FEDERAL COURT OF AUSTRALIA

Manebona v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 402

Review of:	*Manebona and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2023] AATA 4123 (12 December 2023)
File number:	NSD 3 of 2024
Judgment of:	**STEWART J**
Date of judgment:	22 April 2024
Catchwords:	**MIGRATION** – visa cancelled on character grounds – application for judicial review of Tribunal's decision to affirm decision of the delegate not to revoke cancellation – whether Tribunal misapplied a direction it was bound to apply – whether Tribunal overlooked material – whether failure to take relevant material into account satisfies threshold of materiality – whether Tribunal had a duty to make inquiries about relevant material – Tribunal's decision set aside
Legislation:	*Migration Act 1958* (Cth) ss 476A, 499, 501, 501(3A), 501(6), 501(7), 501CA(4)
Cases cited:	*Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; 225 CLR 88 *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593 *BHA17* [2018] FCAFC 68; 260 FCR 523 *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2; 98 ALJR 196 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 730 *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 116; 298 FCR 516 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332

	Minister for Immigration and Citizenship v SZIAI [2009] HCA 39; 259 ALR 429 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; 274 CLR 398 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 275 CLR 582 *Sowa v Minister for Home Affairs* [2019] FCAFC 111; 269 ALR 389 *Uelese v Minister for Immigration and Broder Protection* [2015] HCA 15; 256 CLR 203
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	84
Date of last submission:	12 April 2024
Date of hearing:	9 April 2024
Counsel for the Applicant:	J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
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Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The second respondent filed a submitting notice save as to costs.

ORDERS

NSD 3 of 2024

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

ORDER MADE BY: **STEWART J**

DATE OF ORDER: **22 APRIL 2024**

THE COURT ORDERS THAT:

1. The decision of the second respondent dated 12 December 2023 to affirm the decision of a delegate of the first respondent not to revoke the cancellation of the applicant's visa be set aside.
2. The matter be remitted to the second respondent, differently constituted, for redetermination.
3. The first respondent pay the applicant's costs.

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

REASONS FOR JUDGMENT

STEWART J:

Introduction

1 This is an application under s 476A of the *Migration Act 1958* (Cth) for judicial review of a migration decision of the Administrative Appeals Tribunal. The Tribunal affirmed the decision of a delegate of the Minister for Home Affairs under s 501CA(4) of the Act on 29 September 2021 not to revoke the mandatory cancellation of the applicant's visa. The applicant's visa had been cancelled on 10 February 2021 under s 501(3A) of the Act on the basis that the applicant did not pass the character test.

2 There is no dispute that the applicant fails the character test. That is on account of his conviction on 9 December 2020 for domestic violence offences for which he was sentenced to two years imprisonment, partially suspended. The question before the delegate and the Tribunal was whether they were satisfied that there was "another reason" why the mandatory cancellation decision should be revoked as referred to in s 501CA(4). As will be seen, central to that question was the attitude of the applicant's ex-partner whom he had assaulted, JW, to the prospect of him being deported, both in relation to herself and her minor children of whom he is the father.

Background

3 The applicant was born in the Solomon Islands in 1986. He is 37 years old.

4 For nearly a year when he was 14-15 years old, the applicant lived in Australia and attended school. He then returned to live with his grandparents in the Solomon Islands. He returned to Australia in 2007 when he was aged 20.

5 From the following year, at age 22, the applicant began to accumulate criminal offences. They were initially petty offences such as travelling on public transport without paying the correct fare and public urination, but escalated to shoplifting, unauthorised dealing with shop goods, driving whilst disqualified, wilful damage and possession of drugs and drug paraphernalia.

6 In June 2014, the applicant and JW commenced a relationship. Two children were born of the relationship, daughters born in June 2015 and May 2017.

7 In December 2018, a domestic and family violence protection order was made against the applicant in favour of JW. The protection order required that the applicant demonstrate good behaviour towards JW and their daughters and not commit domestic violence against them or expose the daughters to domestic violence. In October 2019, the applicant contravened the protection order. That led to the variation of the protection order by a temporary protection order on 15 October 2019 which added a prohibition against the applicant contacting or attempting to contact JW. The varied protection order was made final on 6 February 2020 and continues in force until 5 February 2025.

8 In December 2020, the applicant was charged with assault occasioning actual bodily harm and other offences against JW. They were domestic violence offences directed at JW and took place in the presence of the daughters. The applicant pleaded guilty. He was sentenced to two years imprisonment, suspended after serving three months.

9 On 16 January 2021, JW provided a letter of support to the applicant. The letter was confirmed in a statutory declaration of the same date to which it was attached. Since the Tribunal referred to the letter as a statement, I will do likewise when I return to it below.

10 On 10 February 2021, a delegate of the Minister cancelled the applicant's visa under s 501(3A) as the delegate was satisfied he did not pass the character test because of the operation of s 501(6)(a) (substantial criminal record) on the basis of s 501(7)(c) (sentenced to a term of imprisonment of 12 months or more) and because he was serving a sentence of imprisonment on a full-time basis.

11 On 24 February 2021, the applicant was charged with contravention of the domestic violence protection order on 14 October 2019. The applicant was convicted and sentenced to 12 months imprisonment to run concurrently with the previous sentence referred to at [8] above.

12 As mentioned, on 29 September 2021, a delegate of the Minister refused to revoke the cancellation of the applicant's visa.

13 The delegate's decision was affirmed by the Tribunal (differently constituted than in respect of the decision presently under review) on 17 December 2021. A review of the first Tribunal's decision was dismissed by a judge of the Court on 24 June 2022: *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 730. However, the appeal from that decision was allowed by the Full Court on 26 July 2023:

Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCAFC 116; 298 FCR 516. The matter was accordingly remitted to the Tribunal.

14 The second Tribunal held a hearing on 27 November 2023. Although the applicant had been legally represented in the court proceedings, he was self-represented at the remittal hearing. The Tribunal's decision to affirm the delegate's decision to refuse to revoke the cancellation of the applicant's visa was published on 12 December 2023.

The Tribunal's reasons

15 The Tribunal recognised that it was bound to make its decision within the framework set by *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*, a direction made under s 499 of the Act. By s 499(2A) of the Act, the Tribunal had to comply with the Direction.

16 The Tribunal concluded that primary consideration 1, being protection of the Australian community from criminal or other serious conduct, weighs very heavily against revocation of the cancellation of the applicant's visa.

17 The Tribunal concluded that primary consideration 2, being whether the conduct engaged in constituted family violence, weighs very heavily against revocation of the cancellation of the applicant's visa.

18 The Tribunal concluded that primary consideration 3, being the strength, nature and duration of the applicant's ties to Australia, weighs moderately in favour of revocation of the cancellation of the applicant's visa.

19 In respect of primary consideration 4, being the best interests of minor children in Australia, the Tribunal considered the interests of the applicant and JW's two daughters as well as two nieces of his, one aged 13 years and the other aged one. The Tribunal concluded that assuming in the applicant's favour that he does not reoffend, primary consideration 4 weighs moderately in favour of revocation of the applicant's visa cancellation.

20 The Tribunal concluded that primary consideration 5, being the expectations of the Australian community, weighs heavily against revocation of the cancellation of the applicant's visa.

21 The Tribunal also considered various other matters identified in the Direction. It concluded that the extent of impediments faced by the applicant if removed to the Solomon Islands weigh moderately in favour of revocation of the visa cancellation.

22 In respect of the impact of a decision to revoke the cancellation of the applicant's visa on members of the Australian community, including victims of the applicant's criminal behaviour and their family members, the Tribunal relevantly stated the following:

> 194. The primary victim here is JW. She has provided a statement in support of the Applicant dated 16 January 2021. There is no way of knowing her current views, as no such evidence was before the Tribunal. She did not give evidence and is still protected from the Applicant by an ADVO until 2025.
>
> 195. I note that JW says that returning the Applicant to the Solomon Islands will have a negative impact on her and her children. As previously observed, Child A and Child B are in some respects, also victims of the Applicant's offending.
>
> 196. I accept that the Applicant has evidence of support from his victim(s). Assuming in the Applicant's favour that JW still holds the same opinion, this weighs slightly in his favour.
>
> 197. This Other Consideration (c) weighs slightly in favour of revocation.

23 The Tribunal characterised the case as essentially involving weighing the gravity of the applicant's family violence offending and the risk of him continuing to offend, against his personal disadvantages and those of his family, JW, friends and minor children in Australia if he were to be deported to the Solomon Islands. The Tribunal then reasoned as follows in concluding that the delegate's decision should be affirmed:

> 213. The Applicant's family violence offending, and breach of a protection order are extremely serious. The Direction makes it clear that family violence is unacceptable. The Applicant's no doubt genuine desire to be a positive part of his daughter's lives, must be tempered by practical reality. He stands little prospect of being a regular, physical presence in their lives in the foreseeable future, if ever during their minority. He may possibly offer some financial support if he were to remain in Australia, but otherwise, his contact with them by electronic means may be basically the same whether he was in Brisbane, Perth, or the Solomon Islands. In my view, Primary Considerations 1, 2 and 5, greatly outweigh Primary Considerations 3, 4 and the Other Considerations.

The grounds of review

24 By his amended originating application, the applicant asserts three grounds of review that can be characterised as follows.

25 Ground 1 asserts that the Tribunal erroneously concluded that paragraph 8.1.1(1)(b)(iii) of the Direction was applicable whereas that paragraph "does not pertain to an objective jurisdictional fact within the ambit of s 501 of the *Migration Act 1958* (Cth)".

26 Ground 2 asserts that the Tribunal ignored, overlooked or misunderstood relevant facts or materials in concluding that no further statements from JW had been provided since 2021. As detailed below, JW had sworn an affidavit on 26 May 2022 which was referred to and

summarised in the first review decision in this Court and the appeal to the Full Court. The ground asserts that the Tribunal either ignored or overlooked the substance of JW's affidavit.

27 Ground 3 asserts that the Tribunal failed to make an obvious inquiry about a critical fact, the existence of which was easily ascertainable, namely it failed to request a copy of JW's affidavit of 26 May 2022.

28 It is convenient to consider the grounds in the order in which they are presented in the amended originating application.

Ground 1: the applicability of paragraph 8.1.1(1)(b)(iii) of the Direction

29 As mentioned, primary consideration 1 is the protection of the Australian community from criminal or other serious misconduct. It is dealt with in paragraph 8.1 of the Direction. Paragraph 8.1(1) provides that decision-makers should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity and other serious conduct by non-citizens, and should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are law-abiding. Notably, it is the protection of the community from "harm as a result of criminal activity *and other serious conduct*" that is at the heart of the consideration which is not limited to specific conduct that may give rise to a failure of the character test in s 501(1) of the Act.

30 Paragraph 8.1(2) provides that decision-makers should also give consideration to (a) the nature and seriousness of the non-citizen's conduct to date and (b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct. In relation to the first of those considerations, namely the nature and seriousness of the non-citizen's conduct to date, paragraph 8.1.1(1) then sets out matters that decision-makers "must have regard to". There are eight such matters identified in subparagraphs (a) to (h).

31 It is in that context that paragraph 8.1.1(b) identifies, in each of its sub-paragraphs numbered (i) to (iv), four categories of conduct that are stated as being types of crimes or conduct considered by the Australian Government and the Australian community to be serious. That is to say, the listed categories of conduct are deemed to be considered serious regardless of what view the decision-maker might otherwise take.

32 The categories of conduct identified in subparagraphs (i), (ii) and (iv) are forcing a person into a marriage, crimes against vulnerable members of the community and crimes committed while

in immigration detention. They can have no application to the applicant. That leaves subparagraph (iii) for consideration.

33 Subparagraph (iii) identifies "any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c))". Section 501(6)(c) provides, as one of many bases on which a non-citizen may fail the character test, that the decision-maker is satisfied that the person is not of good character having regard to the person's past and present criminal conduct and/or their past and present general conduct.

34 The applicant observes that the cancellation of his visa because he failed to pass the character test arose from the application of the objective standard that he has "a substantial criminal record" (s 501(6)(a)), to wit: he was sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)). He submits that because that was the basis for his visa cancellation, the subjective standard referred to in paragraph 8.1.1(1)(b)(iii) does not and cannot apply. The result, so it is said, is that the Tribunal's decision was in breach of s 499(2A) of the Act as it failed to comply with the Direction: ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12 at [31].

35 Consideration of how the Tribunal dealt with this aspect starts with the Tribunal's long recitation of the applicant's criminal and other anti-social conduct starting, as mentioned, in 2008. It includes the conduct that led to a temporary and then final family and domestic violence protection order, possession of contraband in immigration detention and other conduct for which the applicant was not convicted. These matters are covered in the Tribunal's reasons at [11]-[84].

36 In dealing specifically with paragraph 8.1.1(1) of the Direction, ie the nature and seriousness of the applicant's conduct, the Tribunal considered each subparagraph (a) to (h) separately. In relation to subparagraph (b), the Tribunal quoted the four categories of conduct in subparagraphs (i) to (iv) (at [105] of its reasons and identified in [32]-[33] above). In the next paragraph, it stated:

> 106. The Applicant's conduct is such that he does not pass the character test.

37 The applicant submits that the reference to not passing the character test in that paragraph must be a reference to the objective criterion of conviction for a serious criminal offence as that was the only basis on which the applicant's visa was cancelled on character grounds. Nevertheless,

the Tribunal (at [119]), after excluding subparagraphs (f), (g) and (h) as irrelevant, concluded that "the rest of the relevant subparagraphs of paragraph 8.1.1(1) of the Direction, in their totality, weigh heavily against revocation of the cancellation of the Applicant's visa". The applicant submits that that shows that the Tribunal took into account subparagraph (b) as counting against the applicant whereas that subparagraph could have had no application at all. He submits that that is an error of law that is material in the sense that, had it not been made, that could realistically have altered the ultimate conclusion.

38 In my assessment, the applicant's argument on this aspect of the case fails at the proposition that the Tribunal at [106] was referring to the objective failure of the character test that was relied on by the delegate of the Minister in cancelling the applicant's visa. Although the reasoning of the Tribunal is barely stated, I understand the Tribunal at [105] and [106], with reference to its long recitation of the applicant's criminal and non-criminal anti-social conduct, to be stating a conclusion as to its state of satisfaction that the applicant fails the character test as a result of that conduct. That is to say, the Tribunal must be understood to be saying that it is not satisfied (see s 501(2)(b) of the Act) that the applicant's conduct is such that he passes the character test, as referred to in paragraph 8.1.1(1)(b)(iii) of the Direction.

39 I am mindful, as is often repeated, that the Tribunal's reasons must not be construed minutely and finely with an eye keenly attuned to the perception of error; the reasons of the Tribunal are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 272.

40 Here, it is difficult to see that the Tribunal was doing anything other than concluding that, based on "[t]he applicant's conduct", he fails the character test. If the statement at [106] was a statement in relation to the objective failure of the character test on the basis of having a substantial criminal record, one would expect the Tribunal to have used language relevant to such a finding, such as reference to his criminal record or his sentencing to a minimum of 12 months imprisonment. Instead, the Tribunal referred to the applicant's "conduct", which is the word used in paragraph 8.1.1(1)(b)(iii) of the Direction and s 501(6)(c) of the Act and is at the heart of the inquiry under paragraph 8.1.1(1). A finding about failure to pass the character test on the objective basis in s 501(7)(c) can have no application in relation to paragraph 8.1.1(1)(b) which, by the structure of its reasons, the Tribunal was clearly addressing at [106].

41 Also, the applicant's past "criminal conduct" and "general conduct" is of such a nature that it could reasonably give rise to the requisite state of satisfaction required by s 501(6)(c). As I have acknowledged, the Tribunal's reasoning from quoting paragraph 8.1.1(1)(b) to the conclusionary statement at [106] is bare, or even absent, but the conclusionary statement's justification is nevertheless apparent from the earlier findings in relation to the applicant's criminal and other conduct over many years. What is stated in [106] is a conclusion apparently based on those findings.

42 There is no unreasonableness challenge by the applicant, but in any event the conclusion expressed at [106] is not apparently such as to rise to that level – the conclusion does not lack an evident and intelligible justification, it is not so devoid of plausible justification that no reasonable person could have reached it, and it is a conclusion that falls within a range of possible acceptable outcomes which are defensible on the facts and the law: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [76], [91] and [105].

43 For those reasons, I am not satisfied that the Tribunal misconstrued or misapplied the Direction in the respects identified, with the result that it was not in breach of s 499(2A) of the Act.

44 Review ground 1 must therefore fail.

Ground 2: failure to consider JW's affidavit of 26 May 2022

45 As explained, by this ground the applicant criticises the Tribunal for identifying the last word from JW available to it to have been her statement in January 2021 when in fact she swore an affidavit on 26 May 2022 that was before the Court in the earlier review proceedings. The essential point made by the applicant is that the Tribunal, in stating that JW's attitude after January 2021 was unknown, overlooked or ignored that relevant material.

The Tribunal's references to JW's attitude

46 The applicant draws attention to the Tribunal referring on a number of occasions to JW's attitude subsequent to January 2021 being unknown.

47 First, at [7] in the introductory section of its reasons, the Tribunal stated that although it was understandable given that the applicant was prevented by the protection order from contacting JW, JW's views must be gleaned from her short statement made in January 2021 and that "[w]hether this is her current view is unknown".

48 Secondly, at [160] in the context of considering the best interests of minor children in Australia, the Tribunal stated that although JW had provided a statement dated January 2021 supporting the applicant's continuing relationship with his daughters, she had "provided no other statement since 2021" and whether she "continues to hold that view is unknown". The Tribunal went on at [164] to note that the outcome of any steps that the applicant may wish to take to re-establish contact with his daughters is speculative "especially in circumstances where JW's present views are unknown."

49 Thirdly, at [194] (quoted at [22] above) in the context of considering the impact on victims if the cancellation of the applicant's visa were revoked, the Tribunal recognised that JW is the primary victim and although she had provided a statement in support of the applicant dated January 2021, there was "no way of knowing her current views, as no such evidence was before the Tribunal".

50 Finally, at [196] (also quoted at [22] above) in the same context as in relation to [194], the Tribunal accepted that the applicant has evidence of support "from his victim(s)" and assumed in the applicant's favour that JW still held the same opinion.

Chronology of evidence of JW's attitude

51 The chronology in relation to JW's attitude to the possible revocation of the cancellation of the applicant's visa is important given the Tribunal's references to JW's current (ie as at the time of the Tribunal's decision) views being unknown.

52 As mentioned, JW's statutory declaration and letter (ie her "statement") are dated 21 January 2021 although the applicant's visa to Australia was mandatorily cancelled only thereafter, on 10 February 2021. Amongst other things, the statement said that the applicant had a good relationship with his daughters and that JW did not want her daughters missing out on having the presence of the applicant as their father. She said that she believed the applicant to be "a very good person and important role model and father figure" for the daughters. She said that she and her daughters love the applicant and miss him dearly.

53 On 29 September 2021, a delegate of the Minister refused to revoke the cancellation.

54 The Tribunal held its hearing in the first review of the delegate's decision on 9 December 2021. At that hearing it had JW's January 2021 statement, and it heard the oral testimony of JW directly before it – that is apparent from the reasons of the first Tribunal and the judgment of the Full Court.

55 The first Tribunal's summary of JW's oral testimony included that JW expressed support for the applicant to remain in Australia so that their children can have access to their father. She expressed concern for her children's mental health and said that the older one remembers him a lot more than the younger one and asks for and wants to speak to him. The younger daughter does not remember her father much. JW said that she would not live with the applicant if he were released, and that he cannot come near her until 2025 in consequence of the protection order.

56 The first Tribunal also recorded that JW gave evidence of a proposal for her and the applicant to share custody of the children on a week on, week off basis. It stated that JW gave positive evidence regarding the applicant particularly as to his role as a father and being a good person and an important role model, and she requested for the sake mainly of her elder daughter that the applicant be allowed to remain in Australia.

57 The first Tribunal published its reasons affirming the delegate's decision on 17 December 2021.

58 In its reasons, the first Tribunal expressed concern that JW's evidence before it was compromised by the closeness of JW's relationship with the applicant's mother, sister and brother and was tailored in consequence of that relationship. For that reason, the Tribunal gave little weight to JW's evidence in regard to the consideration of the impact of a decision in the applicant's favour on members of the Australian community including victims.

59 In the applicant's first judicial review application, at the hearing on 1 June 2022 he read an affidavit of JW sworn by her on 26 May 2022. The affidavit is referred to and summarised at [60] of the primary judge's reasons. The purpose of the affidavit was to support what was review ground 2. That ground alleged a failure to afford the applicant procedural fairness because the Tribunal failed to advise that it was minded to draw an adverse conclusion that would not obviously be open on the known material. The adverse conclusion was that little weight should be afforded JW's evidence because of her closeness to the applicant's mother and siblings. See the primary judgment at [45]-[46].

60 The judgment on appeal, which was also before the Tribunal, gave details of JW's evidence (by way of written statement and oral testimony) before the first Tribunal. It set out (at [34]) the six paragraphs of the first Tribunal's reasons which summarised JW's oral evidence. It also set out excerpts from JW's oral testimony before the Tribunal. That included that JW supported

the applicant remaining in Australia so that her children could have their father in the same country, and that the applicant would not only provide financial support but also emotional support for the children (at [35]). It recorded that JW had said that she did not want her children to lose their father (at [36]).

61 The Full Court stated (at [122]) that JW had given evidence to the first Tribunal that if the applicant were removed from Australia, JW would suffer adverse financial and emotional impacts. She described the emotional consequences for her children resulting from separation from their father as "quite heartbreaking to watch", "heartbreaking to witness" and "painful to witness". The latter two of those quotes are taken from the January 2021 statement, but the first appears only in JW's oral testimony on 9 December 2021 (see the Full Court judgment at [35]).

62 The Full Court (at [130]) characterised JW's affidavit evidence before the primary judge as describing the impact of the deportation of the applicant on her in the context of her losing a co-parent and the effect of his absence on her as a single mother and having to endure the emotional impact on her daughters of their father's absence.

Consideration

63 The applicant submits that the second Tribunal overlooked the material before it in the form of what was said by the primary judge and the Full Court about JW's affidavit before the primary judge. He submits that that error amounts to jurisdictional error of the nature recognised in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 275 CLR 582 at [27], ie as having "ignored, overlooked or misunderstood relevant facts or materials".

64 Although what was said in the earlier judgments is not evidence, it is "material" before the Tribunal on which the Tribunal could base its findings. See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; 274 CLR 398 at [17]. The judgments also indicated the existence of further evidence, namely JW's May 2022 affidavit.

65 Notwithstanding that the Tribunal did not list the earlier judgments as "exhibits" in annexure A to its reasons, it is common ground before me that the judgments formed part of the material before the Tribunal. That is in any event clear from the inclusion of the judgments in the "Remittal Bundle" which is recorded in the index of the documents tendered before me to have formed part of the Minister's tendered materials before the Tribunal. It is also clear from the many references in the Tribunal's reasons to the judgments, including to them being in the

Remittal Bundle. The same is true of the first Tribunal's reasons – they were in the Remittal Bundle and were referred to by the second Tribunal in its reasons.

66 I accept, as submitted by the Minister, that since the Tribunal referred several times in its reasons to the judgments of the primary judge and the Full Court, the inference that it failed to consider the material in those judgments is "not too readily to be drawn". That is with reference to *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; 236 FCR 593 at [47]. However, on the numerous occasions identified above, the Tribunal stated that the last word that it had from JW was her statement in January 2021. That issue, which is to say whether JW's positive attitude to the applicant and to the revocation of the cancellation of his visa continued beyond that date, was a matter of patent significance to the Tribunal. In those circumstances, its failure to mention the extensive and detailed oral evidence of JW before the first Tribunal in December 2021 and her affidavit evidence before the primary judge which was dated May 2022 satisfies me that the Tribunal overlooked that evidence; had it considered it, it could not have stated, let alone repeatedly, that there was nothing from JW more recent than January 2021.

67 I accept, as submitted by the Minister, that where the Tribunal lamented not having anything more recent from JW it also stated that it did not have anything to show what her "current" attitude was (ie as at the time of the Tribunal's hearing and decision) and that her later oral evidence and affidavit were not "current". However, that does not persuade me that the Tribunal did not overlook that material. Had the material been considered, the Tribunal could not have stated that there was no way of knowing JW's current views. That is because of the availability of the inference that since her views had remained constant from January 2021 through May 2022, they remained the same at the time current to the Tribunal. If the Tribunal had genuinely considered what her "current" view was, it would necessarily have had to at least consider the consistency of her views in January and December 2021 and May 2022.

68 Leaving to one side the substantial material before the Tribunal with regard to JW's oral testimony before the first Tribunal in December 2021, I am satisfied that had the Tribunal considered what was said about JW's attitude in May 2022 in the judgments of the primary judge and the Full Court, the Tribunal may have ascribed a different weight to primary consideration 4, namely the best interests of minor children in Australia. As it is, the Tribunal gave that consideration only moderate weight in favour of revocation. The different weighting, even if only in relation to that single primary consideration, could realistically have resulted in

a different overall conclusion. In that sense, the Tribunal's error was material to the outcome. See *LPDT* at [16].

69 The Minister submits, with reference to *Sowa v Minister for Home Affairs* [2019] FCAFC 111; 269 ALR 389 at [43] and *Minister for Immigration and Border Protection v BHA17* [2018] FCAFC 68; 260 FCR 523 at [79(3)] and [80], that the Tribunal's obligation to consider the applicant's representations does not extend to considering a reason in favour of revocation not advanced by the applicant. From that proposition, the Minister submits that since the applicant did not seek to rely on JW's evidence before the primary judge in his representations to the Tribunal, the Tribunal cannot be faulted for ignoring that evidence.

70 The trouble with that submission is that although it is not known just what was put to the Tribunal because the transcript has not been produced, the Tribunal clearly appreciated that the applicant relied on JW's support. The Tribunal canvassed that issue on a number of separate occasions in its reasons. The issue was therefore squarely raised. It was the Tribunal's reasoning that there was nothing from JW after January 2021 which squarely brought into play JW's more recent evidence. That was overlooked, and it was material.

71 In the result, review ground 2 succeeds. The decision of the Tribunal must be set aside and the matter must be remitted to the Tribunal for reconsideration.

Ground 3: failure to call for JW's affidavit of 26 May 2022

72 In view of my conclusion on review ground 2, review ground 3 can be briefly considered.

73 By this ground the applicant submits, with reference to *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 259 ALR 429 at [25], that the Tribunal failed to make an obvious inquiry about a critical fact, the existence of which is easily ascertainable. On that basis, the applicant submits that there was a constructive failure to exercise jurisdiction. The applicant submits that it was a jurisdictional shortcoming for the Tribunal to fail "to make even the most cursory inquiry" (quoting from ***Uelese*** *v Minister for Immigration and Broder Protection* [2015] HCA 15; 256 CLR 203 at [66]) of the applicant or the Minister for production of JW's affidavit of 26 May 2022.

74 As in the present case, in *Uelese* there was a direction issued under s 499 of the Migration Act that required the delegate to take into account the consequences of a visa cancellation on minor children. The Court found that the Tribunal had been in legal error in concluding that the legislation precluded it from considering the interests of the applicant's two youngest children

because his case had been presented in reliance only on the interests of his three older children. Evidence of the existence of the two youngest children only emerged before the Tribunal in cross-examination on behalf of the Minister of a witness called by the applicant.

75 One of the asserted grounds of review of the Tribunal's decision was that the Tribunal should itself have pursued the issue of the applicant's two youngest children's interests (at [31]). The primary judge and the Full Court on appeal held that the Tribunal was not obliged to make its own inquiries into the issue because the applicant's case was presented on the basis that he had only three children (at [35]).

76 Before the High Court, the Minister submitted that because the applicant had not included the interests of his two youngest children in the case he presented to the Tribunal, their interests were not relevant to the Tribunal's decision. In rejecting that submission, the Court held that the interests of those children were relevant because the children existed and the fact of their existence was known to the Tribunal (at [61]). The Court also reasoned that the Minister's submission sought to import into the inquisitorial review function of the Tribunal notions appropriate to adversarial proceedings conducted in accordance with formal rules of pleading, and held that that approach is inappropriate to the kind of review undertaken by the Tribunal (at [62]).

77 Noting that in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; 225 CLR 88 at [24] the Court had cautioned against transposing the language and mindset of adversarial litigation to inquisitorial decision-making of the kind in question, in *Uelese* the Court held that it would be to give undue weight to conceptions drawn from adversarial litigation to accept that the Tribunal was not required to take into account the interests of the applicant's two youngest children because he had not sought to advance their interests as a positive part of his case (at [63]). The Court noted that by virtue of the relevant direction, one of the primary considerations for the Tribunal concerned the interests of children who were not themselves represented in the proceedings before the Tribunal (at [64]).

78 It was in that context that the Court held that the Tribunal not only declined to act upon the information which was put before it (because of the error that it made as to it being precluded from so acting), but it also failed to make even the most cursory inquiry to follow-up on that information (at [66]).

79 The most recent authority on the circumstances in which a Tribunal may have a duty to inquire is *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2; 98 ALJR 196. In summarising prior authority, the High Court explained that where the decision-maker has failed to inquire about a relevant fact or matter, the resulting decision may involve jurisdictional error capable of characterisation as either a constructive failure to exercise jurisdiction or a legally unreasonable exercise of a particular duty or power (at [25]). Also, although the criteria for such an error have been expressed by prior authority as including that the potential fact was readily ascertainable and critical or central to the decision, those criteria merely reflect the usually high threshold for a conclusion that a power has been unreasonably exercised as a matter of law (at [25]).

80 The present matter is similar to *Uelese* in the sense that the Tribunal not only failed to act on the information before it in relation to JW's stated attitude in her May 2022 affidavit as to the cancellation of the applicant's visa and the effect of such cancellation on her and the applicant's minor children, but it failed to make even the most cursory inquiry to follow-up on that information.

81 Given my finding (in relation to ground 2) that the Tribunal made a jurisdictional error in failing to consider that information, it is somewhat artificial to also fault the Tribunal for not making further inquiries about the information – because it had overlooked the information it was not alerted to the possibility of making any further inquiry. Nevertheless, the Tribunal should have been alerted to the existence of JW's May 2022 affidavit by the references to it in the earlier judgments. Those references reveal that the affidavit is relevant to a primary consideration that the Tribunal was obliged by the Direction to take into account, namely the interests of minor children. In those circumstances, the Tribunal had an obligation to make further inquiry with regard to the content of the affidavit.

82 Notwithstanding that conclusion, I am ultimately not satisfied that review ground 3 is established because I am not satisfied that any further inquiry could realistically have made any difference to the Tribunal's ultimate decision. That is because JW's affidavit was not tendered in the judicial review application. It is not before me. For that reason, not only do I not know whether the affidavit goes any further than the references to it and the summaries of what it says in the judgments of the primary judge and the Full Court, but even if it does, I do not know whether that is such as to realistically have had any possibility of producing a

different result. It is therefore not established that any error by the Tribunal in not making further inquiry was material even at the low threshold explained in *LPDT*.

83 Review ground 3 therefore fails at the low hurdle of materiality.

Conclusion

84 In the result, the judicial review application succeeds – the Tribunal's decision must be set aside and the matter again remitted to the Tribunal for reconsideration. The parties accept that the costs should follow the event.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Stewart.

Associate:

Dated: 22 April 2024