Federal Court of Australia

District Registry: New South Wales

Division: General No: NSD320/2023

TONGIA HALISI HEAKI
Applicant

MINISTER OF IMMIGRATION, CITIZENSHIP & MULTICULTURAL AFFAIRS
and another named in the schedule
Respondents

ORDER

JUDGE: JUSTICE JACKMAN

DATE OF ORDER: 01 August 2023

WHERE MADE: Sydney

BY CONSENT, THE COURT ORDERS THAT:

1. A writ in the nature of certiorari issue directed to the second respondent quashing its decision dated 2 March 2023 (Tribunal File No. 2022/10145).

2. A writ of mandamus issue directed to the second respondent requiring it to determine according to law the application for review made on 12 December 2022.

3. The first respondent pay the applicant's costs as agreed or assessed.

THE COURT NOTES THAT:

1. The first respondent concedes that the decision of the second respondent, the Administrative Appeals Tribunal (**Tribunal**), is affected by jurisdictional error, as follows.

2. *First*, the Tribunal misapplied the applicable law in its findings at [110], as follows:

> *110. The power to grant revocation is dependent upon a finding that the Applicant does not pose a risk to the Australian community. The Tribunal is not so satisfied.*

3. The Tribunal's power to revoke the mandatory cancellation of the applicant's visa required, relevantly, the Tribunal to be satisfied 'that there is another reason why the original decision should be revoked': section 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth) (**Act**).

4. The Tribunal's misapplication of the law was material and therefore jurisdictional.

5. *Second*, the Tribunal failed to comply with Ministerial Direction No. 90 (**Direction**) 'Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA'; cf. subsection 499(2A) of the Act and see, eg., *Kerry v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1355 at [42] and the authorities there cited; *Trout v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 583 at [72] and the authorities there cited; *Brownlie v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 436 at [57] and the authorities there cited.

6. Specifically, paragraph 8.2 of the Direction (the family violence primary consideration) relevantly mandated as follows:

> ...
>
> *(3) In considering the seriousness of the family violence engaged in by the noncitizen, the following factors must be considered where relevant:*
>
> > *a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;*
> > *b) the cumulative effect of repeated acts of family violence;*
> > *c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:*
> > > *i the extent to which the person accepts responsibility for their family violence related conduct;*
> > > *ii the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);*
> > > *iii efforts to address factors which contributed to their conduct; and*
> >
> > ...

7. There was evidentiary material before the Tribunal of relevance to, *inter alia*, paragraph (c) above. This material included evidence that the applicant had completed a Preventing Violence Programme run by Relationships Aotearoa: see AB 212 (representations dated 15 June 2022), AB 280 (representations dated 13 February

2023, also acknowledging and expressing a response for family violence committed in New Zealand, see [10]–[11]), AB 304 (statutory declaration of wife, 'N' at [5]), AB 372 and 373 (letters from counsellor on letterhead of Relationships Aotearoa).

8. The Tribunal overlooked the evidence of the applicant's completion of the Preventing Violence Programme run by Relationships Aotearoa and conflated this program with 12 sessions of anger management the applicant had also completed, in New Zealand, at an earlier time. On the evidence before the Tribunal, these were not one and the same (Tribunal at [18], [54], and see, eg., AB 296[23]).

9. The Tribunal's reasoning on the family violence primary consideration is relevantly at [40], as follows:

> *The Tribunal notes that the Applicant was convicted of offences of family violence in New Zealand. There is also evidence that the infant children have witnessed family violence as discussed in Primary Consideration C. Accordingly, this consideration weighs against revocation.*

10. The Tribunal did not comply with paragraph 8.2(3)(c) of the Direction. It did not have regard to rehabilitation since the applicant's last act of family violence, the extent to which the applicant accepted responsibility for their family violence and the extent to which the applicant accepted the impact of their behaviour on the victim: Direction 90, paragraph 8.2(3)(c).

11. The Tribunal's error was material and therefore jurisdictional.

Date that entry is stamped: 1 August 2023

Registrar

Schedule

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Second Respondent ADMINISTRATIVE APPEALS TRIBUNAL