FEDERAL COURT OF AUSTRALIA

Pillay v Minister for Immigration and Citizenship [2026] FCAFC 24

Appeal from:	*Pillay v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1465
File number:	QUD 748 of 2024
Judgment of:	**COLLIER, MCDONALD AND LONGBOTTOM JJ**
Date of judgment:	19 March 2026
Catchwords:	**MIGRATION** – application for judicial review of decision of Administrative Appeals Tribunal – non-revocation of visa cancellation – failure to satisfy character test – Tribunal bound by Ministerial Direction 99 issued under s 499 of *Migration Act 1958* (Cth) – whether Tribunal erred by failing to consider effect of non-revocation decision on Australian business interests or by failing to make inquiries before making adverse findings – whether Tribunal erred by taking into account irrelevant consideration – whether the tribunal acted on misunderstanding of law – appeal allowed
Legislation:	*Migration Act 1958* (Cth) ss 499, 501, 501CA
Cases cited:	*Attorney-General (NSW) v Quin* (1990) 170 CLR 1 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 *CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 318; [2022] FCAFC 124 *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 *Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 300 FCR 67; [2023] FCAFC 173 *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 280 CLR 265; [2024] HCA 2 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321; [2024] HCA 12 *Minister for Home Affairs v DUA16* (2020) 271 CLR 550; [2020] HCA 46 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30

	Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18 *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123; [2009] HCA 39 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 *Pillay v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1465 *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582; [2022] HCA 17 *Warren v Coombes* (1979) 142 CLR 531 *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22; [2015] HCA 51
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	111
Date of hearing:	12 August 2025
Counsel for the Appellant:	Dr J D Donnelly with Mr C J Fitzgerald
Solicitor for the Appellant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr B McGlade with Mr N P Hanna
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice

ORDERS

QUD 748 of 2024

BETWEEN:	**LESLEY PILLAY** Appellant
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** First Respondent
	ADMINISTRATIVE REVIEW TRIBUNAL Second Respondent

ORDER MADE BY: **COLLIER, MCDONALD AND LONGBOTTOM JJ**

DATE OF ORDER: **19 MARCH 2026**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders of the Federal Court of Australia dated 7 December 2024 be set aside.
3. In lieu thereof, the following orders be substituted:
   (a) A writ of certiorari issue, quashing the decision of the Administrative Appeals Tribunal dated 15 April 2024.
   (b) A writ of mandamus issue to the Administrative Review Tribunal, requiring it (differently constituted) to determine the applicant's application for review of the decision of the delegate of the first respondent dated 14 July 2023 according to law.
   (c) The first respondent pay the applicant's costs of the application for judicial review, to be agreed or taxed.
4. The first respondent pay the appellant's costs of the appeal, to be agreed or taxed.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The appellant, Lesley Pillay, was convicted of multiple fraud offences and, on 8 July 2022, was sentenced to 15 months' imprisonment for those offences. In August 2022, while in custody serving that sentence, a delegate of the predecessor of the first respondent (**Minister**) cancelled Mr Pillay's Subclass 857 visa, as was required by s 501(3A) of the *Migration Act 1958* (Cth).

2 Mr Pillay sought the revocation of the cancellation of his visa. On 20 April 2023, a delegate of the Minister decided not to revoke the decision to cancel Mr Pillay's visa pursuant to s 501CA(4) of the *Migration Act*. On 14 July 2023, the Administrative Appeals Tribunal (**Tribunal**) affirmed the delegate's decision not to revoke the cancellation of Mr Pillay's visa. In September 2023, this Court set aside the decision of the Tribunal and remitted the decision for reconsideration.

3 On 15 April 2024, the Tribunal again made a decision to affirm the decision of the delegate not to revoke the cancellation of Mr Pillay's visa. Mr Pillay applied to this Court for judicial review of that decision. On 17 December 2024, the primary judge dismissed Mr Pillay's application for judicial review: *Pillay v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1465. On the same day, Mr Pillay filed a notice of appeal against the decision of the primary judge.

4 For the reasons that follow, we consider that Mr Pillay has established that the decision of the Tribunal was affected by jurisdictional error. The appeal should be allowed. The orders of the primary judge should be set aside. In lieu thereof, a writ of certiorari should issue to quash the decision of the Tribunal, and a writ of mandamus should issue, requiring the Administrative Review Tribunal to determine Mr Pillay's application for review of the decision not to revoke the cancellation of his visa according to law.

Relevant legal requirements applicable to the Tribunal's decision

5 Section 501(3A) of the *Migration Act* provides that the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because they have a substantial criminal record (including, relevantly, because they have

been sentenced to a term of imprisonment of 12 months or more) and are serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory. Section 501CA(4) empowers the Minister to revoke the visa cancellation decision if the person makes representations as to why the original decision should be revoked, and the Minister is satisfied that the person passes the character test, or that there is another reason why the original decision should be revoked. In Mr Pillay's case, it was not disputed that he passed the character test. On review of the Minister's decision, the Tribunal was therefore required to determine whether there was "another reason" why the decision to cancel Mr Pillay's visa should be revoked.

6 Section 499(2A) of the *Migration Act* provided that the Tribunal was required to comply with any direction made by the Minister under s 499(1). The relevant direction that applied at the time of the Tribunal's decision was "Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA" (**Direction 99**).

7 Clause 5 of Direction 99 identified the objectives of the direction and set out principles which "provide the framework within which decision-makers should approach their task of deciding whether to … revoke a mandatory cancellation under s 501CA". These included, in cl 5.2(6), that decision-makers "must take into account the primary and other considerations relevant to the individual case". Clause 7 directed that, "[i]n applying the considerations … , information and evidence from independent and authoritative sources should be given appropriate weight"; that "[p]rimary considerations should generally be given greater weight than the other considerations"; and that "[o]ne or more primary considerations may outweigh other primary considerations".

8 Clause 8 of Direction 99 set out, and then elaborated on, the "primary considerations", which were (1) protection of the Australian community from criminal or other serious conduct; (2) whether the conduct engaged in constituted family violence; (3) the strength, nature and duration of ties to Australia; (4) the best interests of minor children in Australia; and (5) expectations of the Australian community. Clause 9 set out, and then elaborated on, four "other considerations" to be taken into account where relevant. The other considerations were (1) legal consequences of the decision; (2) extent of impediments if removed; (3) impact on victims; and (4) impact on Australian business interests.

The decision of the Tribunal

9 As has already been noted, the matter came before the Tribunal after a previous decision of the Tribunal was quashed by the Federal Court. Following a hearing over two days, at which Mr Pillay represented himself, the Tribunal made its decision affirming the decision not to revoke the cancellation of Mr Pillay's visa. The reasons of the Tribunal were largely structured by reference to the considerations set out in Direction 99.

10 The Tribunal assessed each of the "primary considerations". In relation to the protection of the Australian community, the Tribunal found that Mr Pillay had committed multiple violent offences against women. His offending had been frequent and very serious. The Tribunal had regard to the reports of two psychologists, Dr Gavan Palk and Dr Jacqui Yoxall, and to the oral evidence of Dr Yoxall. It ultimately concluded that Mr Pillay's risk of recidivism was no different from the risk at the time when he was last removed from the community. The Tribunal found that the consideration of protection of the Australian community weighed very heavily in favour of affirming the decision not to revoke the cancellation of Mr Pillay's visa.

11 In the course of its reasoning to that conclusion, the Tribunal made various findings regarding inconsistencies between the evidence of Mr Pillay's criminal offending which was before the Tribunal and the details he had provided to Dr Yoxall. The Tribunal found that Mr Pillay had "selectively provided material to Dr Yoxall" and that he had done so in order to prevent her from fact-checking or cross-referencing what he told her against objective material that should have been included in the material he provided to her. The Tribunal also attached significance to the fact of, and the particular terms of, a warning that had previously been given to Mr Pillay by a delegate of the Minister when an earlier decision to cancel Mr Pillay's visa had been revoked. The latter two aspects of the Tribunal's reasons are relevant to two of Mr Pillay's grounds of appeal in this Court, and are addressed in greater detail below.

12 The Tribunal found that Mr Pillay had committed family violence against his former partner and his former wife; that this was very serious; and that the second of the primary considerations thus weighed very heavily in favour of affirming the decision not to revoke the cancellation of Mr Pillay's visa.

13 Having regard to the evidence regarding Mr Pillay's family members in Australia, the Tribunal concluded that the third primary consideration relating to the strength, nature and

duration of Mr Pillay's ties to Australia weighed strongly in favour of revoking the cancellation of his visa. In reaching this conclusion, however, the Tribunal indicated that it did not take into account the interests of Mr Pillay's brother, Damien Pillay, who resided in South Africa. The Tribunal's treatment of Damien Pillay's interests forms the basis for Mr Pillay's third ground of appeal in this Court, and is addressed further below.

14 As to the remaining primary considerations, the Tribunal considered the best interests of minor children in Australia – in particular, Mr Pillay's own biological children and step-children, his niece and his cousins' children – and gave this strong weight in favour of revocation of the visa cancellation decision. The Tribunal found that, given the seriousness of Mr Pillay's offending, the Australian community would expect that Mr Pillay's visa would remain cancelled, and gave this consideration heavy weight in favour of affirming the decision not to revoke the cancellation of Mr Pillay's visa.

15 In connection with the four "other considerations", the Tribunal:

(a) assigned neutral weight to the legal consequences of the decision;

(b) found that there were significant impediments to Mr Pillay's establishing himself in South Africa if he were to be removed to that country, and assigned this strong weight in favour of revoking the decision to cancel his visa;

(c) had regard to the evidence of Mr Pillay's former wife, a victim of his previous violent offending and the mother of one of his biological children, who was supportive of his remaining in Australia, and gave moderate weight to the impact on victims in favour of revocation; and

(d) stated that the parties were in agreement that the consideration of the impact on Australian business interests was not engaged by the facts of Mr Pillay's case, indicated that it agreed with the parties, and allocated neutral weight to this consideration.

16 The way the Tribunal dealt with the consideration of the impact on Australian business interests is the subject of further consideration below in connection with the first argument advanced under Mr Pillay's first ground of appeal.

17 Weighing all of the considerations identified by Direction 99, the Tribunal found that the combined weight allocated to the protection of the Australian community, the consideration of family violence, and the expectations of the Australian community outweighed the

combined weight given to the remaining primary and other considerations. The Tribunal thus found that there was not another reason to revoke the cancellation of Mr Pillay's visa.

The decision of the primary judge and the appeal to the Full Court

18 Before the primary judge, Mr Pillay relied on four grounds of judicial review. In relation to each ground, the primary judge held that Mr Pillay had not established that the decision of the Tribunal was affected by jurisdictional error. Accordingly, her Honour dismissed the application for judicial review.

19 On his appeal to the Full Court, Mr Pillay relies on three grounds of appeal. In connection with the first ground of appeal, Mr Pillay relies on two distinct arguments, each of which is said to support a conclusion that the Tribunal constructively failed to exercise its jurisdiction to review the decision of the delegate. The four arguments advanced on the appeal correspond with arguments that were advanced before, and dealt with in the reasons of, the primary judge.

Ground 1 – first argument – failure to consider effect on Australian business interests

20 The first ground of appeal complains that the primary judge erred "in failing to find that the Tribunal engaged in a constructive failure to exercise jurisdiction". As has already been noted, Mr Pillay advances two separate arguments under this ground.

21 In the first argument, Mr Pillay contends that the evidence before the Tribunal was such as to require it to consider one of the "other considerations" referred to in Direction 99, namely the "impact on Australian business interests". In particular, he relies on evidence given by his aunt, Nancy Chetty, regarding a cleaning business which she operates in Australia, and the possibility of Mr Pillay being employed in that business should the visa cancellation decision be set aside.

22 The relevant "consideration" is explained in cl 9.4 of Direction 99, in the following terms:

> **9.4 Impact on Australian business interests**
>
> (1) Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

23 Mr Pillay contends that the Tribunal's reasons demonstrate that it did not have regard to this consideration, and that the evidence before it was such that it was required to do so.

24 The Tribunal referred to this consideration only briefly, at [185] of its reasons for decision, stating:

> **Other Consideration (d): Impact on Australian business interests**
>
> The parties are in agreement that this Other Consideration (d) is not engaged by the facts of this matter. I agree with the parties and will allocate neutral weight to it.
>
> (Footnote omitted.)

25 Before the first hearing in the Tribunal, at a point in time when Mr Pillay was legally represented, he filed a statement of facts, issues and contentions in the Tribunal, which included the following paragraphs:

> Impact on Australian business interests. Paragraph 9.4(1) of Direction 99 provides that decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under s 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.
>
> This other consideration is not relevant in these proceedings.

26 After the matter was remitted to the Tribunal after his first successful judicial review application, Mr Pillay (then no longer legally represented) did not file a further or updated statement of facts, issues and contentions.

27 Ms Chetty's written witness statement, dated 9 February 2024, included the following paragraph which is relevant to this issue:

> I have a cleaning company (as per my last letter) and it requires more staff, but I am finding it rather difficult to get reliable and responsible persons. I am able to offer a position to Lesley including the use of a company vehicle should he have his visa reinstated. I know my business will greatly benefit if he comes on board as I plan to branch out. I would like to train and mentor him to help manage my business with me. This will help me to have some much needed free time to rest as I now overwork myself due to staff issues.

28 Ms Chetty gave oral evidence before the Tribunal on the first day of the hearing, 6 March 2024. Mr Pillay was permitted to ask her some questions. Most relevantly, the exchange included the following:

> Q: In terms of work that you have offered me, is that an immediate role? Could that commence immediately or - - -?
>
> A: Yes. Yes. It could commence immediately because at the moment I am struggling to get staff to help me. Basically I can get staff, but they're not reliable. Very little accountability and I'm struggling to get good staff to do cleaning. So just to describe what's happening at the moment, it's just me and Uncle [Indistinct], but he has a full-time role, a job with Spotless,

> [Indistinct] Downer. So he helps me in the afternoons and then he's got to go and start his shift from 9 pm to 4.30 in the morning. So, yes. You know, I'm really really needing staff to actually help me, instead of making him work like for me and then go to his normal night job.
>
> Q: Okay. And also my driver's licence; would you be able to assist me in renewing that? So like - - -?
>
> A: Yes. … If you are allowed to drive that should not be a problem. I am able to take you. I am able to further help you because the job that I could give you, or the job that you know I'm offering, has to have a driver – reliable driver because you've got to take the cleaning equipment to the facility. So nothing is kept like at the factory. Everything is kept in the cleaning vehicle. So yes. That job would need a driver.

29 Ms Chetty was then cross-examined by counsel for the Minister. She acknowledged that she believed that Mr Pillay had a history of traffic infringements. When asked whether she knew if Mr Pillay had ever had his licence suspended she said that he might have. She said that she currently provided "very little" financial support to Mr Pillay, and was asked whether she would continue to provide similar financial support to him if he were returned to South Africa. She said she would try to provide support if she could, but elaborated:

> I will try and provide some support if I can. But really it'll be really cutting it really fine. Yes. If I do have extra work, which will be very hard for me right now, as I've explained with unreliable staff and I can't commit to taking anyone because of the unreliability. It actually keeps my business very small because of that. And so financially it's hard. Like I always explain to Lesley, it's not easy for me to just say you know what I could give you a few extra hundred dollars, but it – and we are in Australia, in our late 50s. We will not have any access to any government support, so we also have to grow a little nest for us which, you know, which is very hard at the moment to do. So, you know, if I have to give my spare money away to look after Lesley, or even his brother, then it's not going to be easy for me.

30 Ms Chetty was not asked any questions in cross-examination concerning the impact on her business of Mr Pillay's being removed from Australia although, as can be seen, she volunteered some information about her business and the job she was prepared to offer Mr Pillay. Her statements lacked detail. There was no evidence before the Tribunal to suggest that Mr Pillay would be a reliable staff member, or as to whether he would be able to obtain a driver's licence.

31 At the beginning of his closing addresses, after Mr Pillay made some brief submissions, the Tribunal stepped him through the primary and other considerations identified in Direction 99. Towards the end of that process, the following exchange occurred between the Senior Member and Mr Pillay:

> SENIOR MEMBER: Now there's a final consideration and I don't think it's relevant here. It relates to whether any delivery of an important service or a major project

> would be impacted if you were to leave Australia. That doesn't apply to you. Do you agree?
>
> MR PILLAY: Yes, Sir.
>
> SENIOR MEMBER: And Mr West agrees, so we can put that to one side. …

32 Mr Pillay submits that the question asked by the Tribunal member in relation to this consideration did not accurately reflect the full terms of cl 9.4(1) of Direction 99, and that Mr Pillay's response could not, therefore, be taken as a concession that the consideration referred to in cl 9.4(1) was not relevant.

33 In our view, the primary judge was correct to hold that, in the circumstances of this case, the limited evidence of Ms Chetty about the possibility of her employing Mr Pillay in her business was not sufficiently substantial as to require the Tribunal to give greater consideration than it did to the potential impact on Australian business interests. We have reached that conclusion for several reasons, having regard to Ms Chetty's evidence as a whole.

34 First, the main point of Ms Chetty's evidence about her cleaning business and the possibility of Mr Pillay being employed in it was to assure the Tribunal that Mr Pillay had potential prospects for employment, a matter to be taken into account favourably to Mr Pillay in the Tribunal's assessment of the risk to the community if he were to remain in Australia. In his closing submissions, in the course of identifying positive steps that he would take to avoid reoffending, Mr Pillay submitted that, if he were released into the Australian community, he would go straight into "full-time lawful employment" with Ms Chetty. The only way in which Mr Pillay himself sought to deploy Ms Chetty's evidence was as a protective factor in connection with the likelihood of his reoffending. Ms Chetty's belief that Mr Pillay could potentially assist her personally, and could contribute to her business, served to demonstrate that her offer of employment to Mr Pillay was a realistic one.

35 Secondly, on a fair reading of her brief evidence on this topic, Ms Chetty was not saying that her business would suffer any adverse impact as a consequence of Mr Pillay's *not* being available to work for her, but that the circumstances of her business were such that she believed that his being employed by her would be of benefit to the business and to her personally. While that could be regarded as a kind of potential "impact" on an Australian business, it is not the kind of impact with which cl 9.4(1) of Direction 99 is primarily concerned.

36 Thirdly, Mr Pillay's connection with Ms Chetty's business was one of (potential) employment. Having regard to the terms of cl 9.4(1) of Direction 99, the possible "impact on Australian business interests" was not of the kind that cl 9.4(1) contemplated should "ordinarily" be given weight. The evidence did not suggest that Mr Pillay's unavailability would "compromise" Ms Chetty's business at all, nor that it would have any – let alone a "significant" – effect on the delivery of a major project or important service. Moreover, there was nothing about the circumstances identified by Ms Chetty in her evidence to suggest that this was a situation that was out of the "ordinary", such that it was arguable that, exceptionally, weight should be given to Mr Pillay's (potential future) "employment link".

37 The evidence regarding Ms Chetty's business was not such as to require the Tribunal to give specific consideration to it as a factor to be weighed in determining whether there was another reason to revoke the visa cancellation decision. Mr Pillay himself had not sought to advance the impact on Ms Chetty's business interests as a consideration on which he relied; the evidence about it was brief and nonspecific; and the evidence was not such as to suggest that the case fell within the class of cases contemplated by cl 9.4(1) of Direction 99 as one in which weight should be given to the impact on Australian business interests. Bearing all this in mind, this was not a situation where the issue emerged sufficiently clearly on the material that the proper discharge of the Tribunal's review function required it to address the issue to a greater extent than it did. It was not a claim that was "clearly articulated" (or articulated at all), nor one that was "squarely raised" by or which "clearly emerged" from the materials: cf *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582; [2022] HCA 17 at 599 [25] (Kiefel CJ, Keane, Gordon and Steward JJ); *CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 318; [2022] FCAFC 124 at 334 [88]-[91]; *Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 300 FCR 67; [2023] FCAFC 173 at 78 [64]-[66].

38 We would not find that the Tribunal misunderstood either the scope of Direction 99 or the effect of Mr Pillay's concession. It is true that the question asked of Mr Pillay by the Senior Member in the course of his closing submission did not fully reflect the whole of cl 9.4(1) of Direction 99, but it did substantially reflect what cl 9.4(1) specifically said about circumstances like those of Mr Pillay (ie, a case where there was only an "employment link"). What the Senior Member said was consistent with his holding a view that, in accordance with the expectation expressed in cl 9.4(1), he would not be inclined to give weight to a potential effect of Mr Pillay's possible employment on Australian business

interests unless it would significantly compromise the delivery of a major project, or delivery of an important service in Australia. We are not prepared to infer, from the language used by the Senior Member in a single brief statement which he made in the course of the hearing, that he proceeded on a misunderstanding of cl 9.4(1) of Direction 99. Mr Pillay did not advance any evidence on the application for judicial review to the effect that he had, in fact, been misled by the Senior Member's question, or that, had he not been so misled, he would have wished to advance a submission based on the potential impact on Ms Chetty's business.

39 Further, it is not apparent that the Tribunal's reference in its reasons to the parties' agreement that the consideration of "impact on Australian business interests" was not engaged was a reference *only* to the answer Mr Pillay gave to the Tribunal's question in the course of closing submissions. While he was not necessarily constrained in his final submissions by his original statement of facts, issues and contentions, Mr Pillay never sought to resile from what had been said there. He had never attempted to suggest that any impact on Australian business interests was a reason why the cancellation of his visa should be revoked. The concession that the impact on Australian business interests was not engaged remained a sensible one that reflected a realistic view as to how the Tribunal would approach cl 9.4(1) of Direction 99 in this case.

40 The Tribunal's statement that the parties had agreed that the consideration concerning any impact on Australian business interests was "not engaged by the facts of this matter" was not inaccurate. The Tribunal also expressed its own agreement with that position, and its conclusion that any impact on the business interests of Ms Chetty should be given "neutral weight" was consistent with a proper application of cl 9.4(1) of Direction 99.

41 For these reasons, we do not consider that the primary judge erred in failing to find that the Tribunal's decision was affected by jurisdictional error because it failed to address the possible impact on Ms Chetty's business of Mr Pillay's not being allowed to remain in Australia.

Ground 1 – second argument – failure to make inquiries before making adverse findings

Introduction

42 The second argument advanced by Mr Pillay in relation to ground 1 concerns the Tribunal's finding to the effect that Mr Pillay was dishonest. The finding was relevant to the Tribunal's assessment of Mr Pillay's evidence as well as its assessment of his character, which was in

turn relevant to the assessment of the risk of Mr Pillay's engaging in criminal or other serious conduct in the future.

43 The Tribunal's finding regarding Mr Pillay's lack of credit was based, in significant part, on its conclusion that, when he briefed the psychologist, Dr Yoxall, for the purposes of conducting a risk assessment regarding his likelihood of future offending, Mr Pillay deliberately withheld key documents from her, and on the further inference that he had done so in order to preclude her from checking whether statements he made to her, on which she would base her risk assessment, were accurate. Mr Pillay contends that that finding was factually wrong, and that, in the circumstances of this case, the Tribunal constructively failed to exercise its jurisdiction by reason of its failure to make obvious inquiries which, if made, could easily have established that the premise on which the Tribunal proceeded was factually wrong.

The course of proceedings before the Tribunal

44 The way this issue arose before the Tribunal was as follows.

45 It will be recalled that the matter came before the Tribunal after an earlier decision was set aside on judicial review. A bundle of relevant documents was compiled, comprising some 2158 pages. This was referred to as the "remittal bundle".

46 On the morning of the first day of the Tribunal hearing, Mr Pillay gave oral evidence. He was cross-examined by reference to the contents of the report of Dr Yoxall, including to the effect that, when he had spoken to Dr Yoxall, there were a number of incidents that he had not disclosed to her or had not discussed with her. Mr Pillay's response in relation to some of these questions was that he had in fact discussed some incidents with Dr Yoxall. In relation to other incidents, his answers were to the effect that Dr Yoxall had been provided with all the relevant material, including material which referred to those incidents, because he had provided her with a copy of the remittal bundle. When he spoke to Dr Yoxall, Mr Pillay was answering her questions, and he did not regard it as his role to discuss matters that were not raised with him, given that he had provided her with the remittal bundle. Mr Pillay stated three times that he had sent Dr Yoxall the remittal bundle. Counsel for the Minister did not suggest to Mr Pillay that that evidence was incorrect, and appeared to frame further questions on the basis that that aspect of his evidence was accepted.

47 Dr Yoxall gave oral evidence on the morning of the second day of the Tribunal hearing. Mr Pillay did not ask any questions of Dr Yoxall. She was cross-examined by counsel for the Minister. Dr Yoxall was asked whether the material that she reviewed for the purposes of preparing her report included certain documents. In particular, she was asked whether she had been provided with a transcript of the previous hearing in the Tribunal, and with Queensland Police forms (known as a QP9) which identified the prosecution case in respect of the offences with which Mr Pillay had been charged. Her answers were to the effect that she had not been provided with, or "had not seen", either of those documents, even though they were in the remittal bundle.

48 Mr Pillay did not re-examine Dr Yoxall. The apparent inconsistency between Mr Pillay's evidence, that he had provided Dr Yoxall with the complete remittal bundle, and Dr Yoxall's evidence, that she had not seen certain of the documents contained in the remittal bundle, was not pointed out to him until counsel for the Minister was making his closing submissions.

49 Mr Pillay had already given evidence before Dr Yoxall gave her oral evidence to the Tribunal. It had not been put to Mr Pillay that he had failed to provide Dr Yoxall with particular material that was included in the remittal bundle, or that he was being dishonest in suggesting that he had done so – no doubt because it was not known at that stage that Dr Yoxall's evidence would be that she had not seen that material. The Minister did not seek to recall Mr Pillay to suggest to him that he had been dishonest in his evidence about having provided Dr Yoxall with the remittal bundle, or raise the possibility of the Tribunal doing so, or call for production of the material that Mr Pillay had sent to Dr Yoxall.

50 In the proceedings before the primary judge, Mr Pillay adduced evidence of the email which he had sent to Dr Yoxall before she interviewed him, to which he had attached the complete remittal bundle. It is evident that there is a strong likelihood that, if asked to do so, either Mr Pillay or Dr Yoxall could easily have produced a copy of that email to the Tribunal or the Minister, establishing objectively what material was included in the bundle that was provided to Dr Yoxall.

51 The Minister does not dispute that the premise for the Tribunal's finding was factually wrong. However, the Tribunal's finding was based on the evidence that was before it, and an error of fact does not itself ordinarily constitute jurisdictional error: see, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-6 (Mason CJ). The Minister

submits that the primary judge was correct to hold that the Tribunal had no duty to make further inquiries about this issue, and that its decision was not affected by jurisdictional error.

The Tribunal's decision relating to the withholding of documents from Dr Yoxall

52 In the reasons for its decision, the Tribunal made strong adverse findings in relation to the evidence of Mr Pillay. In particular, at [49]-[52], the Tribunal said:

> [49] Misgivings can also be said to result from the Applicant's evidence given in the Hearing before me. There were specific and quite material elements of the Applicant's offending that he did not report to the expert psychologist – Dr Jacqui Yoxall – whom the Applicant retained for the instant proceeding. For example, in terms of his version of certain incidents reported to Dr Yoxall, the Applicant denied certain specific details of the physical violence perpetrated upon a domestic partner victim in circumstances where that denial was squarely at odds with the version of the incident recorded by Police.
>
> [50] The Applicant's explanation for this inconsistency between what is recorded about his conduct in the material and how he reported that conduct to Dr Yoxall is now vacuously sought to be explained away on the basis of him saying he gave her the whole remittal bundle and that he relied on her to look through the entirety of that material (circa 2100 pages) and to counterpoint and compare his version of a given incident compared to what the remittal bundle has to say about that incident. The reality is the Applicant knew the precise details of the answer he had to provide to Dr Yoxall's question on a given incident. He took a gamble on Dr Yoxall perhaps not turning up the relevant page(s) in the remittal bundle to expose the blatant inaccuracy of what the Applicant was telling her. While he may think the gamble paid off with Dr Yoxall, it will not with this Tribunal.
>
> [51] In any event, it transpired during Dr Yoxall's evidence that she had not been provided with the transcript of the previous ventilation of this matter before this Tribunal and nor had she been provided with the critically important prosecution QP9 material. Both the previous transcript and the QP9 documents appear in the remittal bundle. *The result is that an inference can now be drawn that the Applicant selectively provided material to Dr Yoxall such as to deprive her of fulsomely fact-checking or cross-referencing whatever answer he gave her to a given question against what should have appeared in the remittal bundle before her. This does the Applicant's credit no favours.*
>
> [52] *This predisposition towards dishonesty is a concerning facet of both the Applicant's offending pattern and in his approach towards instructing Dr Yoxall.* While he may be able to explain away his fraudulent conduct on the basis of committing it to obtain money in order to acquire illicit drugs, *he cannot maintain such position with regard to the material he gave to Dr Yoxall* and how he sought to explain some aspects of his conduct to this Tribunal or her. He purported to minimise much of his conduct resulting in a multiplicity of convictions for breaching domestic violence orders on the basis of those breaches deriving from exclusively verbal arguments as opposed to physical interference perpetrated upon a domestic partner-victim. On any reasonable view, the Applicant's position on the breaches being exclusively limited to oral disputes does not square with the evidence.
>
> (Emphasis added.)

53 The Tribunal then identified (at [53]) Dr Yoxall's conclusion that Mr Pillay represented "a low to moderate risk of general reoffending and a low to moderate level of rehabilitation needs", and that he presented with a low risk of domestic violence reoffending, so long as he "remains abstinent from alcohol and drugs, and he manages his mental health".

54 Later, when making its own assessment of Mr Pillay's risk of reoffending, the Tribunal relevantly said (within [70]):

> …
>
> • **the expert opinion** propounded at the Hearing before me was that of Dr Jacqui Yoxall. At the previous ventilation of this matter before this Tribunal (differently constituted) the Applicant told his previously-retained expert witness (Dr Gavan Palk-psychologist) that he would not use heroin again, that he was fearful of causing another mandatory cancellation of his Visa and that he was fearful of a resulting deportation to South Africa. His subsequent conduct bears little or no resemblance to what he told Dr Palk.
>
> *The significant difficulty with the report and findings of Dr Yoxall is to be found in what the Applicant did not tell her or did not brief to her during her efforts to obtain detailed instructions from him.* There is, as I have outlined above, a serious inconsistency between what is recorded about his unlawful conduct in the material and how that conduct was reported to Dr Yoxall. *As I mentioned above, whatever gamble he thought he was taking with Dr Yoxall perhaps not being able to turn up the relevant detail demonstrating inconsistency in what he was telling her may have paid off (or regrettably embarrassed) in terms of the findings of an expert professional like Dr Yoxall, that gamble goes nowhere with this Tribunal. The Applicant selectively provided material to Dr Yoxall such as to deprive her of a capacity to fact-check or cross-reference what he was saying to her compared to what the material said about him.*
>
> …
>
> (Bold in original; italics added.)

55 At [71] of its reasons, the Tribunal then said:

> The Applicant's evidence about being able to successfully resist a relapse into illicit drug use is vague and, ultimately, unconvincing. The integrity of the findings of Dr Yoxall has, to my mind, been seriously impugned *by the manner in which the Applicant has caused material to be briefed to her* and in certain of the responses he provided to her questions. This of course, is in no way the fault of Dr Yoxall. …
>
> (Emphasis added.)

56 The Tribunal again referred to the failure of Mr Pillay to provide all relevant material to Dr Yoxall in the following passage from [91] of its reasons:

> … On the one hand, the Applicant accepts the very serious nature of the totality of his offending, including, his domestically violent conduct. He also purports to have developed an understanding of the consequences of such conduct upon its victims. But on the other hand, *it seems clear that he engineered both the briefing of certain*

> *material to Dr Yoxall* and also reviewed her draft report *with an objective of achieving a "friendly" outcome from the terms of Dr Yoxall's filed report about the true nature and extent of his family violence conduct*. Further to this, he now selectively accepts particular indicia of his conduct but denies other parts of it. It may be said (and found) that the Applicant has accepted some measure of responsibility for his family violence conduct. Such a finding must be significantly tempered by an analogous finding that he wants this Tribunal to accept a particular version of his acceptance of responsibility for that conduct that is best suited to a favourable outcome in the instant proceeding[.]
>
> (Emphasis added.)

57 The italicised portions of these passages demonstrate that the Tribunal's conclusions with respect to both Mr Pillay's credit and the weight to be placed on Dr Yoxall's evidence regarding the risk of his reoffending were materially affected by the Tribunal's conclusion that Mr Pillay had withheld from Dr Yoxall material which the Tribunal regarded as important. They also indicate that the Tribunal consequently drew an inference that Mr Pillay had withheld material deliberately, in order to prevent Dr Yoxall from being fully informed about the details of his previous offending, and thus to obtain a more favourable report from her. It is clear that the Tribunal's finding about the extent of the material provided to Dr Yoxall was not the only consideration that informed its view of Mr Pillay's credit and Dr Yoxall's opinion, but it did contribute substantially to the Tribunal's overall assessment. In those circumstances, the Minister accepted that, *if* the approach of the Tribunal involved error of a kind that could constitute jurisdictional error, it could not be said that the error was not jurisdictional because it was not material.

Failure to make an inquiry that results in a constructive failure to conduct a review: High Court authority

58 In *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123; [2009] HCA 39 (***SZIAI***), French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said (at 1128 [20]):

> The failure of an administrative decision-maker to make inquiry into factual matters which can readily be determined and are of critical significance to a decision made under statutory authority, has sometimes been said to support characterisation of the decision as an exercise of power so unreasonable that no reasonable person would have so exercised it.

59 Later, their Honours said (at 1129 [25]):

> Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a "duty to inquire", that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the *Migration Act* is a duty to review. *It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some*

> *circumstances, supply a sufficient link to the outcome to constitute a failure to review.* If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. *It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.* It is not necessary to explore these questions of principle in this case. …
>
> (Emphasis added; footnote omitted.)

60 The reasons why French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ considered it unnecessary to explore those questions further in *SZIAI* were, first, that there was nothing on the record in that case to indicate that any further inquiry could have yielded a useful result and, secondly, that further inquiry would have been futile. Their Honours concluded (at 1129 [26]) that there was "no factual basis for the conclusion that the failure to inquire constituted a failure to undertake the statutory duty of review or that it was otherwise so unreasonable as to support a finding that the Tribunal's decision was infected by jurisdictional error". These circumstances may be contrasted with the present case, where a simple inquiry might readily have led to the Tribunal being informed of the manner in which material had been provided to Dr Yoxall, and the production of the email which demonstrated what material was in fact provided to her.

61 In *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1 (***SZGUR***), in the context of a review under Part 7 of the *Migration Act*, French CJ and Kiefel J (with whom Heydon J and Crennan J agreed) noted that there was no general duty on the Refugee Review Tribunal to make inquiries or to exercise, or to consider the exercise of, its statutory inquisitorial powers: at 602-3 [20]-[22]. However, they went on to say that "[t]hat is not to say that circumstances may not arise in which the Tribunal has a duty to make particular inquiries": at 603 [22]. It was acknowledged that that issue had been left open in *SZIAI*: *SZGUR* at 603 [23] (French CJ and Kiefel J); 620 [78] (Gummow J).

62 In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 (***Li***), Gageler J, in the context of discussing the requirement that the Migration Review Tribunal acted reasonably in conducting a review of a delegate's decision, relevantly said (at 373-4 [100]):

> … [T]he requirement for the MRT to act reasonably is not exhausted in every case where an applicant before the MRT is given a reasonable opportunity to give evidence, provide information and present arguments in relation to the decision under review. Reasonableness can require more. Thus, while it has been held that the MRT has no general duty to make inquiries, it has been accepted that "a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a

> failure to review". The touchstone is reasonableness in the performance of the duty to review.
>
> (Footnotes omitted.)

63 Another case in which this kind of error was discussed was *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22; [2015] HCA 51. In that case, a delegate of the Minister had made a decision to cancel the plaintiff's visa on the basis of the delegate's incorrect finding of fact that the plaintiff was not enrolled in a registered course, and had thus failed to comply with a condition of his visa. The finding was based on the content of an electronic database, PRISMS, which the plaintiff's education provider had failed to update, in breach of a statutory duty. Justices Gageler and Keane held (at 35 [34]-[35]) that the delegate's decision was affected by jurisdictional error because the finding had resulted from the failure of the education provider to comply with its statutory duty. Justice Nettle disagreed with this conclusion, holding that the delegate's finding based on the content of the database was merely an error of fact (at 39 [48]). However, Nettle J found that the decision was affected by jurisdictional error on the alternative basis that the delegate had failed to make an obvious finding about a critical fact. The factors that led Nettle J to conclude that there had been a constructive failure to exercise jurisdiction included the fact that the delegate was on notice that the plaintiff would not have a practical opportunity to demonstrate why the visa should not be cancelled, and were otherwise identified as follows (at 40-1 [51]):

> … one obvious way of ensuring, or at least being more certain, that the plaintiff had ceased to be enrolled was to make a telephone inquiry of the University, the direct and authoritative source of confirmation of the plaintiff's enrolment, just as the delegate had done on 20 February 2014 to check the plaintiff's address. Given the criticality of the fact that the plaintiff was enrolled at the University, the relative ease with which that fact could have been ascertained, the obviousness of the means of doing so – by picking up the telephone and requesting the University to check whether the plaintiff's enrolment status as shown in PRISMS was in fact correct – and the clear link between the delegate's failure to make that inquiry and the delegate's determination to cancel the visa, I consider this to be a case in which the delegate's failure amounted to a constructive failure to exercise jurisdiction and therefore a jurisdictional error.

64 In *Minister for Home Affairs v DUA16* (2020) 271 CLR 550; [2020] HCA 46, the High Court considered an argument that the Immigration Assessment Authority (**Authority**) had constructively failed to exercise its jurisdiction due to an unreasonable failure to decide the review before it without making further inquiries, in circumstances where the migration agent acting for a visa applicant, CHK16, provided written submissions to the Authority which the Authority appreciated did not relate to CHK16's case. The Court unanimously held (at 565-6 [31]-[32]) that, in the circumstances, it was legally unreasonable for the Authority

not to ask why the submissions did not relate to CHK16's case, and to proceed to decide the review without making further inquiry.

65 The issue of jurisdictional error arising from failure to make an obvious inquiry was most recently addressed by the High Court in *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 280 CLR 265; [2024] HCA 2. In that case, the plaintiff applied for judicial review of a decision of a delegate of the Minister to refuse a visa on character grounds. The Court held that, in the circumstances of that case, it was not unreasonable for a delegate to have refused to grant a visa without making an inquiry about the existence and age of a particular child (who had been referred to in one document, but whom the plaintiff had not suggested was a minor child whose interests would be affected by the decision). Of more importance than the outcome in that case is the Court's recitation of the relevant principles (at 278-9 [25]):

> The making of a decision, the decision-maker having failed to inquire about a relevant fact or matter, 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. While decisions have expressed the criteria for an error of this kind as including that the potential fact was readily ascertainable and was critical or central to the decision, these criteria merely reflect the usually high threshold for a conclusion that a power has been unreasonably exercised as a matter of law.
>
> (Footnotes omitted.)

66 The High Court authorities thus establish that, while there is no general duty to make inquiries, the application of the principles relating to the requirement that a decision-making power be exercised reasonably may lead to the conclusion that, in certain circumstances, a decision may be found to be legally unreasonable because of the failure of the decision-maker to make an inquiry. Whether the making of a decision without making an inquiry about a fact is legally unreasonable depends on an assessment in all the circumstances of the case. The apparent importance of the fact to the decision actually made, the obviousness of the inquiry, and the ease with which it could have been made and the relevant fact ascertained, are factors which may inform the conclusion as to whether the decision was legally unreasonable.

Was the decision of the Tribunal affected by unreasonableness because it made a finding without making an obvious inquiry?

67 As Mr Pillay accepted in the course of argument, the relevant basis on which jurisdictional error might be found to exist in these circumstances is that the decision was affected by the Tribunal's adoption of a procedure that was legally unreasonable. In a practical sense, to

contend that a procedural course taken by the Tribunal was legally unreasonable, an applicant for judicial review ordinarily will need to be able to point to steps that a reasonable decision-maker in the position of the Tribunal could or would have taken if it had acted reasonably. In this context, Mr Pillay framed some of his submissions in terms that might have seemed to contend that the Tribunal was under a "duty" to make particular inquiries.

68 However, it is important not to lose sight of the fact that the ultimate issue here is whether the Tribunal's approach, viewed holistically and in the overall context of the review and the decision of the Tribunal, failed to comply with the legal requirement to act reasonably; not whether the Tribunal had a "duty" to make a particular inquiry. The requirement to act reasonably does not dictate that the Tribunal make inquiries – even obvious inquiries where the answer is likely to be readily ascertainable – in all circumstances. The requirement of legal reasonableness is not a prescriptive duty, but an implicit or assumed limit on the manner in which the Tribunal may lawfully go about exercising its function.

69 I am conscious of the well-known statement of Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-6:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

70 This is a case where it can fairly be said that a form of "administrative injustice" *has* occurred, in that Mr Pillay's application for review of the delegate's decision was determined by the Tribunal on the basis of a conclusion which was strongly adverse to him, and which is now known to have been based on a premise that was factually incorrect. That does not itself demonstrate or amount to jurisdictional error. The question is whether it should be concluded that the approach of the Tribunal went beyond the bounds of legal reasonableness and so amounted to a constructive failure to exercise its jurisdiction.

71 I accept the Minister's submission that, in principle, the assessment of whether the Tribunal acted unreasonably is to be made by reference to what was known to the Tribunal, and not in hindsight, in the light of new evidence which indicates that the factual conclusion from which the Tribunal reasoned was wrong. The evidence, adduced on the application for judicial review, as to what material was actually provided to Dr Yoxall is relevant to demonstrating

that any error was material to the Tribunal's decision. It may also be useful in assisting the Court to appreciate the potential gravity of an adverse finding (which is relevant to assessing whether the requirement to act reasonably was complied with). However, we must be careful not to allow our knowledge that the Tribunal's finding in fact turned out to be wrong as intruding into the assessment of whether its decision was unreasonable.

72 I have concluded that the Tribunal's decision to proceed to make a decision in this case, based in part on the strong adverse findings that it made about the material that was provided to Dr Yoxall and Mr Pillay's dishonesty in respect of that issue, without making any further inquiry or otherwise raising the issue with Mr Pillay, was legally unreasonable. This conclusion arises from the unusual constellation of circumstances in this case and, in particular:

(a) the way in which the evidence as to the material provided to Dr Yoxall was adduced, and the point in the hearing at which it became evident that there was an apparent dispute about what had been provided to Dr Yoxall (ie, *after* Mr Pillay had given unchallenged evidence that he had provided her with all relevant material);

(b) the fact that Mr Pillay was not represented before the Tribunal (where a legal representative might have been expected to have better appreciated the effect of the discrepancy between the evidence of Mr Pillay and that of Dr Yoxall);

(c) the evident relevance of the issue not only to Mr Pillay's credit but also to the assessment of the likelihood of Mr Pillay's reoffending, given that his visa had been cancelled on the basis of his convictions for fraud;

(d) the absence of any independent evidence (ie, evidence other than the oral evidence of Mr Pillay and Dr Yoxall) as to what material had and had not actually been provided to her;

(e) the fact that the contradiction in the evidence and its potential significance, in relation to both the weight to be given to Dr Yoxall's evidence and Mr Pillay's credibility and honesty, in the context of his history of offences of dishonesty, was not pointed out to Mr Pillay;

(f) the obviousness of the likelihood that Mr Pillay, if given the opportunity, could have addressed the issue by producing objective evidence of what he had sent to Dr Yoxall;

(g) the seriousness of the potential consequences of a finding adverse to Mr Pillay's interests on this issue, in influencing the reasoning and conclusion of the Tribunal; and

(h) the fact that the Tribunal ultimately proceeded to make a finding on the issue by preferring Dr Yoxall's evidence to that of Mr Pillay, and to attach significance to that finding by treating it as demonstrating that Mr Pillay had been less than forthright with Dr Yoxall, and dishonest in his evidence to the Tribunal, for the sinister purpose of manipulating the opinion expressed by Dr Yoxall.

73 Our conclusion that this course was legally unreasonable does not depend on the fact that the Tribunal's finding turns out to have been wrong (though it does take into account the seriousness of the consequences that would naturally follow from the Tribunal's conclusion, and the harshness of those consequences in the event that the conclusion were to turn out to be wrong). However, it is doubtful that Mr Pillay could have established that that unreasonableness on the part of the Tribunal was material to its decision (and thus amounted to jurisdictional error) without demonstrating that there was objective evidence that he could have provided to the Tribunal, which showed that its conclusion was wrong.

74 In any given case, there will usually be a range of ways in which the Tribunal could comply with the requirement to conduct the review in a manner that is not unreasonable. In this case, the Tribunal might have made further obvious inquiries of either Mr Pillay or of Dr Yoxall to ascertain the means by which material was provided to Dr Yoxall, and whether an objective record of the material provided was available. That kind of inquiry would have revealed that the remittal bundle was sent by email, and that its content could be checked. However, it is not necessary to conclude that making such inquiries was the only way the Tribunal could have acted reasonably in this case. For example, it might well have been within the bounds of reasonableness for the Tribunal merely to point out to Mr Pillay that there was a conflict between his evidence and that of Dr Yoxall, to explain the nature of the possible consequences that could follow if the Tribunal were to prefer the evidence of Dr Yoxall, and to outline that it was open to Mr Pillay to ask for the opportunity to provide objective evidence of the material that had been provided to Dr Yoxall. That might well have been enough to conclude that the Tribunal had not acted unreasonably. Alternatively, the Tribunal, recognising the limits of the evidence on that issue, might have declined to reach a concluded view as to whether Mr Pillay had provided all relevant material to Dr Yoxall and to draw adverse conclusions about his credibility from the conflicting evidence on that particular

topic. For these reasons, we would prefer not to describe the Tribunal's error categorically as a "failure to inquire".

75 In *Li*, Gageler J (at 375 [107]) explicitly recognised that "[p]otential for legitimate disagreement in the judicial application of the standard of *Wednesbury* unreasonableness" was "inevitable". Nevertheless, it is a standard that admits of only one right answer, and so an appellate court must determine for itself whether the decision-maker acted unreasonably, rather than deferring to the evaluative judgement of the primary judge: *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541; [2018] HCA 30 (***SZVFW***) at 552 [18] (Kiefel CJ), 554-5 [27], 565-6 [54]-[57] (Gageler J), 580 [117] (Nettle and Gordon JJ), 583 [130], 593-4 [154]-[155] (Edelman J).

76 The judgement as to the application of the reasonableness standard in the present case is quite finely balanced. We can understand how the primary judge reached the conclusion that the Tribunal's decision was not legally unreasonable. However, for the reasons we have explained, in our view, taking into account all the circumstances, it should be concluded that it was unreasonable for the Tribunal to rely on the conflict between the evidence of Mr Pillay and that of Dr Yoxall to make adverse findings about Mr Pillay's honesty, without first taking any of the relatively simple and obvious steps available to ascertain whether there was objective evidence that supported the conclusion that Mr Pillay's evidence on that topic had been dishonest.

Materiality

77 The primary judge accepted that, if the Tribunal's finding was affected by error of the kind alleged by Mr Pillay, then the error was material. On appeal, the Minister accepted that the Tribunal had proceeded on the basis of a wrong finding of fact concerning the provision of material to Dr Yoxall, that that wrong finding of fact had led it to make adverse findings about the honesty of the evidence given by Mr Pillay to the Tribunal, and that the Tribunal's decision could possibly have been different had it not made those findings.

78 For the reasons we have explained, in our opinion, the better view is that the Tribunal's findings should be characterised as involving a failure to exercise its jurisdiction in a manner that avoided legal unreasonableness. The error was material and so it follows that the Tribunal's decision was affected by jurisdictional error.

Ground 2 – taking into account an irrelevant consideration by having regard to the full terms and effect of a warning that was previously given to Mr Pillay

79 By his second ground of appeal, Mr Pillay contends that the primary judge erred in "failing to find that the Tribunal took into account an irrelevant consideration". Mr Pillay argues that the Tribunal erred in having regard to the full terms and effect of a warning that was contained in a letter sent to Mr Pillay by a delegate of the Minister, dated 14 February 2020.

80 On 15 February 2019, Mr Pillay's visa had been cancelled on character grounds pursuant to s 501(3A) of the *Migration Act*. Mr Pillay applied for the revocation of the cancellation of his visa, and on 14 February 2020, a delegate of the Minister made a decision to revoke the cancellation of the visa. The relevant warning appeared in the letter by which that decision was communicated to Mr Pillay. It was printed in bold type and read as follows:

> Warning: if you engage in further criminal or other serious conduct, this may again result in your visa being cancelled on character grounds.
>
> WARNING FROM THE DECISION-MAKER:
>
> "A stern warning should be issued to Mr PILLAY on this occasion, that he must refrain from further offending and continue to rehabilitate, especially given his addiction to heroin. He should not expect to receive any further leniency. The protection and safety of the Australian community is of paramount importance and a salient consideration.
>
> The Government has a zero tolerance policy on domestic violence and this kind of behaviour will not be tolerated again nor will any further theft, property offences or breaches of judicial orders."

81 The Tribunal referred to the warning contained in the letter of 14 February 2020 in several parts of its reasons for decision.

82 The first reference to the warning was in connection with the Tribunal's assessment of cl 8.1.1(1)(g) of Direction 99, which stated that, in assessing the seriousness of a non-citizen's criminal offending or other conduct to date, decision-makers must have regard to:

> whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).

83 Addressing this aspect of Direction 99, the Tribunal said (at [30]):

> The next enquiry, pursuant to paragraph 8.1.1(1)(g) of the Direction, involves the question of whether the Applicant has reoffended since being formally warned about the consequences of further offending on his Visa status to remain here. As

> mentioned earlier, the Applicant's Visa has been mandatorily cancelled twice. When it was reinstated after the first mandatory cancellation, the Applicant received a warning about the consequences that further offending would very likely have on his Visa status to remain here. The explicit terms of that warning appear in the material. I will refer again to this warning later in these Reasons when addressing the issue of recidivist risk. For the purposes of this paragraph 8.1.1(1)(g) of the Direction it suffices to say that (1) he received the abovementioned warning on about 14 February 2020; and (2) he thereafter committed some 20 further offences that attracted the imposition of some 21 months of head custodial time. This paragraph 8.1.1(1)(g) thereby very strongly militates in favour of a finding that the Applicant's offending has been of a *very serious* nature.
>
> (Emphasis in original.)

84 Later, in the part of its reasons relating to the Tribunal's assessment of the likelihood of Mr Pillay's engaging in further criminal or other serious conduct, the Tribunal set out the terms of the letter sent to Mr Pillay on 14 February 2020 and then said (at [57]):

> I repeat that the Applicant has had his Visa mandatorily cancelled twice. Following the Visa's reinstatement after the first mandatory cancellation, the Applicant offended within four months by committing the offence of "*fraud-dishonestly obtains property from another.*" In addition, from the time he received the abovementioned letter of warning (February 2020) the Applicant committed some 21 additional offences that were punished by 19 months of head custodial time and which attracted orders for him to make restitution to defrauded victims in the cumulative sum of $11,738.93.
>
> (Footnote omitted.)

85 The Tribunal then said (at [58] of its reasons):

> The further point of the abovementioned letter is this: the significant majority of these types of letters of warning usually and only contain the words "***Warning: if you engage in further criminal or other serious conduct, this may again result in your visa being cancelled on character grounds***." It is, in my experience, rare for such a letter of warning to include a further "**WARNING FROM THE DECISION MAKER**" …
>
> (Emphasis in original.)

86 The Tribunal then summarised the various aspects of the warning. Reference was again made to the warning when the Tribunal expressed its conclusions under the headings "Findings about risk" and "Assessment of recidivist risk". Relevantly, it said (at [70]-[72] of its reasons):

> …
>
> - **the letter of warning from the Respondent's Department dated 14 February 2020 furnished to the Applicant**: I have recounted the stern warning contained in this letter. Even after his Visa was reinstated which occurred concurrently with receipt of this letter, the Applicant re-offended within four months and then proceeded to commit some 21 additional

> offences punished by 19 months of head custodial time which also required him to make restitution to victims of his fraudulent conduct in the cumulative sum of nearly $12,000. He totally ignored the contents of the letter requiring him to (1) continue to rehabilitate from his heroin addiction; (2) bear in the mind the paramount importance of the safety of the Australian community; (3) understand that the Respondent would tolerate no further breaches of judicial orders; and (4) understand that he should not expect any further leniency.
>
> … To my mind, this Applicant has had his final warning. It appears in the abovementioned letter from the Respondent's Department dated 14 February 2020. He totally ignored every single one of the warnings appearing in that letter.
>
> … I have little or no faith in his capacity [to remain drug free if returned to the community] given … (3) his brazen and appalling failure to heed the stern warning from the Respondent's Department after the first cancellation of his Visa, only to reoffend to the extent of triggering a second mandatory cancellation of his visa.
>
> (Emphasis in original.)

87 Mr Pillay accepts that, a delegate who decided to revoke a decision to cancel a visa, exercising the power in s 501CA(4) of the *Migration Act*, may write to the non-citizen in terms that include a warning to the effect that, if they engage in further criminal or other serious conduct, this may result in their visa again being cancelled on character grounds. He further accepts that the fact that a non-citizen has previously had their visa cancelled and then reinstated, and has been given a warning as to what may occur if they engage in further offending, can lawfully be taken into account against the non-citizen in deciding whether to revoke a subsequent decision to cancel their visa. Mr Pillay does not submit that the Tribunal's reference to the fact that he had received a warning itself demonstrates jurisdictional error.

88 However, Mr Pillay contends that the Tribunal fell into jurisdictional error by having regard to the terms of the second part of the warning contained in the letter of 14 February 2020. In particular, he submits that that was an irrelevant consideration because the decision-maker who revoked the first cancellation decision had no "power" to issue Mr Pillay with a warning expressed in those terms.

89 The better reading of the warning that was given is that the delegate who issued the warning was attempting to communicate what he understood to be the government's policy position, and to sheet home to Mr Pillay the strong likelihood that the application of that policy in the future, should Mr Pillay reoffend, would result in his visa being cancelled and the cancellation decision not being revoked. We do not think a fair reading of the letter supports

the proposition that the delegate was purporting to make a determination that would bind a future decision-maker, considering a request for revocation of a future visa cancellation.

90 If the warning were to be read as an attempt to dictate the outcome of a then-hypothetical future decision-making process, it could not validly have had that effect. Nevertheless, even if the warning purported to have some legal effect which it did not have, it remained a fact that Mr Pillay had been informed in strong terms that the consequence of further offending may well be that he could expect no further leniency and, at least by implication, that he might not be permitted to continue to hold a visa. The facts that he had received a warning, that the warning had been strongly expressed, and that (as the Tribunal found) he had "ignored" the warning, were rationally capable of being regarded by the Tribunal as bearing on its assessment of Mr Pillay's willingness and capacity to refrain from further offending, and thus of the risk of further harm to the Australian community should the visa cancellation decision be revoked.

91 There is nothing in the Tribunal's reasons to suggest that it proceeded on the basis that the giving of the warning, or the terms in which it was expressed, meant that the Tribunal was bound not to revoke the cancellation of Mr Pillay's visa. On the contrary, it is clear that the Tribunal merely had regard to the terms of the warning that were issued, including the forceful nature of the statement, as part of its assessment of his circumstances and the weighing of the considerations prescribed by Direction 99.

92 For these reasons, we do not consider that the Tribunal's decision was affected by jurisdictional error by reason of the way it had regard to the terms of the warning that had previously been given to Mr Pillay.

Ground 3 – misunderstanding of the law concerning the Tribunal's capacity to take into account the impact of visa cancellation on Mr Pillay's brother

93 By his third ground of appeal, Mr Pillay contends that "[t]he primary judge erred in failing to find that [the] Tribunal acted on a misunderstanding of the law". This contention relates to the way in which the Tribunal addressed the evidence given by Mr Pillay's brother, Damien Pillay.

94 At the time of the Tribunal hearing, Damien Pillay was living in South Africa. He had previously lived in Australia but had been removed to South Africa in June 2023 following the cancellation of his own visa. In his written statement, which was before the Tribunal,

Damien Pillay described the conditions in South Africa and the effect that removal had had on him. That part of his evidence was evidently directed to establishing that Mr Pillay would likely be exposed to hardship if he were returned to South Africa. Damien Pillay's written statement also said:

> … I know if [Mr Pillay] is allowed to remain in Australia he will go straight to work and also help me, but if he is removed from Australia that will leave us both in a bad position.

95 This statement was plainly capable of being understood as an assertion that it would be in Damien Pillay's interests for Mr Pillay to be permitted to remain in Australia. Mr Pillay contends that the Tribunal's reasons demonstrate that it proceeded on the basis that it was *prevented* from having regard to the effect of non-revocation of his visa on Damien Pillay's interests.

96 The Tribunal referred to Damien Pillay's evidence in the part of its reasons in which it addressed cl 8.3(1) of Direction 99. That clause states:

> (1) Decision-makers must consider any impact of the decision on the noncitizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

97 This part of Direction 99 imposed an obligation on decision-makers to have regard to the impact on the people whom it identified. It did not *prohibit* the Tribunal from having regard to any evidence of the potential impact of their decision on other family members.

98 At [103]-[104], the Tribunal identified particular persons as members of Mr Pillay's family who were citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely – in particular, his partner, his mother and his sister. After summarising the evidence relating to their circumstances, the Tribunal concluded that each of them would be adversely affected in the event of Mr Pillay's removal to South Africa.

99 Then, at [105] of the Tribunal's reasons, it said:

> I also make mention of both the written and oral evidence of the Applicant's brother, Mr Damien Pillay who was the subject of a matter involving the cancellation of his visa consequent upon the offending history he compiled in Australia. Mr Damien Pillay was not successful in revoking the mandatory cancellation of his visa and in June 2023 he was removed to South Africa where he remains. While Mr Damien Pillay is the Applicant's brother, *I am not able to take his interests into account as an immediate family member of the Applicant because he is not in Australia at the time of my decision in the instant application*.
>
> (Emphasis added.)

100 The first issue that arises in connection with this ground of appeal concerns the interpretation of the italicised words.

101 The primary judge found (at [32]) that in this passage, fairly understood, the Tribunal was not making a general statement that it could not take into account Damien Pillay's interests at all, but was, rather, referring to the matters it was to take into account pursuant to cl 8.3(1) of Direction 99.

102 The meaning of the Tribunal's written reasons and the inferences to be drawn about its state of mind are issues of fact which admit of one correct answer, and which fall to be determined on the basis of the reasons themselves. The Full Court on appeal is in as good a position as the primary judge to evaluate those matters, and should give effect to its own conclusion: *Warren v Coombes* (1979) 142 CLR 531 at 551 (Gibbs ACJ, Jacobs and Murphy JJ); *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 at 126-9 [25]-[31] (Gleeson CJ, Gummow and Kirby JJ); *SZVFW* at 557 [34] (Gageler J).

103 The immediate context in which the Tribunal referred to the topic of the impact of its decision on Damien Pillay's interests was its consideration of cl 8.3(1) of Direction 99. That context tends to support the view that the Tribunal was merely indicating that Damien Pillay was not one of the persons mentioned in cl 8.3(1), not that it was prohibited by law from having regard to the possible impact of its decision on his interests. The literal meaning of the Tribunal's statement – particularly of the words "I am *not able* to take his interests into account" – does tend in favour of the view that the Tribunal thought it could not have regard to Damien Pillay's interests in making its decision. However, the words that follow – "as an immediate family member of the Applicant" – are most naturally read as qualifying or limiting that statement. Those words echo part of the language of cl 8.3(1) and are thus readily capable of being understood as a shorthand reference to the class of persons described in that clause. That is, the relevant statement in the Tribunal's reasons is capable of being understood, without excessive strain, as a statement about the applicability of cl 8.3(1) of Direction 99.

104 Later in its reasons, the Tribunal referred to Damien Pillay's evidence about the difficulties he had experienced establishing himself in South Africa, but did not specifically refer again to the impact of its decision on him. The fact that the Tribunal did not separately address the impact on Damien Pillay's interests is potentially capable of supporting the conclusion that the Tribunal believed it was not permitted to address his interests at all.

105 However, Damien Pillay's evidence about the potential effect of Mr Pillay's removal from Australia on him was nonspecific and very brief. The issue was not further explored in his oral evidence, and Mr Pillay did not make an express submission that the Tribunal should weigh his brother's interests as a consideration in favour of revocation of the visa cancellation decision. Damien Pillay was a non-citizen who had himself been removed from Australia following this cancellation of his own visa on character grounds, and his speculative interest in being supported financially by Mr Pillay if he were to remain in Australia and obtain work was not a consideration to which the Tribunal could be expected to attach much, or perhaps any, weight. So, while it is possible that the Tribunal's failure to expressly discuss or assign weight to the impact of its decision on Damien Pillay's interests could have reflected a belief on the part of the Tribunal that it was legally prohibited from doing so, even outside the context of cl 8.3(1) of Direction 99, the more likely explanation is simply that the Tribunal did not regard his interests as a matter that was material to its decision: cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at 346 [68]-[69] (McHugh, Gummow and Hayne JJ).

106 For these reasons, on balance, we agree with the conclusion of the primary judge that the better view is that the Tribunal, in [105] of its reasons, was simply identifying that the impact of the decision on Damien Pillay's interests was not within the class of matters to which the Tribunal was required to have regard by virtue of cl 8.3(1) of Direction 99.

107 The primary judge also accepted the Minister's submission that, even if the Tribunal had erred by misunderstanding the law in the manner suggested by this ground of appeal, its decision was not thereby affected by jurisdictional error, because there was no realistic possibility that, had the Tribunal not made that error, its decision could have been different. We also agree with the primary judge's conclusion in this regard.

108 The Court must be careful not to substitute its own view of the merits of the decision (or the merits of a particular consideration that could be relevant to the decision) for the Tribunal's judgement. The Court is nevertheless required to determine whether, as a matter of "reasonable speculation", there is a "realistic possibility" that, had the Tribunal not made the error, its decision could have been different: *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321; [2024] HCA 12 at 328-9 [14]-[16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

109 Appreciating that that is an "undemanding" standard, in our view the primary judge was correct to conclude that, even if the Tribunal had wrongly excluded the interests of Damien Pillay from its consideration, it was not a realistic possibility that its decision could have been different in the event that it had had regard to his interests. The Tribunal took into account the considerably weightier impacts of Mr Pillay's removal from Australia on his other family members. The evidence relating to any potential impact on Damien Pillay was very brief, vague, and speculative, and could not realistically have been expected to be given any real weight.

Conclusion

110 For the reasons explained above, we would uphold the appeal in respect of the second limb of ground 1. We would not otherwise uphold any of the grounds of appeal advanced by Mr Pillay.

111 It follows that the appeal should be allowed. The orders of the primary judge should be set aside. In lieu thereof, orders should be made that a writ of certiorari issue to quash the decision of the Tribunal and a writ of mandamus issue to require the Administrative Review Tribunal to determine Mr Pillay's application for review according to law. The Minister should pay Mr Pillay's costs of the application for judicial review and the appeal to this Court.

I certify that the preceding one hundred and eleven (111) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Collier, McDonald and Longbottom.

Associate:

Dated: 19 March 2026