Federal Court of Australia

LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCAFC 64

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| Appeal from: |  |
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| File number(s): | VID 431 of 2022 |
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| Judgment of: | **MARKOVIC, THOMAS and BUTTON JJ** |
|  |  |
| Date of judgment: | 3 May 2023 |
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| Catchwords: | **MIGRATION** – visas – cancellation – where Appellant was convicted of criminal offences and sentenced to terms of imprisonment – appeal from orders of a judge of the Federal Court of Australia dismissing an application for judicial review – where Appellant’s visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) – where the delegate decided not to revoke the cancellation under s 501CA of the *Migration Act 1958* (Cth) – where the Administrative Appeals Tribunal affirmed the delegate’s decision – whether the primary judge erred in not setting aside the Tribunal’s decision – whether the Tribunal erred in construing the applicable law and Direction – whether the Tribunal erred in assessing the appellant’s criminal offending or conduct as “very serious” or “serious” under the applicable Direction – whether the Tribunal erred in finding that the Appellant was formally warned or otherwise made aware, in writing, about the consequences of further offending in terms of migration consequences – whether the Tribunal’s errors were material – application dismissed  **ADMINISTRATIVE LAW** – where the Tribunal did not detail its path of reasoning – whether the Appellant bears the onus of establishing the Tribunal’s unstated path of reasoning – whether determination of error requires drawing of inferences as to how in fact the Tribunal came to the conclusions stated – whether a court may fill in gaps in the Tribunal’s path of reasoning |
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| Legislation: | *Migration Act 1958* (Cth) ss 476A, 499, 500, 501, 501CA  *Direction No 90 — Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (8 March 2021) |
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| Cases cited: | *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565  *AEM20 v Minister for Home Affairs* (2020) 277 FCR 299  *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321  *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353  *BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1429  *BSE17 v Minister for Home Affairs* [2018] FCA 1926  *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 276 FCR 75  *CKL21 v Minister for Home Affairs* (2022) 293 FCR 634  *CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 124  *CRU18 v Minister for Home Affairs* (2020) 277 FCR 493  *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1368  *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 232; [2022] FCAFC 115  *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754; [2014] HCA 26  *FTZK v Minister for Immigration and Citizenship* (2013) 211 FCR 158  *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123  *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390  *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 810  *Mackie v Minister for Home Affairs* [2021] FCA 1326  *Mackie v Minister for Home Affairs* [2022] FCAFC 120  *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437  *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13; [2021] HCA 41  *MKBL v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1827  *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; [2021] HCA 17  *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737; [2022] HCA 26  *Nguyen v Minister for Home Affairs* (2019) 270 FCR 555  *PQSM v Minister for Home Affairs* (2020) 279 FCR 175  *Re LPDT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 2224  *Sadsad v NRMA Insurance Ltd* (2014) 67 MVR 601; [2014] NSWSC 1216  *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227  *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9  *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 163 |
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| Date of last submission/s: | 13 March 2023 |
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| Date of hearing: | 27 February 2023 |
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| Counsel for the Appellant: | Mr N Wood SC with Ms K McInnes |
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| Solicitor for the Appellant: | Clothier Anderson Immigration Lawyers |
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| Counsel for the First Respondent: | Mr R Knowles KC with Mr C Hibbard |
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| Solicitor for the First Respondent: | Clayton Utz |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | VID 431 of 2022 |
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| BETWEEN: | LPDT  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |
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| order made by: | MARKOVIC, THOMAS and BUTTON JJ |
| DATE OF ORDER: | 3 May 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. By **4:00pm on Friday, 5 May 2023**, the parties notify each other of their respective positions as to costs.
3. By **4:00pm on Wednesday, 10 May 2023**, the parties each file and serve a written submission not exceeding two pages as to costs.

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

REASONS FOR JUDGMENT

THE COURT:

# Introduction

1. The Appellant is a Vietnamese national. The Appellant’s Class BS Subclass 801 (Spouse) visa was cancelled pursuant to s 501(3A) of the *Migration Act 1958* (Cth) (the **Act**). An application, made under s 501CA of the Act, for the revocation of the cancellation of the Appellant’s visa, failed. The Appellant then applied to the Second Respondent (the **Tribunal**) for review of the decision of the Minister’s delegate not to revoke the visa cancellation. The Tribunal declined to exercise its discretion to revoke the mandatory cancellation of the Appellant’s visa: *Re LPDT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 2224. As the Tribunal did not participate in the appeal, we refer to the First Respondent as the **Respondent** in these reasons.
2. The application for review by the Tribunal urged that there was “another reason why the original decision [to cancel the Appellant’s visa] should be revoked” pursuant to s 501CA(4), it being conceded that, by virtue of his criminal offending and the sentences of imprisonment imposed, the Appellant did not pass the character test.
3. In his subsequent application to this court seeking judicial review pursuant to s 476A(1)(b) of the Act, the Appellant contended that the Tribunal committed a number of jurisdictional errors in its treatment of paragraphs 8.1.1(1)(a), (b) and (g) of *Direction No 90 — Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**), being a direction made by the responsible Minister under s 499 of the Act. The primary judge dismissed the application: *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 810 (**PJ**). In his appeal from the primary judge’s decision, the Appellant relied on substantially the same criticisms of the Tribunal’s reasons (**TR**) as were advanced before the primary judge.

# Relevant factual background

1. The background facts are set out more fully by the Tribunal and by the primary judge. For the purposes of this appeal, the relevant facts may be briefly stated.
2. The Appellant came to Australia in 1997. He was granted a spouse visa in 2008. He was married to an Australian citizen, and had an adult Australian citizen son. The Appellant had adopted a number of false identities at various times.
3. On 10 November 2011, the Appellant was sentenced by Judge Montgomery of the County Court of Victoria to 7 years and 6 months’ imprisonment for offences which included *conspiracy to import/export marketable quantity of border controlled drugs or plants* and *attempt to possess marketable quantity of imported border controlled drugs or plants*.In the course of his sentencing remarks, Judge Montgomery referred to a statement made by an investigator of the Department of Immigration and Citizenship (the **officer’s statement**) as follows:

4) Deportation. During the course of the various days of the pleas, investigations were made into whether you would be deported. On the final day of the plea, a statement from Sean James Stewart, a senior investigator of the Department of Immigration and Citizenship was tendered. That statement set out the various possibilities that could occur in respect to a deportation.

You are currently lawfully in Australia as a holder of a sub-class BS801 spouse visa granted on 25 September 2008. Paragraphs 9, 10, 11, 14, 15, 18, 21, 22 and 23 of Mr Stewart’s statement set out the various ways in which the department could consider deporting you.

1. The officer’s statement is relevant to the arguments concerning paragraph 8.1.1(1)(g) of Direction 90. Notes taken by prison officers in 2012–13 were also before the Tribunal, and made reference to “deportation issues” (the **prison officers’ notes**), as were observations made by three judges of the Victorian Court of Appeal in 2012, stating that the Appellant would experience “stress … while waiting to learn whether he will be deported at the completion of his sentence”.
2. On 28 June 2013, the Appellant was convicted at the Magistrates’ Court of Victoria in relation to making a false statutory declaration and making false statements. He was sentenced to 6 months’ imprisonment on each charge, to be served concurrently.
3. On 17 August 2017, Judge McInerney of the County Court of Victoria sentenced the Appellant to 4 years and 6 months’ imprisonment in relation to two counts of *traffick drug of dependence* and *deal property suspected proceeds of crime.*
4. The Appellant’s visa was cancelled on 8 May 2019, as was required by s 501(3A) of the Act. The decision of the Minister’s delegate not to revoke the cancellation was dated 13 April 2021.

# Direction 90

1. This appeal is concerned with the terms of Direction 90, and its application by the Tribunal. It is necessary to refer to the structure and content of Direction 90 in some detail.
2. Section 499 of the Act provides that the Minister may give written directions to a person or body having functions or powers under the Act if the directions are about either the performance of those functions, or the exercise of those powers.
3. The responsible Minister made Direction 90 pursuant to s 499 on 8 March 2021.
4. For the purposes of Direction 90, the Tribunal was a “decision-maker” and was required to adhere to the Direction in reviewing the decision of the Minister’s delegate not to revoke the cancellation of the Appellant’s visa under s 501CA(4)(b) of the Act: ss 499(2A), s 500(1)(ba).
5. Direction 90 sets out various principles in paragraph 5.2. Paragraph 5.2 describes those principles as providing “the framework within which decision-makers should approach their task”. This is reinforced by section 6, which states that “[i]nformed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision”.
6. Two of the principles set out in paragraph 5.2 are particularly relevant to the present appeal. Sub-paragraphs 5.2(2)–(3) provide that:

Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

1. Sections 8 and 9 set out the **Primary Considerations** and the **Other Considerations** as follows:

**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.

**8.1 Protection of the Australian community**

(1) When considering protection of the Australian community, decision-makers should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.

(2) Decision-makers should also give consideration to:

a) the nature and seriousness of the non-citizen’s conduct to date; and

b) the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.

**8.1.1 The nature and seriousness of the conduct**

(1) In considering the nature and seriousness of the non-citizen’s criminal offending or other conduct to date, decision-makers must have regard to the following:

a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:

(i) violent and/or sexual crimes;

(ii) crimes of a violent nature against women or children, regardless of the sentence imposed;

(iii) acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

(i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

(ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;

(iii) any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker’s opinion (for example, section 501(6)(c));

(iv) where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, … or an offence against section 197A of the Act, which prohibits escape from immigration detention;

c) with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;

d) the frequency of the non-citizen’s offending and/or whether there is any trend of increasing seriousness;

e) the cumulative effect of repeated offending;

f) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;

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

**8.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct**

(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government’s view that the Australian community’s tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

(2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

i) information and evidence on the risk of the non-citizen re-offending; and

ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

c) where consideration is being given to whether to refuse to grant a visa to the non-citizen — whether the risk of harm may be affected by the duration and purpose of the non-citizen’s intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

[Paragraph 8.2 relates to family violence committed by non-citizens, and paragraph 8.3 relates to the best interests of minor children in Australia affected by the decision]

**8.4 Expectations of the Australian Community**

(1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.

(2) In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

(a) acts of family violence; or

(b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;

(c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, ‘serious crimes’ include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;

(d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or

(e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or

(f) worker exploitation.

(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.

(4) This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government’s views as articulated above, without independently assessing the community’s expectations in the particular case.

**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):

a) international non-refoulement obligations;

b) extent of impediments if removed;

c) impact on victims;

d) links to the Australian community, including:

i) strength, nature and duration of ties to Australia;

ii) impact on Australian business interests

1. The balance of section 9 sets out various further matters to which decision-makers must have regard in assessing the Other Considerations.

# The Tribunal’s reasons

1. The Tribunal identified that there were two issues before it in determining whether it should revoke the mandatory cancellation of the Appellant’s visa pursuant to s 501CA(4) of the Act. First, whether the Appellant passed the character test. As noted above, it was not in dispute that the Appellant did not meet the character test. Secondly, whether there was another reason why the decision to cancel the Appellant’s visa should be revoked: at TR [48]. Before identifying these issues, the Tribunal observed (at TR [10]) that the Appellant “has a history of very serious criminal offending”. Immediately following that observation, the Tribunal set out the Appellant’s criminal record, to which we have already referred.
2. Having identified the issues, the Tribunal referred to Direction 90, and the features of its structure. The Tribunal referred to the principles recorded in paragraph 5.2 of Direction 90, and identified (at TR [59]–[61]) that sections 8 and 9 stipulated four Primary Considerations, which the Tribunal stated it “must take into account”, and a non-exhaustive list of Other Considerations which the Tribunal must take into account “where relevant”.
3. The Tribunal then worked its way through each of the Primary Considerations. So far as the issue of error is concerned, this appeal is concerned with Primary Consideration 1 — Protection of the Australian Community, but the Tribunal’s reasons as a whole must be considered in addressing arguments on materiality.
4. The Tribunal accurately paraphrased paragraph 8.1.1(1)(a) of Direction 90 at TR [68], but then at TR [69]–[70] made reference to the Appellant’s explanations for how he came to become involved in drug trafficking, and his remorse for his actions, before stating its conclusion that “sub-paragraph (a) … militates strongly in favour of a finding that the [Appellant’s] criminal offending has been of a very serious nature”. The relevant paragraphs ([69]–[71]) of the Tribunal’s reasons were in the following terms:

The Applicant claims that he became involved in the drug trade to pay back debts which he had accumulated borrowing large sums of money to fund a gambling problem. Additionally, the Applicant claims that he trafficked drugs to pay for his family expenses, including his son’s private school fees.

The Applicant states that he is remorseful for his actions and that he has *learnt that trafficking drugs is the worst mistake I have ever made in my life*.

Taking into account all of the evidence, the Tribunal finds that sub-paragraph (a) of paragraph 8.1.1(1) of the Direction militates strongly in favour of a finding that the Applicant’s criminal offending has been of a very serious nature.

(original emphasis)

1. The Tribunal did not explain how it reached the view that sub-paragraph (a) militated strongly in favour of the finding it identified and did not explain the link between the Appellant’s evidence, to which it had just referred, and its conclusion in relation to sub-paragraph (a).
2. The Tribunal then moved on to sub-paragraph (b). Again, the Tribunal’s reasoning was sparse. After accurately setting out the effect of sub-paragraph (b), the Tribunal stated (at TR [73]–[74]) only that:

The Applicant’s conduct in trafficking drugs can be said to negatively impact vulnerable members of the community, namely drug users and persons experiencing drug addiction.

Taking into account all of the evidence, the Tribunal finds that sub-paragraph (b) of paragraph 8.1.1(1) of the Direction militates in favour of a finding that the Applicant’s criminal offending has been of a very serious nature.

1. It is not necessary to dwell further on how the Tribunal addressed sub-paragraphs (c) to (f), save to note that — with the exception of sub-paragraph (c), which the Tribunal said “militates in favour of a finding that the totality of the [Appellant’s] offending must be viewed as very serious” (at TR [75]) — the Tribunal used more direct language in relation to the other sub-paragraphs, finding that the Appellant’s criminal offending and adoption of different identities “enlivens” or “clearly enlivens” sub-paragraphs (d)–(f). That language stands in contrast to the “militates in favour of” language used by the Tribunal in relation to sub-paragraphs (a) and (b).
2. Turning to sub-paragraph (g), the Tribunal set out the sub-paragraph and then stated (at TR [86]–[92]) that:

86. This consideration is directly relevant in this case. The sentencing remarks of His Honour Judge Montgomery of the County Court of Victoria indicate that, at the time of the 2011 sentence, investigations were made as to whether the Applicant would be deported. Notwithstanding this, the Applicant told the Tribunal that at that time he had no understanding that he could be deported. The Tribunal does not accept this.

87. At the hearing the Applicant was also asked about notes taken by prison officers in 2012–13 concerning “deportation issues”. The Applicant said that at that time he did not understand anything about deportation. The Tribunal does not accept this.

88. Similar denials to this effect were advanced by the Applicant’s representatives in the written material lodged with the Tribunal, on his behalf.

89. The Tribunal observes that in 2012 three Court of Appeal justices who considered an appeal application concerning the 2011 sentence observed that the Applicant would experience “stress” “while waiting to learn whether he will be deported at the completion of his sentence”.

90. Having considered all the evidence, the Tribunal considers that the Applicant, having arrived in Australia under a false identity and having been convicted of serious offences, would have understood that his migration status was a relevant issue prior to his re-offending.

91. The Tribunal is satisfied that the Applicant re-offended since having been formally warned or since otherwise being made aware in writing about the consequences of further offending in terms of his migration status.

92. Having regard to all of the evidence and submissions made to the Tribunal, including that which is outlined in the abovementioned relevant sub-paragraphs of paragraph 8.1.1(1) of the Direction, the Tribunal is of the overall view that the nature and seriousness of the Applicant’s conduct can only be characterised as very serious.

1. The Tribunal proceeded to address paragraph 8.1.2 of the Direction, but it is not necessary to set out here the Tribunal’s analysis, to which no exception was taken.
2. Having proceeded in that way, the Tribunal set out its findings on Primary Consideration 1 (at TR [104]) as follows:

The Tribunal finds that:

(a) the nature of the Applicant’s offending to date is very serious;

(b) were he to reoffend in a similar way, the nature of the resulting harm would involve very significant physical, psychological and/or economic harm to the Australian community and, quite conceivably, to a disastrous level; and

(c) in terms of risk of recidivism, there is a demonstrably unresolved and consequently convincing likelihood that he will engage in further very serious offending conduct if returned to the Australian community.

1. The Tribunal (having referred to Primary Considerations 2 and 3) then turned to Primary Consideration 4, the Expectations of the Australian Community. The Tribunal set out, at some length, features of the Direction addressing the deemed expectations of the Australian community, including the expectation that “where a non-citizen has engaged in serious conduct in breach of the community’s expectations, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia” (at TR [108]).
2. The Tribunal’s analysis included the following, which is relevant as the Tribunal’s analysis recalls its earlier observations about the seriousness of the Appellant’s offending (at TR [112]):

As a starting point, the Tribunal refers to its observations above, that the Applicant has been convicted of multiple serious offences on separate occasions over an extended period of time. This all amounts to conduct in breach of the Australian community’s expectation that non-citizens in Australia will obey the law. Therefore, by virtue of paragraph 8.4(1) of the Direction, the Australian community, as a “*norm*” expects the Government to remove the Applicant.

(original emphasis)

1. The Tribunal concluded as follows in relation to Primary Consideration 4 (at TR [115]):

In consideration of all the evidence and each of the relevant factors contained in the Direction, the Tribunal finds that this Primary Consideration weighs very strongly in favour of non-revocation.

1. The Tribunal then analysed the various Other Considerations listed at section 9 of the Direction. The Tribunal found that the Appellant would face “some hardship” at the prospect of not being able to see his wife and adult son in person if returned to Vietnam, and that relocating would bring “the usual challenges” of such a move (but not more, given the Appellant’s familiarity with Vietnam, and the presence of family members in that country): at TR [146]–[147]. The Tribunal stated that (at TR [148]):

Overall, having considered all the circumstances, it is difficult to allocate anything more than a slight level of weight in favour of the Applicant, pursuant to this Other Consideration (b), such that his visa status to remain in Australia be restored to him.

1. Similarly, the Tribunal concluded that the Appellant’s links to the Australian community “weigh slightly, and certainly not determinatively, in favour of the restoration of his visa status”: at TR [158].
2. Summarising its conclusions on the Other Considerations, the Tribunal stated (at TR [162]):

With reference to these Other Considerations, to the extent that any of them may weigh in favour of revoking the mandatory visa cancellation decision, they are outweighed by Primary Considerations 1 and 4, each of which weigh strongly in favour of non‑revocation. The weight allocable to the Other Considerations relevant to the present matter can be summarised as follows:

(a) International non-refoulement obligations: neutral;

(b) Extent of impediments if removed: slight weight in favour of the Applicant;

(c) Impact on victims: neutral; and

(d) Links to the Australian community: slight weight in favour of the Applicant.

1. The Tribunal then drew its findings together and concluded as follows (at TR [164]–[165]):

In considering whether there is another reason to exercise the discretion afforded by section 501CA(4) of the Act to revoke the mandatory visa cancellation decision, the Tribunal has had regard to the considerations referred to in the Direction. The Tribunal finds as follows:

(a) Primary Consideration 1: weighs strongly in favour of non-revocation;

(b) Primary Consideration 2: is not relevant and is therefore neutral;

(c) Primary Consideration 3: is not relevant and is therefore neutral;

(d) Primary Consideration 4: weighs strongly in favour of non-revocation;

(e) The Tribunal has outlined the weight attributable to the Other Considerations. The Tribunal does not consider that the totality of the weight attributable to the relevant Other Considerations outweigh[s] the strong, combined and determinative weight that it has attributed to Primary Considerations 1 and 4; and

(f) A complete view of the considerations in the Direction therefore favours the non-revocation of the decision to cancel the Applicant’s visa.

Consequently, I cannot exercise the discretion to revoke the mandatory cancellation of the Applicant’s visa.

# Grounds of appeal and notice of contention

1. Omitting lengthy particulars, the Appellant’s Notice of Appeal advanced four grounds of appeal as follows:

1. The learned primary judge erred in declining to accept that the Administrative Appeals Tribunal (**Tribunal**) constructively failed to exercise jurisdiction, in misconstruing sub-para [8.1.1(1)(b)] of *Direction 90: visa cancellation and refusal under s501 and revocation of a mandatory cancellation of a visa under s501CA* (***Direction 90***).

2. The learned primary judge erred in declining to accept that the Tribunal constructively failed to exercise jurisdiction, in misconstruing sub-para [8.1.1(1)(a)] of *Direction 90* or, in the alternative, in making an irrational or legally unreasonable finding.

3. The learned primary judge erred in declining to accept that the Tribunal constructively failed to exercise jurisdiction, in misconstruing sub-para 8.1.1(1)(g) of *Direction 90*.

4. The learned primary judge erred in declining to accept that the Tribunal made a finding that was not open on the evidence before it.

1. As noted above, the grounds of appeal advanced in respect of the decision of the primary judge substantively replicated the grounds for review advanced before the primary judge in respect of the decision of the Tribunal. We address the primary judge’s reasons in considering each ground of appeal.

# SECOND GROUND OF APPEAL: Direction 90, paragraph 8.1.1(1)(a)

## The primary judge’s reasons: Direction 90, paragraph 8.1.1(1)(a)

1. The primary judge observed (at PJ [21]) that the Appellant contended that the Tribunal proceeded upon a mistaken appreciation of what Direction 90 required of it. His Honour then set out what he regarded as the court’s task, and how it should be undertaken, as follows (at PJ [21]–[22]):

Acceptance or rejection of those central contentions requires that the court first make factual findings about how the Tribunal made its decision. Doing so requires that inferences be drawn from the inevitably limited evidence with which the court was supplied — and, most significantly, from the structure and text of the Tribunal’s Decision.

The recent observations of the High Court plurality in *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441, 454 [38]–[39] (Kiefel CJ, Gageler, Keane and Gleeson JJ) are apposite (particularly, though not solely, inasmuch as they bear upon the question of materiality):

The counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was in fact breached cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made. Like other historical facts to be determined in other civil proceedings, the facts as to what occurred in the making of the decision must be determined in an application for judicial review on the balance of probabilities by inferences drawn from the totality of the evidence. And like other counterfactual questions in civil proceedings as to what could have occurred — as distinct from what would have occurred — had there been compliance with a legal obligation that was in fact breached, whether the decision that was in fact made could have been different had the condition been complied with falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities.

Bearing the overall onus of proving jurisdictional error, the plaintiff in an application for judicial review must bear the onus of proving on the balance of probabilities all the historical facts necessary to sustain the requisite reasonable conjecture. The burden of the plaintiff is not to prove on the balance of probabilities that a different decision would have been made had there been compliance with the condition that was breached. But the burden of the plaintiff is to prove on the balance of probabilities the historical facts necessary to enable the court to be satisfied of the realistic possibility that a different decision *could* have been made had there been compliance with that condition.

(references omitted)

(original emphasis)

1. As set out in the passages just quoted, the primary judge proceeded on the basis that resolving the question of whether the Tribunal erred required the drawing of inferences as to how in fact the Tribunal came to the conclusions it stated.
2. In relation to sub-paragraph (a), the primary judge identified three distinct types of error, which the Appellant submitted the Tribunal had fallen into, as follows (at PJ [33]):

The applicant maintains that it was not open to the Tribunal to reason that anything contained within 8.1.1(1)(a) of Direction 90 might assist it in making its assessment of the nature and seriousness of the applicant’s offending. Because it was quite plainly of a contrary view — that is, because it very clearly proceeded on the basis that that subparagraph *was* apt to inform that assessment — it should, he submits, follow that the Tribunal did at least one of three things, namely that it:

(1) erred by so concluding (and by proceeding to take account of a consideration that was, in truth, irrelevant);

(2) wrongly concluded that the applicant’s criminal history involved crimes of a sexual or violent nature of the kinds to which 8.1.1(1)(a) of Direction 90 refers; or

(3) wrongly concluded that 8.1.1(1)(a) of Direction 90 records the view of the Australian government or community that drug trafficking is considered a “very serious” crime.

(original emphasis)

1. The primary judge then identified that the question of whether the Tribunal took account of what sub-paragraph (a) required it to take into account was a question of fact, which may be resolved by process of inference (at PJ [35]). His Honour then concluded that, even if the Appellant was correct that the deemed views set out in sub-paragraph (a) were not apt to inform any assessment of the nature and seriousness of the Appellant’s criminal history, it did not follow that Direction 90 precluded the Tribunal from having regard to the consideration recorded in that sub-paragraph. In that regard, his Honour concluded that there was nothing improper in the Tribunal taking account of something which Direction 90 did not require it to take into account: at PJ [38].
2. The primary judge went on to set out a kind of analogical reasoning that his Honour regarded as open to the Tribunal (at PJ [39]), before proceeding to determine whether, in this case, the Tribunal had proceeded to make its decision upon a correct understanding of what Direction 90 required.
3. Given the importance of what we will refer to as the **analogical reasoning** to the issues in this appeal, we set out in full what the primary judge said (at PJ [39]) about the path of reasoning which his Honour considered was open to the Tribunal:

In any event, I do not accept that [the consideration recorded in sub-paragraph (a)] was irrelevant to the Tribunal’s task here. The seriousness with which the Australian government or community views sexual or violent crimes is a consideration that might rationally inform an assessment as to the nature and seriousness of other crimes, including those of the kind of which the applicant had been convicted. Criminality can sensibly be adjudged along a spectrum: some crimes, assessed by reference to various factors (such as their impacts upon victims, the costs that they impose upon the community or their capacity to inspire public outrage) can rightly be considered more serious than others. There is nothing untoward about the Tribunal making its assessment in this case relatively; that is, by reference to the seriousness that might be thought to attach to other criminal conduct, including sexual and violent criminality.

1. By reference to the Tribunal’s reasons, the primary judge determined that it could not be said that the Tribunal either misconstrued the nature of the Appellant’s offending, or otherwise mistakenly took the view that the offending was within the contemplation of sub-paragraph (a): at PJ [41]–[44]. The primary judge then identified what his Honour described as a “better conclusion — or, at least, an equally available one”, namely that the Tribunal had adopted the kind of analogical reasoning that his Honour had identified: at PJ [45]. The primary judge also observed that any conclusion that the Tribunal had erred in the way that the Appellant alleged would require the court to draw one or both of the inferences that his Honour had found were not properly to be drawn: at PJ [46].
2. In rejecting the Appellant’s contention that the Tribunal erred in the manner contended for, the primary judge proceeded on the basis that the Tribunal had in fact engaged in the analogical form of reasoning which his Honour had found to be open, or (as expressed at one point) that the Appellant could not establish that that is *not* what had occurred: at PJ [48], [50], [52].

## The parties’ arguments on error

1. The Appellant’s argument focused on TR [71] where the Tribunal stated:

Taking into account all of the evidence, the Tribunal finds that sub-paragraph (a) of paragraph 8.1.1(1) of the Direction militates strongly in favour of a finding that the Applicant’s criminal offending has been of a very serious nature.

1. The Appellant accepted that the Tribunal may form its own view as to whether criminal conduct of a kind that is *not* mentioned in sub-paragraph (a) is “very serious”. That much is apparent from the introductory words to sub-paragraph (a) which preface the balance of the sub-paragraph as follows: “without limiting the range of conduct that may be considered very serious …”.
2. The Appellant emphasised, however, that sub-paragraph (a) does not deem criminal conduct of the listed kinds to be “very serious” conduct. Rather, the sub-paragraph stipulates that the Australian government and the Australian community *view* conduct of the stated kind “very seriously”. On the Appellant’s argument, once it is ascertained that the conduct before the Tribunal is not within (i)–(iii) of sub-paragraph (a), the Tribunal should move on to the next sub-paragraph on the basis that, the conduct in question not falling within sub-paragraph (a), the sub-paragraph does not present a relevant consideration.
3. The Appellant stopped short of contending that the Tribunal could not engage in the kind of analogical reasoning the primary judge referred to *at all*, but submitted that any such reasoning would have to form part of the Tribunal’s consideration of its own views after the paragraph 8.1.1 factors had been considered. On the Appellant’s argument, engaging in analogical reasoning of the kind referred to by the primary judge would constitute an error in the application of sub-paragraph (a). The Appellant submitted that sub-paragraph (a) provides no discernible criteria that allow the Tribunal to classify conduct that is not of a kind referred to in (a) as very serious, whether by analogy or otherwise.
4. However, the Appellant’s argument went further. The Appellant argued that it was impermissible to, and the primary judge erred in, filling in the gaps in the Tribunal’s reasons by positing a course of reasoning that was not spelled out by the Tribunal. The Appellant argued that it was not incumbent on him to identify the precise course of reasoning by which the Tribunal erred. He submitted that “[o]ne way or another, [71] of the Tribunal’s reasons reveals error” and that, once it is clear that there has been an error, it was not incumbent on the Appellant “to demonstrate precisely how or why the Tribunal made that error”. The Appellant relied on *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 at 360 (Dixon J) in support.
5. The Respondent contended that the Appellant bore the onus of establishing that the course of reasoning that the Tribunal adopted entailed error. In addressing the fact that no analogical reasoning was exposed in the Tribunal’s reasons, the Respondent submitted that it did not automatically follow that one moves to assessment of error. The Respondent submitted that “[o]ne has to give some meaning to what the reasons actually say” and to consider whether the Tribunal fell into the error alleged. The Respondent took the position that the approach set out by the High Court in *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; [2021] HCA 17 (***MZAPC***) was not limited to the analysis of materiality, but extended to working out what the Tribunal’s course of reasoning was when that reasoning was not exposed by the Tribunal.
6. These submissions laid the foundation for the Respondent’s submissions based on the Appellant’s burden. In view of the alternative, analogical path of reasoning that the primary judge identified, the Respondent contended that the Appellant had not discharged its burden of showing that the Tribunal erred. In casting the argument in terms of the onus of establishing the path of the Tribunal’s reasons underpinning TR [71], the Respondent refuted the suggestion that its argument, and the course adopted by the primary judge, involved impermissible reconstruction and speculation about the Tribunal’s course of reasoning.
7. The Respondent also contended that the analogical reasoning of the kind identified by the primary judge *could* take place as part of the mandatory consideration of sub-paragraph (a). In that regard, the Respondent highlighted that, as is stated in paragraph 8.1.1(1), decision-makers “must have regard” to each and all of sub-paragraphs (a)–(g). On the Respondent’s argument, the Tribunal was required to have regard to the matters referred to in sub-paragraph (a), and that remained the position notwithstanding that the conduct in question did not fall within any of (i)–(iii) in sub-paragraph (a).
8. The Respondent also observed that the Tribunal’s reasons at TR [71] did not involve a finding that the sub-paragraph was directly applicable, nor did the Tribunal at that point reach a conclusion as to the quality of the Appellant’s conduct; rather, the Tribunal’s view, expressed at TR [71], was that sub-paragraph (a) “militated” in favour of the stated conclusion.

## Consideration

1. In our view, the Tribunal’s approach to sub-paragraph (a) did involve error. As we have recorded, the Tribunal referred, in two paragraphs, to the Appellant’s evidence about how he came to be involved in drug trafficking, and his remorse, before concluding, without further elaboration, that “taking into account all of the evidence [sub-paragraph (a)] militates strongly in favour of a finding that the Applicant’s criminal offending has been of a very serious nature”: at TR [71].
2. We reject the Respondent’s argument that the failure of the Tribunal to detail the path of reasoning by which it arrived at the conclusion stated in TR [71] can be resolved by reference to the Appellant’s burden, on the basis that the Appellant has failed to establish just how it was that the Tribunal came to the conclusion just stated. In our view, the primary judge erred in rejecting the Appellant’s contentions of jurisdictional error based on a combination of analogical reasoning and recourse to the Appellant’s burden.
3. Not all decision-makers are required to give written reasons for their decisions. However, where written reasons are given by a tribunal, it is to those reasons which a court must look in order to understand why a power was exercised as it was: *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 at [47] (Allsop CJ, Robertson and Mortimer JJ). The reasons actually stated by the Tribunal are to be understood as recording the steps that were, in fact, taken by the Tribunal in arriving at its decision: *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1368 at [26] (Burley J).
4. In *CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 124 at [133], Katzmann, Charlesworth and Burley JJ stated that “[i]t is not appropriate … to infer that the Tribunal made findings or drew conclusions not mentioned in its written reasons”. The Full Court made that observation in rejecting a submission by the Minister that, as a matter of fact, the Tribunal had considered the risks of harm to the appellant in that case against the available country information based on the contents of the transcript. As the Full Court went on to say (at [134]–[135]), “[t]he conclusion that the Tribunal might have reached is not apparent from the transcript in any event. … The reasons do not expressly disclose that the Tribunal availed itself of the option of deferral discussed in [*Plaintiff M1/2021 v Minister for Home Affairs* (2012) 96 ALJR 497; [2022] HCA 17], and there is no basis to draw such an inference on the facts of the present case.”
5. In *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754; [2014] HCA 26 at [67], Crennan and Bell JJ referred to what was said by Kerr J in *FTZK v Minister for Immigration and Citizenship* (2013) 211 FCR 158 at [118] as follows:

For a reviewing court to imply or infer critical findings of fact, not expressed in the decision‑maker’s reasons, would, his Honour said, “turn on its head the fundamental relationship between administrative decision‑makers and Chapter III courts exercising the power of judicial review”.

1. Their Honours’ observations were in turn referred to in *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565 at [130], where Besanko J (with whom Allsop CJ, Kenny, Kerr and Charlesworth JJ agreed) again cautioned against drawing inferences as to findings of fact, or paths of reasoning not set out in a decision-maker’s reasons, and stated:

The cases are legion in which the Courts have said that it is not appropriate, or ordinarily appropriate, to infer that the decision-maker has made findings or drawn conclusions not referred to in the written reasons of the decision-maker (see, for example, *SZMDS* at [36] per Gummow ACJ and Kiefel J; *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at [67] per Crennan and Bell JJ*; Minister for Home Affairs v Omar* (2019) 272 FCR 589 at [34(a)]; *Minister for Immigration and Citizenship v SZLSP* (2010) 187 FCR 362 at [55] per Kenny J).

1. Giving a “beneficial construction” to an administrative decision-maker’s decision requires that a court not construe reasons minutely and finely with an eye keenly attuned to error (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271–2 (Brennan CJ, Toohey, McHugh and Gummow JJ)); but it does not permit a court to “fill in gaps in the path of reasoning”: *Sadsad v NRMA Insurance Ltd* (2014) 67 MVR 601; [2014] NSWSC 1216 at [47] (Hamill J); see also *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 at [26] (Stone J); *AEM20 v Minister for Home Affairs* (2020) 277 FCR 299 at [95] (Katzmann J); *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 232; [2022] FCAFC 115 (***Deng***) at [128] (Farrell, Moshinsky and Burley JJ) to the effect that a conclusion of error cannot be avoided on the basis that an impugned finding was *open* to the Tribunal if discharging the Tribunal’s statutory function required that it address certain matters en route to the finding in question.
2. In *Deng*, the primary judge considered that the Tribunal used the expression “intimate partner” as a shorthand expression for a person who fell within the concept of a “member of the person’s family”. The Full Court disagreed, reasoning that it was not possible to know whether the Tribunal used the expression in that way where the Tribunal had not explained its approach: *Deng* at [129]. As such, *Deng* also illustrates that unexplained findings in a decision-maker’s reasons will not usually avoid a finding of error where, on review, it is possible to posit a logical and legally available means by which the finding could have been reached.
3. Accordingly, we must look to the Tribunal’s reasons to discern its course of reasoning. Having set out paragraph 8.1.1(1) of the Direction, the Tribunal paraphrased the import of sub-paragraph (a), as it set out the deemed views of the Australian government and community on the conduct there referred to. The Tribunal then referred to the Appellant’s evidence as to how he became involved in criminal drug-related activity and his remorse, before stating its view in relation to sub-paragraph (a) at TR [71].
4. The Tribunal’s reasons do not expose any chain of reasoning at all, let alone a comprehensible one, between the features of the Appellant’s evidence referred to and the conclusion that sub-paragraph (a) “militates strongly in favour of a finding that the [Appellant’s] criminal offending has been of a very serious nature”. As such, the Tribunal’s reasons involved error. It was not incumbent on the Appellant to establish just how the Tribunal came to state the conclusion that it stated, and that that unstated method of reasoning involved error. Rather, the error lies in the very lack of any articulated comprehensible connection between the conclusion and the articulated basis for it.
5. We do not consider that the approach adopted by the primary judge is available to avoid a conclusion that the Tribunal’s approach involved error. The short point is that we do not consider that the deficiencies in the Tribunal’s reasoning can be overcome either by inferring that the Tribunal in fact reached the conclusion that it did concerning sub-paragraph (a) based on analogical reasoning, or that the contention of error could properly be rejected on the basis that the Appellant had not discharged his onus.
6. In our view, to infer that the Tribunal *in fact* adopted an analogical course of reasoning goes too far in filling in gaps in the Tribunal’s path of reasoning. To reason in that way is contrary to the authorities referred to above. Nor do we consider that such an approach to determining whether a Tribunal’s course of reasoning involves error has been endorsed by the High Court in *MZAPC*. As the primary judge observed, in *MZAPC* at [38], Kiefel CJ, Gageler, Keane and Gleeson JJ identified that:

The counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was in fact breached cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made. Like other historical facts to be determined in other civil proceedings, the facts as to what occurred in the making of the decision must be determined in an application for judicial review on the balance of probabilities by inferences drawn from the totality of the evidence. And like other counterfactual questions in civil proceedings as to what could have occurred — as distinct from what would have occurred — had there been compliance with a legal obligation that was in fact breached, whether the decision that was in fact made could have been different had the condition been complied with falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities.

(references omitted)

1. However, what was said in *MZAPC* about drawing inferences about basal factual questions about how the decision in question came to be made, was said in relation to the exercise that a court must undertake in determining whether an established error is jurisdictional. The High Court’s observations were not addressed to drawing inferences to determine whether there was error at all, still less drawing inferences that might permit an otherwise unexplained substantive conclusion to be explained by inferences as to a course of reasoning nowhere stated in the decision-maker’s reasons.
2. The Tribunal did not state how it arrived at the conclusion that sub-paragraph (a) “militates strongly” in favour of a finding that the Appellant’s criminal offending was of a very serious nature. Even if the question of whether there was error can be determined by drawing inferences as to an unstated course of reasoning, we do not consider that there are sufficient markers in the Tribunal’s reasons for us to infer that the Tribunal in fact adopted the analogical reasoning identified by the primary judge.
3. While the Appellant urged strongly that analogical reasoning was an impermissible approach to sub-paragraph (a), it is not necessary for us to finally decide that point and we say no more on it, save to make two observations. The first is that it does not obviously seem an impermissible approach to consider the seriousness of particular offending before the Tribunal by reference to the view taken by the Australian government and community of different offending. Secondly, and in any case, we do not accept the contention advanced by the Appellant that the analogical form of reasoning posited by the primary judge would have involved the Tribunal reaching conclusions about how the Australian government and community would regard the seriousness of the offending before the Tribunal, as distinct from reaching its own view on the nature and seriousness of the offending, having regard to the deemed views of the Australian government and community as regards *other* types of offending. In other words, the analogical form of reasoning need not involve the Tribunal reaching conclusions on the views of the Australian government and community and exceeding its proper function when it is for the Minister to assess and determine what (properly informed) community values or attitudes would be (see the discussion of the Full Court in *CKL21 v Minister for Home Affairs* (2022) 293 FCR 634 (***CKL21***) at [29]–[30] (Moshinsky, O’Bryan and Cheeseman JJ) and the cases referred to therein).
4. As we have noted in setting out the primary judge’s approach, there are strong indications that his Honour determined that the Tribunal did not err as contended for by ground 2 on the basis that the Tribunal in fact engaged in analogical reasoning. That said, we also recognise that other aspects of the primary judge’s reasons speak more strongly of the point having been decided based on the question of onus.
5. While the primary judge was of course correct to point to the onus borne by the Appellant, we do not agree that it could only be discharged by the Appellant satisfying the court that the Tribunal must have adopted a specific unstated, but erroneous, course of reasoning, and not some other, also unstated, but not erroneous, course of reasoning. Here, the Tribunal’s reasoning was scant and included a conclusion (at TR [71]) that bore no exposed logical connection with either the preceding paragraphs (at TR [69]–[70]) or the precis of what sub-paragraph (a) stated: at TR [68].
6. As we have explained above, in our view, in circumstances where a logical connection cannot be supplied by filling the gaps in the Tribunal’s reasons, the only remaining conclusion available is that the Tribunal has erred in some way, and it is not necessary to fix firmly on the precise dimensions of the error. It places an impossibly high burden on the Appellant to require the non-citizen to prove that the Tribunal fell into a specific misconception, which misconception presents a more compelling explanation for the Tribunal’s conclusion than an explanation devised by the judge (but nowhere found in the Tribunal’s reasons).

## Materiality

### Legal principles

1. Materiality is essential to the existence of jurisdictional error: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 (***SZMTA***) at [45] (Bell, Gageler and Keane JJ). In order to establish that the Tribunal’s error in relation to sub-paragraph (a) was material, the Appellant must establish that there is a realistic possibility that the Tribunal’s decision *could* have been different had the breach of the relevant condition not occurred: *SZMTA* at [45].
2. The High Court has also addressed questions of onus and methodology in relation to the finding of facts, and analysis, of materiality. In *SZMTA*, Bell, Gageler and Keane JJ stated (at [46] and [48]) that:

Where materiality is in issue in an application for judicial review, and except in a case where the decision made was the only decision legally available to be made, the question of the materiality of the breach is an ordinary question of fact in respect of which the applicant bears the onus of proof. Like any ordinary question of fact, it is to be determined by inferences drawn from evidence adduced on the application.

… The court must be careful not to intrude into the fact-finding function of the Tribunal. Yet the court must be alive to the potential for a document or information, objectively evaluated, to have been of such marginal significance to the issues which arose in the review that the Tribunal’s failure to take it into account could not realistically have affected the result.

1. In *MZAPC*, Kiefel CJ, Gageler, Keane and Gleeson JJ at [3] stated that *SZMTA* was sound in principle and declined to revisit the case. In their Honours’ reasons at [38]–[39], they made the following statement, which was quoted by the primary judge in the present appeal (emphasis in bold added, citations omitted):

The counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was in fact breached **cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made. Like other historical facts to be determined in other civil proceedings the facts as to what occurred in the making of the decision must be determined in an application for judicial review on the balance of probabilities by inferences drawn from the totality of the evidence**. …

The burden of the plaintiff is not to prove on the balance of probabilities that a different decision *would* have been made had there been compliance with the condition that was breached. But the **burden of the plaintiff is to prove on the balance of probabilities the historical facts necessary to enable the court to be satisfied of the realistic possibility that a different decision *could* have been made had there been compliance with that condition**.

1. Similar observations were made by Kiefel CJ, Keane and Gleeson JJ in *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737; [2022] HCA 26 (***Nathanson***), reaffirming *MZAPC* at [32].
2. Engaging in the reconstructive factual exercise required in assessing materiality may be difficult. At a practical level, the exercise may challenge the conventional (and important) distinction between judicial review and merits review. Such difficulties were referred to by Banks-Smith and Jackson JJ in *PQSM v Minister for Home Affairs* (2020) 279 FCR 175 (***PQSM***)at [150]–[151], but it is a task that the court must take up and resolve on the basis of the evidence and inferences available, including the reasons of the Tribunal, and having regard to the Appellant’s onus of proof: *PQSM* at [151].
3. Caution is also required so that the reconstructive exercise is undertaken while being alive to the extent to which the Tribunal’s reasons are a product of the very error whose materiality is being addressed: *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 276 FCR 75 (***Chamoun***) at [70] (Mortimer and Bromwich JJ). This means that a decision-maker’s errors cannot be neatly excised, leaving the balance of the decision-maker’s reasons intact: *MKBL v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1827 at [58] (Jackson J, applying *Chamoun*).
4. The threshold for establishing materiality has been described as “undemanding” and “not onerous” (*Nathanson* at [33] (Kiefel CJ, Keane and Gleeson JJ) and at [47] (Gageler J)). However, that does not mean that the exercise in which a court is required to engage in assessing materiality is to be undertaken by adopting an approach that is driven by formalism, which fixes on nuances said to arise from a fine-grained parsing of the decision-maker’s language, or which focuses on possibilities that are theoretical rather than real (*Chamoun* at [66], distinguishing realistic possibilities from those that are fanciful or improbable).
5. An approach to assessing materiality which is driven by formalism would see jurisdictional error established in almost every case. Errors may too readily be deemed jurisdictional because, where a decision-maker engages in an error en route to a final decision, a formalistic argument could almost always be mounted that, without the error, the course of the final decision *might* have been different. Such formalistic arguments would urge that, because the course of reasoning on that hypothesis will not be known, it *could* theoretically have been different with a different outcome. But that approach fails to recognise that to label an error “jurisdictional” is to reflect on its gravity: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (***Hossain***) at [25] (Kiefel CJ, Gageler and Keane JJ). It is not the approach which the authorities require the court to take.
6. The prospect that the Appellant might have enjoyed a different outcome, absent error, must be a *realistic* possibility: *SZMTA* at [48] (Bell, Gageler and Keane JJ); *MZAPC* at [2] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
7. Where, for example, an error has been made with respect to a piece of evidence that provides further support for a finding that is otherwise supported by strong evidence, the error may not be material: *Mackie v Minister for Home Affairs* [2021] FCA 1326 (***Mackie (first instance)***) at [55](Besanko J); *Mackie v Minister for Home Affairs* [2022] FCAFC 120 (***Mackie (Full Court)***) at [62] (Rares, Mortimer and O’Sullivan JJ), acknowledging that the reconstructive exercise stipulated by *MZAPC* involves “reasonable conjecture” on which reasonable judicial minds might differ, but that any difference will not necessarily reveal error. Conversely, as Mortimer and Bromwich JJ observed in *Chamoun* at [60], where the error involves a misunderstanding by the decision-maker “of the very power which she or he is tasked to exercise”, the realistic possibility of a different outcome will be more readily apparent and “it may be that quite specific circumstances would be required before a reviewing court could confidently conclude that an applicant or appellant was not deprived of the possibility of a successful outcome”. It should be recalled that, in *Chamoun*, the misunderstanding went to the core of the Minister’s task in the exercise of his discretion.
8. Not every error of law will be of sufficient gravity or have sufficient impact on the decision as to be material: *Hossain* at [25], [31] (Kiefel CJ, Gageler and Keane JJ); *BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1429 (***BOE21***) at [26] (Bromwich J). The requirement of materiality must add something to the requirement that error be identified, in order for the error to be jurisdictional and to have taken the decision-maker’s decision outside the permissible bounds of administrative decision-making accorded to that decision-maker under the relevant legislation. As we have said, this means that a person seeking to establish that an error was material must establish that there was a *realistic* possibility of a different outcome had the error not occurred. Just as the assessment of whether that *realistic* possibility has been established is not to be undertaken by merely excising specific reasoning which involves error without assessing the impact of the error on the decision-maker’s reasoning and the reconstructive exercise required (*Chamoun* at [70]), nor is it to be undertaken in a formalistic fashion, or by adopting an approach which involves fine-grained parsing of the decision-maker’s language.

### The parties’ submissions

1. In addressing materiality, the Appellant invoked the image of “straws on the camel’s back”, likening each erroneous finding of the Tribunal to such a straw. The Appellant harnessed the metaphor to submit that we ought to be satisfied that there was a realistic possibility that removal of the tainted straws couldhave resulted in a favourable outcome before the Tribunal. This submission, advanced orally, did not rest happily with the submission, advanced in writing, that the impugned finding concerning sub-paragraph (a) “cannot safely be excised” such that this court could confidently say there was no “realistic possibility” that the Tribunal’s overall conclusion at TR [92], which was based on the Tribunal’s cumulative assessment of the matters in sub-paragraphs (a)–(g) might have been different. The Tribunal’s finding that the Appellant’s conduct was “very serious” (rather than merely “serious”) was also an inextricable part of its ultimate conclusion, stated at TR [164(e)]. There, the Tribunal stated that it did not consider that the weight attributable to the relevant Other Considerations outweighed the “strong, combined and determinative weight” that it attributed to Primary Considerations 1 and 4.
2. The Respondent contended that the Appellant did not establish that any purported error would be material. The Respondent stressed that the Tribunal found that each of the sub-paragraphs (a), (b), (c), (e) and (f) supported the conclusion that the Appellant’s offending was “very serious” and also reached its conclusion that the offending was very serious after having regard to “all of the evidence and submissions made to the Tribunal”: at TR [92].
3. The Respondent also advanced a submission that the Tribunal’s reasons disclosed an assessment of the seriousness of the offending based on the Tribunal’s own consideration of the evidence and submissions before it, which was not the product (or not solely the product) of consideration of the matters set out in sub-paragraphs (a)–(g): at TR [10], [92], [104]. The Respondent also highlighted that the Tribunal considered that only some “slight” weight was to be given to two of the Other Considerations, whereas it concluded that two of the four Primary Considerations weighed strongly in favour of non-revocation (with the other two Primary Considerations relating to family violence and minor children not being relevant): at TR [164].
4. In oral submissions, the Respondent cited the decision of Besanko J in *Mackie (first instance)*, which was upheld on appeal to the Full Court in *Mackie (Full Court)*. The point that Besanko J made in *Mackie (first instance)* was that, where a factor forms part of a cumulative decision, an error made in relation to one piece of evidence does not rule out a conclusion that an error has not been shown to be material. His Honour stated as follows at [55]:

The fact that an error has been made with respect to a piece of evidence that provides further support for a finding otherwise supported by strong evidence does not rule out a conclusion that the error has not been shown to be material as the decision in *SZMTA* illustrates. The Minister’s argument here was that the other evidence and findings of the Minister that the applicant had an unwillingness to obey Australian laws was so strong that there is no realistic possibility of a different result absent the finding of a further example. In my opinion, that is correct, both as to the assessment of the national interest and the weighing process against other considerations favouring non-cancellation of the applicant’s visa.

1. On appeal, the Full Court in *Mackie (Full Court)* recognised (at [62]) that Besanko J’s description of the “other evidence and findings” of the Minister as “so strong” as to negate a realistic possibility of a different result involved:

the supervising Court weighing the totality of the “historical facts” as represented by the reasons of the repository and making a judgment about the possibility of a different result if the error had not been made.

1. In view of the Respondent’s late Notice of Contention concerning materiality, the Appellant sought and was granted an opportunity to put on a short additional written submission addressing materiality. In his additional written submission on materiality, the Appellant contended that the Tribunal’s errors in relation to sub-paragraphs (a) and (b) contributed to its assessment of his conduct as “very serious”, when the Tribunal could have concluded that his conduct was merely “serious”; no submission was made that the Tribunal could have concluded that the Appellant’s conduct was not at least “serious”. The submission was that, if the Tribunal had assessed his conduct as less than “very serious”, its overall evaluative and discretionary weighing process could have been different. The Appellant pointed to aspects of the Tribunal’s reasons where the seriousness of the offending was referred to by the Tribunal in its assessment of Primary Consideration 1, the ultimate submission being that:

[B]ut for the Tribunal’s errors affecting its assessment of the appellant’s conduct as “very serious”, the Tribunal might have given less weight to “Primary Consideration 1”.

The Appellant further submitted that, because the Tribunal approached Other Consideration 4 by ascribing relative weight to that consideration, its “error in ascribing weight to Primary Consideration 1 flowed through to affect the relative weight given to Other Consideration 4”.

1. In relation to *Mackie (first instance)* and *Mackie (Full Court*), the Appellant emphasised that, in those cases, the court was concerned (in obiter dictagiven the principal finding that the Minister did not err) with the materiality of the Minister’s consideration of matters which were but a “further example” of the applicant’s unwillingness to obey Australian laws. By contrast, the Appellant observed that the errors concerning sub-paragraphs (a) and (b) were not merely “further example(s)”, but went to the central task of the gradation of the seriousness of the Appellant’s conduct.

### Consideration

1. As set out above, in our view, the Tribunal erred in finding that sub-paragraph (a) militated strongly in favour of a finding that the Appellant’s criminal offending was of a very serious nature without elucidating any logical basis upon which that conclusion was reached.
2. In assessing whether that error was material, we are required to consider whether there is a realistic possibility that, if the Tribunal had not fallen into error, it could have reached a conclusion favourable to the Appellant on revocation. The observations of the High Court in *MZAPC* at [38]–[39] — regarding the approach to be taken in answering the counterfactual question that arises in assessing materiality — allow for basal questions of fact, including the question of “how the decision that was in fact made was in fact made”, to be determined by inference. We do not, however, read the High Court’s observations as directing that we must proceed to determine, by inference, whether the Tribunal engaged in the analogical reasoning, or some other course of reasoning, where, as is the case here, the Appellant puts its case on materiality on a different basis.
3. The Appellant contended that, properly construing and applying the Direction, once a decision-maker has confirmed that the criminal conduct in question is not of a kind described in sub-paragraph (a), that sub-paragraph becomes wholly irrelevant and the decision-maker should move on to consider the next sub-paragraph. The Appellant contended that adopting analogical reasoning would also amount to an error. We have already noted that, without deciding the point, we do not consider that proposition necessarily to be correct. Nevertheless, the issue of materiality can be resolved taking the Appellant’s case at its highest, on the basis that, as the Appellant contended, the Tribunal should have disregarded sub-paragraph (a) as irrelevant. Proceeding in that manner also means that we do not need to determine, as a basal fact, for the purposes of the materiality analysis, whether or not the Tribunal *in fact* adopted analogical reasoning.
4. We are not persuaded that, had the Tribunal concluded that sub-paragraph (a) was simply irrelevant to its analysis (as the Appellant contends it should have), there is a realistic possibility that the Appellant could have achieved a favourable decision on revocation. As such, the error is not jurisdictional.
5. That is so for the following reasons.
6. First, this is not a case of the kind referred to in *Nguyen v Minister for Home Affairs* (2019) 270 FCR 555at [51] (Jagot, Robertson and Farrell JJ) where there is a “clear causal link” between the error and the decision. Nor is this a case of the kind referred to by Mortimer and Bromwich JJ in *Chamoun* at [61], in which the decision-maker has misunderstood the very power to be exercised. On the contrary, here, the Tribunal properly stated the nature of its task, and the content of the various aspects of Direction 90. The only aspect relevantly impugned is the way in which the Tribunal approached sub-paragraph (a).
7. Secondly, the Tribunal plainly considered that the Appellant’s offending was very serious. On a fair reading of the whole of the Tribunal’s reasons, that conclusion was not dependent on the Tribunal’s view that sub-paragraph (a) militated strongly in favour of a conclusion that the conduct was very serious. Contrary to the Appellant’s submission, even if the Tribunal had concluded that sub-paragraph (a) was entirely irrelevant and moved on, we do not consider that there is a realistic possibility that the Tribunal could have considered the conduct to be merely serious, or (if it did) that the weighing exercise could have had a favourable outcome.
8. We do not accept that, as the Respondent suggested, the presence of TR [10] near the start of the Tribunal’s reasons suggests that the Tribunal actually reached that conclusion independent of the Direction altogether. That conclusion could have been included at any stage of the Tribunal’s drafting and reasoning process. Nevertheless, the content of the observation at TR [10], in conjunction with the description of the offending which followed, indicates that the Tribunal considered the actual offending to be very serious. It is also apparent from TR [92] that the Tribunal’s view of the seriousness of the Appellant’s offending — namely that it was very serious — was reached following consideration of “all the evidence and submissions made to the Tribunal”, and not just the matters identified in the relevant sub-paragraphs of paragraph 8.1.1 of the Direction.
9. The way in which the Appellant advanced his argument highlighted that the Direction requires decision-makers to adopt a structured approach, but tended to lose sight of the fact that the matters set out in sections 8 and 9 are matters that the decision-maker must “take into account … where relevant to the decision”; those matters are not integers in a mathematical formula.
10. More than that, paragraph 8.1.1 sets out matters to which a decision-maker must have regard in considering the “nature and seriousness” of a non-citizen’s offending, which is itself a matter to which a decision-maker must “give consideration” in considering the “protection of the Australian community from criminal or other serious conduct”. The protection of the Australian community is but one of four identified Primary Considerations. In other words, positing that the Tribunal ought to have disregarded sub-paragraph (a) entirely, that would only have affected one aspect of an ultimate decision that brought in many considerations. The Tribunal reached its view on the seriousness of the Appellant’s offending by an analysis that clearly gave significant weight to the matters stated in sub-paragraphs (c) to (e) relating to the sentences imposed, the frequency and any trend of increasing seriousness in the offending, and the cumulative effect of repeated offending: see TR [75]–[81].
11. Thirdly, the Tribunal’s assessment that the weight of the Other Considerations favouring revocation was “slight” reveals that the Tribunal did not consider there to be much force in the only considerations that countervailed against the conclusion driven by the conclusions reached on Primary Considerations 1 and 4. As such, had the Tribunal not erred in its approach to sub-paragraph (a), we do not consider that there is a realistic possibility that the outcome of the process of reasoning set out in TR [164] could have been different.
12. Fourthly, the Tribunal plainly, and appropriately, had regard to the principles set out in paragraphs 5.2(2) and (3) and Primary Consideration 4, in relation to which decision-makers are to take into account the matters stated at paragraph 8.4 of Direction 90: at TR [107]–[115]. Those matters indicate a lack of tolerance on the part of the Australian community for non-citizens engaging in criminal conduct, and an expectation that those engaged in “criminal or other serious conduct” should expect “to forfeit the privilege of staying in, Australia”. In stating its conclusions on Primary Consideration 4, the Tribunal drew attention to the “norm” stated in paragraph 8.4(1) and the principle in paragraph 5.2(b). While it is the case that those matters refer back to the nature of the non-citizen’s conduct, we do not consider that there is any basis on which to conclude that the Tribunal’s error in relation to sub-paragraph (a) “infected” its analysis of Primary Consideration 4. As such, the Tribunal’s conclusion regarding Primary Consideration 4 and its role in the ultimate decision as to non-revocation (at TR [164]) remains undisturbed.
13. The Tribunal conducted a weighing exercise in bringing together its analysis of the ultimate decision on non-revocation: at TR [164]. It was not suggested by the Appellant that this approach involved error. Even if, as the Appellant submitted, the Tribunal’s conclusion on Primary Consideration 1 could have been less severe, had it not erred in its approach to sub-paragraph (a), and even if, as the Appellant again submitted, the Tribunal could have concluded that the Appellant’s conduct was merely “serious” (rather than “very serious”), there is, in our view, no realistic possibility that the outcome of the weighing exercise could have been any different. That is the position given the view the Tribunal took on the strength of Primary Consideration 4, and the view the Tribunal formed on the Other Considerations.
14. The Appellant’s submissions on materiality failed to grapple at all with the weight and force of the Tribunal’s consideration of Primary Consideration 4. His submission on Other Consideration 4 (links to the Australian community) suggested that, due to its error, the Tribunal ascribed more weight to Primary Consideration 1 than it should have, and that the relative weight given to Other Consideration 4 was thereby also affected. The Tribunal’s reasons state plainly that the Tribunal took into account the impact of a non-revocation decision on the Appellant’s wife, who was imprisoned, his adult son and his adult step-children, as well as the evidence that the Appellant had friends in Australia and had come to Australia in 1997. The Tribunal, having evaluated those matters, considered that they only weighed “slightly” in favour of restoration of his visa.
15. For these reasons, in our view the Tribunal’s error in relation to sub-paragraph (a) was not jurisdictional.

# FIRST GROUND OF APPEAL: Direction 90, paragraph 8.1.1(1)(B)

## The primary judge’s reasons: Direction 90, paragraph 8.1.1(1)(b)

1. In relation to ground 1, the primary judge identified the two attacks mounted on the Tribunal’s approach to sub-paragraph (b). The first related to the contention that the Tribunal had misconstrued sub-paragraph (b), which refers to criminality that is “serious”, rather than “very serious”. The second line of attack was mounted on the basis that, because sub-paragraph (b) is directed to crimes that are committed “against” vulnerable members of the community, rather than crimes that “negatively impact” them, the Tribunal must also have misconstrued sub-paragraph (b).
2. In rejecting the first line of attack, the primary judge rejected an inference that the Tribunal’s observation (at TR [74]) proceeded on the basis that sub-paragraph (b) recorded the view of the Australian government and community that certain types of offending there referred to were “very serious”. The primary judge then adopted a similar course of reasoning as his Honour had in relation to sub-paragraph (a), in identifying that there was “a more (or at least equally) plausible explanation as to how the Tribunal was drawn to the observation that was recorded in [74] of its Decision”: at PJ [60]. There, the primary judge concluded that the Tribunal “formed (or might fairly be thought to have formed) the view that it formed” by the form of analogical reasoning that his Honour had found to be open in respect of sub-paragraph (a): at PJ [60]. The primary judge then declined to infer that the Tribunal did not properly appreciate sub-paragraph (b), observing that the inference could not properly be drawn “because there is at least one competing inference that the evidence is equally capable of supporting”: at PJ [61].
3. While the primary judge’s reasoning in relation to sub-paragraph (b) was similar to his Honour’s reasoning in relation to (a), the primary judge’s reasons on the latter more clearly involved a concluded view that the Tribunal *had* adopted an analogical form of reasoning, as distinct from deciding the point on the basis that the Appellant had not discharged his onus due to the availability of a competing inference (namely that the Tribunal adopted analogical reasoning).
4. Turning to the second line of attack, the primary judge observed that the distinction between crimes committed “against” identified victims and crimes that negatively affect them “is, in all likelihood, illusionary”: at PJ [63]. His Honour observed that, in any event, it could not be inferred that the Tribunal misunderstood sub-paragraph (b) as encompassing crimes that “negatively impact” vulnerable people given that the Tribunal had accurately recorded the content of sub-paragraph (b): at PJ [64]. That inference was said to be unavailable on the basis that it was “more (or at least equally) likely” that the Tribunal adopted the analogical form of reasoning already discussed: at PJ [65]. On that basis, the primary judge concluded that the Appellant could not establish the factual foundation necessary in order to make good the submission advanced: at PJ [65].

## The parties’ arguments on error

1. On appeal, the Appellant contended (as he had before the primary judge) that two distinct errors emerge from the Tribunal’s approach to the application of sub-paragraph (b).
2. First, he contended that the relevant limb of the sub-paragraph is engaged only if “a particular identifiable person was a victim of a crime” and that particular person could be characterised as a vulnerable member of the community. On that basis, the Appellant contended that the Tribunal misconstrued sub-paragraph (b)(ii) by equating the concept of a crime that might “negatively impact” unidentified or unidentifiable people with crimes “against” vulnerable members of the community.
3. Secondly, the Appellant contended that the Tribunal manifestly erred by finding that sub-paragraph (b) “militates in favour of a finding that the [Appellant’s] offending has been of a very serious nature”. The Appellant submitted that that conclusion “collides” with the express terms of the sub-paragraph, which refers to conduct that the Australian government and Australian community are deemed to regard as “serious” as distinct from “very serious”. The Appellant submitted that sub-paragraphs (a) and (b) must be read together, to expose the distinction drawn between conduct regarded as “very serious” as compared with merely “serious”.
4. The Appellant submitted that its argument did not rest on persuading the court to draw any inference as to how the Tribunal reached the conclusion it reached in order to establish that the Tribunal erred; rather, he contended that the Tribunal’s error was express and manifest in its reasons at [74]. The Appellant submitted that:

Put simply, paragraph (b) cannot “militate[] in favour of a finding” that conduct is “very serious” (as distinct from “serious”) in nature.

(original emphasis)

1. The Appellant further argued that the primary judge’s approach involved a reconstruction of the Tribunal’s reasons.
2. In developing his arguments orally, the Appellant argued, as he did in relation to sub-paragraph (a), that the introductory words to sub-paragraph (b) merely acknowledge that it remains open to the Tribunal to conclude that conduct is serious, or very serious, even if it is not of a kind specifically deemed by the Direction to have that quality in the view of the Australian government or community. Drawing on the appellate and first instance decisions in *CKL21* and *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, the Appellant submitted that it was not open to the Tribunal itself to attempt to form views about how the Australian community or government would regard conduct not of a kind specified in the sub-paragraph.
3. The Respondent relied on the arguments advanced in respect of sub-paragraph (a) in his submissions on sub-paragraph (b). The Respondent further submitted that there is nothing in the scheme of the Direction to confine sub-paragraph (b)(ii) to identified vulnerable persons affected by criminal conduct. The Respondent argued that the primary judge’s observations as to the lack of a distinction between criminal conduct engaged in “against” a person and criminal conduct that visits adverse consequences on a person were correct.
4. In addressing the second error contended for by the Appellant, the Respondent submitted that there was no need for any “reconstruction” of the Tribunal’s reasons to discern its path of reasoning. The Respondent noted that [72] of the Tribunal’s reasons indicated that the Tribunal was aware of the relevant features of the sub-paragraph and that, in placing the Appellant’s conduct on a spectrum of seriousness, the Tribunal was entitled to consider the types of conduct deemed to be “serious” in the eyes of the Australian government and community.

## Consideration

1. We do not accept the Appellant’s argument that sub-paragraph (b)(ii) requires that there be an identified victim who is vulnerable. In referring to crimes “committed against vulnerable members of the community (such as the elderly and the disabled)”, the relevant part of the sub-paragraph identifies a sub-set of criminal conduct whose effect is suffered by those with the stipulated features. As the primary judge explained (at PJ [63]), the distinction between crimes committed “against” identified individuals and crimes that negatively affect them is likely to be illusory. It is the nature of the persons who experience the consequences of the criminal conduct in question that is of importance, and on which the relevant part of the sub-paragraph fixes. Accordingly, we reject the first specific error contended for by the Appellant.
2. Turning to the second error contended for by the Appellant, in our view, the Tribunal’s reasons in relation to sub-paragraph (b) suffer from the same error that we identified in relation to sub-paragraph (a) above. Put shortly, the Tribunal did not elucidate *any* reasoning as to why or how a deemed view that the Australian government and community view certain kinds of criminal conduct as “serious” (as distinct from “very serious”) “militates in favour of” a finding that the Appellant’s criminal conduct was of a “very serious nature”: at TR [74]. Given that sub-paragraph (b) establishes the deemed views of the Australian government and community that certain criminal conduct is “serious” (as distinct from “very serious”), the failure of the Tribunal to elucidate a course of reasoning by which those deemed views could support its “very serious” conclusion, constitutes an error.
3. For the same reasons as have been set out above concerning sub-paragraph (a), we do not consider that this conclusion of error can be avoided by pointing to a course of reasoning that theoretically *could* have been engaged in by the Tribunal. As we have said, the reconstructive exercise undertaken by the primary judge went too far. Nor, for the same reasons as have been set out above, do we consider that the conclusion of error can be avoided by recourse to the Appellant’s burden. In order to establish error in this case, it is enough for the Appellant to identify, as he has, a conclusion on an aspect of the Direction that has no comprehensible foundation in the articulated reasoning of the Tribunal.
4. For completeness, we do not accept the Appellant’s submission that the Tribunal erred on the basis that it impermissibly formed its “own idiosyncratic view” that conduct not listed in sub-paragraph (b) was viewed seriously by the Australian government or community. The Tribunal’s conclusion at TR [74] was not framed by reference to how the Australian government or community would view the Appellant’s conduct; rather, it was a conclusion directed to the nature of the Appellant’s conduct as assessed by the Tribunal.

## Materiality

### The parties’ submissions

1. In contending that the Tribunal’s error in relation to sub-paragraph (b) was material, the Appellant adopted the submissions he advanced in relation to sub-paragraph (a). The Appellant also made his supplementary written submissions on materiality by reference to sub-paragraphs (a) and (b) together. Accordingly, the Appellant’s submissions are not repeated in detail here, save to note that the submissions emphasised the low bar an applicant has to clear on materiality, and contended that, but for the errors, the Tribunal could have assessed the Appellant’s conduct as less than “very serious” and, had it done so, then the Tribunal’s overall evaluative and discretionary weighing process could have been different.
2. The Respondent also adopted the submissions he made on materiality in relation to sub-paragraph (a) in addressing materiality in relation to sub-paragraph (b). The burden of the Respondent’s submissions on materiality lay in stressing that the Tribunal formed its own view as to the seriousness of the Appellant’s conduct, and that the weighing exercise undertaken by the Tribunal saw only “slight” weight being given to the only factors supportive of revocation.

### Consideration

1. The question is whether the Appellant has met his burden of establishing that, had the Tribunal not erred but had (as the Appellant contended it should have) regarded sub-paragraph (b) as irrelevant, there is a realistic possibility that the Tribunal could have approached the weighing exercise differently, with a favourable decision on revocation. In our view, the Appellant has not discharged that burden. In our view, even if the Tribunal had (as the Appellant contends it should have) taken the view that sub-paragraph (b) did not apply at all, we do not consider there was a realistic possibility that this could have led the Tribunal to a favourable decision on revocation of the decision. For all of the reasons we have already set out in relation to sub-paragraph (a), we are not satisfied that, with so little weighing in the Appellant’s favour (arising from the Other Considerations), there is any realistic possibility that the Tribunal’s weighing exercise could have reached a different outcome had the Tribunal disregarded sub-paragraph (b).

# THIRD AND FOURTH GROUNDS OF APPEAL: Direction 90, paragraph 8.1.1(1)(G)

## The primary judge’s reasons: Direction 90, paragraph 8.1.1(1)(g)

1. The primary judge addressed grounds 3 and 4 of the application before him together. The primary judge considered that the impugned finding of the Tribunal was a finding of fact (at PJ [74]), to which a number of cases (set out in his Honour’s reasons) concerning factual errors were relevant: at PJ [74]–[78]. In particular, the primary judge referred to the observations of Moshinsky J in *BSE17 v Minister for Home Affairs* [2018] FCA 1926 (***BSE17***) at [33]that the “no evidence” ground will not be made out where there is even a “skerrick” of evidence.
2. After referring to the evidence that was before the Tribunal, and weaknesses in relation to it, the primary judge concluded that it could not be said that there was *no* evidence that the Appellant had received written notice sufficient to support the conclusion to which the Tribunal was drawn. His Honour referred to the sentencing remarks of Judge Montgomery of the County Court in 2011, which referred to the officer’s statement. In respect of that statement, his Honour noted that, as was apparent from the sentencing remarks, the statement “identified that there was at least a possibility that the applicant might be deported in consequence of his offending”: at PJ [86]. The primary judge then concluded that (at PJ [86]):

The statement that was tendered to establish that possibility was one that the Tribunal was entitled to infer had been given to (and, having been received, had been advanced on the instruction of) the applicant.

1. The primary judge also rejected the Appellant’s criticism advanced on the basis that none of the material before the Tribunal considered the consequences of *future* offending. That contention was rejected on the basis that, insofar as the Appellant was told that adverse migration consequences might attach to the offending for which he was sentenced in 2011, he must plainly be understood implicitly to have been told that further offending would visit equivalent consequences: at PJ [88].
2. Although the primary judge rejected the contention that the Tribunal erred in concluding that sub-paragraph (g) was engaged, his Honour proceeded to address materiality. On the basis that the Tribunal was entitled to have regard to its finding regarding what the applicant knew or understood at the time of the reoffending, that matter remained a relevant consideration to which the Tribunal could have regard. The primary judge concluded that it was “frankly, fanciful to suggest that the Tribunal might nonetheless have drawn a more lenient conclusion than it did simply because the state of awareness [regarding potential migration consequences of reoffending] arose otherwise than by means of advice of the kind to which subparagraph (g) refers”: at PJ [93].

## The parties’ arguments on error

1. The parties made their submissions on grounds 3 and 4 together.
2. The Appellant, having noted that the Tribunal did not make any clear finding about which limb of sub-paragraph (g) applied, submitted that, in any event, the warnings to which the Tribunal referred were not warnings, in writing, about the consequences of further offending.
3. The Appellant submitted that, in that regard, the matter ought to be distinguished from that which was held not to be affected by jurisdictional error in *BOE21*. *BOE21* was said to be distinguishable because in that case the Tribunal observed that the non-citizen had been informed by the sentencing judge that he was at risk of deportation and Bromwich J treated the sentencing judge’s remarks as the direct delivery of a verbal warning (cf a written warning falling within sub-paragraph (g)). As such, in *BOE21* there was no conflation of verbal and written warnings.
4. The Appellant contended that the Tribunal erred in supposing that it was required by sub-paragraph (g) to consider the factors weighing against revocation when the factor was not an applicable mandatory relevant consideration. He argued that the Tribunal’s finding at TR [91] — that the Appellant had reoffended since having been formally warned or since otherwise being made aware in writing about the consequences of further offending in terms of his migration status — was made without any evidentiary basis. The Appellant submitted that, contrary to the primary judge’s finding (at PJ [86]), it was not open to the Tribunal to infer that the Appellant was given a written statement tendered during his 2011 sentencing. He also contended that, in order for an inference to have been drawn by the Tribunal supporting TR [91], it would have been necessary for the Tribunal to have drawn an additional inference that the statement in question dealt with the consequences of further offending. On that matter, the Appellant submitted that there was nothing in the Tribunal’s reasons to support the proposition that it drew a two-step inference, or that the inference was reasonably open: cf PJ [86].
5. In contesting that the Tribunal fell into error, the Respondent emphasised that there will be no jurisdictional error arising from a finding of fact if there is even “a skerrick of evidence” to support the finding (citing *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 (***SDAEA***) at [31] (Tracey J)). The Respondent further submitted that evidence supporting a finding need not be direct but may be found in material which permitted the Tribunal to reasonably infer a particular matter and that jurisdictional error will only arise if the finding is “critical to the outcome of the decision”.
6. The Respondent submitted that it was open to the Tribunal to infer that the Appellant had been made aware, in writing, about the consequences of further offending on his migration status. The Respondent placed particular reliance on the sentencing remarks of Judge Montgomery in 2011, which referred to the officer’s statement. The Respondent submitted that it was reasonably open to the Tribunal to draw two inferences, each of which supported its conclusion: first, that the Appellant had been provided with a copy of the officer’s statement; and secondly, that the Appellant had been provided with a copy of the sentencing remarks. The Minister submitted that, on either view there was more than a “skerrick” of evidence on which the Tribunal could rely to find that the Appellant had been given a written notice for the purposes of sub-paragraph (g) and that the sub-paragraph was therefore engaged.
7. In oral submissions, the Minister added a further inference, namely as to the content of possibilities identified in the officer’s statement. The Minister submitted that it was to be inferred that the officer’s statement referred to the possibility of deportation for future offences among the “various possibilities” to which Judge Montgomery made reference.

## Consideration

1. The Tribunal found that the consideration set out in sub-paragraph (g) was “directly relevant”: at TR [86]. The Tribunal further stated that it was satisfied that the Appellant had reoffended “since having been formally warned or since otherwise being made aware in writing about the consequences of further offending in terms of his migration status”: at TR [91].
2. The Tribunal’s reasoning in relation to sub-paragraph (g) is set out at paragraph 26 above. The evidence before the Tribunal relevant to this matter constituted the sentencing remarks of Judge Montgomery in 2011 (which referred to the officer’s statement), the prison officers’ notes, and the observations of the Court of Appeal judges in 2012 (set out at paragraph 26 above).
3. In the course of its reasoning, the Tribunal noted (more than once) that it rejected the Appellant’s claims that he did not understand the potential deportation consequences of criminal offending. On the contrary, the Tribunal found that the Appellant “would have understood that his migration status was a relevant issue prior to his reoffending”: at TR [91].
4. The Tribunal appears to have approached sub-paragraph (g) primarily by having regard to what the Appellant would have understood about his migration status. The Tribunal did not specify in terms whether it considered that the Appellant had been “formally warned” or had been “otherwise … made aware in writing” about the consequences of further offending. It is also clear from the Tribunal’s reasons that it considered sub-paragraph (g) to be “directly relevant” (cf the “militates in favour of” language used in relation to sub-paragraphs (a) and (b)).
5. In our view, the Tribunal erred in concluding that sub-paragraph (g) applied. As noted, the Tribunal’s reasoning fixed on what the Appellant ought to have understood about the risk of deportation. The Tribunal rejected the Appellant’s claims not to have understood anything about deportation based on the material referred to by it.
6. It is well established that a decision-maker who makes a finding of fact or draws an inference where there is a complete absence of evidence makes an error of law: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355–56 (Mason J); *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390 at [91] (Hayne, Heydon, Crennan and Kiefel JJ).
7. However, the “no evidence” ground traditionally requires that there be “not a skerrick of evidence”: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13; [2021] HCA 41 at [17] (Keane, Gordon, Edelman, Steward and Gleeson JJ); *BSE17* at [33] (Moshinsky J); *SDAEA* at [31] (Tracey J). In our view, this threshold, while demanding, has been met, and the Tribunal erred in concluding that sub-paragraph (g) applied.
8. Sub-paragraph (g) is concerned with whether a non-citizen has reoffended since havingbeen “formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen’s migration status”. As the Appellant pointed out during the hearing of the appeal, it was not contended by the Minister that the Appellant had been formally warned. Accordingly, sub-paragraph (g) could only apply if the Appellant had been made aware *in writing* of the consequences of *further offending*.
9. There is no indication on the evidence before the Tribunal that the officer’s statement referred to by Judge Montgomery was provided to the Appellant. Nor is there any indication that a written record of the judge’s sentencing remarks, or the observations of the Court of Appeal judges, were provided to the Appellant. Likewise the prison officers’ notes.
10. Further, none of those documents, even if provided to the Appellant, referred to the consequences of *further offending*. We are not prepared to infer (as the Minister invited us to) that the officer’s statement referred to the possibility of deportation for future offending. To do so would not only descend into speculation, but would be to engage in primary fact-finding in circumstances where there is no indication that the Tribunal made any such inference.
11. While warnings which ought to have caused the Appellant to be aware that further criminal offending would jeopardise his migration status could be taken into account by the Tribunal as a relevant non-mandatory consideration, the mandatory consideration presented by sub-paragraph (g) is not engaged by warnings which do not directly address the consequences of *further offending*. A written document will not fall within sub-paragraph (g) if it only touches on the consequences of further offending by a process of inference or deduction.
12. It follows that we do not agree with the primary judge’s conclusion (at PJ [88]) that a warning may fall within sub-paragraph (g) where it relates to the consequences of prior offending but ought to cause a non-citizen to appreciate the consequences of future offending. Being alerted to potential deportation consequences of past offending may very well cause a non-citizen to realise that future offending will likewise raise the same (or even graver) risks of deportation; but that is not what sub-paragraph (g) requires. Rather, the sub-paragraph is specific in its terms, and a warning (direct or inferential) which falls outside its parameters remains a relevant consideration, although not one made mandatory by sub-paragraph (g) of Direction 90.
13. The Respondent contended that it was open to the Tribunal to infer that the Appellant was given a copy of the officer’s statement and the sentencing judge’s remarks. The difficulty with this submission is that the Tribunal did not state it was making those inferences. As has already been discussed, in determining whether or not a decision-maker has erred, the role of a reviewing court is not to fill gaps in the decision-maker’s reasons or infer that the decision-maker drew conclusions not set out in its written reasons. We are also unable to draw the inferences invited concerning the Tribunal’s course of reasoning, as the Tribunal’s focus was plainly, and consistently, on what the Appellant understood about the risk of deportation arising from criminal offending. Put simply, the Tribunal did not infer that the officer’s statement (or the other written documents before the Tribunal) were provided to the Appellant.
14. The primary judge accepted the contention that there was no evidence of receipt of a written communication in relation to the sentencing remarks of Judge Montgomery, the Court of Appeal’s reasons or the prison officers’ notes: at PJ [85]. We agree, but we do not consider that there was even a “skerrick” of evidence which would support a factual conclusion that the officer’s statement was provided to the Appellant. The fact that it was tendered — by whom is not known — and referred to by the Appellant’s counsel in making submissions on sentencing only reveals that it was available to the Appellant’s counsel. It is not for us to venture into speculation regarding the working relationship between the Appellant and his counsel and, in particular, which documents available to counsel were provided to the Appellant. Accordingly, we do not need to decide whether the happenstance of a written document being passed on to a non-citizen — here, by his legal team in preparing to make submissions on sentencing — would mean that person had been “made aware, in writing, about the consequences of further offending in terms of the non-citizen’s migration status”. That question was not the subject of argument before us.
15. For these reasons, we consider that the Tribunal erred in finding that sub-paragraph (g) was “directly relevant” and that the Appellant had “re-offended since having been formally warned or since otherwise being made aware in writing about the consequences of further offending in terms of his migration status”: at TR [86], [91].

## Materiality

### The parties’ submissions

1. The Appellant submitted that the Tribunal’s finding at TR [91] was “critical to the outcome of the decision” as the Tribunal had stated that sub-paragraph (g) was “directly relevant” to the case. The Appellant submitted that “[t]he error therefore affected the Tribunal’s consideration of the matter that was otherwise required to be considered”, which finding was then relied on by the Tribunal as a critical strand of its reasoning on the weight to be given to the relevant primary consideration. The Appellant submitted that this was an error of the kind described in *CRU18 v Minister for Home Affairs* (2020) 277 FCR 493 at [31] (Wigney, Jackson and Snaden JJ).
2. On the Appellant’s submission, had the Tribunal appreciated that it was not *required* to consider the matter in sub-paragraph (g), it “might not have taken the warnings into account and might have made a different assessment of the seriousness of the offending”. On that basis, he submitted that the Tribunal’s error deprived him of the realistic possibility of a different outcome (citing *Nathanson* at [1] (Kiefel CJ, Keane and Gleeson JJ)).
3. The Appellant accepted that reoffending following warnings falling outside sub-paragraph (g) would be a relevant, but not mandatory, consideration. However, the Appellant contended that it was not open to us to consider whether there was a realistic chance of a different outcome had the Tribunal considered the matter as a relevant non-mandatory consideration, rather than proceeding on the basis that sub-paragraph (g) applied. This was said to be the position because the Minister had only raised the relevance of reoffending following being made aware of the potential deportation consequences in relation to sub-paragraph (g), and had not raised that matter as a relevant non-mandatory consideration.
4. On the Appellant’s case, the only thing to be done in conducting the reconstructive exercise mandated by *Chamoun* was to remove the “straw” of reoffending following being made aware of possible deportation consequences altogether. He submitted that, had the Tribunal not erred in applying sub-paragraph (g), it might not have considered that matter at all. The Appellant characterised consideration of the reoffending as a relevant non-mandatory consideration outside sub-paragraph (g) as an “entirely different argument”. The Appellant further submitted that it would be “quite radical” to pursue a counterfactual involving what he characterised as different reasoning, as that would permit any error in relation to the application of the Direction to be excused, provided substantially the same matter could have been considered as a relevant non-mandatory consideration. He contended that, to the extent *BOE21* might be read as condoning such a course, it was wrong.
5. The Respondent resisted the Appellant’s submissions on materiality, submitting that the finding that the Appellant had been made aware “in writing” (as opposed to by some other means) was not critical to the outcome in the decision, relying on the decision of Bromwich J in *BOE21*. The Respondent disputed that *BOE21* was distinguishable on the basis that the Tribunal there expressly recognised that no written notice had been given, but had regard to the formal warning given in the course of sentencing remarks.
6. The Respondent submitted that, although no actual written statement was given in the present case, in both this matter and in *BOE21* the substance of what the non-citizen had been told was relevant. Whether or not sub-paragraph (g) was properly to be considered a mandatory consideration in this case, the Respondent submitted that it could not have been an error for the Tribunal to consider reoffending after the Appellant was alerted to the potential consequences of offending on his migration status when consideration of such a matter (even if not within sub-paragraph (g)) was a relevant non-mandatory consideration. The Respondent further drew attention to the observations of the primary judge that, even if that finding of fact is wrong, such an error would “rarely suffice by itself to stigmatise a discretionary administrative decision as the product of jurisdictional error”: at PJ [74]–[76].
7. Finally, and consistent with his position on materiality in relation to grounds 1 and 2, the Respondent emphasised that any error made by the Tribunal in relation to sub-paragraph (g) was not material when considered in the context of the Tribunal’s reasons as a whole. In that regard, the Respondent stressed that all the indications on the Primary Considerations “went one way”, and the Tribunal accorded only slight weight to the Other Considerations insofar as they supported revocation.

### Consideration

1. Given the paucity of the Tribunal’s reasons, it is not immediately clear whether the Tribunal misunderstood what sub-paragraph (g) required, and applied it as though it did not require a communication in writing of the kind specified, or concluded that there *was* a communication in writing with the requisite characteristics. This is reflected in the paired grounds of appeal, with ground 3 asserting a misconstruction of sub-paragraph (g) and ground 4 asserting that the Tribunal made a finding that was not open to it on the evidence. Nevertheless, two things emerge clearly from the relevant part of the Tribunal’s reasons. First, the Tribunal found as a matter of fact that the Appellant was aware that criminal offending could jeopardise his migration status, and had engaged in further offending after becoming so aware: see TR [90]. Secondly, the Tribunal found that the fact that the Appellant reoffended in those circumstances contributed to the Tribunal’s “overall view that the nature and seriousness of the [Appellant’s] conduct can only be characterised as very serious”: at TR [92].
2. In our view, it is plain from the Tribunal’s reasons that it was influenced by the substantive matter of the Appellant’s reoffending in light of his awareness of the consequences of offending on his migration status. The possibility that the Tribunal, had it correctly identified that the warnings in question did not fall within sub-paragraph (g), would have entirely disregarded the fact of reoffending once migration consequences had been raised, is fanciful. That is so notwithstanding that the Minister raised the reoffending under sub-paragraph (g) and not independently of that sub-paragraph. The Tribunal would not have been prevented from considering a matter that was, as the Appellant accepts, open to it to consider, merely because the Minister advanced the consideration in question as a mandatory relevant consideration, rather than a relevant non-mandatory consideration.
3. The further proposition — and one which the Appellant needs to establish to render the error jurisdictional — is that the Tribunal’s decision on non-revocation might have been different had the Tribunal not erred in relation to sub-paragraph (g). Plainly, if that question is to be approached, as we think it can be, on the basis that the Tribunal would have had regard to the same substantive matters as a relevant non-mandatory consideration, then the Appellant cannot succeed on materiality. There is, on the facts of this case, no basis upon which to consider that, had the Appellant’s reoffending (once aware of potential migration consequences) been approached as a relevant non-mandatory consideration, its contribution would have been so much slighter as to potentially affect the outcome.
4. We do not accept that, as the Appellant submitted, this approach is “radical” or involves an approach to the analysis of materiality which means any misapplication of the Direction can be excused if the same matter could be considered as a relevant non-mandatory consideration. The Appellant’s argument loses sight of the nature and role of materiality in the review of administrative decision-making; as is plain from *SZMTA*, it is only material errors that are jurisdictional. If an error is not, properly considered, jurisdictional, there is nothing radical about that error not sounding in the relief sought. Further, the materiality of each error must be considered in the context of, and on the facts of, the case in which it arises. Our conclusion about the particular error of the Tribunal in this case concerning sub-paragraph (g) is rooted in the facts of this case, and in consideration of how the error affected the Tribunal’s reasoning; it says nothing about whether other errors concerning the Direction would be excused on the sweeping basis that the Appellant raised in argument.
5. It follows from the foregoing that, while we depart from the primary judge insofar as we are of the view that the Tribunal did err, we agree with his Honour’s alternate analysis of materiality: at PJ [90]–[93].

# CONCLUSION

1. The appeal will be dismissed. We will determine costs on the papers. We will permit the parties to make short written submissions as to costs.

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| I certify that the preceding one hundred and sixty-three (163) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, Thomas and Button. |

Associate:

Dated: 3 May 2023