Federal Court of Australia

Seau v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 176

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| Review of:  | *Pritchard Junior Seau v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 3430 |
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| File number(s): | NSD 935 of 2022 |
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| Judgment of: | **RARES J** |
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| Date of judgment: | 13 February 2023 |
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| Catchwords: | **MIGRATION** – application for constitutional writ relief in respect of decision of the Administrative Appeals Tribunal under s 501CA(4) of the *Migration Act 1958* (Cth) to affirm decision of delegate not to revoke cancellation of visa under s 501(3A) – whether Tribunal took into account in considering best interests of a minor child in Australia, without expressly mentioning them in its reasons, either psychologist’s report on effect on minor child that separation from applicant might have, or child’s known views, as required by pars 8.3(4)(d) and (f) of Direction 90 made under s 499 of the *Migration Act* – whether Tribunal’s failure to take those factors into account material jurisdictional error – held: Tribunal decision set aside. |
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| Legislation: | *Administrative Appeals Tribunal 1975* (Cth) s 43*Migration Act 1958* (Cth) ss 430, 499, 500, 501, 501CA |
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| Cases cited: | *Cowgill v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1337*East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986)162 CLR 24*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323*Nathanson v Minister for Home Affairs* (2022) 403 ALR 398*Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417*R v Hunt; Ex Parte Sean Investment Pty Ltd* (1979) 180 CLR 322*Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153*Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 |
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| Date of hearing: | 13 February 2023 |
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| Counsel for the applicant: | Mr S Stagliorio |
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| Solicitor for the applicant: | Northam Lawyers |
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| Solicitor for the first respondent: | MinterEllison |

ORDERS

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|  | NSD 935 of 2022 |
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| BETWEEN: | PRITCHARD JUNIOR SEAUApplicant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| order made by: | RARES J |
| DATE OF ORDER: | 13 FEBRUARY 2023 |

THE COURT ORDERS THAT:

1. The decision of the second respondent made on 18 October 2022 be set aside.
2. The applicant’s application for review of the decision made by the first respondent by his delegate on 22 July 2022 be remitted to the second respondent for determination in accordance with law.
3. The first respondent pay the applicant’s costs.

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

REASONS FOR JUDGMENT

(Revised from transcript)

RARES J:

1. This is an application for constitutional writ relief in respect of the decision of the Administrative Appeals **Tribunal** given on 18 October 2022 to affirm the decision of a delegate of the Minister made on 22 July 2022 not to revoke the cancellation of a class TY special category (temporary) **visa** held by the applicant, Pritchard Junior **Seau**. Mr Seau’s visa had been cancelled mandatorily under s 501(3A) of the *Migration Act 1958* (Cth) because he was then in prison. He applied under s 501CA(4) for the cancellation decision to be revoked. He accepted that he failed the character test, but made submissions in accordance with s 501CA(4)(b) that there was another reason why the revocation should occur.
2. Mr Seau’s amended originating application for review of a migration decision sets out extensive particulars of the two grounds on which he relies, namely that the Tribunal failed to comply with its obligation under s 499(2A) of the *Migration Act* to take into account, as required by **Direction 90** made by the Minister under s 499, the considerations specified in, *first*, pars 8.3(4)(d) and (f) (relating to the best interests and views of his adopted niece, **T**, then aged 11), and, *secondly*, par 9.2(1)(a) (relating to his age and health, were he to be returned to New Zealand).

# The provisions of Direction 90

1. Relevantly, Direction 90 provides:

**7. Taking the relevant considerations into account**

(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.

(2) **Primary considerations should generally be given greater weight than the other considerations.**

(3) **One** or more primary considerations **may outweigh other primary consideration**s.

**8. Primary considerations**

In making a decision under section 501(1), 501(2) or 501CA(4), the following are primary considerations:

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

(2) whether the conduct engaged in constituted family violence;

**(3) the best interests of minor children in Australia;**

(4) expectations of the Australian community

(emphasis added)

1. Paragraph 8.3 requires a decision-maker to make a determination about whether, relevantly, non-revocation of the visa cancellation under s 501CA(4) is or is not in the best interests of a minor child affected by the decision. Importantly, pars 8.3(4)(d) and (f) provide:

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

…

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

…

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;

…

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

(emphasis added)

1. Next, par 9 relevantly provides:

**9. Other considerations**

(1) In making a decision under section 501(1), 501(2) or 501CA(4), other **considerations must also be taken into account,** **where relevant**, in accordance with the following provisions. These considerations include (but are not limited to):

…

b) extent of impediments if removed;

**9.2 Extent of impediments if removed**

(1) Decision-makers must consider the extent of any impediments that the noncitizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), **taking into account**:

a) **the non-citizen's age and health;**

…

(emphasis added)

# Background

1. Mr Seau is a national of New Zealand, having been born there in 1990. He first arrived in Australia as a minor in 2005, at which time he was granted the visa. Mr Seau’s family unit included his adoptive sister, **Ms CH**, her 11 year old daughter, T, and Ms CH’s mother, **Ms B**.
2. He was convicted of multiple offences in Australia between 2011 and 2021. He also had a driving conviction and another relatively minor conviction in New Zealand. His offending here became more serious in 2018, as reflected in the sentences he received. In 2021, he was sentenced on four counts of, relevantly, possessing a prohibited drug on three occasions, supplying a prohibited drug of an indictable, but less than commercial, quantity on a fourth occasion, and dealing with property that was the proceeds of crime worth less than $100,000. He was sentenced to an aggregate term of 20 months imprisonment, with a non-parole period of 12 months, reduced to 10 months on appeal.
3. Mr Seau conceded before the Tribunal that he was unable to satisfy the Tribunal that he passed the character test for the purposes of s 501CA(4)(b)(i), because he had a substantial criminal record as defined in s 501(7)(c) of the Act.

# The material before the Tribunal

1. Relevantly, Mr Seau’s statement of facts, issues, and contentions before the Tribunal referred to his background and circumstances, and under the heading, “Ms [CH] and her daughter [T]”, stated:

In light of the evidences **we present with this submission**, we submit that the removal of the applicant from Australia would inflict irreversible harm to the child.

The documents attached are self-explanatory. Given the very limited time available, **we prefer the evidences to speak for themselves**.

(emphasis added)

1. The statement annexed an index and 92 pages of material. This included three sets of documents listed in the index under T’s name, being: her birth certificate, a psychological assessment by Joanna **Kirlagitsi** on 20 September 2022 made shortly before the Tribunal hearing, and a group of documents comprising a birthday card to Mr Seau from T, two drawings on a card she had done for him, and another letter from her, apparently to the Tribunal.
2. Ms Kirlagitsi stated that, shortly before the report, T had attended two appointments for a mental health assessment and psychological therapy. She noted that T’s main supports in her life were her mother, grandmother (Ms B), and her uncle, Mr Seau. The report referred to a history given by Ms CH and stated that, following the death of her maternal grandfather, T had developed a very close bond with Mr Seau. It listed some of the ways in which Ms Kirlagitsi opined that he had made a positive contribution to T’s life, namely, looking after her daily, taking her to and picking her up from school, driving her to extracurricular activities, being a source of emotional support, demonstrating stability, as he was always there for her, both physically and emotionally, and being a significant figure in her life.
3. Ms Kirlagitsi recorded that she understood Mr Seau had been incarcerated for approximately the previous two years, and that T reportedly spoke with him every three weeks, but avoided visiting him in prison. She said:

It is of my opinion that [T] faces socio-emotional challenges, as well as symptoms consistent with low self-confidence and self-esteem, as well as perfectionism. **Mr Seau seems to be a significant source of social and emotional support for T, and his presence may aid in building her socio-emotional skills.**

(emphasis added)

1. The handwritten material from T included a birthday card which T had drawn and written on herself. On another card she depicted, in stick figures, herself, Mr Seau and a castle in which they apparently were to be located under what appears to be a sunny outlook and a rainbow. In a third drawing, the child depicted herself, her uncle, and a cat. In the birthday card she wrote, among other things:

I love you so much, and **wish that you were here to celebrate**, and so I **could give you presents**. **I will love you, no matter what happens**.

(emphasis added)

1. Last, the material included the following handwritten letter from T, apparently to the Tribunal:

Hi, My name is [T].

**Uncle Jay [Mr Seau] means the world to me**. Sometimes I enjoy McDonalds with him or we go shopping together. **Anything that I need or want, he is willing to get it for me, even if my mother is against it.** Every morning he takes time out of his day to drop me off at school. He originally moved in with us when I was 3 or 4. **He is like a dad to me, and means the world to me**. Every birthday he is there, with presents that he has taken the time to buy. **Every year, he watches closely to what I’m into.** On my 6th birthday, he organised a frozen themed cake.

(emphasis added)

1. Mr Seau raised a substantial number of matters in a reasonably well-articulated submission to the Tribunal. This included his claim that, were he removed to New Zealand, there would be an adverse effect on his relationship with his adoptive sister, Ms CH, and her child, T, would suffer harm.

# The Tribunal’s decision

1. The Tribunal reviewed Mr Seau’s criminal history, including the way in which he put his case before various sentencing courts concerning his own circumstances. Those included that, in 2006, his father had murdered his mother at the family home, while he was a minor. He claimed that, for obvious reasons, the murder had affected his mental health, traumatised him and caused him to leave New Zealand to reside here.
2. The Tribunal assessed, among other things, various reports as to Mr Seau’s past and relatively recent mental health, his attempts at rehabilitating himself away from his drug and alcohol dependence and his psychological state. Among other things, the Tribunal considered evidence of a psychologist, Ms **Hayek** and her recent report. Ms Hayek had opined that Mr Seau suffered from post-traumatic stress disorder and comorbid presentation of sedative hypnotic or anxiolytic use disorder, being moderate in sustained remission. She gave oral evidence to the Tribunal that there was a low risk of Mr Seau reoffending. The Tribunal found that certain inaccuracies in her report diminished its probative value and it gave limited weight to her opinions in light of its concerns about the accuracy of information given to her.
3. The Tribunal placed considerable weight on the facts that Mr Seau had completed several rehabilitation programs in the past, and that, on his and Ms Hayek’s evidence, he had gained insight into the effects of drug and alcohol use on his conduct. However, it found that, despite completing those intervention programs, they had not appeared to be successful in preventing his subsequent further offending. And, it found, he had been warned several times about the consequences of his conduct when being sentenced for his various offences, yet he continued to offend. The Tribunal considered that his promise to it that he had rehabilitated and would not reoffend further was unreliable and unpersuasive. It found that his recent participation in a program designed to reduce his risk of reoffending might not necessarily prevent that occurring, because he had abstained from drugs and alcohol as a result of conditions during detention. It found that a considerable motivation for his committing his more recent drug offences was to make money. It found that at least some of his offending did not appear to be caused by, or stem from, his past trauma, but, rather, was motivated by personal gain. It considered that, despite his participation in rehabilitation programs, he may still, in the future, be motivated to reoffend if he decided that he needed money.
4. The Tribunal found that Mr Seau had multiple driving offences and that his undertakings in the future not to use drugs and alcohol and to abide by road rules had not been adequately tested, given his incarceration and subsequent immigration detention. It found that the risk of him reoffending remained and its occurrence may be dependent on his use of drugs and alcohol, which it reiterated had not been adequately tested at the time of its decision. The Tribunal found that, if Mr Seau were to reoffend, the risk to the Australian community would be significant, and, given the potential seriousness of offences involving drink driving, unlicensed driving and the use and supply of drugs, it concluded that the protection of the Australian community “weighs heavily against the revocation”.
5. Importantly, under the heading “The best interests of minor children in Australia”, the Tribunal stated (at [61]-[65]):

61. The applicant states in his submission to the delegate that he is the only father figure to his niece, T, who is an Australian citizen and whose father died before she was born. The applicant submits that his removal would mean that this Australian family would be seriously disadvantaged and it will ‘leave a dent’ in the upbringing of T. In oral evidence to the Tribunal the applicant had also described his relationship with T and the parental role he had in relation to the child. **The Tribunal is prepared to accept that evidence.**

62. There is before the Tribunal medical evidence relating to T’s mother, Ms CH, confirming that she has a number of health issues. The evidence is that the applicant has helped care for the child, looks after her during the school holidays, helps pick her up from school, etc. It is stated that the applicant is a father figure for the child. **The Tribunal accepts that evidence.**

63. As noted below, the Tribunal acknowledges the evidence provided to the Tribunal by T’s mother Ms CH and accepts the special circumstances surrounding the birth of T and her upbringing and the strong bond she has developed with the applicant. The Tribunal accepts that the applicant has a close relationship with the child. **The Tribunal accepts that prior to his incarceration, the applicant had cared for the child and had maintained a parental role. The Tribunal accepts the evidence of Ms CH about the relationship between the applicant and T.** Ms CH’s evidence to the Tribunal is that the applicant has also provided financial support to the child in the past and the Tribunal is prepared to accept that evidence. The Tribunal also acknowledges the evidence that the child’s mother and grandmother rely on the applicant and the Tribunal acknowledges that such reliance may be greater in circumstances where the child’s mother has been diagnosed with several mental health conditions. **The Tribunal is prepared to accept that if the applicant’s removal from Australia would adversely affect T’s mother and grandmother, their well-being would also be relevant to T’s own well-being.**

64. **In all these circumstances, the Tribunal has formed the view that it is in the best interests of T that the cancellation of the applicant’s visa be revoked. This weighs heavily in favour of the revocation**.

65. The applicant refers to another Tribunal decision where it was found that the best interests of a child outweighed other considerations. The Tribunal acknowledges that evidence but must determine each case on its own facts and the weight to be given to different considerations would be different in each case because the facts of each case are different.

(emphasis added)

1. The Tribunal considered that the primary consideration of the expectations of the Australian community also “weigh against revocation”. It found that, while the community would feel a great deal of compassion and empathy in relation to a person with Mr Seau’s experiences, it had to have regard to his conduct. It found that the community would expect that Mr Seau should not hold a visa, because of his repeated offending behaviour over a number of years, violent conduct in relation to another person in an offence committed in New Zealand in 2008, and reoffending after receiving multiple warnings from various sentencing courts, combined with the potential harm to the community from drug offences.
2. Under the heading, “Extent of impediments if removed”, the Tribunal accepted that Mr Seau would not receive social, medical and/or economic support in New Zealand, but found that there would be no language or cultural barriers to his return. It found that Mr Seau, with some breaks, had been employed throughout his stay in Australia. It accepted his oral evidence that he would have no difficulties obtaining employment in New Zealand. It found that he would have no difficulties in establishing himself and maintaining basic living standards in that country.
3. It noted that the listing in Direction 90 of the factors that it had to consider was not exhaustive. It also considered other impediments, were Mr Seau removed, including the impact on his partner and the fact that both of them wanted to have children together, but that she would not accompany him to New Zealand were he removed. It found that considerable hardship would be caused to Mr Seau’s partner if he were removed.
4. The Tribunal considered a psychological report in relation to the partner. It accepted that she had some significant or severe psychological conditions, including PTSD symptoms. It accepted that Mr Seau was in a close relationship with both his Australian family and his partner.
5. It also accepted evidence of Mr Seau’s adoptive sister, Ms CH, about the close relationship that he had developed with T, and found that his departure from Australia might have a detrimental effect on his adoptive family. It summarised the evidence of Ms CH, including that, after her grandfather passed away, Mr Seau came into her and T’s lives and quickly developed a close relationship with both, taking T to and from school, playing and reading with her and having a parental role in her life. It found that Mr Seau and Ms CH had discussed and made decisions about T’s wellbeing together. It found that Ms CH had expressed the view that if Mr Seau were to leave Australia, it would “‘destroy’ her daughter”.
6. The Tribunal then referred to a psychological report prepared in relation to Ms CH and the range of complex mental health difficulties that she had experienced, including generalised anxiety disorder, major depressive disorder in the context of PTSD, and meeting the diagnostic criteria for borderline personality disorder that impacted on her functioning and wellbeing.
7. The Tribunal also considered a statement prepared by Mr Seau’s adoptive mother, Ms B, that she had addressed to a sentencing judge. She described how she too relied on Mr Seau to pick T up from school at short notice, to look after her during school holidays, and how both she and Mr Seau relied on each other during tough times. It noted Ms B’s evidence that Mr Seau was a father figure for her granddaughter, T, who had not known her father (because he had died while her mother was pregnant) and, since the passing of T’s grandfather, Mr Seau had always been there for T. Ms B referred to her own health and age, and her feeling that her continuing support for her daughter, T’s mother, was getting “too much” as she aged. It noted Ms B’s evidence that, were Mr Seau removed, there would be a significant impact on T and that both Ms CH’s and her (Ms B’s) mental health would be set back. Tribunal said at [100]:

100. Having regard to the above evidence, **the Tribunal accepts that if the applicant is removed from Australia, it would result in** separation of the applicant from his family in Australia and **cause significant hardship to his family in Australia**. While the Tribunal acknowledges that the applicant will be able to maintain electronic contact with his family in Australia, the nature of relationships will necessarily be different to what could exist when the applicant is near his family in Australia. **The Tribunal accepts that there would be a significant impediment to the applicant and others if he is removed** from Australia. **This weighs heavily in favour of the revocation**.

(emphasis added)

1. The Tribunal found that Mr Seau had resided in Australia since he was 17 years old, had come here because of the murder of his mother in 2006, his father’s subsequent imprisonment in New Zealand, and that he had been in continuous employment with his current employer since 2013 up to his imprisonment.
2. The Tribunal accepted that Mr Seau had a genuine and ongoing relationship with his partner, that he had formed strong ties to Australia, including, among others, family, social, and employment, and that this factor weighed in favour of revocation. It noted:

111. The applicant’s representative submits that the applicant is a person with disability and that the Convention on the Rights of Persons with Disabilities applies to the applicant. As noted above, the Tribunal accepts the evidence in the various professional reports and accepts that the applicant has mental health issues. That evidence is not in dispute. The Tribunal has regard to that evidence when reaching its decision. Even if the Convention on the Rights of Persons with Disabilities applies to the applicant, it cannot prevent the lawful operation of the Australian law.

1. In explaining its conclusions, the Tribunal said:

114. The Tribunal has formed the view that the applicant had committed serious offences, in particular, the drug offending, and that there remains a risk of reoffending. The nature of the offending and the applicant’s general disregard for the law evident from persistent offending, including while on bond not to reoffend, are such that his conduct is against the expectations of the Australian community. **The Tribunal has formed the view that the protection of the Australian community and the expectations of the Australian community weigh heavily against the revocation. These are primary considerations and the Tribunal gives these significant weight.**

115. **The other primary consideration**, the best interests of a minor child in Australia, **weighs strongly in favour of the revocation**. In this case, **the Tribunal accepts that the applicant’s niece would be adversely affected** if the applicant was to leave Australia and **she may also be affected if her mother and grandmother are affected by the non-revocation of the applicant’s visa**.

116. With respect to other considerations, the Tribunal accepts that the applicant has significant ties in Australia, in particular the presence of his adoptive sister and niece, mother and partner. He has been employed in Australia and has formed social and employment ties in this country. The applicant has been living in Australia since he was a minor and came to Australia to avoid what would have been a very difficult situation in New Zealand. The Tribunal has formed the view that there would be significant impediment to the applicant and others if the applicant is removed from Australia and **that weights strongly in favour of revocation**.

…

118. **Overall**, the Tribunal acknowledges the significant impediment to the applicant and others if he is removed from Australia, his strong ties to Australia **and, most significantly, the best interests of a child** and these **are all factors that weigh in favour of the revocation. However, in the particular circumstances of this case**, the Tribunal has decided to **give greater weight to the protection of the Australian community and the expectations of the Australian community**. The Tribunal has formed the view that the applicant has engaged in serious and repeated conduct and that there remains a risk of reoffending (**even if the risk is not significant**). The Tribunal has decided that, in all the circumstances of this case, **these two primary considerations should be given greater weight**. The Tribunal has decided that the decision under review should be affirmed.

# The parties’ submissions

1. Mr Seau argued in support of ground 1 that at no point in the Tribunal’s reasons did it refer to any material in the evidence before it from either the psychologist, Ms Kirlagitsi or T, despite his reliance on that material and their relevance to the consideration of the factors in pars 8.3(4)(d) and (f) of Direction 90.
2. The Minister argued that ground 1 should fail because of the Tribunal’s findings (in par 64) in favour of Mr Seau that the best interests of T “weigh[ed] heavily in favour of the revocation”. He submitted that it could not be inferred that the Tribunal had overlooked the views of T in its consideration of her best interests or the likely effect any separation from Mr Seau would have on her. The Minister argued that the Tribunal should be taken as having accepted T’s views “sub silentio”. However, he accepted that Mr Seau had made plain that he relied on T’s views in the hearing before the Tribunal. He contended that it could be inferred that, despite it not mentioning the evidence of the psychologist or T, the Tribunal had had regard to those matters as mandated by pars 8.3(4)(d) and (f) in its favourable findings in pars 61-64, relying on *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417 at 425-426 [24]-[27].
3. The Minister sought to distinguish *Cowgill v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1337 on the basis that, there, although the Tribunal did not refer in its reasons to the written evidence of the applicant’s 13-year-old daughter, A, it had only given moderate weight in favour of revocation to her best interests as a result of a number of factors adverse to that applicant on that issue. The Minister pointed out that, in that case, A had written a letter, in somewhat more detail than T, in which she referred twice to the effect deportation of Mr Cowgill would have on her. He argued that in those circumstances, it was open to Rangiah J to reason that the Tribunal’s failure to take into consideration or advert expressly to the daughter’s evidence was a jurisdictional error that was material.
4. The Minister contended that, here, in contrast to *Cowgill* [2022] FCA 1337, the Tribunal found (at par 64) that T’s bests interests weighed heavily in favour of revocation and (at par 115) those interests “[weigh] strongly in favour of the revocation”, she would be adversely affected if Mr Seau were to leave Australia and his departure may also affect T because of the impact of that on both her mother and grandmother. He submitted that in par 118, the Tribunal had acknowledged the significant impediments to Mr Seau and others were he to be removed, his strong ties to Australia and “most significantly, the best interests of a child” being all factors that weighed in favour of revocation. He argued that any failure to refer expressly to either the known views of T or Ms Kirlagitsi’s evidence could not be found to have been material to the Tribunal’s overall decision-making in arriving at its ultimate finding to give greater weight to the protection of the Australian community and its expectations.
5. Mr Seau argued in support of ground 2 that the Tribunal had failed to deal with the effect on his mental or physical health or age as an impediment in accordance with its obligation under par 9.2(1)(a) of Direction 90. However, he accepted that he had not put to the Tribunal any submissions concerning, and made no reference to, the impact caused by his mental health were he to return to New Zealand and had not otherwise advanced any claim as to how his age or physical health bore on its decision-making.

# Consideration

## Ground 2

1. It is convenient to deal with ground 2 immediately. As I noted in the course of argument, par 9(1) of Direction 90 requires the matters in par 9.2(1)(a) to be taken into account “where relevant”. As Kiefel CJ, Keane, Gordon and Steward JJ said in *Plaintiff M1/2021* 400 ALR at 425-426 [22], [24]-[25] and [27]:

22. In determining whether they are satisfied that there is “another reason” for revoking a cancellation decision, the decision-maker undertakes the assessment by reference to the case made by the former visa holder by their representations.

…

24. Consistently with well-established authority in different statutory contexts, there can be no doubt that **a decision-maker must read, identify, understand and evaluate the representations**. Adopting and adapting what Kiefel J (as her Honour then was) said in *Tickner v Chapman* [(1995) 57 FCR 451 at 495], **the decision-maker must have regard to what is said in the representations**, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and **appreciate who is making them**. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker. And the decision-maker is not obliged "to make actual findings of fact as an adjudication of all material claims" made by a former visa holder.

25. It is also well-established that **the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness**.

…

27. None of the preceding analysis detracts from, or is inconsistent with, established principle that, for example, **if review of a decision-maker's reasons discloses that the decision-maker ignored, overlooked** or misunderstood **relevant facts or materials** **or a substantial and clearly articulated argument**; misunderstood the applicable law; or misunderstood the case being made by the former visa holder, **that may give rise to jurisdictional error**.

(emphasis added)

1. In my opinion, ground 2 has no substance. Mr Seau made no clearly articulated claim before the Tribunal that any of his age, mental or physical health either would affect him or create an impediment were he to be returned to New Zealand. In any event, the Tribunal had regard to his age in the course of its reasoning. It found that there would be significant impediments to him and others if he were removed from Australia that weighed heavily in favour of revocation. It also found that he would be able to find employment were he returned to New Zealand. However, it did not avert to those matters beyond its discussion of the impact of his past addictions to alcohol and drugs and the potential that they may or may not resurface in the context of future offending.
2. In my opinion, the case made by Mr Seau for revocation of the cancellation decision raised nothing to do with his age, mental or physical health were he to be returned to New Zealand.
Accordingly, par 9.2(1)(a) of Direction 90 did not require the Tribunal to take those matters into account because Mr Seau’s representation did not raise them as relevant: see *Plaintiff M1/2021* 400 ALR at 425-427 [22], [25]-[27]. Ground 2 fails.

## Ground 1

1. Where a statute, such as s 499(2A) of the *Migration Act*, requires a decision-maker to consider one or more factors as a primary consideration in arriving at a decision to exercise a power, the decision-maker must take each such factor into account and give it weight “as a fundamental element in making his determination”: *R v Hunt; Ex Parte Sean Investment Pty Ltd* (1979) 180 CLR 322 at 329, per Mason J.
2. In *Telstra Corporation Ltd v Australian Competition and Consumer Commission* (2008) 176 FCR 153 at 181-183 [103]-[112] (applied in *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at 242 [267] per Jacobson, Lander and Foster JJ), I explained how a legislative requirement to have regard to, or take into consideration, a matter as a primary consideration must be approached by a decision-maker. In such a case, the decision maker must take each matter that the statutory provision identifies into account as a fundamental or central element in making the decision. I held (at 181 [105]) that where the provision required more than one consideration to be taken into account, Mason J had explained:

…in his classic judgment in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41, in the absence of any statutory indication of the weight to be given to various considerations, **it is generally for the decision-maker and not the Court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising a statutory power**. Mason J said that **the Court could set aside an administrative decision which had failed to give adequate weight to a relevant factor of great importance**, or had given excessive weight to a relevant factor of no great importance, but the preferred ground on which that power was to be exercised was that the decision was “manifestly unreasonable”. **A person entrusted with a discretion must call his own attention to the matters which he is bound to consider***: Peko-Wallsend* 162 CLR at 39 per Mason J applying *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 228 per Lord Greene MR.

(emphasis added)

1. In *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at 244 [52], Gleeson CJ, Heydon and Crennan JJ said that where a decision-maker must consider matters prescribed by law, generally, he or she cannot“**jettison or ignore [some of] the factors** … or … give them cursory consideration only in order to put them to one side” (emphasis added).
2. Gummow and Hayne JJ concurred, observing at 256 [102]:

It was not enough for the ACCC to say in its final determination that it had considered those matters in the sense of having looked at but discarded them.

1. When evaluating the Tribunal’s reasons here, it is also important to be conscious of the constraints in undertaking judicial review, to which Brennan CJ, Toohey, McHugh and Gummow JJ adverted in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, namely:

… [A] court should not be "concerned with looseness in the language ... nor with unhappy phrasing" of the reasons of an administrative decision-maker (*Pozzolanic* (1993) 43 FCR 280 at 287). The Court continued (*Pozzolanic* (1993) 43 FCR 280 at 287): "The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.

These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed (see *McAuliffe v Secretary. Department of Social Security* (1992) 28 ALD 609 at 616).

1. In *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 346 [69] McHugh, Gummow and Hayne JJ explained the requirements of s 430 of the *Migration Act* (which is an analogue of s 43(2B) of the *Administrative Appeals Tribunal 1975* (Cth)) that the Tribunal give reasons for its decision. Relevantly, s 500(6G) of the *Migration Act* applies s 43(2B) to applications to the Tribunal, such as Mr Seau’s, to review the decision of a delegate under s 501CA(4) not to revoke a cancellation of a visa under s 501(3A)), and 43(2B) requires the Tribunal in giving its reasons to “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). Their Honours held that the legislative purpose of such a provision was to enable a person dissatisfied with a decision to know with certainty what the Tribunal’s reasons were for it “and what facts it considered material to that conclusion”. They said that (at 346 [69]) (referring to s 430 of the *Migration Act*):

Similarly, a court which is asked to review the decision is able to identify the Tribunal's reasons and the findings it made in reaching that conclusion. **The provision entitles a court to infer that any matter not mentioned in the**[**s 430**](https://anzlaw.thomsonreuters.com/Link/Document/FullText?refType=U7&docFamilyGuid=I8a98ac10ee9111e8af46ddc380776190&pubNum=1100190&originationContext=document&transitionType=DocumentItem&docVersion=Law+in+Force&ppcid=67762ddd78754a6687e6c680e6e36e97&contextData=(sc.UserEnteredCitation))**statement was not considered by the Tribunal to be material** (*Repatriation Commission v O'Brien* (1985) 155 CLR 422 at 446, per Brennan J; *Sullivan v Department of Transport* (1978) 20 ALR 323 at 348-349, per Deane J; at 353, per Fisher J; cf *Fleming v The Queen* (1998) 197 CLR 250 at 262-263 [28]-[29])….The Tribunal's identification of what *it* considered to be the material questions of fact **may demonstrate that it took into** **account** some irrelevant consideration or **did not take into account some relevant consideration** (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24).

(bold emphasis added; italic emphasis in original)

1. I reject the Minister's argument that the Tribunal considered, even if it did not mention either in its reasons, each of the material expressing T’s views and Ms Kirlagitsi’s opinion, as required by pars 8.3(4)(f) and (d), respectively.
2. By force of par 8.3(4)(f), the Tribunal must consider:

any **known views of the child** (with **those views being given due weight** in accordance with the age and maturity of the child)

(emphasis added)

1. Mr Seau had put to the Tribunal, in the annexure to his statement of facts, issues and contentions, T’s views, which she made known. She twice said in her letter to the Tribunal that her uncle, Mr Seau, meant “the world to me”. She said that “He is like a dad to me”. She identified how he impacted on her life and what a significant figure he was in it. In addition, her birthday card or letter to Mr Seau, expressed her love for him and implored that “I wish that you were here to celebrate” and that “I will love you no matter what happens”. The Tribunal did not state in its reasons whether or how it gave “those views … due weight” in accordance with pars 8.3(4)(f).
2. I agree with Rangiah J’s analysis in *Cowgill* [2022] FCA 1337 of the particular importance to a decision-maker’s approach, and performance of the evaluation task, in considering the child’s best interests in accordance with the mandatory primary consideration in pars 8.3(4)(f), namely that it have regard to the child’s own expression of the importance to him or her of the person seeking review of a decision affecting his or her visa. The decision-maker must do so in the manner that I explained in *Telstra* 176 FCR at 181-183 [103]-[112].
3. As Rangiah J identified in *Cowgill* [2022] FCA 1337 at [44], it is one thing to accept the evidence of parents or others close to a child as to how **they** perceive the removal of a person from Australia may affect the child, and another to have regard to the way in which the child, himself or herself, expresses that impact, having regard to the manner of expression and his or her age, as par 8.3(4)(f) requires. In *Cowgill* [2022] FCA 1337 at [44], his Honour found that, if the Tribunal had considered A’s letter:

…it would have been open to the Tribunal **to accord greater weight** to the daughter’s expression of her views about the effects of the removal upon her **than it did to her parents’ evidence**.

(emphasis added)

1. There, like here, the Tribunal accepted the evidence of adults as to the adverse impact on Mr Cowgill’s daughter, A, but it did not demonstrate in its reasons that it had taken into account her actual views, of which it knew, in accordance with par 8.3(4)(f) of Direction 90.
2. Moreover, the Tribunal made no mention in its reasons of T’s clearly expressed views, or of the evidence of the psychologist, Ms Kirlagitsi, in considering, as the Tribunal was required, the best interests of T, in relation to the consideration mandated in par 8.3(4)(d), namely, “[t]he likely effect that any separation from a noncitizen would have on the child”.
3. The psychologist’s report related directly to the particular effect on T of Mr Seau’s provision of social and emotional support for her as a growing child and her need for that support. That was an expert opinion as to the positive contribution Mr Seau had made to T’s life and that his presence “may aid in building her socio-emotional skills’.
4. The Tribunal had to consider, as required by par 8.3(4)(d), the likely effect of any separation taking into account the child’s and non-citizen’s ability to maintain contact in other ways. The psychologist made a case for Mr Seau’s physical presence as an important matter in the child’s life. Yet, in its reasons, the Tribunal made no reference at any point to those or T’s views. I infer that this was because, contrary to its obligation to take each of those matters into account, it did not consider them: *Yusuf* 206 CLR at 346 [69]; *Telstra* 176 FCR at 181 [105]; *East Australian Pipeline* 233 CLR at 344 [53]; *Cowgill* [2022] FCA 1337 at [44].
5. For these reasons, I am of opinion that the Tribunal made two jurisdictional errors in failing to take into account, as required by each of pars 8.3(4)(f) and (d) of Direction 90, as a fundamental element in making its decision, the expressed views of either T or the psychologist as to the impact on her, of Mr Seau’s removal, over and above the evidence of Mr Seau and other witnesses, which it accepted weighed heavily in favour of revocation.
6. I reject the Minister's argument that, notwithstanding this failure to refer expressly to either of those matters, that any error was not material. In *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 at 410 [33], Kiefel CJ, Keane and Gleeson JJ explained that:

There will generally be a realistic possibility that a decision-making process could have resulted in a different outcome if a party was denied an opportunity to present evidence or make submissions on an issue that required consideration. **The standard of "reasonable conjecture" is undemanding.** It recognises that a fundamental purpose of affording procedural fairness is to afford an opportunity to raise relevant matters which are not already obvious, or not liable to be advanced by the apparently persuasive "story" of the opposing party. Where a Tribunal errs by denying a party a reasonable opportunity to present their case, "reasonable conjecture" does not require demonstration of how that party might have taken advantage of that lost opportunity. Nothing said in *MZAPC* denies this. To the contrary, **the standard of "reasonable conjecture", correctly applied, proceeds on assumptions that are derived from the rationale for procedural fairness**, namely that, if given a fair opportunity to present their case, a party will take advantage of that opportunity and that, by doing so, the party could achieve a favourable outcome.

(bold emphasis added; italic emphasis in original)

1. In explaining how it undertook at its overall weighing process in par 118 of its reasons, the Tribunal found that relevantly, a number of factors weighed in favour of revocation, but it gave greater weight to factors against it. The best interests of T were a primary relevant consideration because par 8(3) and each of pars 8.3(4)(d) and (f) specified factors that a decision-maker had to take into account as a fundamental element in its decision-making. In *Telstra* 176FCR at 182-183 [108]-[110], I explained:

108. Because s 152CR(1) required it to take into account each of the seven specified factors, the Commission had to give each of them appropriate consideration in arriving at its final determination.  **The number and variety of factors which a statute requires a decision-maker to take into account or to have regard to in arriving at a decision necessarily affects the weight any one of those factors must be given in the deliberative process**.  In *Sean Investments* 180 CLR 322, the costs were fundamental - or foundational - because they were the only matter which the statute prescribed.  The subject matter, scope and purpose of the statutory power provide a context in which to assess the duties it imposes on the decision-maker in any particular situation:  cf  *Foster v Minister for Customs* (2000) 200 CLR 442 at [22]-[23] per Gleeson CJ and McHugh J, Gaudron and Hayne JJ agreeing with their Honours at [32].

109. Here, s 152CR(1) prescribes a number of matters for consideration.  This is a sure legislative indication that these matters must be central matters for the Commission.  But, **because s 152CR(2) expressly widens the range of matters which the Commission may consider, it is authorised to arrive at a final determination, after due consideration, which accords more weight to some other factor or factors than those in s 152CR(1).  Indeed, the factors in s 152CR(1) itself tend in different directions**.  The interests of a carrier (s 152CR(1)(b)) and those of all persons who have a right to use a declared service (s 152CR(1)(c)) more often than not will be opposed.  If the Commission were to give fundamental weight to each in the sense which Telstra argued, how could it arrive at a decision favouring one at the expense of the other?  cf *Telstra Corporation Limited v Australian Competition and Consumer Commission*[2008] FCA 1436 at [311]-[312] per Lindgren J.

110.  I am of opinion that **the sense in which the High Court used the expression “fundamental weight” in this context is to require the decision-maker to treat the *consideration* of the factors, as opposed to the factors themselves, as a central element in the deliberative process:  *Meneling Station*158 CLR at 338 per Mason J.  In this way the decision-maker will give appropriate weight to those factors.** The Parliament sought to ensure that the Commission would give proper, genuine and realistic consideration to each of the factors it specified in s 152CR(1) but without confining it to those matters, as s 152CR(2) showed.  Such consideration must be reflected in the Commission’s reasons for its decision.

(bold emphasis added; italic emphasis in original)

1. It can be accepted that the Tribunal found, without taking into account either T’s known views or Ms Kirlagitsi’s opinions, that the evidence of Mr Seau and Ms CH established, based on their (but not T’s) expressed views, the closeness of his relationship with T and that her best interests weighed heavily in favour of revocation. However, the Tribunal did not take into account the relevant mandatory considerations in pars 8.3(4)(d) and, in particular, (f) in dealing with that other evidence. Thus, in undertaking its overall weighing process, as it explained in par 118, it weighed only the particular factors that it specified which led ultimately to its decision.
2. I am of opinion that, notwithstanding that the Tribunal already regarded the best interests of T as weighing heavily in favour of revocation, its ultimate allocation of weight may have been affected had it taken T’s expressed views and, possibly, Ms Kirlagitsi’s evidence, into account as s 499(2A) and Direction 90 required, and, that, had it done so, one or both may have proved determinative: *Telstra* 176 FCR at 182-183 [110]. That is what Mr Seau asked it to do, as the Tribunal recorded in par 65.
3. In *Nathanson* at 403 ALR at 410 [33], Kiefel CJ, Keane and Gleeson JJ said that the court must undertake a process of reasonable conjecture in determining the materiality of a jurisdictional error. That process is undemanding in relation to, for example, a failure to take a relevant consideration into account or to deny a party an opportunity to present evidence or make submissions on an issue that required consideration. So, too, a failure to have regard to, or consider, evidence or material that the decision-maker had to take into account as a fundamental element in his or her decision-making process is a denial of procedural fairness: that is, it constitutes a failure to adhere to the process that the Parliament has mandated that a decision-maker must follow in arriving at an exercise of the power which the enactment confers.
4. Mr Seau’s relationship with T was a central element in his submission under s 501CA(4)(b) of the *Migration Act* that there was another reason why the cancellation decision should be revoked. Each of the two types of evidence, namely, T’s statements as to her perception of her relationship with Mr Seau and the impact that Mr Seau’s absence would have on her, and Ms Kirlagitsi’s opinion, may have affected the ultimate allocation of the weight given to the best interests of T, had the Tribunal taken either or both into account.
5. In my opinion, it cannot be said that consideration of those matters could have made no difference to the ultimate decision, simply because the Tribunal had said it weighed Mr Seau’s and Ms CH’s evidence of T’s best interests heavily in favour of revocation. In the evaluative exercise of weighing the strength of evidence or arguments in any particular context, the failure to take into account relevant evidence or material may affect the outcome of the overall outcome. As Mason J explained in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986)162 CLR 24 at 41, ordinarily, the weight that a factor that the legislation prescribes as a mandatory relevant consideration is a matter for the decision-maker, not the Court: see too *Telstra* 176 FCR at 182-183 [108]-[110].
6. It is not possible to find that the Tribunal had regard to either T’s or Ms Kirlagitsi’s evidence, because it failed to refer to that evidence at all. These were two separate instances of the Tribunal failing to comply with its obligation to have regard to each mandatory relevant consideration prescribed in pars 8.3(4)(d) and (f) of Direction 90 that bore directly on T’s position. I am satisfied that there is a realistic possibility that, in arriving at its overall weighing of the whole of the circumstances of Mr Seau’s case, the Tribunal could have found more persuasive the case for revocation than it did, had it taken each or either of those matters into account as a fundamental element in its decision-making: *Nathanson* 405 ALR at 410 [33].

# Conclusion

1. For these reasons, I am of opinion that ground 1 succeeds. The application should be granted. The Tribunal’s decision should be set aside and the matter remitted to it for determination according to law. The Minister must pay Mr Seau’s costs.

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| I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares. |

Associate:

Dated: 6 March 2023