Federal Court of Australia

District Registry: New South Wales

Division: General No: NSD99/2022

TXZQ
Applicant

MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS and another named in the schedule
Respondent

ORDER

JUDGE: JUSTICE THAWLEY

DATE OF ORDER: 28 March 2024

WHERE MADE: Sydney

THE COURT ORDERS, BY CONSENT THAT:

1. The name of the first respondent be amended to 'Minister for Immigration, Citizenship and Multicultural Affairs'.

2. The decision of the second respondent dated 24 December 2021, affirming the decision of a delegate of the first respondent dated 7 October 2021 not to revoke the cancellation of the applicant's visa, be set aside.

3. The matter be remitted to the second respondent requiring it to determine the application made to it for review of the delegate's decision dated 7 October 2021 according to law.

4. The first respondent pay the applicant's costs, as agreed or taxed.

5. The case management hearing listed at 11:30am on 5 April 2024 be vacated.

THE COURT NOTES THAT:

The first respondent concedes that the decision of the second respondent (**Tribunal**) dated 24 December 2021, affirming the decision of a delegate of the first respondent dated 7 October 2021 not to revoke the mandatory cancellation of the applicant's visa under s 501CA(4) of the *Migration Act 1958* (Cth) (**Act**), is affected by jurisdictional error for the following reason.

When deciding whether the applicant passed the character test in s 501(6)(d)(i) of the Act, for the purposes of s 501CA(4)(b)(i), the Tribunal was required to consider whether there was a risk that the applicant would engage in criminal conduct in Australia if allowed to remain in the country. Further, in deciding whether there was "another reason" why the decision to cancel the applicant's visa should be revoked under s 501CA(4)(b)(ii), the Tribunal was required to consider the protection of the Australian community: s 499(2A) of the Act; paragraph 8.1 of Ministerial Direction no. 90. The Tribunal, when assessing the risk that the applicant would engage in criminal conduct if allowed to remain in Australia, found that he had been convicted of offences at a time when he was under 16 years of age (see [34]-[35], [57]-[59], [61], [64]-[65], [75]-[76], [78], [81], [84], [122], [150], [152] of the Tribunal's reasons). The Tribunal was precluded from taking into account the fact that the applicant had been charged with, or found guilty of, those offences, by reason of the operation of ss 85ZR(2) and 84ZS(1)(d)(ii) of the *Crimes Act 1914* (Cth). In doing so, the Tribunal took into account an irrelevant consideration: *Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 6.

The first respondent concedes that the Tribunal's error was material to its decision, in that there is a realistic possibility that the decision could have been different had the error not been made: *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at [2].

Date that entry is stamped: 28 March 2024

Registrar

Schedule

No: NSD99/2022

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Second Respondent ADMINISTRATIVE APPEALS TRIBUNAL