



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD102/2023

TJHG

Applicant

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL
AFFAIRS** and another named in the schedule

Respondent

ORDER

JUDGE: JUSTICE HALLEY

DATE OF ORDER: 17 April 2023

WHERE MADE: Sydney

THE COURT NOTES THAT:

1. The second respondent has filed a submitting notice in these proceedings.
2. The applicant and the first respondent agree that the second respondent committed jurisdictional error by misconstruing its statutory task.
3. The first respondent concedes that the second respondent's decision is affected by jurisdictional error apparent on the face of the record, and is manifested in the following ways:
 - a. In its statement of reasons, the second respondent did not refer to the test set out in s 501CA(4) of the *Migration Act 1958* (Cth), and made no finding as to whether there was "another reason" to revoke the Applicant's mandatory visa cancellation within the meaning of s 501CA(4)(b)(ii) of the *Migration Act*. See [1], [9], [29] of the second respondent's decision, contained in Annexure MN-7 of the affidavit of Mark Northam dated 1 February 2023;
 - b. In its statement of reasons, the second respondent failed to apply Direction 90, which it was obliged to follow by s 499 of the *Migration Act*. In particular:



- i. Contrary to cl 7 of Direction 90, the second respondent failed to weigh the various primary and other considerations set out in Direction 90. The second respondent also failed to draw any distinction between the primary considerations and the other considerations: see [3], [9] of the second respondent's decision;
 - ii. Contrary to cl 8.1.2(2)(a) of Direction 90, the second respondent failed to consider the nature of the harm to individuals, or the Australian community, should the applicant engage in further criminal or other serious conduct: see [13] of the second respondent's decision;
 - iii. Contrary to cl 8.3(1) of Direction 90, the second respondent did not make a finding about whether non-revocation of the applicant's visa was, or was not, in the best interests of his step-grandchildren: see [16]-[17] of the second respondent's decision; and
 - iv. Contrary to cl 9.4.1(1) of Direction 90, the second respondent failed to consider the impact of the removal of the applicant from Australia on his wife or stepson: see [27] of the second respondent's decision.
4. While further sources of jurisdictional error alleged by the applicant are set out in the grounds of review set out in the Originating Application, in relation to which the first respondent has not yet been required to plead its position, the parties agree that the above errors of themselves materially affected the second respondent's decision, such that, had they not been made, there was a realistic possibility that the second respondent could have made a different decision: see *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17.

BY CONSENT, THE COURT ORDERS THAT:

1. The originating application for judicial review filed on 6 February 2023 be allowed.
2. An order in the nature of certiorari issue quashing the decision of the second respondent dated 17 January 2023.



3. An order of mandamus issue to the second respondent requiring the second respondent, differently constituted, to determine the applicant's application according to law.
4. The first respondent is to pay 90% of the applicant's costs of the application to be taxed, if not agreed.

Date that entry is stamped: 17 April 2023

Sia Lagos
Registrar



Schedule

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Second Respondent ADMINISTRATIVE APPEALS TRIBUNAL