FEDERAL COURT OF AUSTRALIA

TPTN v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCAFC 82

Appeal from:	*TPTN v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 788
File number(s):	QUD 315 of 2022
Judgment of:	**COLLIER ACJ, MEAGHER AND HORAN JJ**
Date of judgment:	20 June 2024
Catchwords:	**MIGRATION** – where Administrative Appeals Tribunal decided not to revoke the cancellation of the appellant's visa under s 501CA(4) of the *Migration Act 1958* (Cth) – where Tribunal took into account offences committed by the appellant as a child – where appellant taken never to have been convicted of juvenile offences by ss 85ZR and 85ZS of *Crimes Act 1914* (Cth) – where conceded that Tribunal erred in having regard to appellant's juvenile offending – whether error was material to Tribunal's decision – where there is a realistic possibility that the Tribunal's decision might have been different if the error had not occurred – appeal allowed
Legislation:	*Crimes Act 1914* (Cth) ss 85M(1), 85ZR, 85ZS *Migration Act 1958* (Cth) ss 499, 501(2), 501(3A), 501(7)(c), 501CA *Federal Court Rules 2011* (Cth) r 36.05 *Children (Criminal Proceedings) Act 1987* (NSW) ss 14(1), 14(1)(a), 15 *Youth Justice Act 1992* (Qld) s 184(2)
Cases cited:	*Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315 *Boensch v Pascoe* (2019) 268 CLR 593 *Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 6; 98 ALJR 475 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; 98 ALJR 610 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 *Minister for Immigration, Citizenship, Migrant Services*

	and Multicultural Affairs v Thornton (2023) 276 CLR 136 *TPTN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 262 *TPTN v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 788
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	73
Date of last submissions:	Appellant: 8 March 2024 First Respondent: 22 March 2024
Date of hearing:	23 November 2023
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr B McGlade
Solicitor for the First Respondent:	Minter Ellison

ORDERS

QUD 315 of 2022

BETWEEN:	**TPTN** Appellant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
ORDER MADE BY:	**COLLIER ACJ, MEAGHER AND HORAN JJ**
DATE OF ORDER:	**20 JUNE 2024**

THE COURT ORDERS THAT:

1. The appellant be granted leave to rely on the Further Amended Notice of Appeal dated 29 October 2023.
2. The appeal be allowed.
3. Order 3 of the Orders made on 15 June 2022 in proceeding QUD 72 of 2022 be set aside, and in lieu thereof it be ordered that:
   (a) the decision of the second respondent made on 14 February 2022 be set aside;
   (b) the appellant's application for review be remitted to the second respondent, differently constituted, to be determined according to law; and
   (c) the first respondent pay the appellant's costs of the appeal as agreed or taxed.

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

REASONS FOR JUDGMENT

THE COURT:

1 The appellant is a citizen of New Zealand who held a Class TY Subclass 444 Special Category (Temporary) visa (**Special Category visa**) that was cancelled under s 501(3A) of the ***Migration Act*** *1958* (Cth). A delegate of the **Minister** for Immigration, Citizenship and Multicultural Affairs decided under s 501CA(4) of the Migration Act not to revoke the cancellation decision, and the delegate's decision was affirmed on review by the Administrative Appeals **Tribunal**.

2 On 15 June 2022, the primary judge dismissed the appellant's application for judicial review of the Tribunal's decision: *TPTN v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 788. The appellant was unrepresented in the proceedings before the primary judge.

3 On 12 September 2022, the appellant filed an application for an extension of time to file a notice of appeal under r 36.05 of the *Federal Court* ***Rules*** *2011* (Cth).

4 On 13 February 2023, after the appellant had obtained pro bono legal representation and filed an outline of submissions articulating two proposed grounds of appeal (each of which raised a new ground of review), the Court made orders by consent granting an extension of time and giving the appellant leave to rely on an amended notice of appeal, including leave to argue the new grounds of review. One of those new grounds sought to rely on an argument that had been raised in a pending appeal in another matter that was then listed for hearing before the High Court: see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Thornton*** (2023) 276 CLR 136. In such circumstances, the Court ordered that this matter should remain in abeyance until the determination by the High Court of the appeal in *Thornton*.

5 As will become apparent, the ground of appeal based on *Thornton*, as later applied by the High Court in ***Lesianawai*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 6; 98 ALJR 475, is ultimately decisive of the outcome in the present appeal.

6 The High Court delivered judgment in *Thornton* on 14 June 2023, and this appeal was subsequently listed for hearing on 23 November 2023. At the outset of the hearing, and without opposition from the Minister, the Court granted the appellant leave to rely on a further amended notice of appeal raising an additional ground that was also not argued before the primary judge.

7 Accordingly, the grounds of appeal now before this Court are in the following terms:

1. **The Tribunal acted on a misunderstanding of the law**.

    a. First, the Tribunal concluded that s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth) (the **Act**) involved an exercise of discretion. The Tribunal erred in so concluding.

    b. Second, s 501CA(4)(b)(ii) of the Act involves a state of satisfaction test, not the exercise of a discretion.

    c. Third, the Tribunal's error was material: *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125 [51]-[52], [167]-[169].

2. **The Tribunal failed to comply with a mandatory consideration**.

    a. First, the Tribunal was required to have regard to relevant considerations in Direction 90: s 499(2A) of the Act. Here, the Tribunal failed to comply with paras 8.1.1(1)(a)(iii), 8.2 and 8.4(2)(a) of Direction 90.

    b. Second, the Tribunal failed to consider whether Ms BW was a 'member of the appellant's family' or a 'family member' under Direction 90: *JVGD v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1253; *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 115.

    c. Third, the Tribunal's error was material: *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398.

3. **The Tribunal took into account an irrelevant consideration**.

    a. First, s 14(1) of the *Children (Criminal Proceedings) Act 1987* (NSW) is an example of the type of state legislative provision expressly provided for in s 85ZR(2) of the *Crimes Act 1914* (Cth) as one 'which removes or disregards the conviction altogether': *cf. Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 23; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 409 ALR 234.

    b. Thus, the effect of s 85ZR(2) is that the appellant is taken never to have been found guilty of any offence committed as a child and to prohibit the Tribunal from taking into account a conviction of a child where there has been an order that no conviction be recorded: *Thornton* [36].

    c. Second, the Tribunal had taken into account findings of guilt in respect of offences in relation to the appellant where a Court had ordered that no conviction be recorded.

    d. Third, the error was material: *Nathanson*. It was an error to take those findings of guilt into account.

8 At the hearing on 23 November 2023, counsel for the appellant informed the Court that ground three was similar to a ground of review raised in another pending matter in which the High Court had recently reserved judgment: *Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 161 (16 November 2023). In that case, the High Court heard argument on the application of ss 85ZR and 85ZS of the ***Crimes Act** 1914* (Cth) in

conjunction with the State legislation that is the subject of ground three of this appeal, namely s 14(1) of the *Children (Criminal Proceedings) Act 1987* (NSW) (**Children Proceedings Act**). Although the parties made oral submissions at the hearing that addressed all of the grounds of appeal, it was agreed that the further hearing of the appeal should be adjourned until after the High Court had delivered judgment in *Lesianawai*. Accordingly, the Court made orders to adjourn the hearing until further order and required the parties to notify the Court after the decision in *Lesianawai* as to whether they sought to make any further submissions limited to the effect of that decision and ground three of the notice of appeal.

9 The High Court delivered judgment in *Lesianawai* on 6 March 2024. The appellant and the Minister filed brief further written submissions on 8 March 2024 and 22 March 2024 respectively.

10 In the light of the decision in *Lesianawai*, the Minister accepts that the Tribunal erred by having regard to findings of guilt in respect of the appellant's offending as a child but contends that this error was not material to the Tribunal's decision. As a result, the outcome of ground three of the notice of appeal turns only on the question of materiality.

11 For the reasons set out below, the Tribunal's error in having regard to the appellant's juvenile offences was material to its decision to affirm the delegate's decision not to revoke the cancellation of his visa, and the appeal should be allowed. In the circumstances, it is unnecessary to determine the other grounds of appeal: see ***Boensch v Pascoe*** (2019) 268 CLR 593 at [7]-[8] (Kiefel CJ, Gageler and Keane JJ), [101] (Bell, Nettle, Gordon and Edelman JJ).

FACTUAL BACKGROUND

12 The appellant was born in the Cook Islands on 8 October 1990. He is a citizen of New Zealand by virtue of his father's citizenship, but he has never resided in New Zealand.

13 The appellant arrived in Australia on 26 October 1998 when he was eight years old and, save for a brief 3-week period, he has since continuously resided in Australia. The appellant's parents, brother, grandmother and extended family all live in Australia. Until the cancellation decision on 14 May 2021, the appellant was the holder of a Special Category visa.

14 The appellant has a lengthy history of criminal offending in Australia, culminating in his conviction on 31 March 2021 in the Local Court of New South Wales for the offences of "assault occasioning actual bodily harm (DV)" and "Contravene prohibition/restriction in AVO

(Domestic)". The appellant was sentenced to a term of imprisonment of 18 months for each of these offences, to be served concurrently.

15 As a result of those convictions, the appellant did not pass the character test because he had a "substantial criminal record" on the basis of s 501(7)(c) of the Migration Act. Accordingly, his Special Category visa was subject to mandatory cancellation under s 501(3A) while he was serving his sentence of imprisonment on a full-time basis. On 14 May 2021, the Minister notified the appellant that his Special Category visa has been cancelled and invited him to make representations about the revocation of that decision pursuant to s 501CA.

16 On 15 November 2021, a delegate of the Minister decided not to revoke the cancellation under s 501CA(4) of the Migration Act.

17 On 16 November 2021, the appellant applied to the Tribunal for a review of the non-revocation decision. The appellant was self-represented before the Tribunal. A hearing took place on 24 January 2022, at which the Tribunal received oral evidence from the appellant (who appeared via Microsoft Teams) and his father.

18 On 14 February 2022, the Tribunal affirmed the delegate's decision not to revoke the cancellation of the appellant's Special Category visa: *TPTN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 262 (**Tribunal's reasons**).

THE TRIBUNAL'S REASONS

19 After setting out the appellant's immigration history, the Tribunal summarised the appellant's history of criminal offending in Australia. Under the heading "Offender history", the Tribunal stated:

> 7. The Applicant's first offending was as a juvenile. On 31 October 2005, he appeared before the Children's Court and was dealt with for the offences of assault occasioning actual bodily harm and affray. He received on each offence, a six-month bond to be under the supervision of juvenile justice for such time as deemed necessary.

20 The Tribunal proceeded to address the appellant's subsequent criminal record as an adult, noting that "[t]he [appellant] was first dealt with as an adult on 28 August 2008 when he appeared in the Liverpool Local Court for three road traffic offences". The Tribunal's reasons then dealt in turn with the appellant's sentences for offences of robbery and demanding money with menaces with intent to steal (committed on 2 May 2010); driving offences and drug

offences in 2016, 2017 and 2019; offences of assault occasioning actual bodily harm and demand with menaces with intent to obtain gain or cause loss (committed on 27 April 2019); an offence of contravention of a prohibition or restrictions in an apprehended violence order; and offences of assault occasioning actual bodily harm and further contraventions of a prohibition or restriction in an apprehended violence order (committed on 16 November 2020). It was the sentence imposed in respect of the last-mentioned offences that enlivened the mandatory cancellation provisions in s 501(3A) of the Migration Act.

21 The Tribunal noted that the victim of the offences committed on 27 April 2019 was a woman referred to as "Ms BW", in whose apartment the appellant was living together with Ms BW's two-year-old daughter from a previous relationship. At the time of the appellant's conviction of those offences, an apprehended violence order was issued that prohibited the appellant from contacting Ms BW. The subsequent offences committed on 16 November 2020 involved a violent altercation between the appellant and Ms BW that took place at Ms BW's home.

22 After referring to the terms of s 501CA(4)(b) of the Migration Act, the Tribunal identified the two issues before the Tribunal as follows:

(a) whether the appellant passed the character test; and

(b) whether there was another reason why the decision to cancel the appellant's visa should be revoked.

23 It was not in dispute that the appellant did not pass the character test, and the Tribunal so found. Accordingly, the main question for determination was "whether pursuant to 501CA(4)(b)(ii) of the [Migration] Act there is another reason why the original decision should be revoked": Tribunal's reasons at [34].

24 The Tribunal acknowledged that, "[w]hen considering the exercise of the discretion in s 501CA(4) of the [Migration Act]", it was bound to comply with Ministerial *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**).

25 The Tribunal set out the principles contained in para 5.2 of Direction 90 and identified the primary considerations and the other considerations that were required to be taken into account.

26 In considering the protection of the Australian community under "Primary Consideration 1", the Tribunal addressed the nature and seriousness of the appellant's conduct. The Tribunal

relevantly noted that, pursuant to para 8.1.1(1) of Direction 90, "[v]iolent and/or sexual crimes, crimes of a violent nature against women or children regardless of the sentence imposed and acts of family violence regardless of whether there is a conviction for an offence, or a sentence imposed, are viewed very seriously by the Australian government and community." The Tribunal continued:

> 44. **The Applicant's offending commenced when he was a child**. He was dealt with by the Children's Court in October 2005 for offences of violence namely affray and assault occasioning actual bodily harm. He was then 15 years of age and had been in Australia for about 7 years.
>
> 45. The Applicant in evidence could not remember the circumstances of his offending as a youth. He described himself as young and stupid.
>
> (Emphasis added.)

27 The Tribunal then considered the appellant's offending as an adult, relevantly finding:

> 55. However, it was the [appellant's] domestic violence offences for which he was before the court on 16 August 2019 (for offences committed on 27 April 2019), his offending 15 months later for breach of AVO committed on 10 November 2020, and his domestic violence offending committed 7 days later on 17 November 2020 (for which he was sentenced on 31 March 2021) that demonstrated an escalating level of seriousness, disregard for the victim Ms BW, and once again a contempt for the laws of Australia.
>
> 56. His offending on 16 August 2019 which included the head-butting of his former partner was further aggravated because the violent behaviour was in the presence of Ms BW's 2-year-old daughter whom Ms BW was holding in her arms at the time.

28 The Tribunal found that the appellant's "offending, and in particular his domestic violence offences, were very serious" (at [60]).

29 Referring to para 8.1.2 of Direction 90, the Tribunal addressed the risk to the Australian community should the appellant commit further offences or engage in other serious conduct. The Tribunal stated that its assessment of the nature of the harm to individuals or the Australian community was informed by "[t]he nature of the [appellant's] offending to date, **including any escalation in offending**" (emphasis added): Tribunal's reasons at [64]. While the Tribunal took into account the appellant's completion of drug and alcohol programs and domestic violence courses, the Tribunal had "very little confidence that the [appellant] will not offend in the future" (at [69]). The Tribunal stated:

> 71. The Tribunal is satisfied that the incidences of family violence are very serious and that even a low risk of reoffending is unacceptable. A risk of future offending would not be tolerated by the community. Family violence is plainly abhorrent, and the Australian community would have no tolerance of a person

being exposed even to a low risk that such offending might be repeated.

> 72. The Tribunal notes that the [appellant] and Ms BW are no longer in a relationship but given his propensity for violence there remains a real risk that violent offending may occur in the future. The [appellant] has shown a disregard for and contempt of court orders and the principles of law that underpin Australian society. That he committed various driving offences including alcohol and drug related offences is also evidence of this.

30 The Tribunal was satisfied that "Primary Consideration 1" (protection of the Australian community from criminal or other serious conduct) weighed heavily against the appellant and in favour of non-revocation of the cancellation decision.

31 In respect of "Primary Consideration 2" (family violence), the Tribunal found that "[t]he [appellant's] domestic violence offending is properly regarded as very serious". The Tribunal took into account the circumstances of the offences, including the nature of the violence and the fact that the appellant had knowingly and wilfully disobeyed apprehended violence orders. Although the offending had occurred at a time when both the appellant and his partner were using drugs, the Tribunal considered that this did not excuse the appellant's violent offending, and that neither the impact of drugs and alcohol nor the appellant's mental health issues mitigated the Tribunal's serious concern about the domestic violence offences. The Tribunal found that this primary consideration also weighed heavily against the appellant and in favour of non-revocation of his visa cancellation: Tribunal's reasons at [85].

32 In respect of "Primary Consideration 3" (the best interests of minor children in Australia), the Tribunal considered the appellant's relationship with a number of children of his relatives. The Tribunal noted that the appellant had little contact or engagement with those children in recent years and concluded that moderate weight was to be given to this primary consideration in favour of the appellant and the revocation of his visa cancellation: Tribunal's reasons at [112].

33 The Tribunal found that "Primary Consideration 4" (the expectations of the Australian community) weighed significantly against the appellant and in favour of the non-revocation of his visa. The Tribunal noted that this primary consideration would have weighed heavily against the appellant, but for various matters personal to the appellant that warranted some reduction in its weight (namely, that the appellant had spent the majority of his life in Australia, that he had performed volunteer work assisting disadvantaged and disconnected youths, including from indigenous communities, and that he had strong family ties in Australia). The Tribunal relevantly stated:

> 121. However, **the [appellant] commenced offending as a youth** and has a history

> of violence including domestic violence, disregard for court orders including AVOs, and demonstrated contempt and disregard for Australia's laws. The Tribunal accepts that drug and alcohol placed a significant part in contributing to the [appellant's] offending and in particular his offences of domestic violence, but this is no excuse.

(Emphasis added.)

34 In respect of the other considerations under Direction 90, the Tribunal made the following findings.

(a) No evidence was led in respect of international non-refoulement obligations or impact on victims, and the Tribunal gave those considerations "neutral weight".

(b) The Tribunal found that the appellant would face some impediments if removed to New Zealand or the Cook Islands, which weighed slightly in favour of revocation of the cancellation decision. However, the Tribunal found that, while he may face some short term difficulties, this should not prevent him from establishing himself in the medium to longer term and maintaining basic living standards commensurate with other citizens of those countries.

(c) The Tribunal accepted that the appellant had "significant links to the Australian community and that the whole of his immediate and extended family resides in Australia" and took into account several character statements in support of the appellant. The Tribunal continued:

> 152. The [appellant] arrived in Australia in 1998 when he was eight years of age and has remained a resident of Australia since. **The [appellant] began offending as a juvenile approximately seven years after arriving in Australia.** I do not regard this passage of … time as enlivening the obligation on the Tribunal to give less weight to this Other Consideration [as] provided in Direction 9.4.1(2)(a)(i).
>
> 153. Taking all relevant factors into consideration, Other Consideration (d) and the strengths, nature and duration of ties to Australia weigh heavily in favour of the [appellant] and the revocation of his visa cancellation.

(Emphasis added)

35 The Tribunal then restated the questions arising for determination in the following terms:

> 154. Section 501CA(4)(b) of the [Migration] Act stipulates two alternate conditions precedent to the exercise of the discretion to revoke the mandatory cancellation of the [appellant's] visa: either (1) the [appellant] must be found to pass the character test, or (2) the Tribunal must be satisfied that there is another reason, pursuant to the Direction, to revoke the cancellation.
>
> 155. Based upon the [appellant's] serious offending, he does not pass the "character test" as defined in s 501(6) of the Act. In then considering whether there is another reason to exercise the discretion afforded by s 501CA(4) of the Act to

> revoke the mandatory visa cancellation decision, the Tribunal has had regard to those considerations referred to in the Direction.

36 The Tribunal concluded that the combined weight of the first, second and fourth primary considerations against revocation of the visa cancellation outweighed all other considerations. As a consequence, the Tribunal did not "exercise the discretion to revoke the mandatory cancellation of the applicant's visa" and affirmed the delegate's decision.

CONSIDERATION

37 As set out above, the appellant advanced three grounds of appeal, each of which raised a new ground of review that was not argued before the primary judge.

38 First, the appellant submitted that the Tribunal erred by treating s 501CA(4)(b)(ii) of the Migration Act, which requires the Tribunal to be satisfied "that there is another reason why the original decision should be revoked", as involving an exercise of discretion rather than a state of satisfaction, relying on the decision in ***Au*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315 at [51]-[52] (Derrington J, Perry J agreeing), [167]-[169] (O'Sullivan J).

39 Secondly, the appellant submitted that the Tribunal erred in applying Direction 90, in so far as it was required to have regard to acts of "family violence" engaged in by the non-citizen, by failing to consider or make any finding as to whether Ms BW was a member of the appellant's family at the relevant times.

40 Thirdly, the appellant submitted that the Tribunal erred by taking into account an irrelevant consideration, namely the offences committed by him as a child, contrary to s 14(1) of the Children Proceedings Act as picked up by ss 85ZR and 85ZS of the Crimes Act: see *Thornton* and *Lesianawai*.

41 As indicated at the outset of these reasons, the third ground is dispositive of the appeal.

Ground three – *Thornton* and *Lesianawai*

The Tribunal's error

42 It is common ground that the Tribunal took into account the offences of assault occasioning actual bodily harm and affray that were committed by the appellant as a 15-year old, for which he was dealt with by the Campbelltown **Children's Court** in 2005 and received a six-month bond in respect of each offence: Tribunal's reasons at [7], [44], [152].

43 Section 85ZR(2) of the Crimes Act provides:

> (2) Despite any other Commonwealth law or any Territory law, where, under a State law or a foreign law a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence under a law of that State or foreign country:
>
> (a) the person shall be taken, in any Territory, in corresponding circumstances or for a corresponding purpose, never to have been convicted of that offence; and
>
> (b) the person shall be taken, in any State or foreign country, in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State or country, never to have been convicted of that offence.

44 Section 85M(1) of the Crimes Act provides that a person shall be taken to have been convicted of an offence if, among other things, "the person has been charged with, and found guilty of, the offence but discharged without conviction".

45 Where, under s 85ZR of the Crimes Act, a person is taken never to have been convicted of an offence in particular circumstances or for a particular purpose, s 85ZS relevantly provides that the person is not required to disclose the fact that the person was charged with or convicted of the offence and can claim that he or she was not charged with or convicted of the offence. Further, anyone else who knows or could reasonably be expected to know that s 85ZR applies to the person in relation to the offence shall not "in those circumstances, or for that purpose, take account of the fact that the person was charged with, or convicted of, the offence".

46 In *Thornton*, the respondent had been found guilty in the Queensland Children's Court of a number of offences committed when he was a child, without a conviction being recorded. The majority of the High Court held that s 85ZR(2) of the Crimes Act operated to pick up s 184(2) of the ***Youth Justice Act*** *1992* (Qld), which provided that "[e]xcept as provided in this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose". As a consequence, the Minister was precluded from taking into account the offences that had been committed by the respondent as a juvenile when deciding that there was no other reason to revoke the cancellation of the respondent's visa under s 501CA(4)(b)(ii) of the Migration Act.

47 The effect of s 184(2) of the Youth Justice Act, as applied by s 85ZR(2) of the Crimes Act, was that the respondent in *Thornton* was to be taken by any Commonwealth authority in all circumstances and for all purposes never to have been convicted of the relevant juvenile offences: *Thornton* at [4], [33] (Gageler and Jagot JJ), [73] (Gordon and Edelman JJ).

Accordingly, when exercising the power under s 501CA(4), the Minister had taken into account an irrelevant consideration, by noting that the respondent had begun offending as a minor with a number of offences recorded before reaching adulthood and that he had a history of drug-related and violent offences since he was 16 years old: *Thornton* at [7], [36] (Gageler and Jagot JJ), [49], [74] (Gordon and Edelman JJ). The High Court concluded that this error was material to the Minister's decision and amounted to jurisdictional error: *Thornton* at [4], [37] (Gageler and Jagot JJ), [78]-[80] (Gordon and Edelman JJ).

48 At the date of hearing of this appeal, the High Court had reserved judgment in *Lesianawai*, which raised a similar issue to *Thornton* in relation to the application of ss 85ZR and 85ZS of the Crimes Act to s 14(1)(a) of the Children Proceedings Act, the latter of which relevantly provides:

> (1) Without limiting any other power of a court to deal with a child who has pleaded guilty to, or has been found guilty of, an offence, a court:
>
> (a) shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years, and
>
> (b) may, in respect of an offence which is disposed of summarily, refuse to proceed to, or record such a finding as, a conviction in relation to a child who is of or above the age of 16 years.

49 Where a conviction was not recorded against a person who had pleaded guilty to or had been found guilty of an offence committed when the person was a child, s 15 of the Children Proceedings Act placed restrictions on the admission into evidence in subsequent criminal proceedings of the fact that the person had pleaded guilty or had been found guilty of the offence.

50 On 6 March 2024, the High Court delivered judgment in *Lesianawai*. Justice Beech-Jones (with whom Gageler CJ, Gordon, Edelman and Gleeson JJ agreed) held (at [7]):

> [T]he relevant provisions of the Children Proceedings Act are not materially different to the provisions of the Youth Justice Act considered in *Thornton*, and the plaintiff's circumstances are not otherwise materially different to those of the respondent in *Thornton*. Consequently, the delegate was precluded by ss 85ZR and 85ZS of the Crimes Act from taking into account the offences for which the plaintiff was sentenced by the Children's Court when he was under the age of 16 years. As it was accepted by the Minister that those offences were material to the delegate's decision, it follows that the decision was affected by jurisdictional error and certiorari quashing the decision to cancel the plaintiff's visa should issue.

51 On the facts in *Lesianawai*, the plaintiff had been sentenced by the Children's Court of New South Wales in respect of offences for which he had pleaded guilty or had been found guilty

when he was under 16 years of age. After he was subsequently convicted of various offences and sentenced to terms of imprisonment as an adult, a delegate of the Minister had cancelled the visa held by the plaintiff under s 501(2) of the Migration Act. The delegate took into account the plaintiff's "convictions", including those for offences for which he was sentenced by the Children's Court when he was under the age of 16 years. The High Court held that this was precluded by ss 85ZR and 85ZS of the Crimes Act in conjunction with s 14(1)(a) of the Children Proceedings Act.

52 In *Lesianawai*, the High Court confirmed the earlier holding in *Thornton* that s 85ZR(2) of the Crimes Act is not restricted to a State law that sets aside the fact of, or relieves the effects of, a previous conviction. Rather, s 85ZR(2) is engaged by a State law that provides that a plea or finding of guilt without any conviction being recorded is not taken to be a conviction for any purpose (at [37]). Relevantly to the present appeal, the High Court in *Lesianawai* rejected the Minister's submission that ss 14(1)(a) and 15 of the Children Proceedings Act did not prohibit consideration being given to findings of guilt by an administrative decision maker, including in circumstances where the considerations to which the delegate was to have regard under the applicable Ministerial Direction were not limited to convictions but included the visa holder's offences, conduct and criminal behaviour. Justice Beech-Jones dealt with this submission as follows (at [44]):

> This contention elides the question of whether the Children Proceedings Act purports to preclude the use of the finding of guilt contemplated by s 14, in all or at least some circumstances and for all or at least some purposes, with the question posed by s 85ZR(2) of the *Crimes Act*, namely, whether the Children Proceedings Act purports to preclude such a finding of guilt being treated *as a conviction* in all or at least some circumstances and for all or at least some purposes. In relation to the former, s 15(1) precludes the use of the finding of guilt in criminal proceedings in some, but not all, circumstances and does not impose any restriction on its use for the purposes of making an administrative decision. However, in relation to the latter, the effect of the Children Proceedings Act is that such a finding is not to be treated or taken as a conviction for any purpose unless some other provision of State law specifically provides to that effect. That is sufficient to engage s 85ZR(2).
>
> (Emphasis in original.)

53 His Honour noted that the Youth Justice Act considered in *Thornton* had prevented a finding of guilt made against a child from being used in any subsequent proceedings against them as an adult for an offence and from forming part of the criminal history of any adult. Even though such restrictions did not preclude a finding of guilt from being used for a purpose or in a circumstance analogous to a consideration of whether to cancel a visa, the majority in *Thornton* had held that the Minister was precluded by ss 85ZR and 85ZS of the Crimes Act from taking

into account the respondent's youth offending and the findings of guilt. In *Lesianawai*, Beech-Jones J reached the same outcome in relation to the Children Proceedings Act (at [46]):

> Similar to *Thornton*, in this case the delegate was precluded from taking into account so much of the plaintiff's "youth offending" and "finding[s] of guilt" that related to the offences for which he was sentenced by the Children's Court prior to his reaching 16 years of age and the fact that he was charged with, or supposedly convicted of, those offences.
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> (Citations omitted.)

54 In the present appeal, in the light of the decision in *Lesianawai*, the Minister no longer seeks to distinguish s 14(1)(a) of the Children Proceedings Act from the provisions of the Queensland Youth Justice Act considered in *Thornton*. The Minister now accepts that the Tribunal was forbidden by ss 85ZR and 85ZS of the Crimes Act from taking into account the appellant's juvenile offending as a 15-year old and that, in so doing, the Tribunal had regard to an irrelevant consideration. However, the Minister maintains that the error was not material to the Tribunal's decision to affirm the non-revocation of the cancellation of the appellant's visa, and therefore did not result in the Tribunal having fallen into jurisdictional error.

Was the error material to the Tribunal's decision?

55 As was recently stated ***LPDT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12; 98 ALJR 610 at [2] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), "[j]urisdictional error can refer to breach of an express or implied condition of a statutory conferral of decision-making authority which results in a decision made in the purported exercise of that authority lacking the legal force attributed to exercise of that authority by statute". This can include, relevantly, having regard to an irrelevant consideration which the statute forbids the decision-maker from taking into account in the exercise of the statutory power.

56 In most cases, such an error will only be jurisdictional if it was material to the decision that was in fact made, "in the sense that there is a realistic possibility that the decision that was made in fact *could* have been different if the error had not occurred": *LPDT* at [7] (emphasis in original). This "threshold of materiality" was elaborated by the High Court in *LPDT* in the specific context of a decision under s 501CA(4) of the Migration Act not to revoke a visa cancellation. The plurality stated that whether an error has occurred and whether that error was material are both "wholly backward-looking" questions that are "to be answered by reference to the decision that was made and, depending on the nature of the error, how that decision was

made": *LPDT* at [9]-[10]. Whether or not an error is material "is determined by inferences drawn from the evidence adduced on the application": *LPDT* at [13].

57 The plurality summarised the principles drawn from the High Court's previous decisions on the question of materiality as follows: *LPDT* at [14]-[16].

> The question in these cases is whether the decision that was in fact made *could*, not *would*, "realistically" have been different had there been no error. "Realistic" is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable. Though the applicant must satisfy the court that the threshold of materiality is met in order to establish that the error is jurisdictional, meeting that threshold is not demanding or onerous.
>
> What must be shown to demonstrate that an established error meets the threshold of materiality will depend upon the error. In some cases, it will be sufficient to show that there has been an error, and that the outcome is consistent with the error having affected the decision. ... Importantly, a court called upon to determine whether the threshold has been met must be careful not to assume the function of the decision-maker: the point at which the line between judicial review and merits review is crossed may not always be clear, but the line must be maintained. This case affords an example.
>
> In sum, unless there is identified a basis on which it can be affirmatively concluded that the outcome would inevitably have been the same had the error not been made, once an applicant establishes that there has been an error and demonstrates that there exists a realistic possibility that the outcome of the decision could have been different had that error not been made, the threshold of materiality will have been met (and curial relief will be justified subject to any issue of utility or discretion).
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> (Citations omitted, emphasis in original.)

58 As in the present case, there was no dispute in *LPDT* that the Tribunal had fallen into error. The error in *LPDT* was a failure by the Tribunal to comply with Direction 90 in making findings for the purposes of paras 8.1.1(1)(a), (b) and (g) of the Direction that were illogical or unreasonable or not supported by evidence. As was accepted before the High Court, this involved a failure by the Tribunal to comply with s 499(2A) of the Migration Act by failing to comply with Direction 90 and thereby breaching a condition governing the exercise of the decision-making power under s 501CA(4): *LPDT* at [31].

59 In *LPDT*, the Full Court below had reasoned that the error was not material because the Court did not consider that there was a realistic possibility that the Tribunal could have viewed the appellant's conduct as merely serious (as opposed to viewing it "very seriously"), nor that the weighing exercise under para 8.1.1(1) could have had a "favourable outcome" for the appellant in any event. In overturning the Full Court's conclusion on materiality, the plurality of the High Court disapproved both of those findings as "making assumptions about how the Tribunal would have undertaken the weighing exercise of the matters in para 8.1.1(1)", which went

beyond the role of a court on judicial review. The plurality stressed that "[a] reviewing court does not engage in a review of the merits of the decision, reconstruct a decision making process, rework the apparent basis upon which a decision has been made, or rewrite the reasons for decision": *LPDT* at [29] (citations omitted).

60 The plurality in *LPDT* concluded that the Tribunal's error in the application of para 8.1.1(1) of Direction 90 was material to the decision made by the Tribunal, stating that "[e]ach particular of the error contributed to the evaluative and discretionary decision which the Tribunal made in that each bore on the Tribunal's assessment of Primary Consideration 1, and in that the Tribunal's assessment of Primary Consideration 1 weighed in favour of its exercise of discretion under s 501CA(4) not to revoke the cancellation of the appellant's visa": at [35]. In such circumstances, the plurality found that "the evaluative conclusion reached by the Tribunal in the exercise of the discretion under s 501CA(4) could have been different if there had been no error". The plurality said at [36]:

> It would involve improper speculation to attempt to discern how the Tribunal would have reasoned if it had not departed from the required process of reasoning in these respects. It follows that there is a possibility, not fanciful or improbable, that the decision that was made in fact *could* have been different if the error had not occurred. The threshold of materiality was met. None of the facts before the Court provided a basis to consider that the outcome would inevitably have been the same had the error not been made. The error was jurisdictional. …
>
> (Emphasis in original.)

61 Justice Beech-Jones agreed with the principles stated by the plurality in relation to jurisdictional error and materiality: *LPDT* at [38]. His Honour characterised the errors that had been made by the Tribunal in that case as involving a misconstruction of Direction 90, leading to a failure to comply with s 499(2A) of the Migration Act. In assessing the materiality of those errors, Beech-Jones J held that the Tribunal's misconstruction of Direction 90 had affected its findings that the appellant's conduct was "very serious", notwithstanding that it might have been open to the Tribunal to reach that finding if it had not misconstrued Direction 90: *LPDT* at [46]. The misconstruction also affected the Tribunal's findings that there was a "convincing likelihood" that he would engage in "further very serious offending" should he remain in Australia, and its findings on the expectations of the Australian community.

62 Justice Beech-Jones rejected the Minister's submission that, absent the error, the Tribunal would have assessed the appellant's crimes as serious and "the same outcome would have

ensued" (at [48]). After noting that "the structure of Direction 90 … is such that an assessment of the seriousness of the non-citizen's conduct is an evaluative exercise which informs the assessment of the relative weight to be attached to the two primary considerations that were relevant to this case", Beech-Jones J stated at [49]:

> In this case, a court could only be affirmatively satisfied that the outcome would inevitably have been the same had the error not been made if the court assumed the function of the Tribunal and assessed for itself the relative seriousness of the appellant's crimes and the weight to be attached to the primary considerations relating to the relative seriousness of those crimes, and then, in light of those assessments, weighed the competing considerations against each other. Such an approach is impermissible. The evaluative nature of the Tribunal's decision was such that the failure to comply with so much of Direction 90 that related to the assessment of the nature and seriousness of the appellant's crimes meant that there was a "realistic possibility" that the outcome of the decision would have been different had the error in construing and applying Direction 90 not been made. The Tribunal's error was jurisdictional. The Tribunal's decision was made "outside jurisdiction".
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> (Citations omitted.)

63 The decision in *LPDT* illustrates that, where a legal error has been made in the application of Direction 90, meeting the threshold of materiality is not difficult or onerous. Of course, each case will turn on its own particular circumstances, including the nature of the error and the manner in which the reasons are expressed. However, it is not permissible for the Court to speculate as to how the Tribunal might have reasoned or what conclusions it might have reached if it had not made the error in question. In particular, the Court on judicial review cannot step into the shoes of the Tribunal and attempt to perform the evaluative exercise required in the application of a Ministerial Direction such as Direction 90. Once an applicant has established that there is an error and that there exists a realistic possibility of the outcome being different, then unless there is some basis on which the Court can be affirmatively satisfied that the Tribunal would inevitably have made the same decision, without crossing the line that separates judicial review of the legality of a decision from a review of its merits, the error will be material. For example, there might be an independent basis for the Tribunal's decision that is unaffected by any error, or the error in question might be "so insignificant" that it could not have materially affected the decision (compare *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41 (Mason J)).

64 In the present case, the Minister submits that the Tribunal's admitted error in having regard to the appellant's juvenile offending was not a material error.

(a) First, the Minister submits that the appellant implicitly accepted before the Tribunal that he had committed the offences in question or had engaged in the conduct giving rise to the offences, so that the Tribunal was free to make the same findings that it did based on the appellant's admissions before it.

(b) Secondly, the Minister submits that, "objectively and rationally, it is very difficult to see how the appellant's juvenile offending could have played such a significant part in the Tribunal's decision to the point that, even if such offending had never occurred, the Tribunal's decision could have realistically been different".

65 In relation to the first basis, the Minister refers to the Tribunal's reasons at [45], where it is stated in relation to the two offences dealt with by the Children's Court that the appellant "in evidence could not remember the circumstances of his youth" and that he "described himself as young and stupid". The Minister submits that the decision in *Lesianawai* does not prevent the Tribunal from taking into account the conduct the subject of the appellant's juvenile offending "where there was evidence before the Tribunal (beyond the fact of being charged with the relevant offending and having pleaded/found guilty in respect of such offending) that such conduct had been engaged in".

66 In relation to the second basis, the Minister contends that the offending committed by the appellant as a 15-year old comprised two offences in an otherwise long and serious offending history, and that those two offences were "objectively of little weight" given that they occurred a long time ago and that little was known about the underlying facts. Rather, it is submitted that the Tribunal's conclusions were focused on the seriousness of the appellant's domestic and family violence offending, and that it is "fanciful" to think that its conclusions about his propensity for violence and his risk of re-offending in respect of family violence issues was materially impacted by his juvenile "convictions". The Minister submits that materiality "is a *qualitative* analysis, not a quantitative one" (emphasis in original), and that "[i]n assessing the materiality of an error, the Court's task is to conduct a counterfactual to ascertain the objective possibility of the result of the case being different". In the Minister's submission, this requires consideration of how and to what extent the juvenile offending weighed against the appellant. The Minister argues that the Court can and must ascertain for itself the objective possibility

that the particular findings made by the Tribunal would still have made having regard to its reasons and "all relevant evidence before the Court".

67 More particularly, the Minister submits that the Tribunal's findings about the escalation in the appellant's offending were inevitable even if the juvenile offending had never occurred. Further, the Minister submits that the Tribunal would still have found that the appellant commenced offending "as a youth" or "as a juvenile" (Tribunal's reasons at [7], [121], [152]), based on subsequent offences that were committed by the appellant as a 17-year old (driving as a learner unaccompanied and without displaying "L" plates, and driving with a "middle range" prescribed concentration of alcohol). In respect of the latter submission, however, it is clear that the Tribunal proceeded on the basis that the "road traffic offences" for which the appellant was convicted in 2008 formed part his criminal history "as an adult": see Tribunal's reasons at [8]. While this was strictly inaccurate, given that the appellant was 17 years old at the date of the 2008 convictions, it reveals that the Tribunal's references to the appellant's offending "as a juvenile" or "as a child" must be taken as references to the offences that were dealt with by the Children's Court in 2005, being those which attracted the Children Proceedings Act and ss 85ZR and 85ZS of the Crimes Act.

68 In our view, the approach advocated by the Minister is contrary to, and has been overtaken by, the High Cout's reasoning in *LPDT*. In assessing whether the threshold of materiality is met in relation to the Tribunal's error, it is not permissible for the Court "to attempt to discern how the Tribunal would have reasoned" if it had not fallen into error, nor to revisit the evaluative assessment that was engaged in by the Tribunal in its application of Direction 90. It is sufficient to demonstrate that the error was material if "there is a possibility, not fanciful or improbable, that the decision that was made in fact could have been different if the error had not occurred": *LPDT* at [36]. Jurisdictional error will be established where there is an error which gives rise to a realistic possibility that the outcome could have been different "unless there is identified a basis on which it can be affirmatively concluded that the outcome would inevitably have been the same had the error not been made": *LPDT* at [16].

69 In the present case, the Tribunal referred to the appellant's juvenile offending as a 15-year old at a number of points in its reasons.

(a) The Tribunal's summary of the appellant's "offender history" commenced with a recitation of those offences, stating that "[t]he [appellant's] first offending was a juvenile": Tribunal's reasons at [7].

(b) In dealing with the nature and seriousness of the appellant's conduct to date, in the context of "Primary Consideration 1", the Tribunal again stated that "[t]he [appellant's] first offending commenced when he was a child", repeating the details of the offences for which the appellant had been dealt with by the Children's Court when he was 15 years of age "and had been in Australia for about 7 years": Tribunal's reasons at [44]. The Tribunal made clear that its assessment was informed by "[t]he nature of the [appellant's] offending to date, including any escalation in offending": Tribunal's reasons at [64].

(c) Later, in the context of its assessment of the expectations of the Australian community, the Tribunal specifically referred to the fact that the appellant "commenced offending as a youth": Tribunal's reasons at [121]. References to the appellant's "history of violence" should also be understood as encompassing the violent offences committed by the appellant as a juvenile: see Tribunal's reasons at [121], [123].

(d) When considering the appellant's links to the Australian community, the Tribunal commented that the appellant had arrived in Australia in 1998 when he was 8 years of age and "began offending as a juvenile approximately seven years after arriving in Australia". On the other hand, the Tribunal treated this consideration as weighing heavily in the appellant's favour and did not regard such a passage of time as enlivening the obligation under para 9.4.1(2)(a)(i) of the Direction to give less weight to the fact that the appellant arrived in Australia as a young child or the length of time the appellant had resided in Australia: Tribunal's reasons at [152]-[153].

(e) The Tribunal stated in its conclusion that it had had regard to "the considerations referred to in the Direction" in considering whether there was another reason to revoke the mandatory visa cancellation under s 501CA(4): Tribunal's reasons at [155]. The Tribunal found that, "taking into account all of the Considerations in the Direction, they weigh against the revocation of the mandatory cancellation of the [appellant's] visa": Tribunal's reasons at [159]. As a consequence, to the extent that the Tribunal's evaluation of each of the primary and other conditions was affected by its error in having regard to the appellant's juvenile offending, that error might have contributed to the Tribunal's overall evaluation in the exercise of the power conferred by s 501CA(4).

70 This is not to deny that the Tribunal placed significant weight on the appellant's domestic violence offences in 2019 and 2020, including in the context of its findings directed to the

"escalating level of seriousness" of the appellant's offending: see e.g. Tribunal's reasons at [55]. Nevertheless, it cannot be assumed that the Tribunal's view of the "escalation" in the appellant's offending was unaffected by its error in treating the appellant's juvenile offending as a 15-year old as the starting point.

71 In all of the circumstances, we do not consider that the Tribunal would inevitably have reached the same decision if it had not impermissibly taken into account the appellant's juvenile offending. Rather, noting that the Court cannot itself undertake an evaluation on the merits, there is a realistic and non-fanciful possibility that the Tribunal's decision might have been different if the error had not occurred. The threshold of materiality is met, and the Tribunal's decision is beyond jurisdiction.

The other grounds of appeal

72 The conclusion on ground three is sufficient to dispose of the appeal. As the appellant has established jurisdictional error on the part of the Tribunal, it is unnecessary to determine the other grounds of appeal. In our view, this is a case in which it is appropriate for the Court "to confine itself to determining only those issues which it considers to be dispositive of the justiciable controversy raised by the appeal": see *Boensch v Pascoe* at [7] (Kiefel CJ, Gageler and Keane JJ), [101] (Bell, Nettle, Gordon and Edelman JJ).

CONCLUSION

73 Accordingly, the appeal is allowed. The order made by the primary judge dismissing the application is set aside, and in lieu thereof it should be ordered that the Tribunal's decision be set aside and the matter be remitted to the Tribunal for reconsideration according to law. The Minister should pay the appellant's costs of the appeal.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Acting Chief Justice Collier and Justices Meagher and Horan.

Associate:

Dated: 20 June 2024