FEDERAL COURT OF AUSTRALIA

Matthews v Minister for Home Affairs [2020] FCAFC 146

|  |  |
| --- | --- |
| Appeal from: | *Matthews v Minister for Home Affairs* [2019] FCA 2184  |
|  |  |
| File number(s): |  |
|  |  |
| Judge(s): | **MIDDLETON, PERRY and O'Bryan JJ** |
|  |  |
| Date of judgment: | 26 August 2020 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from application for judicial review of Administrative Appeals Tribunal decision not to revoke mandatory cancellation under s 501CA(4), Migration Act, of appellant’s visa – whether Tribunal failed to engage in an active intellectual manner with evidence as to the strength, nature and duration of the appellant’s ties with Australia for the purposes of Ministerial Direction No. 65 – whether Tribunal failed to consider letters from family members as to the appellant’s links with his family – consideration of relevant principles – leave to raise new ground alleging Tribunal’s decision unreasonable refused – appeal dismissed  |
|  |  |
| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 43(2B)*Migration Act 1958* (Cth) s 501CA(4) |
|  |  |
| Cases cited: | *Minister for Home Affairs v Buadromo* [2018] FCAFC 151;(2018) 267 FCR 320*Minister for Home Affairs v HSKJ* [2018] FCAFC 217; 266 FCR 591*Minister for Home Affairs v Ogawa* [2019] FCAFC 98; (2019) 269 FCR 536*Minister for Home Affairs v Omar* [2019] FCAFC 188; 373 ALR 569*Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421*Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16; 309 ALR 67*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611*Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323*Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73;(2017) 250 FCR 510*Navoto v Minister for Home Affairs* [2019] FCAFC 135*Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) 258 CLR 173*Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286*SZTMD v Minister for Immigration and Border Protection* [2015] FCA 150; (2015) 150 ALD 34*Vu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 90*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588 |
|  |  |
| Date of hearing: | 11 August 2020 |
|  |  |
| Registry: | Melbourne |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 67 |
|  |  |
| Counsel for the Appellant: | Mr A Krohn |
|  |  |
| Solicitor for the Appellant: | Aila Rose Melasecca Barristers & Solicitors |
|  |  |
| Counsel for the First Respondent: | Mr M Hosking |
|  |  |
| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
|  |  |
| Counsel for the Second Respondent: | Second Respondent filed a submitting notice |

ORDERS

|  |  |
| --- | --- |
|  | VID 53 of 2020 |
|   |
| BETWEEN: | GARRETT TEHIRI TANGA MATTHEWSApplicant |
| AND: | THE MINISTER FOR HOME AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | MIDDLETON, PERRY and O’BRYAN JJ |
| DATE OF ORDER: | 26 August 2020 |

THE COURT ORDERS THAT:

1. Leave to raise ground 2 of the notice of appeal filed on 3 February 2020 is refused.
2. The appeal is dismissed.
3. The appellant is to pay the costs of the first respondent as agreed or assessed.

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

REASONS FOR JUDGMENT

THE COURT:

|  |  |
| --- | --- |
| 1 INTRODUCTION | [1] |
| 2 BACKGROUND | [5] |
| 2.1 The mandatory cancellation of Mr Matthews’ visa and decision by the Minister’s delegate not to revoke the cancellation | [5] |
| 2.2 The decision of the Tribunal | [12] |
| 2.3 The decision of the primary judge | [26] |
| 3 DID THE TRIBUNAL FAIL TO HAVE REGARD TO RELEVANT CONSIDERATIONS OR MATERIAL (GROUND 1) | [27] |
| 3.1 Relevant principles | [27] |
| 3.2 Did the Tribunal fail to give meaningful consideration to the strength, nature and duration of Mr Matthews’ ties to Australia? | [37] |
| 3.2.1 Mr Matthews’ age | [38] |
| 3.2.2 Letters from Mr Matthews’ family | [46] |
| 4 SHOULD LEAVE BE GRANTED TO RAISE GROUND 2 OF THE NOTICE OF APPEAL? | [60] |
| 5 CONCLUSION | [67] |

##### INTRODUCTION

1. This is an appeal from a judgment of a single judge of this Court dismissing the appellant’s application for judicial review of a decision of the Administrative Appeals Tribunal (the **Tribunal**) given on 25 June 2018. By that decision, the Tribunal affirmed the decision of a delegate of the Minister for Home Affairs (the **Minister**) made on 2 March 2018. The delegate decided under s 501CA(4) of the *Migration Act 1958* (Cth) (the **Act**) not to revoke the mandatory cancellation of the appellant’s visa.
2. By ground 1 of the notice of appeal and as clarified at the hearing of the appeal, the appellant, Mr Garrett Matthews (**Mr Matthews**), alleges that the primary judge erred in failing to find that the Tribunal fell into jurisdictional error for the following reasons:
3. the Tribunal failed to engage in an active intellectual way with the fact that Mr Matthews had spent most of his life in Australia from a young age, in considering the strength, nature and duration of his ties to Australia as required by paragraphs 6.3(5) and 14.2 of *Direction No. 65 – 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 65**);
4. while the primary judge correctly held that the Tribunal failed to consider the letters from Mr Matthews’ younger brothers, Messrs Cody and Tarran Matthews, about Mr Matthews and their family links with him, his Honour erred in finding that this error was not material; and
5. the Tribunal failed to engage in an active intellectual manner with the letters from Mr Matthews’ mother, Mrs Marlene Matthews, and one of his younger brothers, Mr Colt Matthews.

(It is convenient to refer to Messrs Cody, Tarran and Colt Matthews by their first names in these reasons, as did the primary judge. We would emphasise that in so doing, no disrespect is intended.)

1. In addition, Mr Matthews seeks leave to advance a new ground on the appeal, namely:

2. The Court at first instance erred in not finding that the Tribunal fell into jurisdictional error in that it was unreasonable.

Particulars

(a) Having regard to all the evidence in the circumstances of the Appellant relating to the strength nature and duration of his ties to Australia, as required by 14.2 of Direction [65] in particular, the decision was unreasonable.

(b) The Appellant refers to and repeats the particulars to Ground 1 of the Notice of Appeal.

(proposed ground 2)

1. For the reasons set out below, leave to raise ground 2 must be refused for the reason that it has no reasonable prospects of success and the appeal must be dismissed.

##### BACKGROUND

###### The mandatory cancellation of Mr Matthews’ visa and decision by the Minister’s delegate not to revoke the cancellation

1. Mr Matthews was born in New Zealand and moved to Australia permanently in 1989 at the age of six. Mr Matthews has been convicted of a significant number of criminal offences commencing in 1998 when he was 15 years of age. These include:
2. in April 2005, receiving a sentence of 12 months’ imprisonment for armed robbery;
3. in October 2006, receiving an aggregate sentence of 15 months’ imprisonment for burglary and theft; and
4. in March 2013, receiving an aggregate sentence of imprisonment for 6 years and 9 months for aggravated burglary, recklessly causing serious injury, causing criminal damage, theft, and unlawful assault.
5. On 21 July 2006, following Mr Matthews’ conviction in April 2005, a delegate of the (then) Minister for Immigration and Multicultural Affairs considered cancelling his visa under s 501(2) of the Act on character grounds. While the delegate decided not to exercise the discretion to cancel Mr Matthews’ visa despite his failing the character test, the delegate’s decision record relevantly stated that he “*is to be warned that a fresh assessment will be made with a view to cancelling his visa if he is convicted of any further offences*”.
6. Following Mr Matthews’ conviction in March 2013, his visa was cancelled on 19 January 2016 under the mandatory cancellation power in s 501(3A) of the Act on the ground that he failed the character test by reason of his substantial criminal record and he was serving a sentence of imprisonment on a full-time basis.
7. Pursuant to s 501CA(4) of the Act, the Minister (and therefore her or his delegate) may revoke a cancellation decision under s 501(3A) 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.

1. The same provision fell to be applied afresh by the Tribunal subsequently on review of the delegate’s decision because the Tribunal stands in the “shoes” of the delegate in deciding for itself what is the correct and preferable decision at the time of its decision: *Shi v Migration Agents Registration Authority* [2008] HCA 31; (2008) 235 CLR 286.
2. Mr Matthews was notified of the delegate’s decision, and invited to make representations about revocation of the decision. Representations made by Mr Matthews in response included the provision of letters from his mother, Marlene, and his three brothers, Cody, Colt and Tarran (AB 107-110).
3. On 2 March 2018, the Minister’s delegate decided under s 501CA(4) of the Act not to revoke the cancellation of Mr Matthews’ visa and provided a statement of reasons (AB21 and 22).

###### The decision of the Tribunal

1. Mr Matthews applied to the Tribunal for review of the delegate’s decision. He attended a hearing before the Tribunal on 12 June 2018 with legal representation and was cross-examined. Relevantly with respect to ground 1 of the appeal, Mr Matthews’ mother and Colt also gave evidence at the hearing (Tribunal reasons (**TR**) at [3]).
2. On 25 June 2018, the Tribunal affirmed the delegate’s decision not to revoke the cancellation of Mr Matthews’ visa (AB228).
3. Among other material, the Tribunal had before it the volume of documents under s 501 of the Act (the **G documents**) which included the letters from four members of Mr Matthews’ family to which we have referred, and statements of facts issues and contentions (**SFIC**) from Mr Matthews and the Minister filed in the Tribunal (TR at [4]).
4. In its reasons, the Tribunal found ***first*** that Mr Matthews failed the character test on the ground that he has a substantial criminal record as defined in the Act (TR at [14]). That finding was not contested. The sole issue before the Tribunal was whether there was another reason as to why the original cancellation decision should be revoked.
5. ***Secondly***, in addressing that issue the Tribunal correctly found that it was bound to comply with Direction 65 (at [17]): *Minister for Home Affairs v HSKJ* [2018] FCAFC 217; 266 FCR 591 (***HSKJ***) at [41] (the Court). This meant that it was required to take into account the Primary and Other Considerations specified in Direction 65 and relevant to Mr Matthews’ case in determining whether to revoke the mandatory cancellation of his visa (para 8, Direction 65). As the Tribunal noted at [20], para 13(2) of Direction 65 provided that there were three Primary Considerations which it was required to take into account, namely:

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

(b) The best interests of minor children in Australia;

(c) Expectations of the Australian community.

(**Primary Considerations A, B** and **C** respectively)

1. Paragraph 14(1) of the Direction provides a non-exhaustive list of the **Other Considerations** required to be taken into account, as the Tribunal acknowledged at [21]. These included, relevantly:

(b) Strength, nature and duration of ties;

…

(e) Extent of impediments if removed.

1. As the Tribunal also acknowledged, the Direction “*sets out that the primary considerations should generally be given more weight than the other considerations and that one or more considerations may outweigh other primary considerations*” (TR at [22] (referring to paras 8(4) and (5) of Direction 65)).
2. ***Thirdly***, the Tribunal summarised Mr Matthews’ contentions and evidence, as well as the evidence of Colt and Mr Matthews’ mother (TR at [23]-[30]). In this regard, the Tribunal noted that the legal representatives for Mr Matthews and the Minister were agreed that the main point of difference between them was the risk of Mr Matthews re-offending (TR at [30]).
3. The Tribunal then turned to consider the merits of the decision under review, applying Direction 65 (TR at [39]).
4. The Tribunal found that Primary Consideration A (protection of the Australian community) weighed against revocation of the cancellation decision (TR at [63]). In reaching that view, the Tribunal took into account the following matters:
5. Mr Matthews’ offending was “*serious and violent*” (noting that he accepted that his offending was serious) (at [41]-[45]);
6. under Direction 65, violent crimes are to be viewed “*very seriously*” (at [46]);
7. Mr Matthews had a lengthy criminal history;
8. later offences committed by Mr Matthews were to be viewed “*very bleakly*” given his failure to heed warnings given by sentencing judges and by the Department (at [47]-[54]);
9. despite efforts at rehabilitation, there remained a risk of Mr Matthews re-offending even though the Tribunal did not accept that this risk was very high (at [60]-[62]); and
10. given the violent nature of his past crimes, ***any*** risk of this type of offending recurring was unacceptable (at [62]).
11. The Tribunal further found that Primary Consideration C (expectations of the Australian community) weighed “*heavily*” against revocation of the cancellation decision (TR at [66]-[68]), while Primary Consideration B (the best interests of minor children) was not relevant in Mr Matthews’ case (TR at [64]-[65]).
12. With respect to Other Considerations, the Tribunal relevantly found that:
13. the strength, nature and duration of Mr Matthews’ ties to Australiaweighed in favour of revocation of the cancellation decision (TR at [70]-[71]); and
14. with respect to the extent of impediments if removed to New Zealand, Mr Matthews would not face any significant language or cultural barriers and, notwithstanding his criminal offending, had acquired valuable practical skills that would open up opportunities for employment in New Zealand (TR at [74]-[75]).
15. We expand upon the Tribunal’s reasons for so finding later in the context of considering ground 1 of the notice of appeal.
16. The Tribunal concluded that the Primary Considerations of the protection of the Australian community and the expectations of the Australian community outweighed the Other Considerations which were either neutral or in favour of revocation of the cancellation decision. As such, the Tribunal affirmed the decision not to revoke the decision to cancel Mr Matthews’ visa, concluding that:

76. … the nature and seriousness of Mr Matthew’s offending, and the fact that there is some risk of reoffending, weigh against revoking the mandatory cancellation of his visa. These considerations outweigh the considerations in this matter that might weigh in his favour or weigh neutrally. The Tribunal is not bound only to consider the stipulations framed in [Direction 65] and also takes into account, as set out above, the fact that Mr Matthews knew his visa had been in danger of cancellation before and also knew that on that occasion the discretion had been exercised in his favour with the injunction that he cease his record of offending. That he did not heed that warning is to be lamented, and has led to an outcome that no doubt will have a significant effect on the Applicant and his family. But the conclusion of the Tribunal is that refusal to revoke mandatory cancellation of the Applicant’s visa is the correct decision in law and the preferable decision in terms of the discretion available to the decision maker.

###### The decision of the primary judge

1. At first instance, Mr Matthews contended, in essence, that the Tribunal did not have adequate regard to the length, nature and strength of his ties to Australia contrary to para 14.2 of Direction 65 and, in particular, to the evidence from Mr Matthews’ family about the father-like role which he held within the family. That contention was rejected by the primary judge and the application dismissed for reasons which his Honour summarised as follows:

3. I accept that the Tribunal apparently overlooked letters provided by two of the applicant’s younger brothers, Cody and Tarran. However, in circumstances where the Tribunal considered and accepted separate evidence from the applicant’s mother, and the applicant’s brother, Colt, regarding the role of the applicant to their family, my view is that the Tribunal’s apparent failure to have regard to the letters from Cody and Tarran did not amount to a jurisdictional error.

##### DID THE TRIBUNAL FAIL TO HAVE REGARD TO RELEVANT CONSIDERATIONS OR MATERIAL (GROUND 1)

###### Relevant principles

1. The relevant principles were not in issue and may be summarised as follows.
2. ***First***, the burden lies upon the appellant to demonstrate jurisdictional error: *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) 258 CLR 173 at [24] (French CJ, Bell, Keane and Gordon JJ).
3. ***Secondly***, the appellant’s representations made pursuant to the invitation under s 501CA(3) must be considered by the Minister and, therefore, by the Tribunal on review standing in the Minister’s “shoes”. As such, the representations constitute a mandatory relevant consideration: *Minister for Home Affairs v Buadromo* [2018] FCAFC 151;(2018) 267 FCR 320 (***Buadromo***)at [41] (the Court). However, as the Full Court further explained in *Buadromo*, “*they* *are a mandatory relevant consideration* ***as a whole*** *and not as to the individual statements contained in the representations*”: ibid (emphasis added); see also e.g. *Navoto v Minister for Home Affairs* [2019] FCAFC 135 (***Navoto***) at [84] (the Court); and *Minister for Home Affairs v Omar* [2019] FCAFC 188; 373 ALR 569 (***Omar***) at [34 (e) and (g)] (the Court).Consistently with this,it is generally unnecessary for the Tribunal to refer to every piece of evidence or contention advanced by the appellant:  *Buadromo* at [48]-[49]; *Navoto* at [88].
4. ***Thirdly***, it was not in issue that the Tribunal was bound by Direction 65 and therefore required to have regard to the Primary and Other Considerations identified in the direction. As such those considerations were also relevant considerations in a jurisdictional sense.
5. ***Fourthly***, as the Full Court held in *Navoto:*

85. … if a decision-maker under s 501CA(4) of the Act overlooks a substantial, clearly articulated argument advanced as demonstrating a reason why a cancellation decision should be revoked, which if accepted would or could be dispositive of the decision, the decision-maker may, depending on the seriousness of the error, commit a jurisdictional error…

1. Furthermore, the Tribunal is required to give active intellectual or meaningful consideration to “*a substantial, clearly articulated argument*” to the effect described: *Navoto* at [87]; *Omar* at [34 (i)] and [36]-[37].
2. In the ***fifth*** place, among other things the appeal raises the question of whether it is to be inferred from the absence of any reference to the letters from Cody and Tarran that the Tribunal overlooked that evidence. It is well established that the question of what inferences should be drawn from the Tribunal’s written reasons must take into account the statutory context within which the reasons were produced: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 (***Yusuf***).
3. In this case, the source of the Tribunal’s obligation to provide reasons was s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**). Importantly, s 43(2B) provided with respect to the content of written reasons that:

Where the Tribunal gives in writing the reasons for its decision, those reasons ***shall*** include ***its*** findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

(emphasis added)

1. Thus, the obligation upon the Tribunal is to set out its findings on those questions of fact which the Tribunal subjectively considered to be material: *Minister for Home Affairs v Ogawa* [2019] FCAFC 98; (2019) 269 FCR 536 at [103] (the Court). It follows, as Gleeson CJ explained in *Yusuf* that, if the Tribunal’s reasons do not set out a finding on a question of fact, “*that will indicate that it made no finding on that matter, and that in turn, may indicate that the Tribunal did not consider the matter to be material*”: *Yusuf* at [5]; see also at [69] (McHugh, Gummow and Hayne JJ)) and *Omar* at [34(d)] (the Court). Conversely as Gleeson CJ also explained, “*[b]y setting out its findings, and thereby exposing its views on materiality, the Tribunal may disclose a failure to exercise jurisdiction, or error of a kind falling within a ground in s 476(1) other than s 476(1)(a), or may provide some other ground for judicial review*” (*Yusuf* at [10]).
2. ***Finally***, the inference that the Tribunal has not mentioned a matter because it did not regard it as material may be displaced by other considerations. As Perram J explained in *SZTMD v Minister for Immigration and Border Protection* [2015] FCA 150; (2015) 150 ALD 34 (***SZTMD***) (in a passage approved by the Full Court in *HSKJ* at [44]):

19. The inference in *Yusuf* is not mandatory. The manner in which a statement of reasons is drawn, or even its surrounding context, may provide material which detracts from, or even displaces, the inference. For example, there may be country information which was available to the Tribunal which is so obviously relevant that it is unthinkable that the Tribunal would not have referred to it if it had actually considered it. There is nothing, however, like that in this case. The applicant’s argument did not move beyond the generality of the claim that the material was not considered to any detailed analysis of what that might signify. In those circumstances, there is no good reason not to draw the *Yusuf* inference. Once that occurs it seems to me that I cannot avoid the conclusion that the Tribunal did address itself to the issue of the relevance of the material and decided that it was irrelevant.

See also *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16; 309 ALR 67 at [34] (the Court).

###### Did the Tribunal fail to give meaningful consideration to the strength, nature and duration of Mr Matthews’ ties to Australia?

1. Counsel for Mr Matthews submitted that the Tribunal failed to give meaningful consideration to the strength, nature and duration of his ties to Australia in a number of respects in accordance with the principles outlined above and despite this being a relevant consideration identified in Direction 65.

Mr Matthews’ age

1. The appellant accepted that the primary judge correctly observed that the Tribunal mentioned the date of his arrival in Australia and “*was aware that the appellant had spent most of his life in Australia since arriving as a young child*” (primary judge at [35]). However he submitted that the Tribunal did not engage in an active intellectual manner with “*the specific young age at which the Appellant arrived in Australia, nor the specific length and proportion of his life which he had spent in Australia*” (appellant’s submissions at [31]) and that the primary judge erred in finding that the Tribunal had considered the ***implications*** of this fact as required by para 14.2 of Direction 65 and para 6.3(5) (**Principle 5**) of the Direction. Principle 5 provided that:

Australia ***may*** afford a higher level of tolerance of criminal or other serious conduct in relation to a noncitizen who has lived in the Australian community for most of their life, or from a very young age.

(emphasis added)

1. The submission must be rejected.
2. First, it is true that the Tribunal’s reasons did not expressly refer to the fact that Mr Matthews arrived in Australia as a young child in the context of considering the strength, nature and duration of his ties under para 14.2 of Direction 65. Nonetheless, the Tribunal commenced its consideration of this Other Consideration at [70] of its reasons by acknowledging that “*[a]s mentioned above, Mr Matthews has resided in Australia since 1989*.” This could be understood only as a reference to the Tribunal’s reasons at [1] where it not only referred to Mr Matthews having arrived in Australia in 1989, but also to the fact that he was born in 1983. Furthermore, at a number of points in its reasons, the Tribunal referred to the young age at which Mr Matthews commenced and continued his offending: see e.g. TR at [62] and [70].
3. Nor was the age at which Mr Matthews arrived in Australia given any prominence in his material before the Tribunal. The submission by Mr Matthews’ legal representatives to the Department dated 16 February 2016 simply referred to his young age when he arrived in Australia with his mother and that he has remained here ever since (AB78), as did his hand-written statement (AB101). As such, there was no substantial, clearly articulated submission advanced to the Tribunal by Mr Matthews regarding the young age at which he arrived in Australia as demonstrating a reason why the cancellation decision should be revoked, let alone a submission as to the implications of this fact for his application for review of the delegate’s decision. No issue is taken in this regard with the Tribunal’s finding at [30] that the principal issue between Mr Matthews and the Minister concerned the risk that Mr Matthews might re-offend: see above at [19].
4. It follows that, while the Tribunal did not expressly state that Mr Matthews arrived in Australia as a young child, we agree with the Minister’s submission that, by not giving this factor particular prominence in its reasons, it cannot be inferred that the Tribunal failed to consider Mr Matthews’ representations as a whole; nor can it be inferred that the Tribunal failed to consider a significant, clearly articulated argument by Mr Matthews on this issue as demonstrating why the automatic cancellation of his visa should be revoked (respondent’s submissions at [36]).
5. Secondly, insofar as the appellant submits that the Tribunal failed to meaningfully consider the age at which he arrived in Australia having regard to Principle 5, it is clear that the Tribunal was aware of the principle because it quoted the principle earlier in its reasons at [18] in the context of setting out salient aspects of Direction 65. However, it may be inferred that the Tribunal did not consider that Principle 5 ought to be given any real weight in Mr Matthews’ case, given in particular the seriousness and violent nature of his prior offending and the finding that the risk of this type of offending recurring was “*unacceptable*”. In this regard, the finding of an unacceptable risk must be read in particular in the context of para 6.3(4) (**Principle 4**) which provides that:

In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that ***any*** risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.

(emphasis added; see also para 6.2(1))

1. As such, it may be inferred that the Tribunal did not consider that the fact that Mr Matthews had resided in Australia for most of his life from a young age was material as against the unacceptable risk that he might re-offend in a similarly serious and violent manner.
2. In this regard, it is important to emphasise that the express purpose of Direction 65 is “*to* ***guide*** *decision-makers performing functions or exercising powers under section 501 of the Act*” (para 6.1(4), Direction 65; emphasis added). It remains the task of the Tribunal to determine what is and is not relevant in the circumstances of the individual case. Thus, as Perram J held by analogy in ***SZTMD*** (in a passage also approved in *HSKJ* at [44]):

20 Although the applicant did not directly raise the issue, I would indicate that I accept Mr Hume’s submission that it was for the Tribunal to form an opinion as to what was relevant under cll 2 and 3 [of Ministerial Direction 56 made under s 499 of the Act] and what was not. The usual way of reading provisions such as these clauses is that they are construed as requiring the formation by the decision-maker of an opinion on the standard (here, relevance) imposed; that is to say, they are not generally construed as requiring the existence of a jurisdictional fact: see, for example, *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456 at 466-468 (FC). Consequently, there is no occasion to consider whether this Court is of the opinion that there were relevant parts of the guidelines or country information. It is the Tribunal’s views on relevance which matter, not those of this Court.

Letters from Mr Matthews’ family

1. As earlier explained, the appellant also contends that the Tribunal failed to have regard to representations made by his family in support of the revocation of the automatic cancellation of his visa.
2. The relevant passages from the Tribunal’s decision appear under the heading “*Other consideration: Strength, nature and duration of ties (paragraph 14.2)*”:

70. As mentioned above, Mr Matthews has resided in Australia since 1989. His mother lives here, and he has three brothers who live here, all of whom are Australian citizens. He began offending in 1998 when he appeared before the Children’s Court, aged just 15. He has made a positive contribution to the Australian community in his work, and seems to have held certain positions of responsibility in a number of jobs when gainfully employed.

71. There was ample written and oral evidence from Mrs Matthews and Mr Colt Matthews that they would be significantly affected should Mr Matthews not be able to remain in this country. The Tribunal accepts this evidence and, on balance, finds that this consideration weighs in favour of revoking the mandatory cancellation of Mr Matthews’ visa.

1. The appellant argues ***first*** that the primary judge wrongly held at [40] that the Tribunal gave sufficient consideration to the letters from Mr Matthews’ mother and Colt. However, as the primary judge held at [40], these letters were not lengthy and, while the Tribunal did not expressly refer to every aspect of the letters, “*it accepted the crux of their evidence – that they would be significantly affected should the applicant not be permitted to stay in Australia*.” In so holding, the primary judge was plainly correct. As we have earlier explained, it is not necessary for the Tribunal to refer to every piece of evidence or contention advanced by the appellant: see above at [29]. Nor does the brevity of the Tribunal’s consideration of that evidence at [70]-[71] in contrast to its consideration of Primary Considerations A and C demonstrate otherwise, contrary to Mr Matthews’ submission. No doubt the Tribunal made detailed findings with respect to Primary Considerations A and C because it found that those considerations weighed against, and in the case of Primary Consideration C, “*heavily against*”, revocation of the mandatory cancellation of Mr Matthews’ visa. On the other hand, it accepted the evidence of Mr Matthews’ mother and Colt as to the impact upon them should Mr Matthews be unable to remain in Australia and therefore there was not the same need to set out detailed reasons on that issue.
2. ***Secondly***, the appellant submitted that the primary judge correctly inferred that the Tribunal failed to consider the letters from Cody and Tarran about him and their family’s links with him. However, the appellant submitted that the primary judge erred in finding that that error could not realistically have affected the Tribunal’s decision and was therefore not jurisdictional in nature. In support of this submission, the appellant pointed to additional factors in his favour including the positive contribution he had made when in prison through various positions of trust including helping new prisoners settle in, helping intellectually disabled prisoners deal with incarceration, and mentoring younger offenders (as referred to by the Tribunal at [33]). As such, the appellant contended that it could not be said that if the Tribunal had given proper consideration to the letters from Cody and Tarran and all of the evidence, it might not have weighed all of the factors differently.
3. Against this, the Minister submitted that:
4. the primary judge did not in fact infer that the Tribunal failed to consider the letters from Cody and Tarran, but merely proceeded on the assumption that it failed to do so in Mr Matthews’ favour;
5. in the alternative, if the primary judge found as a matter of inference that the Tribunal failed to consider the letters from Cody and Tarran, that inference was wrongly drawn; and, in any event,
6. the primary judge correctly held that any such error was not material and therefore no jurisdictional error was established.
7. As to the alleged inference drawn by the primary judge from the failure by the Tribunal to refer to the Cody and Tarran letters, the primary judge found that:

41. The Tribunal highlighted the evidence from the applicant’s mother and Colt, presumably because they, unlike Cody and Tarran, also gave oral evidence. Although I acknowledge that the Tribunal was not required to refer to every piece of evidence presented by, or on behalf of, the applicant, the letters from Cody and Tarran were material to which the Tribunal ought to have referred to in its reasons. The failure of the Tribunal to expressly refer to Cody and Tarran’s letters ***leaves open an inference that the Tribunal overlooked that material***.

1. While there is some force in the Minister’s submission, the better view is that the primary judge made a positive finding that the Tribunal overlooked the letters from Cody and Tarran, particularly given the his Honour’s more emphatic statement at the start of his reasons that “*[i]n summary,* ***I accept*** *that the Tribunal apparently overlooked letters provided by two of the applicant’s younger brothers, Cody and Tarran*” (emphasis added).
2. That being so, we agree, with respect, with the Minister’s proposition that his Honour thereby fell into error. Rather, given that the Tribunal expressly considered the letters from Mr Matthews’ mother and Colt from whom it also heard oral evidence and that the letters from Cody and Tarran were largely to the same effect, the natural inference to draw in the context of s 43B(2) of the AAT Act is that the Tribunal did not consider the letters from Cody and Tarran to be material. The fact that there may have been differences in terms of detail and emphasis in the letters from Cody and Tarran does not provide any sound reason not to draw the *Yusuf* inference: see by analogy *SZTMD* at [19] (Perram J) (quoted above at [36]).
3. ***Thirdly*** and in any event, the appellant correctly did not take issue with the proposition that an error will be jurisdictional only if it is material in the sense that there is a realistic possibility that it could have resulted in a different outcome: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; (2019) 264 CLR 421 (***SZMTA***) at [45] (Bell, Gageler and Keane J). However, the appellant submitted that the primary judge erred at [43] in finding that there was no such realistic possibility. To the contrary, the appellant submitted that:

The letters indicated a unanimity of the family members which may have increased the weight of the factor of the strength, nature and duration of the ties. Also the content of the letters, including the reference by Cody to the vital and important role of the Appellant as head of the family, and the statements by Tarran of the suffering he endured when separated from his brother the Appellant may have added considerably to the weight ascribed by the Tribunal to this consideration.

Further the letters of the brothers, as all of the material, noted the relevance of the family relationship to the hardship to be visited on the appellant if removed from Australia and his family. This is a necessary relevant consideration, both generally under 14(1) of the Direction, which notes that the list there set out is not exhaustive, and under 14.2. It must be a matter for active intellectual engagement to consider the hardship when strong family ties are ruptured, but the Tribunal has not done this at all in its reasons. Had it done so, it cannot be said that the weighting exercise must have resulted in the decision not to revoke the cancellation of the visa. Here it is notable that the Tribunal accepted that there was “a risk” but not “a very high risk” of the Appellant reoffending.

1. The primary judge held at [43] that the Tribunal’s apparent failure to consider the letters from Cody and Tarran would not amount to jurisdictional error because there was no realistic possibility that they would have resulted in a different outcome for the following reasons (at [42]):

(a) the importance of the applicant being a father figure and the head of the family was expressly referred to in the representations made by the applicant’s mother and Colt. The Tribunal accepted their evidence. The representations by Cody and Tarran regarding the applicant’s role in the family do not add anything of substance to the representations made by the applicant’s mother and Colt;

(b) having regard to the evidence provided by the applicant’s mother and Colt, the Tribunal recognised that they would be significantly affected should the applicant be removed to New Zealand. The Tribunal accordingly held that the strength, nature and duration of the applicant’s ties to Australia weighed in favour of the revocation of the cancellation of his visa; and

(c) despite this, the Tribunal found that the primary considerations of the protection of the Australian community and the expectations of the Australian community outweighed the considerations (including the applicant’s ties to Australia) that weighed in favour of revocation or otherwise weighed neutrally.

1. No error is apparent in the primary judge’s reasons for so holding. As his Honour held, the letters from Cody and Tarran only briefly addressed Mr Matthews’ role in his family and did not say anything different in substance on the issue from that said by Mr Matthews’ mother and Colt in their letters: see by analogy *SZMTA* at [71]. For example, Mr Matthews’ mother explained her pain and suffering from knowing that she could “*lose her beloved son at any moment*’, that Mr Matthews “*stands as the head and cornerstone of our family unit*”, and that when Mr Matthews was with the family, he assisted the home and his mother financially and provided her with support (AB107). Similarly, Cody said that Mr Matthews’ deportation would “*only bring pain, heartache, depression and destruction to our family*,” would leave his mother “*distraught and heartbroken*”, and that his family loved him and needed him with them “*as part of this small family and as it’s head*” (AB 108). Tarran also referred to Mr Matthews as having become the “*Father figure of our house*” for him following his father’s death (AB 110).
2. In those circumstances and given that the Tribunal accepted the evidence of Mr Matthews’ mother and Colt as to the effect upon his family if Mr Matthews were returned to New Zealand, it was unnecessary for the Tribunal to expressly address every piece of evidence on that issue as a matter of law.
3. Furthermore, with respect to the submission that the letters from Tarran and Cody, “*as all of the material, noted the relevance of the family relationship to the hardship to be visited on the appellant if removed from Australia*”, as well as upon his family, there is nothing to suggest that the Tribunal overlooked that impact. In particular, at [34], the Tribunal summarised Mr Matthews’ own evidence that if he were deported “*his mother and brothers would not follow him and that he had no family or other support in New Zealand*”.
4. It cannot therefore be said that there was a realistic possibility that the Tribunal would have reached a different conclusion even on the assumption that it overlooked the letters from Cody and Tarran. Rather, the appellant ultimately seeks impermissibly to take issue with the merits of the Tribunal’s decision.

##### SHOULD LEAVE BE GRANTED TO RAISE GROUND 2 OF THE NOTICE OF APPEAL?

1. The second ground raises a new ground not raised before the primary judge. As such, the appellant requires leave in order to raise it on the appeal. The principles governing the grant of leave in such a case are conveniently summarised in the oft-quoted passage from the Full Court in *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 158; (2004) 238 FCR 588 as follows:

46. … Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interests of justice to do so: *O’Brien v Komesaroff* (1982) 150 CLR 310; *H v Minister for Immigration & Multicultural Affairs*; and *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at [20]-[24] and [38].

47. In *Coulton v Holcombe* (1986) 162 CLR 1, Gibbs CJ, Wilson, Brennan and Dawson JJ observed, in their joint judgment, at 7:

“It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish.”

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. In our view, the proposed ground of appeal has no merit. There is no justification, therefore, for permitting it to be raised for the first time before this Court.

(Approved e.g. in *Murad v Assistant Minister for Immigration and Border Protection* [2017] FCAFC 73;(2017) 250 FCR 510 at [19] (Griffiths and Perry JJ); and *Vu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 90 (***Vu***) at [42] (O’Callaghan J, Katzmann and Stewart JJ agreeing at [1] and [69] respectively).

1. Leave to raise the new ground should be refused.
2. First, no explanation has been given for the failure to raise ground 2 at first instance, despite the appellant having then been represented by Senior Counsel. The fact that Mr Matthews is now represented by different counsel is not of itself sufficient: *Vu* at [41] and the authorities there cited.
3. Secondly, in support of the ground, the appellant submitted that the Tribunal’s decision was unreasonable “*having regard to all the evidence and the circumstances of the Appellant relating to the strength, nature and duration of his ties to Australia as required by 14.2 of Direction*” (applicant’s submissions (**AS**) at [40]). Specifically, in order to act reasonably, the appellant submitted that:

Such consideration would have required attention to the hardship to the Appellant, his tender years on arrival in Australia, his spending about 85% of his life in Australia, and the hardship to all members of his immediate family. It is respectfully submitted that in a situation where the risk of reoffending was found by the Tribunal not to be “very high”, and in all the circumstances, the decision was not reasonable.

Putting the submission another way, if the Tribunal had had regard to all relevant considerations as submitted above, it would not have made the decision.

(AS at [41]-[42])

1. The appellant’s submission fails to identify any specific respect in which the Tribunal’s process of reasoning was irrational, illogical or unreasonable; it can be put no higher than an expression of strong disagreement with the Tribunal’s decision and, in particular, the weight given by the Tribunal to particular factors including the risk of re-offending. However, that does not suffice to establish legal unreasonableness. Rather, as Crennan and Bell JJ explained in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611:

135. … Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.

1. This is not a case where that high standard is met. To the contrary, as the Minister submitted it was plainly open to the Tribunal to conclude that the only Primary Considerations which were relevant weighed against revocation of the cancellation decision and that these considerations outweighed the Other Considerations in favour of revocation. This is particularly so where Direction 65 provided that in general Primary Considerations should be given greater weight than Other Considerations, and in circumstances where Mr Matthews had committed serious and violent offences attracting a lengthy sentence of imprisonment despite the earlier warning from the Department. As such, the appellant ultimately invites the Court to substitute its own view of the merits of the request for revocation of the cancellation decision for that of the Tribunal and must therefore fail.
2. It follows for these reasons that leave to raise ground 2 must be refused.

##### CONCLUSION

1. For the reasons set out above, leave to raise new ground 2 of the notice of appeal is refused and ground 1 is not established. As such, the appeal is dismissed with costs.

|  |
| --- |
| I certify that the preceding sixty-seven (67) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Middleton, Perry and O’Bryan. |

Associate:

Dated: 26 August 2020