FEDERAL COURT OF AUSTRALIA

JVGD v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1253

Review of:	*JVGD and Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 2830
File number:	NSD 841 of 2022
Judgment of:	**JACKSON J**
Date of judgment:	18 October 2023
Catchwords:	**MIGRATION** - cancellation of visa under s 501(3A) of the *Migration Act 1958* (Cth) - judicial review of Administrative Appeals Tribunal's decision under s 501CA not to revoke cancellation of visa - primary consideration of family violence - no consideration of whether applicant's former partner was a member of his family as required by mandatory ministerial direction - victim's familial relationship with applicant contestable - inference that Tribunal did not consider the question - jurisdictional error established - application allowed
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) s 43 *Migration Act 1958* (Cth) ss 499, 501, 501CA
Cases cited:	*Applicant S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 32 *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1456 *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 115; (2022) 293 FCR 509 *Hong v Minister for Immigration and Border Protection* [2019] FCAFC 55; (2019) 269 FCR 47 *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202; (2019) 273 FCR 121 *KXXH v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 111; (2022) 292 FCR 15 *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 11; (2021) 284 FCR 152

	Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41; (2021) 274 CLR 398 *Nathanson v Minister for Home Affairs* [2022] HCA 26 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 *Rukuwai v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 67 *Rukuwai v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 157 *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15; (2015) 256 CLR 203 *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; (2018) 263 FCR 531
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	66
Date of hearing:	21 June 2023
Counsel for the Applicant:	Dr J Donnelly with Mr W Calokerinos
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Ms K Hooper
Solicitor for the First Respondent:	Australian Government Solicitor
Counsel for the Second Respondent:	The second respondent filed a submitting notice save as to costs

ORDERS

NSD 841 of 2022

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

ORDER MADE BY:	**JACKSON J**
DATE OF ORDER:	**18 OCTOBER 2023**

THE COURT ORDERS THAT:

1. The application is allowed.
2. The decision of the second respondent dated 30 August 2022 affirming the decision of a delegate of the first respondent dated 7 June 2022 is set aside.
3. The application for review of the delegate's decision is remitted to the second respondent for determination according to law.
4. The first respondent must pay the applicant's costs of the proceeding, to be assessed if not agreed.

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

REASONS FOR JUDGMENT

JACKSON J:

1 The applicant came to Australia from Ethiopia in 2007 and has never become an Australian citizen. He was convicted of criminal offences which led the first respondent (**Minister**) to cancel his visa (for a second time) in October 2019. In June 2022, a delegate of the Minister decided under s 501CA(4) of the *Migration Act 1958* (Cth) not to revoke the cancellation. The second respondent, the Administrative Appeals Tribunal, affirmed that decision on 30 August 2022. The applicant now seeks judicial review of the Tribunal's decision in this Court.

2 The application impugns the Tribunal's decision in three respects. The grounds stated in the application are, broadly:

(a) Ground 1: that the Tribunal failed to carry out its statutory task, because in considering whether the applicant had engaged in family violence for the purposes of paragraph 8.2 of *Direction 90: Visa Refusal and Cancellation Under Section 501 and Revocation of a Mandatory Cancellation of a Visa Under Section 501CA* (**Direction 90**), the Tribunal was required to consider whether the victim of violence was a member of the applicant's family, and here it made no finding whether the victim of certain offending, whom I will call SM, was a member of the applicant's family;

(b) Ground 2: the Tribunal's decision was legally unreasonable and/or illogical or irrational, because it found that the sentencing judge's remarks were information from an independent and authoritative source that the applicant had been involved in family violence against SM, when at the time of the relevant offences they were no longer in a relationship and did not live with each other; also, the Tribunal found at one point that the applicant's offending against his cousin was not family violence, and at another point that it was; and

(c) Ground 3: the Tribunal acted on a misunderstanding of the law by relying on a particular passage from *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; (2018) 263 FCR 531 (***Viane 2018***), set out below.

3 For the following reasons, ground 1 will be upheld and the decision of the Tribunal will be set aside.

Background

4 The applicant was born in a refugee camp in Ethiopia. He may not be an Ethiopian citizen, given that his parents were Sudanese, and Ethiopian citizenship is not automatically granted to persons born in that country to non-Ethiopian parents (see the Tribunal's reasons dated 30 August 2022 (**AAT**) paras 27-28). While much of the applicant's documentation refers to him as Ethiopian, for the purposes of his visa cancellation and potential removal from Australia, the delegate and Tribunal found him to be Sudanese.

5 The applicant is 29 years old. He arrived in Australia on 8 May 2007 with various members of his extended family on a Class XB Subclass 202 Global Special Humanitarian visa.

6 The applicant began offending as a juvenile and has spent much of his adult life in prison or immigration detention. On 15 May 2013, he received fines of $50 and $100 for fraud related offences. A few days later, on 18 May 2013, he committed the offence of aggravated robbery while subject to a community-based order. He was sentenced to a term of two years and three months in prison. In 2015 his visa was mandatorily cancelled pursuant to s 501(3A) of the *Migration Act*. He then sought to have the cancellation revoked and was successful.

7 Between 2016 and 2018, however, the applicant committed several further offences which resulted in fines. On 26 September 2018, he attended the home of SM and committed the offences of 'aggravated burglary and commit offence in dwelling' and 'stealing' which the Tribunal defined as the **Phone Stealing offences**. SM was in her home, along with SM's daughter by the applicant, and a friend. The applicant came through the unlocked front door without permission and argued with SM. He damaged SM's television beyond repair by throwing something at it, and he took her mobile phone with him when he left. He was sentenced to 18 months' imprisonment for the burglary and for committing an offence within a dwelling, and for 3 months for the stealing, to be served concurrently.

8 On 1 October 2019, the applicant's visa was mandatorily cancelled again pursuant to s 501(3A) of the *Migration Act*. He made representations to the Minister requesting revocation of the cancellation. On 7 June 2022, a delegate of the Minister decided under s 501CA(4) of the *Migration Act* not to revoke the cancellation. The following day, the applicant lodged the application for review with the Tribunal.

The Tribunal's decision

9 The applicant was self-represented before the Tribunal. He gave oral evidence and was cross examined by counsel for the Minister. After canvassing the applicant's background and the legislative framework, including Direction 90, the Tribunal determined that the applicant did not pass the character test due to his 'substantial criminal record' within the meaning of s 501(7) of the *Migration Act.* It therefore went on to consider whether it was satisfied under s 501CA(4)(b)(ii) that there was 'another reason' why the cancellation decision should be revoked.

10 In that regard, and giving rise to the third ground of review in this Court, the Tribunal set out (via a quote from another Tribunal decision), a passage from the judgment of Colvin J sitting as a member of a Full Court in *Viane 2018*. His Honour was considering the power the Minister has under s 501CA(4)(b)(ii) of the *Migration Act* to revoke the mandatory cancellation of a visa if satisfied 'that there is another reason why the original decision should be revoked'. At [64], Colvin J said (citations removed) (AAT para 46):

> There is no statutory power to revoke under s 501CA(4)(b)(ii) unless the Minister is satisfied that there is a reason, other than a conclusion that the person concerned passes the character test, which means that the original decision 'should be' revoked. It is not enough that there is a matter that might be considered or may be said to be objectively relevant. It must be a reason that carries sufficient weight or significance to satisfy the Minister entrusted with the responsibility to consider whether to revoke the visa cancellation that the decision should be revoked. Only a reason of that character enlivens the statutory power to revoke. It is the absence of such a reason that will result in a decision not to revoke a visa cancellation.

11 In the decision presently under review, the Tribunal highlighted, by reference to *Viane 2018*, that there must be 'a reason that carries significant weight or significance' for it to be satisfied that the cancellation decision should be revoked (AAT para 47).

12 The Tribunal then turned to consider whether there was 'another reason' to revoke the cancellation of the visa. Direction 90 contains many requirements that bind the Tribunal in relation to its performance of that statutory task: s 499(2A). The Tribunal considered the protection of the Australian community in accordance with paragraph 8.1 of the direction. Paragraphs 8.1.1(1)(a)(i), (ii) and (iii) provide that in considering the nature and seriousness of the non-citizen's criminal offending or other conduct, one of the matters to which decision-makers must have regard is that the Australian Government and the Australian community view very seriously violent and/or sexual crimes, crimes of a violent nature against

women or children and 'acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed'.

13 The Tribunal outlined the applicant's offending history, both juvenile and adult. In assessing the nature and seriousness of all the applicant's conduct, the Tribunal referred to the above sub-paragraphs of Direction 90. In the course of doing so, the Tribunal described the Phone Stealing offences which the applicant committed in relation to SM, in the manner set out at [7] above. The Tribunal found that the applicant's offending overall could be viewed as serious and that the violence and domestic violence offences should be viewed very seriously. Overall, it found that the nature and seriousness of the conduct weighed strongly against revocation of the cancellation decision.

14 The Tribunal considered the risk to the Australian community should the applicant commit further offences, pursuant to paragraphs 8.1(2)(b) and 8.1.2 of Direction 90. After addressing a range of factors as required by the direction, the Tribunal considered the risk of the applicant reoffending to be moderate to high. It therefore weighed strongly against the revocation of the cancellation decision.

15 The Tribunal then had regard to family violence committed by the applicant, which was also a primary consideration pursuant to paragraphs 8(2) and 8.2 of Direction 90. It set out the provisions of paragraph 8.2, which refer to the serious concerns that the Australian Government has about 'conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia': paragraph 8.2(1). The Tribunal set out the definition of 'family violence' in paragraph 4(1) of the direction, which provides that the term 'means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful'. The definition then sets out examples of behaviour that may constitute family violence, but the examples are all focussed on the nature of the behaviour and shed no light on who might, or might not, be considered to be a 'family member' for the purposes of the definition. There is no definition of 'family' in Direction 90.

16 The Tribunal then made the following findings, which are central to grounds 1 and 2 (evidentiary references omitted):

> 127. Paragraph 8.2(2) of Direction No 90, stated above, sets out the circumstances where this primary consideration will be relevant. Firstly, it is relevant where the Applicant has been convicted of an offence, has been found guilty, or has had charges proven howsoever described that involve family violence

(para 8.2(2)(a) of Direction No 90). The Phone Stealing offences, in my view, fall within this category, even though they comprise offences ('aggravated burglary and commit offence in dwelling' and 'stealing') that are not usually associated with family violence.

128. However, para 8.2(2)(a) of Direction No 90 refers to offences 'howsoever described'. When the facts of this offending are examined, in my view, the charges proven for the Phone Stealing offences show that the offences involved conduct that meets the broad definition of family violence in para 4(1) of Direction No 90. This definition includes 'violent, threatening or other behaviour that coerces or controls a member of a person's family or causes the family member to be fearful'.

129. The Phone Stealing offences involved the Applicant attending his ex-partner, SM's, house without consent, having an argument with her and throwing an item that broke her television. I note that 'intentionally damaging or destroying property' is described in para 4(1)(e) of Direction 90 as an example of behaviour that may constitute family violence. Both the Applicant and SM sought to downplay this offence in their evidence at the hearing. SM made a statement to police describing the incident but said in her evidence at the hearing that the police 'pushed me a lot to make the statement'. She did, however, accept that she did not lie in her statement. In the statement, SM refers to the Applicant's conduct making her cry, and that she was 'afraid' that he would throw a salt lamp at her. I find, based on this contemporaneous evidence, that the Applicant's conduct caused SM to be fearful.

130. Also, according to para 8.2(2)(b) of Direction 90 this primary consideration will also be relevant where 'there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence'. When sentencing the Applicant for the Phone Stealing offences, the sentencing Judge in the Perth District Court characterised the Applicant's conduct as being family violence and [referred] to the likely fear experienced by SM. The sentencing Judge stated:

> In summary, the offending occurred in the context of the breakdown of a personal relationship between you and the victim, surrounding, in particular, custody and access to a child between you. The offending is, on any view, very serious. It occurred in the context of the breakdown of the personal relationship between you and the victim.
>
> As already mentioned, the community and courts abhor any form of violence, let alone domestic violence, and you need to understand, as a young person very quickly, that there is no place in this community for violence of any shape or form.
>
> You were under the influence of illicit substances at the time. That would have created additional fear on the part of the victim, in view of the way in which you were conducting yourself, and the behaviours that you are exhibiting. Those substances appear to have included alcohol and drugs. The behaviour was accompanied with threats that she would have heard, and would have created additional psychological fear for her.
>
> At one stage you left, but you returned, so the conduct of the totality of the offending was properly described, as submitted by the State prosecutor, persistent. You had been advised earlier in the day, in written communications, not to come around. But you obviously worked yourself

> up into a state where you decided you would. You are, of course, legally responsible for anything you do whilst under the influence of prohibited drugs, or alcohol.
>
> There is no victim impact statement, but there can be no doubt that the experience would have created emotional and psychological trauma for the victim, and she would be wary of that going forward, and she would need to process it and deal with it in the circumstances that you have a child between you.
>
> 131. I find that the sentencing Judge's comments constitute information or evidence from independent and authoritative sources that the Applicant has been involved in the perpetration of family violence.

17 The Tribunal went on to refer to other offending by the applicant which involved direct violence against persons. One incident involved a different member of his family, being a cousin who had grown up in the same house and to whom the applicant referred as his stepsister. Of this the Tribunal said (AAT para 132):

> The Stepsister Disorderly offence was a disorderly offence, however, it involved violent behaviour towards a family member, being the Applicant's stepsister. The Applicant's stepsister is a member of his family. As I noted above, the Applicant was brought up with his biological cousins as if they were his siblings. He referred to his stepsister as either his stepsister or sister at the hearing. The Applicant lived at home with his aunt (whom he calls his stepmother) and his 'stepsiblings', even when he was in a relationship with SM. The Applicant's evidence was that he had punched his stepsister because he believed she had been talking negatively about him and he agreed that he had wanted to hit her all day. This meets the definition of family violence.

18 Another incident involved a cousin who was not living under the same roof as the applicant. The Tribunal said of that (AAT para 133):

> The Good Samaritan offence involved violent behaviour by the Applicant against a young woman who the Applicant described in his evidence as his 17-year-old female cousin, specifically the daughter of his mother's sister (transcript/42). The Applicant was trying to get her to go home and was pulling her along the street by her arm while she was crying out for help. The Applicant agreed to these facts in his evidence at the hearing. I find that his behaviour was controlling because he was trying to make his cousin go home against her will in a manner that would constitute an assault. Unfortunately, the Direction does not define 'family' and a cousin who does not live under the same roof may not be sufficiently close to constitute a family member (see *Deng v Minister Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1456 at [155]). Consequently, although borderline, I cannot definitively conclude that the Applicant's behaviour associated with the Good Samaritan offence was family violence.

19 The Tribunal also went on to find that breaches of protective bail orders which the applicant committed did not meet the definition of family violence. That was because, although they involved the applicant attending 'his ex-partner, SM's house' on three occasions to see his

daughter, SM did not give clear evidence that this made her fearful. In other words, it was the component of the definition requiring 'violence' that was not satisfied, as distinct from the aspect that required it to involve 'family'.

20 After referring to other relevant matters including the applicant's lack of insight into his family violence offending, the Tribunal concluded (AAT para 143):

> The Applicant has engaged in conduct that would constitute family violence against three women, namely his stepsister, cousin and ex-partner, SM. He has taken little responsibility for this offending, and has limited, if any, insight. He has not undertaken any rehabilitation or other efforts to address this behaviour. I therefore find that this conduct weighs strongly against the revocation of the Cancellation Decision.

21 The Tribunal considered the best interests of minor children affected by the decision. In particular, the Tribunal considered the interests of the applicant's young child and other young relatives. It found that the applicant was a caring partner who loved his daughter and wanted to be involved in her life. SM too fulfilled a parenting role. The applicant and SM intended to co-parent their child, even though their relationship was over. In the course of making these findings, the Tribunal noted that when the child was born, SM was 16 years of age and still in school, and that she and the applicant were not living together, although he would stay over several nights a week. The Tribunal considered that the child's interests weighed strongly in favour of revocation of the cancellation decision.

22 The Tribunal considered the expectations of the Australian community, pursuant to paragraphs 8(4) and 8.4 of Direction 90. In particular, the Tribunal referred to the community's expectations with respect to specific conduct which includes family violence and the commission of serious crimes against women. This consideration weighed strongly against the revocation of the cancellation decision.

23 Another part of the Tribunal's reasons with some relevance to grounds 1 and 2 was its consideration of the impact on victims. Under that heading the Tribunal said (evidentiary references omitted):

> 197. SM, the Applicant's ex-partner and the mother of his daughter was the victim of the Phone Stealing offences. She is supportive of the Applicant and thinks he has learned his lesson and that he has changed.
>
> 198. SM is anxious for the Applicant to stay in Australia so that he can have a relationship with their daughter. SM does not want their daughter to grow up without a father like she did. It appears to me that SM has had a difficult time being a young mother who had a baby when she was trying to complete school. She did not receive any help from her own mother, and it was the Applicant

> who provided emotional support throughout her pregnancy and later looked after their daughter while she was at school.
>
> 199. As I mentioned above, from mid-2018 when their relationship ended, the Applicant saw his daughter less. However, since the Applicant went into immigration detention he and SM have been communicating and they have made plans to co-parent their daughter. She said that 'it's just been really hard' without having the Applicant to help her, and that when she thinks about him being released into the community, 'it just feels like a big relief'.
>
> 200. I find that revocation of the Cancellation Decision is in the best interests of SM. She has experienced hardship as a young single mother and wants her daughter to grow up with a father. She would benefit from the Applicant's assistance in parenting their daughter. Consequently, I find that this consideration weighs moderately in favour of revocation of the Cancellation Decision.

24 The Tribunal also found that the applicant has strong ties to Australia because his immediate family members, as well as SM and their child, reside in Australia. This weighed moderately to strongly in favour of revocation.

25 As a separate consideration, the Tribunal acknowledged that if it were to affirm the Minister's decision, the applicant would face the prospect of prolonged or indefinite detention. This consideration weighed strongly in favour of revocation.

26 In its conclusion, after reviewing its findings on all the various considerations, the Tribunal said:

> 223. I find that the primary considerations that weigh strongly against the revocation of the Cancellation Decision outweigh the primary and other considerations that weigh in the Applicant's favour.
>
> 224. Specifically, the best interests of minor children (particularly the best interests of [the] Applicant's five-year-old daughter which weighed strongly, and his minor cousins which weighed moderately), Australia's international non-refoulement obligations (which weighed slightly), the Applicant's links to the Australian community (which weighed moderately to strongly), the extent of impediments if removed (which weighed slightly), impact on victims (which weighed moderately) and the prospect of indefinite detention (which weighed strongly) [are] in favour of revocation of the Cancellation Decision. However, I find that they are outweighed by the primary considerations of the protection of the Australian community, family violence and the expectations of the Australian community which all weighed strongly against the revocation of the Cancellation Decision.
>
> 225. In other words, the primary and other considerations that weigh in favour of revocation of the Cancellation Decision are not significant enough reasons which carry significant weight, so that I am satisfied that the Cancellation Decision should be revoked (*Viane*). That is, there is not another reason why the Cancellation Decision should be revoked. Therefore, the correct or preferable decision is to affirm the Reviewable Decision.

Ground 1: the Tribunal failed to consider whether SM was a family member

The parties' cases in relation to ground 1

27 In oral argument the applicant's case under ground 1 was articulated as follows. Paragraphs 6 and 8(2) of Direction 90 required the Tribunal, in making its decision, to take into account as a primary consideration whether the applicant's criminal or other serious conduct constituted family violence. As already said, that is defined in paragraph 4(1) by reference to 'a member of the person's family'. Together, these paragraphs therefore required the Tribunal to determine whether persons who had experienced violence perpetrated by the applicant were family members as defined. In this case, nowhere did the Tribunal determine that SM was a family member of the applicant. The Tribunal therefore failed to fulfill the requirement imposed by the direction to make that determination.

28 Counsel for the applicant drew a contrast between the analysis the Tribunal conducted in relation to whether the applicant's cousin was a family member, and the lack of any such analysis in relation to SM. Specifically, as described at [18] above, the Tribunal applied ***Deng*** *v Minister Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1456 to conclude that since the cousin did not under the same roof as the applicant, she was not a member of his family. And yet it expressed no such consideration in relation to SM even though, counsel pointed out, she too did not live under the same roof as the applicant.

29 Counsel accepted that the terms of Direction 90 on which he relied did not require the Tribunal to make an express finding in all cases as to whether the victim of violence perpetrated by the non-citizen was a family member. There will be examples of persons so obviously a family member that there is no need to make such a finding, for example the non-citizen's biological mother. There will be examples of persons who are obviously not family members and so no express finding is required, for example an unfortunate victim of violence perpetrated randomly in the street. But where someone, like SM, falls between such extremes, counsel submitted that the Tribunal needed to consider the factual indicia of the relationship in order to determine whether the victim was or was not a family member.

30 In making this argument, the applicant referred to various indicia as to whether two persons were members of the same family that he took from *Deng* at [156]-[157]. These were, according to the applicant:

> (a) whether the persons are related to each other; (b) whether the persons are living together; (c) whether the persons are financially dependent upon each other;

> (d) whether the persons are sharing expenses; (e) whether the persons are in a de facto relationship; (f) whether the persons provide companionship and emotional support to each other; and (g) whether the persons are in a relationship of mutual affection and obligation.

31 In the end I did not take counsel for the applicant to be submitting that it was necessary for the Tribunal to go through each of those indicia as if they were mandatory considerations. But he submitted that in this case there needed to be some analysis of that kind. That is in the context where, under s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), any written reasons of the Tribunal were required to 'include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based'.

32 Counsel referred to the decision on appeal from *Deng*, *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 115; (2022) 293 FCR 509 (***Deng FC***) at [126], where it was held that there was no express consideration by the Tribunal of whether the relevant person was a member of the appellant's family and, in the absence of that consideration, the Full Court was not satisfied that the Tribunal considered the question, and this constituted a failure to carry out the statutory task. The primary judge found in *Deng* that, in essence, it was *open to* the Tribunal to make such a finding, but the Full Court took the view that it was nevertheless necessary for the Tribunal *to consider* whether the relevant person was a family member.

33 Counsel for the Minister accepted that as a matter of substance the Tribunal was required to engage with the question of whether SM was a member of the applicant's family. But that does not mean that it was required to work through each of the indicia identified by counsel for the applicant. In circumstances where there was material before the Tribunal indicating that the appellant and SM had lived together, that they had a child together, and that they intended to co-parent the child in future, it was open to it to conclude that they were members of the same family. The reasons of the Tribunal reveal that it paid close attention to Direction 90 and the conclusion that it reached that the cousin was not a family member showed that it was aware of the need to be satisfied as to the elements of the direction. But it did not engage in an 'elaborate' way with the question in respect of SM because that was not a live issue before the Tribunal, and the level of consideration required depended in part on the nature and content of the submissions put to it.

Consideration of ground 1

34 I accept the parties' common position that Direction 90 required the Tribunal to consider whether SM was a member of the applicant's family. That follows from the provisions outlined in [28] above. It is difficult to see how the Tribunal can fulfil its obligation to take account of whether the applicant's conduct constituted family violence without considering whether the victims of that violence were members of his family. In *Rukuwai v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 157 (***Rukuwai FC***) at [60], the Full Court thought that the requirement was obvious.

35 Whether the Tribunal fulfilled the requirement here is a question of fact to be determined chiefly from the written reasons it delivered. In ***KXXH*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 111; (2022) 292 FCR 15 the Full Court discussed relevant aspects of the approach to be taken to determining the question. Briefly summarised:

(1) The onus is on the applicant for judicial review to establish that the Tribunal has not given the requisite level of consideration to a matter, and it is not a conclusion the Court will reach lightly: *KXXH* at [47].

(2) The question is whether as a matter of substance the decision maker has had regard to the requisite matter. That will often be a question of impression reached in the light of all the circumstances: *KXXH* at [48]-[49].

(3) Each case turns on its own facts and those facts must be considered in a practical and common sense manner: *KXXH* at [50].

(4) While a mandatory direction like Direction 90 may require a matter to be considered regardless of the applicant's representations, those representations remain relevant. The extent to which representations are made about a matter will affect the prominence of the matter, and thus the degree of consideration required: *KXXH* at [51]-[53].

36 Finally, with particular reference to the submission the applicant made about what was required to be in the Tribunal's written reasons under s 43(2B) of the AAT Act, in *KXXH* at [54] the Full Court said that (citations removed):

> … the fact that the Tribunal has not mentioned particular information does not necessarily mean that it has not considered that information. Section 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth), which requires the Tribunal to include in any written reasons its findings on material questions of fact, only requires the Tribunal to set out the findings of fact which in its opinion are material. That

> entitles the Court to infer that any matter not mentioned in the Tribunal's reasons was considered by the Tribunal not to be material. However, the Court need not make that inference. The manner in which a statement of reasons is drawn and its surrounding context may detract from or displace the inference; for example, because there is material that is so obviously relevant that it is unthinkable that the Tribunal would not have referred to it if it had actually considered it. On the other hand, while a failure to deal with an issue in the decision-maker's reasons may indicate a failure to consider the issue, that inference should not be drawn too readily where the reasons are otherwise comprehensive and the issue has at least been identified at some point.

37 In this case, while the matter is finely balanced, in the end the following aspects of the Tribunal's reasons lead me to infer, respectfully, that the Tribunal did not consider the question of whether SM was a family member of the applicant's for the purpose of addressing the primary consideration in Direction 90 concerning family violence:

(1) Nowhere in its reasons does the Tribunal expressly ask or expressly answer the question of whether SM was a family member of the applicant's.

(2) The Tribunal was plainly aware that SM was the applicant's 'former partner' (AAT para 21) or 'ex-partner' (AAT para 63) and the mother of his child. The Tribunal referred to her in those ways in several places in the reasons. But the Tribunal's reasons do not give any consideration to the nature and history of the relationship including, for example, whether SM and the applicant had lived together and for how long. Where there is some discussion of the relationship, that is in different contexts and for different purposes, including consideration of the best interests of minor children or the applicant's ties to Australia, as detailed above.

(3) The passages set out at [16]-[18] above are important. First, at AAT paragraph 127, the Tribunal simply found that the Phone Stealing offences fell within the category of family violence. But the issue it expresses in the course of doing so is not whether SM was a member of the applicant's family, but whether the offences fall within that category 'even though they comprise offences ("aggravated burglary and commit offence in dwelling" and "stealing") that are not usually associated with family violence'. The Tribunal appears to be focussed on the nature of the conduct, not the nature of the relationship between the applicant and the victim.

(4) The same may be said of AAT paragraph 128, where the Tribunal considers the fact that the offences involved an argument and damage to property. While this paragraph shows that the Tribunal was aware of and applied the definition of 'family violence' in

paragraph 4(1) of Direction 90, it was again concerned with the nature of the conduct rather than the nature of the relationship.

(5) The same may be said of the discussion in AAT paragraph 129. The Tribunal found that the applicant's conduct caused SM to be 'fearful', that being part of the definition of 'family violence' in paragraph 4(1), but appears at this point to be simply taking it as read that SM was a member of the applicant's family. Again, the Tribunal's focus was on the conduct and its effect on SM, not on whether she was a member of the applicant's family.

(6) Similarly when, in AAT paragraphs 130-131, the Tribunal considers and quotes from the remarks of the sentencing judge in relation to the Phone Stealing offences, the focus is on the nature of the conduct and its effect on SM. The Tribunal says that the sentencing judge 'characterised the Applicant's conduct as being family violence' but then refers immediately and in the same sentence to 'the likely fear experienced by SM' (AAT para 130).

(7) It may be that the Tribunal based an implicit finding that the offending was family-related on the sentencing judge's characterisation of it as 'domestic violence'. But if so, that only increases the likelihood that the Tribunal did not consider the matter for itself. The sentencing judge was obviously not directing his attention to the same question as that raised by Direction 90. So if the Tribunal did equate 'domestic violence' in his Honour's remarks to 'family violence' in the direction, that is further indication that the Tribunal did not give the matter independent consideration. It will be necessary to return to this subject below in relation to ground 2.

(8) By this point, the Tribunal's remarks at AAT paragraphs 127-131, read together, give the impression that the Tribunal has assumed that SM was a member of the applicant's family. To the extent that the Tribunal expressly finds that the Phone Stealing offences do fall within the category of family violence, it seems to be focussed on the question of 'violence' rather than on the relationship between the applicant and SM.

(9) Then, in contrast, at AAT paragraphs 132-133, the Tribunal does deliberate over whether other people who have been the subject of the applicant's offending, his stepsister and his cousin, are members of his family so that the offending involving them can be family violence. This shows that the Tribunal was neither unaware of the need to make such determinations, or ignorant of the criteria to apply. The Minister submits that the reason the Tribunal did not engage in the question with respect to SM

is because in contrast to the other 'potentially less proximate relatives', it was not a contested or contestable issue. But as discussed in more detail below, I do not accept that, and the Tribunal was required to consider the issue, even though it was not squarely raised by the representations made by the applicant. The absence of any express consideration in relation to SM, in contrast to the consideration given to the stepsister and the cousin, therefore supports an inference that the Tribunal did not engage in any consideration of this kind in relation to her.

(10) That is because, viewed objectively, the question of whether SM was a family member was contestable, just as it was in relation to the stepsister and the cousin. The Tribunal consistently referred to her as the applicant's ex-partner or former partner, and was plainly aware that she had given birth to a child of the applicant's. But there is no consideration in the Tribunal's reasons of the nature or duration of their relationship. The Tribunal was obviously aware that SM did not live with the applicant at the time of the hearing, but did not consider the implications of that, if any, for whether she was a member of his family. Indeed, the Tribunal did not make any findings about whether SM ever did live with him, or if so, for how long. Although designating her as having been his partner may imply cohabitation, that is not abundantly clear in this case; as mentioned above, the Tribunal noted that the applicant was not living with SM when their child was born, and elsewhere the Tribunal says that the applicant was living at home with his aunt and his 'stepsiblings' even when he was in a relationship with SM.

(11) As mentioned above, there can be cases where the fact that a victim of offending is, or is not, a member of the non-citizen's family is so obvious that there is no need to make an express finding about it, or to give reasons for the finding. But it was not that obvious in relation to SM. So the fact that the Tribunal did not make any express finding that SM was a member of the applicant's family, or give any reasons why, when it did both those things in relation to the stepsister and the cousin, supports an inference that the Tribunal overlooked the need to consider the point in relation to SM.

(12) There was a statutory requirement that the Tribunal include in its written reasons its findings on material questions of fact and a reference to the evidence or other material on which those findings were based. It is common ground that the question of whether SM was a family member of the applicant had to be considered, so it cannot be said that it was not a material question of fact. The absence of any express finding about the

matter, and of any clear reference to the evidence on which such a finding was based, further supports a conclusion that it was not, in fact, considered.

38 I therefore consider, with respect to the senior member of the Tribunal, that ground 1 has been made out. The Tribunal has not met the requirements of Direction 90 because it has not considered whether SM was a member of the applicant's family for the purposes of the primary consideration concerning family violence.

39 A failure to comply with the requirements of a mandatory direction under s 499 of the *Migration Act* can constitute jurisdictional error: *Deng FC* at [122]; *Rukuwai FC* at [62(1)]. The Minister submitted that any such error was not material. That was said to be because even if the Tribunal had given full consideration to the question, there was no realistic prospect that it would have found that SM was not a member of the applicant's family when this offending occurred. That is said to be because all of the evidence pointed squarely to a conclusion that she was.

40 I do not accept that. For reasons given above, whatever the correct conclusion was, I consider the point was contestable. In addition to what has already been canvassed, the applicant raised the following points in written submissions that the Tribunal ought to have considered when determining whether the offending constituted family violence (at para 25):

(a) the offending occurred on 26 September 2018 and the applicant and SM had broken up in June 2018;

(b) the applicant and SM were not financially dependent upon each other or sharing expenses;

(c) the applicant and SM were not in a de facto relationship;

(d) the applicant and SM were not providing companionship and emotional support to each other;

(e) the applicant and SM were not in a relationship of mutual affection and obligation; and

(f) the applicant was in a relationship with another woman.

41 The standard of materiality is undemanding, and as a matter of reasonable conjecture, it was possible that if the Tribunal had given full consideration to the matter, including all of the circumstances addressed above, it might have come to a different conclusion: see ***Nathanson v Minister for Home Affairs*** [2022] HCA 26 at [33] (Kiefel CJ, Keane and Gleeson JJ).

42 For completeness I will address a few other matters that came up during submissions.

43 *First*, as mentioned above, the representations made by the non-citizen remain relevant even when the requirement to consider a particular matter arises from the mandatory direction. Here, the Minister submitted, the parties did not raise as an issue whether SM was a member of the applicant's family. I accept that; while the applicant did not list her as a family member in the forms he used to make his representations, that by itself was hardly enough to identify the issue, and the Minister simply assumed that SM was a family member in the statement of facts, issues and contentions that he filed in the Tribunal.

44 Nevertheless, in the end the Tribunal's function was inquisitorial, and it was required to consider substantial issues raised by the materials before it, even if that issue was not raised by the submissions of the parties: *Hong v Minister for Immigration and Border Protection* [2019] FCAFC 55; (2019) 269 FCR 47 at [65] (Bromwich and Wheelahan JJ). The terms of a mandatory direction may require consideration of a matter that arises on the materials regardless of whether a party has drawn attention to it: see, by analogy, *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15; (2015) 256 CLR 203 at [64]. Certainly, the representations of the non-citizen and more broadly the way the parties treat an issue may explain and justify relatively brief treatment of it in the Tribunal's reasons. But as explained above, here consideration of whether SM was a member of the applicant's family was not brief, it was absent.

45 *Second*, the applicant relied in particular on *Deng FC* in support of his case. As has been said, each case of jurisdictional error will turn on its own facts and circumstances. Nevertheless, *Deng FC* does illustrate how a failure to consider whether a person is a member of the non-citizen's family can be a jurisdictional error. There, the Tribunal had characterised the person in question as the appellant's 'intimate partner'. The appellant submitted that the Tribunal did not expressly address any of the evidence as to the specific nature of the relationship and that this meant that it did not address the statutory task. The Full Court accepted this, concluding (at [126], emphasis in original) that while the relevant person '*may* have been a member of the appellant's family for the purposes of the definition of "family violence", this was a contestable issue that needed to be considered'. In the absence of express consideration of the question in the Tribunal's reasons, the Full Court was not satisfied that the Tribunal considered the question.

46 In some ways *Deng* was a stronger case of jurisdictional error by the Tribunal than this one because here, the fact that SM and the applicant had a child made it more likely that she was a member of his family than the 'intimate partner' who was in issue in *Deng*. So it would not be safe to transpose to this case the ultimate finding in *Deng FC* that an absence of express consideration of the issue resulted in jurisdictional error. Nevertheless, *Deng FC* illustrates how a lack of such consideration can be a failure to carry out the statutory task, that being how the error is described in ground 1 here. Although I prefer to describe it as a failure to carry out a requirement of the mandatory direction which, being material, was a jurisdictional error.

47 *Third*, and on the other side of the ledger, the Minister relied on the decision in ***Rukuwai** v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 67, in which it was contended that the Tribunal assumed, and did not consider and explain why, a person was a member of the appellant's family within the meaning of Direction 90. That was in circumstances where the marriage between them had broken down, they lived in different houses, they had 're-partnered' and where, it was said to be inferred, they were not financially dependent on each other. The primary judge did not find jurisdictional error in those circumstances and that was upheld in *Rukuwai FC*.

48 Once again, the case depended on its particular facts. The appellant and the other person clearly *had* been members of the same family, as they had been 'happily married' for 14 years and had four children together. It also depended on the manner in which the Tribunal expressed its findings, for example in paragraph 103 (quoted in *Rukuwai FC* at [41]) which at least implied that the Tribunal considered that being a former spouse made the person a member of the appellant's family for the purposes of the definition of 'family violence' in Direction 90. *Rukuwai* and *Rukuwai FC* are thus distinguishable. I note that in *Rukuwai FC*, the Full Court found it unnecessary to consider a submission that *Deng FC* was plainly wrong.

49 *Finally*, to the extent that the applicant submitted that it was incumbent on the Tribunal to go through each of the matters mentioned by the primary judge in *Deng* (see [31]-[32] above), I do not accept that submission. The primary judge in *Deng* did not purport to lay out any list of indicia to be used to answer the question. It is to be answered as an ordinary question of fact based on all the relevant circumstances of the case. Likewise, whether the Tribunal has given consideration to the question is itself a question of fact that depends on the circumstances of the case. The extent to which the Tribunal is required to articulate any 'indicia' will also depend on those circumstances.

50 For the reasons given above, ground 1 will be upheld.

Ground 2: legal unreasonableness, illogicality or irrationality

51 Having upheld ground 1, it is appropriate to deal with the remaining grounds briefly. As counsel for the applicant accepted, ground 2 really involves two different grounds; although he preferred to call them 'strands', he correctly accepted that they were independent of each other, and all they have in common is that they assert illogicality. I am content to call them strands to avoid confusion. The first concerns the Tribunal's reliance on the sentencing judge's remarks. The applicant contends that this was illogical or legally unreasonable because the sentencing judge made no finding that SM was a member of the applicant's family, and any finding that she was would be inconsistent with the state of affairs at the time of the offending (including that they were not in a romantic relationship and did not live with each other). The applicant contended that the Tribunal failed to consider 'a substantial body of evidence/material in addressing the question of whether the victim was a member of the applicant's family'.

52 The second strand contained within ground 2 concerns the inconsistency between the Tribunal's finding, in one place, that the applicant's cousin was not a family member for the purposes of the family violence consideration in Direction 90, and the statement in another place that she was.

53 I do not consider that either of these strands has been made out. As to the first, the context of the Tribunal's findings was that paragraph 8.2(2)(b) of Direction 90 provides that the primary consideration as to family violence is relevant in circumstances that include where 'there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence'. The sentencing remarks had characterised the offending as 'domestic violence'. While that it not necessarily precisely the same thing as 'family violence' for the purposes of paragraph 4 of Direction 90, the applicant did not articulate how the two concepts were materially different or how a finding that a person has engaged in domestic violence cannot 'indicate' that his conduct constituted family violence.

54 In any event, I consider that the applicant's contentions under this first ground depended on exaggerating and mischaracterising the use the Tribunal made of the sentencing judge's remarks. As the discussion under ground 1 above shows, the main point of the Tribunal's consideration of the sentencing remarks was that the judge had found that the applicant's conduct had caused SM to feel fearful and that this brought it within the definition of family

violence in paragraph 4(1) of the direction. I do not consider that the Tribunal relied on the sentencing remarks as a basis to find that SM was a member of the applicant's family. As the consideration of ground 1 reveals, the Tribunal did not consider that matter at all. In that sense, the first strand is an alternative to ground 1.

55 In any event, there was nothing illogical in the way in which the Tribunal dealt with the sentencing judge's remarks. It was appropriate, perhaps necessary, for the Tribunal to rely on them: see *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202; (2019) 273 FCR 121 at [180]; *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 11; (2021) 284 FCR 152 at [72]. Even if there was other material pointing in different directions, that does not make such reliance illogical.

56 As for the second strand, there is clearly an inconsistency between the Tribunal's finding at AAT paragraph 133 that the applicant's cousin was not a family member for the purposes of paragraph 4(1) of Direction 90, and its conclusory statement at AAT paragraph 143 that she was. But it is clear from all the context that the latter is merely a slip that does not affect the substance of the Tribunal's reasoning. In the balance of the section of the decision on family violence, the Tribunal had a firm grasp on its findings that the applicant had committed family violence on 'two occasions' (AAT para 136) against 'two separate women' (AAT para 137). It only gave substantive consideration under this heading to the nature and seriousness of the Phone Stealing offences against SM and the offending against the applicant's stepsister.

57 I am satisfied that the statement in AAT paragraph 143 is a slip that does not express the Tribunal's true opinion. One possible explanation is that it was a prior version of the conclusion that was not rectified after the Tribunal reached a different finding about the cousin, on fuller consideration. The Minister submits, and I agree, that the inconsistency in the reasons is patent and it does not establish a jurisdictional error.

58 I do not uphold ground 2.

Ground 3: *Viane 2018*

59 The applicant refers to the Tribunal's reliance on *Viane 2018* to say that s 501CA(4)(b)(ii) of the *Migration Act* is only invoked if there is a 'reason that carries sufficient weight or significance' (AAT paras 46-47, 225). The applicant says that the Tribunal made a material error by acting on a misunderstanding of the law in this context.

60 The applicant submits that that use of the terms 'sufficient weight' or 'significance' places an 'unnecessary gloss' on the statutory language. The applicant further says that what constitutes 'another reason' is a matter for the decision-maker and parliament has not prescribed reasons which might justify revocation (or not) of a cancellation decision. The applicant says that, while deciding whether or not that other reason exists might be the product of fact-finding, predictions about the future, or characterisations of past offending, it is neither desirable nor possible to formulate rules about how the Minister may or may not be satisfied about a reason for revocation.

61 There is no merit in this ground. The paragraph from *Viane 2018* which the applicant impugns is in the decision of Colvin J, with whom Reeves J generally agreed (at [3]). The Full Court's reasoning in this case has not been disapproved or overruled by the High Court or another Full Court. It is binding on me as a single judge. It is not for me to decide whether the particular passage states an unnecessary gloss on the statutory requirement.

62 The applicant submits that the passage is in conflict with recent decisions of the High Court. His submissions list 10 propositions said to be established by those decisions that are asserted to be inconsistent with *Viane 2018* at [64]. But, with respect, they are not. It is not necessary to list all 10. It is enough to give three examples:

(a) 'the power of revocation is broad and wide': *Applicant S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 32 at [36]; *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 at [22];

(b) 'deciding whether or not to be satisfied that "another reason" exists might be the product of necessary fact finding, or the product of making predictions about the future, or it might be about assessments or characterisation of an applicant's past offending': *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] FCA 41; (2021) 274 CLR 398 at [14]; and

(c) 'the Tribunal's task under s 501CA(4) is evaluative': *Nathanson* at [71].

63 Nothing in *Viane 2018* at [64] is inconsistent with any of this. All it says is that, where s 501CA(4)(b)(ii) relevantly requires that the Minister be satisfied 'that there is another reason why the original decision should be revoked', it is not enough that the reason is one that might be relevant to that question. It must be a reason substantial enough to mean that the cancellation 'should be' revoked.

64 The passage has not been relevantly overruled, disapproved or overtaken by subsequent or higher authority. The Tribunal did not fall into error in relying on it. Ground 3 is not upheld.

Conclusion

65 The applicant has established that the Tribunal fell into jurisdictional error in the way articulated in ground 1. The decision of the Tribunal will be set aside and the matter will be remitted to the Tribunal for determination according to law.

66 While the applicant's counsel was acting pro bono, it is appropriate to make the usual order for the Minister to pay the applicant's costs, in case there are disbursements or other charges that may be properly recoverable in accordance with the indemnity principle.

I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson.

Associate: 

Dated: 18 October 2023