FEDERAL COURT OF AUSTRALIA

Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 125

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| Appeal from: | *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1223 |
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| File number: | NSD 1072 of 2020 |
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| Judgment of: | **KATZMANN, DERRINGTON AND O’BRYAN JJ** |
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| Date of judgment: | 16 July 2021 |
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| Catchwords: | **MIGRATION LAW** – decision of the Administrative Appeals Tribunal not to revoke mandatory cancellation of visa under s 501CA(4) of the *Migration Act 1958* (Cth) –whether Tribunal erred in formation of state of satisfaction for the purpose of s 501CA(4) – whether primary considerations stated in Ministerial Direction 79 were mandatory considerations in forming state of satisfaction – whether mandatory considerations included best interests of appellant’s child – whether best interests of child raised in representations pursuant to s 501CA(3) – whether best interests of child clearly arose during hearing before Tribunal – whether Tribunal considered the best interests of the appellant’s child – whether material before Tribunal on which consideration could occur – the migration status of the child consequent upon the cancellation of the appellant’s visa and the revocation of the cancellation –whether Minister advanced legally erroneous submissions to Tribunal as to migration status of the child – whether erroneous submissions material to the Tribunal’s decision –whether Tribunal failed to perform its statutory duty to consider the best interests of the appellant’s child as a primary consideration – appeal dismissed**STAUTORY INTERPRETATION** – meaning of s 140(3) of the *Migration Act 1958* (Cth) – whether s 140(3) applicable to the cancellation of a visa pursuant to s 501**PRACTICE AND PROCEDURE –** application for leave to raise new ground of review on appeal – whether adequate explanation provided for failure to raise ground of review before primary judge – whether proposed new ground has sufficient merit – leave granted  |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 15AA*Australian Citizenship Act 2007* (Cth) s 12(1)(b)*Migration Act* *1958* (Cth) ss 78(1), 128, 133A, 133C, 133F, 134, 137J, 137L, 137N, 140(1), 140(2), 140(3), 140(4)(b), 486D, 499(1), 499(2A), 501(3), 501(3A), 501A(3), 501C, 501CA(3A), 501CA(4), 501CA(5), 501CA(6)*Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth)*Migration Legislation Amendment (Overseas Students) Act 2000* (Cth)*Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth)*Migration Legislation Amendment Act* *1994* (Cth)*Migration Reform Act* *1992* (Cth)*Migration Regulations 1994* (Cth) Schedule 2 cl 444.511*United Nations Convention on the Rights of the Child*. Opened for signature 20 November 1989. 1577 UNTS 3. (entered into force 2 September 1990) |
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| Cases cited: | *AAD16 v Minister for Immigration and Border Protection* [2018] FCA 1433*AAM15 v Minister for Immigration and Border Protection* (2015) 231 FCR 452*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27*Ali v Minister for Home Affairs* (2020) 278 FCR 627*Baker v Minister for Immigration and Citizenship* [2012] FCAFC 145*BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456*BLX16 v Minister for Immigration and Border Protection* [2019] FCAFC 176*Carrascalao v Minister for Immigration and Border Immigration and Border Protection* (2017) 252 FCR 352*Chevron USA Inc v National Resources Defence Council Inc* 467 US 837 (1984)*Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135*Coulton v Holcombe* (1986) 162 CLR 1*CSZ15 v Minister for Immigration and Border Protection* [2017] FCA 706*DKN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 97*DKT16 v Minister for Immigration and Border Protection* [2019] FCAFC 208*DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1184*EXV17 v Minister For Home Affairs* [2018] FCA 1780*Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166; 153 ALD 338*GBV18 v Minister for Home Affairs* (2020) 274 FCR 202*Guclukol v Minister for Home Affairs* (2020) 279 FCR 611*Guclukol v Minister for Home Affairs* (2020) 279 FCR 611*Gupta v Minister for Immigration and Border Protection* (2017) 255 FCR 486*H v Minister for Immigration and Multicultural Affairs* (2004) 63 ALD 43*HZCP v Minister for Immigration and Border Protection* (2019) 273 FCR 121*Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1*Leota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120*Lesianawai v Minister for Immigration* [2012] FCA 897; 131 ALD 27*Maharjan v Minister for Immigration and Border Protection* (2017) 258 FCR 1*Marzano v Minister for Immigration and Border Protection* (2017) 250 FCR 548*MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 11*Minister for Home Affairs v Buadromo* (2018) 267 FCR 320*Minister for Home Affairs v Omar* (2019) 272 FCR 589*Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326*Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 259 ALR 429*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273*Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19* [2020] FCAFC 166*Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1*NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51*Nweke v Minister for Immigration and Citizenship* [2012] FCA 266; 126 ALD 501*NWQR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 30*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355*Raibevu v Minister for Home Affairs* [2020] FCAFC 35*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165*Re* *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1*Rokobatani v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583*Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128; 139 ALD 1*SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 364*Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1313*Singh v Minister for Home Affairs* (2020) 274 FCR 506*Singh v Minister for Immigration and Border Protection* (2018) 261 FCR 556*Spruill v Minister for Immigration and Citizenship* [2012] FCA 1401; 135 ALD 45*SZQYM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 779*SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51*Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531*Uelese v Minister for Immigration* (2015) 256 CLR 203*Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608*Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588*Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133*Water Board v Moustakas* (1988) 180 CLR 491*Ye v Crown Limited* [2004] FCAFC 8 *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
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| Number of paragraphs: | 192 |
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| Date of hearing: | 11 February 2021  |
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| Date of last submission/s: | 2 March 2021 |
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| Counsel for the Appellant: | Mr D Hooke SC and Mr S Lawrence |
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| Solicitor for the Appellant: | Blair Criminal Lawyers |
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| Counsel for the First Respondent: | Mr N Wood |
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| Solicitor for the First Respondent: | Sparke Helmore |

ORDERS

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|  | NSD 1072 of 2020 |
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| BETWEEN: | STANLEY TOHIAppellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| order made by: | **KATZMANN, DERRINGTON AND O’BRYAN JJ** |
| DATE OF ORDER: | 16 July 2021 |

THE COURT ORDERS THAT:

1. The appellant be given leave to advance the ground of appeal as stated in his amended notice of appeal filed on 6 October 2020.

2. The appeal be dismissed.

3. The appellant pay the first respondent’s costs of the appeal.

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

REASONS FOR JUDGMENT

KATZMANN J:

1 I have had the considerable benefit of reading in draft the reasons of both Derrington J and O’Bryan J. Like O’Bryan J, and for the reasons his Honour gives, I would grant the appellant leave to raise the new ground but dismiss the appeal.

2 I only wish to add some observations about the opinion expressed by Derrington J concerning the proper construction of s 501CA(4) of the *Migration Act 1958* (Cth) (**Act)**, a subject upon which his Honour acknowledged neither active party made any substantive submissions.

3 The opinion expressed by Derrington J is contrary to the weight of authority in this Court. The weight of authority is to the effect that s 501CA(4) does not involve a two-stage decision-making process of the kind posited by his Honour with the decision-maker first determining whether they are satisfied that there is a reason to revoke the cancellation decision and only if so satisfied considering whether or not to do so: see *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at [21] (Besanko, Barker and Bromwich JJ). An argument to the effect of his Honour’s construction was rejected by North ACJ in *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166; 153 ALD 338 at [26]–[38], a case in which the construction question was squarely raised, and the construction preferred by North ACJ was accepted as correct by at least two Full Courts in *Marzano v Minister for Immigration and Border Protection* (2017) 250 FCR 548 at [30]–[32] (Collier J, Logan and Murphy JJ agreeing at [59] and [60] respectively) and ***Viane*** *v Minister for Immigration and Border Protection* (2018) 263 FCR 531 at [73]–[74] (Colvin J, Reeves J agreeing at [3]). The effect of these authorities is that the use of the modal verb “may” in the chapeau to s 501CA(4) does not confer a discretion on the Minister to determine whether or not to revoke the original decision if the Minister is satisfied that there is another reason why the original decision should be revoked. Rather, it confers a power to do so which must be exercised if the conditions in s 501CA(4)(a) and (b) are satisfied.

4 The reasons given by Colvin J in *Viane* at [73]–[74] essentially reflect the position taken in the earlier cases. They are compelling:

[I]f the Minister is satisfied that there is a reason why the cancellation decision should be revoked then, given the way in which s 501CA(4)(b) is expressed, the Minister must revoke. As the failure to meet the character test will be the only reason why a person’s visa will be revoked under s 501(3A), it would be strange if the Minister was satisfied for the purposes of s 501CA(4)(b)(i) that the person passed the character test, yet there remained a discretion whether to revoke. Such a construction would mean that the power to revoke could be withheld even though the Minister was satisfied that the basis on which the visa had been cancelled was not actually satisfied. Equally, it would be strange if the Minister found that there was another reason for the purposes of s 501CA(4)(b)(ii) why the original decision should be revoked, but nevertheless retained a discretion to refrain from revoking the cancellation of the visa.

Therefore, the opening words to s 501CA(4) are in all likelihood an example of those cases where “may” means “must”: *Marzano* at [31]; *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134‑135, 138‑139 and *Leach v The Queen* (2007) 230 CLR 1 at [38]. If there remains a discretion once the Minister is satisfied as to one of the matters in s 501CA(4)(b) it would be a very narrow one that, in most circumstances, could not be reasonably exercised by refusing to revoke the original decision to cancel the visa.

5 In *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456 at [22] Bromberg and Mortimer JJ were apparently of a similar opinion. While describing s 501CA(4) as a “discretionary power to revoke the cancellation”, their Honours observed that “in practical terms, the real discretionary considerations subsist in the terms of s 501CA(4)(b)(ii) – whether ‘there is another reason why the original decision should be revoked’”.

6 All these judgments were published before Direction 79 was given and inform the way in which it is to be understood. It may therefore be taken that the reference to the “discretion” in Pt C para 13 of the Direction is to the evaluative process involved in the determination of the question whether, where the decision-maker is not satisfied that the person whose visa was cancelled passes the character test, there is another reason not to revoke the cancellation decision. That is the process in which the decision-maker considers the representations made by the person and weighs in the balance factors for and against revocation. Where the decision-maker is bound by s 499 of the Act to take into account the Direction, those factors will necessarily include the considerations listed in paras 13 and 14 of the Direction.

7 That said, I respectfully agree with Derrington J that it is unnecessary in this case to decide whether the prevailing opinion is or is not correct. That decision must be left to a case in which the issue is squarely raised and the proponent of the contrary opinion establishes to the satisfaction of another Full Court that the prevailing opinion is plainly wrong.

8 The orders of the Court will be as proposed by O’Bryan J.

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| I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Katzmann. |

Associate:

Dated: 16 July 2021

REASONS FOR JUDGMENT

DERRINGTON J:

# INTRODUCTION

9 I have had the advantage of reading the extensive draft reasons of O’Bryan J. I gratefully adopt his Honour’s recitation of the relevant facts of this matter. In the result I need only consider two essential issues. First, whether leave should be given to advance a new ground on appeal in the absence of any explanation as to why it was not agitated before the primary judge? Second, if leave is given to advance the new ground, whether it should succeed?

10 As appears from the following discussion, leave to raise the new ground on appeal should be refused. The appellant was represented by Counsel before the primary judge, and yet no explanation has been provided for the failure to raise it then. Although there may be no specific prejudice to the respondent and the new ground may well be arguable, to allow it to be raised in the absence of any reasonable explanation could only be justified if this Court now accepts that a first instance hearing is no more than a preliminary synthesisation of a non-exhaustive list of matters which might be considered on appeal.

11 Even if the leave sought were granted, the proposed new ground could not succeed. First, it proceeds on the implicit basis that a number of decisions of this Court as to what matters a decision-maker is required to take into account when ascertaining whether they reach the state of satisfaction required by s 501CA(4) are in error. Second, to the extent to which the best interests of the appellant’s child were to be taken into account, the issue was raised by the Administrative Appeals Tribunal (the Tribunal) and it appropriately considered all of the available evidence relevant to it. The appellant’s complaint is no more than that the Tribunal did not engage in speculation as to the qualitative differences between the modalities of life in Australia for the appellant’s child and those which notionally might be encountered in Tonga or New Zealand, despite there being an absence of evidence in relation to the latter. Third, to the extent to which the appellant relies on the Tribunal’s misunderstanding as to the visa entitlements of the appellant’s child under the *Migration Act 1958* (Cth) (the Act), no such ground or particular of a ground is raised in the proposed notice of appeal, any error could not have had any relevant impact on the decision, and, if it did, the impact was not shown to be material.

12 This case highlights the problematic manner in which the Department of Home Affairs (the Department) and the Tribunal regularly apply directions made under s 499 of the Act in relation to s 501CA(4). Relevantly to this appeal, Direction No. 79 is expressly referable to the exercise of the discretion in that section once enlivened. In its terms, it says nothing about the manner in which a decision-maker is to ascertain whether, for the purposes of s 501CA(4)(b)(ii), they are satisfied that there exists another reason as to why the cancellation decision should be revoked. In undertaking that latter function, the decision-maker is obliged to consider the matters raised by the non-citizen in their representations provided in response to the invitation issued under s 501CA(3)(b): see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19* [2020] FCAFC 166 [15] (*CTB19*) which is discussed below.

# LEAVE TO AMEND THE NOTICE OF APPEAL

13 The decision in *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 (*VUAX*) has been regarded for many years as identifying the principles applicable to determining whether leave ought to be granted to an appellant to raise a new ground on appeal. The overriding rubric of whether leave to do so is in the interests of justice is well established. It is also well accepted that within the deliberative process of deciding that question certain, almost ubiquitous, issues arise for consideration. They include the following:

(1) That in the ordinary operation of the court structure, the substantial issues between parties to litigation are decided at trial. Leave is not granted merely for the asking and hearings before courts at first instance are not to be regarded as provisional: *Coulton v Holcombe* (1986) 162 CLR 1 at 7 – 8.

(2) Has the applicant for leave provided any adequate or acceptable explanation for why the ground was not raised below? This is a significant matter: *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at 85 [166]. The fact that new counsel may have been engaged for the purposes of the appeal and has identified the new point is not, of itself, sufficient: *BLX16 v Minister for Immigration and Border Protection* [2019] FCAFC 176 [31]; *CSZ15 v Minister for Immigration and Border Protection* [2017] FCA 706 [11]; *DKT16 v Minister for Immigration and Border Protection* [2019] FCAFC 208 [31] (*DKT16*).

(3) The making of a deliberate forensic decision in the hearing below not to take a point strongly militates against the granting of leave to advance it on appeal: *DKT16* [31]; *Singh v Minister for Immigration and Border Protection* (2018) 261 FCR 556 at 574 [61]; *Ye v Crown Limited* [2004] FCAFC 8 [79]; *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 [38]. It may follow that, where the appellant demonstrates that the point was not taken below as a result of an oversight, the negative weight accorded to the omission will not be as great.

(4) Whether there exists any prejudice to the respondent in permitting the new ground to be agitated? Necessarily, where the new ground sought to be raised might have been met by evidence at trial, the need to accord the respondent procedural fairness will usually prevent leave being granted: *SZQYM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 779 [136]. Conversely, where the new point sought to be raised turns on a question of law or construction, or where the facts are not in controversy, leave is more likely to be given. Even then, if leave is granted, the consequence for the respondent is the removal of a right of appeal on the point with the remaining avenue for redress being the limited prospects of obtaining special leave to the High Court: *Leota v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1120 (*Leota*) [44]; *AAM15 v Minister for Immigration and Border Protection* (2015) 231 FCR 452 at 455 [14].

(5) The nature and extent of the prejudice which will be suffered by the appellant if leave is not granted will also usually be relevant. In migration appeals, this consideration can extend to persons associated with the appellant who might be affected as a result of an appeal being dismissed.

(6) The criterion of whether the proposed new ground has merit has been referred to as “an important consideration”: *Maharjan v Minister for Immigration and Border Protection* (2017) 258 FCR 1 at 10 [33]; *Leota* [43]. In *NWQR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 30, the Full Court observed (at [31]) that, in common with the approach adopted in determining whether an extension of time in which to appeal should be granted, the determination of whether any proposed new ground of appeal has merit is assessed at a relatively impressionistic level, and the Court should not descend into a fuller consideration of arguments for and against each proposed new ground.

14 Although the above represent criteria which often fall for consideration in the determination of an application for leave to raise a new ground, the broadness of the overriding question of whether it is in the interests of justice to grant leave should not be overlooked. In *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 11, Allsop CJ said (at [2]):

… I refer to and repeat what I said in *SZQYM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 779 at [136] about leave to argue new points on appeal. The ultimate question is the interests of justice, which extend to the potential vindication of a just outcome, to which is relevant the seriousness of the consequences of the decision: cf *Iyer v Minister for Immigration* [2000] FCA 1788 at [22]. Whilst not intending to identify any error in the way Bromwich J helpfully summarised some of the cases in *Han v Minister for Home Affairs* [2019] FCA 331 at [10] – [18] care is always necessary in a discretion of this kind not to over-conceptualise or over-categorise matters, which, in any particular case, may be seen to affect the interest of justice, into categories of consideration to be applied as rules or as a set of rules.

15 Whilst his Honour’s observations are entirely correct and judicial discretions of the nature under discussion ought not to be constrained by artificial limitations, that does not suggest the absence of a principled approach to the exercise of the Court’s power which is likely to ensure coherency in its exercise and result in like cases being treated in similar ways. It may be that some of the categorisation to which the Chief Justice was referring included the observations of the Full Court in *VUAX* where it identified (at 598 – 599 [48]) two circumstances which might be regarded as having a likely outcome. The first was that:

The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated.

The second was that:

Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.

16 *Prima facie*, the circumstances of the present case fit into the first of these categories. As the reasons of O’Bryan J and the discussion below reveal, the ground has some merit to it and Counsel for the Minister very properly conceded that the Minister would not suffer specific prejudice in the circumstances of this case from the Court allowing the new point to be raised. However, the description of this case as being one where the ground has merit and the respondent does not suffer prejudice does not express the totality of the relevant circumstances. Here, the appellant was represented by Counsel before the learned primary judge and no explanation has been provided as to why the point now sought to be argued was not taken. It might usually be inferred from the fact that the appellant was legally represented that the omission to raise the point was a result of a deliberate forensic decision. The appellant was almost certainly the only party who was able to positively establish whether this was so, however no affidavit from Counsel who appeared before the primary judge has been produced. In an ideal world, the Court would have little cause for hesitancy in concluding that an omission to take a point at first instance was the result of a deliberate forensic decision. Sadly, the Court must accept the reality that litigants may be represented by practitioners of insufficient ability in the areas in which they profess to practise. There is no need to consider here why that situation has come to pass. It does, however, mean that the Court may be more willing to accept that a point was not taken at first instance as a result of an oversight. In this case, the reasons of the primary judge reveal that the argument advanced to him was fundamentally misguided. This is borne out from his Honour evidently being of the opinion that it was necessary to set out a number of basic principles concerning judicial review and, no doubt, this was because the case before him had been argued as though it was a merits review of the Tribunal’s decision.

17 Despite the above, it must be kept steadily in mind that whether the failure to take the point below arose as the result of a forensic decision or an oversight was a matter which it was within the power of the appellant to prove. He was represented before this Court and, if he had any information which might have established that the omission to raise the point arose by oversight, it can be expected that he would have produced it. As it was, no evidence advancing that issue either way was sought to be tendered.

18 Here, the circumstances which affect the exercise of the power to permit a new ground to be raised on appeal are:

(a) the ground was not raised at first instance where the issues between the parties are to be determined;

(b) no explanation has been provided for the omission to raise the matter before the primary judge. There exists the possibility that this was not the result of a deliberate forensic decision but the consequence of oversight, although in the absence of any evidence on that topic no conclusion can be reached in that respect;

(c) the Minister is not likely to suffer any specific prejudice if the new ground is allowed, save that he will be denied one level of appeal if the point is decided against him;

(d) the appellant will suffer prejudice in the sense that the cancellation of his visa will stand and he will permanently lose his right to reside in Australia. Additionally, there is the potential for his son, JT, to lose one of the potential avenues of obtaining Australian citizenship, being to remain in Australia until he reaches the age of 10. There was, however, an absence of any substantive evidence adduced as to what would occur in the future, and the Court was left to speculate about the various possible scenarios; and

(e) at an impressionistic level, the proposed new ground of appeal has some merit to it, such that to refuse leave may result in the disposition of the appeal otherwise than in accordance with its merits.

19 The absence of any explanation for the failure to raise the ground at first instance is a not insignificant hurdle to the granting of leave. If leave were to be granted in cases such as this, the risk of first instance hearings becoming “preliminary skirmishes” is made very real. In every case where a new ground with some merit is identified after the first instance hearing, an appellant will be able to claim some prejudice if leave is not allowed to raise it on appeal on the basis that the matter may be dealt with otherwise than on the real issues. In many migration cases, that will raise the spectre of the loss of an entitlement to remain in Australia which is accepted by this Court as amounting to prejudice of a varying degree depending upon the circumstances of the case. If the unexplained omission to raise a reasonably arguable point at first instance is of immaterial weight, it is likely that the prejudice resulting from being unable to advance the new point on appeal will always outweigh it, with the result that leave will be rarely refused. That would invert the ordinary rule that issues in dispute are to be resolved at first instance.

20 It is appropriate in the context of the present discussion to recall the salutary advice of Branson, Marshall and Katz JJ in *H v Minister for Immigration and Multicultural Affairs* (2004) 63 ALD 43 at 45 [8]:

In our view, the readiness with which appeal courts have in the past been satisfied that it is expedient in the interests of justice to allow a fresh point to be argued and determined on appeal is unlikely to continue into the future. The volume and complexity of the cases presently required to be heard and determined by the intermediate appellate courts of Australia is such that it is increasingly important that such courts are able to devote their time to the genuine review of first instance decisions. It is becoming increasingly difficult, in our view, to establish that it is expedient in the interests of justice that the time of three or more judges should be spent giving original consideration to issues that ought to have been raised before the primary judge. The interests of justice in this sense extend beyond the interests of the parties to the appeal to encompass the interests of other litigants whose appeals require hearing and determination, and the broad public interest in efficient judicial administration.

21 Similar views were expressed by Logan J in *Gupta v Minister for Immigration and Border Protection* (2017) 255 FCR 486 at 501 [108] and these were recently cited with approval by Charlesworth J in *AAD16 v Minister for Immigration and Border Protection* [2018] FCA 1433 [17] – [23] and, in turn, by the Full Court in *DKN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 97 [17].

22 With the greatest respect to the views of others, the granting of leave to raise the new ground of appeal in this case could only be justified on a rule that leave ought to always be granted, save in circumstances where the respondent can establish substantial prejudice or that the proposed ground is wholly without merit. Such a rule inverts the principle that issues in dispute are to be determined at first instance as much as it does the onus which applies in applications of this nature. In this case, the appellant has not established that it is in the interests of justice for leave to be given to raise the proposed new ground on appeal and his application for the relief should be refused. The consequence is that the appeal should be dismissed.

# WOULD THE APPELLANT SUCCEED ON THE NEWLY RAISED GROUND?

## The confused nature of the appellant’s proposed new ground of appeal

23 The appellant’s claim that the Tribunal erred by failing to give proper consideration to the mandatory consideration of whether revocation of the cancellation decision would be in the best interests of his child was raised before this Court in a somewhat diffuse manner. In part, it was submitted that the obligation arose from Direction No. 79, although it was later conceded that the specific matters which it is said the Tribunal did not consider are not there identified as matters which the decision-maker was obliged to take into account. It was also said that the obligation arose consequent upon the appellant’s “legitimate expectation” that, in exercising the power, the decision-maker will give effect to Australia’s obligations under the *United Nations Convention on the Rights of the Child*. Opened for signature 20 November 1989. 1577 UNTS 3. (entered into force 2 September 1990) (the UN Convention). As these reasons demonstrate, neither the ministerial direction, nor the UN Convention are the source of any obligation imposed on a decision-maker when performing the function of ascertaining whether they are satisfied, for the purposes of s 501CA(4), that there was another reason why the cancellation decision should be revoked.

24 The nature of the operation of s 501CA(4) has been the subject of a number of recent authorities in this Court: *Ali v Minister for Home Affairs* (2020) 278 FCR 627 (*Ali*) at 641 – 648 [39] – [49]; *HZCP v Minister for Immigration and Border Protection* (2019) 273 FCR 121; *Singh v Minister for Home Affairs* (2020) 274 FCR 506; and there is no need to repeat any discussion of that here. Nevertheless, it is apt to keep in mind the duality of the decision-maker’s function under that section. First, the decision-maker must reach the state of satisfaction that there exists another reason why the cancellation decision should be revoked. It is only once that jurisdictional fact is satisfied that the discretionary power is enlivened and, when it is, Direction No. 79 (now superseded) obliges the decision-maker to take into account certain identified considerations when determining whether to revoke the earlier decision.

25 Here, the delegate concluded that they did not reach a state of satisfaction that there was another reason why the cancellation decision should be revoked, with the consequence that the discretionary revocation power was not enlivened. It was that conclusion which was the substance of the decision reviewed by the Tribunal. Although the delegate correctly identified the correct statutory function to be performed, in undertaking it, it purported to apply Direction No. 79. In its express terms, Direction No. 79 is more correctly addressed to the exercise of the discretionary power. However, as is discussed below, there is nothing in the Act which prohibits a decision-maker from considering the criteria in Direction No. 79 when ascertaining whether they are satisfied of the required matter. Indeed, in general terms, where sufficient evidence exists, one or more of the criteria in Direction No. 79 may well support the existence of “another reason” within s 501CA(4)(b)(ii). Nevertheless, the relevant point in that Direction No. 79 is not the direct source of mandatory considerations for the purpose of that subsection. The word “directly” is used advisedly as it is possible for a non-citizen to reference some of the criteria in Direction No. 79 in their representations to the Minister under s 501CA(3) and to thereby elevate them to considerations which the Minister is required to take into account.

26 The Tribunal’s decision was also somewhat confused. Although it identified (at paragraph [10] of its reasons) that one of the relevant issues was whether there was another reason why the decision to cancel the appellant’s visa should be revoked, it appeared to approach the matter on the basis of whether it ought to exercise the power to revoke. At paragraph [15], it misstated what was required of it:

Section 501CA(4)(b)(ii) of the Act requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision. If the Tribunal is satisfied that the cancellation decision should be revoked following that evaluative exercise, the Tribunal must decide to revoke the decision.

27 That approach is not consistent with the established authorities. What the subsection requires is that the Tribunal be satisfied that there is another reason to revoke. It is only if it is so satisfied that the power to revoke is enlivened. The Tribunal continued its incorrect application of the section through its reasons: see paragraphs [48], [74], [82] and [97] of its reasons. Like the delegate, it also identified Direction No. 79 as the source of the matters which it was obliged to take into consideration. Be that as it may, the possible misidentification of the Tribunal’s relevant function was not a point taken by the appellant on appeal and it may be doubtful that it would have made any difference to the outcome.

## Direction No. 79 and its applicability

28 Direction No. 79 was made pursuant to s 499 of the Act which now provides:

**499 Minister may give directions**

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

(a) the performance of those functions; or

(b) the exercise of those powers.

(1A) For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.

(2) Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.

(2A) A person or body must comply with a direction under subsection (1).

(3) The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given.

(4) Subsection (1) does not limit subsection 496(1A).

29 That section is in relevantly the same form as it was when Direction No. 79 was made on 20 December 2018.

30 Direction No. 79 states at para 6.1(4) that its purpose is, *inter alia*, to “guide decision-makers performing functions or exercising powers … to revoke a mandatory cancellation under s 501CA of the Act.” As provided by s 499(2A) of the Act, a decision-maker must comply with a direction made pursuant to s 499(1).

31 Section 2 is entitled “Exercising the Discretion” and, within that, para 7 provides:

**7. How to exercise the discretion**

(1) Informed by the principles in paragraph 6.3 above, a decision-maker:

a) …

b) must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non­citizen's visa will be revoked.

32 Part C of Direction No. 79 is concerned with instances where a visa has been cancelled under s 501(3A), as in this case, and the former visa holder requests that the cancellation be revoked. Paragraph 13 provides:

**13 Primary Considerations – revocation requests**

(1) … A non­citizen who has had his or her visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. **Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case.**

(2) In deciding whether to revoke the mandatory cancellation of a non-citizen’s visa, the following are primary considerations:

a) Protection of the Australian community from criminal or other serious conduct;

b) The best interests of minor children in Australia;

c) Expectations of the Australian community.

(Emphasis added).

33 Direction No. 79 provides additional specific guidance as to how a decision-maker is to address the primary considerations. In relation to the primary consideration of “Best interests of minor children in Australia affected by the decision”, para 13.2 relevantly provides:

**13.2 Best interests of minor children in Australia affected by the decision**

(1) Decision-makers must make a determination about whether revocation is in the best interests of the child.

(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to revoke or not revoke the mandatory cancellation decision is expected to be made.

(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(4) In considering the best interests of the child, the following factors must be considered where relevant:

a) The nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);

b) The extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;

c) The impact of the non-citizen’s prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child’s or non-citizen’s ability to maintain contact in other ways;

e) Whether there are other persons who already fulfil a parental role in relation to the child;

f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and

h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen’s conduct.

34 Direction No. 79 is explicit in identifying that it is only in the exercise of the enlivened discretionary power in s 501CA(4) to revoke the cancellation decision that the decision-maker must take into account the specified criteria and, consistently with that, para 13(1) recognises that the discretion is to be enlivened by an antecedent process.

35 As mentioned above, the delegate in this case recognised that it was not until the relevant state of satisfaction was reached that the revocation power would be enlivened. In fulfilling the function under s 501CA(4)(b)(ii), it was expressly concluded that the required state of satisfaction was not met and there was no need to consider use of the discretionary power. Somewhat inconsistently, however, the delegate applied Direction No. 79 in performing the function of forming that state of satisfaction. That is a regularly occurring feature of the manner in which decision-makers apply s 501CA(4). No submissions were made in relation to this point and, necessarily, it ought not to be determined. Nevertheless, there are good reasons for thinking that the wording of Direction No. 79 is coherent with the correct operation of the section. That would dictate that s 501CA(4)(b)(ii) only imposes a moderate hurdle before the discretion can be exercised, being that there exists “another reason” why the cancellation decision should be revoked. For example, that a non-citizen had three naturalised children in Australia who would lose contact with him if the cancellation of his visa is not revoked might, of itself, be sufficient to satisfy the decision-maker that there exists “another reason” to revoke. Once that requirement is satisfied, the discretionary power found in the chapeau of s 501CA(4) is enlivened and Direction No. 79 can be given full force and effect by requiring, in the exercise of that power, consideration of the enumerated matters. This construction provides consistency between the interpretation of s 501CA(4) and the subordinate legislation in the form of the direction (although a justifiable question may arise as to the extent to which the meaning attributed to the latter might influence the construction of the former).

36 As numerous authorities reveal, that is not how delegates and the Department customarily apply Direction No. 79 and s 501CA(4). The usual approach is to assume that the entire deliberative process is located within the process of ascertaining whether the jurisdictional fact in s 501CA(4)(b)(ii) is satisfied, such that the effective determination is whether, when all the reasons for or against revocation are taken together, there is another reason to revoke the cancellation decision. In the matters which come before the Court, the decision-maker has invariably determined that the jurisdictional fact has not been met and the power is not enlivened. However, that customary application of s 510CA(4) by the Executive branch of government is irrelevant to the correct construction of the Act. The principle of “deference” which exists in the United States: *Chevron USA Inc v National Resources Defence Council Inc* 467 US 837 (1984); has no application in Australia: *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135. Nevertheless, there are a number of authorities of this Court where it might be taken as implicitly accepting that the mandatory considerations identified in the ministerial directions relating to the exercise of power in s 501CA(4) are directed to the formation of the decision-maker’s state of satisfaction as opposed to the exercise of the enlivened power.

37 It is also a regular feature of matters involving s 501CA that, once the cancellation decision has been made, the Minister, as she or he is required to do, contacts the erstwhile visa holder in writing and invites them to make representations. It appears to be the Department’s practice to send also a copy of the then current ministerial direction with the invitation. That often has the consequence that the subsequent representations are framed in accordance with the matters specified in the ministerial direction but without any indication as to whether they are referable to the formation of the relevant state of mind or to the subsequent exercise of discretion. In such circumstances, it may well be incumbent upon the Minister or a delegate when performing the function under s 501CA(4)(b)(ii) to take into account those representations even though they may be more correctly applicable to the exercise of the discretion if it is enlivened. This is not because of the operation of Direction No. 79 or the then current ministerial direction, but because the non-citizen has adopted one or more of the criteria in the relevant ministerial direction as the foundation of their representations.

38 No party made any substantive submissions as to this point, although the careful submissions of Mr Wood for the Minister might be taken to have acknowledged the existence of some confusion in the application of the section. In those circumstances, it is not necessary to reach any final conclusion as to this point and it is appropriate to address the issues in the manner in which they were advanced to the Court as best as that can be achieved.

## The appellant’s case as advanced on appeal

### The appellant’s submission as to the source of the obligation

39 At the very least, it can be assumed that the substance of the appellant’s submissions were directed to the Tribunal’s formation of the state of mind that there was not another reason why the cancellation decision should be revoked. In broad terms, he submitted that the Tribunal failed to take into account the impact on JT’s modality of living were he required to relocate to another country and, conversely, the benefits to him were he to remain in Australia. The difficulty here is that the appellant failed to identify with any clarity the source of the Tribunal’s obligation to take this or any other particular matter into consideration. In part, he relied upon the existence of Direction No. 79 as indicating the several considerations and the occasions on which the Tribunal was required to take them into account. In particular, reference was made to para 13.2. In his written submissions, it was said, “In deciding the review, the Tribunal was required to comply with Part C of Ministerial Direction No 79 (the Direction) issued pursuant to s 499 of the Act”.

40 However, the appellant’s written and oral submissions thereafter diverged from the direction and largely ignored the operation of para 13.2. In his oral submissions, Mr Hooke SC made mention of para 13.2(4) but submitted that other factors were also mandatory considerations. He said:

… subclause 4 [of para 13.2] provides that what we would submit is a nonexclusive list of mandatory factors to be taken into account. The sum of those are engaged in this case, others not. It’s fair to say that the issues that we say necessarily arose for the tribunal’s consideration on the basis of its findings in this case and, indeed, on the basis of the Minister’s submissions to the tribunal in this case, engaged factors that don’t appear in the list of specific considerations in subparagraph 4.

41 A similar proposition can be derived from the amended notice of appeal which identifies as one of the particulars that “[t]he Tribunal was obliged to consider any reason to revoke that sufficiently arose on the material and/or was expressly put”. Another particular of the new ground of appeal was that the Tribunal had failed to properly consider, in the requisite legal sense, several matters which amounted to a failure to “engage in an active intellectual process with significant and clearly expressed representations”, although it was never made clear which party had made the representations, how or when.

42 The appellant’s assertion that a mandatory consideration arose from a representation or as a result of the submissions made to the Tribunal seems to reference the view expressed in a number of authorities that the structure of s 501CA requires that representations made by a person pursuant to an invitation issued under s 501CA(3) must be considered by a delegate (or the Tribunal on review) in performing the function of forming a state of satisfaction as to the existence of another reason to revoke the cancellation decision: *CTB19* [15] and *GBV18 v Minister for Home Affairs* (2020) 274 FCR 202 at 217 – 221 [30] – [32] (*GBV18*). Those decisions proceed upon the basis that the subject matter, scope and purpose of s 501CA and of the Act have the consequence that the substantive matters raised by a non-citizen in the representations are considerations which, if not considered by the decision-maker in performing the statutory function, will vitiate any state of mind relevantly formed: *GBV18* [31(c)]; *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 (*Viane*) at 546 [66] – [68].

43 Additionally, the reference in Mr Hooke SC’s oral submissions to issues which “necessarily arose” has echoes of errors committed by decision-makers in exercising the function in s 65 of the Act to ascertain whether they are satisfied that a visa applicant has met the criteria for a visa and, in particular, a protection visa by failing to have regard to claims which “clearly arise” on the material before the Tribunal: see *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 (*NABE*)which is discussed in detail below.

44 Further, in the course of the appeal, the Court was taken to a line of cases which followed the decision in *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 (*Vaitaiki*) which, in respect of the powers there under consideration, identified an obligation on the decision-maker to give full effect to the UN Convention when exercising the power. The origin of that principle can be traced to the application of the doctrine of “legitimate expectation” as espoused in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (*Teoh*).

45 In summary, the appellant’s position seemed to be that the matters in para 13.2(4) of Direction No. 79 were mandatory to the decision-maker’s determination of whether the relevant state of satisfaction was reached, but not exclusively so, and that other mandatory matters may arise from the representations made to the decision-maker or might clearly arise from the material or from findings which are made. It might also be that some form of legitimate expectation derived from the UN Convention imported some mandatory considerations. Alternatively, the appellant’s argument might be taken as being that Direction No. 79 raises the best interests of the child as a mandatory consideration but that the range of factors which a decision-maker is required to take into account in consideration of that are not limited to the matters stipulated in para 13.2(4) and may extend to matters which are raised in the representations, which clearly arise in the course of the hearing, or which a non-citizen has a legitimate expectation that the decision-maker will take into account.

### The Minister’s submissions as to the relevant source of mandatory considerations

46 The submissions of Mr Wood on behalf of the Minister were to the effect that Direction No. 79 was not applicable to the question of whether the required state of satisfaction under s 501CA(4)(b)(ii) was reached, and that the necessary considerations were to be drawn from the representations made to the decision-maker. That is probably correct although its inconsistency with the manner in which the Tribunal approached its task in this case is somewhat glaring. However, it does not necessarily follow from that observation that the Tribunal’s reasons are in error and no ground of appeal was based upon it.

## Considerations arising from the s 501CA(3) representations

47 The Minister’s submissions on this point should be accepted. In reaching that conclusion, there is no need to consider in detail the authorities and principles relating to the identification of relevant considerations for the purpose of a decision-maker performing the function in s 501CA(4)(b). They were recently summarised by the Full Court (McKerracher, Kerr and Wigney JJ) in *CTB19* as follows (at [15]):

(1) The task of a decision-maker under s 501CA(4) is to determine whether there is “another reason” to revoke a cancellation decision;

(2) In discharging the duty under s 501CA(4), a decision-maker is required to have regard to a former visa holder’s representations made in response to an invitation under s 501CA(3) as a whole. That is to say, viewed as a whole, the representations comprise a mandatory relevant consideration, but not every statement in the representations can be so described;

(3) Where a former visa holder makes a representation as to the harm that he or she may face if returned to their country of origin, the decision-maker needs to give consideration to it;

(4) There is a distinction between considering harm, or the risk of harm and hardship, on the one hand, and, on the other, considering whether or not the former visa holder is a person to whom non-refoulement obligations are owed: See *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636 per Robertson J (at [185]);

(5) The significance of any particular matter raised in the representations is to be assessed by reference to the manner in which it is expressed;

(6) The duty to consider representations made in support of revocation of a cancellation decision requires the decision-maker to engage in an active intellectual process with reference to those representations;

(7) The representations need to be “significant and clearly expressed” (*GBV18* at [32(d)]) or “clearly articulated and substantial or significant”: *Omar* (at [39]); *GBV18* (at [32(e)]–[32(f)]) and *EVK18* (at [14]). Put another way in *AXT19* (at [56]) and applied by Bromberg and Mortimer JJ in *DQM18* (at [27]):

[t]he greater the degree of clarity in which a claim has been made and advanced for consideration, the greater may be the need for the [decision-maker] to consider the claim in clear terms. Conversely, the more obscure and less certain a claim is said to have been made, the less may be the need for the [decision-maker] to consider the claim.

(See also *DQM18* per Snaden J (at [158]-[160])).

As Snaden J observed in *Guclukol v Minister for Home Affairs* [2020] FCA 61 (at [28]):

[t]he difficulty that often, if not always, arises in cases such as the present … is that determination of the consequences or circumstances that an applicant will face if removed from Australia … typically requires speculation. Often, it requires speculation upon imperfect or incomplete evidence, or to a degree that doesn’t easily permit of definitive findings. …

(8) Whether consideration has been given to a former visa holder’s representations must be judged in the context of the material placed before the decision-maker by, or on behalf of, the former visa holder: *DQM18* per Bromberg and Mortimer JJ (at [36]);

(9) “Depending on the nature and content of the representations”, the decision-maker may be required to make specific findings of fact, including on whether the feared harm is likely to eventuate: *Omar* (at [39]). However, the duty to consider a representation does not necessarily require the making of a finding of fact: see *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 per Besanko, Barker and Bromwich JJ (at [46]) and *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643 (at [41]) per Rares and Robertson JJ;

(10) A finding that a decision-maker has not engaged in a meaningful or active intellectual process will not lightly be made by a court: *GBV18* (at [32(g)], referring to *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 per Griffiths, White and Bromwich JJ (at [48])); and

(11) Ultimately, each case turns on its own particular facts and circumstances.

48 For present purposes, it is useful also to refer to the decision in *GBV18* (Flick, Griffiths and Moshinsky JJ) and the principles articulated by the Court at [31]. The Court referenced and relied upon the lucid discussion of the relevant principles by Colvin J in *Viane*, stating (at [31(c)]):

The representations play a central role in the relevant statutory regime, whether the decision-maker be the Minister, a delegate or the AAT. The statutory power to revoke (and therefore “undo”) the mandatory cancellation of a person’s visa is only enlivened if revocation has been requested and representations are made in support of that request. The making of the representations is a condition on the exercise of the statutory power. **Those representations play an important role in the decision-maker’s determination of whether he or she is satisfied that there is “another reason” why the cancellation should be revoked.** As Colvin J said in *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 (*Viane*) at [66], the Minister has a statutory duty to consider whether or not he or she has the requisite state of satisfaction to revoke the cancellation by reference to the material presented in the representations. The same applies to a case where the AAT is conducting a review of a Ministerial delegate’s decision under s 501CA(4).

(Emphasis added).

49 It is relevant that these principles did not include any reference to ministerial directions made under s 499 of the Act. Whilst there is little doubt that a ministerial direction could be made relating to the manner in which a decision-maker may reach the required state of satisfaction, Direction No. 79 and its various iterations are directed to the exercise of the discretion and not to the antecedent formation of the required state of mind. The statement of principles by the Full Court also stand in stark contrast to the cases referred to below which have followed the decision in *Vaitaiki* where, in reliance on discarded notions of “legitimate expectation”, it was held that the decision-maker was obliged to take into account the general notion of the best interests of the child when exercising statutory power.

50 Given the foregoing, I agree with the submissions advanced by Mr Wood that the correct construction of s 501CA(4)(b)(ii) requires that, in ascertaining whether the required state of satisfaction has been reached, the decision maker take into account those matters which are raised by the non-citizen’s representations. A qualification is that matters raised by the representations which do not relate to the issues being ascertained by the decision-maker do not have to be considered. It should also be accepted that Direction No. 79 is directed to the use to which its express terms limit it, being to the exercise of the discretionary power under, *inter alia*, s 501CA(4) once that stage is reached. That is not to say that the matters articulated within Direction No. 79 may not become relevant considerations to the question of the state of satisfaction when they are adopted by a non-citizen as topics of their representations to the Minister. Further, the Minister, his delegate or the Tribunal on review *may* reference the matters in Direction No. 79 when considering whether there is another reason why the cancellation decision should be revoked. There is nothing in the nature, scope and purpose of the Act which suggests that the decision-maker is prohibited from considering them as potential grounds which establish the requisite state of mind. That, however, does not render them matters which, if not considered, will vitiate any relevant state of mind.

51 With great respect to those who hold a contrary view, the suggestion that s 501CA(4) should be read as if the obligation to form a relevant state of satisfaction and the discretionary power should be assimilated into the one exercise of power should be rejected:

(1) It is contrary to decisions of the Full Court of this Court where the point was specifically considered and decided: *Ali* at 641 – 648 [39] – [49]; *Guclukol v Minister for Home Affairs* (2020) 279 FCR 611 at 616 – 617 [16].

(2) It is contrary to the natural reading of the section which not only identifies the two stage process but structurally isolates them by locating them in separate parts of the section.

(3) Direction No. 79 as well as its progenitor iteration (Direction No. 65) are explicit in identifying the separate stages of satisfaction of a jurisdictional fact followed by the exercise of discretionary power, and that the latter is conditioned on the former. This Court should be cautious about adopting an approach which directly contradicts the clear and repeated expressions of legislative intent.

(4) The recognition of the different elements of s 501CA is consistent with the High Court’s construction of the similarly structured s 65 of the Act: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165.

(5) The conflation of the discrete parts of s 501CA(4) fails to have regard to the differences in which a vitiating error may occur in the process of forming a state of satisfaction as opposed to the exercise of discretion.

## Was there any relevant error in this case?

52 In oral submissions, Mr Wood for the Minister accepted that, for the purposes of ascertaining whether there was another reason why the cancellation decision should be revoked, the Tribunal addressed the broad issue of whether revocation was in JT’s best interests. However, he also submitted that the particular aspects of that general issue were relevantly confined to where JT would live and with whom. There is much force in that submission. It is pellucid that the Tribunal addressed itself to whether revocation was in JT’s best interests and, after considering at some length a range of particular features which arose on the evidence, it determined that issue in the appellant’s favour.

### The appellant’s submissions

53 When the appellant’s oral and written submissions are analysed, the gravamen of the appeal specifically concerned the following complaints:

(a) that the Tribunal only gave consideration to the prospect of the child’s separation from the appellant and to the diminishing effect of this consideration due to the appellant’s imprisonment and detention;

(b) that the Tribunal failed to turn its mind to a range of matters concerning the impact on JT of his departure from Australia, his separation from his extended family in Australia, and his reduced life opportunities were he to live in Tonga which was underdeveloped;

(c) that the Tribunal failed to consider the benefits to JT if the cancellation decision were revoked including the benefits of residing with his wider family and retaining his entitlement to citizenship;

(d) that the Tribunal failed to engage with what it would mean for JT to be removed from Australia where he was born and to be relocated to New Zealand or Tonga including that he would be separated from the remainder of his family who resided here;

(e) that the Tribunal failed to consider the benefits of allowing Ms Sau to regularise her immigration status so that they may all reside in Australia as a family or give JT the opportunity to live here with his mother; and

(f) that the Tribunal failed to consider that revocation would allow the appellant to find employment here so as to enable him to care for his son.

54 Given the central importance of the appellant’s representations to the Minister pursuant to s 501CA(3)(b) to the question of whether the Tribunal failed to take into account a relevant consideration, it is significant that Mr Hooke SC did not identify where any of the matters allegedly not considered had been raised by the appellant or on his behalf. That is not surprising as his representations to the Minister were extremely sparse and generally focused on his claimed rehabilitation. Apart from noting the existence of JT and that he was living with the appellant’s mother at the time, JT’s particular circumstances were not identified at all. Further information, albeit not a great amount, was provided to the delegate in a letter of support from Ms Sau as appears from the reasons given for the original decision. However, none of the matters raised on appeal as being considerations relevant to the Tribunal’s determination were mentioned in the representations made to the Minister. They could not, therefore, be characterised as considerations which the Tribunal was required to consider by an application of the principles identified in *CTB19*.

55 As emerged from the appellant’s oral submissions, the foundation for the assertion that certain matters were not considered or not adequately considered was a line of authorities dealing with provisions which are or were substantially different to s 501CA(4). Specific reliance was placed on *Vaitaiki*, a decision of the Full Court of this Court. In that case, a deportation order had been made in respect of the appellant under the former s 55 of the Act consequent upon his commission of a number of serious offences. Following *Teoh*, the Court held that in the exercise of the discretionary power to deport the appellant, the Tribunal was required to take into account the best interests of the appellant’s children as a primary consideration. The obligation arose, so it was said, because if the decision-maker intended to act inconsistently with the appellant’s legitimate expectation that it would give primary consideration to the interests of children affected by the decision, it would inform the appellant and it had not. The legitimate expectation was said to arise consequentially upon Australia’s ratification of the UN Convention. The particular circumstances in *Vaitaiki* raised the question of the content of the obligation to have regard to the best interests of the child as required by the UN Convention. The Tribunal had observed in general terms that the best interests of the children would be served if they went to live with their father in Tonga so as not to be deprived of his guidance and society. Burchett J held that the Tribunal’s consideration was inadequate because it did not take into account that the children as Australian citizens would be deprived of the country of their own and their mother’s citizenship under Australian law “and of its protection and support, socially and culturally and medically, and in the many other ways evoked by, but not confined to, the broad concept of lifestyle”: at 614. His Honour also held that the Tribunal’s consideration ignored the fact that the children would be transported to a foreign environment and be isolated from their mother and other relations. Branson J also criticised the Tribunal for concluding that it would be in the best interests of the children to maintain a close relationship with their father and that would be served by them leaving Australia and living with him in Tonga: at 631. Her Honour held that such a conclusion could not be reached without taking into account that, by so accompanying him, they would be required to leave Australia and the community in which they had lived all of their respective lives, start a new life and schooling in a new land, and lose many of the benefits available to them in Australia.

56 Mr Hooke SC also referred to the decision in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133 (*Wan*), also a decision of the Full Court of this Court. The power under consideration in that case was s 501(2) (in its then form) which permitted the Minister to refuse to grant a visa on character grounds. The visa applicant was married to an Australian citizen and had two children who also held citizenship. Without treating the interests of the children as a primary consideration, the Minister refused the application in reliance on s 501(2). Again, the Court’s decision was founded upon a perceived obligation, arising from the applicant’s legitimate expectation, to take into account the best interests of the children as that term is understood in the UN Convention. After referring to the decisions in *Vaitaiki* and *Teoh*, the Court concluded that the Tribunal had asked itself the wrong question in relation to the interests of the children. It was held (at 140 [27]):

… Moreover, immediately after identifying the best interests of the children as a consideration relevant to its determination, the Tribunal turned to consider how the interests of the children would be affected by their accompanying their father to China, or alternatively by their remaining in Australia while he lived in China. This suggests that the Tribunal was concerned to identify, not what decision would be in the best interests of the children, but rather how the children’s interests would be affected by a decision to refuse to grant their father a visa.

57 It was submitted that this passage has some resonance with the current case, save that the Tribunal here did not consider how JT being removed to Tonga would coincide with his best interests. In this respect, it was submitted that the Tribunal in *Wan* had gone further than it had in the present case. With respect, that conclusion cannot be accepted. The Tribunal’s reasons in this case identified both the benefits of JT living in Australia if the cancellation decision were revoked and the detriment to him if it were not. In addition, in answer to the criticism that the Tribunal did not consider how JT’s removal to Tonga would coincide with his best interests, it must be recalled that in this matter the Tribunal concluded that it would be in JT’s best interests if the cancellation decision was revoked so that he would not be required to live in another country.

58 Later in her reasons in *Wan* (at 141 [30]), Branson J concluded that the Tribunal’s written reasons contained no findings about the fact that the children in question would be deprived of their citizenship, of their country, and of the mother’s citizenship, that there would be resultant disruption to their childhood and loss of their homeland, the loss of their educational opportunities and the isolation from their mother, these being the integers of the best interests of the children derived from *Teoh* and *Vaitaiki*. This was said to speak of a failure to properly engage with the requirement of the best interests of the child or to treat that factor as a primary consideration.

59 A similar approach was adopted by Jagot J in *Nweke v Minister for Immigration and Citizenship* (2012) 126 ALD 501 which was briefly referred to by Mr Hooke SC. There, her Honour held that the Minister had failed to take into account as a primary consideration the best interests of the children affected by the potential cancellation of the applicant’s visa. In doing so, her Honour placed reliance for the existence of the obligation to do so and the content of that obligation on the decisions in *Vaitaiki* and *Wan*. In *Lesianawai v Minister for Immigration and Citizenship* (2012) 131 ALD 27, Katzmann J adopted a similar approach in respect of the Minister’s power under s 501A(2) of the Act which permitted the Minister to reverse a Tribunal’s decision in the national interest. The power there exercised is substantially different to the power under consideration in this case.

60 It is important to keep in mind that the obligation identified in *Teoh* that a decision-maker was required to take into account the UN Convention’s concept of the best interests of the child was derivative upon the High Court’s flirtation with the now abandoned or moribund concept of “legitimate expectation” as a direct source of administrative rights: *Re* *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; *DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1184 (*DXQ16*) [27]. With respect to the submissions made on behalf of the appellant, the authorities which rely upon an obligation recognised in *Teoh* do not assist in the analysis of the present case. Here, the decision-maker’s obligation and its content are controlled and regulated by ss 501CA(3) and (4). As the decision in *CTB19* makes clear, the identification of the factors to which the decision-maker under s 501CA(4) must have regard are those found in the non-citizen’s representations and which are “significant and clearly expressed” or “clearly articulated and substantial or significant”. There is nothing in the section which imports any obligation to consider the best interests of any children of a non-citizen as that concept is used in the UN Convention and, accordingly, the decision in *Teoh* is not relevant to this question. As an aside, I note that Steward J reached a slightly different conclusion as to the continued relevance of *Teoh* in his decision in *DXQ16*. However, no inconsistency arises as his Honour correctly limited the *Teoh* consideration to procedural fairness issues and, more relevantly, the present case concerns a different statutory provision to that addressed by his Honour.

61 It is also necessary to observe that the task imposed upon the Minister or other decision-maker in s 501CA(4)(b)(ii) is not the exercise of power. It is the mere performance of a statutory function, the result of which may operate as a jurisdictional fact, albeit a subjective one, on which the discretionary power conferred in the chapeau is conditioned. The decisions relied upon by the appellant related to actual exercises of power and, as such, they are not relevant to the contentious issue in this case.

62 It follows that the foundation of the appellant’s claim, that the several integers of what might be in the best interests of the child as identified in *Vaitaiki* were mandatory considerations for the Tribunal, cannot be supported by the authorities on which he relied.

### Are matters which “clearly arise” on the material also mandatory considerations

63 As mentioned, Mr Hooke SC’s submitted that the matters which the Tribunal was obliged to consider extended to matters which “necessarily arose” on the Tribunal’s findings and on the basis of the Minister’s submissions. No authority was referred to in support of that statement although it appears to be a notion derived from cases such as *SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 364 (at 368 – 369 [16] – [18]) which, in dealing with claims which might support a protection visa, obliges the decision-maker to deal with all “claims” which arise for determination. That does not only include those claims which are expressly raised but also those which clearly arise from the material: *NABE* at 18 – 19 [58] – [59]. Unfortunately, the concept of what is meant by a claim which clearly arises has not been sufficiently identified. In this regard, I had cause to make the following observations in *EXV17 v Minister For Home Affairs* [2018] FCA 1780:

[36] However, where the claim is unarticulated, the obligation of the decision maker is more obscure. As the authorities say, the implicit case must be one which “arises clearly” or “squarely” from the material. However, there is very little guidance as to how the claim is to be detected. Whilst it is said that it does not depend “for its exposure on constructive or creative activity” by the decision maker, nothing is identified as to the lengths to which the decision maker must go to detect the existence of a claim. It is apparent that in this exercise the authorities require the decision maker to “connect the dots” of a potential claim to some extent but they do not explain how many dots need to exist before the task needs to be attempted.

[37] It must be kept in mind, as Gleeson CJ observed in *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs* (2003) 216 CLR 473 [1], the claim advanced must be one which was made before the decision maker:

… Proceedings before the tribunal are not adversarial; and the issues are not defined by pleadings, or any analogous process. Even so, this court has insisted that, on judicial review, a decision of the tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant’s lawyers, at some later stage in the process.

64 Even accepting that a claim might clearly arise from the material before a decision-maker, the statutory deliberative context in which the obligation arises to consider a claim for a protection visa on an application under s 65 of the Act is substantially different to the statutory function imposed by s 501CA(4)(b)(ii). In the former, the decision-maker’s obligation is, *inter alia*, to consider whether they are satisfied the applicant has a well-founded fear of persecution and whether that arises by reason of the membership of a relevant social group. In that context, it may well be that the evidence before the Tribunal “clearly raises” a claim for protection which the applicant has not specifically advanced. For instance, the claim may be considered on the basis of membership of a recognisable social group which the applicant had failed to identify: *NABE* at 17 – 18 [55].

65 The present matter concerns whether the decision-maker has reached a state of satisfaction that there is another reason why the cancellation decision should be revoked within the meaning of s 501CA(4)(b)(ii) and the matters which are to be taken into account in that process have been authoritatively identified by reference to the nature, scope and purpose of the statutory function as being those which appear in the non-citizen’s representations to the Minister. The affording to the non-citizen a specific entitlement to make representations establishes the obligation on the decision-maker to consider each of the reasons which the non-citizen raises. It is not self-evident that the non-citizen is then to be afforded additional opportunities to identify grounds as to why the revocation should occur and no submissions were directed to this question. On the other hand, it may be inherent in the Tribunal’s review processes and, without accepting that to be so, it might be so assumed for the purposes of the appeal.

66 Nevertheless, although there may exist factors which the decision-maker is obliged to consider when ascertaining whether they are satisfied that there exists another reason to revoke the earlier decision, there will necessarily be other matters which the decision-maker *may* consider. In this respect, the question of concern on this appeal is directed to whether an omission by the decision-maker to consider a particular matter vitiates the performance of the statutory function. In its ordinary meaning, the concept of “another reason” (as that term is used in s 501CA(4)(b)(ii)) suggests a combination of facts, including hypothetical assumptions, which taken together can be accorded sufficient presumptive weight to justify revocation of the cancellation decision. In the context of s 501CA(4), the decision-maker is obliged to take into account the grounds, reasons or contentions advanced by the non-citizen which might establish the required justification. However, there is no basis for assuming that every piece of evidence concerning the non-citizen or their family which is given to or arises before the Tribunal must be used as a possible foundation for a reason which justifies revocation. For example, the substance of one of the appellant’s submissions in this appeal is that the evidence before the Tribunal that JT attended some educational facility in Australia raised, as a representation or ground for satisfaction of s 501CA(4)(b)(ii), that he would be deprived of it or be worse off if revocation did not occur. That involves an incorrect approach. The relevant question is whether there is, “another reason why the [cancellation] decision should be revoked”. A non-citizen does not raise a “reason” by merely identifying the current living arrangements in Australia of themselves or their dependants from which the decision-maker is to prognosticate about the potential scenarios if revocation does not occur. More is required and, in particular, at least some evidence as to the consequences or likely consequences of non-revocation on those arrangements.

67 In the circumstances of this matter, there is no need to reach any final conclusion as to whether the obligation of the Tribunal to consider possible reasons as to why the cancellation should be revoked can arise from the material before it or its findings. On the assumption that it could, it is apt to recall the observations in *CTB19* that representations which are raised by a non-citizen must be “significant and clearly expressed” or “clearly articulated and substantial or significant”, and there is no reason to think that requirement would be any less in relation to an alleged ground which is said to arise on the material before the Tribunal. Here, the fact that some evidence emerged in the course of the hearing before the Tribunal as to the circumstances of JT’s life did not raise a matter which the Tribunal was required to consider in determining whether there was “another reason” for the purposes of s 501CA(4).

## The effect on JT if revocation did not occur

68 Mr Wood for the Minister acknowledged that, before the Tribunal, the broad question of whether revocation was in the best interests of JT was considered, it having been raised by the Tribunal itself. So much is clear from its reasons and focus on Direction No. 79 as the source of its obligation to consider relevant matters. However, as Mr Wood submitted, there was a paucity of evidence on which the Tribunal could have made any findings as to how JT would be affected by the revocation or non-revocation of the cancellation decision. It was submitted that, to the extent there was evidence before the Tribunal as to how JT may be affected, the Tribunal made the relevant determinations and took such matters into account in reaching its conclusion that it was in JT’s best interests that the cancellation decision be revoked.

69 As is clear from its reasons, the Tribunal considered the issue of whether revocation was in JT’s best interests under the rubric of the matters articulated in Direction No. 79. It considered the nature of the relationship between JT and the appellant and analysed the evidence in relation to that issue despite its conclusion that the appellant was not “upfront” about all of those circumstances. It considered the nature and extent of the appellant’s involvement in JT’s life and the fact that they continued to have contact even whilst the appellant was in jail. It also considered whether the appellant was likely to play a positive role in JT’s life in future and specifically noted the appellant’s stated intention to care and provide for JT. To an extent this consideration was also included within the broader issue of the relative probabilities of where the family unit would reside. The adverse impact of separation on JT was also considered by the Tribunal which identified the appellant’s assertion that he had a very close relationship with JT and that if his visa were revoked it would be difficult for JT who would grow up without a father and have no family stability in his life. Although the Tribunal did not accept the appellant’s assertion of a close relationship with JT, this issue was rendered less relevant because of the appellant’s assertion that he intended to live with Ms Sau and JT even if the cancellation was not revoked. This led it to conclude that the family unit would necessarily reside in another country, being either New Zealand or Tonga. It also considered the existence of persons who filled a parental role in relation to JT and specifically referred to the care and support which JT received from the appellant’s extended family who were in Australia and it appears that this element further caused the interests of JT to weigh further in favour of revocation of the cancellation decision: see paragraph [61] of the Tribunal’s reasons. Given the Tribunal’s conclusion that JT would reside with the appellant in another country if there was no revocation, its conclusion that it was in JT’s best interests if the revocation did occur necessarily meant that it accorded presumptive weight to preserving JT’s modality of life in Australia.

70 In this context, the substance of the appellant’s submission was that, when considering the best interests of the child, the Tribunal did not take into account what relocation to another country would mean for his modality of living. In the course of submissions, Mr Hooke SC said:

But the tribunal didn’t get to the counterfactual, because it didn’t turn to consider what the realities of its finding of third country relocation would mean for the child. So it cut its own inquiry initiated by its own finding of fact on a questionable factual basis as to foreign law and not following that through to consider what that meant for the best interests – in the context of the best interests of the child.

71 Earlier in the submissions, it was said that the issue of the impact of relocation in some other country was raised on the evidence:

Well, what we say is that there was evidence, for example, that the child was at school in Australia, that all of the extended family are in either Australia or the United States. He was born in Australia and has lived here all of his short life. His language is English. His social connections, albeit that they’re early in their development, are in this country, and those are matters that all involve the best interests of the child, and which would be uprooted and overturned if there were a resettlement anywhere, but particularly to Tonga. We also say that the issue of resettlement in Tonga, being the basis upon which the tribunal has approached the issue of family cohesiveness, if you like, that being, on the tribunal’s findings, the only place where all three, according to the Minister’s counsel before the tribunal, had a right to live, necessarily involved a consideration of what those factors meant for the young child in terms of his interests. For example, he would not have the educational or economic opportunities that he enjoys in Australia.

72 The difficulty with the above issues relating to the sequelae which JT might endure if the cancellation decision was not revoked is that they were not matters raised in the representations and, assuming they were relevant, they were not clearly raised on the material before the Tribunal or on its findings. It is a feature of the appellant’s case that the Court was not taken to any representation, evidence, or finding which might be said to raise a ground or contention that underpinned some “other reason” for revoking the cancellation decision.

73 In the course of the appeal, the Court granted leave to the appellant to file an affidavit exhibiting the transcript of the hearing before the Tribunal. Mr Wood for the Minister took the Court to several parts of it which demonstrated that the Tribunal went to some lengths to ascertain from the appellant the likelihood of the several possible alternative scenarios as to the family’s future living arrangements. This issue was complicated by reason of Ms Sau not having any current visa to remain in Australia which carried the potential for her to be deported to Tonga at any time. Unfortunately, the appellant had not given these circumstances a great deal of thought and was unable to assist with any definitive answers. Nevertheless, the Tribunal accepted that he had a caring relationship with JT and that he intended to keep the family together. The difficulty with that was, unfortunately, the absence of any evidence of Ms Sau’s entitlement to live in New Zealand rather than Tonga and there was no evidence as to how the appellant intended to reconcile his intention to keep the family together on the one hand and, on the other, not to live in Tonga. Before the Tribunal, the appellant indicated that he had not made up his mind as to where JT might reside if his visa remained cancelled. Ultimately, the best that the Tribunal was able to do was to determine that if the cancellation decision was not revoked the family would live in another country, being Tonga or New Zealand.

74 Whilst the issue of where the family might potentially reside together had been raised by the Tribunal and sparse evidence in relation to that was extracted from the appellant, there was no evidence of the circumstances which JT would face were he to live in Tonga or New Zealand. No issue was raised by the appellant in his representations or before the Tribunal that JT would suffer any detriment if he relocated to either country. Whilst there was evidence before the Tribunal that some of the appellant’s extended family in Australia had provided care for JT over time, there was no evidence of the nature and strength of that bond. Nor was there evidence of the extent to which there were any members of the appellant’s extended family in New Zealand or members of Ms Sau’s family in Tonga who might become part of JT’s extended family in those locations. There was no evidence of the economic opportunities available to the appellant and Ms Sau in any other country and which would also become available to JT. There was also an absence of evidence as to the appellant’s and JT’s possible living conditions were they to relocate to New Zealand or Tonga or the relative standard of educational and social institutions which might be available to JT in those places.

75 The appellant’s submissions were founded upon a vague notion that the Tribunal should undertake some form of theoretical, socio-economic comparisons between Australia and other places where the appellant and his family might eventually live and do so in the absence of specific evidence but with a definite parochial bias towards living conditions in Australia. That approach was founded upon the like approach adopted in *Vaitaiki* which concerned a different statutory power onto which was embroidered a now outmoded approach to the exercise of administrative power.

76 The important question is whether, in performing the function required by s 501CA(4)(b)(ii), the decision-maker took into account the factors which were raised by the appellant in his representations or, possibly, which were raised in the course of the Tribunal hearing. There is no super-added obligation arising from cases such as *Vaitaiki* which require some broad qualitative comparative assessment of the perceived modalities of life which a child has in Australian and might have in another country. The Minister’s submissions in relation to this should be accepted. The issues which are now alleged not to have been considered were not raised by the appellant and nor did they emerge at the hearing. Even if they had, there was an absence of evidence on which the Tribunal would have been able to make any relevant determination.

77 Mr Hooke SC submitted that the issue of JT’s comparative living conditions was raised because there was evidence of JT’s life in Australia including his schooling and the care which he received from Ms Sau and the appellant’s extended family. Evidence of a child’s life in Australia does not clearly raise any issue as to the impact on the child in relation to their modality of living and their conditions if they, with their parents, relocate to another country. Such facts may form *part* of a foundation for a submission to that effect when supported by other evidence, but no such issue is clearly raised from that evidence alone. In the course of the hearing, the Tribunal elicited from the appellant some information relating to his future intended living arrangements. This was directed to the potential adverse effect of non-revocation on JT’s relationship with his father. In effect, that was the only “ground” or contention possibly raised in the course of the hearing in relation to the ascertainment of JT’s best interests. The Tribunal specifically dealt with it and determined it in favour of the appellant’s claim that the cancellation decision should be revoked. There was no other issue concerning JT which was raised or emerged which was overlooked by the Tribunal in the performance of its function under s 501CA(4).

### JT’s visa entitlements

78 In the course of the appeal, a question emerged as to whether the Tribunal had erred by failing to take into account the fact that if JT left Australia he would lose his entitlement to obtain Australian citizenship when he attained the age of ten years. It was suggested that the fact that JT’s entitlement to Australian citizenship might be lost was a matter which the Tribunal could not ignore. Again, whether or not that is so depends upon the scope of matters which the Act requires the decision-maker to take into account. Here, the appellant did not raise any such issue in his representations and, even if it had been, there was great uncertainty as to where the child might reside such that ascertaining whether his entitlement to citizenship in the future might be lost would have been a matter of pure speculation.

79 The matter concerning JT’s visa first arose when Counsel for the Minister before the Tribunal made a submission in relation to JT’s visa entitlements:

So we are grateful for the additional time to clarify the circumstances surrounding [JT]. I can confirm that – it’s our understanding [JT] is entitled to New Zealand citizenship, as well as Tongan, through his parents. It’s now – I am instructed that while [JT], at the time of birth, would have been entitled to the same visa that his father held, it appears that no action was taken to regularise his status here in Australia, so currently he does not hold a visa and is an unlawful citizen, however steps can be taken by his parents to regularise his status. And the fact – I am instructed that the fact his father’s visa has been cancelled does not impact his ability to regularise his status because it’s an at time of birth criteria.

80 It seems to be accepted that this submission was in error in some respects and, in particular, insofar as it purported to describe JT’s immigration status in Australia. This is analysed by O’Bryan J in his reasons who concludes that, despite the Tribunal being misinformed, its conclusions as to the impact of the revocation of the appellant’s visa are consistent with the true legal position and that should be accepted. Once that point is reached, there is no warrant for thinking that any error by the Tribunal in assessing this issue vitiated its state of mind that there was not “another reason” why the cancellation decision should be revoked. If the Tribunal accurately assesses the relevance of the issue, the mere fact that it made an error in its legal underpinnings renders any error irrelevant. At the very least, it would not be material and no real attempt was made by the appellant to show that it was.

81 Finally, the allegation that the Tribunal erred by erroneously considering JT’s visa status was not something raised in the notice of appeal. That, of itself, is a reason for rejecting it as a foundation on which the appeal should be allowed. This Court should be careful not to encourage ambulatory appeals in which new grounds are added in the course of addresses.

# CONCLUSION

82 It follows that I am of the opinion that even if leave had been granted to raise the new ground on appeal, it would not have succeeded in any event. The appropriate orders should be:

(1) The appellant be refused leave to raise a new ground of appeal.

(2) The appeal is dismissed.

(3) The appellant pay the first respondent’s costs of the appeal.

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| I certify that the preceding seventy-four (74) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington. |

Associate:

Dated: 16 July 2021

REASONS FOR JUDGMENT

O’BRYAN J:

## Introduction

83 The *Migration Act* *1958* (Cth) (**Act**) requires that in certain circumstances a visa must be cancelled by the Minister if the visa holder does not pass the character test. The Act also empowers the Minister to revoke the mandatory cancellation. The Minister’s decision whether or not to revoke the cancellation can have serious consequences, both for the visa holder and their family.

84 This appeal is concerned with a decision made under s 501CA(4) of the Act not to revoke the mandatory cancellation of the appellant’s visa, originally made by a delegate of the Minister and then affirmed by the Administrative Appeals Tribunal. The appellant, Mr Tohi, sought judicial review of the Tribunal’s decision in this Court on the basis that the Tribunal’s decision was affected by jurisdictional error. The primary judge dismissed the application for review and Mr Tohi appeals against that decision. By his amended notice of appeal, Mr Tohi contends that the Tribunal failed to properly consider a reason for revoking the cancellation of his visa, being the best interests of Mr Tohi’s young son (whom I will refer to by his initials, JT).

85 This proceeding has involved a number of missteps at different stages by each of the parties which has increased the complexity of the appeal.

86 First, the ground of appeal sought to be raised by Mr Tohi in this appeal was not a ground of review raised before the primary judge. As a consequence, Mr Tohi requires leave to raise the new ground. Mr Tohi did not adduce any evidence in this appeal seeking to explain why the ground was not raised before the primary judge despite Mr Tohi being represented by Counsel in that hearing.

87 Second, the new ground sought to be raised in this appeal, as stated in Mr Tohi’s amended notice of appeal, did not clearly articulate the legal basis of the underlying complaint. During the course of argument, the legal basis of the ground shifted from a contention that the Tribunal failed to give proper consideration to the submissions and evidence advanced by Mr Tohi to a contention that the Tribunal failed to discharge the statutory duty imposed by s 499 of the Act, and Direction 79 made pursuant to that section, to consider the best interests of Mr Tohi’s child and, in so doing, to make a determination about whether revocation is in the best interests of the child. It is problematic, to say the least, for the appellant to seek leave to raise a new ground the basis of which is only fully revealed in the course of argument.

88 Third, the migration status of JT assumed some significance in the course of the hearing of the appeal and the parties were given leave to file written submissions on his status following the conclusion of the hearing. It is accepted by the Minister that a submission advanced on behalf of the Minister to the Tribunal concerning the migration status of JT was legally erroneous. However, the Minister contends that the erroneous submission advanced before the Tribunal was not raised by the appellant as a ground to challenge the Tribunal’s decision and, further, the erroneous submission was not material to the Tribunal’s decision.

89 Even the presentation of the appeal by the parties was hampered by missteps. Mr Tohi was late to produce a copy of the transcript of the hearing before the Tribunal, and an affidavit read on behalf of the Minister at the hearing before the primary judge (being an affidavit of Monica Kate Forrester Perotti affirmed 8 July 2020) was only provided to this Court some weeks after the conclusion of the hearing of the appeal.

90 For the reasons that follow, I consider that it is in the interests of justice for leave to be given to Mr Tohi to advance the grounds that were the subject of argument during the hearing of the appeal, but that the appeal should be dismissed.

## Background

91 The appellant, Stanley Tohi, was born in Tonga in 1955 and lived there until he was 25 when he settled in New Zealand. He is a New Zealand citizen.

92 Mr Tohi arrived in Australia in 2010, aged 54, on a Subclass 444 special category temporary visa. That visa permits Mr Tohi to remain in Australia for so long as he is a New Zealand citizen.

93 The Tribunal found that, since 2014, Mr Tohi has been in a relationship with a Tongan national, Ms Sau, who, at the time of the Tribunal’s decision, was living in Australia without a valid visa. They have a five-year-old son, JT, who was born in Australia in July 2015. When JT was born, Mr Tohi and Ms Sau moved in together.

94 On 25 March 2017, Mr Tohi drove a car whilst heavily intoxicated and struck a pedestrian who sustained serious injuries to her leg. In December 2017, Mr Tohi was convicted of the offence of aggravated dangerous driving occasioning grievous bodily harm and was sentenced to three years’ imprisonment. Until that time, Mr Tohi had no criminal history of any kind. At the time of his arrest in March, his son was not yet two. Mr Tohi was taken into custody but released on bail four days later. He returned to prison following his sentence and remained there until he was released on parole on 5 June 2019. By that time his son was nearly four.

95 The Tribunal found that, at the time of the offence, Mr Tohi had abstained from alcohol for over 20 years. On the day of the offence, Mr Tohi had an argument with Ms Sau about money. The argument was heated and Ms Sau threatened to terminate the relationship and deny Mr Tohi access to their son. Mr Tohi decided to go and see his friends for support. He drove to a friend’s house in his brother's motor vehicle. The car's registration had expired the previous day and Mr Tohi had never held a driver’s licence. At the friend’s house, Mr Tohi drank a large quantity of wine during the day. In the evening, strongly affected by alcohol, he tried to move his brother’s car from the street into a residential parking complex. Whilst moving the vehicle Mr Tohi mounted the curb and struck a pedestrian who was walking on the footpath.

96 On 17 August 2018, a delegate of the Minister cancelled Mr Tohi’s visa as required by s 501(3A) of the Act. Mr Tohi made representations to the Minister seeking revocation of the cancellation decision. On 20 December 2019, a delegate of the Minister decided not to revoke the cancellation decision. Mr Tohi applied to the Tribunal for review of that decision. After a two-day hearing, during which Mr Tohi was self-represented, the Tribunal affirmed the delegate’s decision: *Tohi and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 495 (**Reasons**).

97 Mr Tohi filed an application in this Court for judicial review of the Tribunal’s decision. The application was not lodged within the 35-day statutory period, so he also sought an extension of time. By an amended application, he raised two grounds of review, both alleging error in relation to the Tribunal’s findings concerning the risk of reoffending. The amended application was certified under s 486D of the Act by Counsel and Mr Tohi was represented by Counsel at the hearing of the application for review. The primary judge granted Mr Tohi an extension of time but dismissed the application for review with costs: *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1223. It is unnecessary to refer further to the primary judge’s decision because, in this appeal, Mr Tohi does not allege error in that decision. He seeks leave to raise a new ground on which the Tribunal’s decision should be set aside.

## The legal framework

98 Section 501(3A) relevantly provides that the Minister must cancel a visa that has been granted to a person if the person is serving a full-time custodial sentence and the Minister is satisfied that the person does not pass the character test because, amongst other things, of the operation of paragraph (6)(a) (substantial criminal record) on the basis of paragraph (7)(a), (b) or (c). Paragraph (6)(a), when read with paragraph (7)(c), provides that a person does not pass the character test if the person has been sentenced to a term of imprisonment of 12 months or more.

99 Section 501CA relevantly provides as follows:

**501CA Cancellation of visa—revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)**

(1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.

…

(3) As soon as practicable after making the original decision, the Minister must:

(a) give the person, in the way that the Minister considers appropriate in the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

(5) If the Minister revokes the original decision, the original decision is taken not to have been made.

100 In relation to the meaning and effect of s 501CA(4), I respectfully agree with the view expressed by Colvin J in *Viane v Minister for Immigration* (2018) 263 FCR 531 at [73]-[74] (with whom Reeves J agreed) that, if the conditions in paragraphs (a) and (b) are satisfied, the Minister is obligated to revoke the original decision. As Katzmann J observed in *Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1313, the weight of authority in this Court supports that conclusion (at [80]-[85]). No argument was advanced on the appeal to the contrary.

101 Section 499(1) of the Act provides that the Minister may give written directions to a person or body having functions or powers under the Act if the directions are about the exercise of those functions and powers. By s 499(2A), a person or body must comply with a direction made under s 499(1). On 20 December 2018, the then Minister made a direction titled “Direction No. 79 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA” (**Direction 79**) which came into force on 28 February 2019. In exercising the power in s 501CA(4) to decide whether to revoke the cancellation of Mr Tohi’s visa, the Tribunal was required to apply Direction 79.

102 In a section of Direction 79 titled “Preamble”, paragraphs 6.1(3) and (4) relevantly state:

(3) … A non-citizen who has had his or her visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case.

(4) The purpose of this Direction is to guide decision-makers performing functions or exercising powers … to revoke a mandatory cancellation under section 501CA of the Act. Under section 499(2A) of the Act, such decision-makers must comply with a direction made under section 499.

103 The phrase “where the discretion to consider revocation is enlivened” in paragraph 6.1(3) is, in light of the meaning and effect of s 501CA(4), poorly expressed. However, read in context, the phrase can be understood as referring to the satisfaction of the condition in s 501CA(4)(a) – that the person whose visa has been cancelled has made representations in accordance with the invitation. If that condition is satisfied, the Minister is under an implicit statutory obligation to consider whether to revoke the cancellation, which decision is conditional upon the Minister being satisfied that either the person passes the character test or there is another reason why the original decision should be revoked.

104 Paragraph 6.2(3) stipulates that the principles in paragraph 6.3 provide a framework within which decision-makers should approach their task of (relevantly) deciding whether to revoke a mandatory cancellation under section 501CA and that the relevant factors that must be considered are identified in Part C of the Direction. Similarly, paragraph 7(1)(b) of Direction 79 stipulates that, informed by the principles in paragraph 6.3, a decision-maker must take into account the considerations in Part C of the Direction, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked. The factors referred to in Part C of the Direction are relevant to the condition in s 501CA(4)(b)(ii) – whether there is another reason why the original decision should be revoked.

105 Paragraph 8(1) stipulates that decision-makers must take into account the primary and other considerations relevant to the individual case (which, in the case of a decision whether to revoke the mandatory cancellation of a non-citizen's visa, are articulated in Part C). Paragraph 8(4) provides that primary considerations should generally be given greater weight than the other considerations.

106 Part C of the Direction then sets out the considerations which a decision-maker must take into account in deciding whether to revoke the mandatory cancellation of a visa under s 501CA(4). These considerations are divided into "primary considerations" and "other considerations". Paragraph 13(2) states that the following considerations are "primary considerations":

(a) protection of the Australian community from criminal or other serious conduct;

(b) the best interests of minor children in Australia; and

(c) expectations of the Australian community.

107 This appeal is concerned with primary consideration (b) – the best interests of minor children in Australia. In respect of that consideration, paragraph 13.2 of the Direction states as follows:

**13.2 Best interests of minor children in Australia affected by the decision**

(1) Decision-makers must make a determination about whether revocation is in the best interests of the child.

(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to revoke or not revoke the mandatory cancellation decision is expected to be made.

(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

(4) In considering the best interests of the child, the following factors must be considered where relevant:

a) The nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);

b) The extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;

c) The impact of the non-citizen’s prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child’s or non-citizen’s ability to maintain contact in other ways;

e) Whether there are other persons who already fulfil a parental role in relation to the child;

f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and

h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen’s conduct.

108 The foregoing mandatory consideration reflects Australia’s international obligations under Article 3(1) of the United Nations Convention on the Rights of the Child which provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

## The ground of appeal

109 By an amended notice of appeal filed on 6 October 2020, Mr Tohi sought orders setting aside the decision of the primary judge and quashing the decision of the Tribunal. The amended notice contains a single ground of appeal, namely that the Court erred in failing to find that the Tribunal fell into jurisdictional error by failing to “properly consider” a reason for revoking the cancellation, namely, the best interests of Mr Tohi’s child. The ground was supported by the following particulars:

* The Tribunal was obliged to consider any reason to revoke that sufficiently arose on the materials and/or was expressly put.
* Ministerial Direction No. 79 obliged the Tribunal to take into account as a primary consideration the bests interests of any child in Australia who would be affected by the decision.
* The Appellant asserted that non revocation would not be in the best interests of his son, who was born in Australia in 2015.
* The Tribunal found that the Appellant’s partner (and the mother of his child) was a Tongan national in Australia, *“without a visa”* and whose “*migration status in Australia would be difficult to regularise”.*
* The Tribunal considered the best interests of the child at [49] and [61] only in respect of the prospect of the separation of the Appellant and his son, a matter it said the weight of which was “*substantially mitigated”* because of the Appellant’s stated intention that he wished to keep the family unit together, a circumstance the Tribunal said could only be achieved “*in a third country*”.
* The Tribunal failed to consider that on its own findings non revocation of the decision would likely lead to the departure of the son from Australia or his remaining in Australia without either parent.
* The Tribunal as a consequence failed to weigh to what extent each of these two alternate outcomes were not in the best interests of the child and whether the decision to cancel the Appellant’s visa should be revoked on that basis alone, or in combination with other reasons advanced.
* This failure included a failure to consider that the only country that both the Appellant and his partner seemingly both had a right to reside in was Tonga and that the child as a consequence of the decision might take up residence in Tonga, a small developing country and therefore be deprived of the opportunities of life in Australia, his birthplace.
* The Tribunal failed to consider that the only possible avenue for allowing the child to remain in Australia with his two parents, was the revocation of the cancellation of the Appellant’s visa.
* The failure to properly consider in the requisite legal sense these matters was a failure to “*engage in an active intellectual process with significant and clearly expressed representations*” (*Guclukol v Minister for Home Affairs* [2020] FCAFC 148 at [29] and a consequent failure to engage in “*honest confrontation of what is being done to people*” (*Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [630]).

110 It is common ground that, since this issue was not raised below, leave is required to raise it on the appeal. The grant of leave is discretionary. Considerations that are relevant to the exercise of the discretion have been stated many times. As recently observed by Allsop CJ, though, the ultimate question is the interests of justice and “care is always necessary in a discretion of this kind not to over-conceptualise or over-categorise matters, which, in any particular case, may be seen to affect the interest of justice, into categories of consideration to be applied as rules or as a set of rules”: *MBJY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 11 at [2].

111 The starting point remains the importance to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial: *Coulton v Holcombe* (1986) 162 CLR 1 at 7. Nevertheless, an appellate court may allow a point to be raised for the first time on appeal where it is expedient and in the interests of justice and where the new ground could not have been met by calling evidence and would not have resulted in the case being differently conducted: *Water Board v Moustakas* (1988) 180 CLR 491 at 497. The usual approach of the Court in migration cases was described by the Full Court in *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 in the following terms (at [48]):

The practice of raising arguments for the first time before the Full Court has been particularly prevalent in appeals relating to migration matters. The Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated. Where, however, there is no adequate explanation for the failure to take the point, and it seems to be of doubtful merit, leave should generally be refused.

112 As the above cases emphasise, the merit of any proposed new ground is an important consideration to the grant of leave. This does not mean that an appellate court should enter upon a full consideration of the grounds. To do so would make the requirement for leave meaningless. It is sufficient to decide whether the proposed new appeal ground has a reasonable prospect of success: *NWQR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 30 at [31].

113 In support of the grant of leave, Mr Tohi submitted that: there is no prejudice to the Minister; the ground has merit; the ground concerns a pressing interest of the appellant (his right of residence in Australia); and the ground concerns whether the best interests of a child were properly considered and a child stands to be gravely affected by the decision.

114 In opposing the grant of leave, the Minister submitted that: the ground is of doubtful merit; it is possible that the Minister could have (at least in part) sought to meet the ground by calling evidence below, being a transcript of the evidence and submissions made to the Tribunal at the two-day hearing; and no explanation (let alone an adequate explanation) has been given as to why the appellant, who was legally represented by Counsel in the trial, did not advance the ground now sought to be advanced.

115 It can be accepted that an adverse decision may have very serious consequences for Mr Tohi as he faces the continued cancellation of his visa and removal from Australia.

116 As to prejudice to the Minister, Mr Tohi sought leave to read an affidavit of Naadirah Sathar affirmed 9 February 2021 which exhibited a copy of the transcript of the hearing before the Tribunal. The Minister did not oppose the grant of leave and the Court granted leave. As a result, all of the evidence relevant to the new ground of appeal, and that might have been called by the Minister in the hearing before the primary judge, was before the Court on this appeal. That evidence comprises the record that was before the Tribunal (and which was before the primary judge) and the transcript of the Tribunal hearing. Accordingly, the prejudice to the Minister from granting Mr Tohi leave to raise the new ground is greatly diminished. It remains the case, though, that some prejudice to the Minister arises because additional costs will be incurred and a possible right of appeal will be lost.

117 Weighing against the grant of leave is the fact that Mr Tohi was represented by Counsel before the primary judge. No explanation was offered for why the ground of review, now sought to be agitated on appeal, was not raised below. The Full Court recently observed in *Raibevu v Minister for Home Affairs* [2020] FCAFC 35 at [95], approving the reasoning of Charlesworth J in *AAD16 v Minister for Immigration and Border Protection* [2018] FCA 1433 at [26]-[27], that in the absence of an explanation, it may be inferred that attention had in fact been given to the grounds available to be argued at first instance by those who were legally qualified to make that assessment. Mr Tohi argued that, in this case, the Court should infer that the new ground of review was overlooked below. In the absence of evidence to that effect, which would have been within the power of Mr Tohi to adduce, the Court is unable positively to draw that inference. This is a significant factor in the assessment of the grant of leave.

118 For the reasons discussed in more detail below, I have come to the view that the proposed new ground of review has sufficient merit to warrant the grant of leave, notwithstanding the factors weighing in the opposite direction. The ground concerns the Tribunal’s consideration of the best interests of Mr Tohi’s child, JT, who is not a party to the proceeding. The best interests of JT was a mandatory consideration for the Tribunal in exercising power under s 501CA(4), and the Tribunal was under a statutory duty to make a determination about whether revocation is in the best interests of JT. It is apparent that the decision whether to revoke the cancellation of Mr Tohi’s visa is likely to have a significant impact on JT. Furthermore, certain submissions made on behalf of the Minister to the Tribunal concerning the migration status of JT, which submissions appear to have been accepted by the Tribunal, were legally erroneous. There is no suggestion that the error was other than inadvertent. Nevertheless, a real question arises whether the legally erroneous submissions misdirected the Tribunal’s consideration of the best interests of JT. In those circumstances, the grant of leave is warranted in the interests of justice to consider fully whether the erroneous submissions affected the conduct of the review by the Tribunal and the Tribunal’s decision. In reaching that conclusion, it should be emphasised that I have assessed the merits of the new ground at an “impressionistic level” (as per *NWQR* at [31]) for the purpose of determining whether leave should be given. Ultimately, following full consideration of the arguments, I have determined that the proposed new ground of review should not be accepted and that the appeal should be dismissed.

## The decision of the Tribunal

119 There was no dispute before the Tribunal that Mr Tohi did not pass the character test (as defined by s 501 of the Act) and therefore the relevant question was whether the Tribunal was satisfied that there was another reason why the decision to cancel Mr Tohi’s visa should be revoked (as per s 501CA(4)(b) of the Act). In considering that question, the Tribunal addressed each of the considerations referred to in Direction 79 in turn. For the purposes of this appeal, it is only necessary to refer to the Tribunal’s consideration of the best interests of Mr Tohi’s young son (which the Tribunal referred to as “Primary Consideration B”).

120 The question raised by the ground of appeal is whether the Tribunal “properly” considered the best interests of Mr Tohi’s son, JT. In determining that question, it is necessary to have regard to the evidence and submissions put before the Tribunal on that issue, and the Tribunal’s consideration of that material as reflected in its reasons. The documentary record before the Tribunal suggests that at certain points in time, Mr Tohi may have assumed that his partner, Ms Sau, and his child, JT, had rights of residency in Australia. At a later point, Mr Tohi is aware that his partner did not have rights of residency. The migration status of JT became an issue of significance at the hearing before the Tribunal and, as already noted, was the subject of erroneous submissions on behalf of the Minister.

121 Following the cancellation of Mr Tohi’s visa, on 22 August 2017 Mr Tohi completed a form requesting the revocation of the decision. In that form, Mr Tohi completed a section headed “Reasons for Revocation” and stated (amongst other things) that:

I have a 3 year old son, who was born in Australia. I support my sons *[sic]* upbringing financially. … Should my visa be cancelled my son will grow up without a father and no financial support to help with his education and upbringing which I contribute to wholly.

122 The form asked for a description of the relationship with each child, to which Mr Tohi responded:

The relationship with my son is very close. He resided with me prior to my going to jail. He now lives with his mother because of my being in prison. I was the primary carer of my son.

123 The form asked for a description of the impact that the visa cancellation would have on each child, to which Mr Tohi responded:

Because I was the primary carer I think it would be very difficult for him. He would grow up without a father and would have no family stability in his life. He would have no father’s guidance.

124 In the section of the form headed “Any Other Information”, Mr Tohi stated (amongst other things):

I have a 3 year old son who needs to grow up knowing who his father is. I want to be in his life as he grows so as to teach him about family values and the importance of belonging to a society as a contributing member.

…

On my release I can regain my old job with my previous employer. I will be working hard to support my son.

125 In a subsequent letter submitted to the Minister, Mr Tohi stated (amongst other things, errors in original):

I am Sixty four years old of age and I have a four year old son and he is curently living with my mother who is eighty two years old of age. Surely I cannot rely on my mother's constant support due to her physical appearance but her age as well is a factor that I worry much about. I am forver grateful for her kindness and support. But I do want to take over her duties and allow her to simply unwind and settle. It has taken a toll on her! I am simply asking that I can be reunited with them, and spent quality times while she is still alive.

I am emotionally desperate. It pains me that I am stuck here and cannot see my son. It hurts me deeply and so badly and I cannot provide the emotional assistance that he needs. It stresses me for the fact that I am unable to be there for him when he needs me the most. …. In that regards I also have a strong conviction that children (my son) should have inalienable rights to their own thoughts and feelings, a sense of security, and a safe space to learn and live. Unfortunately due to unforseen circumstances fate has decides otherwise. I am deeply saddened by it for the fact I feel at times that I did not performed well as father or provide all the necessaries. I remaine positive though.

126 It is apparent that Mr Tohi’s statements in support of revocation were made on the assumption that, if the cancellation of his visa was not revoked and he was deported from Australia, he would be separated from his son.

127 Ms Sau provided a letter of support to the Minister which stated as follows (errors in original):

My name is Leipua Sau I am Stanley's de facto partner. We have been together for over 5 years and we have a 3 year old son. Ever since he was born, Stanley has been the sole provider for his son. I never imagine this situation to happen now that Stanley is not here, my son has to go without the thing he use get before. His family helps but it's not the same as when the father is here.

My son misses his dad every day, when he sees man in their working clothes it reminds him of his father.

Please take in to consideration his son in making your decision.

128 Mr Tohi’s mother also provided a letter of support to the Minister which stated (amongst other things, errors in original):

He has since made Western Sydney his home for him and his two year old son who he is the primary carer of. Due to unforeseen events Stanley has made serious mistakes in his past and is deeply sincere and apologetic for his actions. He understands the consequences of his actions and is striving for an early release to care for his dependent son. Deportation of Stanley to New Zealand would result in no benefits his son and family is heavily reliant on Stanley he would also have no financial support or family care in New Zealand as his family has since migrated to the States or Australia.

129 At the Tribunal hearing, Mr Tohi was not legally represented and was assisted by an interpreter. The hearing was conducted over two days. A copy of a transcript of the hearing was in evidence. Mr Tohi was asked questions by the Tribunal member and by the Minister’s legal representative, but even with the assistance of an interpreter the answers to the questions were not always clear. Nevertheless, at the hearing, Mr Tohi gave evidence and made statements to the following effect:

(a) His son, JT, was living with the child’s mother, Ms Sau, and Mr Tohi’s family provided assistance, such as taking JT to school, and financial support. Mr Tohi agreed that Ms Sau was JT’s primary carer.

(b) If the cancellation of his visa was revoked, he would discuss with Ms Sau whether they would resume living together. His intention would be to live with Ms Sau and his son. If Ms Sau could not remain in Australia and had to return to Tonga, Mr Tohi’s intention would be for JT to remain in Australia (for schooling) but also to spend time with Ms Sau in Tonga.

(c) If the cancellation of his visa was not revoked, it was an option for Mr Tohi to return to New Zealand and JT may go with him. It was also an option for Mr Tohi to return to Tonga. Mr Tohi’s plan would be to return to New Zealand with JT and look for a way for JT’s mother, Ms Sau, to reside in New Zealand.

130 At the conclusion of the first day of the hearing, the Minister’s legal representative submitted that JT’s migration status, and particularly the effect on that status of the cancellation of Mr Tohi’s visa, may have a bearing on the Tribunal’s decision and proposed that the hearing be adjourned overnight to obtain instructions on the issue. That course was agreed. The following morning, the following submissions were made on behalf of the Minister:

(a) JT was entitled to New Zealand and Tongan citizenship through his parents.

(b) While JT, at the time of his birth, would have been entitled to the same visa that his father, Mr Tohi, held, it appeared that no action was taken to “regularise” his status in Australia so that he did not hold a visa and was an unlawful citizen. However, steps could be taken to regularise his status and the fact that his father’s visa had been cancelled did not impact his ability to regularise his status because it is an “at time of birth” criteria. Accordingly, the revocation of Mr Tohi’s visa would not impact JT’s eligibility to be issued a visa.

131 As discussed later in these reasons, it is accepted by the Minister in this appeal that aspects of these submissions made on behalf of the Minister about JT’s migration status under the Act were not correct, although the Minister submits that the error had no material effect on the Tribunal’s decision.

132 Subsequently, the Minister’s legal representative submitted to the Tribunal that:

While it’s a matter for the family whether they decide to relocate to New Zealand or Tonga, in circumstances where [JT] is not an Australian citizen, there’s no legal right or community expectation that he would remain in Australia.

133 It is not clear what was meant by that submission. The assertion that JT had no legal right to remain in Australia is inconsistent with the submission that JT’s migration status could be “regularised” so that he held a visa to remain in Australia. The legal accuracy of the submission is considered further below.

134 In respect of Primary Consideration B, the best interests of the child, the Tribunal made the following findings (emphasis added):

51. Mr Tohi has been in a relationship consistently with Ms Sau since early 2014. When JT was born in July 2015 the couple moved in together. Mr Tohi, Ms Sau and JT continued living together until Mr Tohi was imprisoned.

52. Mr Tohi has been less than upfront about his relationship with Ms Sau and there are documents before the Tribunal where he has stated that the couple were no longer in a relationship. An Offender Intake Data Form dated March 2018 records that Ms Sau is Mr Tohi’s “ex-partner” and that she lives in Queensland. It even notes the reason for their separating was that they had issues which led to them breaking up but that they still have a civil relationship and some contact.

53. At the hearing Mr Tohi confirmed that he and Ms Sau never stopped having a relationship, she lives in Sydney and that they have regular contact over the phone. This is consistent with Ms Sau’s statement and is accepted as fact by the Tribunal.

54. Relevantly, Ms Sau, like Mr Tohi, was born in Tonga. Ms Sau is in Australia without a valid visa. It was put to Mr Tohi that Ms Sau’s unlawful migration status was the reason he claimed to be separated from Ms Sau. Mr Tohi denied this, stating he was unaware of Ms Sau’s visa status. He conceded, however, that Ms Sau was seeking to use their relationship as a basis from which to regularise her own status by gaining a permanent visa. He contends that he only became aware of this fact after they had commenced their relationship and that he did not know she was currently without a valid visa.

55. As with the status of his relationship, Mr Tohi was opaque about the care arrangements for JT. He initially claimed to be the primary carer for JT, but following questioning conceded that he was referring to “the financial side”. He then said that while he was in jail and detention care for JT was assumed by Ms Sau (with support from Mr Tohi’s mother). In a letter to support the revocation of the cancellation decision, he writes “I have a four year old son and he is currently living with my mother who is eighty two years old”. Following prompting Mr Tohi provided more detail around JT’s care and stated that his brothers were jointly sharing responsibility for his care with Mr Tohi’s mother.

56. Mr Tohi later conceded that Ms Sau is in fact the primary carer for JT and that most of the time JT is with Ms Sau. It is a role she performs with the financial support and assistance of Mr Tohi’s family. The Tribunal accepts this as fact.

57. Mr Tohi states that he has a “very close” relationship with his son and that should his visa be revoked it “would be very difficult” for his son. His son would, he contends, “grow up without a father and would have no family stability in his life”.

58. Whilst I do not doubt Mr Tohi’s affection and parental care for his son, I note that when he was incarcerated his son was two and a half years old. He has not lived with his son since December 2017, though JT accompanies Mr Tohi’s brothers when they visit Mr Tohi in detention. JT is now approaching 5 years of age. In these circumstances and in the absence of any other evidence, I am not convinced that Mr Tohi and his son have a close relationship at this time.

59. Mr Tohi said that if released back into the community his intention is to live with JT and Ms Sau as a family. It appeared to the Tribunal that Mr Tohi had not considered the practicalities of such an arrangement and the likelihood that it was achievable given Ms Sau’s uncertain immigration status. When questioned about this Mr Tohi said that if Ms Sau were to leave Australia, JT would stay with him and they would live here in Australia. He said he would go and visit Ms Sau in Tonga but that he would not live there. He said he has to work first before considering going to Tonga.

60. Based on information provided by the Respondent it is the Tribunal’s understanding that JT is entitled to New Zealand citizenship as well as Tongan citizenship through his parents. At the time of his birth JT would have been entitled to the same visa as Mr Tohi but it appears that no action was taken to regularise his status here in Australia. To stay in Australia JT’s parents will be required to regularise his immigration status.

61. I accept that Mr Tohi has a caring relationship with his son and that it is his intention to care and provide for him. JT is also the recipient of the care and support he receives from Mr Tohi’s extended family, particularly Mr Tohi’s brothers and mother who together provide both financial support and care. For these reasons, Primary Consideration B weighs in Mr Tohi’s favour. However, based on the information before the Tribunal, it would appear that at present the only opportunity for Mr Tohi to live as per his stated intention, in a stable family unit with his son and Ms Sau, would be in a third country. As such, this consideration is substantially mitigated in its weight.

135 The Tribunal’s reference to a “third country” in paragraph 61 is not entirely clear. The Tribunal may be referring to New Zealand, or Tonga, or both. Mr Tohi submitted that the Tribunal should be taken to be referring to Tonga because Ms Sau only had rights of residency in Tonga (as a Tongan national). The Minister submitted that the Tribunal should be taken to be referring to a country other than Australia, although the two countries that had been referred to in submissions were New Zealand and Tonga. At paragraph 85, when considering the extent of impediments Mr Tohi may face if removed from Australia, the Tribunal assumed that Mr Tohi would relocate to New Zealand and not Tonga. In my view, when read in context, the Tribunal’s reference to a “third country” in paragraph 61 must be taken to contemplate a country other than Australia. In light of the facts accepted by the Tribunal, the Tribunal should be taken to have had in mind either New Zealand or Tonga without differentiation between the two. In relation to Tonga, the Tribunal accepted that each of Mr Tohi, Ms Sau and JT had Tongan citizenship (see Reasons at [17], [20], [54] and [60]). In relation to New Zealand, the Tribunal accepted that Mr Tohi had New Zealand citizenship (see Reasons at [1]) and had lived in New Zealand from when he was 25 years old (Reasons at [17]), JT was entitled to New Zealand citizenship (Reasons at [60]) and Mr Tohi intended to relocate to New Zealand if the cancellation of his visa was not revoked (Reasons at [85]). As noted earlier, Mr Tohi had made submissions to the Tribunal that, if the cancellation of his visa was not revoked, he would look for a way for JT’s mother, Ms Sau, to reside in New Zealand.

136 The Tribunal returned to the topic of the best interests of JT in its concluding remarks, when it proceeded to weigh those considerations that did not favour revocation with those that did. At that point the Tribunal member said (emphasis added):

95. I accept that Mr Tohi expects to provide for his son and that he has a relationship with him. However for most of his son’s life the parental role has been fulfilled by others. I also consider that Mr Tohi’s expectations for the care arrangements of his son are unrealistic or not sustainable given the current migration status of his son and the child’s mother. Based on the information available, it would appear Ms Sau’s migration status in Australia will be difficult to regularise. For this reason the primary consideration concerned with interests of minor children carries some, though not significant weight in favour of revocation.

## Arguments advanced at the hearing of the appeal

### Appellant’s arguments

137 At the hearing of the appeal, Mr Tohi argued that the Tribunal’s reasons reveal a constructive failure to exercise jurisdiction. In substance, Mr Tohi submitted that the Tribunal’s consideration of the best interests of JT was too narrow. The Tribunal recognised that a factor in favour of revocation of the cancellation decision was that JT would then continue to receive the care and support of Mr Tohi’s extended family in Australia (Reasons at [61]). However, the Tribunal concluded that the weight of this consideration was substantially mitigated because of Mr Tohi’s stated desire to keep the family unit together, which could only be achieved “in a third country” (Reasons at [61], [95]). Mr Tohi submitted that the Tribunal “failed to engage in any way” with the effect that a decision not to revoke would mean for JT, in particular:

(a) his departure from Australia, the place of his birth, either to Tonga or, possibly, New Zealand;

(b) his separation from family in Australia who were involved in his care; and

(c) the reduced life opportunities in relocating to Tonga (the place, on the evidence, where both parents had a right of residence).

138 Mr Tohi further submitted that the Tribunal failed to engage with how revocation was in the best interests of JT, pointing to the following matters:

(a) it would allow Mr Tohi and his son to live together;

(b) it would allow Ms Sau to pursue the regularisation of her migration status, a matter that on the evidence she was seeking to do on the basis of her relationship with Mr Tohi and her son;

(c) it would allow JT to maintain his established relationships with his family;

(d) it would allow JT to reside in the country of his birth, where he has been raised;

(e) it would not require JT to relocate to a small, relatively isolated, developing country in the South Pacific;

(f) it would allow Mr Tohi to find employment and care for his son;

(g) in the “unlikely” event that Ms Sau’s migration status could not be regularised, it would allow the family to determine and establish regular contact by way of travel to Tonga (a matter about which Mr Tohi gave evidence).

139 In support of those submissions, Mr Tohi referred to the principles summarised by the Full Court in *Minister for Home Affairs v Omar* (2019) 272 FCR 589 (***Omar***) at [36]–[41] of the “key points” made in *Carrascalao v Minister for Immigration and Border Immigration and Border Protection* (2017) 252 FCR 352 (***Carrascalao***) about the nature of the duty of an administrative decision-maker to “consider” a matter. Those cases principally concerned the obligations of a decision-maker to consider an applicant’s “case” or submissions and representations advanced by an applicant. That was not truly the nature of Mr Tohi’s complaint. In the course of argument at the hearing, it became apparent that Mr Tohi’s complaint is more accurately expressed as an alleged failure by the Tribunal to undertake the statutory duty required by s 499 of the Act and Direction 79, to consider the best interests of Mr Tohi’s child and to make a determination about whether revocation is in the best interests of the child. Mr Tohi argued that the Tribunal did not have regard to all relevant factors bearing on the best interests of Mr Tohi’s child, JT, and thereby failed to “make a determination about whether revocation is in the best interests of” JT as required by paragraph 13.2 of Direction 79, as a mandatory relevant consideration.

### The Minister’s arguments

140 The Minister’s written submissions assumed that the new ground of review sought to be raised by Mr Tohi was that the Tribunal had failed to consider submissions or representations advanced by Mr Tohi in accordance with the principles stated in *Omar* and *Carrascalao*. The Minister’s assumption was understandable, in light of the formulation of the ground of review in the amended notice of appeal and Mr Tohi’s written submissions. The Minister submitted that the Tribunal had properly addressed the circumstances relating to Mr Tohi, his partner, Ms Sau, and their son, JT, in light of the evidence and submissions before the Tribunal. The Minister observed that:

(a) Ms Sau has been the primary carer for JT, albeit a role that she performs with the support of Mr Tohi’s family (Reasons at [56], [61]).

(b) As an unlawful non-citizen, Ms Sau was required to be removed from Australia as soon as reasonably practicable (s 198 of the Act).

(c) No evidence was apparently presented to the Tribunal regarding any visa applications made by Ms Sau; or of her views concerning JT residing in Australia with Mr Tohi and without Ms Sau if she were required to leave Australia; or the impact upon JT if that were to occur.

(d) No evidence or submissions were apparently presented to the Tribunal about the impact upon JT if the cancellation was not revoked, including the “life opportunities” available in New Zealand or Tonga, being the countries that the family might relocate to.

141 The Minister submitted that, ultimately, questions about where, with whom, and in what circumstances JT might live were not capable of being determined by the Tribunal in its decision. Those outcomes would be the product of different future contingencies, which the Tribunal did not control or decide, and about which it is not apparent what evidence the Tribunal had in making its decision. Those contingencies included the negotiation of custody arrangements between the parents, consequent upon various contingencies and the timing, prospects and outcome of any visa application or other actions by the mother.

142 At the hearing of the appeal, the Minister raised a concern that, in the course of oral argument, Mr Tohi had advanced a ground of review that was not within the amended notice of appeal, to the effect that the Tribunal had failed to comply with the duty imposed by paragraph 13.2 of Direction 79 to consider the best interests of Mr Tohi’s child and to make a determination about whether revocation is in the best interests of the child. The complaint has some foundation. The argument that emerged at the hearing on behalf of Mr Tohi was not well articulated in the amended notice of appeal, and it is understandable that the Minister’s written submissions were focussed on the question whether the Tribunal had failed to give proper consideration to the evidence and submissions advanced by Mr Tohi. Nevertheless, I consider that the ground of review which emerged at the hearing was within the boundaries of the ground stated in the amended notice of appeal. It can be discerned from the amended notice of appeal, when read with Mr Tohi’s written submissions, that Mr Tohi contended that the Tribunal had failed to discharge the statutory duty required by s 499 of the Act and Direction 79, to consider the best interests of Mr Tohi’s child and to make a determination about whether revocation is in the best interests of the child. In his written submissions, Mr Tohi contended that the Tribunal’s reasons “reveal a constructive failure to exercise jurisdiction”. Further, it is a ground that can be considered solely by reference to the terms of Direction 79 and the Tribunal’s reasons and the Minister did not persuade me that, if the ground had been raised before the primary judge, it might have been met by further evidence.

143 In respect of compliance with Direction 79, the Minister submitted that, reading the Tribunal’s reasons fairly, the Tribunal concluded that it was in the best interests of JT that the cancellation of Mr Tohi’s visa be revoked, which would have facilitated the theoretical possibility of enabling JT to live in Australia with Mr Tohi and his extended family. However, the Tribunal gave that consideration less weight because of the uncertainty whether JT’s mother would remain in Australia and the consequences for JT if she were required to leave Australia. In doing so, the Tribunal complied with the requirements of Direction 79, as imposed by s 499 of the Act. In the absence of evidence or submissions about how JT’s interests might be affected by the different educational, economic or social opportunities available to him in Australia as compared with New Zealand or Tonga, the Tribunal was not required to speculate about such matters in making its determination.

## The post-hearing submissions concerning JT’s migration status

144 During the hearing, there was disagreement between the parties with respect to the migration status of Mr Tohi’s son, JT, and how the instant decision (whether to revoke the cancellation of Mr Tohi’s visa) would affect JT’s migration status. The Court requested the parties to confer and prepare and file a joint note on that issue. Subsequently, the parties sought and, on 19 February 2021 were granted leave, to file a supplementary submission on that issue, in place of the requested joint note.

### Matters that were agreed

145 It is common ground that, by operation of s 78(1) of the Act, JT is taken to have been granted, at the time of his birth, a visa of the same kind and class as held by Mr Tohi at that time, being a Special Category (Subclass 444) visa. Although categorised as a temporary visa, it entitles the holder to remain in Australia indefinitely.

146 The Minister submitted, without contradiction by Mr Tohi, that a term of a Subclass 444 visa, set out in clause 444.511 of Schedule 2 to the *Migration Regulations 1994* (Cth), is that it is a “*[t]emporary visa permitting the holder to remain in Australia while the holder is a New Zealand citizen*”. Accordingly, if a child is granted a Subclass 444 visa by operation of s 78(1) of the Act, but the child is not a citizen of New Zealand, then the visa would immediately cease to have effect. The Minister further submitted that the status of JT as holding a Subclass 444 visa would ordinarily be confirmed to the Department by provision of suitable evidence of these matters (birth certificates, New Zealand citizenship records etc). However, as the Minister stated to the Tribunal, the Department had not, until the revocation proceedings, been aware of the existence of JT (let alone his New Zealand citizenship status).

147 The Minister accepted, on the basis of the foregoing, that JT either did, or did not, hold the Subclass 444 visa by operation of s 78(1) the Act (depending upon whether he was or was not a New Zealand citizen). The Minister acknowledged that the submission made to the Tribunal on behalf of the Minister, that JT could obtain a visa by taking steps to “regularise” his status, and that he did not or could not hold a visa until such steps were taken, was legally erroneous. Nevertheless, the Minister submitted that the erroneous submission made to the Tribunal, and the Tribunal’s apparent acceptance of that submission (Reasons at [60]), was immaterial; that is to say, there was no realistic possibility that, if the Tribunal had appreciated that JT did have a visa by operation of the Act (so long as he was a New Zealand citizen), as distinct from him being able to obtain a visa by his parents taking administrative steps to that end, the Tribunal would have made a different decision. Mr Tohi contests that conclusion.

148 On 9 March 2021, nearly 4 weeks after the conclusion of the hearing and a week after the receipt of the post-hearing submissions, the parties jointly informed the Court that an affidavit read on behalf of the Minister at the hearing before the primary judge had been omitted from the agreed appeal book. This was an affidavit of Monica Kate Forrester Perotti affirmed 8 July 2020. Ms Perotti is a solicitor employed by Sparke Helmore, the solicitors for the Minister. Ms Perotti’s affidavit exhibited a copy of the Statement of Facts, Issues and Contentions filed by the Minister in the Tribunal. The document is significant in the present context because it contains the statement that JT “is a New Zealand citizen by virtue of s 7(1)(a) of the New Zealand Citizenship Act 1977”. Thus, in the Tribunal, the Minister advanced the contention, and must be taken to have admitted the fact, that JT is a New Zealand citizen. It follows from that admission that, by operation of s 78(1) of the Act, JT held a Subclass 444 visa at the time of his birth, entitling him to remain in Australia indefinitely.

149 Given the foregoing, the questions that arise are: what effect would the cancellation of Mr Tohi’s visa have on JT’s visa, and did the Tribunal proceed on an erroneous assumption about that effect? The parties made opposing submissions on that question.

### Mr Tohi’s submissions on the effect of cancellation

150 Mr Tohi submitted that, by virtue of s 140(3) of the Act, the cancellation of Mr Tohi’s visa resulted in the cancellation of JT’s visa. Section 140 provides as follows:

**140 Cancellation of visa results in other cancellation**

(1) If a person's visa is cancelled under section 109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister's personal powers to cancel visas on section 109 grounds), 133C (Minister's personal powers to cancel visas on section 116 grounds) or 137J (student visas), a visa held by another person because of being a member of the family unit of the person is also cancelled.

(2) If:

(a) a person's visa is cancelled under section 109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister's personal powers to cancel visas on section 109 grounds), 133C (Minister's personal powers to cancel visas on section 116 grounds) or 137J (student visas); and

(b) another person to whom subsection (1) does not apply holds a visa only because the person whose visa is cancelled held a visa;

 the Minister may, without notice to the other person, cancel the other person's visa.

(3) If:

(a) a person's visa (the cancelled visa) is cancelled under any provision of this Act; and

(b) the person is a parent of another person; and

(c) the other person holds a particular visa (the other visa), that was granted under section 78 (child born in Australia) because the parent held the cancelled visa;

 the other visa is also cancelled.

(4) If:

(a) a visa is cancelled under subsection (1), (2) or (3) because another visa is cancelled; and

(b) the cancellation of the other visa is revoked under section 131, 133F, 137L or 137N;

the cancellation under subsection (1), (2) or (3) is revoked.

151 Mr Tohi further submitted that, if the cancellation of his visa is revoked pursuant to s 501CA(4) of the Act, the effect of s 501CA(5) would be to automatically reinstate JT’s visa. As recorded earlier, s 501CA(5) provides that, if the Minister revokes the original decision (relevantly, to cancel Mr Tohi’s visa), the original decision is taken not to have been made.

152 It follows, in Mr Tohi’s submission, that the representations made on behalf of the Minister to the Tribunal were erroneous in a material way. Contrary to the Minister’s submissions, if the cancellation was not revoked, JT would lose his right to hold a visa and would not be able to “regularise” his visa status as of right. Further, JT would lose the opportunity to become an Australian citizen through residence in Australia. Mr Tohi submitted that, if JT is ordinarily resident in Australia throughout the period of 10 years beginning on the day he was born, he would at the end of that period become an Australian citizen by operation of s 12(1)(b) of the *Australian Citizenship Act 2007* (Cth). The Minister did not contest that conclusion.

153 Mr Tohi argued that the erroneous submissions advanced by the Minister had the effect that the Tribunal failed to properly consider JT’s best interests, because it misdirected itself as to law and failed to understand or consider the legal consequences of its decision.

### The Minister’s submissions

154 The Minister submitted that, assuming JT held a Subclass 444 visa at the time of his birth, s 140(3) of the Act did not apply to the cancellation of Mr Tohi’s visa under s 501(3A) and JT’s Subclass 444 visa was not cancelled consequentially. It follows, on the Minister’s submission, that the decision whether or not to revoke the cancellation of Mr Tohi’s visa would not affect JT’s visa.

155 The Minister acknowledged that that submission was contrary to the plain language of s 140(3) which is expressed to apply if a person's visa is cancelled under any provision of the Act (which includes s 501(3A)). Nevertheless, the Minister argued that there are purposive and contextual reasons for construing s 140(3) such that it only applies if a person’s visa is cancelled under a provision of Part 2 of the Act (which would exclude s 501(3A)).

156 As to purposive considerations, the Minister submitted that it would be a surprising and anomalous result if the visa of a child which is granted by operation of s 78 is cancelled by operation of s 140(3) when their parent’s visa is cancelled under s 501(3A) and that, although the cancellation of the parent’s visa can be revoked under s 501CA, the cancellation of the child’s visa cannot. The Minister argued that s 501CA(5) (relied on by Mr Tohi) does not operate to avoid that result. In support, the Minister observed that there are equivalent provisions for each of s 133F(6) (as to the effect of revocation under s 133F) and s 137P(1) (as to the effect of revocation under ss 137L or 137N), and Parliament still thought fit to include s 140(4) of the Act in respect of those powers of revocation.

157 The Minister submitted that an examination of the legislative history indicates that s 140(3) was only intended to apply to cancellation provisions in Part 2 of the Act. In support, the Minister referred to the following aspects of the legislative history:

(a) Section 140 of the Act, within Part 2 Division 3 Subdivision H (“General provisions on cancellation”), was inserted into the Act (then numbered as s 50G) by the *Migration Reform Act* *1992* (Cth). At that time, subsection (3) was not within the section.

(b) Subsection (3) was subsequently inserted into the Act (then numbered as subsection (2A)) by the *Migration Legislation Amendment Act 1994* (Cth), and that insertion was also reflected in subsection (4) (then numbered as subsection (3)).

(c) As originally inserted, s 140(4)(b) (then numbered s 50G(3)(b)) only referred to the circumstance that the cancellation of the “other visa” was revoked under s 131 (then numbered as s 50AQ).

(d) Subsequently, additional coordinate provisions in relation to cancellation and revocation of visas were inserted into Part 2 of the Act. Relevantly:

(i) a provision for automatic cancellation in certain circumstances (s 137J) and a coordinate power of revocation (ss 137L and 137N) were inserted by the *Migration Legislation Amendment (Overseas Students) Act 2000* (Cth), and those insertions were also reflected in s 140(4)(b); and

(ii) certain powers to cancel without affording natural justice (ss 133A(3) and 133C(3)) and a coordinate power of revocation (s 133F) were inserted by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), and those insertions were also reflected in s 140(4)(b).

(e) Other powers to cancel visas without affording natural justice (ss 501(3) and 501A(3), and 501CA(3A)) and coordinate powers of revocation (ss 501C and 501CA respectively) have been inserted into other Parts of the Act by the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth) and the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), but no consequential amendments were made to s 140(4)(b) in respect of those provisions.

158 The Minister submitted that it is significant that Parliament has confined ss 140(1) and (2) to particular cancellation powers in Part 2 of the Act and there appears to be no discernible reason in principle for s 140(3) to have a radically different operation (applying to cancellation powers throughout the Act). The Minister also observed that while new powers of cancellation in Part 2 have been added to the lists in ss 140(1) and (2) (ss 133A, 133C and 137J), s 501 and related provisions have never been added to those lists.

159 Quite properly, the Minister drew the Court’s attention to an important part of the legislative history that might tell against the Minister’s proposed construction. The Explanatory Memorandum that accompanied the *Migration Legislation Amendment Act* *1994* (Cth) stated as follows in relation to the reason for the insertion of s 50G(2A) (now s 140(3)):

[102] This clause amends section 50G [now s 140] to ensure that a visa which is taken to have been granted to a child born in Australia, under section 26ZS [now s 78], is cancelled if the equivalent visa of a parent is cancelled. This is consistent with the general principle, reflected in subsection 50G(1) [now s 140(1)] that where a person holds a visa because he or she is a member of the family unit of a person whose visa has been cancelled under section 45 [now 109] (incorrect information) or section 50AB [now s 116] (specified grounds for cancellation), the visa of the family unit member is also cancelled. However, new subsection 50G(2A) [now s 140(3)] is not limited to particular cancellation actions under the *Migration Act*. The new subsection applies when a parent’s visa is cancelled under any of the cancellation powers. (emphasis added)

160 The Minister observed that, at the time of the *Migration Legislation Amendment Act* *1994* (Cth), other powers of cancellation existed in Part 2 of the Act, including s 50AN (now s 128) and s 50A (now s 134), and the Explanatory Memorandum may be understood as referring to those powers. However, the Minister acknowledged that yet another power of cancellation existed in s 180A (now s 501) which was located outside Part 2 of the Act.

161 On the basis of that construction, the Minister submitted that JT’s visa was not affected by the cancellation of Mr Tohi’s visa, and therefore the revocation decision would not affect JT’s migration status. It followed that the Court should not accept Mr Tohi’s submission that the Tribunal misdirected itself as to law and failed to understand or consider the legal consequences of its decision in relation to JT’s visa. The Minister further submitted that, in any event, Mr Tohi has not sought leave to advance a further ground of appeal to that effect, which ground would also potentially be affected by evidence (whether JT is a New Zealand citizen) as well as questions of materiality. Accordingly, and also in light of the complexity of the constructional question, the Minister submitted that the Court should not determine the appeal on the basis of this issue.

## Consideration of JT’s migration status

162 It is convenient to consider JT’s migration status, and the Tribunal’s consideration of that question, as a preliminary issue. Contrary to the Minister’s submission, it is necessary to determine this issue. The record of the hearing before the Tribunal, and the Tribunal’s reasons, reveal that the issue was of significance to the Tribunal in its consideration of the best interests of JT. Further, the Minister accepts that, at least in part, submissions were made to the Tribunal on behalf of the Minister that were legally erroneous. In determining Mr Tohi’s contention that the Tribunal failed to perform its statutory task of considering JT’s best interests, it is necessary to determine whether the Tribunal’s reasoning on that issue was based on an incorrect understanding of the law governing JT’s migration status, and whether any such error affected the Tribunal’s conclusion. Three questions arise for determination:

(a) What is JT’s migration status at law and what effect would the revocation decision have on that status?

(b) What submissions were made to the Tribunal about JT’s status and were the submissions legally correct or incorrect and to what extent?

(c) If the submissions were incorrect, did that have a material effect on the Tribunal’s decision (in the sense that the Tribunal assumed the legal correctness of the submissions and that assumption might have deprived Mr Tohi of the possibility of a successful outcome)?

### What is JT’s migration status at law?

163 As noted above, it is common ground that, by operation of s 78(1) of the Act, JT is taken to have been granted, at the time of his birth, a visa of the same kind and class as held by Mr Tohi at that time, being a Special Category (Subclass 444) visa. The issue in dispute is whether, by operation of s 140(3), JT’s visa is cancelled by the cancellation of Mr Tohi’s visa and whether the revocation of the cancellation of Mr Tohi’s visa results in JT’s visa being reinstated at law. The answer to those questions depends upon the proper construction of s 140(3) and its interaction with s 501CA(5).

164 Section 15AA of the *Acts Interpretation Act 1901* (Cth) requires the Court to prefer the interpretation of a statutory provision that would best achieve the purpose or object of the statute. As observed by the majority in *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 at 28 [57], the technique of statutory construction involves choosing from the range of possible meanings the meaning which Parliament should be taken to have intended. The statutory language cannot, however, be given a meaning which the words used will not bear. For that reason, it is said that the starting point is the text whilst, at the same time, there is to be regard to context and purpose: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47]. The permissible extent to which a court may depart from the statutory text was considered by the High Court majority in *Taylor v The Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [38]-[40] (citations omitted):

The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills “gaps disclosed in legislation” or makes an insertion which is “too big, or too much at variance with the language in fact used by the legislature”.

Lord Diplock’s three conditions (as reformulated in *Inco Europe Ltd v First Choice Distribution*) accord with the statements of principle in *Cooper Brookes* and McColl JA was right to consider that satisfaction of each could be treated as a prerequisite to reading s 12(2) as if it contained additional words before her Honour required satisfaction of a fourth condition of consistency with the wording of the provision. However, it is unnecessary to decide whether Lord Diplock’s three conditions are always, or even usually, necessary and sufficient. This is because the task remains the construction of the words the legislature has enacted. In this respect it may not be sufficient that “the modified construction is reasonably open having regard to the statutory scheme” because any modified meaning must be consistent with the language in fact used by the legislature. Lord Diplock never suggested otherwise. Sometimes, as McHugh J observed in *Newcastle City Council v GIO General Ltd*, the language of a provision will not admit of a remedial construction. Relevant for present purposes was his Honour’s further observation, “[i]f the legislature uses language which covers only one state of affairs, a court cannot legitimately construe the words of the section in a tortured and unrealistic manner to cover another set of circumstances”.

Lord Diplock’s speech in *Wentworth Securities* laid emphasis on the task as construction and not judicial legislation. In *Inco Europe* Lord Nicholls of Birkenhead observed that even when Lord Diplock’s conditions are met, the court may be inhibited from interpreting a provision in accordance with what it is satisfied was the underlying intention of Parliament: the alteration to the language of the provision in such a case may be “too far-reaching”. In Australian law the inhibition on the adoption of a purposive construction that departs too far from the statutory text has an added dimension because too great a departure may violate the separation of powers in the *Constitution* .

165 The Minister’s proposed construction of s 140(3) requires a significant alteration to the plain meaning of the legislative text. It requires that paragraph (a) of s 140(3) be construed as if the phrase “cancelled under any provision of this Act” were altered to “cancelled under any provision of Part 2 of this Act”, or some similar grammatical formulation. This is not merely inserting words to clarify an otherwise ambiguous provision. There is nothing ambiguous about the phrase “any provision of this Act”. The interpretation proposed by the Minister alters the reach and effect of the provision. It requires s 140(3)(a) to be “read down” such that it is confined in its operation to a cancellation that occurs through a provision of Part 2 of the Act.

166 The contextual matters relied on by the Minister, principally matters of legislative history, provide only limited support for the Minister’s proposed construction. It is undoubtedly correct that subsections (1), (2) and (4) of s 140 are directed to powers of cancellation and revocation contained in Part 2 of the Act. However, it does not necessarily follow that subsection (3) is intended to be so confined. Subsection (3) is concerned with a discrete circumstance: a person's visa is cancelled; the person is a parent of a second person; and the second person holds a particular visa that was granted under s 78 (child born in Australia) because the parent held the cancelled visa. In that circumstance, the second person’s visa is also cancelled. The legislative history does not require, or make more likely, a construction that limits subsection (3) to cancellation under a provision of Part 2 of the Act.

167 As to statutory purpose, the Minister’s argument that reading s 140(3) literally would produce anomalous results cannot be accepted. The revocation of a visa cancellation under s 501CA(4) will have the effect of nullifying a consequential cancellation under s 140(3). As submitted by Mr Tohi, that would occur by virtue of s 501CA(5) which provides that, if the Minister revokes the original (cancellation) decision, the original decision is taken not to have been made. Section 501CA(5) is not expressed to be subject to any limitation or qualification (other than in respect of the subject matter addressed in s 501CA(6)) and must, at the very least, be taken to have effect with respect to other provisions of the Act that depend upon the “original decision”. Section 140(3) is one such provision. The effect of s 501CA(5) is that s 140(3) can no longer apply to the “original decision” because that decision is taken not to have been made. As a result, any visa cancellation brought about by the combined operation of a cancellation decision under s 501(3A) and s 140(3) is nullified if the cancellation decision is revoked under s 501CA(4).

168 In my view, neither purposive nor contextual considerations provide a sufficient basis to read down s 140(3) in the manner proposed by the Minister. Subsection 140(3) should be construed in accordance with its plain meaning. Accordingly, Mr Tohi is correct to submit that:

(a) prior to the cancellation of Mr Tohi’s visa under s 501(3A), JT held a Special Category (Subclass 444) visa;

(b) upon the cancellation of Mr Tohi’s visa, JT’s visa was also cancelled by effect of s 140(3); and

(c) if the cancellation of Mr Tohi’s visa were to be revoked under s 501CA(4), the cancellation of JT’s visa would be nullified by the operation of s 501CA(5).

### What submissions were made about JT’s status and were they legally correct?

169 As set out earlier, submissions were made to the Tribunal on behalf of the Minister to the following effect:

(a) JT did not hold a visa and was an unlawful citizen because, while JT was entitled to the same visa that his father, Mr Tohi, held, it appeared that no action had been taken to “regularise” his status in Australia; and

(b) the revocation of Mr Tohi’s visa would not impact JT’s eligibility to be issued a visa because the visa criteria applies at the time of his birth and steps could be taken to regularise his status notwithstanding the cancellation of his father’s visa.

170 Both of those submissions were legally erroneous. As to the first, JT’s visa did not depend on actions being taken to “regularise” his status. Further, JT was not entitled to the same visa that his father held, because his father’s visa had been cancelled and s 140(3) operated to cancel JT’s visa. As to the second, the revocation of Mr Tohi’s visa would impact JT’s visa because revocation would nullify the effect of s 140(3).

### Did the submissions have a material effect on the Tribunal’s decision?

171 The Tribunal’s consideration of JT’s migration status was relatively brief. It was contained in paragraphs 60, 61 and 95 of the Tribunal’s reasons, which are reproduced above. The following matter should be noted about the Tribunal’s reasons.

172 At paragraph 60, the Tribunal expressly accepted the erroneous submission made on behalf of the Minister that JT was (presently) entitled to the same visa as Mr Tohi but steps would need to be taken to “regularise” his status in Australia. It is clear that the Tribunal did not appreciate that the effect of s 140(3) of the Act was that JT lost his visa upon the cancellation of Mr Tohi’s visa. Nor did the Tribunal appreciate that, if the cancellation of Mr Tohi’s visa was revoked, JT would have an immediate right to a visa without steps being taken.

173 Despite the Tribunal’s misapprehensions about JT’s migration status, at paragraph 61 the Tribunal reasoning proceeds on two implicit assumptions. The first assumption is that, if the cancellation of Mr Tohi’s visa is revoked, JT would be entitled to remain in Australia with his father and his father’s extended family. That assumption underlies the Tribunal’s conclusion that “Primary Consideration B weighs in Mr Tohi’s favour”. That assumption accords with the position at law. The second assumption is that, if the cancellation is not revoked and Mr Tohi departs Australia, JT would also leave Australia to live with his parents or one of them. There is no contemplation that JT would remain in Australia if the cancellation of Mr Tohi’s visa was not revoked. Again, that assumption accords with the position at law. If the cancellation is not revoked and Mr Tohi departs Australia, JT would not have a visa to remain in Australia and would also be required to leave Australia.

174 At paragraph 95, the Tribunal concludes that “Mr Tohi's expectations for the care arrangements of his son are unrealistic or not sustainable given the current migration status of his son and the child's mother”, and then observes that “it would appear Ms Sau’s migration status in Australia will be difficult to regularise”. The focus of that paragraph is Ms Sau’s uncertain immigration status, and the consequential uncertainty whether the revocation of the cancellation of Mr Tohi’s visa would result in JT being cared for by both parents in Australia, which is Mr Tohi’s preference. It is for that reason that the Tribunal concludes that “the primary consideration concerned with interests of minor children carries some, though not significant weight in favour of revocation”.

175 It follows that the Tribunal’s central conclusions about the impact of non-revocation on JT were consistent with the true legal position, despite the Tribunal having been misinformed about the operation of the Act. It must be concluded that the erroneous legal submission made to the Tribunal on behalf of the Minister did not lead the Tribunal into legal error in its reasoning.

## Consideration of claimed failure to perform statutory task

### Applicable legal principles

176 In *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (***Teoh***), the High Court considered a decision by the Minister to refuse an application for a permanent entry permit on character grounds because the applicant had been convicted of drug offences and sentenced to imprisonment. The applicant’s wife and young children were resident in Australia. A majority of the High Court concluded that Australia’s ratification of the United Nations Convention on the Rights of the Child, and particularly Article 3(1) of that Convention, gave rise to a legitimate expectation that the Minister would act in conformity with it and treat the best interests of the applicant’s children as a primary consideration in making the decision whether to grant the permanent entry permit. The majority found that the applicant had been denied procedural fairness because he had not been afforded an opportunity to present a case against the Minister’s decision not to treat the best interests of the applicant’s children as a primary consideration.

177 The concept of “legitimate expectation” as a necessary criterion of an entitlement to procedural fairness has since been rejected by the High Court (see the discussion in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [28]-[30] (Kiefel, Bell and Keane JJ) and at [61] (Gageler and Gordon JJ)). However, that does not undermine the conclusion reached by the High Court in *Teoh* that a breach of the requirements of procedural fairness may occur if a decision to refuse to grant, or to cancel, a visa is made without considering the best interests of a child affected by the decision as a primary consideration, and without giving the applicant an opportunity to be heard on that matter. Such a conclusion has been reached by this Court in cases including *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 150 ALR 608 (***Vaitaiki***), *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, *Nweke v Minister for Immigration and Citizenship* [2012] FCA 266; 126 ALD 501 and *Lesianawai v Minister for Immigration* [2012] FCA 897; 131 ALD 27.

178 The above cases are not directly relevant to the ground of review sought to be relied upon by Mr Tohi in this appeal. Mr Tohi’s amended notice of appeal did not allege any failure by the Tribunal to afford procedural fairness. Rather, Mr Tohi alleged a failure to “properly consider” a reason for revoking the cancellation of the visa, being the best interests of Mr Tohi’s child. Despite that, the above cases have some indirect relevance to the ground of review. The cases explain the breadth of the concept of the “bests interests of the child” emanating, as it does, from Article 3(1) of the Convention on the Rights of the Child. The concept embraces consequences of an administrative decision that may bear upon the welfare of children including, most directly, the break-up of the immediate family unit (see *Teoh* at 304 per Gaudron J). If the effect of the cancellation of the parent’s visa is that the child is likely to accompany the parent to a third country, the welfare considerations may include separation from the child’s extended family and community, the social and linguistic disruption of childhood, and loss or reduction in education opportunities (see *Vaitaiki* at 614 per Burchett J and at 631 per Branson J).

179 Unlike the above cases, in the present case the Tribunal was under a statutory duty to consider the best interests of Mr Tohi’s child as a primary consideration: *Rokobatani v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 583 at [12]; *Baker v Minister for Immigration and Citizenship* [2012] FCAFC 145 at [55]. That duty arose by force of s 499 of the Act which, by subsection (1), empowered the Minister to issue Direction 79 and, by subsection (2A), stipulated that the persons or body to whom the Direction was applicable must comply with the Direction. The consideration must be weighed as a “primary consideration”. A failure to address the best interests of a child, where relevant, as a primary consideration is a failure to conduct the review required by the Act and, subject to materiality, constitutes jurisdictional error: *Uelese v Minister for Immigration* (2015) 256 CLR 203 (***Uelese***) at [68]; *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [39].

180 Furthermore, paragraph 13.2(1) of Direction 79 stipulates that the Tribunal must make a determination “about whether revocation is in the best interests of the child”. As Robertson J concluded in *Spruill v Minister for Immigration and Citizenship* [2012] FCA 1401; 135 ALD 45 at [18]-[19], it is not enough for the Tribunal merely to have regard to those interests; a failure to make a determination about whether revocation is in the best interests of the child is a failure to complete the exercise of jurisdiction.

181 In *Uelese*, the plurality stated (at [64]) that the requirement to consider the best interests of minor children in Australia affected by the decision is imposed on decision-makers in terms which are not dependent on whether an applicant for review argues that those interests are relevant as part of his or her “case”. Nevertheless, the Tribunal is required to assess the best interests of the child based on the evidence and submissions before it and is not under a general duty to inquire about matters not raised: *Sami v Minister for Immigration and Citizenship* [2013] FCAFC 128; 139 ALD 1 (at [30]); see also *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39; 259 ALR 429 (at [25]).

### Did the Tribunal conduct the review as required by Direction 79?

182 The factual and legal circumstances confronting the Tribunal in this matter involved a number of contingencies. The contingencies arose from the fact that JT’s mother, Ms Sau, was an unlawful non-citizen with no right to reside in Australia. As a consequence, JT’s right to reside in Australia was derived from Mr Tohi’s migration status.

183 If the cancellation of Mr Tohi’s visa was revoked, Mr Tohi could remain in Australia and the consequential cancellation of JT’s visa (under s 140(3)) would be nullified. Whether Ms Sau was able to remain in Australia would depend upon making an application for an appropriate visa, such as a partner visa. The prospect of successfully obtaining such a visa could only be assessed as a possibility. Whether JT would remain in Australia was, to some extent, dependent upon whether Ms Sau remained in Australia and, if she did not, whether she sought to have JT relocate with her to a third country (likely Tonga) and whether Mr Tohi contested the relocation.

184 If the cancellation of Mr Tohi’s visa was not revoked, neither Mr Tohi nor Ms Sau would be able to remain in Australia. By operation of s 140(3), a necessary consequence would be that JT could not remain in Australia. Thus, the practical effect of a decision not to revoke the cancellation of Mr Tohi’s visa would be that JT would depart Australia to live with his father, his mother, or both in another country, presumed to be New Zealand or Tonga.

185 The representations made by and on behalf of Mr Tohi to the Tribunal concerning JT, both before and during the Tribunal hearing, were limited in their scope. The representations concerned the familial and financial care and support that would be provided to JT if the cancellation of Mr Tohi’s visa was or was not revoked. The representations were to the effect that: while JT’s mother had been his primary carer, Mr Tohi’s extended family in Australia had also provided care and support to him and would continue to do so in the future; JT would in the future benefit from the care and support of his father; Mr Tohi intended to raise JT with JT’s mother, Ms Sau; and, if the visa cancellation was not revoked, Mr Tohi wished to reside in New Zealand and care for JT.

186 In its reasons, the Tribunal addressed those representations. At paragraph 61, the Tribunal concluded that the consideration, the best interests of JT, weighed in favour of revocation because of the care and support JT would receive in Australia from his father and his father’s extended family. But the Tribunal also concluded that:

… based on the information before the Tribunal, it would appear that at present the only opportunity for Mr Tohi to live as per his stated intention, in a stable family unit with his son and Ms Sau, would be in a third country.

187 Based on that latter conclusion, the Tribunal determined that the weight to be given to the consideration, the best interests of JT, was “substantially mitigated”. The Tribunal reiterated this conclusion at paragraph 95, stating:

Mr Tohi's expectations for the care arrangements of his son are unrealistic or not sustainable given the current migration status of his son and the child's mother. Based on the information available, it would appear Ms Sau's migration status in Australia will be difficult to regularise. For this reason the primary consideration concerned with interests of minor children carries some, though not significant weight in favour of revocation.

188 The Tribunal’s reasons show that its consideration of the best interests of JT had, as a primary focus, the break-up of the immediate family unit. That focus reflected the representations made to the Tribunal by Mr Tohi, and the circumstance that Ms Sau did not hold a visa to remain in Australia. Thus, even if the cancellation of Mr Tohi’s visa was revoked, JT may not be able to reside in Australia with both parents and a possible outcome was that JT would leave Australia to live with his mother.

189 As cases such as *Vaitaiki* make clear, if the effect of the cancellation of the parent’s visa is that a dependent child is likely to accompany the parent to a third country, the considerations that may be relevant to the best interests of the child may include separation from the child’s extended family and community, the social disruption of childhood and loss or reduction in education opportunities. The Tribunal took into account the fact that cancellation of Mr Tohi’s visa would result in JT being separated from his extended family in Australia, but also took into account the fact that JT had the prospect of living with both parents in a third country (either New Zealand or Tonga).

190 I do not accept Mr Tohi’s submission that the Tribunal "failed to engage in any way" with the effect that a decision not to revoke would mean for JT. The Tribunal engaged with the representations made by Mr Tohi and took into account the fact that JT would depart Australia and relocate to either Tonga or New Zealand. It may be accepted, as Mr Tohi submitted, that the Tribunal did not consider whether, and to what extent, JT might have “reduced life opportunities in relocating to Tonga”. However, in circumstances where no such submission was put to the Tribunal, and no evidence was adduced in support of any such submission, the Tribunal did not err in failing to consider and make findings about such matters. The Tribunal is not under a general duty to inquire: *Sami* at [30]; *SZIAI* at [25]. I accept the Minister’s submission that, in the absence of evidence or submissions about the different educational, economic or social opportunities available to JT in Australia as compared with New Zealand or Tonga, the Tribunal was not required to speculate about such matters in making its determination.

191 Having regard to the above matters, I am not persuaded that the Tribunal failed to perform its statutory duty to consider the best interests of Mr Tohi’s child as a primary consideration. It follows that the appeal must be dismissed.

## Conclusion

192 In conclusion, I would grant leave to the appellant to advance the ground of appeal as stated in his amended notice of appeal, but I would dismiss the appeal. The first respondent should have his costs of the appeal.

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| I certify that the preceding one hundred and ten (110) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O'Bryan. |

Associate:

Dated: 16 July 2021