge**) of this Court delivered on 28 June 2021 in *RGKY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 750 (**primary decision**). In that matter the primary Judge allowed an appeal from a decision of the Administrative Appeals Tribunal (**Tribunal**) not to revoke the mandatory cancellation of the appellant's class TY subclass 444 Special Category (Temporary) Visa (**visa**) pursuant to under s 501(3A) of the *Migration Act 1958* (Cth)(**Migration Act**). In doing so, the primary Judge made Orders setting aside the Tribunal's decision and remitted the matter to the Tribunal for determination according to law.

2 The appellant now appeals the primary decision on the following grounds:

1. His Honour erred by upholding Ground One of the application before him and, in particular, his Honour erred by finding that the Tribunal made a jurisdictional error in the following (alleged) ways (when it did not in fact do so):
 - a. The Tribunal failed to engage in an active intellectual process in determining what the best interests of the RGKY's child were and what weight should be given to them.
 - b. The Tribunal had ignored evidence of RGKY, MQ and other evidence.
 - c. The Tribunal failed to make any finding what the best interests of RGKY's child would be.
 - d. The Tribunal failed to consider a claimed change of character after RGKY went into custody following the birth of his son.
 - e. There was a duty upon the Tribunal to inquire and that this was breached.
 - f. The Tribunal failed to make findings what was in the best interests of RGKY's minor siblings and minor nieces or nephews.
2. His Honour erred by upholding Ground Two and finding that the Tribunal did not consider a claimed change in RGKY's character after RGKY went into custody following the birth of his son. That claim was in fact considered and not accepted by the Tribunal.

3 Additionally, the appellant seeks relief in the following terms:

1. The appeal be allowed.
2. The orders made by the primary judge on 28 June 2021 be set aside and in lieu of those orders, there be orders as follows:
 - a. the applicant's application for judicial review be dismissed; and

- b. the applicant pay the respondent's costs of the application.
3. The first respondent pay the appellant's costs of the appeal.

BACKGROUND

4 The primary Judge, at [2] – [4] of the primary decision, outlined the factual background to that proceeding as follows:

- 2 The applicant is 23 years of age. On 15 November 2017, the applicant had been sentenced to a term of 12 months' imprisonment following his conviction for the offences of stalking with intent to cause fear of physical or mental harm and assault occasioning actual bodily harm. Additionally, the applicant received a lesser sentence for the offences of common assault and destroying or damaging property. After serving his sentence and being released into the community, he and his partner, Ms MQ, had a son born in May 2019. On 22 July 2019, the applicant engaged in further offending outside the home of his mother. His two month old son was present inside that home. The applicant was remanded in custody in late July 2019 and has been in custody or immigration detention ever since.
- 3 On 20 September 2019, a delegate of the Minister cancelled the applicant's visa pursuant to s 501(3A) and issued him with an invitation under s 501CA(3)(b) to make representations to the Minister seeking revocation of the cancellation. On 30 July 2020, another delegate of the Minister refused to revoke the cancellation of the applicant's visa. On 5 August 2020, he sought review of that decision in the Tribunal.
- 4 Like many cases now coming before the Court, the accident of the applicant's birth in New Zealand five months before he was brought to Australia, where he has lived ever since with the whole of his extensive family without having sought to obtain citizenship, has meant that he now is in the position where, unless able to satisfy the Minister that there is 'another reason' why the cancellation of his visa should be revoked, he will be removed from Australia and his family forever.

5 I respectfully adopt his Honour's summation of these material facts.

6 The two grounds of review before the primary Judge were that the Tribunal failed to give proper, realistic and genuine consideration to:

- (1) the best interests of minor children individually in compliance with Direction 79 made by the Minister under s 499 of the Migration Act entitled "Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA"; and
- (2) the character evidence relied on by the first respondent in support of his contention that his character had changed since his incarceration following his last criminal offence.

7 In this appeal, the appellant asserts, in essence, that the Tribunal did give proper, realistic and genuine consideration to these two points. In doing so, the appellant submits that the primary

Judge erred by making observations, at various points in the primary decision, that led his Honour to the conclusion that these matters had not been properly considered by the Tribunal.

SUBMISSIONS

Appellant's submissions

8 In summary, the appellant submitted, in support of ground 1 of its appeal and the particulars pleaded therein, that:

- the primary Judge erred in finding that, at [49], the Tribunal “failed to engage in an active intellectual process in determining what the best interests of the [first respondent’s] son were and what weight should be given to them”. This was not the case, as evidenced by the Tribunal’s reasoning at [81] – [82], where it noted that:
 - the first respondent’s return to New Zealand would likely result in “something of a negative impact on [the first respondent’s] son”;
 - a portion of the first respondent’s criminal history and particular offences had been committed against his son’s mother in the presence of his son, being unable to find that “[the first respondent] would, on balance, be likely to play a positive parental role in his son’s life”;
 - should the first respondent continue to commit criminal offences this would likely have a “negative impact on [the first respondent’s] son because of its likely psychological impact”;
 - moderate weight should be attached to the damage caused by the removal of the first respondent on his son;
 - any damage resulting from the removal of the first respondent could be minimised by maintaining contact by telephone or social media;
- The primary Judge erred in finding, at [60], that the Tribunal had ignored evidence before it concerning the best interests of relevant children (in particular the first respondent’s son) in finding that there was “a dearth of information” before it;
- The primary Judge erred, at [56], in finding that in determining that it could not make an assessment of the magnitude of the damage to his son of the first respondent returning to New Zealand, the Tribunal “eschewed making any finding of exactly what the best interests of the child would be”. Rather, the Tribunal did make findings of what course of action would be best for the first respondent’s son, namely at [106] that it

would be beneficial to him should the cancellation be revoked, and that consequently the best interests of the first respondent's son weighed moderately in favour of revocation;

- The primary Judge's reliance on *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [56] – [57], [60], [62]–[63] and [65]–[66] was erroneous given that the Tribunal had assessed the best interests of the first respondent's son, and there was no incorrect assumption made referable to the consideration of his evidence. In finding that other factors moderated and ultimately outweighed the best interests of the first respondent's son, the Tribunal in no way failed to execute its statutory duty per *Sebastian v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 31 at [16]–[19]; *Nahi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1169 at [40]–[59];
- The primary Judge erred at [54] by accepting the submission that “[the first respondent's] articulated claim of a change in character after he went into custody following the birth of his son” as the “the basis of the second ground of review” and “also relevant to the Tribunal's finding in [81] as to the risk of [the first respondent's] re-offending”;
- The primary Judge erred, at [60], by finding that even if a “dearth of information presented” to the Tribunal, it would still have had to “make inquiries about the best interests of the children, particularly the son”. No such ground was pressed by the first respondent. Further, any duty on the part of the Tribunal to obtain additional evidence beyond that before it goes no further than “an obvious inquiry about a critical fact, the evidence of which is easily obtained” per *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at [25]. Rather, the first respondent failed to demonstrate that any particular inquiry would have yielded a useful result per *Karan v Minister for Home Affairs* [2019] FCAFC 139 at [30]–[31]; *DCR19 v Minister for Immigration Citizenship Migrant Services and Multicultural Affairs* [2020] FCA 501 at [71]–[72];
- This proceeding is similar to the factual scenarios in *Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128 at [24]–[25], [30], and *Nahi* at [41]–[59], where it was determined that no duty to inquire further into the best interests of minor children was identified. The Tribunal also accepted, at [80] of its reasons, that on the evidence of the first respondent, his grandparents and others, the first respondent was devoted to his son, that this would likely continue into the future, that the first respondent desired

to be part of his son's life as he grew up, and that all those things were positive and in his son's best interests;

- The primary Judge erred by finding, at [62], that the second respondent failed to make an assessment as to what was in the best interest of the first respondent's minor siblings, nieces and nephews despite being required to do so. The Tribunal did make such a finding at [85] and [106] of its reasons, where it stated that the interests of the first respondent's minor siblings, nieces and nephews weighed slightly in favour of revocation. Nevertheless, the Tribunal ultimately concluded at [107] that the interests of those minor parties were outweighed by the need for protection of the Australian community and their expectations.

9 In relation to ground 2 of the appeal, the appellant submitted in summary:

- The primary Judge erred by concluding at [62]–[69] that the Tribunal failed to consider the claim that the first respondent's character had reformed following his being taken into custody as a result of his last offence on 22 July 2019. The appellant contended that the Tribunal did consider this claim at [34]–[36] of its reasons, but ultimately did not accept that the first respondent would not continue criminal offending into the future, in addition to evidence adduced as to his reformed character. On the authority of *Baker v Minister for Immigration and Citizenship* [2012] FCAFC 145, the Tribunal is not assumed to have forgotten or not taken into account this evidence. Given that this finding had been made by the Tribunal, the primary Judge should not have concluded that this submission by the first respondent, and the evidence in support of it, was not the subject of an active intellectual process by the Tribunal;
- The conclusion that a decision maker failed to engage in an active intellectual process in relation to a mandatory consideration referable to a matter before it should not be made lightly, and must be clearly supported: *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [48]; *Makarov v Minister for Home Affairs* [2021] FCAFC 129 at [76], referring to *GBV18 v Minister for Home Affairs* (2020) 274 FCR 202 at [32(g)];
- The Tribunal recognised, at [50] of its reasons, that there “must be genuine consideration and intellectual engagement in the process of achieving, or not, the requisite satisfaction”, but that this position should be relied on to ignore consideration of factors that has occurred; and

- The weight to be given certain evidence and value judgments remained a matter for the Tribunal.

First respondent's submissions

10 In relation to ground 1 of the appeal, the first respondent submitted, in summary:

- The primary Judge correctly found that the Tribunal had failed to engage in an active intellectual process in determining which course of action would be in the best interests of the first respondent's son given:
 - The Tribunal noted at [49] of its reasons that the that the “more optimal or ideal relationship between father and son involving as it does daily contact and daily physical involvement in the child's life”;
 - The primary Judge found that the magnitude of the loss of that connection was “ordinary incident of the relationship between a parent and a child”;
- The Tribunal's finding that it could not make an assessment of the magnitude of the impact of the non-revocation of the cancellation on the first respondent's son amounted to “an unintelligible finding”, and therefore “[failed] to give proper, genuine and realistic consideration” to that point. This failure was evidenced by:
 - The Tribunal stated at [91] (in the context of a different primary consideration) that the consequences of non-revocation for the first respondent's son would be significant in an emotional context;
 - The Tribunal stated at [96], referable to other considerations, that the first respondent's “ties” to his son are “obviously strong”;
 - The Tribunal, at [77], stated that there was “not a great deal of evidence about any of the minor children other than the [first respondent's] own child”;
 - At [82], the Tribunal noted that the first respondent's son was “obviously too young to express his preference about [the first respondent] remaining in Australia”;
- The primary Judge was correct to take issue with the Tribunal's finding to the effect that any hardship suffered by the first respondent's son owing to his removal from Australia would be mitigated given the ability to maintain regular contact by means of phone and social media. The primary Judge correctly found at [60] that the Tribunal “had to explain why simply having some kind of remote contact by phone or social

media, as had happened up to that date, would be in the son's best interests when the witnesses told it that this was not the case";

- The primary Judge correctly found, at [56] that the Tribunal "eschewed making any finding of exactly what the best interests of the child would be" in determining that the removal of the first respondent from Australia "will necessarily have something of a negative impact on (first respondent's) son";
- The primary Judge correctly took issue with the Tribunal's observation that it had a "dearth of evidence" before it, not only because there plainly was evidence before the Tribunal, but the Tribunal noted the existence of that evidence but failed to take it into account, for example:
 - the consequences for the first respondent's child of non-revocation would be emotionally significant (at [91]);
 - the first respondent obviously had strong ties to his son (at [96]);
 - there was not a great deal of evidence about any of the minor children other than the first respondent's son (at [77]);
- The primary Judge correctly noted that the Tribunal was required to engage in "some real and active intellectual process that considered and made a finding about what would be the best interests of the child if he was deprived permanently of one of his two parents", and that this did not occur;
- The primary Judge correctly took issue at [62] with the Tribunal's reasoning in relation to the first respondent's relationship with his siblings, in circumstances where there was plainly extensive material before the Tribunal to demonstrate the relationship between the first respondent and his siblings. At [91] of its reasons, the Tribunal implicitly recognised the relationship between the first respondent and his siblings in noting that they would be subject to "significant emotional hardship" in the event that the first respondent was removed to New Zealand;

11 In relation to ground 2 of the appeal, the first respondent submitted, in summary:

- The primary Judge correctly noted at [64] - [69] that the first respondent had raised a significant and clearly articulated claim that he had changed while in custody after July 2019, that the Tribunal was required to engage with it, and on the face of its reasons the Tribunal did not;

- In considering the first respondent’s likelihood of reoffending, the Tribunal failed to intellectually engage with the claim that he had reformed his character. The failure to consider such a representation in written reasons allows a court to infer that it was not considered: *Minister for Home Affairs v Omar* (2019) 272 FCR 589, at [34]. The Tribunal also failed to resolve this claim;
- The primary Judge correctly observed that the Tribunal’s adverse credibility finding was unsustainable given it had not first considered corroborative evidence from the first respondent’s witnesses. This could not be ignored as the first respondent did not fall into the category outlined in *SZDGC v Minister for Immigration and Citizenship* [2008] FCA 1638 whereby “the well has been poisoned beyond redemption”;
- The Tribunal did not consider the first respondent’s claim regarding his reformed character, following his incarceration as a result of his last criminal offence, given it concluded the assessment of the first respondent’s character with consideration of the *pre-sentence* report for that offence; and
- The primary Judge correctly found at [68] that the Tribunal had not actively engaged with supporting evidence and material from the family and friends of the first respondent.

CONSIDERATION

- 12 It is well settled that the Tribunal must engage in an active intellectual process in making a revocation decision for the purposes of s 501CA(4) of the Migration Act, and specifically in considering the factors that are to inform such a decision: *Carrascalao* at [43]–[46] per Griffiths, White and Bromwich JJ; *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; 362 ALR 48 at [42] per Besanko, Barker and Bromwich JJ; *Chetcuti v Minister for Immigration and Border Protection* [2019] FCAFC 112 at [54]–[58] per Murphy, Rangiah and O’Callaghan JJ; *Omar* at [35]–[37] per Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ.
- 13 The engagement in such a process by a decision maker requires “the reality of consideration” of the relevant factors by it: *Maioha v Minister for Immigration and Border Protection* [2018] FCAFC 216 per Rares and Robertson JJ at [45].
- 14 In the event that a decision maker is bound to take a particular matter into account, the question arises whether that matter was "really", "genuinely", "properly", and "effectively" taken into

account: *McGlade v South West Aboriginal Land & Sea Aboriginal Corporation (No 2)* [2019] FCAFC 238 at 148, 149.

- 15 In making such an assessment, a court should have particular regard to relevant statutory provisions applicable to the decision: *EGH 19 v Minister of Home Affairs* [2020] FCA 692.
- 16 Further, a failure on the part of the Tribunal to consider a significant clearly articulated claim in the form of representations under ss 501CA(3)(b) and (4) of the Migration Act that would amount to, if accepted, another reason to revoke a visa cancellation for the purpose of s 501CA(4)(b)(ii), may amount to jurisdictional error: *Omar* at [39]-[40]; *Guclukol v Minister for Home Affairs* [2020] FCAFC 148 at [50] per Katzmann, O'Callaghan and Derrington JJ. Whether a claim has been “squarely raised or clearly articulated” is dependent on the facts and circumstances of a particular case: *EHG 19* at [51].

Ground 1

- 17 For the following reasons, I consider that ground 1 of the appeal does not succeed.
- 18 First, particulars (a) and (c) of ground 1 can conveniently be considered together. I do not accept that the primary Judge erred in finding that the Tribunal had failed to engage in an active and intellectual process in determining what the best interests of the first respondent’s son were, and what weight should be attached to those interests.
- 19 The Tribunal set out its reasoning of the “Best interests of minor children in Australia affected by the decision” as follows:

74. Next, I am required to consider the best interests of children who may be affected by the decision to either revoke or not revoke the cancellation of RGKY’s visa. Clause 13.2(2) requires that I only consider minor children, that is children under the age of 18 years, when I make my decision. Clause 13.2(3) requires that, where there are two or more minor children, I consider the interests of any such children individually to the extent that their interests may differ.
75. It is important to keep in mind that this consideration is not concerned with RGKY’s interests at all. Rather, it is directed towards the interests of minor children, and in fact as the consideration states, their best interests.
76. In considering the best interests of minor children I am directed to consider a number of specific factors. Those which are relevant here are: *‘the nature and duration of the relationship between the child and the non-citizen’* noting *‘that 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’* (cl.13.2(4)(a)); *‘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... (cl.13.2(4)(b)); *'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'* (cl.13.2(4)(c)); *'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'* (cl.13.2(4)(d)); *'whether there are other persons who already fulfil a parental role in relation to the child'* (cl.13.2(4)(e)); and *'any known views of the child (with those views being given due weight in accordance with the age and maturity of the child)'* (cl.13.2(4)(f)). I have reproduced these factors so that the observations I make below can be understood in context.

77. The minor children who were referred to in the evidence are RGKY's own child who is about 17 months old, his two younger brothers aged 16 and 13 and his younger sister aged 14 and his nieces and nephews. There was not a great deal of evidence about any of the minor children other than RGKY's own child.
78. RGKY had about six or seven weeks' interaction with his son after he was born and before RGKY commenced his most recent period of imprisonment which was followed by him being placed in detention. There has been a relatively short period of day in day out meaningful contact with his son.
79. Before March this year, when restrictions were imposed due to the pandemic, he was visited by his son, about once a week and sometimes twice a week. During those visits he played with his son and attended to the types of things fathers often do with babies such as changing nappies, feeding and comforting the baby and so on. He has since then spoken to him every day on telephone or by using a social media platform such as FaceTime. Although this contact is meaningful it would be wrong to overstate it especially when measured against what might be considered to be the more optimal or ideal relationship between father and son involving as it does daily contact and daily physical involvement in the child's life.
80. I accept the statements of RGKY, his grandfather and grandmother, Ms MQ and others, about RGKY's devotion to his son both in the past and in all likelihood into the future. I accept his and their desire that RGKY be part of his son's life as he grows up. All of those things can only be something that would be positive in a child's upbringing and therefore in the best interests of the child.
81. Those things need to be measured very carefully given RGKY's criminal history and, in particular, the fact that that history involves offending against his son's mother and his own mother when his son was present and in her care. I am unable to find that RGKY would, on balance, be likely to play a positive parental role in his son's life in the future given those matters and my assessment concerning the likelihood of him re-offending. Moreover, should the kinds of offending in the past be repeated in the future I consider that will invariably have a negative impact on RGKY's son because of its likely psychological impact upon the child. It is to be remembered that RGKY's most recent offending against his mother was in the presence of his child. These are matters that cause me to moderate the weight that I give to this consideration.
82. As is likely to be the case, separation from his father should RGKY return to New Zealand will necessarily have something of a negative impact on

RGKY's son. I am unable to make any assessment at all as to the magnitude of that impact because of the dearth of information that was presented. So much is self-evident, but contact will be able to be maintained in other ways such as by phone and by resort to social media platforms as has been done since March this year so that the effect upon him will be mitigated. RGKY's son is obviously too young to express his preference about RGKY remaining in Australia. His son has his mother who is able to fulfil a parental role.

83. So far as RGKY's younger brothers and sister are concerned, I accept they would be quite upset about RGKY being required to return to New Zealand even though they did not give direct evidence about that. I do not know a great deal about their present relationship with RGKY or even their relationship in his adult years. The relationship is not parental. It can be given that in their youth the children were close by reason of their plight in foster care and the fact that RGKY assumed something of a paternal role in their upbringing. That obviously did not continue in recent years because of his incarceration and detention. Again, his potential future role in their upbringing needs to be approached cautiously because of his offence record and his likelihood of re-offending. That is another reason why I have given consideration of their best interests less weight. Like with his own child he will be able to maintain contact with them by phone and social media in the event of non-revocation. RGKY's relationship with them is not parental so that I should give less weight to this consideration in their cases because that is what the Direction requires.
84. I am unable to give any meaningful consideration to the best interests of RGKY's nieces and nephews as I know so little about their situations. There was no direct evidence about their family situation or the detail of the nature of their relationship with RGKY both now and in the past. Nonetheless I think it is reasonable to give some weight to their position because of the relationship they have had with RGKY.
86. In my view, the best interests of RGKY's child weighs moderately in favour of revocation. The best interests of RGKY's minor brothers and sister weigh slightly in favour of revocation. The best interests of his minor nieces and nephews also weigh slightly in favour of revocation.

20 As the primary Judge explained:

56. ...Direction 79 required the Tribunal to make a determination of what the best interests of the child were, as French CJ, Kiefel, Bell and Keane JJ made plain in *Ueese v Minister for Immigration* (2015) 256 CLR 203 at 233 [64] in relation to an earlier version of Direction 79. They held that a review conducted by the Tribunal under s 500 of the Act was inquisitorial, not adversarial (256 CLR at 221 [62]–[63]). They said of an analogue of cl 13.2(1)

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”.

(emphasis added)

21 At [82] the Tribunal found that the removal of the first respondent to New Zealand would have “something of a negative impact” on the first respondent’s son, however it was “unable to make any assessment at all as to the magnitude of that impact...” However, it is difficult to reconcile this finding with the earlier observation of the Tribunal at [79] concerning the active engagement of the first respondent with his son, including:

Before March this year, when restrictions were imposed due to the pandemic he was visited by his son, about once a week and sometimes twice a week. During those visits he played with his son and attended to the types of things fathers often do with babies such as changing nappies, feeding and comforting the baby and so on. He has since then spoken to him every day on telephone or by using a social media platform such as FaceTime. Although this contact is meaningful it would be wrong to overstate it especially when measured against what might be considered to be the more optimal or ideal relationship between father and son involving as it does daily contact and daily physical involvement in the child’s life.

22 It is unclear how the Tribunal, having identified the nature and value of the relationship between the first respondent and his son, was unable to quantify the effect his removal to New Zealand would have on that relationship, and on the best interests of the first respondent’s son. It is not sufficient that the Tribunal generalise the likelihood of damage to the son in such a situation, and make no further observation other than that the child would be subject to “something of a negative impact” should the cancellation of the first respondent’s visa not be revoked.

23 This statement cannot be construed as the end result of an active intellectual process on the part of the Tribunal in identifying the best interests of the first respondent’s son, and the effect the first respondent’s removal would have on him. Ultimately, I endorse the finding of the primary Judge at [56] that the Tribunal failed to make any finding as to what the best interests of the first respondent’s son would be, and the weight to be attributed to those interests.

24 Second, I do not accept that there was a “dearth of evidence” before the Tribunal such that it was unable to make a finding of the best interests of the first respondent’s son. As the primary Judge observed at [57], the Tribunal conducted a two-day hearing. His Honour further observed at [58] that there was, for example, evidence of the desire of the first respondent to have a normal parental relationship with his son, involving day-to-day contact, both physical and emotional, together with the ordinary incidents of parental upbringing of a child in a household

with the other parent; evidence of the actual interactions between the first respondent and his son; evidence of the age of the first respondent's son; and the wish of the first respondent's partner MQ that the child have a normal parent-child relationship with the first respondent. As the primary Judge observed:

59. Ordinarily, the best interests of a child are to have two loving parents who wish to care for and look after the child in the family home. While that is a matter that, in the evaluation of any particular case, is a factual finding, the Tribunal was obliged to engage in some real and active intellectual process that considered and made a finding about what would be the best interests of the child if he was deprived permanently of one of his two parents....

25 Third, I do not accept the appellant's submission that:

- the "[first respondent's] clearly articulated claim of a change in character after he went into custody following the birth of his son" (which forms the basis for ground 2) was also relevant to ground 1,
- the first respondent's claim of a change in character was actually considered but not accepted by the Tribunal, and
- accordingly, the primary Judge erred by finding at [54] that (in dealing with ground 1) the first respondent's claim of change of character was not considered by the Tribunal."

26 As the primary Judge explained:

54. The applicant's clearly articulated claim of a change of character after he went into custody following the birth of his son is the basis of the second ground of review in this matter. *But, its consideration was also relevant to the Tribunal's finding in [81] as to the risk of the applicant's reoffending.* As I have noted, the Minister accepted that the Tribunal had not referred expressly to or dealt with that claim in its reasons other than to recognise that the applicant, his witnesses and other evidence raised his change of character.

(emphasis added)

27 I am not satisfied that any observations of the Tribunal as to claimed changes of character on the part of the first respondent, referable to ground 2, constituted an answer to the first respondent's claim of change of character referable to his risk of reoffending and the best interests of his minor child (and the subject of ground 1). The Tribunal at [81] concluded that the first respondent would be unlikely to play a positive parental role in his child's life in the future, given the Tribunal's assessment of the likelihood of his reoffending. There was no engagement by the Tribunal in that context with the first respondent's clearly articulated claim that he had experienced a change in character following his incarceration after the birth of his son.

28 Fourth, the appellant claimed error by the primary Judge in finding that there was a duty upon the Tribunal to inquire, and that this was breached.

29 The primary Judge referred to *Uelese*, where the High Court observed as follows:

62. Secondly, the Minister's submission seeks to import into the inquisitorial review function of the Tribunal notions appropriate to adversarial proceedings conducted in accordance with formal rules of pleading. That approach is inappropriate to the kind of review undertaken by the Tribunal.
63. In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, this Court cautioned against transposing the language and mindset of adversarial litigation to inquisitorial decision-making of the kind authorised by s 500 of the Act. It is true, as the Full Court of the Federal Court rightly observed in *Jagroop*, that both s 500 of the Act and the AAT Act "contemplate participation by both the applicant and the Minister in the [Tribunal] hearing." Section 500(6H) expressly contemplates that the applicant will present a "case"; and it is implicit that the Minister will also present a "case". That having been said, it would be to give undue weight to conceptions drawn from adversarial litigation to accept that the Tribunal was not required to take into account the interests of the appellant's two youngest children because he had not sought to advance their interests as a positive part of his case.

(footnotes omitted)

30 Turning specifically to the reasons of the primary Judge, his Honour continued at [56]-[58]:

56. However, I am of opinion that the Tribunal's statement that it was unable to make any assessment at all as to the magnitude of the impact of separation of the applicant from his son that would be caused by his removal to New Zealand beyond saying anything more than that it would have "something of a negative impact" on the son, eschewed making any finding of exactly what the best interests of the child would be. That was a material jurisdictional error. Direction 79 required the Tribunal to make a determination of what the best interests of the child were, as French CJ, Kiefel, Bell and Keane JJ made plain in *Uelese v Minister for Immigration* (2015) 256 CLR 203 at 233 [64] in relation to an earlier version of Direction 79. ***They held that a review conducted by the Tribunal under s 500 of the Act was inquisitorial, not adversarial*** (256 CLR at 221 [62]-[63]). They said of an analogue of cl 13.2(1):

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".

...

57. The Tribunal conducted a two-day hearing. For it to say that there was a “dearth of information that was presented” demonstrates that it fell into error in failing to address the task mandated in Direction 79. That is because, as French CJ, Kiefel, Bell and Keane JJ held in *Uelese* 256 CLR at 222 [65]–[66]:

... 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...

...

58. The task for the Tribunal here was to make a determination of what was in the best interests of each of the son, the minor siblings and other children. The Tribunal had before it evidence that the applicant wished to have a normal parental relationship with his son, involving day-to-day contact, both physical and emotional, together with the ordinary incidents of parental upbringing of a child in a household with the other parent (Ms MQ), and the ability to support the child and his partner. It also had the evidence of Ms MQ, which it had regarded as “biased” because she said that she wished the applicant to have just such a relationship.

31 I am unable to identify any error of the primary Judge in these paragraphs His Honour was correct to note the inquisitorial review function of the Tribunal, identified by the High Court in *Uelese*. Further, and ultimately, as found by the High Court in *Uelese* and the primary Judge in these proceedings, it was incumbent on the Tribunal to both identify and take in to account the interests of minor children. This is a task the Tribunal did not undertake, notwithstanding the evidence before it canvassed over the course of a two day hearing.

32 Finally in relation to ground 1, I reject the proposition that the primary Judge erred in finding that the Tribunal failed to make findings concerning the best interests of the first respondent’s minor siblings, and minor nieces and nephews. The appellant submitted that the Tribunal did make findings, at [85] of its reasons. I note the following reasons of the Tribunal:

84. I am unable to give any meaningful consideration to the best interests of RGKY’s nieces and nephews as I know so little about their situations. There was no direct evidence about their family situation or the detail of the nature of their relationship with RGKY both now and in the past. Nonetheless I think it is reasonable to give some weight to their position because of the relationship they have had with RGKY.

85. In my view, the best interests of RGKY's child weighs moderately in favour of revocation. The best interests of RGKY's minor brothers and sister weigh slightly in favour of revocation. The best interests of his minor nieces and nephews also weigh slightly in favour of revocation.

33 As the primary Judge noted, however, there was clear evidence before the Tribunal of the quasi-parental role the first respondent had played in the upbringing of his siblings, as well as the evidence of the first respondent's grandfather concerning the distress of the first respondent's siblings at the prospect of the cancellation of the first respondent's visa. The Tribunal itself noted that the first respondent had brothers and a sister, and four nieces and nephews, but made no specific findings as to their best interests.

34 Ground of appeal 1 is not substantiated.

Ground 2

35 In my view, ground 2 of the appeal similarly does not succeed. In this context, I make the following observations.

36 In its reasons, the Tribunal relevantly noted:

34. RGKY put much of his offending down to being taken away from his parents at an early age and his troubled upbringing in foster care. He said having a child has changed him. He said the fact that he has not been able to use drugs while in custody and detention means that he is drug free and that he intends to remain drug free upon his release from detention. He said that he had learnt his lesson from being incarcerated which has taught him how much he misses his family and his son. He referred to the courses he did after his first period of incarceration as being something that would assist him in not taking up methamphetamine abuse again. He says he has full time work available to him with his cousin upon his release. That evidence about his prospective employment when released was corroborated. I accept it.

35. A number of witnesses called to give evidence on behalf of RGKY expressed the view that RGKY had 'changed' and that the birth of his son had brought that about. They expressed the opinion that RGKY would be a different person if released from detention and permitted to stay in Australia. Much of this evidence displayed the kind of support that RGKY would have in the local community if he were permitted to remain in Australia.

36. Mr WW and his wife Ms JW who are RGKY's grandparents gave evidence about their respective opinions about RGKY's likelihood of re-offending especially having regard to the arrival of his son. Mr JW frankly conceded that his evidence might be biased by reason of his affection for RGKY. Mr WW gave evidence about the views of RGKY's brothers and sisters who he said were missing him and are distressed at the thought of their brother being removed from Australia.

37 It does not appear to be in dispute that, before the primary Judge, the appellant acknowledged that the Tribunal had not expressly addressed the first respondent's claim that he had reformed

his character while incarcerated. There is also no dispute that this claim was clearly articulated before the Tribunal, and that the Tribunal was aware of this claim. Plainly, the Tribunal was required to address it and make relevant findings: *Omar* 272 FCR at 605–608 [36], [39]–[40]; *Guchlukol* at [50]. A fair reading of the Tribunal’s reasons demonstrates that, while the Tribunal considered the first respondent’s history of offending, and the desirability of his changing his conduct at some earlier time prior to the cancellation of his visa, the Tribunal did not consider his claim that he had changed while in custody following the birth of his son.

38 Further, and importantly, there was significant material before the Tribunal in support of the first respondent’s claim that he had reformed his character following his most recent period of incarceration. This material included the first respondent’s own evidence, the evidence of his grandparents, and others. As the primary Judge correctly noted, there was no further consideration of this material, which was outlined by the Tribunal at [34]–[36] of its reasons, other than its statement at [70] that:

The difficulty with relying on any of his stated intentions singularly or together as indicating some lower likelihood of re-offending than what was assessed in the pre-sentence report, is that only about six weeks after his son was born he was re-offending both in terms of property offences and an offence of personal violence against his mother.

39 The failure on the part of the Tribunal to consider this clearly articulated claim of the first respondent was exacerbated by the fact that the Tribunal’s assessment of the first respondent’s character was based on his most recent pre-sentence report which was prepared *before* the first respondent’s most recent period of incarceration in July 2019, and was therefore of limited value in assessing the claim that the first respondent reformed his character *during* that period of incarceration. Consequently, it cannot be said that the second respondent gave proper, genuine and realistic consideration to this claim.

40 It follows that ground 2 of the appeal is not substantiated.

CONCLUSION

41 The primary Judge was plainly correct in concluding that the Tribunal did not engage in an active and intellectual process in considering the best interests of the first respondent’s son and the weight that should be attached to them, as well as those of his minor nieces and nephews and siblings, and that the Tribunal did not consider the first respondent’s clearly articulated claim that he had reformed his character following his most recent period of incarceration.

42 The appeal should be dismissed. Consistently with the approach of the primary Judge, the matter should be remitted to the Tribunal for determination according to law. It is also appropriate that the appellant pay the first respondent's costs of and incidental to the appeal, such costs to be taxed if not agreed.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier.

Associate:

A handwritten signature in dark ink, appearing to read 'J Spence', with a long horizontal flourish extending to the right.

Dated: 2 November 2022

REASONS FOR JUDGMENT

FARRELL AND HALLEY JJ:

INTRODUCTION

43 On 20 September 2019, a delegate of the responsible **Minister** cancelled the appellant’s TY subclass 444 special category **visa** pursuant to s 501(3A) of the *Migration Act 1958* (Cth) (**cancellation decision**). Following the Minister’s invitation to do so, the appellant (also referred to as **RGKY**) made representations to the Minister in accordance with s 501CA(4)(a) of the *Migration Act* about why the Minister should revoke the cancellation decision. On 30 July 2020, another delegate of the Minister refused to revoke the cancellation decision (**non-revocation decision**).

44 On 5 August 2020, RGKY sought review of the non-revocation decision by the Administrative Appeals **Tribunal**. As it was common ground that RGKY did not pass the “character test” set out in s 501(6)(a) and (7)(c) of the *Migration Act*, the application before the Tribunal turned upon whether there was “another reason” to revoke the cancellation decision under s 501CA(4)(b) of the *Migration Act*.

45 The materials before the Tribunal are contained in the Appeal Book and they include:

- (a) The delegate’s decision record relating to the non-revocation decision;
- (b) Copies of representations made by RGKY to the Minister’s Department in response to the Minister’s invitation under s 501CA(3) and to the Tribunal;
- (c) Supporting statements made by RGKY’s partner (**Ms MQ**), his grandmother (**Ms JW**) and her husband (**Mr WW**) as well as some of his cousins, an aunt and uncles, family friends and representatives of the Benevolent Society and the Maori community in Australia;
- (d) Records relating to RGKY’s offending, including incomplete records of proceedings before the Local Court; and
- (e) Statements of facts, issues and contentions submitted to the Tribunal by RGKY (who was legally represented) and the Minister.

46 Following a two day hearing on 1 and 2 October 2020 (the transcript of which was not included in the Appeal Book), the Tribunal affirmed the delegate’s non-revocation decision and issued reasons for that decision (**decision record** or **DR**) on 26 October 2020.

47 RGKY then sought judicial review of the Tribunal’s decision in this Court on two grounds, namely that the Tribunal made a jurisdictional error because it had failed to give proper, genuine and realistic consideration to:

- (a) The best interests of minor children individually in compliance with **Direction 79** made by the Minister under s 499 of the *Migration Act* entitled “Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s501CA”; and
- (b) The character evidence on which RGKY relied in support of his contention that his character had changed since his loss of liberty in July 2019 after his last offending.

48 A Judge of this Court (**primary judge**) found that both grounds were made out and accordingly made orders setting aside the Tribunal’s decision, remitting the matter back to the Tribunal to be determined according to law and requiring the Minister to pay RGKY’s costs: see *RGKY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 750 (**J**).

49 The Minister now appeals that decision on the grounds set out at [104] and [105] below.

50 For the following reasons, we find that the primary judge erred in accepting that the Tribunal fell into jurisdictional error and the Minister’s appeal should be allowed. In our view, the Tribunal gave the requisite level of engagement to the representations made to it in this case and to the change of character evidence.

TRIBUNAL DECISION

51 The Tribunal considered the factual background at DR[9]-[37] as follows.

52 The Tribunal found that: RGKY is a citizen of New Zealand. He was brought to Australia when he was only five months old. He always thought he was an Australian citizen, which was unsurprising. To his knowledge, all of RGKY’s relatives live in Australia. His mother was a citizen of New Zealand but is now a citizen of Australia. His father was a citizen of New Zealand, but RGKY is unsure what citizenship his father currently holds. As at October 2020, RGKY had three younger brothers aged 19, 16 and 13 and a younger sister aged 14. The Tribunal found that they have been permanently in Australia for some time if not all their lives. Another younger sister died in August 2012, when RGKY was 14 years of age. RGKY was close to her. In addition to his grandmother and step grandfather, RGKY has 11 aunts and uncles, four nieces and nephews and 36 cousins: DR[9].

- 53 The Tribunal accepted that RGKY had a deprived childhood. Ms JW described his parents as regularly drinking alcohol, presumably to excess, and beating him. As a result, RGKY was placed in foster care with Mr WW and Ms JW from when he was seven years of age until he turned 18: DR[10]. The Tribunal noted that RGKY worked during 2015 to 2018 and that he had a white card which permitted him to work on construction sites. Some of that employment appears to have been full time: DR[11].
- 54 Sometime in 2017 or 2018, RGKY and Ms MQ became partners: DR[12].
- 55 RGKY has a history of criminal offending which commenced when he was about 16 years of age. It involved the commission of about 40 offences over about six years. The Tribunal found that his criminal offending more likely than not commenced at a time when his alcohol, cannabis and methamphetamine use commenced: [DR13].
- 56 The Tribunal noted that much of RGKY's early offending appears to be drug related involving a mix of possession and supply of prohibited drugs and stealing offences, such as shoplifting, goods in custody and obtaining property by deception. RGKY used cannabis and methamphetamine up until he commenced his most recent period of incarceration in July 2019. For the 20 or so offences he committed over the period from December 2013 to September 2017, RGKY accumulated a series of bonds, control orders, periods of probation and fines: DR[14] and [16].
- 57 The Tribunal found that there were three juvenile offences of particular note, being common assault, assault occasioning actual bodily harm and using an offensive weapon with intent to commit an indictable offence. These offences involved threatening another young person (a girl) with a knife, striking her with his hand, cutting her leg with scissors and pulling her hair. RGKY received sentences of two years' probation, a three-month control order and a 12-month control order respectively for these offences. The Tribunal found that these offences were significant in the light of RGKY's later offences against Ms MQ and his mother: DR[15].
- 58 The cancellation decision was based on a decision of the Local Court, made on 15 November 2017, in relation to offences which occurred on 19 June 2017. The Local Court sentenced RGKY to a term of 12 months' imprisonment following his conviction for the offences of stalking with intent to cause fear of physical or mental harm and assault occasioning actual bodily harm. He was also convicted on two counts of common assault for which he was sentenced to three months imprisonment for each offence. Due to special circumstances, the

Magistrate set a non-parole period of only four months. RGKY was also placed on a good behaviour bond for an offence of destroying or damaging property. The Tribunal acknowledged that much of the circumstances of the offences were unknown because documents relevant to their commission have not been found. However, the Tribunal noted that the Magistrate's remarks indicate that the personal offences were committed against Ms MQ who was then 17 years of age, that they involved violence (which was evident from the nature of the offences) and that the Magistrate described RGKY's conduct towards Ms MQ as "reprehensible": DR[17]-[18].

59 The Tribunal noted that the following happened after RGKY served his sentence and was released into the community.

60 *First*, on 22 November 2018, which the Tribunal noted was only a few months after his parole ended, RGKY was convicted of an offence of dishonestly obtaining property by deception. He was given a 12-month community correction order for that offence: DR[20].

61 *Second*, on 9 May 2019, RGKY was convicted on charges relating to a series of offences committed on 31 August 2018. Those offences were the offences of common assault, affray, resist arrest, contravene a condition of an apprehended violence order (domestic) and fail to appear in accordance with a bail acknowledgment. The Tribunal found that the evidence about the circumstances attending these offences and the findings made in the Local Court were a little unsatisfactory. However, the Tribunal found that the offences involved RGKY assaulting Ms MQ and resisting arrest by police who gave evidence of having witnessed the assault. At the time of this offence an apprehended violence order was in place. The order had been made almost 12 months previously and, amongst other things, it proscribed RGKY from assaulting Ms MQ. There was sparse detail of the facts on which RGKY was convicted disclosed in the Magistrate's sentencing remarks. It appeared to the Tribunal that RGKY pleaded guilty to resisting arrest but the other offences were the subject of a defended hearing, the materials relating to which were not before the Tribunal. The Tribunal noted inconsistencies in the evidence which RGKY gave to it concerning the stage of Ms MQ's pregnancy when the offences occurred and whether or not he pleaded guilty to the charges involving upper cut punches to her stomach. This led the Tribunal to find that it was difficult to rely on RGKY's evidence about what happened. Ms MQ's evidence before the Tribunal was that "it never happened" but that evidence was not accepted because of the guilty verdict. The Tribunal found that "Ms MQ's evidence was likely to have been affected by her desire to paint things

better for RGKY so that her main focus of her son having a relationship with his father could be advanced”. The Tribunal found that the evidence of RGKY and Ms MQ was not capable of disturbing the strong prima facie position provided by the conviction and sentence in the Local Court: DR[21]-[26].

62 At DR[27]-[29] the Tribunal noted the following concerning these offences:

27. A pre-sentence report was prepared in relation to these offences. The pre-sentence report recorded that RGKY sought to justify and excuse his offending even though he was said to understand that unless he changed, he would have to face the consequences. The presentence report also recorded that RGKY ‘failed to genuinely demonstrate an understanding of the impact of his actions on the victim and the other family members’. Most significantly the report contains the most recent assessment of RGKY’s likelihood of reoffending which was undertaken in accordance with the Level of Service Inventory – Revised and assessed his likelihood of re-offending as ‘T2/Medium/High risk of re-offending’.

28. The Magistrate made several observations when sentencing RGKY that are relevant here. First, her Honour observed that RGKY’s grandfather, Mr W, believed that he required ‘mandated counselling, anger management, drug and alcohol cessation and support and, most importantly, meaningful employment to provide for your young family’. The Magistrate agreed with those views and warned RGKY about the seriousness of the offences. Her Honour continued saying that ‘I accept that your girlfriend loves you and doesn’t want to see you in gaol but she is also about to be a mother and she will want that child and herself to be safe and protected, do you understand?’. RGKY agreed he did understand. The observations of the Magistrate support the conclusion that the offences were serious.

29. For all of these offences except the one related to breach of the bail condition, for which he received only a conviction by way of penalty, he was placed on a 12 month intensive correction order. The Magistrate explained to RGKY that what he was receiving by way of penalty was not a good behaviour bond and that if he breached the order he would go before the Parole Board and they would decide what was to happen. ...

63 *Third*, RGKY and Ms MQ had a son born in May 2019: DR[12].

64 *Fourth*, on 9 and 10 July 2019, RGKY stole goods from a motor vehicle: DR[30].

65 *Fifth*, on 22 July 2019, RGKY contacted his mother with a view to collecting his baby from her. When he and Ms MQ got to his mother’s home (where the two-month old baby and RGKY’s mother’s other four children were present) his entry was blocked by a screen door. RGKY made threats to “kill you all” if she did not give him the baby. For this conduct RGKY was charged with “stalk/intimidate with intent to cause fear of physical or mental harm” in relation to his mother and “maliciously damaging property valued under \$2000”. RGKY’s evidence to the Tribunal as set out at DR[32] was different to the version of events to which he pleaded guilty. The Tribunal found RGKY’s evidence did not displace the strong prima facie

evidence provided by the conviction and sentence or satisfy the heavy onus that they present and stated that it formed this view because it considered that RGKY to be “an unreliable historian”: DR[30]-[32].

66 *Sixth*, RGKY was remanded in custody in late July 2019, when he was “bail refused” because these offences were committed at a time when he was on an intensive correction order. The Tribunal noted RGKY’s evidence that from the time of incarceration in July 2019 and until pandemic restrictions prevented it, his son visited him weekly, sometimes twice a week. Since then, RGKY spoke to the child on the phone every day. It noted RGKY’s evidence that his son falls asleep with the phone next to him every night: DR[30] and [12].

67 *Seventh*, on 13 August 2019, the 12-month intensive correction order was revoked by the New South Wales Parole Board which replaced it with a term of imprisonment of just over nine months, to be served in custody rather than in the community: DR[29].

68 *Eighth*, on 20 September 2019, a delegate of the Minister made the cancellation decision: DR[1].

69 *Ninth*, on 10 October 2019, RGKY was sentenced to two months’ imprisonment for his offence committed on 22 July 2019 against his mother. He was also convicted of four offences for his conduct on 9 and 10 July 2019. He received a sentence of one month’s imprisonment for one of the offences and a 12-month community correction order for three of those offences: DR[33].

70 At DR[34]-[37], the Tribunal said the following:

34. RGKY put much of his offending down to being taken away from his parents at an early age and his troubled upbringing in foster care. He said having a child has changed him. He said the fact that he has not been able to use drugs while in custody and detention means that he is drug free and that he intends to remain drug free upon his release from detention. He said that he had learnt his lesson from being incarcerated which has taught him how much he misses his family and his son. He referred to the courses he did after his first period of incarceration as being something that would assist him in not taking up methamphetamine abuse again. He says he has full time work available to him with his cousin upon his release. That evidence about his prospective employment when released was corroborated. I accept it.

35. A number of witnesses called to give evidence on behalf of RGKY expressed the view that RGKY had ‘changed’ and that the birth of his son had brought that about. They expressed the opinion that RGKY would be a different person if released from detention and permitted to stay in Australia. Much of this evidence displayed the kind of support that RGKY would have in the local community if he were permitted to remain in Australia.

36. Mr WW and his wife Ms JW who are RGKY's grandparents gave evidence about their respective opinions about RGKY's likelihood of re-offending especially having regard to the arrival of his son. Mr JW frankly conceded that his evidence might be biased by reason of his affection for RGKY. Mr WW gave evidence about the views of RGKY's brothers and sisters who he said were missing him and are distressed at the thought of their brother being removed from Australia.

37. I will refer to some of the other facts below as is necessary.

71 At DR[38], the Tribunal noted that it was required to comply with Direction 79 in considering whether there was another reason for why the cancellation decision should be revoked.

72 At DR[39]-[46], the Tribunal summarised the seven principles set out in Direction 79. We note in particular what was said at DR[43], [44] and [46] as follows:

43. The fourth principle opens with the words '*[i]n some circumstances*', indicating that there will be specific cases that attract its attention. The '*some circumstances*' are those where '*criminal offending or other conduct... may be so serious, that any risk of similar conduct in the future is unacceptable*' and it is '*[i]n these circumstances*' that '*even other strong countervailing considerations may be insufficient to justify not cancelling... the visa*'. This principle leaves open two possibilities relevant to not cancelling a visa. The first is where criminal offending or other conduct is not so serious that '*strong countervailing considerations*', or even countervailing considerations alone, might justify not cancelling a visa. The second is where '*strong countervailing considerations*' may be, in any event, sufficient to justify not cancelling a visa.

44. The fifth principle is that: '*Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age*'. So far as this principle is concerned, sight should not be lost of the fact that living in the Australian community for most of their life, or from a very young age, is not at all qualified by the words '*participating in, and contributing to*' as applies in the case with those who have only been in Australia for a short time. Although it is not expressed to be the case, these are likely to be amongst the '*countervailing considerations*' that are relevant to the fourth principle. It is also important to note that living in Australia for '*most of their life*' or '*from a very young age*' is not something that is to be regarded as an automatic exception to the general position of '*low tolerance*'; the word '*may*' suggests that the issue is an open one presumably dependant on other principles, the relevant factors that must be considered and, naturally enough, the circumstances of the particular case.

...

46. The seventh principle, like the fifth, states that the '*length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa...cancellation for minor children and family members*' are considerations. The use of the conjunction '*and*' suggests that positive contribution is not relevant to the issue of consequences for minor children and family members so that, so far as consequences for minor children and family members are considered, time is immaterial. Again, these are likely to be among the countervailing considerations referred to in other principles.

73 At DR[47]-[51], the Tribunal considered the “primary and other considerations” that it was required to take into account under Direction 79. It noted (at DR[47]) that the seven principles “inform” the decision-maker’s consideration of the matters referred to in Part C of the Direction which contains “primary” and “other considerations”. It stated that the primary considerations are: protection of the Australian community from criminal or other serious conduct (cl 13.1), the best interests of minor children in Australia (cl 13.2) and the expectations of the Australian community (cl 13.3). The five named “other considerations” are: international non-refoulement obligations (cl 14.1), the strength, nature and duration of ties to Australia (cl 14.2), the impact on Australian business interests (cl 14.3) the impact on victims (cl 14.4) and the extent of impediments if a non-citizen is removed from Australia (cl 14.5).

74 The Tribunal considered the first primary consideration “Protection of the Australian community” at DR[52]-[73].

75 At DR[53], the Tribunal noted that:

The principles and matters that I must consider as relevant to this case are: ‘*without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed very seriously*’ (cl.13.1.1(1)(a)); ‘*crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed*’ (cl.13.1.1(1)(b)); ‘*crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties, are serious*’ (cl.13.1.1(1)(c)); ‘*the sentence imposed by the Court for a crime or crimes*’ (cl.13.1.1(1)(d)); ‘*the frequency of the non-citizen’s offending and whether there is any trend of increasing seriousness*’ (cl.13.1.1(1)(e)) and ‘*the cumulative effect of repeated offending*’ (cl.13.1.1(1)(f)). I have considered the other matters listed in this part of the Direction and they do not appear relevant in this case.

76 In relation to RGKY’s offending against a person, the Tribunal found (at DR[54]-[56] and [60]) that:

- (a) RGKY’s offending involved violence against Ms MQ on two separate occasions within 14 months and against his mother about a year after the second offence against Ms MQ. The first offence against Ms MQ in 2017 involved a sentence of 12 months’ imprisonment and the 2018 offence against Ms MQ involved punching her in the stomach for which RGKY received a 12-month intensive correction order. All of this was to be treated seriously;
- (b) The principles indicate that, generally, offences involving violence against women are to be treated seriously such that a person who committed such crimes should expect to forfeit the right to remain in Australia; and

(c) While RGKY's offending was not escalating, it was serious.

77 In relation to RGKY's other offences, the Tribunal noted (at DR [57]-[59]) that:

- (a) RGKY's conviction for resisting a police officer in the execution of his duty was objectively serious as was the fact that it attracted a 12-month intensive correction order;
- (b) The property related offences are not as serious as those involving violence against people. There were, however, two important things about their seriousness: their frequency over a period of six years and the fact that they attracted increasingly serious sentences, with the 2019 offences attracting 12 months intensive correction and community correction as penalties. The Tribunal found that that "perhaps reflects that the earlier penalties do not appear to have had much of a deterrent effect" and the cumulative effect over a period of years makes what might not otherwise be viewed as serious offending "all the more serious"; and
- (c) It did not give much weight to the juvenile offending, but those offences were relevant as a foreboding of what came later.

78 The Tribunal found (at DR[60]-[62]) that: If there was a trend to RGKY's offending, it was from property/drugs offences to violence against people. In general, the offending demonstrated a continuing disregard for the law which was also evidenced by the breaches of community correction orders, bail conditions and intensive correction orders that RGKY had had the benefit of during his involvement in the criminal justice system. Consistent with the position put by both RGKY and the Minister in addressing it, RGKY's record of criminal offending was very serious.

79 Relevantly to the second ground of appeal, the Tribunal then said the following at DR[63]-[73] (footnoted clauses of Direction 79 inserted):

63. Next, I must consider the risk to the Australian community should further offences or other serious conduct be committed. I am required to have regard to, 'cumulatively', 'the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct' (cl.13.1.2(a)) and 'the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen re-offending'. (cl.13.1.2(b))

64. First, the nature of the harm should the offences be repeated is likely to be at least as serious as the harm caused by the offending to date. Having regard to the nature of the charges, the offending conduct in 2017 involved physical violence against Ms MQ that inflicted actual bodily harm, but I do not know what her injuries were. It

also involved psychological violence, but again I know little about it. The 2018 offending conduct involved punching her to the stomach and given that she was likely one month pregnant things probably could have turned out much worse. The offending conduct in 2019 involved a threat to kill someone. The harm caused by such threats is difficult to measure especially when there is no evidence about the actual nature of the harm caused. Of course, all these offences cause harm directly to the victim but also to those close to them. There are also the social costs, direct and indirect, associated with such offending. The harm associated with the offending should it be repeated is in general terms likely to be significant.

65. So far as the property related offences are concerned there is obviously a personal cost to those who have had their property stolen. There is the social cost associated with law enforcement and the like. The harm of one individual instance of such an offence is probably not great but over time its cost to the community mounts. The ongoing harm associated with such offending may ultimately prove considerable.

66. Second, it is difficult to assess the likelihood of RGKY re-offending. The most telling evidence in that regard is the pre-sentence report that was prepared in May 2019. Apart from assessing RGKY as a medium to high risk of re-offending that pre-sentence report recorded that RGKY ‘appeared to justify and excuse his behaviour’. That was much the same as he did in his evidence before me where he attributed his wrongdoing to his upbringing and the death of his sister. His lack of acceptance of responsibility for his offending is a significant factor in assessing the likelihood of him re-offending. The report also recorded that RGKY recognised that if his behaviour did not change, he would have to face the consequences. Ominously that is at least in part what this matter concerns.

67. The larger difficulty, of course, is that RGKY even after that report did not change and offended once more by the threats directed towards his mother that led to his most recent period in custody. Before leaving that pre-sentence report it is significant that the report recorded that RGKY failed to ‘genuinely demonstrate an understanding of the impact of his actions on the victim and the other family member’.

68. In his evidence RGKY’s denials of his wrongdoing concerning punching Ms MQ and his culpability in the offence involving his mother demonstrate a lack of any genuine remorse for his wrongdoing. That lack of remorse was, in similar vein to that which is recorded in the pre-sentence report, accompanied by a lack of any genuine understanding about his wrongdoing and a genuine acceptance of responsibility.

69. I accept that RGKY says that it his intention not to re-offend once in the community. I also accept that it is his intention to try to remain ‘drug free’ once released. And I accept that the fact of his young son is some motivation to keep him away from offending as is the fact of the deterrent effect of being imprisoned and placed in detention once more. I accept that he has an intention to participate in rehabilitation courses.

70. The difficulty with relying on any of his stated intentions singularly or together as indicating some lower likelihood of re-offending than what was assessed in the pre-sentence report, is that only about six weeks after his son was born he was re-offending both in terms of property offences and an offence of personal violence against his mother. By then he had already had the experience of about four months in prison because of his offences in August 2018. He had also been warned by the Magistrate that things were serious. He was alerted to the fact that his continued re-offending would have consequences. He was afforded the opportunity to participate in a rehabilitation programme during the course of the intensive correction order. The only matter that is not known, because it simply cannot be tested, is his ability to remain

drug free if he were released into the community, but again he had the opportunity to go down that road on 9 May 2019 when he received the 12 month intensive correction order. And he did not take it. It is for these reasons that I am unable to place any significant reliance on what RGKY says about what he intends to do in the future.

71. Some reliance was placed on the fact that if released into the community RGKY would have the support of a strong network of friends and family led no doubt by his grandfather and grandmother. I do not doubt the motivations of those people, but the simple fact remains that that network did not assist much in the past.

72. In like fashion it was suggested that RGKY knowing that he would be deported if he offended again would be a significant deterrent to him re-offending. Although superficially attractive there does not seem to be much going for that in the light of the fact that criminal sanctions involving the last resort of incarceration have not done much by way of deterrence, especially when RGKY was placed on notice when he was sentenced to an intensive correction order that further offending would in fact involve serving the remainder of his sentence in prison.

73. Having regard to RGKY's long record of offending, the nature of his offences, and the opinion expressed in the pre-sentence report in May 2019 I find that there is a real likelihood of RGKY re-offending again in the future. Considered with the nature and seriousness of RGKY's offence record I consider that the protection of the Australian community weighs heavily against revocation of the mandatory cancellation.

80 Relevantly to the first ground of appeal, the Tribunal then turned to consider the "Best interests of minor children in Australia affected by the decision" at DR[74]-[85].

81 The Tribunal noted (DR [74]-[75]) that it was required to consider the best interests of children who may be affected by the decision to revoke or not revoke the cancellation decision, that cl 13.2(2) of Direction 79 requires that the Tribunal only consider children under the age of 18 years and that cl 13.2(3) requires that, where there are two or more minor children, the Tribunal must consider the interests of any such children individually to the extent that their interests may differ. It also noted that it was important to keep in mind that this consideration was not concerned with RGKY's interest but rather that it was directed towards the "best interests" of minor children.

82 The Tribunal noted (at DR [76]) that it was required to consider a number of specific factors under cl 13.2(4) of Direction 79 (see [185] and [187] below where they are reproduced). The Tribunal stated that it had reproduced those factors so that the observations it then made could be understood in context.

83 The Tribunal then said:

77. The minor children who were referred to in the evidence are RGKY's own child who is about 17 months old, his two younger brothers aged 16 and 13 and his younger sister aged 14 and his nieces and nephews. There was not a great deal of

evidence about any of the minor children other than RGKY's own child.

78. RGKY had about six or seven weeks' interaction with his son after he was born and before RGKY commenced his most recent period of imprisonment which was followed by him being placed in detention. There has been a relatively short period of day in day out meaningful contact with his son.

79. Before March this year, when restrictions were imposed due to the pandemic, he was visited by his son, about once a week and sometimes twice a week. During those visits he played with his son and attended to the types of things fathers often do with babies such as changing nappies, feeding and comforting the baby and so on. He has since then spoken to him every day on telephone or by using a social media platform such as FaceTime. Although this contact is meaningful it would be wrong to overstate it especially when measured against what might be considered to be the more optimal or ideal relationship between father and son involving as it does daily contact and daily physical involvement in the child's life.

80. I accept the statements of RGKY, his grandfather and grandmother, Ms MQ and others, about RGKY's devotion to his son both in the past and in all likelihood into the future. I accept his and their desire that RGKY be part of his son's life as he grows up. All of those things can only be something that would be positive in a child's upbringing and therefore in the best interests of the child.

81. Those things need to be measured very carefully given RGKY's criminal history and, in particular, the fact that that history involves offending against his son's mother and his own mother when his son was present and in her care. I am unable to find that RGKY would, on balance, be likely to play a positive parental role in his son's life in the future given those matters and my assessment concerning the likelihood of him re-offending. Moreover, should the kinds of offending in the past be repeated in the future I consider that will invariably have a negative impact on RGKY's son because of its likely psychological impact upon the child. It is to be remembered that RGKY's most recent offending against his mother was in the presence of his child. These are matters that cause me to moderate the weight that I give to this consideration.

82. As is likely to be the case, separation from his father should RGKY return to New Zealand will necessarily have something of a negative impact on RGKY's son. I am unable to make any assessment at all as to the magnitude of that impact because of the dearth of information that was presented. So much is self-evident, but contact will be able to be maintained in other ways such as by phone and by resort to social media platforms as has been done since March this year so that the effect upon him will be mitigated. RGKY's son is obviously too young to express his preference about RGKY remaining in Australia. His son has his mother who is able to fulfil a parental role.

83. So far as RGKY's younger brothers and sister are concerned, I accept they would be quite upset about RGKY being required to return to New Zealand even though they did not give direct evidence about that. I do not know a great deal about their present relationship with RGKY or even their relationship in his adult years. The relationship is not parental. It can be given that in their youth the children were close by reason of their plight in foster care and the fact that RGKY assumed something of a paternal role in their upbringing. That obviously did not continue in recent years because of his incarceration and detention. Again, his potential future role in their upbringing needs to be approached cautiously because of his offence record and his likelihood of re-offending. That is another reason why I have given consideration of their best interests less weight. Like with his own child he will be able to maintain contact with them by phone and social media in the event of non-revocation. RGKY's relationship with them is not parental so that I should give less weight to this

consideration in their cases because that is what the Direction requires.

84. I am unable to give any meaningful consideration to the best interests of RGKY's nieces and nephews as I know so little about their situations. There was no direct evidence about their family situation or the detail of the nature of their relationship with RGKY both now and in the past. Nonetheless I think it is reasonable to give some weight to their position because of the relationship they have had with RGKY.

85. In my view, the best interests of RGKY's child weighs moderately in favour of revocation. The best interests of RGKY's minor brothers and sister weigh slightly in favour of revocation. The best interests of his minor nieces and nephews also weigh slightly in favour of revocation.

84 The Tribunal then turned to consider the expectations of the Australian community at DR[86]-[93]. At DR [91]-[93], the Tribunal found as follows:

91. The seventh principle which is relevant to the consideration of visa cancellation refers to the length of time a person has been making positive contributions to the Australian community, and the consequences of non-revocation for minor children and other immediate family members. I do not think in light of RGKY's offence record and his limited time in paid employment in Australia it is possible to say that he has been making a significant positive contribution to the community. His sporting achievements are something of a positive contribution. The consequences for his child and his brothers and sister and immediate family are significant if only in an emotional sense. This factor too operates to moderate the weight to be accorded to this consideration.

92. In all of the circumstances the Australian community would expect that RGKY should not have the mandatory cancellation of his visa revoked. The fact of his long criminal record and the seriousness of his offending would ordinarily weigh heavily against revocation. That weight is reduced, as I have said, because of RGKY's long time from his early childhood in Australia and because of the consequences of non-revocation for his minor children [sic] and his immediate family.

93. I will accord this primary consideration moderate weight in my consideration of the matter.

85 The Tribunal considered the strength, nature and duration of RGKY's ties to Australia at DR[94]-[97]. At DR [96], the Tribunal found that RGKY's ties were familial and social in nature and that many of those ties, especially those with his son and his grandparents, were "obviously strong". It concluded, at DR [97], that this consideration weighed "moderately in favour of revocation" of the cancellation decision because while "the ties he has are numerous and in some cases strong, he has made a limited contribution to the Australian community and has been offending over a period of years".

86 The Tribunal considered the extent of the impediments to RGKY in establishing and maintaining basic living standards in New Zealand at DR[98]-[102] and concluded that this factor weighed moderately in favour of revocation of the cancellation decision.

87 The Tribunal addressed “other considerations” at DR[103]-[104] and said at DR[104]:

I will give some weight to the impact of not revoking the decision to cancel the visa on Ms MQ even though this was not relied on at all by RGKY. The Minister conceded it was open to me to accord weight to this consideration given Ms MQ’s desire to have her son brought up with RGKY in his life. In that sense the decision not to revoke the cancellation will have an impact upon her although as I have said RGKY will be able to be in his son’s life to the extent that telephones and social media permit. In that light I accord this consideration some weight, albeit slight.

88 The Tribunal set out its conclusions at DR[105]-[109] as follows:

105. I have found that the protection of the Australian community weighs heavily against revocation of the mandatory cancellation and that the expectations of the Australian community weigh moderately against revocation. Those two considerations loom very large in the consideration I have given to this matter.

106. The best interests of RGKY’s child weigh moderately in favour of revocation of the visa, while the best interests of his minor siblings and nieces and nephews weigh slightly in favour of revocation. RGKY’s ties in Australia weigh moderately in favour of revocation as do the impediments to him re-establishing himself in New Zealand. I have given the impact on Ms MQ of a decision not to revoke the mandatory cancellation slight weight given her desire that her son be brought up with RGKY in his life.

107. The weight I have given to the protection of the Australian community and the expectations of the Australian community, which are primary considerations, is significant. Those two considerations weigh much more heavily than the primary consideration concerning the best interests of minor children. The weight attached to the ties RGKY has to Australia and the impediments confronting him upon return to New Zealand do not outweigh the overall weight I have given to the primary considerations. I see no reason to depart from the general position that the Direction refers to requiring that primary considerations are generally to be given greater weight than other considerations.

108. I am unable to find that there is another reason why the mandatory cancellation of RGKY’s visa should be revoked.

109. I affirm the decision refusing to revoke the mandatory cancellation of the Applicant’s Class TY Subclass 444 Special Category (Temporary) Visa.

THE PRIMARY JUDGE’S DECISION

89 The primary judge set out brief factual background at J[2]-[4]. His Honour then summarised the grounds of the review application at J[5] as follows:

The applicant relied on two grounds for relief, namely that the Tribunal made a jurisdictional error because it had failed to give proper, genuine and realistic consideration to, first, the best interests of minor children individually in compliance with Direction 79 made by the Minister under s 499 of the Act entitled “Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA”, and, secondly, the character evidence relied on by the applicant in support of his contention that his character had changed since his loss of liberty after his last offending.

90 The primary judge then turned to consider the legislative context at J[6]-[7], including cl 13.2 of Direction 79 which his Honour set out in full as follows:

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.**
- ...
- (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;

91 The primary judge then summarised the decision of the Tribunal at J[8]-[38] and the Minister's submissions at J[39]-[44].

92 We note that the primary judge set out (at J[39]) the submissions made by RGKY to the Tribunal (before which RGKY was legally represented) in his statement of facts, issues and contentions addressing the interests of minor children as follows:

Interest of minor children

27. The applicant has a 16 months old son. He used to live with his son and partner before going into custody and immigration detention. The applicant has a close relationship with his son and is extremely concerned for his wellbeing should he be removed from Australia.

28. The applicant contends that his removal from Australia will have a “negative impact” upon his minor child and his other nieces and nephews and cousins ages of whom are not known at the time of writing.

29. It is respectfully submitted the best interest of the applicant’s minor child substantially weighs in favour of revoking the visa cancellation.

(citations omitted)

First ground of review

93 In considering the first ground of review, the primary judge first noted (at J[45]-[47]) that the Full Court had identified the necessity for administrative decision-makers to engage in an active intellectual process in arriving at the decision required by statute. His Honour cited *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; (2017) 252 FCR 352 (*Carrascalao*) at [35] (Griffiths, White and Bromwich JJ); *CAR15 v Minister for Immigration and Border Protection* [2019] FCAFC 155; (2019) 272 FCR 131 at [76] (Allsop CJ, Kenny and Snaden JJ) and *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628 (*Hands*) at [3] (Allsop CJ, with whom Markovic and Steward JJ agreed), a passage cited with approval in *Minister for Home Affairs v Omar* [2019] FCAFC 188; (2019) 272 FCR 589 (*Omar*) at [37] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

94 At J[48]-[50], the primary judge said:

48. The Tribunal found in [81] that a determinative factor for moderating the weight it would give to the best interests of the applicant’s son was its inability to find that the applicant would be likely to play “a positive parental role in his son’s life in the future” given his criminal history and risk of reoffending, including his offending against his partner and mother when his son “was present and in [his mother’s] care”. It repeated the latter factor at the end of [81]. It then said of the separation of the applicant from his son, were the visa not reinstated, that it was “unable to make any assessment at all as to the magnitude of that impact because of the dearth of information that was presented”, and that the son had a mother who would be able to fulfil a parental role.

49 In my opinion, the Tribunal failed to engage in an active intellectual process in determining what the best interests of the applicant’s son were and what weight ought be given to them. The Tribunal noted in [79] the current relationship between the applicant and his son following his being taken into custody was less than “the more optimal or ideal relationship between father and son involving as it does daily contact and daily physical involvement in the child’s life”. It is impossible to understand how, in that context, the Tribunal asserted that it was “unable to make any assessment at all” as to the magnitude of the loss of that connection, which is an ordinary incident of the relationship between a parent and a child.

50 Nor does the fact that one parent remains in contact from another location with the child deal with the potential impact on the best interests of the child if he or she is not able to live with and grow up in the household of both parents who, as here, are in

a relationship in which that can occur.

95 The primary judge then noted the following:

- (a) The Tribunal had found that, since the imposition of restrictions on physical contact due to the pandemic, RGKY had spoken to his son every day by phone or social media. The Tribunal had recognised (at DR[25]) that Ms MQ’s evidence was likely to have been affected by her desire to paint things better for him “so that her main focus of her son having a relationship with his father could be achieved”: J[51];
- (b) Ms MQ’s evidence was supported by evidence from RGKY’s relatives and Ms MQ herself that she knew RGKY would be “a great father” and that if RGKY were to be deported “it would be [her] son’s future being jeopardised as most of you know growing up without a father can affect the way a young boy develops mentally and emotionally”: J[52];
- (c) In that character reference, Ms MQ recognised the “toxic” nature of the early relationship between RGKY and Ms MQ and went on to state that her son “deserves to have his father” and in the year he had been away from his son, RGKY “has changed dramatically, the choices and decisions that he makes are coming from a different state of mind” and if he were released to society, she believes he would be “a completely different person as he wants to be the best father to his son he can”, stating that she had “known him to be a hard worker and good caring person and I want my son to grow up around that”: J[53]; and
- (d) RGKY’s clearly articulated claim to a change of character after he went into custody following his son’s birth was the basis of the second ground of review. The primary judge found that consideration of that claim was also relevant to the Tribunal’s finding at DR[81] as to the risk of RGKY reoffending and the Minister accepted that it was not expressly referred to or dealt with in the Tribunal’s reasons other than to recognise that RGKY and his witnesses and other evidence raised his change of character: J[54].

96 The primary judge accepted (at J[55]) that the reasons of an administrative decision-maker must not be construed minutely and finely with an eye keenly attuned to error and that they must be read fairly as a whole. However, his Honour found (at J[56]) that the Tribunal’s statement that it was unable to make any assessment at all of the magnitude of the impact of separation on RGKY’s son that would be caused by RGKY’s removal to New Zealand beyond saying that it would have “something of a negative impact” eschewed making any finding of

exactly what the best interest of that child would be, and that was a “material jurisdictional error”. The primary judge went on to say (emphasis in original):

55. ... Direction 79 required the Tribunal to make a determination of what the best interests of the child were, as French CJ, Kiefel, Bell and Keane JJ made plain in *Ueese v Minister for Immigration* (2015) 256 CLR 203 at 233 [64] in relation to an earlier version of Direction 79. They held that a review conducted by the Tribunal under s 500 of the Act was inquisitorial, not adversarial (256 CLR at 221 [62]–[63]). They said of an analogue of cl 13.2(1):

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”.**

(emphasis added)

57 The Tribunal conducted a two-day hearing. For it to say that there was a “dearth of information that was presented” demonstrates that it fell into error in failing to address the task mandated in Direction 79. That is because, as French CJ, Kiefel, Bell and Keane JJ held in *Ueese* 256 CLR at 222 [65]–[66]:

... 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...

(emphasis added)

97 After noting that the task of the Tribunal was to make a determination of what was in the best interests of each of the son, minor siblings and other children, the primary judge:

- (a) Stated that the Tribunal had before it evidence of what RGKY wished for his relationship with his son and Ms MQ’s evidence and noted that the Tribunal regarded her evidence as “biased” because she said that she wished for RGKY to have such a relationship: J[58];

- (b) Stated that, ordinarily, “the best interests of a child are to have two loving parents who wish to care for and look after the child in the family home”. After acknowledging that, in the evaluation of any particular case, that is a matter that is a factual finding, the primary judge stated that the Tribunal was “obliged to engage in some real and active intellectual process that considered and made a finding about what would be the best interests of the child if he was deprived permanently of one of his two parents” and referred to *Hands* at [3]: J[59]; and
- (c) Said the following at J[60]:

The Tribunal had to engage in an active intellectual process of consideration of the evidence before it, and if there really were “a dearth of information presented”, it would have had to make enquiries about the best interests of the children, particularly the son: *Uelese* 256 CLR at 222 [66]. However, the Tribunal’s assertion that there was “a dearth of information” presented ignored the applicant’s, Ms MQ’s and the other evidence, to which I have referred, so that it did not carry out its function of review. It had to explain why simply having some kind of remote contact by phone or social media, as had happened up to that date, would be in the son’s best interests when the witnesses told it that this was not the case. The Tribunal appeared to have required some information to be presented to make up for what it found was “a dearth”, so that it could in fact make an assessment, being its statutory task. In my opinion, this error was both material and fundamental to the way in which the Tribunal failed to discharge its role: *Uelese* 256 CLR at 221–222 [62]–[66]. Tamberlin, Kiefel and Emmett JJ held in *Sebastian v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 31 at [11] and [15] that determining the best interests of a child, ordinarily, requires the reasons of the decision-maker to disclose an appreciation of what those interests are and what they called for, including the child’s human development, health, happiness, social and educational needs.

- 98 The primary judge also found (at J[61]) the Tribunal’s treatment of the position of RGKY’s minor siblings problematic. His Honour noted that, in written material before the Tribunal, two people writing in support of revocation of the cancellation decision noted that RGKY had been through a traumatic time with a neglectful mother who had harmed him physically and mentally as a young child and left him to care for his little brothers and sister while she drank and recovered and that he “did a damn good job they always went off to school together happy, well fed and clean” (J[61]). The primary judge found that this suggested that the relationship (which the Tribunal acknowledged involved RGKY assuming “something of a parental role in their upbringing”) was likely to have comprised a real and significant part in the siblings’ lives, yet the Tribunal “only” found that the siblings “would be quite upset” about RGKY returning to New Zealand and that it did not know about their present relationship with RGKY. The primary judge noted that the Tribunal did not discuss or make any findings about Mr WW’s evidence that the siblings said they would miss RGKY and were distressed at the thought of

his removal. Relying on the decision in *Uelese v Minister for Immigration* [2015] HCA 15; (2015) 256 CLR 203 (*Uelese*), his Honour also found that the Tribunal was required to consider the siblings' best interest under Direction 79 but it did not do so.

Second ground of review

99 The second ground of review was that the Tribunal failed to take into account and address the significance of the claim that RGKY's character had reformed *after* he had been taken into custody after his offending on 22 July 2019.

100 The primary judge noted that the Tribunal recorded (at DR[34]) that RGKY had said that he had learnt his lesson from being incarcerated "which has taught him how much he misses his family and son" and, clearly, that could only have occurred after his son's birth (J[63]). Character evidence summarised by the Tribunal at DR[35] recorded that some of his character referees (such as Ms MQ and RGKY's grandparents) thought that he "would be a different person if released from detention and permitted to stay in Australia". The primary judge accordingly found that the Tribunal had before it a significant, clearly articulated claim based on substantive evidence that, after his last incarceration, RGKY's character had changed (J[64]).

101 The primary judge accepted that the Tribunal was entitled to have regard to previous incarcerations, warnings, chances and the like in forming its view that RGKY would be likely to reoffend. His Honour found, however, that there is nothing in the Tribunal's reasoning that discusses that claim or the evidence it summarised at DR[35]-[36] beyond the statement at DR[70] that it could not place any significant reliance on what RGKY said about his future intentions. The primary judge accepted that such a finding may have been open to the Tribunal "but only after it had done what its reasons did not reveal, namely to assess the written and oral evidence of those who knew [RGKY], including the passages [his Honour] quoted from Ms MQ's letter in support ... that revealed that, whatever else one might have thought about him, there was a real foundation for his claim to have changed as a result of his incarceration and the impact that he felt from being separated from his newborn son and partner": J[64]. The primary judge noted that the Minister correctly acknowledged that the claim that RGKY had changed at that time was a significant one that the Tribunal had not addressed directly: J[65].

102 The primary judge found that the failure to consider a substantial or significant clearly articulated claim made in representations under s 501CA(3)(b) and (4) which, if accepted, could be "another reason" to revoke the cancellation of a visa under s 501CA(4)(b)(ii) may

constitute jurisdictional error because the decision-maker has not carried out its statutory task, relying on *Omar* at [39]-[40] and *Guclukol v Minister for Home Affairs* [2020] FCAFC 148; (2020) 279 FCR 611 at [50] (Katzmann, O’Callaghan and Derrington JJ): J[66].

103 The primary judge found that the Tribunal’s consideration stopped at its review of RGKY’s character as revealed in the pre-sentence report (prepared for RGKY’s Local Court appearance on 9 May 2019) and his subsequent criminal offending without making any assessment or finding about the change RGKY asserted had occurred once the period of incarceration commenced in July 2019 “because, unlike earlier, he now had a son whom he loved and wanted to be with as a father, but was separated from him”: J[67]. The primary judge rejected the Minister’s argument that the Tribunal indirectly adverted to having considered the supporting evidence and material from RGKY’s family and friends as to his change of character in the reference in DR[71] to supporting him were he to be released into the community on the basis that mere advertence in that context did not amount to engagement in an active and intellectual process directed to the claim: J[68]. The primary judge found that, on the face of the Tribunal’s reasons, it did not address the significant claim that RGKY had changed while in custody after July 2019 and reading the reasons as a whole, it did not consider the claim because of the absence of any reasons making findings about it, relying on *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 (*Yusuf*) at [69] (McHugh, Gummow and Hayne JJ). The primary judge was satisfied that the Tribunal’s failure to do so was a jurisdictional error: J[69].

GROUNDS OF APPEAL

104 The first ground of appeal is as follows:

His Honour erred by upholding Ground One of the application before him and, in particular, his Honour erred by finding that the Tribunal made a jurisdictional error in the following (alleged) ways (when it did not in fact do so):

- a. The Tribunal failed to engage in an active intellectual process in determining what the best interests of the RGKY’s child were and what weight should be given to them.
- b. The Tribunal had ignored evidence of RGKY, MQ and other evidence.
- c. The Tribunal failed to make any finding what the best interests of RGKY’s child would be.
- d. The Tribunal failed to consider a claimed change of character after RGKY went into custody following the birth of his son.
- e. There was a duty upon the Tribunal to inquire and that this was breached.

- f. The Tribunal failed to make findings what was in the best interests of RGKY's minor siblings and minor nieces or nephews.

105 The second ground of appeal is as follows:

His Honour erred by upholding Ground Two and finding that the Tribunal did not consider a claimed change in RGKY's character after RGKY went into custody following the birth of his son. That claim was in fact considered and not accepted by the Tribunal.

PRINCIPLES AND OVERVIEW CONCERNING DIRECTION 79

106 In forming our conclusions on the grounds of appeal, we have had regard to the following principles.

107 In *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 400 ALR 417 (*Plaintiff M1/2021*) at [22]-[27] the plurality of the High Court (Kiefel CJ, Keane, Gordon and Steward JJ) said the following concerning how an administrative decision-maker must approach a decision to be made under s 501CA(4) of the *Migration Act* (citations reformatted):

Decision makers' approach to representations

22 Section 501CA(4) of the *Migration Act* confers a wide discretionary power (38) on a decision maker to revoke a decision to cancel a visa held by a non-citizen if satisfied that there is "another reason" why that decision should be revoked. The statutory scheme for determining whether the decision-maker is satisfied that there is "another reason" for revoking a cancellation decision commences with a former visa holder making representations. In determining whether they are satisfied that there is "another reason" for revoking a cancellation decision, the decision-maker undertakes the assessment by reference to the case made by the former visa holder by their representations (39).

- (38) *Applicant S270 v Minister for Immigration and Border Protection* (2020) 94 ALJR 897; 383 ALR 194 (*Applicant S270*) at [36]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13; 395 ALR 403 (*Viane*) at [12].

- (39) *Applicant S270* at [36]; *Viane* at [13]. See also Australia, House of Representatives, *Migration Amendment (Character and General Visa Cancellation) Bill 2014*, Explanatory Memorandum at [92].

23 It is, however, improbable that Parliament intended for that broad discretionary power to be restricted or confined by requiring the decision-maker to treat every statement within representations made by a former visa holder as a mandatory relevant consideration (40). But the decision-maker cannot ignore the representations. The question remains how the representations are to be considered.

- (40) See *Viane* at [13]. See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 (*Peko-Wallsend*) at 39-40; *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 (*Buadromo*) at [41].

24 Consistently with well-established authority in different statutory contexts, there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations (41). Adopting and adapting what Kiefel J (as her Honour then was) said in *Tickner v Chapman* (42), the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker (43). And the decision-maker is not obliged “to make actual findings of fact as an adjudication of all material claims” made by a former visa holder (44).

(41) *Applicant S270* at [36]; *Viane* at [13]. See also *Tickner v Chapman* (1995) 57 FCR 451 at 462, 476, 495; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 (**Miah**) at [81]-[82]; *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088 (**Dranichnikov**) at [24], [88], [95]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (**SZMTA**) at [13], [105]; *DVO16 v Minister for Immigration and Border Protection* (2021) 95 ALJR 375 (**DVO16**) at [12].

(42) (1995) 57 FCR 451 at 495.

(43) See *Peko-Wallsend* at 41; *Abebe v The Commonwealth* (1999) 197 CLR 510 at [197]; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 (**SZJSS**) at [33].

(44) *Viane* at [14].

25 It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness (45). What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations (46). The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations (47). The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them (48).

(45) *Viane* [13]. See also *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 (**Hetton Bellbird Collieries**) at 430; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at [34]; *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [73]; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [38]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [90]-[92]; *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22 (**Wei**) at [33].

(46) *Peko-Wallsend* at 40; *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 (**CRI026**) at [66]; *SZMTA* [13], [105]; *AXT19 v Minister for Home Affairs* [2020] FCAFC 32 (**AXT19**) at [56]; *Viane* at [15].

(47) *Dranichnikov* at [24], [95]; *CRI026* at [66]. See also *Tickner v Chapman* at 462-463; *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 152 at [59].

(48) See *Applicant S270* [33]; *Viane* at [15]; cf *Dranichnikov* [78].

26 Labels like “active intellectual process” (49) and “proper, genuine and realistic consideration” (50) must be understood in their proper context. These formulas have the danger of creating “a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision maker’s] decision can be scrutinised” (51). That is not the correct approach. As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (52), “[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind”. The court does not substitute its decision for that of an administrative decision-maker.

(49) See *Tickner v Chapman* at 462; *Carrascalao* at [45]-[46]; *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41 at [53]; *Singh v Minister for Home Affairs* (2019) 267 FCR 200 at [30]; *Hands* at [38]; *Omar* (2019) 272 FCR 589 at [37]; *Ali v Minister for Home Affairs* (2020) 278 FCR 627 at [45]; *MQGT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 282 FCR 285 at [20], quoting *Hernandez v Minister for Home Affairs* [2020] FCA 415 at [16]-[20]; *DVO16* at [12].

(50) See, eg, *Khan v Minister for Immigration and Ethnic Affairs* (unreported, Federal Court of Australia, 11 December 1987) at 11; *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470 at [37], [171]; *SZJSS* at [29], [30]; *Bondelmonte v Bondelmonte* (2017) 259 CLR 662 at [43]. See also *Swift v SAS Trustee Corporation* (2010) 6 ASTLR 339 at [45]-[47].

(51) *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513 at [24], quoting *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at [65]. See also *SZJSS* at [29], [34]; *Minister for Immigration and Border Protection v MZYTS* (2013) 230 FCR 431 at [54]; *Carrascalao* at [32], [34]; *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643 (*Maioha*) at [42]; *CXS18 v Minister for Home Affairs* [2020] FCAFC 18 at [35]; *AXT19* at [56]; *XFCS v Minister for Home Affairs* [2020] FCAFC 140 at [22].

(52) At 40; see also 30, 71.

27 None of the preceding analysis detracts from, or is inconsistent with, established principle that, for example, if review of a decision-maker’s reasons discloses that the decision-maker ignored, overlooked or misunderstood relevant facts or materials (53) or a substantial and clearly articulated argument (54); misunderstood the applicable law (55); or misunderstood the case being made by the former visa holder (56), that may give rise to jurisdictional error.

(53) *Craig v South Australia* (1995) 184 CLR 163 at 179; *SZJSS* at [27], citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]-[84]; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [25]; *SZMTA* at [13]; *Viane* at [22]. See also Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at [4.770].

(54) See *SZMTA* at [13], [105]. See also *Dranichnikov* at [24]-[25], [95].

(55) *Hetton Bellbird Collieries* at 430; *Miah* at [81]-[82]; *Wei* at [33].

(56) *Dranichnikov* at [88].

108 We have also taken into account that, as acknowledged by the primary judge at J[55], the reasons of an administrative decision-maker must not be construed minutely and finely, with an eye keenly attuned to discerning error. Rather, they must be read fairly, as a whole: see *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) 258 CLR 173 at [59]-[60] (French CJ, Bell, Keene and Gordon JJ), citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 (**Wu Shan Liang**) at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

109 Further, it is well-established that, while the Tribunal must give the reasons for its decision, it is not required to give the sub-set of reasons why it accepted or rejected individual pieces of evidence. The obligation to give reasons generally does not require a “line-by-line refutation of the evidence of the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the tribunal”: see *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; (2018) 267 FCR 320 (**Buadromo**) at [48] (Besanko, Barker and Bromwich JJ) relying on *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* [2000] HCA 1; (2000) 74 ALJR 405 at [65]-[67] (McHugh J). In *Buadromo* at [49], the Full Court went on to say:

It is generally not essential for a tribunal or other primary decision-maker to refer to every piece of evidence or contention advanced by a claimant. In *Applicant WAEF v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593, the Full Court of this Court said (at [46]-[47]):

It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons. It may be that some evidence is irrelevant to the criteria and some contentions misconceived. Moreover, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different finding of fact (cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [87]-[97]) and a failure by the Tribunal to address a contention which, if accepted, might establish that the applicant had a well-founded fear of persecution for a Convention reason. The Tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised “with an eye keenly attuned to error”. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.

The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an

inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

(see also *Australian Energy Regulator v Australian Competition Tribunal (No 2)* (2017) 255 FCR 274 at [278]; *Carrascalao* at [45].)

110 It is also well established that expressions of conclusion in the Tribunal's reasons in a particular sequence do not necessarily indicate that there has been a failure to consider the evidence as a whole. The Tribunal's reasons should be considered as a whole with an appreciation that their role is to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed: see *Baker v Minister for Immigration and Citizenship* [2012] FCAFC 145 (**Baker**) at [43]-[45] (Nicholas, Yates and Griffiths JJ). This is particularly important where, as here, Direction 79 obliges the Tribunal to have regard to seven principles and three primary and five other considerations.

111 In light of those principles, it is useful to begin with the following observations:

- (a) The Tribunal correctly identified (at DR[6]-[8]) its task under s 501CA(4)(ii) and Direction 79;
- (b) At DR[38], the Tribunal noted that it was required to comply with Direction 79 in performing its task; and
- (c) At DR[39], it noted that the principles set out in Direction 79 "inform" a decision-maker about the matters it must consider in determining whether the cancellation decision will be revoked. It summarised the seven principles at DR[40]-[46], including the relevance of RGKY having been brought to Australia at a young age and the consequences of visa cancellation for minor children and family members. It then summarised (at DR[47]-[49]) the primary and other considerations (noting that they included "the best interests of minor children in Australia") and the weight to be "generally" accorded to primary and other considerations.

112 Of particular relevance to the grounds of appeal are DR[50] and [51] where the Tribunal said:

50. In applying the Direction, it must be kept steadfastly in mind that the obligation is to give active consideration to the circumstances reflected in the evidence. Sight should not be lost of the fact that the rigorous evaluation of the circumstances of a particular case, after all, have an objective: the identification of whether there is another reason to revoke the original decision cancelling a visa. The factors to be considered are not to be robotically applied by simply working through a predetermined list of matters but are to be engaged in a manner that involves genuine consideration and intellect engagement in the process of achieving, or not, the requisite satisfaction.

51. It is nonetheless useful to deal with each consideration informed by the principles. It is convenient to record, consider and deal with each of the primary and other considerations.

113 Conceptually, there is no error in that approach to the Tribunal's task in making a decision under s 501CA(4)(ii) of the *Migration Act*.

114 It is convenient to deal with the second ground of appeal before the first ground.

SECOND GROUND OF APPEAL

115 The second ground of appeal relates to the primary judge's reasoning at J[63]-[69] (see [99]-[103] above). The primary judge's conclusion at J[69] was that, because of the absence of findings about the significant claim that RGKY's character changed after he went into custody following his last offending on 22 July 2019 which occurred after the birth of his son or the evidence supporting that claim, the Tribunal failed to address that claim or evidence as part of an active intellectual process of considering the representations before it under s 501CA(3)(b) and (4) of the *Migration Act*.

Minister's submissions

116 The Minister submitted that the primary judge erred in deciding the second ground of review as his Honour did at J[69] because:

- (a) That claim or argument was considered by the Tribunal, but was impliedly rejected by it. The Tribunal specifically adverted to the evidence underlying that claim at DR[34]-[36]. The Tribunal did not disregard the supporting evidence. At DR[69], the Tribunal accepted that RGKY intended not to re-offend once in the community, to remain drug free and to participate in rehabilitation courses and that his son was motivation to keep away from re-offending. But a fair reading of its reasons at DR[68]-[73] shows that, for the reasons that it gave, the Tribunal did not accept the claim made by RGKY or his witnesses that his behaviour was reformed such that he would not behave in future as he had before; and

- (b) It is necessary to apply the principles discussed in *Baker* at [43]-[45] regarding sequential reasoning in administrative decisions and the need to consider the reasons as a whole, and the discussion in *Buadromo* at [48]-[49] regarding findings as to evidence in reasons for administrative decisions.

RGKY's submissions

117 In overview, senior counsel for RGKY submitted that the important factual background to the appeal is as follows:

- (a) There was a two day hearing before the Tribunal on 1 and 2 October 2020; and
- (b) At that time, RGKY was 23 years old. He had lived his life entirely in Australia and believed himself to be an Australian citizen. He had recently had his first child, a son. He realised during his last sentence that the consequences for his offending were not just imprisonment but also the possible loss of his family and in particular the loss of any relationship with his son.

That is the context in which his claims were advanced. That factual background is of particular importance to the second ground of review.

118 RGKY submitted that the primary judge did not err in upholding the second ground of review for the following reasons.

119 *First*, RGKY submitted that the level of abstraction at which the Minister's second ground is expressed does not precisely reflect (as a matter of fact) what RGKY's claim was as advanced before the Tribunal. As advanced before the Tribunal, the claim was that RGKY's character had reformed after he had been taken into custody following his last offending on 22 July 2019. That claim was advanced in the context of extensive documentary and witness character evidence (**change of character evidence**) as summarised by the Tribunal at DR[35]. That evidence (including from Ms MQ, Ms JW and Mr WW) was that they thought RGKY "would be a different person if released from detention and permitted to stay in Australia" (**change of character claim**).

120 At J[65], the primary judge noted that the "Minister correctly acknowledged that the claim that [RGKY] had changed while in custody and detention, following his arrest in late 2019, was a significant one that the Tribunal had not addressed expressly": see also J[67] to similar effect. The primary judge correctly held (at J[69]) that the Tribunal was required to address the

character claim, which was a clearly articulated, significant and pivotal claim and the evidence relating to it and then to make a finding about it.

121 *Second*, RGKY submitted that the primary judge reasoned correctly (at J[64]) that “there is nothing in the Tribunal’s reasoning that discusses that particular claim or the evidence that the Tribunal summarised at [35]-[36] beyond its statement in [70] that it could not place any particular reliance on what [RGKY] himself said about his future intentions”.

122 In assessing RGKY’s risk of recidivism at DR[66]-[73], the Tribunal considered the factors of the May 2019 pre-sentence report (DR[66]-[68] and [70]), RGKY’s own written and oral evidence (DR[66], [68]-[69]), his long criminal history (DR[70]), whether RGKY’s support network of friends and family would moderate his prospects of re-offending (DR[71]) and whether the prospects of future visa cancellation and deportation would moderate his prospects of re-offending ([DR[72]). It is clear that in assessing the risk of recidivism, the Tribunal did not intellectually engage with the character claim. To do so, the Tribunal was required to address the substantive character evidence from various members of the Australian community that, after his last incarceration and in light of his developing relationship with his son, his character had changed and he would not re-offend.

123 RGKY acknowledges that the fact that the change of character evidence from the members of the community was not mentioned at DR[66]-[73] is not the end of the matter. However, RGKY says that where a particular matter that has been clearly raised in a non-citizen’s representations is not mentioned in the Tribunal’s reasons where relevant, the Court may infer that the Tribunal did not consider it to be material: see *Omar* at [34]. The primary judge was correct, at J[69], to infer that the Tribunal did not resolve the character claim. Read fairly, the Tribunal squarely addressed the risk of recidivism having regard to the factors identified at DR[66]-[73] and failed to analyse the character evidence which corroborated his change of character claim.

124 *Third*, RGKY submitted that the primary judge correctly reasoned (at J[64]) that the Tribunal’s finding that it was unable to place any significant reliance on what [RGKY] says about what he intends to do in the future” at DR[70] might have been open to it “but only after it had done what its reasons did not reveal, namely to assess the written and oral evidence of those who knew [RGKY] ... that revealed that, whatever else one might have thought about him, there was a real foundation for his claim to have changed significantly as a result of his incarceration and the impact that he felt from being separated from his newborn son and his partner”.

125 RGKY says that this reasoning demonstrates that the Tribunal made a critical adverse credibility finding against RGKY without first considering the corroborative evidence from RGKY's witnesses that concerned his character. This is not one of the rare cases in which a party's credibility has been so weakened that the Tribunal may treat what is proffered as corroborative evidence as having no weight because the well has been poisoned beyond redemption and it is not clear from the Tribunal's reasons that it proceeded on that basis.

126 *Fourth*, RGKY submitted that the Tribunal did not consider the change of character claim because, as the primary judge correctly found at J[67], its consideration stopped at its review of RGKY's character as revealed in the May 2019 pre-sentence report and his subsequent criminal offending. The Tribunal did this without making any assessment or finding about the change that RGKY asserted occurred once the latest period of detention commenced. Unlike earlier periods of detention, he now had a son whom he loved and to whom he wanted to be a father but RGKY was separated from him.

127 *Fifth*, RGKY submitted that the primary judge (at J[68]) correctly rejected the Minister's argument that the Tribunal indirectly adverted to having considered the change of character evidence at DR[71] because of RGKY having the benefit of the support of his friends and family were he to be released into the community.

128 *Sixth*, RGKY submitted that the primary judge was correct to find (at J[69]) that, reading the decision record as a whole, the Tribunal did not consider the character claim because of the absence of findings about the character claim: see *Yusuf* at [69]. It follows that the primary judge was correct to find that the Tribunal had committed a material jurisdictional error as claimed in the second ground of review.

Consideration

129 Having regard to the Principles (see [106] to [110] above) and for the reasons that follow, we have formed the view that the Tribunal did not fail to consider the claim that RGKY's character changed after he went into custody following his last offending on 22 July 2019 which occurred after the birth of his son or the change of character evidence supporting that claim. We have formed that view notwithstanding that change of character evidence was not expressly referred to at DR[63]-[73] (see [79] above), where the Tribunal considered the risk to the Australian community should RGKY commit further offences and the likelihood of him engaging in further criminal or other serious conduct.

130 *First*, we have taken into account that the Tribunal in this case set out how it must approach the matters it is required to take into consideration under Direction 79 at DR[38]-[51] and in particular that the Tribunal reminded itself at DR[50]-[51] that in applying the Direction:

- (a) It must keep “steadfastly in mind that the obligation is to give active consideration to the circumstances reflected in the evidence”;
- (b) The factors to be considered are “not to be robotically applied by simply working through a predetermined list of matters but are to be engaged in a manner that involves genuine consideration and intellectual engagement in the process of achieving, or not, the requisite satisfaction”; and
- (c) It was nonetheless useful to deal with each consideration and to “record, consider and deal with each of the primary and other considerations”.

131 At DR[63], the Tribunal set out the requirements of cl 13.1.2(a) and (b) of Direction 79, noting that the Tribunal was required to consider, cumulatively, “the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct” and, relevantly to this ground of appeal, the “likelihood of the non-citizen engaging in further criminal or other serious conduct, *taking into account available information and evidence on the risk of the non-citizen reoffending*” (emphasis added).

132 It is clear that the Tribunal was alive to its obligations to take into account the circumstances established by the evidence in considering whether there was “another reason” why the cancellation decision should be revoked in accordance with Direction 79, and specifically, the likelihood of RGKY engaging in further criminal or other serious conduct if the cancellation decision was revoked.

133 *Second*, the Tribunal expressly adverted to RGKY’s change of character claim at DR[34] and correctly summarised the force of the supporting change of character evidence at DR[35]-[36] (see [70] above). It is plain that the Tribunal read and understood the submissions from RGKY, Ms MQ, Mr WW and Ms JW (among others) containing the change of character claim and change of character evidence and understood that it was not just RGKY who asserted that he had changed since his detention after his last offending on 22 July 2019 and that he was unlikely to re-offend if released to the community.

134 Further, at DR[63]-[73], there is extensive reference back to matters summarised under the heading “Facts” which covers DR[9]-[36].

135 Accordingly, there is evidence that the Tribunal did not overlook the change of character claim or evidence. Having considered the decision record as a whole, there is no reason to think that the Tribunal forgot either the claim or the evidence.

136 *Third*, reading the decision record fairly, it is clear that the Tribunal had formed the view that it should treat with caution the evidence given by Ms MQ and Mr WW. We consider that the Tribunal was entitled to do so for the reasons that it gave at DR[25] and [36]. The Tribunal formed the view that Ms MQ's evidence was likely to have been affected "by her desire to paint things better for RGKY" (since she denied RGKY had committed the offence against her for which he was convicted) so that her main focus on her son having a relationship with his father could be advanced: DR[25]. The Tribunal also noted that Mr WW "frankly conceded that his evidence might be biased by reason of his affection for RGKY": DR[36]. The Tribunal was entitled to bear those matters in mind in weighing the evidence and making its findings.

137 In making those findings, the Tribunal demonstrated its appreciation of who was making the representations: see *Plaintiff M1/2021* at [24]. They were not disinterested or expert third parties but people invested in it being true that RGKY had reformed not just because he might then be allowed to remain in Australia, but also because it would be better for all of them if it were true. Further, their change of character evidence did not appear to take into account that RGKY was (as he said (see DR[34])) drug free because he was imprisoned or detained and the difficulty he might face in remaining so in the community. It was open to the Tribunal to accord little weight to their evidence of the likelihood of RGKY's change of character being maintained after RGKY was returned to the community in those circumstances.

138 *Fourth*, we do not know the detail of oral evidence given to the Tribunal because the transcript of the Tribunal hearing is not in evidence. However, none of the documentary evidence given by RGKY, Ms MQ, Mr WW, Ms JW or any of the others who commented on RGKY's change of character since the birth of his son envisaged what might be the situation if, upon his release to the community, RGKY was unable to give full effect to his intentions (which the Tribunal accepted that he held (DR[69])) not to take drugs or re-offend, in particular, by the commission of offences against women such as his partner and his own mother in the presence of his child, which the Tribunal had found to be serious in nature.

139 However, as noted at DR[63], the Tribunal was required to consider the likelihood of RGKY engaging in further criminal or other serious conduct under cl 13.1.2(b) of Direction 79. We conclude that, on a fair reading of DR[63]-[73], in performing that task the Tribunal did in fact

consider whether it was able to conclude that RGKY had changed in such a way as to reduce the likelihood of his re-offending if he was released into the community, albeit that it did not expressly refer to the supporting character evidence.

140 The fact that the Tribunal framed some of its consideration of the likelihood of RGKY re-offending by reference to his stated intentions at DR[69] and [70] is not a reason to think that the Tribunal remembered what was said at DR[34] but overlooked or forgot the change of character evidence which it referred to at DR[35]-[36]. There is reason to think that, in accepting that RGKY held his stated intentions for his life in the community in the future at DR[69], the Tribunal had regard to the change of character evidence because it supported his stated intentions and RGKY has not demonstrated otherwise. Contrary to RGKY's submissions, what the Tribunal said at DR[69] indicates that the Tribunal did not make an adverse credit finding about RGKY's evidence in this regard. For other reasons, it was simply unable to accept that it was likely to be an accurate prediction of what would happen if RGKY was released into the community.

141 It is notable that in the second sentence of DR[69] the Tribunal accepts that the fact of RGKY's young son and the deterrent effect of being imprisoned and placed in detention were "some motivation" against re-offending. That sentence is not framed in terms of RGKY's intentions or evidence alone. It picks up the evidence recorded by the Tribunal at DR[34]-[36] and accepts it in a qualified way. It was not necessary for the Tribunal to be explicit that it had considered the change of character evidence recorded at DR[35]-[36] in making that finding: see *Buadromo* at [48]-[49] and the cases there cited.

142 *Fifth*, we do not consider that the Tribunal fell into error when testing the likelihood of RGKY re-offending if released into the Australian community by having regard (at DR[66]-[72]) to the following matters the factual background to which was set out at DR[17]-[34].

143 The Tribunal properly considered the commonality of findings in the May 2019 pre-sentence report and the nature of the evidence which RGKY gave to the Tribunal discussed at DR[66]-[68]. We note that RGKY was incarcerated in July 2019 for the last time after his son was born in May 2019. We infer from the decision record (for instance, DR[24] and [32]) that RGKY gave evidence at the hearing held on 1 and 2 October 2020. The Tribunal in effect found that RGKY's evidence to it demonstrated that he continued to fail to take responsibility for his offending by denying:

- (a) that he punched Ms MQ in the stomach in August 2018 in the incident for which he was convicted in May 2019; and
- (b) his culpability in his conduct against his mother in November 2018 for which he was convicted October 2019,

and by seeking to both justify his behaviour and to excuse it by attributing it to his upbringing and the death of his sister. Like the pre-sentence report, the Tribunal also found that RGKY failed to demonstrate genuine remorse or understanding of the impact of his actions on his victims and other family members.

144 Accordingly, the Tribunal effectively observed that, at the time he gave evidence to it in October 2020, RGKY had not changed in ways which affect the likelihood of him re-offending when released into the community in circumstances where the May 2019 pre-sentence report had found for the same reasons that he was at a medium to high risk of re-offending. Read fairly, we understand this consideration to be at play in the finding at DR[73] which refers to the opinion expressed in the pre-sentence report.

145 Given those findings, we see no error in the Tribunal not further mentioning expressly the change of character evidence before finding (at DR[70]) that it could not place “significant reliance” on RGKY’s stated intentions (and implicitly on the change of character evidence) in light of:

- (a) The offences that occurred while RGKY was in the community after RGKY had already experienced four months incarceration, after he had been warned by the Magistrate that “things were serious” and there would be “consequences” of further offending and after his son was born but before he went into custody in late July 2019;
- (b) RGKY’s conduct during the 12-month intensive correction order (which required him to be drug free) and his unwillingness to take up a rehabilitation course at that time; and
- (c) The fact that RGKY’s ability to remain drug free in the community was unknown because it was untested since his last incarceration after his child was born.

146 For completeness, before making its finding (at DR[73]) that there was a “real likelihood” of RGKY re-offending again in the future and that the protection of the Australian community weighs heavily against revocation of the cancellation decision, the Tribunal also took into account that:

- (a) The support of his family and friends “did not assist much in the past” in preventing RGKY from offending: DR[71]; and
- (b) Although the proposition that RGKY would be deterred from further offending because he knew he would be deported if he did was superficially attractive, the last resort of criminal sanctions, incarceration, had not been a sufficient deterrent in the past.

147 We perceive no jurisdictional error in the Tribunal taking into account RGKY’s past conduct in testing whether his stated intentions and the asserted beliefs of RGKY, Ms MQ, Mr WW and others were likely to be realised if the cancellation decision was revoked. Accordingly, we consider that, with respect, the primary judge fell into appellable error in finding that the Tribunal fell into jurisdictional error in reaching the conclusion that his Honour did at J[69].

FIRST GROUND OF APPEAL

Minister’s submissions

148 **Particular a** of the first ground of appeal relates to the primary judge’s finding at J[49] (see [94] above) that the Tribunal “failed to engage in an active intellectual process in determining what the best interests of [RGKY’s] son were and what weight should be given to them”. It also relates primarily to DR[77]-[85] set out at [83] above.

149 In relation to particular a, the Minister submitted that DR[73]-[82] need to be read in context and went on to submit as follows.

150 At J[49], the primary judge found that it was “impossible to understand how, in that context, the Tribunal asserted that it was ‘unable to make any assessment at all’ as to the magnitude of the loss of that connection, which is an ordinary incident of the relationship between a parent and child”. The Minister submitted that the context provided by the primary judge for that finding was an incomplete rendering of the Tribunal’s findings at DR[79] where the Tribunal described limitations on the contact between RGKY and his son.

151 The Minister noted that Tribunal’s statement that it was “unable to make any assessment at all as to the magnitude of the loss of that connection” is from DR[82], but the primary judge did not fairly acknowledge the explanation for saying that provided in the remainder of DR[82] read with DR[81]. The Minister submitted that:

- (a) The Tribunal acknowledged (at DR[82]) that RGKY’s return to New Zealand would have “something of a negative impact on RGKY’s son”. The Minister submitted that,

by the language which the primary judge quoted from DR[82], the Tribunal simply acknowledged that the magnitude of the “negative impact” on RGKY’s son cannot be precisely quantified. That magnitude is not something anyone can know for sure;

- (b) At DR[81], the Tribunal found that RGKY’s criminal history (in particular, the offending against Ms MQ and against RGKY’s own mother when his child was in her care and in the child’s presence), coupled with the Tribunal’s assessment that RGKY is likely to re-offend (see DR[73]) left it “unable to find that RGKY would, on balance be likely to play a positive parental role in his son’s life in the future” and that if his past behaviour was repeated there would be a “negative impact on RGKY’s son because of its likely psychological impact”;
- (c) At DR[81], the Tribunal found that the matters identified in (b) above caused it to “moderate the weight” it gave to the consideration set out in cl 13.2 regarding the best interests of RGKY’s son. The Minister submitted that this should be read as the Tribunal finding that the factors in (b) above caused it to moderate the weight it gave to the negative impact on RGKY’s son of RGKY’s removal to New Zealand which it goes on to find in DR[82] (see (a) above);
- (d) The appropriate interpretation of DR[82] is not that the Tribunal was failing to make a finding as to where RGKY’s son’s best interests lie. Rather, the Tribunal was accepting that RGKY’s son’s best interests lie in favour of revocation. The Tribunal found that phone and social media contact between RGKY and his son would mitigate the negative impact on the son of RGKY’s removal to New Zealand. The Tribunal was not saying that phone and social media contact would be a substitute for living with both parents, having already accepted at DR[79] that day to day contact and physical involvement is the optimal or ideal; and
- (e) The Tribunal did ultimately make a finding that RGKY’s son’s best interests weighed moderately in favour of revocation of the cancellation decision: see DR[85] and [106].

152 **Particular b** of the first ground of appeal relates to the primary judge’s finding at J[60] that the Tribunal’s assertion at DR[82] that there was a “dearth of information” ignored evidence of RGKY, Ms MQ and others so that the Tribunal did not carry out its function of review.

153 The Minister submitted that that finding of the primary judge seems to be a reference back to the evidence that was referred to by the Tribunal at DR[80]. At DR[80], the Tribunal accepted the statements of RGKY, Mr WW, Ms JW and Ms MQ and others about RGKY’s devotion to

his son both in the past and in all likelihood into the future, that it is their desire that RGKY be part of his son's life as he grows up and that "[a]ll of those things can only be something that would be positive in a child's upbringing and therefore in the best interests of the child".

154 The Minister submitted that the Tribunal ought not be assumed to have forgotten or not considered at DR[82] evidence which it had accepted two paragraphs earlier: see *Baker* at [43]-[45]; *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 at [79] (Perram, Murphy and Lee JJ). The Tribunal accepted at DR[82] that RGKY's return to New Zealand "will necessarily have some impact on RGKY's son" but it was "unable to make any assessment at all of the magnitude of that impact, because of the dearth of evidence that was presented". The Minister submitted that that is not to ignore what was said in the evidence of RGKY, Mr WW, Ms JW and Ms MQ (and others), but rather to find it unsatisfying at a particular level. The balance of DR[82] referred also to the mitigating effect of telephone and social media contact of the kind that had occurred in previous months between RGKY and his son. They were factual assessments that were reasonably open to the Tribunal and there was no jurisdictional error.

155 **Particular c** of the first ground of appeal relates to the primary judge's finding at J[56] (and a finding to similar effect at J[60]) that the Tribunal's statement at DR[82] concerning its inability to make any assessment at all of the magnitude of the impact on RGKY's son of his father's removal to New Zealand beyond saying that it had "something of a negative impact", "eschewed making any finding of exactly what the best interests of the child would be".

156 The Minister submitted that that was an incorrect characterisation of what the Tribunal said and that it is clear that the Tribunal did see the interests of RGKY's son as being served by revocation of the cancellation decision but, for reasons previously submitted by the Minister, the Tribunal moderated the weight given to that consideration for the reasons stated at DR[78]-[82] which resulted in the finding at DR[85] (and DR[106]) that the best interests of RGKY's son "weighed moderately in favour of revocation". As was said in *Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128 (*Sami*) at [24] (Jagot, Barker and Perry JJ), the attribution of weight, a function that the Tribunal is bound to perform, does not "undo" the earlier finding that it would be in the best interests of the children for the appellant to remain in Australia.

157 The Minister further submitted that the passages from the High Court's decision in *Uelese* at [62]-[63] and [65]-[66] referred to in the primary judge's reasons at J[56]-[57] and [60] have

no relevance to RGKY's case. That is because the best interests of RGKY's son were in fact considered in this case unlike the position in *Uelese*, where the Tribunal acted upon a misunderstanding of s 500(6H) of the *Migration Act* by wrongly assuming that it was prevented from consideration of evidence that had fallen at the hearing regarding children whose existence had not previously been disclosed.

158 The Minister submitted that, while it depends on the facts as to whether or not it is open to the Tribunal to do so, where there is a paucity of evidence, the Tribunal may without error find that it is unable to make a determination: see *Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1710, (2019) 167 ALD 449 at [96] (Griffiths J).

159 The Minister noted that, at J[60], the primary judge also referred to the decision in *Sebastian v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 31 (*Sebastian*) at [11] and [15] (Tamberlin, Kiefel and Emmett JJ). The Minister submitted that, as in *Sebastian* at [16]-[19], in this case, there were findings about where the best interests of the children lay but they were moderated and ultimately outweighed (see DR[107]). The Minister submitted that that is an approach which was also approved by this Court in *Nahi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1169 (*Nahi*) at [40]-[59] (Halley J) and the cases there cited.

160 **Particular d** relates to the primary judge's finding at J[54] that whether RGKY's "clearly articulated claim of changing character after he went into custody following the birth of his son", was considered is also relevant to the Tribunal's finding at DR[81] as to the risk of RGKY's reoffending. The Minister noted that was also the basis of the second ground of appeal and submitted that if the primary judge considered this matter as an independent basis for upholding the first ground, it is met by the Minister's response to the primary judge's findings concerning the second ground of appeal. Put shortly, the Minister submits that that argument was considered but not accepted by the Tribunal.

161 **Particular e** relates to the primary judge's finding at J[60] that if there was a "dearth of information presented" as found at DR[82], the Tribunal "would have had to make inquiries about the best interests of the children, particularly the son". The Minister notes that no such ground was pleaded in RGKY's amended application before the primary judge.

162 The Minister submitted that any duty of the Tribunal to obtain evidence itself in addition to what has been placed before it can extend no further than “an obvious enquiry about a critical fact, the evidence of which is easily ascertained” as found in *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 83 ALJR 1123 (*SZIAI*) at [25] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). That there was an enquiry which would have borne a useful result available to the Tribunal was not shown. RGKY bore the onus of establishing such evidence as he bore the onus of establishing jurisdictional error by the Tribunal: see *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 at [67] and [84] and *Minister for Immigration and Border Protection SZMTA* [2019] HCA 3; (2019) 264 CLR 421 at [41] and [46] (Bell, Gageler and Keane JJ). He did not discharge that onus. The Minister submitted that authorities to which the primary judge referred at J[60] do not widen the ambit of any possible duty to enquire acknowledged in *SZIAI*. The decision in *Ueese* is unhelpful to RGKY for reasons previously explained by the Minister and as explained in *Sebastian* at [16]-[19]. Rather, the present case is similar to *Sami* at [24]-[25] and [30] and *Nahi* at [41]-[59] where no duty to inquire further into the best interests of minor children was found. The Tribunal is obliged to assess the best interests of the child based on the evidence and submissions before it and is not under a general duty to inquire about matters not raised: see *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125; (2021) 285 FCR 187 (*Tohi*) at [190] (O’Bryan J, Katzmann J agreeing).

163 **Particular f** relates to the primary judge’s findings that the Tribunal failed to make findings about what was in the best interests of RGKY’s minor siblings and minor nieces and nephews: see J[61]-[62].

164 The Minister noted that, while the primary judge found at J[61] that there was no need for the Court to make “ultimate findings” about the Tribunal’s treatment of the position of RGKY’s minor siblings, the primary judge did find (at J[62]) that it was necessary for the Tribunal to make a determination of what was in the best interests of his minor siblings and minor nieces and nephews but it did not do so.

165 The Minister submitted, with respect, that the primary judge was wrong in that finding because of the Tribunal’s finding at DR[85] where it accepted that the interests of RGKY’s minor siblings and minor nieces and nephews all “weigh slightly in favour of revocation”, see DR[106] to similar effect. Those considerations were, however, found by the Tribunal at

DR[107] to be outweighed by the protection of the Australian community and the expectations of the Australian community.

166 The Minister added that:

- (a) The finding at DR[85] does not stand in isolation having regard to the finding at DR[83]. The primary judge's criticism of the Tribunal's acknowledgement that RGKY's siblings would be "quite upset" if RGKY were to be removed to New Zealand at J[62] was unwarranted: it is necessary to take account of all of the Tribunal's reasoning at DR[83] which takes into account the impact on the acknowledged closeness between RGKY and his siblings in recent years due to his incarceration and detention, his criminal record and the likelihood of him re-offending which led the Tribunal to give this consideration less weight; and
- (b) It has not been shown that the Tribunal did not consider the evidence referred to at J[61]-[62]. As was found in *Buadromo* at [48]-[49], the obligation to give reasons does not require line by line refutation of evidence of a claimant either generally or in those respects where there is evidence that is contrary to material findings made by the Tribunal.

RGKY's submissions

167 RGKY submitted as follows in relation to the primary judge's reasoning at J[48]-[49] in taking issue with the Tribunal's statement at DR[82] that "it was unable to make any assessment at all of the magnitude of the impact because of the dearth of information that was presented".

168 *First*, RGKY submitted that the primary judge was correct in finding (at J[49]) that the Tribunal thereby failed to engage in an active intellectual process in determining the best interests of RGKY's son because:

- (a) The Tribunal had earlier noted (at DR[79]), *without the necessity of evidence* (emphasis in the submission), that "the more optimal or ideal relationship between father and son" involves "daily contact and daily physical involvement in the child's life"; and
- (b) As the primary judge found, the issue as to the magnitude of loss of that connection was an "ordinary incident of the relationship between a parent and child".

169 Insofar as the Tribunal's statement at DR[82] relied on there being a "dearth of information", RGKY submitted that it was unintelligible, and therefore failed to give proper, genuine and

realistic consideration in circumstances. That finding could not be sustained in light of the following:

- (a) At DR[77], the Tribunal expressly noted that there was “not a great deal of evidence about any of the minor children *other than* RGKY’s son” (emphasis in submission); see [83] above;
- (b) At DR[82], the Tribunal recognised that RGKY’s son was “obviously too young to express his preference about RGKY remaining in Australia”;
- (c) In the context of considering the “Expectations of the Australian community”, at DR[91], the Tribunal found that the consequences of non-revocation of the cancellation decision for RGKY’s son would be “*significant* in an emotional sense” (emphasis in submission). We note that RGKY’s submissions persisted in using that phrase, which is not an entirely accurate rendering of what was said at DR[91]: see [84] above; and
- (d) In the context of considering the “Strength, nature and duration of ties”, at DR[96], the Tribunal found that RGKY’s ties to his son were “obviously strong”: see [85] above.

170 *Second*, at J[50], the primary judge took issue with the Tribunal’s reasoning at DR[82] that the “hardship” would be “mitigated” as RGKY would be able to maintain contact with his son by phone and social media. RGKY submitted that the primary judge was correct to hold that the fact that one parent remains in contact from another location with their child does not deal with the potential impact on the best interests of the child if he or she is not able to live with and grow up in the household of both parents who, as here, are in a relationship in which that can occur; that reasoning is entirely sound.

171 *Third*, in respect of the finding at DR[82] that RGKY’s removal to New Zealand “will necessarily have something of a negative impact on RGKY’s son”, RGKY submitted that the primary judge correctly reasoned (at DR[56]) that the Tribunal “eschewed making any finding of exactly what the best interests of the child would be”. RGKY submitted that this is not a case where the primary judge engaged in impermissible merits review in disagreeing with the Tribunal’s finding that there was “something of a negative impact” on RGKY’s son. Rather, RGKY says that this is a case where the Tribunal’s defective reasoning, which was also internally inconsistent, led the Tribunal to fail to give proper, genuine and realistic consideration to the primary consideration of the “best interests of minor children in Australia”.

172 *Fourth*, RGKY submitted that, insofar as the primary judge took issue (at J[57]-[60]) with the Tribunal’s reasoning at DR[82] that there was a “dearth of information that was presented”, his Honour’s reasoning was sound in finding that the Tribunal failed to act on the information before it and his reliance on the reasoning in *Uelese* at [62]-[66].

173 RGKY relied on the evidence of RGKY and Ms MQ regarding the relationship they wished RGKY to have with his son discussed at J[58], the matters referred to at [169] above and the evidence given by friends, family and others associated with RGKY set out in the appeal book. RGKY submitted that the tenor of that evidence was that his son would face emotional, financial and practical hardship if RGKY was removed to New Zealand. The primary judge was correct to find, at J[59], that the Tribunal was obliged to engage in some “real and active intellectual process” that considered and made a finding about what the best interests of the child were if he was deprived permanently of one of his two parents; the primary judge’s recitation (at DR[59]) of Allsop CJ’s comments in *Hands* at [3] was entirely apt to this case. The primary judge was correct to find, at J[60], that if there was indeed a dearth of information, the Tribunal would have had to make inquiries about the best interests of the minor children, particularly his son but in this case (and by analogy with *Uelese*), there was no paucity, the Tribunal simply failed to engage lawfully with the material before it.

174 *Fifth*, RGKY says that the primary judge was correct to take issue (at J[62]) with the Tribunal’s reasoning concerning RGKY’s relationship with his siblings. At DR[83], the Tribunal accepted that they would be “quite upset” if RGKY was returned to New Zealand and that it “did not know a great deal about their present relationship with RGKY or even their relationships in his adult years”. Those findings were unintelligible and the Tribunal failed to give proper, genuine and realistic consideration to the best interests of RGKY’s siblings because it failed to engage with any of the following evidence:

- (a) As found by the primary judge at J[62], the Tribunal did not discuss or make findings about the evidence of Mr WW summarised at DR[36] that RGKY’s siblings said that they would miss him and were distressed at the thought of his removal;
- (b) At DR[91], the Tribunal made a clear finding that RGKY’s siblings would be subject to *significant emotional hardship* (emphasis in the submissions) if the cancellation decision was not revoked. RGKY says that, implicit in that finding is a recognition of the close relationship between RGKY and his siblings, otherwise why would they suffer emotional hardship for that reason; and

- (c) Various written materials before the Tribunal spoke to the present relationship (or a fairly recent relationship) between RGKY and his siblings.

175 The written materials on which RGKY relied in relation to his present or fairly recent relationship with his siblings were:

- (a) The evidence of a registered paramedic said that RGKY’s “brothers and sisters – as well as his parents, grandparents and partner will all be affected deeply and permanently, should [RGKY] not be allowed to stay in Australia”;
- (b) The evidence of his first cousin that RGKY “needs to be able to be someone his 4 younger siblings look up to & rely on”;
- (c) His grandmother’s evidence that RGKY “would be so different if he could stay in Australia with his siblings and mainly his son”;
- (d) RGKY’s statement of facts, issues and contentions which included:
 - (i) Representations that his mother, father, partner, grandparents, three brothers and two sisters, eleven aunts and uncles, four nieces and nephews and 36 cousins are concerned for RGKY’s safety in New Zealand and they are prepared to look after and support him; and
 - (ii) The same group and RGKY’s son are mentioned in his ties to Australia;
- (e) RGKY stated in his personal circumstances form that he would like to stay in Australia “to be with my family as all of my family are here”. Read in context, that should be taken to include his siblings whom he included in his list of family members in that form. RGKY submitted that it was important that, at the end of the page which included the list of his family members, RGKY stated:

My family are very important - my Nan relies on me to help her as she is not well most of the time with Heart issues. I check on my Nan daily and do lots of jobs for her - My cousins, Brothers, sister and all my family are here in Australia and I don’t know how I would live without them.
- (f) The 2016 Juvenile Justice Report included in the Appeal Book reported that RGKY was managing PTSD associated with the passing of his younger sister “along with the daily fear his younger siblings may further be removed from the care of his grandparents”; and
- (g) A 2019 NSW Sentencing Assessment Report included in the Appeal Book made plain that RGKY “advised that he has family support from his grandmother and siblings”.

176 In oral submissions, senior counsel for RGKY submitted that the Minister's reliance on particular statements in the authorities, rather than focussing on what the ratio of the decisions were, should not be accepted. For instance, the statements made by the High Court in *SZIAI* in relation to whether the Tribunal has a duty to make inquiries were made in the context of the duties imposed on the Tribunal under s 425 of the *Migration Act*. This appeal, on the other hand, concerns the Tribunal's approach to a decision to be made under s 501CA(4)(ii) of that Act, where the obligation to afford procedural fairness applies more fully. In this case the issue is whether it was enough for the Tribunal to say that there was a dearth of evidence and that it could not make an assessment of the magnitude of the impact on RGKY's son of RGKY's removal to New Zealand (at DR [82]).

177 Senior counsel submitted that, in this case, if there was a dearth of evidence on a critical issue for the decision, then the duty to afford procedural fairness came into play and the Tribunal should have told RGKY as much. It is not appropriate to discuss this issue in terms of whether the Tribunal has a duty to inquire which has grown out of the decision in *SZIAI*, which has a context of its own. Rather, it is an issue of giving content to the duty to afford procedural fairness, which is part of the right to be heard as discussed by the Full Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 293; (1994) 49 FCR 576 (Northrop, Miles and French JJ). If the Tribunal considered that there was a dearth of evidence on the basis of which it would give less weight to the primary consideration of the best interests of children affected by the decision, a party appearing at the Tribunal hearing should have been put on notice of that issue – and that is not to suggest that the Tribunal was under an obligation to give a running commentary on its thought processes.

178 If it was not correct that there was a dearth of evidence, then the Tribunal had an obligation to engage with the evidence that was there. RGKY says that there was not a dearth of evidence on the issue of the interests of minor children such that if the Tribunal thought it was not enough it had to say so at the hearing. It was not open to the Tribunal, by saying that there was a dearth of evidence, to avoid making a finding about the magnitude of the impact on RGKY's son of his father's removal to New Zealand. The Tribunal has to make the best of what it has got before it. If the Tribunal was of the view that it was unlikely that the child would be around RGKY because of the likelihood that he would re-offend, the Tribunal was also obliged to consider what would happen if that was not right in an active consideration of the impact of RGKY's removal to New Zealand on his son's best interests. The totality of the case presented must be considered.

179 Senior counsel submitted that:

- (a) Insofar as the Minister relies on the fact that the transcript of the proceedings at the Tribunal hearing is not in evidence and says it was for RGKY to demonstrate jurisdictional error, this is an appeal, not a first instance trial and it is for the Minister to show error in the primary judge's decision making. Further, while there is no transcript of the Tribunal hearing before the Court on appeal, the Tribunal's reasons are;
- (b) The Minister's submissions on appeal are in effect a rerun of the matters the Minister raised before the primary judge and they take issue only with elements of the primary judge's reasoning. On appeal, what the Minister needs to show is that the primary judge was wrong in finding that there was jurisdictional error on the basis of the first ground of review because there was not a dearth of evidence;
- (c) The Tribunal did not discharge its statutory task. Rather, the Tribunal went "through the motions somewhat". While the Tribunal referred to some evidence and some principles, in reality it did not engage with its statutory task, which was to deal with the mandatory considerations set out in Direction 79.

Consideration

180 For the reasons that follow, we find that the primary judge erred in upholding the first ground of review and the Minister has made out the first ground of appeal. Taking into account the Tribunal's obligation to have regard to cl 13.2 of Direction 79 in its consideration of the interests of minor children affected by its decision, in our view the Tribunal performed its task in conformity with the principles discussed in *Plaintiff M1/2021* at [24] and without falling into errors of the kind described in *Plaintiff M1/2021* at [27] (see [107] above).

181 Put briefly, we accept the Minister's submission that the Tribunal accepted that it was in the best interests of RGKY's son and the other minor children who might be affected by the Tribunal's decision that the cancellation decision be revoked, otherwise there would have been nothing to moderate the weight of in relation to that primary consideration: see DR[81] and [85]. We do not accept (for reasons given in relation to the second ground of appeal) that the Tribunal failed to recognise the claim that RGKY's character changed after he went into custody in July 2019 which occurred after the birth of his son or the change of character evidence supporting that claim. Rather, the Tribunal found that there was a "real likelihood" that RGKY would re-offend for reasons that we consider were open to it. Given RGKY's

offending history and that finding, the Tribunal was entitled to moderate the weight it gave to the best interests of RGKY's son for the reasons that it gave at DR[81] and the best interest of his siblings for the reasons it gave at DR[83]. The Tribunal did not err in its consideration (at DR[82]) of the issues it was required to consider under cl 13.2(4)(c)-(d) of Direction 79 in relation to the best interests of RGKY's son, despite its infelicitous use of language in the second sentence of DR[82]. In the absence of evidence concerning the relationship between RGKY and his nephew and nieces, the Tribunal did not err in according slight weight to their interests: DR[84] and [85]. The High Court's decision in *Ueese* at [62]-[66] does not support the primary judge's finding at J[60] that if there was a dearth of information presented about the minor children affected by the Tribunal's decision, the Tribunal would have had to make inquiries about the children, especially RGKY's son. Rather, in the context of this case, the Tribunal's obligation to make inquiries extended no further than the High Court's decision in *SZIAI* at [25] would require: see *Sami* at [30] and *Tohi* at [190].

182 In deference to the parties' submissions, more detailed reasoning follows.

183 As observed above, there is nothing conceptually wrong with how the Tribunal conceived the approach to its task under s 501CA(4)(ii) and Direction 79 as described at [111]-[112] above. In our view, the Tribunal applied that approach to its consideration of the best interests of minor children as required by cl 13.2 of Direction 79 and it gave active consideration and the requisite level of engagement to the circumstances revealed by the evidence as discussed at DR[50]-[51].

184 It is useful to consider the Tribunal's reasoning in relation to each of the matters it was required to consider by cl 13.2(4) of Direction 79 which are summarised at DR[76]. It is notable that the Tribunal completed its summary of the factors in cl 13.2(4) in DR[76] by saying "I have reproduced these factors so that the observations I make below can be understood in that context". It is necessary to bear this statement in mind in order to read the Tribunal's reasons at DR[77]-[85] fairly. We are not satisfied that the primary judge's reasoning in relation to the first ground of review took this sufficiently into account.

185 The Tribunal summarised cl 13.2(4)(a) of Direction 79 as being "the nature and duration of the relationship between the child and the non-citizen" noting that "***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***" (emphasis added).

186 This factor looks at the relationship between the non-citizen and the minor up to the time the Tribunal makes its decision. After noting (at DR[77]) that RGKY's son was then 17 months old, the Tribunal considered this factor in relation to that child at DR[78]-[79] as follows:

- (a) There were six or seven weeks after the child was born and before RGKY went into custody on 22 July 2019 in which the contact between RGKY and his son was "day in day out meaningful contact";
- (b) The period between 22 July 2019 and March 2020 where the contact was in person once or twice a week, where RGKY played with the child and attended to the things that "fathers often do with babies"; and
- (c) The final period from March 2020 during which pandemic restrictions precluded in person contact between RGKY and his family so that RGKY and his son had daily remote contact by telephone or social media. The Tribunal found that RGKY's contact with his son in this period was "meaningful but not to be overstated" (that is, limited meaningful contact) when compared with the "more optimal or ideal" relationship of day to day contact and physical involvement.

187 The Tribunal summarised the next four factors it was required to consider under cl 13.2(4) as follows:

- (a) Cl 13.2(4)(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" (emphasis added);
- (b) Cl 13.2(4)(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***";
- (c) Cl 13.2(4)(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***"; and
- (d) Cl 13.2(4)(e): "***whether there are other persons who already fulfil a parental role in relation to the child***".

(Emphasis added)

188 The Tribunal addressed these considerations in relation to RGKY's son at DR[80]-[82].

189 The Tribunal accepted that RGKY was devoted to his child and the desire of RGKY, Ms MQ and his grandparents (among others) for RGKY to be part of his son's life growing up and found them to be positive things in the child's upbringing and therefore in his best interests. However, the Tribunal also found (at DR[81]) that those things need to be balanced against:

- (a) RGKY's history of criminal offending (involving offences against Ms MQ and his own mother in the presence of his son); and
- (b) The Tribunal's finding that there was a real likelihood that he would re-offend in the future (for the reasons given at DR[66]-[73]) and if he did, it would likely have a psychological impact on RGKY's son. It is useful to remember that, in making that finding, the Tribunal took into account evidence given by RGKY (as at October 2020) which indicated that he still failed to understand the impact of his offending on his victims or other members of the family (see [143] above).

The Tribunal concluded that it was "unable to find that RGKY would ... be able to play a positive parental role in his son's life in the future" and that if RGKY did re-offend as he had in the past "that will invariably have a negative impact on RGKY's son because of its likely psychological impact on the child". The Tribunal "remembered" that "RGKY's most recent offending against his mother had been in the presence of the child".

190 The language deployed in DR[81] suggests that the Tribunal accepts that it is in the best interests of RGKY's son that the cancellation decision be revoked, but that it would moderate the weight to be applied to that primary consideration because of those balancing factors. This method of reasoning is of the kind accepted by the Full Court in *Sami* at [24].

191 This reasoning discloses no failure of active engagement with relevant evidence and representations before the Tribunal in relation to the best interests of RGKY's son. As previously said, the fact that none of RGKY, Ms MQ or RGKY's grandparents (or others) took the considerations which the Tribunal set out at DR[81] into account in giving their views of the best interests of RGKY's son did not preclude the Tribunal from doing as it was required to do under cl 13.2(4). Further, the fact that the Tribunal did take those factors into account does not mean that it did not take into account evidence given by RGKY, Ms MQ or RGKY's grandparents (and others) as demonstrated at DR[80] or the change of character claim and evidence, it simply did not accept that it was likely to be an accurate prediction of RGKY's future conduct in the community.

192 When, in considering cl 13.2(4)(d), the Tribunal found (at DR[82]) that RGKY's removal to New Zealand would "necessarily have something of a negative impact" on his son, it was picking up on the terms of the submission in RGKY's statement of facts, issues and contentions dated 9 September 2020 at [28] concerning the interests of minor children which was reproduced by the primary judge at J[39] (see [92] above). Paragraph [28] states that:

The applicant contends that his removal from Australia will have a "negative impact" upon his minor child and his other nieces and nephews and cousins ages of whom are not known at the time of writing.

193 The Tribunal's conclusion that RGKY's removal to New Zealand would have "something of a negative impact" on RGKY's son was open to it after taking into account the matters mentioned at DR[78]-[81]. It is, contrary to RGKY's submissions, also consistent with the finding at DR[91] that the consequences of not revoking the cancellation decision for RGKY's child, siblings and immediate family are "significant, if only in an emotional sense" and its finding at DR[96] that RGKY's ties to his son were "obviously strong".

194 The tenor of the primary judge's reasoning at J[49]-[50] is critical of the Tribunal's reasoning at DR[82] for taking into account that, if RGKY were removed from Australia, there would be other means of contact between him and his son and that Ms MQ was fulfilling a parental role because they were not substitutes for RGKY's son growing up in a household with both parents. That reasoning was in error because cl 13.2(4)(d) and (e) of Direction 79 required the Tribunal to consider whether there is a capacity to maintain contact between the non-citizen and the child if the non-citizen were removed from Australia and whether there is someone available to fulfil a parental role. Where such factors exist, they will generally (and subject to the nature of the relevant relationships) mitigate the negative impact on a child of a non-citizen parent's removal from Australia, as the Tribunal found in relation to the capacity for RGKY and his son to maintain contact by telephone and social media. There is no suggestion in the Tribunal's reasons that those things are a substitute for RGKY's day to day involvement in the child's life where, and to the extent that, it is possible.

195 Further, the primary judge's reasoning at J[49]-[60] also fails to take account of the factors identified by the Tribunal at DR[81] even though the primary judge summarised them at J[48]. As said previously, it was necessary for the Tribunal to take them into account in considering matters identified in cl 13.2(4) of Direction 79 and in evaluating the evidence given by RGKY, Ms MQ, Mr WW and others concerning the best interests of the child so that it could make a properly informed determination of the best interests of RGKY's son, as required by cl 13.2(1)

of Direction 79. With respect, the primary judge fell into impermissible merits review in his Honour's reliance on the evidence of Ms MQ, Mr WW and others at J[51]-[60] without taking into account that the Tribunal must also take those balancing factors into account in reaching its determination.

196 It is true that the sentence in DR[82] "I am unable to make any assessment at all of the magnitude of that impact because of the dearth of information" is somewhat jarring in what is otherwise thorough reasoning. It might be thought to be more fittingly placed in DR[83] or [84] having regard to the Tribunal's comment at DR[77] that there was not a great deal of evidence about any of the minor children other than RGKY's own child. However, the Court should not be concerned with such looseness or unhappy phrasing in the Tribunal's language: see *Collector of Customs v Pozzolanic* [1993] FCA 456; (1993) 43 FCR 280 at 287 approved by the High Court in *Wu Shan Liang* at 271-272.

197 Further, these things should also be taken into account in relation to that remark:

- (a) "Dearth", as defined in the Macquarie Dictionary, means "scarcity or scanty supply; lack". That word was not wholly inapt to the availability of reliable evidence (as to which see (b)-(e) below) concerning the impact on RGKY's son of his father's removal to New Zealand. It is also possible that, having regard to the context, the Tribunal meant that the evidence did not just point one way, even though that is not a usual meaning of "dearth";
- (b) RGKY's son was an infant. This is not a case where the child was capable of giving his views for the purposes of cl 13.2(4)(f) of Direction 79. It is also not a case where the father and child had lived together for a length of time during which the father was in the community as the child grew up and observations could be made of the impact on the child of its parent's absence (eg, overseas or in custody);
- (c) The Tribunal reasonably considered that the evidence given by Ms MQ should be treated with caution because it was tailored to achieve an outcome that she desired. Mr WW acknowledged that his evidence might be optimistic because of his affection for RGKY. Some others who gave evidence did not have experience of RGKY's current relationships (for instance, some evidence relied on reports from Ms MQ). The Tribunal was also entitled to treat RGKY's evidence as to his future conduct as aspirational since his capacity to avoid drugs and his consequent capacity not to re-offend were untested in the community since the birth of his child and he had proved

incapable of not re-offending despite many sentences short of imprisonment before the birth of his child, and he had re-offended after the birth of the child;

- (d) The likely actual relationship between RGKY and the child in the future was not susceptible of a precise finding so that the magnitude of the impact of its loss on the child was also not capable of precise measurement even though the Tribunal accepted (at DR[91]) that it was significant that there would be an emotional impact on the child. As acknowledged by the Tribunal at DR[34]-[36] and [80], the evidence did disclose that RGKY and his immediate family wanted the relationship between RGKY and his son to be a good one, with a father who had given up drugs and criminal offending where RGKY and Ms MQ remained in a relationship and in the same home. However, the Tribunal had found that there was a “real likelihood” that RGKY would re-offend and his capacity to remain drug free was untested in the community. While RGKY, Ms MQ and his grandparents envisaged an ideal future with RGKY in the future, other evidence indicated that RGKY was damaged by the time he spent with a neglectful, alcoholic mother. That supported the Tribunal’s view that if RGKY did re-offend in the future as he had in the past (of which there was a “real likelihood”), then his son would suffer psychological damage; and
- (e) There was no expert evidence.

198 Most importantly, having made a finding that RGKY’s removal from Australia would have “something of a negative impact” on his son, the Tribunal did not have an obligation to make a finding about the exact magnitude of the negative impact on the child of RGKY’s removal to New Zealand.

199 The primary judge’s finding at J[56] that the Tribunal’s stated inability to make any assessment at all of its magnitude thereby “eschewed making any finding of exactly what the best interests of the child would be” was in error. Under cl 13.2(4)(d) of Direction 79 (which was under consideration at DR[82]), the Tribunal was only obliged to *consider* “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”. The Tribunal did that at DR[82] by finding that RGKY’s removal would have “something of a negative impact” on his son and going on to consider that telephone and social media contact would mitigate that negative effect. The Tribunal satisfied cl 13.2(4)(e) by recognising that RGKY’s son would also have his mother to fulfil a parental role. The fact that a child has a person (indeed, a parent) able to fulfil a parental

role is consequential when the issue is the likely impact on the child of the other parent's removal from Australia.

200 Further, cl 13.2(4)(d) and (e) were only some of several factors set out in cl 13.2(4) that the Tribunal was required to consider in making the ultimate *determination* required by cl 13.2(1) of Direction 79 of whether revocation of the cancellation decision was in the best interests of the child. We accept the Minister's submission that it is implicit in the Tribunal's finding at DR[85] that the best interests of RGKY's son weighed in favour of revocation of the cancellation decision. Logically, that is the only way that that primary consideration could be given "moderate" weight. It also reflects the language used by the Tribunal in the last sentence of DR[81].

201 In our view, having regard to the terms of DR[80] and the decision record as a whole, the Tribunal proceeded from the commonly held assumption that in most cases a child's best interests are served by remaining with their parents where that is possible. We discern no error in the Tribunal relying on the factors that it did at DR[80] to [82] in determining the weight that it would accord that consideration in relation to RGKY's son. In this regard, the Tribunal's reasoning (including at DR[106]) is similar to the Tribunal's reasoning which was not found to be in error in *Sebastian* and *Sami*.

202 Before returning to the interests of RGKY's minor siblings and nieces and nephews, it is necessary to say something concerning the primary judge's finding at J[60] that if there really were a dearth of information about the best interests of the children, particularly RGKY's son, the Tribunal would have had to make inquiries about their best interests. In so saying, the primary judge relied on the High Court's decision in *Uelese* at [62]-[66]. With respect, we do not agree that the decision in *Uelese* supports that proposition.

203 The issue in *Uelese* was whether the Tribunal was able or obliged to consider the interests of minor children in circumstances where the fact that Mr Uelese had children was not raised in submissions he made to the Tribunal but it became evident that he had children in the Minister's cross-examination of another witness at the hearing of an application for review of a delegate's decision made under s 501(2) of the *Migration Act* to cancel Mr Uelese's visa. The Minister sought to argue that the primary consideration of the best interests of the children under Direction 55 was not relevant because it had not been raised as part of Mr Uelese's case. The High Court (at [64] and [68]) found that whether or not it was part of the non-citizen's "case" that relevant minor children's best interests would be served by the revocation of the

cancellation decision, the Tribunal had an obligation under s 499 of the *Migration Act* and Direction 55 to consider that matter and the Tribunal erred in not doing so because of a misunderstanding of the impact of s 500(6H) on its capacity to take into account the witness's evidence given under cross-examination.

204 We accept the Minister's submission that this case is distinguishable from *Uelese* because in this case the Tribunal implicitly made findings required by cl 13.2(1) and expressly made findings about the weight that should be accorded the best interests of the minor children at DR[81], [83] to [85] and [106].

205 The plurality of the High Court in *Uelese* noted (at [66]) that that the Tribunal had "not only declined to act upon the information which was put before it by [the witness], but it also failed to make even the most cursory inquiry to follow up on this information". The plurality went on to say (at [67]) that they found it unnecessary in that case "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". In our view, the decision in *Uelese* does not require or encourage a finding that a Tribunal is obliged to make enquiries greater than "an obvious enquiry about a critical fact, the evidence of which is easily ascertained" as discussed in *SZIAI* at [25]. That was the view taken by the Full Court in *Sami* at [30] where it said:

Similar misconceptions underpin the proposition in the appellant's supplementary submissions to the effect that the tribunal erred in not making inquiries about the adverse effects there would be on the children if the appellant's visa is cancelled. The principles cited in the appellant's supplementary submissions simply do not engage with the facts of the present case. The tribunal in this case found it was in the best interests of the children for the appellant to remain in Australia. The tribunal was not required to make any further finding about the particular kind or degree of impact on the children that the appellant's removal from Australia would have. It was for the appellant to make his case. ... The fact that proceedings before the tribunal are inquisitorial does not involve any form of a general duty to inquire: *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429; 111 ALD 15; [2009] HCA 39 at [25].

See also *Tohi* at [190]. This Court should follow those decisions.

206 We note that, in oral submissions, senior counsel for RGKY made an argument based on procedural fairness: see [176]-[178]. The issue raised was not the subject of a ground of review, or argument before the primary judge. It was also not the subject of a notice of contention. In those circumstances, we accept the Minister's submission that it is not appropriate for this Court to address those submissions.

207 Turning now back to the consideration of the interests of RGKY’s siblings, the primary judge made no ultimate findings about their interests at J[61]-[62] but found the Tribunal’s treatment of their position was problematic for the reasons there given: see [98] above. Without reference to DR[84], the primary judge found that it was necessary for the Tribunal to make a determination of what was in the best interests of the siblings and RGKY’s nephews and nieces as required by cl 13.2(1) of Direction 79 but that the Tribunal did not do so in accordance with law.

208 In our view, the primary judge’s observations were in error and it was open to the Tribunal to make the findings that it did at DR[83] and [85] in relation to the siblings for the following reasons:

- (a) The Tribunal accepted that RGKY and his siblings were close during their youth because of their common plight in foster care and the fact that RGKY assumed “something of a parental role” to them during that time, but it did not have evidence beyond that given by Mr WW (summarised at DR[36]) as to their more recent or current relationship. The first sentence of DR[83] appears to cross-reference that evidence. Mr WW’s evidence was that the siblings missed RGKY and were “distressed at the thought of their brother being removed from Australia”. Although a somewhat laconic description of that evidence, “quite upset” appears to be a fair description. The evidence does not disclose how the distress is exhibited or its likely impact on the minor siblings’ ongoing welfare;
- (b) It is notable that all of the references to the siblings to which RGKY points (see [175] above) are entirely generic, lumped in with all family members. None of the siblings (aged 19, 16, 14 and 13 in 2020) gave evidence of their individual relationship with RGKY and the impact on them individually of his removal to New Zealand. The Tribunal was entitled to regard that fact as significant; they were all of an age to express their view but they did not;
- (c) It is notable that the minor siblings are not even referred to in the statement of facts, issues and contentions at [27]-[29], which deals with the best interests of minor children (see [92] above). That might suggest that RGKY did not have much involvement in their lives in recent times;
- (d) Having regard to the fact that RGKY commenced drug and alcohol abuse and criminal offending at age 16, that he was convicted of 40 offences in the following six years,

that he had formed a relationship with Ms MQ and started his own family and that he was incarcerated or detained for some of the time, it was open to the Tribunal to conclude that RGKY's "parental role" had ceased in recent years;

- (e) It was relevant (and a required consideration) that RGKY would be able to maintain contact with his siblings by telephone and social media;
- (f) The Tribunal's finding that any role that RGKY might have in the siblings' upbringing had to be weighed against the "real likelihood" that RGKY would re-offend if released into the community was relevant to the weight it might attribute to this consideration; and
- (g) In those circumstances, the Tribunal was entitled to find (implicitly) that revocation of the cancellation decision was in the minor siblings' best interest but to accord it only slight weight, as it did having regard to the terms of DR[83] and [85].

209 There is no evidence of RGKY's involvement in the lives of his nephews and nieces, even though submissions made to the Tribunal suggested that RGKY's removal to New Zealand would have an impact on them. Clause 13.2(1) required the Tribunal to make a finding and it was open to the Tribunal to make a neutral finding: see *Uelese* at [67]. Nonetheless, the Tribunal accepted that there was some relationship, in effect, giving the submissions the benefit of the doubt. The Tribunal found that it was in the best interests of the nieces and nephews that the cancellation decision be revoked, but accorded it only slight weight: DR[84]-[85]. In the circumstances, we perceive no error in that finding.

CONCLUSION

210 The appeal should be allowed. The orders made by the primary judge on 28 June 2021 should be set aside and in lieu thereof it should be ordered that RGKY's application for judicial review of the Tribunal's decision dated 26 October 2020 be dismissed with costs as agreed or taxed. RGKY should pay the Minister's costs of the appeal as agreed or taxed.

I certify that the preceding one hundred and sixty-eight (168) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Farrell and Halley.

Associate:



Dated: 2 November 2022