# FEDERAL COURT OF AUSTRALIA

## Lucas v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1653

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| File number(s): | NSD 871 of 2022 |
| Judgment of: | **MEAGHER J** |
| Date of judgment: | 21 December 2023 |
| Catchwords: | **MIGRATION LAW** – Application for judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) – Where applicant failed the character test – Whether there is another reason why the visa cancellation should be revoked – Whether the Tribunal's decision was illogical or irrational – Where Tribunal rejected the applicant's evidence in its entirety – Whether the applicant was denied procedural fairness – Where Tribunal found that the applicant appeared to have deliberately misled the Court – Whether Tribunal took into account an irrelevant consideration – Where Tribunal considered the applicant's criminal history as a juvenile – Whether the Tribunal acted on a misunderstanding of the law by viewing its task as discretionary in nature – Application allowed |
| Legislation: | *Crimes Act 1914* (Cth) ss 85ZR(2), 85ZR(2)(b), 85ZV(3)<br>*Migration Act 1958* (Cth) ss 476A(1)(b), 501(1), 501(3A), 501(7)(c), 501CA(4)<br>*Crimes Act 1900* (NSW) s 327<br>*Criminal Code 1899* (Qld) s 124<br>*Penalties and Sentences Act 1992* (Qld) s 12<br>*Youth Justice Act 1992* (Qld) |
| Cases cited: | *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 383 ALR 194<br>*Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315<br>*Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576<br>*DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2<br>*Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1368<br>*EPU17 v Minister for Immigration, Citizenship and* |

*Multicultural Affairs* [2023] FCA 49

*Fulton v Chief of Defence Force* (2023) 411 ALR 528

*Hartwig v PE Hack* [2007] FCA 1039

*JSMJ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1466

*LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 1

*Lucas and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 3151

*Minister for Home Affairs v Buadromo* (2018) 267 FCR 320

*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16

*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259

*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 409 ALR 234

*Nathanson v Minister for Home Affairs* (2022) 403 ALR 398

*Plaintiff M1/2021 v Minister for Home Affairs* (2022) 178 ALD 304

*Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480

*R v Briese, ex parte Attorney-General* (1997) 92 A Crim R 75

*R v Cay, Gersch and Schell; ex parte A-G (Qld)* (2005) 158 A Crim R 488

*R v Graham* [2023] QCA 125

*R v ZB* [2021] QCA 9

*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152

*SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609

*Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 10

*Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 604

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| Division: | General Division |
| Registry: | Queensland |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |

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| Number of paragraphs: | 81 |
| Date of hearing: | 18 July 2023 |
| Counsel for the Applicant: | Dr J Donnelly |
| Counsel for the Respondents: | Ms N Maddocks |
| Solicitor for the Applicant: | Zarifi Lawyers |
| Solicitor for the Respondents: | Minter Ellison Lawyers |

# ORDERS

**NSD 871 of 2022**

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| **BETWEEN:** | **CORNELIUS LUCAS**<br>Applicant |
| **AND:** | **MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**<br>First Respondent |
| | **ADMINISTRATIVE APPEALS TRIBUNAL**<br>Second Respondent |

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| **ORDER MADE BY:** | **MEAGHER J** |
| **DATE OF ORDER:** | **21 DECEMBER 2023** |

**THE COURT ORDERS THAT:**

1. The name of the first respondent be changed to "Minister for Immigration, Citizenship and Multicultural Affairs".
2. A writ of certiorari issue quashing the decision of the second respondent made on 23 September 2022, which affirmed a decision of a delegate of the first respondent not to revoke, pursuant to s 501CA(4) of the *Migration Act 1958* (Cth), cancellation of the applicant's Class TY Subclass 444 Special Category visa (Decision).
3. A writ of mandamus issue directing the second respondent to re-determine the applicant's application for the review of the Decision according to law.
4. The first respondent must pay the applicant's costs as agreed or assessed.

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

# REASONS FOR JUDGMENT

## MEAGHER J

### INTRODUCTION

1 The applicant was born in 1997 and is a 26-year-old citizen of New Zealand. He moved to Australia in 2009, after visiting a number of times since 1998, holding a Class TY Subclass 444 Special Category **visa**.

2 On 6 May 2021, the applicant was convicted of *'Robbery with actual violence armed/in company/wounded/used personal violence'* in the **District Court** of Queensland, for which he was sentenced to three years' imprisonment. On 13 August 2021, the applicant's visa was cancelled under s 501(3A) of the Act as the applicant did not pass the character test on the basis that he had a substantial criminal record due to being sentenced to imprisonment on a full-time basis for 12 months or more.

3 On 20 August 2021, the applicant made representations seeking revocation of the cancellation decision pursuant to s 501CA(4)(a) of the Act. On 1 July 2022, a delegate of the Minister decided not to revoke the cancellation decision under s 501CA(4) of the Act (**Decision**).

4 On 6 July 2022, the applicant sought merits review at the Tribunal. On 23 September 2022, the Tribunal affirmed the Decision: *Lucas and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 3151 (**Tribunal's Decision**).

5 The applicant seeks review of the Tribunal's Decision pursuant to s 476A(1)(b) of the *Migration **Act** 1958* (Cth).

### LEGISLATIVE SCHEME

6 Section 501(3A) of the Act provides that the Minister must cancel a visa if the Minister is satisfied that a person does not pass the character test due to having a substantial criminal record and that person is serving a full-time custodial sentence. Section 501(7)(c) of the Act provides that a person has a substantial criminal record if they have been sentenced to a term of imprisonment for 12 months or more.

7 Pursuant to s 501CA(4) of the Act, the Minister may revoke a decision to cancel a visa under s 501(3A) if the person makes representations which satisfies the Minister that either the person

passes the character test, or that there is another reason why the original decision should be revoked.

8 A person or body exercising powers under the Act is required to comply with any directions made by the Minister under s 499(1). In the present case *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90** or **the Direction**), issued on 20 August 2021, is the relevant direction. Paragraph 5 is described as the preamble to the Direction and at 5.1 it states that the purpose of the Direction is to guide decision makers in performing functions or exercising powers under s 501 and 501CA of the Act. Paragraph 5.2 of the Direction sets out principles which provide framework within which decision makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under s 501 or revoke a mandatory cancellation under s 501CA.

9 Paragraph 8 of Direction 90 sets out the primary considerations:

(1) Primary Consideration 1: Protection of the Australian community from criminal or other serious conduct;

(2) Primary Consideration 2: Whether the conduct engaged in constituted family violence;

(3) Primary Consideration 3: The best interests of minor children in Australia; and

(4) Primary Consideration 4: Expectations of the Australian community.

10 Paragraph 9 of the Direction 90 sets out four other considerations to take into account:

(1) Other Consideration (a): International non-refoulement obligations;

(2) Other Consideration (b): Extent of impediments if removed;

(3) Other Consideration (c): Impact on victims; and

(4) Other Consideration (d): Links to the Australian community, including:

(a) strength, nature and duration of ties to Australia; and

(b) impact on Australian business interests

## TRIBUNAL HEARING AND DECISION

11 The Tribunal hearing took place over two days. The applicant gave oral evidence and called a further six witnesses at the hearing.

12 The Tribunal was satisfied that the applicant did not pass the character test, and therefore found the question for the Tribunal was whether there was another reason why the Decision should be revoked. The Tribunal identified that "[i]n considering whether to exercise the discretion" to revoke the Decision, the Tribunal was bound to consider Direction 90: at [20].

13 In its reasons the Tribunal outlined the applicant's history of offending, and detailed the evidence before it, including the evidence given at the hearing: at [28]-[108]. The Tribunal then summarised the closing submissions made by the applicant and Minister: at [109]-[122]. Before turning to consider Direction 90, the Tribunal made detailed findings as to the applicant's credibility at paragraphs [123]-[130]. Those findings and where they appear in the reasons is important. Accordingly, I set them out in full:

> The Tribunal has carefully considered the credibility of this applicant, and found it wanting. When questioned regarding his 2015 offending he initially lied to police, denying any knowledge of the matter, although he later pleaded guilty to entering premises and committing an indictable offence, namely stealing a computer. Before the Tribunal, and notwithstanding his plea of guilty to this offence, the applicant continued to deny the theft of the computer. When apprehended in relation to his 2019 offending, the applicant again lied to police by completely denying the commission of the offence. He further lied to police saying the phone belonged to a friend, and lied again when he said that he had found the mobile phone at a bus stop. He also lied to police when he denied being with his uncle, and claimed to have last seen his uncle a couple of days earlier.
>
> The applicant gave evidence before the Tribunal that everything submitted to the Court and to the Department on his behalf was true. Before the Tribunal, the applicant claimed to have no recollection at all of his offending owing to his state of intoxication, although he was somehow able to have limited recollection of events after his arrest. Before the Court, it was submitted on his behalf that he was extremely intoxicated at the time, although there is little in the police records to suggest extreme intoxication, and he was able to participate in an Electronic Record of Interview. The Court was also told that he was led astray by his uncle, however there is no corroborative evidence to support this. Before the Tribunal, the applicant equivocated between being unaware that his uncle was in possession of a machete, and not remembering whether or not he had one.
>
> On the applicant's instructions - presumably given when he was sober - the Court was told that the machete attack was "*spontaneous offending*". This does not sit comfortably with the applicant's letter -presumably written when he was sober - to the Department asserting that at the time of the assault he had been under the impression that the victim had robbed a family member.
>
> The Tribunal specifically raised its concerns about the applicant's credibility with him. The applicant's response was highly evasive. He was unable to satisfactorily answer questions about the discrepancies, or offer any detail regarding the family member who had been robbed or what had been taken.
>
> The Court was told that the applicant had a good upbringing with his family, and he enjoyed good outdoor pursuits like hunting and fishing. This appears to be a deliberate misleading of the court, as the Tribunal was given a vastly different picture: "*my family*

*background is gang affiliated. Like, it runs in our blood …*"

Moreover, he had a violent alcoholic father who was in and out of jail for domestic violence:

> "Look, I didn't have a great childhood growing up back in New Zealand …. My dad used to beat my mother, like bad, all the time. That's why he was sent to gaol; he'd come back and always you know, he would give me a hiding, you know, and then, you know, beat my mum up for standing up for me…it built up the anger in me … seeing my mother get bashed every day."

It is clear from the foregoing that the evidence of this applicant is fraught with inconsistencies, and implausible improbabilities. He has a history of lies tailored to his immediate circumstance. Taking all of the above into account, the Tribunal finds that the applicant is not a credible witness and rejects his evidence in its entirety.

The Tribunal now turns to the specific considerations of Direction 90.

(Footnotes omitted)

14 Those findings are directly reflected in paragraphs [161], [163], [166] and [170] of the Tribunal analysis of Primary Consideration 1. The applicant's credibility is also referred to in the Tribunal's reasons at paragraph [199] dealing with Other Consideration (b) and at [209] of the Tribunal's analysis related to Other Consideration (d).

15 The Tribunal concluded at [225]:

> In considering whether there is another reason to exercise the discretion afforded by s501CA(4) of the Act to revoke the mandatory visa cancellation decision, The Tribunal finds as follows:
>
> - Primary Consideration 1 weighs very heavily in favour of non-revocation;
> - Primary Consideration 2 is given neutral weight;
> - Primary Consideration 3 weighs slightly in favour of revocation;
> - Primary Consideration 4 weighs heavily in favour of non-revocation; and
> - To the extent that Primary Consideration 3 and Other Consideration (d) weigh in favour of revoking the mandatory visa cancellation decision, they cannot, even when combined, outweigh Primary Considerations 1 and 4.

16 As to the way that the Tribunal hearing relevantly unfolded the transcript discloses that early on the first day of the hearing the Tribunal member asked the following questions of the applicant:

> MEMBER: … Mr Lucas, can you confirm for me, please, that all submissions made to the Court which sentenced you - that's Judge Chowdhury in the District Court of Queensland sitting at Beenleigh - that all submissions made to the Court were true and were made on your instructions?
>
> MR LUCAS: Yes.

> MEMBER: Okay. And can you confirm to me, please, that all statements made to the Department during the request for revocation process and to this tribunal were true and were either made by or authorised by you?
>
> MR LUCAS: Yes.

17 Early on the second day of the hearing the member stated the following to the applicant:

> MEMBER: Thank you. Now, the other thing I'd like to put you on notice about, Mr Lucas, is I'm having some difficulties with your credibility, okay? I haven't reached any concluded views at this stage, but in evidence you've said that you were easily lead astray when intoxicated and I don't know how you can say that if you've got no recollection of the event. If you have no recollection of the event, how can I be sure whether your Uncle influenced you or vice versa? And if you had no recollection of the event, how could you instruct your counsel to submit that your uncle was the lead offender and how could you write to the Department and say that the victim was suspected of robbing a relative? It just doesn't gel with me. Would you like to comment on any of that, please?
>
> MR LUCAS: Yes, I understand what you're saying. I do have plans set out for – if I do get released, I will not be going back towards alcohol at all, because I know that it has affected my life and I do make poor choices on – when I'm under the influence of alcohol. I've got more to look forward to, than may – of ruining my life with alcohol. Got more – I've got my little family, my little daughter to go back to, to work hard for, support for. Like I said, I do – like, I do not want to go back to alcohol at all. And I'm 100 per cent honest about that. Like, it just ruined my life. I don't want nothing to do with it.
>
> MEMBER: My question was addressed to your credibility and your varying recollections, not your alcohol consumption. Is there anything you'd like to add to what I've – to what you've just said?
>
> MR LUCAS: Not right now, Your Honour.
>
> MEMBER: Okay. Well, you'll have the opportunity of addressing me further before the hearing concludes.

## GROUNDS OF REVIEW

18 By a Further Amended Originating Application, the applicant raises four grounds of review.

19 First, the applicant argues that the Tribunal's Decision was illogical and/or irrational, in that it rejected the applicant's evidence in its entirety, but went on to accept aspects of his evidence including as it related to his having experienced background trauma, his commitment to providing for his daughter whether he lives in Australia or New Zealand, his capacity to resist threats presented by his family's connections to gangs to his re-integration into the community, and his intention to provide financial support to his partner in order to assist with raising their daughter including from New Zealand. The applicant argues that this establishes jurisdictional error which was material as those aspects of the applicant's evidence were used against him when considering Direction 90.

20 Second, the applicant argues that he was denied procedural fairness in that the Tribunal found that he deliberately misled the Court when he told the Court that he had a good upbringing, contrary to the evidence he later gave to the Tribunal, namely that his background is "gang affiliated", he "did not have a great childhood growing up in New Zealand", and his mother used to "get bashed every day" by his father. The applicant argues that the Tribunal was required to put that adverse finding to him as it was not obviously open on the evidence, and this error was material as it contributed to an adverse credibility finding.

21 Third, the applicant argues that the Tribunal took into account an irrelevant consideration, being the applicant's criminal history as a juvenile despite no convictions being recorded. The applicant submits that this should not have been taken into account pursuant to s 85ZR(2) of the ***Crimes Act*** *1914* (Cth) and *Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 288 FCR 10 (Katzmann, Derrington and Banks-Smith JJ). The applicant contends that this error was material as it affected the attribution of weight to a primary consideration which weighed against him.

22 Fourth, the applicant argues that the Tribunal acted on a misunderstanding of the law, in that it determined that the statutory power in revoking a cancellation decision pursuant to s 501CA(4)(b)(ii) of the Act is discretionary, which it is not. The applicant contends that the error infected the whole of the decision-making process, and was material, relying on ***Au*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315 at [51]-[52] (Derrington J).

**GROUND FOUR – MISUNDERSTANDING OF THE LAW**

23 It is convenient to first deal with ground four.

24 The applicant referred to paragraphs [20], [225] and [227] of the Tribunal's decision which each, in one way or another, referred to the statutory test as discretionary:

- "In considering whether to exercise the discretion in s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act… The Direction provides guidance for decision-makers on how to exercise the discretion in s 501CA(4) of the Act": at [20].
- "*Direction No 90 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa*

*under section 501CA* ("**the Direction/ Direction 90**"), page 5, Part 2, 6 – *Exercising discretion*": footnote 13 to paragraph [21].

- "In considering whether there is another reason to exercise the discretion afforded by s501CA(4) of the Act to revoke the mandatory visa cancellation decision, The Tribunal finds as follows…": at [225].
- "Consequently, the Tribunal cannot exercise the discretion to revoke the cancellation of the Applicant's visa": at [227].

25 The applicant submitted that the Tribunal erred in exercising its statutory decision making powers as it incorrectly acted on a misunderstanding that the power to revoke the Decision pursuant to s 501CA(4) is discretionary, when it is not.

26 The decision of *Au* was central to the arguments of the parties in relation to this ground, however each had different interpretations.

27 In *Au*, the Full Court of this Court considered whether the Tribunal erred in treating the question of whether there was "another reason" to revoke a cancellation decision for the purpose of s 501CA(4) as a discretionary power. The Full Court held that the Tribunal erred in failing to correctly address the statutory task by adopting a discretionary rather than evaluative approach, which was an error that was material to the outcome of the decision. Relevantly, paragraphs [22], [51] and [52] of Derrington J's judgment, with whom Perry J agreed, states:

> These submissions can be quickly rejected. There is nothing in the Tribunal's reasons suggesting that it understood the correct question to be determined. As indicated above, it expressly directed itself to the exercise of what it perceived to be a discretion in s 501CA(4) as to whether it should or should not revoke the cancellation decision. It seems to be undoubted that when the Tribunal member referred to a "discretion", he intended that to be an accurate description of the power in question.
>
> …
>
> In the present case the application of the process identified in *MZAPC* is somewhat difficult. In cases where the decision-maker has identified for itself the correct question and issues to be determined but has erred in one respect, it is not an unreasonably difficult task to identify what was decided and then ascertain the impact, if any, the error had on the conclusion. Here, the position is quite different. The Tribunal member did not address the question of whether, on the material, there was "another reason for revocation". Instead, it asked itself whether, as a matter of discretion, the cancellation decision should be revoked. As identified previously those two considerations are functionally and substantively different. The former does not seek to determine whether the cancellation decision should be revoked, but only whether there is another reason for doing so.
>
> On one view, if the decision in *MZAPC* is applied to the circumstances of this case, it would necessitate the Court considering whether, on the facts and materials before the

> Tribunal, there was a realistic possibility that it could have concluded there was another reason for cancellation. That would require the Court, standing in the shoes of the decision-maker, considering the material and determining for itself whether such a reason existed. However, that is not the correct approach. Here, the correct question was not addressed. It should have been whether the delegate's decision that the power under s 501CA(4) was not enlivened because they were not satisfied of the existence of another reason for cancellation, was the correct or preferable one. As mentioned, the Tribunal asked itself a different question. Therefore, in the application of the materiality principles the question is whether, if the Tribunal addressed the correct question, there was a realistic possibility of a different outcome. The answer must, of course, be in the affirmative. That is, the Tribunal would not have determined that the correct or preferable decision was that the discretion should be exercised not to revoke the cancellation decision. How it would have answered the entirely different question of whether there was "another reason for revocation" is impossible to ascertain. It follows that the failure to address the correct question was an error that, had it not occurred, meant that there was a realistic probability of a different outcome.

28 See also O'Sullivan J at [153] – [155].

29 The applicant drew the distinction between s 501(1) of the Act which confers a discretionary power to refuse the grant of any visa, and s 501CA(4) which requires a subjective evaluation of factors. The applicant acknowledged that Direction 90 does refer to the power as "discretionary", however submitted that Direction 99, the current Ministerial Direction, no longer refers to the exercise of power as discretionary. The applicant submitted, therefore that by reason of Derrington J in *Au*, the Tribunal plainly fell into jurisdictional error.

30 For the reasons that follow I do not consider that the Tribunal misunderstood its statutory task.

31 There are a number of decisions of the High Court of Australia which refer to the power under s 501CA(4) as discretionary. In *Applicant S270/2019 v Minister for Immigration and Border Protection* (2020) 383 ALR 194 at [36], Nettle, Gordon and Edelman JJ said:

> It follows in this matter that, although the s 501CA(4) discretion is wide, it must be exercised by the Minister considering the claims and material put forward by the applicant. If *no* non-refoulement claim is made — as in this case — non-refoulement does not need to be considered in the abstract. In those circumstances, it would only need to be considered at a later time, if the applicant applied for a protection visa. The appellant has not done so.

32 In *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 178 ALD 304 at [20], Kiefel CJ, Keane, Gordon and Steward JJ stated:

> The distinction also has significant consequences for discretionary decision-making under powers, such as s 501CA, conferred by statute and without specification of unenacted international obligations: such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error.
>
> (Footnotes omitted)

33 In *Tu'uta Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 604, Kiefel CJ, Gageler, Keane and Gleeson JJ at [10] said:

> The "may" in the chapeau to s 477A(2) confers an authority to exercise the jurisdiction conferred under s 476A(1)(b) or s 476A(1)(c) of the Act, and is not merely facultative in nature. The power is discretionary in the sense that it involves an evaluative judgment as to a state of satisfaction.
>
> (Footnotes omitted)

34 First, I consider that the key question to be answered is whether the Tribunal addressed the correct question. In that regard I respectfully agree with the conclusion expressed by Perry J in ***JSMJ*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1466 at [39] (which I note was handed down after judgment was reserved in this matter) as follows:

> Thus it is accepted that the word "*discretion*" may be used in these two senses, namely: (1) to refer to a discretion properly so called; and (2) to describe an evaluative decision which involves the weighing up of different considerations (even though in my view it is preferable to avoid using the term discretion in this second sense). The real question that the proposed ground of review raises is: did the Tribunal fail to address the question of whether, on the material before it, there was "*another reason for revocation*" but simply "a*sked itself whether, as a matter of discretion, the cancellation decision should be revoked*"? (*Au* at [51] (Derrington J, with whose reasons Perry J relevantly agreed at [1]–[2]) and [153]–[155] (O'Sullivan J).)

35 Second, as the Minister submitted, the applicant is attempting to divorce three paragraphs (and a footnote) from the full reasons of the Tribunal. The Minister, referring to paragraphs [2], [11], [13], [14], [15] and [19] of the Tribunal's Decision, submitted that it expressly recognised the correct statutory task:

- "Section 501CA(4) of the Act provides that the decision-maker may revoke the mandatory cancellation of a visa if the person made representations within the relevant time period provided for in the *Migration Regulations 1994* (Cth) (28 days in accordance with reg 2.52), and the decision-maker determines that the Applicant passes the "character test", or, as provided under s 501CA(4)(b), there is another reason why the mandatory cancellation
- should be revoked.": at [2].
- "Revocation of the mandatory cancellation of visas is governed by s 501CA(4) of the Act": at [11].
- The reference to the Full Court's decision in *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 (Besanko, Barker and Bromwich JJ): at [13].

- "As provided in s 501CA(4)(b) of the Act, there are therefore two issues presently before the Tribunal:
- whether the Applicant passes the character test; and
- whether there is another reason why the decision to cancel the Applicant's visa should be revoked.": at [14].
- "If the Applicant succeeds on either ground, the weight of authority indicates that the Tribunal must find that the cancellation of the Applicant's visa must be revoked.": at [15].
- "The remaining question therefore is found in s 501CA(4)(b)(ii) of the Act, namely whether there is another reason why the original decision should be revoked.": at [19].

36 The Minister submitted that paragraphs [11]-[15] of the Tribunal's Decision specifically evidence an understanding of the correct statutory task, and the reference to "discretion" is only to incorporate the wording of Direction 90, rather than a misunderstanding of the correct statutory task. The Minister submits that this matter is therefore distinguishable from *Au*, in the reasons of which the Tribunal stated that "my task is to re-exercise the delegate's discretion afresh" and used the word "discretion" 11 times. As well, in *Au*, the Tribunal did not identify the correct statutory task at all. I accept those submissions.

37 Third, in at least of some of the instances referred to by the applicant, the Tribunal did no more than use the word "discretion" directly as it appeared in the Direction, which cannot amount to an error. As to the applicant's submission that the word "discretion" has been omitted from Direction 99, no submission was made as to the invalidity of Direction 90 as a result of its description of the power in s 501CA(4) of the Act as a discretion.

38 Fourth, it is well established that an administrative decision maker's reasons "are not to be construed minutely and finely with an eye keenly attuned to the perception of error": *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** (1996) 185 CLR 259 at 271-272.

39 Accordingly, I consider that in this matter the Tribunal correctly approached the question as an evaluative exercise in the manner described by Perry J in *JSMJ*, rather than the exercise of a true discretion. Therefore, this ground fails.

**GROUND TWO – PROCEDURAL FAIRNESS**

40 Ground two takes issue with the finding at [127] of the Tribunal's decision, where it states:

> The Court was told that the applicant had a good upbringing with his family, and he enjoyed good outdoor pursuits like hunting and fishing. **This appears to be a deliberate misleading of the court**, as the Tribunal was given a vastly different picture: "*my family background is gang affiliated. Like, it runs in our blood ...*"
>
> (Emphasis added)

41 At hearing this ground focused on two main contentions. First the applicant contended that in accordance with the rules of procedural fairness, the applicant should have been put on notice that the Tribunal would make this finding. As is set out at paragraph [16] above the Tribunal asked the applicant early on the first day of the hearing to confirm that the submissions made at the sentencing at the District Court were truthful and made on his instructions, to which he responded in the affirmative. Those submissions were to the effect that he had a good childhood in New Zealand. The evidence given by the applicant to the Tribunal however was inconsistent with the submissions provided to the District Court, which led to the finding at paragraph [127].

42 The rules of procedural fairness are well established. In *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591-592, Northrop, Miles and French JJ said:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

43 Consistent with *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 at [33], the applicant submitted that there is a realistic possibility of a different outcome as he was denied an opportunity to make submissions on this issue. Furthermore, the applicant submitted that he is not required to demonstrate how he might have taken the opportunity to make submissions, however did file an affidavit in these proceedings which stated that when he spoke to the solicitor prior to his sentencing, he was asked about his upbringing to which he stated it was good and did not disclose any traumatic experiences as he was stressed, overwhelmed and scared as to what was going to occur in Court, and was not in a "good mental space". Further, he stated that he did not feel comfortable disclosing his past traumatic experiences as it is difficult to process those memories, and he has not received any counselling or treatment which

means that he does not like to talk about it. Lastly he stated that he did not want to bring his mother "into this" as she had “been through so much”.

44 The Minister contended that the Tribunal put the applicant on notice that it had issues with his credibility at the hearing, referring to what the Tribunal said to the applicant early in the second day of the hearing, as set out at paragraph [17] above.

45 The Minister submitted that this was sufficient such that the Tribunal had complied with its procedural fairness obligations, referring to *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 at [47]-[48]:

> First, there may well be cases, perhaps many cases, where either the delegate’s decision, or the Tribunal’s statements or questions during a hearing, sufficiently indicate to an applicant that everything he or she says in support of the application is in issue. That indication may be given in many ways. It is not necessary (and often would be inappropriate) for the Tribunal to put to an applicant, in so many words, that he or she is lying, that he or she may not be accepted as a witness of truth, or that he or she may be thought to be embellishing the account that is given of certain events. The proceedings are not adversarial and the Tribunal is not, and is not to adopt the position of, a contradictor. But where, as here, there are specific aspects of an applicant’s account, that the Tribunal considers may be important to the decision and may be open to doubt, the Tribunal must at least ask the applicant to expand upon those aspects of the account and ask the applicant to explain why the account should be accepted.
>
> Secondly, as Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*:,
>
> > … the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.
>
> Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.

46 The second strand is that the applicant contended that the Tribunal was under an obligation, particularly where the applicant was self-represented before it, to put the allegation that he appeared to have misled the Court to him and warn him of his right to privilege against self-incrimination, referring to ***Promsopa*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480 (Allsop CJ). In that case, during the course of the hearing before the Tribunal, the applicant stated that her sole income was derived from Centrelink payments. In response, the Tribunal questioned the applicant as to her eligibility for payments as her visa was cancelled and made a finding in its decision that the applicant had

breached the law by not informing Centrelink of her visa status. Allsop CJ held that the privilege against self-incrimination applies in non-curial settings, and the Tribunal may deny procedural fairness to a self-represented party if its question "strays into matters about which the unrepresented party could invoke the privilege against self-incrimination without warning the person": [37]. The applicant submitted that to deliberately mislead the Court is a criminal offence, namely perjury or perverting the course of justice.

47 The Minister submitted that *Promsopa* was distinguishable as there the Tribunal was asking questions as to whether the applicant had committed an offence which was not what had occurred in this case. Further here, according to the Minister, there was no express finding that the applicant had committed any offence, rather in this case the Tribunal's Decision says that it "appears" that the applicant had deliberately misled the Court at [127].

48 As to the first strand I do not accept that the Tribunal fulfilled its obligations with respect to procedural fairness. The Tribunal's question was broad, and the Tribunal did not put its conclusion, being that he deliberately misled the Court, to the applicant for comment. No submissions were made by the Minister during the course of the hearing regarding the applicant having appeared to mislead the Court, and the Tribunal's general statements putting the applicant on notice as to its concerns regarding credibility were made on the second day of the hearing, sometime after its questions about the submissions to the District Court which were made on the first day. Despite the Tribunal questioning the applicant at the end of his cross-examination and again towards the end of the hearing, at neither point did the Tribunal raise with the applicant that he appeared to have misled the Court. Accordingly, I accept the applicant's submission that it was not obviously open on the known material before the Tribunal that the applicant would be found to have appeared to have misled the court, especially in circumstances where the applicant appeared before the Tribunal self-represented.

49 I accept that the Tribunal is not required to provide a running commentary as to its "prospective reasoning process" or the "existence of doubts, inconsistencies or the absence of evidence": *SZBYR v Minister for Immigration and Citizenship* (2007) 235 ALR 609 at [18] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ). However, taking into consideration the questions put to the applicant at the Tribunal hearing, the gravity of the finding that the applicant had appeared to mislead the Court and the significance of that finding to its overall findings as to credibility, I do not consider that putting the applicant on notice of a potential finding that it appeared that he had misled the court, and giving him the appropriate warning

as discussed further below, to be a running commentary as to "its prospective reasoning process" or the "existence of doubts, inconsistencies or the absence of evidence".

50 As to the second strand, I adopt the comments of Allsop CJ in *Promsopa* at [36] and [37]:

> The privilege against self-incrimination is a fundamental common law right: *Sorby v Commonwealth* [1983] HCA 10; 152 CLR 281 at 294 (Gibbs CJ), 309 (Mason, Wilson and Dawson JJ) and 311 (Murphy J); Reid v Howard [1995] HCA 40; 184 CLR 1 at 11–12 (Toohey, Gaudron, McHugh and Gummow JJ); and *Meneses v Directed Electronics OE Pty Ltd* [2019] FCAFC 190; 273 FCR 638 at [85]–[87]. It is not merely a rule of evidence available in judicial proceedings but is available generally, even in a non-curial context, as the foundation of an entitlement not to answer a question: *Griffin v Pantzer* [2004] FCAFC 113; 137 FCR 209 at [44]. The Tribunal is not bound by the rules of evidence, but this does not allow a Tribunal to require a witness to answer questions which exposes her or him to self-incrimination. The privilege against self-incrimination has also been recognised in statute, most particularly in ss 62(3) and 62(4) of the *Administrative Appeals Tribunal Act 1975* (Cth) . Also, s 371(2)(c) of the Act provides that it is an offence for a witness to fail to answer a question of the Tribunal for the purposes of a review under Pt 5 of the Act. Section 371(3), however, provides an exception to this offence where "answering the question might tend to incriminate the person".
>
> The Tribunal may deny an unrepresented party procedural fairness if its questioning strays into matters about which the unrepresented party could invoke the privilege against self-incrimination without warning the person: *Kohli v Minister for Immigration & Border Protection* [2018] FCA 540; 74 AAR 433 per Flick J at [33]–[34], citing *SZHWY v Minister for Immigration & Citizenship* [2007] FCAFC 64; 159 FCR 1 at [74]–[77], [112] and [160]–[169] where the Full Court found that the Tribunal may deny an unrepresented party procedural fairness in circumstances where it fails to advise the party of the right to invoke client professional privilege. In *Kohli*, Flick J concluded that the Tribunal failed to advise the appellant of his right to invoke the privilege in respect of questioning about whether he had been driving unlawfully and his involvement in a possible theft. Nevertheless, his Honour held that the failure by the Tribunal occasioned the appellant no practical injustice because he was under no continuing risk of being charged with any unlawful driving offence relating to the events described in the cross-examination, and he denied any wrongdoing in respect of the theft. The evidence going to either or both of the matters also assumed little relevance in the ultimate reasoning and conclusion of the Tribunal. On that basis, Flick J at [39] dismissed the appeal ground, finding that the appellant (who was "well-educated (albeit unrepresented)") was not deprived of any meaningful opportunity to be heard by reason of any failure to advise him as to his rights against self-incrimination. That description does not fit the appellant here.

*51* Given the above I do not accept the Minister's submissions. To deliberately mislead the Court is to commit perjury or to pervert the course of justice, which are serious offences (e.g. s 327 of the *Crimes Act 1900* (NSW); s 124 of the *Criminal Code 1899* (Qld)). The questions put by the Tribunal led the applicant to affirming evidence that he had given to the Court, which was at odds with evidence he had given to the Tribunal, and accordingly the obligation to warn regarding the privilege against self-incrimination arose. A general warning as to concerns

about the applicant's credibility at a time distant from the evidence giving rise to the critical finding is not a substitute for a warning as discussed in *Promsopa*.

52 The fact that the Tribunal's finding was couched in terms of "appearing" to be a deliberate misleading of the Court rather than a finding that he "broke the law" does not assist the Minister. It is well accepted that deliberately misleading the Court is an offence and an argument that the way the offence is described might negate the need to provide the appropriate warning is rejected. Accordingly, I am satisfied that the Tribunal erred in failing to accord the applicant procedural fairness.

53 Consideration must be had as to the materiality of the error, the principles of which were recently summarised in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 1 at [73]-[83] (Markovic, Thomas and Button JJ). Importantly, the Court must satisfy itself of the possibility of the decision being different had the error not occurred, and that possibility must not be "fanciful" or "improbable": at [79]. I am of the view that the error had a material impact on the decision, as it led to strong adverse credibility findings against the applicant which impacted a majority of the Tribunal's decision making. Accordingly, the applicant succeeds on ground two.

**GROUND ONE – ILLOGICALITY AND IRRATIONALITY**

54 For a finding to be regarded as illogical or irrational, it must be demonstrated as "extreme" and "measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions": *EPU17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 49 at [44], by reference to *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; (2018) 258 FCR 175 at 184 [30(5)]. The illogicality or irrationality must be such that no logical or rational person could reach the same decision on the same material: *Minister for Immigration and Citizenship v* ***SZMDS*** [2010] HCA 16; 240 CLR 611 at [135] (Crennan and Bell JJ).

55 In ***Davis*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1368, Burley J considered a similar issue where the parties disagreed as to the Tribunal's meaning of certain words at [26]-[27]:

> These provisions demonstrate that the reasons for the decision of the Tribunal are to be taken to reflect what the Tribunal found. However, it is for the Court to discern what the Tribunal is saying in its reasons. The starting point is that because the Tribunal was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were, in fact, taken in arriving at

> that result. If something is not mentioned it may be inferred that it has not been considered or taken into account; Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30; 206 CLR 323 at [5] (Gleeson CJ), [37] (Gaudron J) and [69] (McHugh, Gummow and Hayne JJ, Gleeson CJ agreeing at [1]); Waterways Authority v Fitzgibbon [2005] HCA 57; 79 ALJR 1816 at [130] (Hayne J, McHugh J agreeing at [26] and Gummow J agreeing at [28]).
>
> Whether it is appropriate to draw an inference that something has or has not been considered or taken into account must be determined by reference to the facts of each particular case and the reasons as a whole. The Court will not be concerned with looseness in the language of the Tribunal nor unhappy phrasing of the Tribunal's thoughts, nor are the reasons for the decision under review to be construed minutely and finely with an eye keenly attuned to the perception of error: Wu Shan Liang at [30] (Brennan CJ, Toohey, McHugh and Gummow JJ); Pozzolanic Enterprises at 287 (Neaves, French and Cooper JJ); Politis v Federal Commissioner of Taxation [1988] FCA 739; 16 ALD 707 at 708 (Lockhart J).

56 Ground one deals with the Tribunal's credibility assessment of the applicant. The applicant takes issue with the Tribunal's finding at [129] of its decision, where it states:

> It is clear from the foregoing that the evidence of this applicant is fraught with inconsistencies, and implausible improbabilities. He has a history of lies tailored to his immediate circumstance. Taking all of the above into account, the Tribunal finds that the **applicant is not a credible witness and rejects his evidence in its entirety**.
>
> (Emphasis added)

57 The applicant submitted that, having decided to reject the applicant's evidence in its entirety, it was not then open to the Tribunal to accept aspects of the evidence, and doing so was a reflection of extreme illogicality. The findings, and their relevance as submitted by the applicant, includes:

(1) At [166]-[167], the Tribunal accepted the applicant's evidence concerning his background trauma and necessity for further rehabilitation. Acceptance of the applicant's evidence directly fed into the Tribunal's later finding that the applicant posed a high risk of reoffending at [170].

(2) At [181], the Tribunal accepted the applicant's evidence that he was committed to providing for his daughter if returned to New Zealand. That finding fed into the Tribunal's ultimate finding that only 'slight' weight should be given to the best interests of minor children in Australia at [184].

(3) At [199], the Tribunal concluded "If the applicant is telling the truth when he speaks of his gang-based relatives, he has demonstrated, on previous visits to New Zealand, an awareness of the potential threat to his re-integration into the community, and a

capacity to resist it." In other words, the Tribunal used the applicant's evidence to find that he could re-integrate into the New Zealand community.

(4) At [209], the Tribunal concluded: "…..but if he is good to his word, she should receive financial support from him to assist with the costs of raising their daughter". The applicant's evidence was used to find the hardship of the applicant's partner would be moderated by reference to the financial support the applicant would provide from New Zealand.

58 The Minister contended that, on a fair reading of the Tribunal's Decision in accordance with *Wu Shan Liang* at 271-272, the Tribunal's findings at [129] were confined to the applicant's evidence as to his offending, set out at [123]-[126] of the Tribunal's Decision, and were not suggesting that everything the applicant had ever said was rejected. The Minister submitted that what the Tribunal said cannot be taken literally, as it accepted uncontroversial background facts such as his name, age and family composition.

59 The applicant submitted that it is clear that this was a global finding as to all of the applicant's evidence, as shown by the immediate preceding paragraphs which:

- At [123], the Tribunal undertook a general credibility assessment with reference to his conduct towards police officers and his conduct before the Tribunal.
- At [124], the Tribunal discussed an interview he had with police officers when he was detained.
- At [126], the Tribunal talks about the conduct of the applicant as a witness before it.
- At [127], the Court proceedings are discussed.
- At [128], the Tribunal quotes the applicant's cross-examination.

60 The applicant submitted that this clearly demonstrates that the Tribunal was concerned with more than just his evidence with respect to his offending, and instead entirely rejected the evidence. The applicant submitted that the Tribunal effectively "cherry-picked" aspects of his evidence that were adverse to him.

61 The submission that the finding was a general one rather than confined only to the applicant's offending must be accepted, not only because of the way in which the findings are expressed, including that they refer to the applicant's statements to the Minister and his demeanour, but also by virtue of their placement within the Tribunal's Decision as general findings after its

summary of all of the evidence and the closing submissions and prior to its detailed examination of the individual considerations.

62 It is also to be accepted that the Tribunal's conclusion in this case, that it "rejects [the applicant's] evidence in its entirety" is expressed unfortunately in the context of the evidence overall. It is an example of the "loose language" or "unhappy phrasing" referred to by Burley J in *Davis*. However, the Tribunal's Decision, read as a whole, does not disclose an absolute rejection of the applicant's evidence.

63 I accept the Minister's submission that the applicant is attempting to read the Tribunal's reasons through the lens of three words contained in one paragraph of the reasons, and finely with an eye keenly attuned to the perception of error: *Wu Shan Liang* at 271-272. The reasons overall indicate that the Tribunal rejected much of the applicant's evidence but accepted certain parts of it, although with reservations. Those reservations were expressed in relation to the applicant's prospective support for his child where it is said "if he is good to his word" and by the use of the words "if he is telling the truth" in relation to his ability to not succumb to negative influences from gang-based relatives who he might encounter if returned to New Zealand: at [198], [209].

64 The conclusions are not ones such that no logical or rational person could reach the same decision on the same material: *SZMDS* at [135]. Therefore, this ground must fail.

**GROUND THREE – IRRELEVANT CONSIDERATION**

65 Ground three is concerned with the Tribunal's consideration of the applicant's offending when he was aged 17. It should be noted that this matter was adjourned pending the High Court's decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 409 ALR 234 (Gageler, Gordon, Edelman, Steward and Jagot JJ) (**Thornton HC**), however upon publication of the High Court's reasons the parties sought to proceed to hearing.

66 The relevant aspects of the Tribunal's Decision relating to this ground are:

- At [52], the Tribunal referred to "[a] summary of the applicant's criminal offending" and included reference to an offence that occurred on 22 October 2014.
- At [76], the Tribunal referred to "an offence" that occurred in "October 2014".

- At [139], the Tribunal referred to an "offence" and provided details of the offending that occurred in October 2014, before then finding at [140] that "[t]his offence falls within paragraph 8.1.1(b)(ii) of the Direction, and weighs heavily against revocation of the cancellation of the applicant's visa."
- At [146], the Tribunal states that the applicant's "prior offending was dealt with by way of fines or probation".

67 This ground was originally run as a *Thornton HC* argument, however the applicant appeared to concede that the ***Youth Justice Act*** *1992* (Qld) does not apply to the applicant in circumstances where, at the time of the conduct, he was not a "child" for the purposes of the Youth Justice Act as it was then drafted. In any event, the applicant contended that in fact the applicant was not convicted of the conduct that occurred in October 2014, and therefore it was wrong for the Tribunal to treat those matters as convictions and criminal offences.

68 The applicant submitted that this matter is still analogous to *Thornton HC*, as s 12 of the ***Penalties and Sentences Act*** *1992* (Qld), which deals with when the court may consider whether or not to record a conviction, operates in the same way as the Youth Justices Act with respect to s 85ZR(2) of the Crimes Act.

69 Section 85ZR(2) of the Crimes Act stipulates:

> (2) Despite any other Commonwealth law or any Territory law, where, under a State law or a foreign law a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence under a law of that State or foreign country:
>
> (a) the person shall be taken, in any Territory, in corresponding circumstances or for a corresponding purpose, never to have been convicted of that offence; and
>
> (b) the person shall be taken, in any State or foreign country, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State or country, never to have been convicted of that offence.

70 In the decision of ***Hartwig*** *v PE Hack* [2007] FCA 1039, which the applicant accepts he must overcome to succeed on this point, Kiefel J (as her Honour then was) considered the relationship between s 12(3) of the Penalties and Sentences Act, and s 85ZR(2) of the Crimes Act, determining at [11]:

> Section 12(3) of the *Penalties and Sentences Act* (Qld) and s 85ZR(2) of the *Crimes Act* (Cth) are however dissimilar. The former is concerned that there be no record of a conviction. The Commonwealth provision envisages a state legislation provision, which removes or disregards the conviction altogether. Their common purpose might be said to be rehabilitation, but they arise in different ways, and from a different

> circumstance. In my view, the Commonwealth provision is not referring to a provision such as the non-recording provision in s 12(3) of the *Penalties and Sentences Act* (Qld). The Commonwealth provision does not operate on that provision in the way contended for.

71 While this in itself deals with the applicant's submission, the applicant contends that Kiefel J (as she was at the time) was incorrect, by reference to a number of Queensland Court of Appeal decisions.

72 In *R v Cay, Gersch and Schell; ex parte A-G (Qld)* (2005) 158 A Crim R 488, de Jersey CJ at [11] stated:

> The breadth of the discretion arising under s 12 of the Act has been mentioned in a number of cases. See, for example, *R v Brown; ex parte Attorney-General* [1994] 2 Qd R 182, 193. A Judge exercising the discretion not to record a conviction must however appreciate that in consequence, other people dealing with the offender in the future will not be informed that the offence has been committed, which is itself a potentially serious matter

73 In *R v Briese, ex parte Attorney-General* (1997) 92 A Crim R 75, Thomas and White JJ at 491 determined:

> The consequence is that when there is a non-recording of conviction, there is a prohibition upon entering the conviction into any records whatsoever (s. 12(3)(b)) other than the court's own record and the offender's ''criminal history''. Further, as under s. 12(3)(a) the conviction 20 ''is taken not to be a conviction for any purpose'', it would seem that an offender who declared, even in a statutory declaration, that he had no previous conviction, or expressly denied having been convicted of the relevant offence, could not later be charged with perjury. In short, although s. 12 lacks the detail of the *Criminal Law (Rehabilitation of Offenders) Act* 1986, it appears to have a similar effect to s. 8 of that Act which permits an offender, after the rehabilitation period, to deny ever having been convicted.

74 In *R v Graham* [2023] QCA 125, Kelly J considered at [4]:

> The relevant statutory provisions may be conveniently outlined as follows. Section 12(1) of the Act confers a discretion upon a sentencing judge to record or not to record a conviction. Section 12(2)(c) provides that in the exercise of that discretion, the court "must have regard to all circumstances of the case" including, relevantly, the impact that recording a conviction will have on the offender's economic or social wellbeing or chances of finding employment. The purpose of recording an offender's conviction is to make the fact of the conviction known to those who have a legitimate interest in knowing about it. Section 12(3)(a) provides for the consequence of not recording a conviction, namely that "a conviction without recording the conviction is taken not to be a conviction for any purpose".
>
> (Footnotes omitted)

75 In *R v ZB* [2021] QCA 9, Sofronoff P said at [8]-[10]:

> Section 12(3) provides that a conviction without recording a conviction "is taken not to be a conviction for any purpose". The conviction is nevertheless entered in the

> records of the court and in the offender's criminal history. However, the entry of the conviction in the person's criminal history is only for very limited purposes, including an appeal, proceedings for the same offence and proceedings for a subsequent offence. Section 5(2) of the Criminal Law (Rehabilitation of Offenders) Act 1986 (Qld) provides that, subject to certain exceptions, a person is not required to disclose for any purpose a conviction that is not a part of that person's criminal history.
>
> The decision not to record a conviction thus denies the community the benefit of the information that would otherwise be available when it might be relevant to an assessment of the offender's character. The renunciation of these benefits conferred by the recording of a conviction is not for nothing. The benefit is foregone because a sentencing judge has decided that, in the circumstances of the case, it is to the greater benefit of the community to afford the offender the privilege of nondisclosure. Incidentally the offender also enjoys the personal benefit of this privilege but that is not the point of making the order.
>
> A sentencing judge must consider the potential benefits and detriments to the community of adopting either course. That is what the opposing factors stated in s 12(2) of the Penalties and Sentences Act require. The nature of the offence might itself preclude a decision not to record a conviction. It is for this reason, for example, that the Act provides that a conviction must be recorded in all cases in which a sentence of imprisonment is imposed. This must be so because in any case in which an offender is sentenced to imprisonment the offence must have been of such a nature that not recording a conviction cannot sensibly be in contemplation. However, as is implied by the factors that are identified in s 12(2)(b) and (c), the offender's subjective circumstances so far as they relate to the offender's future prospects are also significant matters. They raise for consideration whether the promise of future rehabilitation calls for and justifies affording the offender the advantages that flow from not recording a conviction. To put it another way, the question is whether the community will be better served by not placing the obstacles created by a recorded conviction in the path of the offender towards rehabilitation. The issue is not one of tenderness to the offender.
>
> (Footnotes omitted)

76 The Minister contended that the argument does not hold up in light of the consideration that *Hartwig* was distinguishable, set out in *Thornton HC* at [27] (Gageler and Jagot J):

> The Youth Justice Act does not define "conviction" as "a finding of guilt, or the acceptance of a plea of guilty, by a court". Like all words, the meaning of "conviction" will depend on its context, but it is apparent that the Penalties and Sentences Act and the Youth Justice Act assume that it ordinarily includes the making of a court order recording the conviction. This is why s 12(4) of the Penalties and Sentences Act additionally provides that a conviction without the recording of a conviction, by para (a), "does not stop a court from making any other order that it may make under this or another Act because of the conviction" and, by para (b), "has the same result as if a conviction had been recorded for the purposes of", amongst other things, "appeals against sentence" and "proceedings against the offender for a subsequent offence", as well as "subsequent proceedings against the offender for the same offence". The expansive definition of "conviction" in the Penalties and Sentences Act also enables s 12(6) of that Act to be framed as an apparent oxymoron in referring to a court which both "convicts an offender of an offence" and "does not record a conviction". In other words, under the Penalties and Sentences Act, a person is in fact "convicted" by a finding or admission of guilt even if no conviction is recorded.
>
> (Footnotes omitted)

77 The application of *Hartwig* has been subsequently considered by the Full Court of this Court in ***Fulton*** *v Chief of Defence Force* (2023) 411 ALR 528 (Logan, Sarah C Derrington, Stewart JJ). This decision was handed down after judgement in this matter was reserved. While the decisions of the Queensland Court of Appeal to which the applicant referred me were not considered in that case, it must be observed that none of the decisions of the Queensland Court of Appeal considered the operation of s 12 of the Penalties and Sentences Act in the context of s 85ZR(2) of the Crimes Act. Accordingly, I do not consider that they assist the applicant.

78 The Full Court's findings in *Fulton* are clear. At [58] – [60], Logan J, who dissented but agreed on this point, stated the following:

> As the primary judge recognised, a complete answer to the alleged transgression of s 12(3) of the Penalties and Sentences was provided by Kiefel J (as her Honour then was) in *Hartwig v Hack* [2007] FCA 1039 (Hartwig). As was held in *Hartwig*, s 12(3) of the Penalties and Sentences Act is concerned with there being no record of a conviction. It does not prevent the taking into account "of the fact of conviction, which is to say: the acceptance of the record and the plea upon which it was based, together with such facts and circumstances as are necessary to provide an understanding of the offence, so far as they are relevant to the question" to be answered in an administrative decision: *Hartwig*, at [12].
>
> *Hartwig* is referred to in *Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs v Thornton [*2023] HCA 17 (*Thornton*), an appeal decided by the High Court after the conclusion of oral submissions in the present appeal. For this reason, the Court afforded the parties an opportunity, in addition to an opportunity already granted in respect of an unrelated issue, before judgment was to stand reserved, to make supplementary submissions in respect of the ramifications, if any, of Thornton for the present case.
>
> FLTLT Fulton saw in *Thornton* support for his contention that WGCDR Nelson had made impermissible use of the 2017 court outcome. However, as the CDF correctly submitted, *Thornton* is predicated on the correctness of what Kiefel J observed in Hartwig of s 12(3) of the Penalties and Sentences Act but distinguishes those observations and that Act on the basis of the different statutory scheme found in the provision relevant to the alleged impermissible use in that case. That different scheme was found in s 184(2) of Youth Justice Act 1992 (Qld), which provided that a finding of guilt without the recording of a conviction was not taken to be a conviction for any purpose. In turn, s 85ZR(2)(b) of the Crimes Act provides that where, under State law, a person is, in particular circumstances or for particular purpose, taken never to have been convicted of an offence under a law of that State, the person shall be taken, in any State, in corresponding circumstances or for corresponding purpose, by any Commonwealth authority in that State, never to have been convicted of that offence. In *Thornton*, the Minister had taken into account a person's offending as a child for which no conviction had been recorded in deciding not to revoke the cancellation of that person's visa. In dismissing the Minister's appeal in *Thornton*, the High Court confirmed that the Minister had made impermissible use of this youthful offending and thus taken into account an irrelevant consideration. In contrast, as Gageler and Jagot JJ identified in their joint judgment in *Thornton* at [25], s 12(3) of the Penalties and Sentences Act, which concerns only that there be no record of a conviction, does not engage the application of s 85ZR(2) of the Crimes Act; see also to like effect in

*Thornton* per Gordon and Edelman JJ at [81].

79 At [230] – [234], Sarah C Derrington and Stewart JJ stated the following:

> The interpretation of this section, and on which the primary judge relied (J[90]–[91]), was considered in *Hartwig v PE Hack* [2007] FCA 1039 . The question which arose was whether the Administrative Appeals Tribunal, by virtue of s 12(3) of the PSA, was entitled to take account of the fact of conviction (albeit that none was recorded), being the acceptance of the record and the plea upon which it was based, together with such facts and circumstances as are necessary to provide an understanding of the offence, so far as they were relevant to the question before the AAT, which involved the purpose for which a person is said to be fit and proper.
>
> In *Hartwig*, Kiefel J held:
>
> > 8 The nature of the State legislation, to which s 85ZR(2) of the Crimes Act (Cth) refers, is one which deems a person never to have been convicted of an offence. The effect of the provision must be such as to take away the fact of the conviction, as a pardon might do. It is not without significance that the section is headed 'Pardons for Persons Wrongly Convicted'. Other legislation of the type to which s 85ZR(2) refers maybe that which deems a person not to have been convicted after the lapse of a number of years.
> >
> > …
> >
> > 11 Section 12(3) of the Penalties and Sentences Act (Qld) and s 85ZR(2) of the Crimes Act (Cth) are however dissimilar. The former is concerned that there be no record of a conviction. The Commonwealth provision envisages a state legislation provision, which removes or disregards the conviction altogether. Their common purpose might be said to be rehabilitation, but they arise in different ways, and from a different circumstance. In my view, the Commonwealth provision is not referring to a provision such as the non-recording provision in s 12(3) of the Penalties and Sentences Act (Qld). The Commonwealth provision does not operate on that provision in the way contended for.
>
> What flows from that judgment is the necessity of considering "like with like" in determining the applicability of the Commonwealth legislation. In *Hartwig*, it was a comparison between, s 12(3) of the PSA, a State Act which did not take away the fact of a conviction, as did s 85ZR(2) of the Crimes Act. By contrast, in *Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs v Thornton* [2023] HCA 17, the High Court held that the relevant State legislation, s 184(2) of the Youth Justice Act (Qld) did take away the fact of the conviction as might s 85ZR(2). Consequently, *Hartwig* was to be distinguished.
>
> In the present case, the relevant comparison is between s 12(3) of the PSA, which is concerned with the recording of convictions and proscribes a conviction without recording the conviction from being taken to be a conviction for any purpose, and s 85ZV(3) of the Crimes Act which makes it lawful for a person not to disclose the fact of a spent conviction, with the correlative proscription on taking into account the fact that the person was charged with, or convicted of, the offence: s 85ZW(b)(iii). It will be recalled that, as defined in s 85ZM, a person's conviction of an offence is spent if, inter alia, the person was charged with, and found guilty of, the offence but discharged without conviction and the waiting period for the offence has ended.
>
> The *PSA* does not define a "spent offence", nor is s 12(3) concerned with a person's right to non-disclosure, as is 85ZV(3). Contrary to the appellant's submissions, s 12(3)

> cannot be considered to be a State law dealing with the disclosure or taking into account of spent offences. As was held in Hartwig at [11], it is concerned that there be no record of conviction. For that reason, s 85ZV(3) is of no assistance to the appellant.

80 This provides a complete answer to the applicant's argument in relation to this ground. Therefore, this ground must fail.

**CONCLUSION**

81 It follows that the application is to be allowed as I am satisfied that the Tribunal erred in the manner specified in ground two, and that the error was material. The decision of the Tribunal will be quashed, and a writ of mandamus will issue directing the Tribunal to determine the application in accordance with the law. The Minister must pay the applicant's costs of the application.

I certify that the preceding eighty-one (81) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Meagher.

Associate: 

Dated: 21 December 2023