

HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

LPDT

APPELLANT

AND

MINISTER FOR IMMIGRATION, CITIZENSHIP,
MIGRANT SERVICES AND MULTICULTURAL
AFFAIRS & ANOR

RESPONDENTS

*LPDT v Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs*

[2024] HCA 12

Date of Hearing: 6 February 2024

Date of Judgment: 10 April 2024

M70/2023

ORDER

1. *Appeal allowed with costs.*
2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 3 May 2023 and 24 May 2023 and, in their place, order that:*
 - (a) *the appeal be allowed with costs; and*
 - (b) *the orders of the Federal Court of Australia made on 14 July 2022 be set aside and, in their place, order that:*
 - (i) *a writ of certiorari issue to quash the decision of the second respondent on 7 July 2021 not to revoke the cancellation of the appellant's visa;*
 - (ii) *a writ of mandamus issue directed to the second respondent requiring it to determine the appellant's request for revocation according to law; and*

(iii) *the first respondent pay the appellant's costs.*

On appeal from the Federal Court of Australia

Representation

N M Wood SC with K R McInnes for the appellant (instructed by Clothier Anderson Immigration Lawyers)

R C Knowles KC with C E A Hibbard for the first respondent (instructed by Clayton Utz)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Administrative law (Cth) – Judicial review – Jurisdictional error – Materiality – Threshold of materiality – Principles to be applied.

Immigration – Visas – Cancellation of visa – Where appellant committed and found guilty of offences – Where appellant sentenced to terms of imprisonment – Where appellant's visa mandatorily cancelled under s 501(3A) of *Migration Act 1958* (Cth) – Where delegate of Minister refused application to revoke cancellation – Where appellant applied to Administrative Appeals Tribunal to review delegate's decision – Where Tribunal required to comply with Direction given by Minister under s 499 of *Migration Act* in determining whether "another reason" why visa cancellation should be revoked – Where Direction required Tribunal engage in evaluative assessment of relevant mandatory considerations – Where Tribunal's decision involved error – Whether Tribunal's decision affected by jurisdictional error – Whether error was material.

Words and phrases – "another reason", "cancellation decision", "convicted", "criminal offending", "direction", "fanciful or improbable", "judicial review", "jurisdictional error", "materiality", "merits review", "protection of the Australian community", "realistic possibility", "threshold of materiality".

Migration Act 1958 (Cth), ss 499, 501(3A), 501CA(4).

1 GAGELER CJ, GORDON, EDELMAN, STEWARD, GLEESON AND
JAGOT JJ. This appeal concerns jurisdictional error and the requirement of
materiality.

Jurisdictional error and materiality

2 Jurisdictional 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. Though a decision affected by jurisdictional
error is a decision in fact,¹ it is "in law ... no decision at all"² and is in that sense
"void".³

3 Because an express or implied condition of a statutory conferral of
decision-making authority can take many different forms, and because breach can
occur in many different circumstances, the categories of jurisdictional error are not
closed.⁴ Jurisdictional error can result from breach by a third party of a condition
of a statutory process preceding a decision,⁵ but more often results from breach by
a statutory decision-maker of a condition of the making of a decision.
Jurisdictional error on the part of a statutory decision-maker in making a decision
can include: misunderstanding the applicable law; asking the wrong question;
exceeding the bounds of reasonableness; identifying a wrong issue;
ignoring relevant material; relying on irrelevant material; in some cases,

1 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33 at
64 [94]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural
Affairs v Moorcroft* (2021) 273 CLR 21 at 37-38 [20].

2 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597
at 616 [53].

3 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at
133 [24], 143 [62].

4 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 573 [71], 574 [73];
Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421 at
455 [81], citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001)
206 CLR 323 at 351 [82].

5 See, eg, *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22
at 32-33 [23]-[24], 35 [32]-[33]; *SZMTA* (2019) 264 CLR 421 at 444 [44].

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making an erroneous finding or reaching a mistaken conclusion; or failing to observe some applicable requirement of procedural fairness.⁶

4 A statute which contains an express or implied condition of a conferral of decision-making authority is not always to be interpreted as denying legal force and effect to every decision that might be made in breach of that condition.⁷ Only by construing the statute so as to understand the limits of the statutory conferral of decision-making authority is it possible to determine, first, whether an error has occurred (that is, whether there has been a breach of an express or implied condition of the statutory conferral of decision-making authority) and, second, whether any such error is jurisdictional (that is, whether the error has resulted in the decision made lacking legal force).⁸

5 Determining whether an error exists as well as whether it is jurisdictional starts with an analysis of the nature of the error alleged in the statutory context within which the decision has been made. Given the broad range of decisions in which errors might be made, the large variety of statutory schemes in which those decisions might be made, and the range of circumstances which may attend the making of any particular decision, it is impossible to divine a rigid classification of the errors that constitute jurisdictional errors.⁹ There are no bright lines to be drawn – "[t]he nature of the error has to be worked out in each case concerning a specific decision under a particular statute".¹⁰

6 See, eg, *Craig v South Australia* (1995) 184 CLR 163 at 179; *Kirk* (2010) 239 CLR 531 at 572 [67]; *Hossain* (2018) 264 CLR 123 at 134-135 [30], 147-148 [70]-[72]; *SZMTA* (2019) 264 CLR 421 at 455 [81].

7 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-389 [91].

8 *Hossain* (2018) 264 CLR 123 at 133 [24], 133-134 [27], 147 [72]; *SZMTA* (2019) 264 CLR 421 at 456 [83]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 276 CLR 136 at 154-155 [53].

9 See *Kirk* (2010) 239 CLR 531 at 574 [73]; *Hossain* (2018) 264 CLR 123 at 137 [42].

10 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 at 543 [101]; *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80 at 117-118 [78]; *Thornton* (2023) 276 CLR 136 at 162 [77].

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6 In some cases, where an error is established, the error will be jurisdictional irrespective of any effect that the error might or might not have had on the decision that was made in fact. In other cases, the potential for an effect on the decision will be inherent in the nature of the error. An example of the former is apprehended or actual bias.¹¹ An example of the latter is unreasonableness in the final result.¹² In such cases, the error necessarily satisfies the requirement of materiality.

7 In most cases, however, an error will only be jurisdictional if the error was material to the decision that was made in fact,¹³ 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.¹⁴ That is because it is now accepted that a statute which contains an express or implied condition to be observed in a decision-making process is ordinarily to be interpreted as incorporating such a "threshold of materiality" in the event of non-compliance.¹⁵

8 The reasons of the primary judge and the Full Court in the present case, as well as other trial and intermediate appellate decisions, suggest uncertainty or confusion about the meaning and effect of some of the language used by the Court in identifying the principles to be applied in assessing materiality. It would be unsatisfactory if that uncertainty or confusion persisted. It is desirable to give practical guidance in terms with which all the Court agree. Necessarily, differences of expression and emphasis previously adopted by individual Justices have been set aside in favour of the guidance that is now set out.

11 *MZAPC* (2021) 273 CLR 506 at 522 [33], 572-573 [182]; *Nathanson* (2022) 276 CLR 80 at 125-126 [98]-[102].

12 *MZAPC* (2021) 273 CLR 506 at 522 [33].

13 *MZAPC* (2021) 273 CLR 506 at 543-544 [101].

14 *SZMTA* (2019) 264 CLR 421 at 445 [45]; *MZAPC* (2021) 273 CLR 506 at 524 [39]; *Nathanson* (2022) 276 CLR 80 at 103 [32], 107-108 [46], 113 [63]; *Thornton* (2023) 276 CLR 136 at 161 [75].

15 See *Hossain* (2018) 264 CLR 123 at 134 [29]; *SZMTA* (2019) 264 CLR 421 at 444 [44]; *MZAPC* (2021) 273 CLR 506 at 522 [33]; *Nathanson* (2022) 276 CLR 80 at 102 [30], 132 [121].

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Two questions

9 Where it is alleged in an application for judicial review that a decision is affected by jurisdictional error constituted by a breach of an express or implied condition of a conferral of decision-making authority by a statute¹⁶ which incorporates a requirement of materiality, there are two questions: has an error occurred; and, if so, was that error material.

10 The inquiry posited by each question is wholly backward-looking.¹⁷ Both questions 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. Those are facts in respect of which the applicant for judicial review bears the onus of proof on the balance of probabilities.¹⁸ Proof of these facts ought to be neither difficult nor contentious.

11 What must be proved to show what decision was made and how it was made will depend upon the nature of the error. In a common case – of which the present is an example – where the error alleged is breach of a condition governing the reasoning to be undertaken by the decision-maker, the applicant's onus of proving the relevant facts is discharged by nothing more than the tender of the decision-maker's statement of reasons.

12 Where the jurisdictional error alleged is one concerned with the process of the decision making, such as a denial of procedural fairness, what must be proved by the applicant will depend upon the precise error alleged to have occurred in the decision-making process, having regard to any relevant statutory provisions within the applicable legislative framework. Examples of the types of evidence that have been sufficient for establishing the relevant facts in such cases include the appellate

16 *Project Blue Sky* (1998) 194 CLR 355 at 388-389 [91].

17 *MZAPC* (2021) 273 CLR 506 at 523-524 [37].

18 *MZAPC* (2021) 273 CLR 506 at 524-525 [38]-[40], 531 [60].

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record,¹⁹ and evidence of the content of a document or information that was required to be provided as part of the decision-making process.²⁰

13 The applicant must satisfy the court on the balance of probabilities that the alleged error in fact occurred.²¹ Unless the error is of a type such as those identified at [6] above (where the error is always material and therefore jurisdictional), whether the error is, or is not, material is determined by inferences drawn from the evidence adduced on the application.

14 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.²² "Realistic" is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable.²³ 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.²⁴

15 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.²⁵ Where the error is a denial of

19 *Nathanson* (2022) 276 CLR 80 at 108 [48], referring to *Stead v State Government Insurance Commission* (1986) 161 CLR 141. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 111 [66].

20 See, eg, *Aala* (2000) 204 CLR 82 at 115 [74]; *SZMTA* (2019) 264 CLR 421 at 446 [50].

21 *SZMTA* (2019) 264 CLR 421 at 451 [69]; *MZAPC* (2021) 273 CLR 506 at 524 [39], 538-539 [85]-[86], 563 [159].

22 *Nathanson* (2022) 276 CLR 80 at 103 [32], 107-108 [46], 113 [63].

23 *SZMTA* (2019) 264 CLR 421 at 445 [45]; *MZAPC* (2021) 273 CLR 506 at 514 [2], 538 [85]. See also *Hossain* (2018) 264 CLR 123 at 134-135 [30]-[31]; *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 467 [62].

24 *Nathanson* (2022) 276 CLR 80 at 107-108 [46]-[47], 134 [127].

25 See, eg, *Thornton* (2023) 276 CLR 136.

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procedural fairness arising from a failure to put the applicant on notice of a fact or issue, the court may readily be able to infer that, if fairly put on notice of that fact or issue, the applicant might have addressed it by way of further evidence or submissions, and that the decision-maker would have approached the applicant's further evidence or submissions with an open mind.²⁶ In those cases, it is "no easy task" for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome.²⁷ 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.²⁸ 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.

16 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).

Background

17 The appellant is a Vietnamese national. He arrived in Australia in 1997 and, in 2008, was granted a Class BS Subclass 801 (Spouse) visa. Between November 2011 and August 2017, he was convicted of various offences on three separate occasions, twice in the County Court of Victoria and once in the Magistrates' Court of Victoria, including offences of conspiring to import or export a marketable quantity of a border controlled drug or plant, attempting to possess a marketable quantity of a border controlled drug or plant, and trafficking a drug of dependence. On each occasion he was sentenced to a

26 *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at 342-343 [58]-[60]; *Nathanson* (2022) 276 CLR 80 at 103 [33], 110-111 [55]-[56], 113 [63], 116-117 [76].

27 *Stead* (1986) 161 CLR 141 at 145-146. See also *Aala* (2000) 204 CLR 82 at 122 [104]; *WZARH* (2015) 256 CLR 326 at 343 [60].

28 *SZMTA* (2019) 264 CLR 421 at 460 [95]; *MZAPC* (2021) 273 CLR 506 at 528 [51].

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period of imprisonment, the most recent of which was on 17 August 2017 for a period of four years and six months.

18 In May 2019, the appellant's visa was subject to mandatory cancellation under s 501(3A) of the *Migration Act 1958* (Cth) ("the cancellation decision"). An application, under s 501CA(4) of the Act, for revocation of the cancellation failed ("the delegate's decision").

19 The appellant applied to the Administrative Appeals Tribunal ("the Tribunal") to review the delegate's decision and, in deciding to affirm the delegate's decision, the Tribunal said it was not satisfied (under s 501CA(4)(b)(ii) of the *Migration Act*) that there was "another reason" why the cancellation decision should be revoked. In considering whether there was "another reason", the Tribunal was required by s 499(2A) of the *Migration Act* to comply with *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("Direction 90").²⁹

20 Direction 90 required the Tribunal, informed by certain principles,³⁰ to take into account the considerations identified in paras 8 ("primary considerations") and 9 ("other considerations") where those considerations were relevant to the decision.³¹ The Tribunal addressed each of the primary considerations in turn, the most relevant of which for the present appeal was Primary Consideration 1: the "protection of the Australian community from criminal or other serious conduct".³² In considering this primary consideration the Tribunal was bound to consider, among other things, the "nature and seriousness of the non-citizen's conduct to date".³³ That in turn required the Tribunal to have regard to the matters set out in sub-paras (a) to (g) of para 8.1.1(1) of Direction 90. Sub-paragraphs (a),

29 See *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 196 at 199 [8]; see also *Ueese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at 210 [11], 211 [19].

30 Direction 90, para 5.2.

31 Direction 90, para 6.

32 Direction 90, para 8(1).

33 Direction 90, para 8.1(2)(a).

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(b) and (g), and the Tribunal's reasoning relating to them, are those relevant to the appellant's contention that the Tribunal's decision involved jurisdictional error.

21 The Tribunal was required by para 8.1.1(1)(a) to have regard to the fact that certain "types of crimes or conduct" described therein are deemed to be viewed "very seriously" by the Australian Government and the Australian community. There was no dispute that none of the appellant's convictions fell within any one of the described types. In considering this sub-paragraph, the Tribunal found that it "militate[d] strongly in favour of a finding that the [appellant's] criminal offending has been of a very serious nature".

22 Paragraph 8.1.1(1)(b) required the Tribunal to have regard to the fact that certain "types of crimes or conduct", which were listed, are considered by the Australian Government and the Australian community to be "serious". The appellant did not dispute that his drug offending could be characterised as falling within one of these described types, namely "crimes committed against vulnerable members of the community".³⁴ The Tribunal found that para 8.1.1(1)(b) also "militate[d] in favour of a finding that the [appellant's] criminal offending has been of a very serious nature".

23 Paragraph 8.1.1(1)(g) required the Tribunal to have regard to whether the appellant "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 [appellant's] migration status". The Tribunal found that "[t]his consideration is directly relevant in this case", and specifically found that it was "satisfied that the [appellant] 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".

24 Having regard to those and other findings in respect of factors referred to in para 8.1, the Tribunal reached an "overall view" that the nature and seriousness of the appellant's conduct "[could] only be characterised as very serious" and went on to find that "Primary Consideration 1 weigh[ed] very strongly in favour of non-revocation". The Tribunal found that Primary Considerations 2 and 3³⁵ were not relevant to the case but considered that Primary Consideration 4,

34 Direction 90, para 8.1.1(1)(b)(ii).

35 Direction 90, paras 8.2 and 8.3.

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concerning community expectations,³⁶ weighed strongly in favour of non-revocation. Its assessment of each of the "other considerations" under para 9 resulted in findings that they were either "neutral" or provided "slight weight in favour of" the appellant. The conclusion of the Tribunal was stated in terms that it "[did] not consider that the totality of the weight attributable to the relevant ['other considerations'] outweigh[ed] the strong, combined and determinative weight that it ha[d] attributed to Primary Considerations 1 and 4".

25 In the Federal Court of Australia, Snaden J dismissed the appellant's application for judicial review of the Tribunal's decision under s 476A(1)(b) of the *Migration Act* on the basis that the Tribunal's decision "was not attended by jurisdictional error". Relevantly, his Honour found that the Tribunal had not erred in its treatment of para 8.1.1(1)(a), (b) and (g) of Direction 90.

26 The Full Court of the Federal Court (Markovic, Thomas and Button JJ) agreed with the primary judge's conclusion that the Tribunal's decision was not attended by jurisdictional error but arrived at that conclusion by a different route. The Full Court found that the Tribunal's findings in relation to para 8.1.1(1)(a), (b) and (g) did involve error, but dismissed the appeal on the basis that the error was not material and therefore not jurisdictional.

27 With respect to para 8.1.1(1)(a), the Full Court found that "the error lies in the very lack of any articulated comprehensible connection between the conclusion and the articulated basis for it", that "the Tribunal's reasoning was scant", and that its conclusion with respect to sub-para (a) (see [21] above) "bore no exposed logical connection" with the Tribunal's summary of the appellant's contentions about his offending or "the precis of what subparagraph (a) stated". As for the Tribunal's finding relating to para 8.1.1(1)(b), the Full Court found that "[g]iven that subparagraph (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".

28 Finally, with respect to para 8.1.1(1)(g), the Full Court found that the consideration identified in that sub-paragraph could not be regarded as applicable, as there was "not a skerrick of evidence" that the appellant had been

36 Direction 90, para 8.4.

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"formally warned" or had been "otherwise ... made aware, in writing" about the consequences of further offending in terms of his migration status.

29 Having found the Tribunal so erred, the Full Court then identified other aspects of the Tribunal's reasons as bases for assuming that the Tribunal would have adopted a different process of reasoning to the same end and, on that basis, concluded that the error was not material.³⁷ By way of example, the Full Court reasoned that, "even if the Tribunal had concluded that subparagraph (a) was entirely irrelevant and moved on", the Full Court did not consider that there was "a realistic possibility" that the Tribunal could have found the appellant's conduct to be merely "serious" in considering the nature and seriousness of his conduct under paras 8.1(2)(a) and 8.1.1(1), or that the weighing exercise under para 8.1.1(1) could have had a "favourable outcome" for the appellant even if the Tribunal did assess his conduct to be "serious".³⁸ Both of these findings involved the Full Court making assumptions about how the Tribunal would have undertaken the weighing exercise of the matters in para 8.1.1(1). Such approaches should not be adopted. A reviewing court does not engage in a review of the merits of the decision,³⁹ reconstruct a decision-making process, rework the apparent basis upon which a decision has been made, or rewrite the reasons for decision.⁴⁰

Did an error occur?

30 Before this Court, there was no dispute that the Tribunal's decision involved error: the Tribunal breached s 499(2A) of the *Migration Act* in failing to comply with Direction 90 in the manner described. In the present case, where the error was

37 See, eg, *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 1 at 25-28 [91]-[105] (in relation to (a)), 31 [124] (in relation to (b)), 37-38 [158]-[162] (in relation to (g)).

38 *LPDT* (2023) 297 FCR 1 at 26 [97].

39 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36, 38; *SZMTA* (2019) 264 CLR 421 at 445 [48], 460 [95]; *MZAPC* (2021) 273 CLR 506 at 528 [51].

40 See, eg, *FTZK v Minister for Immigration and Border Protection* (2014) 88 ALJR 754 at 768 [67]; 310 ALR 1 at 18; *MZAPC* (2021) 273 CLR 506 at 549 [114]. See also, eg, *Sadsad v NRMA Insurance Ltd* (2014) 67 MVR 601 at 610 [47]; *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (2021) 288 FCR 565 at 595 [130].

a breach by a statutory decision-maker of a condition governing the making of the decision, the relevant facts were established by the tender of the Tribunal's reasons for decision. Nothing more was required.

31 In the courts below, the parties and the courts approached the identification of error by considering each aspect of the Tribunal's reasons which was challenged as a separate error. That was a misidentification of the error. As counsel for both the appellant and the Minister accepted in the course of argument, there was one error – a failure to comply with s 499(2A) of the *Migration Act*. Each aspect of non-compliance with s 499(2A) was a particular of the one error – a breach by a statutory decision-maker of a condition governing the making of a decision, namely statutory non-compliance with s 499(2A) of the *Migration Act* in failing to comply with Direction 90.

Was the error material?

32 The issue on appeal concerns the second question: whether the error was material so as to constitute jurisdictional error. The starting point is the nature of the error. There was no submission that a breach of s 499(2A) of the *Migration Act* in failing to comply with Direction 90 was an error that was jurisdictional irrespective of any effect that the error might or might not have had on the decision that was made in fact. The question was whether the decision that was in fact made by the Tribunal *could*, not *would*, "realistically" have been different had there been no error. The answer to that question, in this appeal, is to be determined from the face of the Tribunal's reasons.

33 The error of the Tribunal was a breach by a statutory decision-maker of a condition governing the process of reasoning to be undertaken in exercising the decision-making power under s 501CA(4). The condition imposed by s 499(2A) by reference to Direction 90 required the Tribunal to take into account, as mandatory considerations, the primary considerations identified in para 8 and the other considerations in para 9, where those considerations were relevant to the decision. Fulfilment of the condition required the Tribunal to identify which of those mandatory considerations were relevant to the particular circumstances of the particular applicant. Then, having identified the *relevant* mandatory considerations, the exercise of the discretion under s 501CA(4) required the Tribunal to engage in an evaluative assessment involving the weighing of those relevant mandatory considerations with other relevant considerations.

34 In this case, the Tribunal did not follow the required process of reasoning. In relation to para 8.1.1(1)(a), the unavoidable inference is that the Tribunal

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misunderstood the provision, the appellant's conduct, or both. In relation to para 8.1.1(1)(b), it is not possible to comprehend how the Tribunal made its findings.⁴¹ In relation to para 8.1.1(1)(g), the Tribunal regarded the consideration as directly relevant when there was no evidence before the Tribunal showing that it did apply. There is no rational basis for the Tribunal's findings.

35 Those aspects of the error, in the statutory context in which the decision was made, compel the finding 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. Each 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. The Tribunal's error in its process of reasoning in these respects alone established that the error was material.

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. The curial relief sought by the appellant should be granted.

Orders

37 For those reasons:

1. The appeal should be allowed with costs.
2. The orders of the Full Court of the Federal Court of Australia on 3 May 2023 and 24 May 2023 should be set aside and, in their place, order that the appeal be allowed with costs and the orders of the

41 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 364 [68], 367 [76], 371 [91], 375 [105].

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Federal Court of Australia on 14 July 2022 be set aside and, in their place, order that:

- (a) a writ of certiorari issue to quash the decision of the Tribunal on 7 July 2021 not to revoke the cancellation of the appellant's visa;
- (b) a writ of mandamus issue directed to the Tribunal requiring it to determine the appellant's request for revocation according to law; and
- (c) the Minister pay the appellant's costs.

38 BEECH-JONES J. The background to this appeal is set out in the judgment of Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ. I agree with what their Honours state in relation to jurisdictional error and materiality.⁴² I write separately in relation to the application of the principles stated by their Honours to the circumstances of this case.

39 The first and second errors, or the first and second particulars of a single error, disclosed by the reasons of the Administrative Appeals Tribunal ("the Tribunal") for dismissing the appellant's application for review arise from its findings that each of para 8.1.1(1)(a) and (b) of the relevant Ministerial Direction ("Direction 90")⁴³ made under s 499(1) of the *Migration Act 1958* (Cth) "militates", and in the case of para 8.1.1(1)(a) "militates strongly", "in favour of a finding that the [appellant's] criminal offending has been of a very serious nature". The crimes of which the appellant was convicted did not fall within any of the types of crimes listed as "very serious" in para 8.1.1(1)(a). They may have fallen within the types of crimes described as "serious" in para 8.1.1(1)(b), but even so, that sub-paragraph concerns crimes that are viewed as "serious" and not as "very serious". Although the reasons of the Full Court of the Federal Court of Australia described these errors of the Tribunal in terms suggestive of a failure to give adequate reasons,⁴⁴ the absence of such reasoning reinforces the inference that the Tribunal misconstrued Direction 90. In particular, the Tribunal misconstrued the types of crimes described in para 8.1.1(1)(a) and the characterisation of crimes described in para 8.1.1(1)(b).

40 The third error on the part of the Tribunal, or the third particular of a single error, arises from its conclusion that para 8.1.1(1)(g) of Direction 90 was "directly relevant" and its finding that the appellant was formally warned or otherwise made aware in writing about the consequences of further offending. Paragraph 8.1.1(1)(g) is only relevant if the non-citizen reoffends after having been "formally warned, or ... otherwise ... made aware, in writing, about the consequences of further offending". The Full Court found that the Tribunal's findings were erroneous because there was no evidence to support the finding that

42 Reasons of Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ ("Joint Reasons") at [2]-[16].

43 *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("Direction 90").

44 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 1 at 19-21 [64]-[71], 30 [119] per Markovic, Thomas and Button JJ.

the appellant had been so warned.⁴⁵ However, the relevant error is better characterised as a misconstruction of para 8.1.1(1)(g) in that the Tribunal proceeded on the basis that it was sufficient to engage that provision if the non-citizen was aware of the consequences of reoffending on their migration status even without receiving a formal warning or advice in writing.⁴⁶

41 Each of these three errors, or particulars of a single error, involved a misconstruction of Direction 90. This means that even though the Tribunal purported to comply with Direction 90 as required by s 499(2A) of the *Migration Act*, it failed to do so. This analysis supports the consensus in this Court, noted in the judgment of Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ, that there was only one error on the part of the Tribunal and not three.⁴⁷ However, even if there were multiple errors or "breach[es]" of the kind described by their Honours,⁴⁸ an assessment of materiality is not to be undertaken by reference to each such breach separately without regard to the others. The object of the inquiry is to determine whether the *decision* was one involving jurisdictional error, ie, was there "a failure to comply with one or more statutory *preconditions* or *conditions* to [such] an extent [that it] results in a decision which has been made in fact lacking [the] characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it" (emphasis added)?⁴⁹ In assessing materiality, multiple failures to comply with a precondition or condition, or failures to comply with different preconditions or conditions, are not to be considered without regard to each other.

42 The error on the part of the Tribunal in failing to comply with Direction 90 was not an error that was jurisdictional irrespective of any effect it might have had on the Tribunal's decision to affirm the delegate's decision, nor was its potential effect on the Tribunal's decision inherent in its nature.⁵⁰ Thus, for the error to be jurisdictional, there had to be a "realistic possibility" that the decision that was

45 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 1 at 34 [143], 35 [148] per Markovic, Thomas and Button JJ.

46 See *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 297 FCR 1 at 33 [139] per Markovic, Thomas and Button JJ.

47 Joint Reasons at [31].

48 Joint Reasons at [3].

49 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 ("*Hossain*") at 133 [24] per Kiefel CJ, Gageler and Keane JJ.

50 cf Joint Reasons at [6].

made in fact could have been different if the error had not occurred.⁵¹ Given the nature of the error, the burden of proof as to how the decision was made was discharged by the tender of the Tribunal's reasons.⁵²

43 Was the decision made by the Tribunal one which could "realistically" have been different had the Tribunal not misconstrued Direction 90?⁵³

44 Direction 90 provided the relevant framework for the decision. It specifies four primary considerations for a decision-maker to consider, two of which are presently relevant, namely, the "protection of the Australian community from criminal or other serious conduct" and the "expectations of the Australian community".⁵⁴ In addressing the protection of the Australian community, Direction 90 specifies that the decision-maker should, inter alia, give consideration to "the nature and seriousness of the non-citizen's conduct to date" and "the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct".⁵⁵ In determining the nature and seriousness of the non-citizen's criminal offending, Direction 90 specifies a number of matters the decision-maker must have regard to, including those noted in para 8.1.1(1)(a), (b) and (g), the effect of which has already been described. Although sub-paras (a) and (b) specify types of crime and conduct that are viewed as "very serious" and "serious" respectively, an assessment of the nature and seriousness of a non-citizen's conduct does not yield discrete assessments. There is a spectrum of seriousness.

45 Further, those parts of Direction 90 that concern the assessment of the risk posed by the non-citizen are informed by the assessment of the seriousness of their past conduct. Thus, Direction 90 states that "[s]ome 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".⁵⁶ Similarly, that part of Direction 90 which addresses the expectations of the Australian community is also informed by a consideration of the seriousness of the non-citizen's conduct.⁵⁷

51 Joint Reasons at [7].

52 Joint Reasons at [11].

53 Joint Reasons at [14].

54 Direction 90, para 8(1), (4).

55 Direction 90, para 8.1(2).

56 Direction 90, para 8.1.2(1).

57 Direction 90, para 8.4(1).

46 Consistent with these aspects of Direction 90, the Tribunal found that the appellant's offending was "very serious". Even though it might have been open to the Tribunal to reach that conclusion had it not misconstrued Direction 90, that finding was clearly affected by the Tribunal's misconstruction. Similarly, in assessing the risk posed by the appellant should he remain in Australia, the Tribunal found that there was a "convincing" likelihood that the appellant would engage in "further very serious offending". This finding was also affected by the Tribunal's misconstruction of Direction 90. In addressing the expectations of the Australian community, the Tribunal referred to an earlier part of Direction 90 that refers to, *inter alia*, the "nature of the non-citizen's conduct".⁵⁸ Although it is less clear, the Tribunal's assessment of community expectations was also informed by its assessment of the seriousness of the appellant's offending, and thus was affected by its misconstruction of Direction 90.

47 In affirming the delegate's decision not to revoke the cancellation of the appellant's visa, the Tribunal found that both relevant primary considerations noted above weighed strongly in favour of that outcome. The Tribunal identified other considerations that weighed in favour of revoking the cancellation of the visa, principally the appellant's family ties to Australia, but concluded that the "totality of the weight attributable" to those considerations did not "outweigh the strong, combined and determinative weight" that was attributed to the two primary considerations.

48 The first respondent contended that, at its highest, the Tribunal's error only affected its assessment that the appellant's crimes were "very serious" and that, absent the error, it would have assessed his crimes as "serious", and the same outcome would have ensued. However, as explained, the structure of Direction 90, as exemplified by the Tribunal's decision, 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.

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.⁵⁹ 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

58 Direction 90, para 5.2(5).

59 See Joint Reasons at [15].

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.⁶⁰ The Tribunal's error was jurisdictional. The Tribunal's decision was made "outside jurisdiction".⁶¹

50 The orders proposed by Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ should be made.

60 Joint Reasons at [16].

61 *Hossain* (2018) 264 CLR 123 at 133 [24] per Kiefel CJ, Gageler and Keane JJ.

