FEDERAL COURT OF AUSTRALIA

Te Puke v Minister for Immigration and Border Protection [2015] FCA 398

Citation:	Te Puke v Minister for Immigration and Border Protection [2015] FCA 398
Parties:	**SHAYE TAMA TE PUKE v MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
File number:	NSD 1257 of 2014
Judge:	**WIGNEY J**
Date of judgment:	29 April 2015
Catchwords:	**MIGRATION** – Cancellation of visa on character grounds – Whether Minister properly exercised discretion under s 501(2) of the *Migration Act 1958* (Cth) – Whether risk of harm to the Australian community is a mandatory consideration – Whether Minister is bound to evaluate the likelihood of future harm – Whether Minister erred by failing to have regard to findings made by the sentencing judge – Whether the Minister made a finding that was unsupported by evidence – Whether the Minister's decision was irrational or illogical
Legislation:	*Acts Interpretation Act 1901* (Cth), s 25D *Crimes Act 1900 (NSW)*, ss 93A, 93C *Migration Act 1958 (Cth)*, ss 4, 501, 501(2), 501(6), 501(7)
Cases cited:	*Anderson v Director General of the Department of Environmental and Climate Change* (2008) 163 LGERA 400; (2008) 251 ALR 633 *Australasian Meat Industry Employees' Union v Fair Work Australia* (2012) 203 FCR 389 *Belmorgan Property Development Pty Ltd v GPT RE Ltd* (2007) 153 LGERA 450; [2007] NSWCA 171 *Coderre v Minister for Immigration and Border Protection* (2014) 143 ALD 675 *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 *Colosimo v Director of Public Prosecutions* (2005) 64 NSWLR 645 *Darby v Director of Public Prosecutions* (2004) 61 NSWLR 558 *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 *Fraser v Minister for Immigration and Border Protection*

[2014] FCA 1333
Gbojueh v Minister for Immigration and Border Protection [2015] FCAFC 43
Gbojueh v Minister for Immigration and Citizenship (2012) 202 FCR 417
Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291
King v Minister for Immigration and Border Protection (2014) 142 ALD 305
Madafferi v Minister for Immigration and Multicultural Affairs (2002) 118 FCR 326
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Border Protection v Singh (2014) 139 ALD 50
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
Minister for Immigration and Citizenship v SZJSS (2010) 243 CLR 164
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Gunner (1998) 84 FCR 400
Minister for Immigration and Multicultural and Indigenous Affairs v Huynh (2004) 139 FCR 505
Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566
Minister for Immigration and Multicultural and Indigenous Affairs v Voao [2005] FCAFC 50
Moana v Minister for Immigration and Border Protection [2015] FCAFC 54
MZAGK v Minister for Immigration and Border Protection [2014] FCA 1190
NBMZ v Minister for Immigration and Border Protection (2014) 220 FCR 1
NBNB v Minister for Immigration and Border Protection (2014) 220 FCR 44
Re Patterson; Ex parte Taylor (2001) 207 CLR 391
Roesner v Minister for Immigration and Border Protection [2015] FCA 68
Salahuddin v Minister for Immigration and Border Protection (2013) 140 ALD 1
Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363
Soliman v University of Technology, Sydney (2012) 207 FCR 277
SZMWQ v Minister for Immigration and Citizenship (2010) 187 FCR 109
Tanielu v Minister for Immigration and Border Protection (2014) 225 FCR 424

Date of hearing:	2 March 2015
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	110
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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1257 of 2014**

BETWEEN:	**SHAYE TAMA TE PUKE** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Respondent**

JUDGE: **WIGNEY J**

DATE OF ORDER: **29 APRIL 2015**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The application is dismissed.

2. The applicant is to pay the respondent's costs as agreed or assessed.

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

IN THE FEDERAL COURT OF AUSTRALIA
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JUDGE:	**WIGNEY J**
DATE:	**29 APRIL 2015**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 Shaye Tama Te Puke is a twenty-two year old national of New Zealand. He has lived in Australia since he was about nine years old. Until recently he held a visa which entitled him to live in Australia indefinitely whilst he remained a New Zealand citizen. That changed when, on 6 November 2014, the Minister for Immigration and Border Protection (**the Minister**), the respondent in these proceedings, cancelled his visa on character grounds pursuant to s 501(2) of the *Migration Act 1958* (Cth) (**the Act**). Mr Te Puke applies for a review of that decision, alleging that the Minister erred in various ways in the exercise of his jurisdiction.

2 For the reasons that follow, Mr Te Puke's challenge to the Minister's cancellation of his visa fails. The Minister did not err jurisdictionally in arriving at his decision.

BACKGROUND

3 On 26 May 2012, Mr Te Puke, in company with another person, Mr Tane Hodgson, robbed and seriously assaulted a taxi driver. Mr Te Puke and Mr Hodgson were both 19 years old at the time. The incident occurred after Mr Te Puke, Mr Hodgson and two women who were with them, flagged-down a taxi in the early hours of the morning outside the Bayview Hotel in Gladesville. They asked the driver to take them to Rydalmere. Mr Te Puke and Mr Hodgson were apparently heavily intoxicated at the time after a heavy night of drinking.

4 When the taxi arrived in Rydalmere, Mr Te Puke and his friends got out of the taxi. When the taxi driver, quite understandably, told Mr Te Puke that he had to pay the fare, which was approximately $25 to $30, Mr Te Puke replied, "You pay." The driver, apparently fearing for his safety, grabbed a screwdriver from his taxi and got out of the taxi holding the screwdriver for his protection. A scuffle then ensued between the driver and Mr Te Puke and Mr Hodgson. The taxi driver fell to the ground during this melee, whereupon Mr Te Puke and Mr Hodgson set upon him, kicking and punching him to the head and face. The taxi driver tried to protect himself. He got to his feet and swung the screwdriver towards Mr Te Puke and Mr Hodgson. He apparently made some contact, but was then felled by a heavy blow to the head. For the next five minutes or so, Mr Te Puke and Mr Hodgson continued to viciously assault the driver. They eventually let up, but, to rub salt into the wounds, as it were, they then stole the taxi driver's mobile phone before they left the scene.

5 A local resident witnessed the incident and called emergency services. The driver was eventually taken by ambulance to Westmead Hospital. His injuries were such that he required surgery. He sustained fractures to the bones around his right eye socket and his nose, and bleeding in one of his ears. Some of the injuries have resulted in the driver suffering potentially permanent disability. For some time after the incident he suffered blurred and double vision and hearing loss. The operation on his eye socket has left him permanently disfigured. He continued to suffer psychological and emotional problems resulting from the incident. He was unable to return to driving a taxi for a living.

6 On any view, Mr Te Puke's offending behaviour was serious. As will be seen, the District Court judge who sentenced Mr Te Puke plainly believed so. So too did the Minister.

7 Mr Te Puke and Mr Hodgson were both eventually apprehended and charged by the police with the offence of robbery in company causing grievous bodily harm. They pleaded guilty and, on 4 April 2013, were sentenced to terms of imprisonment by his Honour Judge Hoy SC in the District Court of New South Wales. The overall sentence imposed on Mr Te Puke was imprisonment for four years and six months with a non-parole period of one year and ten months.

8 In arriving at the sentence, the learned sentencing judge, as he was required to do by the relevant sentencing legislation, weighed up various matters, including the objective seriousness of the offence, any mitigating factors and Mr Te Puke's subjective circumstances.

9 In relation to the seriousness of the offence, his Honour characterised the offence as "disgraceful" and as "exud[ing] excessive and almost uncontrollable violence." He concluded that it was "obviously serious." His Honour did, however, refer to some features of the offence which went some way to ameliorating or mitigating the seriousness of the offence. In his remarks on sentence, his Honour said:

> The offence and confrontation also appears to have been impulsive, spontaneous, without planning or premeditation. It apparently occurred under the influence of excessive amounts of alcohol. It occurred in the vicinity of where they lived. There was no weapon used by either Offender. However the assault which inflicted the grievous bodily harm was one of cowardice and brutality, kicking and punching a man about the head and face whilst on the ground. He was then unable to defend himself. Extraordinarily, and perhaps more by way of good luck than good management the injuries, whilst serious and lingering, are not of the worst category for offences of this nature.
>
> The robbery also appears to have been an afterthought. Indeed as described in the further agreed facts, it was belatedly opportunistic in that the iPhone, the only property that was stolen, and against the background of the victim's wallet with about $300 cash later found nearby, it was seized during or shortly after the assault. In my view the nexus thus between the robbery and the violence inflicted is quite slim.

10 His Honour concluded that there are "far more serious instances" of offences of "this nature" and that the offence fell into the low end of the spectrum of objective seriousness. Nonetheless, his Honour still regarded the offence as "heinous".

11 In relation to Mr Te Puke's subjective circumstances, the learned sentencing judge found that Mr Te Puke did not have any "significant" criminal record, that Mr Te Puke was a man of otherwise good character, with a good community and work record, and that he was therefore "unlikely" to re-offend. His Honour found that Mr Te Puke had "good prospects of rehabilitation" and had shown remorse.

12 The sentencing judge also referred to the fact that Mr Te Puke was a "good sportsman", a "proper worker" and "someone who can carry out a role in society staying out of trouble." His Honour found, however, that Mr Te Puke had an addiction to alcohol and anger management difficulties. In his Honour's view, this meant that "under the influence of alcohol he is a time bomb". His Honour said the following of Mr Te Puke's situation concerning his alcohol addiction at the time of sentence:

> The evidence suggests that he has now turned the corner in so far as alcohol is concerned due to his time in custody. He has, as I understand it, abandoned that alcohol addiction by compulsion and his addiction to cannabis. The concern of course is whether he can carry out that resolve when he is released from custody.

> The Court can only hope that he does so. He is very fortunate to have the support of his partner. He has a little child. He has a wonderful family supporting him. They are here. He has got everything going for him but for this matter.

13 It is to be noted that, in relation to the prospects of rehabilitation, whilst his Honour concluded that the prospects were good, his Honour's findings remained somewhat cautious and tempered. His Honour observed that Mr Te Puke had abandoned his addiction "by compulsion" because he had, by the time of his sentence, been in custody for some time. His Honour's findings concerning Mr Te Puke's future prospects were, understandably in the circumstances, expressed in terms of hope rather than certainty.

THE CANCELLATION DECISION

14 Subsection 501(2) of the Act provides that the Minister may cancel a visa that has been granted to a person if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that the person passes the character test. The character test is defined in s 501(6) of the Act in the following terms:

> (6) For the purposes of this section, a person does not pass the ***character test*** if:
> (a) the person has a substantial criminal record (as defined by subsection (7)); or
> (aa) the person has been convicted of an offence that was committed:
> (i) while the person was in immigration detention; or
> (ii) during an escape by the person from immigration detention; or
> (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or
> (ab) the person has been convicted of an offence against section 197A; or
> (b) the person has or has had an association with someone else or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or
> (c) having regard to either or both of the following:
> (i) the person's past and present criminal conduct;
> (ii) the person's past and present general conduct;
> the person is not of good character; or
> (d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:
> (i) engage in criminal conduct in Australia; or
> (ii) harass, molest, intimidate or stalk another person in Australia; or
> (iii) vilify a segment of the Australian community; or
> (iv) incite discord in the Australian community or in a segment of that community; or
> (v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.
> Otherwise, the person passes the ***character test***.

15 Subsection 501(7) of the Act provides that, for the purposes of the character test, a person has a substantial criminal record if, inter alia, the person has been sentenced to a term of imprisonment of 12 months or more.

16 There is no issue that, as a result of the sentence imposed by his Honour Judge Hoy SC, Mr Te Puke had a substantial criminal record and therefore did not pass the character test.

17 Mr Te Puke was released on parole on 31 March 2014. Before his release on parole, the Department of Immigration and Border Protection (**Department**) wrote to Mr Te Puke to advise him that consideration was being given to the cancellation of his visa under s 501(2) of the Act. The letter invited Mr Te Puke to comment or provide information in relation to whether he passed the character test and whether the Minister or his delegate should exercise the discretion to cancel his visa. Further letters were sent to Mr Te Puke on 30 April 2014 and 2 May 2014. In response, Mr Te Puke provided the Department with a completed personal details form and (on or shortly after 8 May 2014) a two page letter containing some comments and information which may have given the Minister or his delegate reason not to cancel Mr Te Puke's visa.

18 On 3 June 2014, an officer of the Department forwarded a submission to the Minister in relation to the possible cancellation of Mr Te Puke's visa. The submission attached an issues paper which contained a discussion of the issues for consideration in relation to the possible cancellation of Mr Te Puke's visa. It also attached a draft statement of reasons. The draft statement of reasons set out the reasons for deciding to cancel Mr Te Puke's visa.

19 The submission gave the Minister the option of making a decision concerning the cancellation of Mr Te Puke's visa personally, or referring the decision to a delegate. The submission correctly pointed out that if the Minister decided the matter personally, merits review of the decision in the Administrative Appeals Tribunal would not be open to Mr Te Puke if the decision was adverse to him. If, as turned out to be the case, the Minister opted to decide the matter personally, the Minister was requested to indicate his decision and sign the issues paper. If the decision was to cancel the visa, the Minister was asked to sign the draft statement of reasons with "any amendments you consider necessary".

20 The Minister decided to cancel Mr Te Puke's visa and signed the issues paper accordingly. He also signed the draft statement of reasons. Whilst nothing of substance turns on this, it appears that the Minister did not make any amendments to the draft statement of reasons.

21 The statement of reasons records that, as a result of the sentence imposed on Mr Te Puke by the District Court on 4 April 2013, Mr Te Puke had a substantial criminal record and did not pass the character test. As has already been said, there is no dispute that Mr Te Puke did not pass the character test.

22 The statement of reasons then records that, in the exercise of the discretion to cancel Mr Te Puke's visa, the Minister was "mindful of the Government's commitment to using s501 of the Act to protect the Australian community from harm that may result from criminal activity or other serious conduct by non-citizens."

23 The statement of reasons then goes on to record a number of findings concerning the nature of Mr Te Puke's criminal conduct, the existence of some mitigating circumstances and the risk of Mr Te Puke re-offending.

24 Mr Te Puke's challenge to the Minister's cancellation decision hinges on paragraphs 8 to 17 of the statement of reasons. These paragraphs accordingly should be set out in full:

> Criminal conduct
>
> 8. Mr TE PUKE has been convicted of a violent offence that caused serious injury to the victim. In May 2012, Mr TE PUKE, together with a co-offender, assaulted a taxi driver rather than pay a taxi fare. The victim was repeatedly punched and kicked to the face and head as he lay on the ground. The offenders also stole his iphone. At the time of sentencing in April 2013, the victim continued to suffer physical and psychological problems as a result of the assault. The victim has also suffered permanent disfigurement. I regard this offending as very serious.
>
> 9. Mr TE PUKE was sentenced to four and a half years imprisonment for this offence, an indication that the court viewed his offending seriously.
>
> 10. Mr TE PUKE has two other violent offences recorded in Australia: common assault and affray, both in 2010 when he was a minor.
>
> Mitigating factors and risk of re-offending
>
> 11. Mr TE PUKE was heavily intoxicated when he committed his most recent offence. The sentencing judge, referring to a psychological report in relation to Mr TE PUKE, indicated that Mr TE PUKE had an addiction to alcohol, in addition to an addiction to cannabis. He also has anger management difficulties.

> 12. The judge noted that Mr TE PUKE had '*abandoned'* his alcohol and cannabis addiction while in custody. Mr TE PUKE has also confirmed that he is abstaining from drug and alcohol use. While I accept that Mr TE PUKE is not currently using these substances, I note that he was released on parole on 31 March 2014 and I consider that his ability to avoid such substances has only been tested in the community for a relatively short period of time.
>
> 13. Mr TE PUKE also has the support of his de facto partner and family in Australia. I note that he has received regular visits in prison from family members.
>
> 14. The judge accepted that Mr TE PUKE was genuinely remorseful for his offending behaviour and had good prospects of rehabilitation.
>
> 15. Mr TE PUKE was of good conduct during his incarceration with no incidents reported in custody. He was employed and received positive work reports. He did not participate in any rehabilitation programs in prison due to his relatively recent sentence.
>
> 16. Mr TE PUKE has a good past employment record and is currently employed. I have noted Mr TE PUKE's advice regarding his remorse, his increased maturity and his resolve to not re-offend.
>
> 17. Notwithstanding Mr TE PUKE's good behaviour in prison, his remorse, his good prospects of rehabilitation, strong family support, employment and the evidence that he addressed his problems with cannabis and alcohol use while in prison, in my view his rehabilitation has been tested for a relatively short period of time in the community and there remains a risk that he will re-offend. I find that once a person has shown disrespect for the law, they cannot then be said to have no risk of re-offending. Rather, I find that Mr TE PUKE has a risk of re-offending, albeit a low risk.

25 The statement of reasons also records some factual findings concerning Mr Te Puke's ties to Australia, the best interest of Mr Te Puke's daughter and the hardship that may be suffered by other family members. None of Mr Te Puke's arguments in this Court turn on these parts of the statement of reasons.

26 The statement of reasons records the Minister's conclusions in the following terms (at [29]-[33]):

> 29. I considered all relevant matters including (1) an assessment against the character test as defined by s501(6) of the *Migration Act 1958*, and (2) all other evidence available to me, including evidence provided by, or on behalf of Mr TE PUKE.
>
> 30. I have given substantial weight to the very serious nature of Mr TE PUKE's offending which was violent and resulted in significant harm to his victim. I consider that he remains at risk of re-offending, despite his good behaviour in prison, remorse and family support.
>
> 31. I took into account Mr TE PUKE's residence in Australia from a young age,

his family and social ties to Australia, and his contribution to the community through employment. I took into account that it is in the best interests of his young daughter that he remain in Australia. While I also consider that it is in the best interests of any minor relatives that Mr TE PUKE remain in Australia, I gave this factor little weight.

32. I also found that the Australian community could be exposed to great harm should Mr TE PUKE reoffend in a similar fashion. I could not rule out the possibility of further offending by Mr TE PUKE as once a person has shown a disrespect for the law by offending, it can never be said that they will not re-offend. The Australian community should not tolerate any further risk of harm. I found these factors outweighed the countervailing considerations in Mr TE PUKE's case.

33. Having given full consideration to all of these matters, I decided to exercise my discretion to cancel Mr TE PUKE's Class TY, Subclass 444 Special Category (Temporary) visa under s501(2).

GROUNDS OF APPLICATION AND SUBMISSIONS

27 Mr Te Puke's application sets out seven grounds upon which the Minister's decision is alleged to have involved legal error. Ultimately, only three grounds (grounds 1, 2 and 4) were pressed. Those grounds are:

Ground 1

1. The Respondent identified a wrong issue, asked the wrong question and/or relied upon irrelevant considerations when considering the risk of harm to the Australian community, with respect to the *propensity* or *likelihood* that the Applicant may engage in similar conduct in the future.

Particulars

a. The Respondent identified the wrong question/issue when he postulated that he "could not rule out the possibility of further offending by" the Applicant (para [32]).

b. The Respondent failed to properly assess the Applicant's likelihood of reoffending, by inflexibly adopting the principle that "once a person has shown a disrespect for the law by offending, it can never be said that they will not re-offend" (paras [17] and [32]).

Ground 2

2. The Respondent's findings, when considering the *degree of seriousness of the Applicant's criminality* and/or *likely harm to the Australian community should the Applicant offend in a similar fashion in the future*, are illogical, irrational and/or otherwise unreasonable. The Respondent also failed to take into account various relevant considerations when making the impugned findings here.

Particulars

a. The findings by the Respondent that the Applicant's commission of the offence for robbery in company causing grievous bodily harm was "very serious" (paras [5], [8] and [30]) is illogical, irrational and/or otherwise unreasonable:

   i. The sentencing judge characterised the objective seriousness of the offence as in the "low end of objective seriousness".

   ii. The sentencing judge found there was no weapon used in the commission of the offence.

   iii. The sentencing judge found the offence was not planned.

   iv. The sentencing judge found the offending was impulsive, spontaneous opportunistic and was not premeditated.

   v. The sentencing judge found the nexus between the robbery and the violence inflicted was "quite slim".

   vi. The sentencing judge found that "insofar as offences of this nature are concerned there are far more serious instances" of the offending in question.

   vii. The Respondent found that the seriousness of the Applicant's offending was reflected in the 4.5 year term of imprisonment [para 9]. However, the Respondent seems to have ignored that the Applicant was only sentenced to an actual *period of imprisonment* for 22 out of the 54 months (a mere 40% of the actual sentence imposed).

   viii. The Respondent ignored the fact that the Applicant was sentenced to a non-parole period of only 1 year and 10 months – for an offence that carries a standard statutory non-parole period of 7 years.

b. The finding by the Respondent that the Australian community could be exposed to great harm should" the Applicant "reoffend in a similar fashion" (para [32]) is illogical, irrational and/or otherwise unreasonable:

   i. The Applicant relies upon the particulars outlined in Ground 2(a) of this originating application.

   ii. The impugned finding here lacks an evident and intelligible justification.

Ground 4

4. The finding by the Respondent that the Applicant had two other "violent offences" on his record (para [10]) was made without probative evidence and/or is otherwise illogical, irrational and/or unreasonable.

Particulars

i. There was no probative evidence which suggested the common assault and/or affray offences were "violent offences".

ii. The offence of common assault is not, by its very nature, necessarily a violent offence.

iii. The offence of affray is not, by its very nature, necessarily a violent offence.

iv. The sentencing judge found that the affray and common assault offences committed by the Applicant as a juvenile were "relatively minor".

(Emphasis by underlining in original)

28 These grounds were significantly refined in submissions made on Mr Te Puke's behalf at the hearing. In relation to ground 1, whilst the ground was originally couched in terms of the Minister identifying a wrong issue, asking a wrong question, or taking into account irrelevant considerations, ultimately Mr Te Puke's case was that the Minister failed to take into account a relevant consideration. That consideration was whether there was a risk of harm to the Australian community. Mr Te Puke's case in relation to this ground can be summarised in terms of three propositions.

29 First, Mr Te Puke submits that the risk of harm to the Australian community is a mandatory consideration for the Minister in the exercise of his cancellation discretion in s 501(2) of the Act.

30 Second, Mr Te Puke contends that the risk of harm can only be ascertained by evaluating the seriousness of any future harm which might be caused and the likelihood of that harm occurring. That in turn requires consideration of the risk of re-offending. The likelihood of re-offending is said to be a necessary element of the risk of harm to the community.

31 Third, Mr Te Puke submits, in essence, that the statement of reasons shows that the Minister did not consider, or at least did not properly consider, or make an assessment of, the risk of harm to the Australian community.

32 In relation to the first two propositions, Mr Te Puke's submissions place considerable reliance on the judgment of Mortimer J in *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424 (***Tanielu***).

33 In relation to the third proposition, Mr Te Puke's arguments largely focus on paragraph 17 of the statement of reasons. He submits, in essence, that the reasons in paragraph 17 reveal that

the Minister did not properly address the risk of Mr Te Puke re-offending because the Minister's finding that there is "a risk" of re-offending is based on nothing more than a global proposition not rooted to the facts of Mr Te Puke's case. The global proposition is that once a person has shown disrespect for the law, it cannot be concluded that there is no risk of them re-offending.

34 The Minister's submissions in relation to ground 1 may be shortly summarised. First, he submits that there is binding authority that the risk of harm to the Australian community is not a mandatory consideration in the exercise of the Minister's discretion under s 501(2) of the Act. That binding authority is said to be the majority decision of the Full Court (Kieffel and Bennett JJ, Wilcox J dissenting) in *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505 (***Huynh***).

35 Second, the Minister submits that even if the risk of harm is a mandatory consideration, the statement of reasons discloses that the Minister considered that matter.

36 Mr Te Puke's second ground challenges the Minister's conclusion, in paragraph 8 of the statement of reasons, that he regarded Mr Te Puke's offending as "very serious". He contends that in so finding, the Minister ignored a number of findings made by the sentencing judge in relation to the offence committed by Mr Te Puke. Mr Te Puke submits that it was mandatory for the Minister to have regard to those findings. Additionally, or perhaps alternatively, Mr Te Puke contends that, because the Minister did not have regard to the findings of the sentencing judge, his conclusion concerning the seriousness of the offence was illogical or unreasonable.

37 The final ground pressed by Mr Te Puke (ground 4) concerns the statement, in paragraph 10 of the statement of reasons, that Mr Te Puke had two previous convictions for violent offences. Mr Te Puke does not dispute that he had previously been convicted of offences of common assault and affray. He contends, however, that these are not necessarily offences that involve violence and that there was no evidence before the Minister concerning the circumstances of these offences. This finding was, therefore, in Mr Te Puke's submission, unsupported by any probative evidence and illogical.

GROUND 1 – DID THE MINISTER FAIL TO HAVE REGARD TO A MANDATORY CONSIDERATION?

38 This ground raises two questions: *first*, is the risk of harm to the Australian community a mandatory consideration for the Minister in the exercise of the discretion to cancel a person's visa under s 501(2) of the Act; and *second*, did the Minister have regard to this consideration in Mr Te Puke's case?

39 For the reasons that follow, it is ultimately unnecessary to answer the first question. That is because even if risk of harm is a mandatory consideration, it cannot be concluded that the Minister failed to have regard to it in Mr Te Puke's case. It follows that Mr Te Puke's challenge to the Minister's decision on this ground must fail. Nevertheless, some consideration should be given to the question whether risk of harm is a mandatory consideration. That is not only because it is an important question, but also because, at least on the Minister's case, there has been some differences of opinion in relation to this question in recent cases in the Court.

Is the risk of harm to the community a mandatory consideration?

40 Two relatively recent decisions of single judges of the Court suggest that the answer to this question is "yes": *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417 (***Gbojueh***); and *Tanielu*. The Minister submits, however, that these cases are wrongly decided because they are contrary to the judgment of the majority in *Huynh*. The Minister also points to another recent single judge decision as indicating that *Tanielu* was wrongly decided, or at least as indicating a difference of opinion concerning this question: *MZAGK v Minister for Immigration and Border Protection* [2014] FCA 1190 (***MZAGK***).

41 The difficulty for the Minister, however, is that *Huynh* is not authority for the proposition that risk of harm to the Australian community is not a mandatory consideration in the exercise of the discretion under s 501(2) of the Act. It would also appear that, to the extent that there is any disagreement or difference of opinion in recent cases in the Court, that disagreement or difference of opinion relates more to the question how the Minister may or must go about assessing or determining the risk of harm. The difference is not about whether risk of harm is a mandatory consideration.

42 The question is, ultimately, one of statutory construction. The ambit of the Minister's discretion to cancel a visa under s 501(2) of the Act is broad and unconfined. It is not subject to any express limitations or constraints. It is well accepted that, in these circumstances, the

Court will not find that the decision-maker is bound to take into account a particular matter unless that can be implied from the subject matter, scope and purpose of the act in question: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 (***Peko-Wallsend***).

43 The general object of the Act is set out in s 4 of the Act. It is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. Subsections 4(2) and 4(4) make it plain that the provisions of the Act relating to visas, and the removal of persons whose presence is not permitted by the Act, which would include persons whose visas have been cancelled, are intended to advance that object.

44 Considered in the context of this broad object, s 501 can readily enough be seen to be dealing with one aspect of the national interest. That aspect is the protection of the Australian community by the removal from Australia of persons who, by reason of their bad character, may present a risk, or whose continuing presence may have adverse consequences for, the Australian community. The removal of such persons is effected, in the first instance, by the cancellation of their visas. Visa cancellation does not, however, automatically follow from a failure to satisfy the character test in s 501(6) of the Act. The Minister retains a discretion. Plainly enough, given the subject matter, scope and purpose of s 501, the nature and extent of the potential adverse consequences or risk posed by the continuing presence of the person in Australia must be seen to be a central consideration in the exercise of that discretion.

45 The protective nature of the Minister's power to cancel a visa appears to be well accepted: *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 at [66]-[68]. Indeed, the Minister does not submit that the power to cancel is otherwise than protective in nature. The Minister's reasons in this matter also proceed on the basis that protection of the public is a primary consideration in the exercise of the discretion to cancel a visa on character grounds. Once that is accepted, it would seem to be but a short step to conclude that the risk or potential for harm to the Australian community posed by the continuing presence in Australia of a person whose visa is open to cancellation is a mandatory consideration. That is because the need to protect the public in this context only arises if there is a risk of harm.

46 In *Gbojueh,* Bromberg J gave consideration to the question whether there were any mandatory considerations which the Minister was bound to take into account in the exercise of his discretion under s 501A(2) of the Act. Section 501A of the Act empowers the Minister

to set aside a decision of the Administrative Appeals Tribunal not to cancel a person's visa under s 501(2) of the Act. The only material difference between the discretions in s 501(2) and s 501A(2) is that s 501A(2) expressly introduces the national interest as a mandatory consideration.

47 Bromberg J concluded that the exercise of the discretion under s 501A(2) of the Act called for a broad evaluative judgment. The subject matter, scope and purpose of the section strongly suggested that the Minister was to be left largely unrestrained to determine for him or herself what factors are to be regarded as relevant when determining whether to cancel a visa in the national interest. Nevertheless, his Honour concluded that the risk of harm to the Australian community was a mandatory relevant consideration in the exercise of the discretion under s 501A(2) of the Act. His Honour said (at [45]):

> There is however one consideration that is so central to the subject matter dealt with by s 501A(2), that it is difficult to imagine that Parliament did not intend it to be a consideration the Minister is bound to take into account, both for the purpose of determining the national interest and the residual discretion. It is unlikely that the potential for the Australian community to be harmed by the continued presence in Australia of the non-citizen was intended as an optional consideration at the Minister's election. In my view, and consistently with the view of the majority (Black CJ and Sackville J) in *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346, the Minister is bound to consider that potential for harm to the Australian community in the exercise of the power conferred by s 501A(2).

48 Whilst *Gbojueh* concerned s 501A(2) of the Act, it is to be noted that Bromberg J concluded that potential for harm is a mandatory consideration for the Minister in both determining the national interest and in respect of the "residual discretion". Bromberg J ultimately concluded that the Minister had given consideration to the risk of harm. Bromberg J's judgment was upheld on appeal, though the appeal did not turn at all on the question whether risk of harm was a mandatory consideration: *Gbojueh v Minister for Immigration and Border Protection* [2015] FCAFC 43. Rather, it turned on whether the Minister had considered a finding made by the sentencing judge.

49 In *Tanielu,* Mortimer J gave detailed consideration to the question whether the risk of harm was a mandatory consideration for the Minister in the exercise of his s 501(2) discretion. After an exhaustive review of the authorities, her Honour concluded as follows (at [154]):

> The risk of harm to the Australian community posed by the subject of the visa refusal or cancellation is a matter a decision-maker, including the Minister personally, must take into account in exercising the s 501(2) power. That is because an assessment of

> such a risk is a necessary part of exercising the power for the purpose for which it was conferred: namely, protection of the Australian community, using "protection" in its broadest sense.

50 The Minister submits that *Tanielu* and, by implication, *Gbojueh* are wrongly decided. The principal basis for that submission is that these decisions are inconsistent with the majority decision of the Full Court in *Huynh*.

51 The specific issue in *Huynh* was not whether protection of the Australian community or the risk of harm were mandatory considerations. Rather, the question was whether the Minister was bound, in exercising the discretion to cancel in s 501(2) of the Act, to have regard to specific findings by the Court of Criminal Appeal concerning the visa-holder's (Ms Huynh's) complicity, and therefore the level of her criminality, in respect of the offence which resulted in her failing the character test. The sentencing judge had found that there was no evidence concerning the level of complicity of Mrs Huynh and her son (who had also been convicted of the same offence) and no "firm" evidence concerning their respective roles. The Court of Criminal Appeal, however, found that Mrs Huynh was not herself a drug dealer, but was simply assisting her son who was. The Minister had regard to what the sentencing judge had said on this topic, but did not have regard to the finding by the Court of Criminal Appeal.

52 Kieffel and Bennett JJ found that the Minister was not bound to consider what the Court of Criminal Appeal had said concerning Ms Huynh's level of complicity or criminality in exercising the s 501(2) discretion. Indeed, their Honours found that the Minister was not bound to consider the general topic of Ms Huynh's level of complicity or criminality at all. Such matters were not relevant considerations "in an administrative law sense" (at [76]).

53 The Minister relies on the following passage from the majority judgment (at [74]):

> A reference to those matters [the subject-matter, scope and purpose of the statute] confirms the breadth of the Minister's discretion. The object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens: s 4(1). To advance that object, provision is made for the removal or deportation from Australia of non-citizens whose presence is not permitted by the Act: s 4(4). If the Minister were able, consistent with the object of the Act, to consider a matter as broad as the national interest, in determining whether a person ought to be permitted to remain in Australia, **it does not seem possible to imply some obligation on the Minister's part to consider specific factors, personal to the visa holder, such as the circumstances surrounding the offences they have committed**. By way of illustration, the Minister may consider that the national interest requires that the commission of a particular type of offence will inevitably result in the cancellation of a visa, where there has been a sentence to imprisonment for the requisite term. To construe the section as requiring the Minister to consider factors such as the level of

> involvement of the visa holder in the offences would cut across that broad discretion. It follows in our view that the obligation of which his Honour the primary judge spoke cannot be read into s 501.
>
> (Emphasis added)

54 Whilst this passage supports the proposition that the Minister's discretion under s 501(2) is broad, it does not support the proposition that the discretion is entirely unconfined, or that there are no considerations that the Minister is bound to have regard to. Rather, this passage is authority only for the proposition that the Minister is not bound, in every case, to consider "specific factors, personal to the visa holder, such as the circumstances surrounding the offences they have committed." In Mrs Huynh's case, that meant that the Minister was not required to consider the extent of Mrs Huynh's involvement or complicity in the offence.

55 Kieffel and Bennett JJ did not expressly find that risk of harm to the community is not a mandatory consideration. Nor can any such conclusion be implied from their Honours' reasons. In relation to the illustration given by their Honours in this passage, the fact that the Minister may decide to cancel a visa having regard to the nature of the particular offence committed, whatever the level of involvement of the visa-holder in the commission of the offence, does not mean that the Minister does not need to consider the risk of harm to the community. It just means that there may be some cases where the offences committed by the visa-holder are so serious that the Minister could form the view that there would be a risk of harm to the community arising from the continuing presence in Australia of the offender irrespective of the level of the offender's specific involvement in the offence.

56 In dissent, Wilcox J found that the Minister was required to have regard to the nature of the visa-holder's offence, this being an essential step in assessing the degree of criminality involved in the offence and therefore the desirability or otherwise of excluding the person from Australia. His Honour observed (at [43]) however, that "it is for the Minister, as the statutory decision-maker, to determine what information about the circumstances of the offence – that is, on what matters and to what level of detail – he or she wishes to receive in order to exercise the relevant statutory discretion."

57 His Honour referred to the well-known statement of Deane J in *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363 at 375:

> In a case such as the present, where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative

importance to be accorded to matters which he so regards.

58 His Honour then said (at [44]):

> Moreover, in relation to matters which are to be treated as relevant, either because of an expressed or implied command in the relevant statute or the choice of the decision-maker, in the absence of a statutory indication to the contrary, the decision-maker will not usually be bound to obtain the required information from any particular source. In a case involving criminal convictions, it will, no doubt, usually be convenient for the Minister to look to material emanating from the court that dealt with the person under consideration. However, the Minister is not bound to obtain and consider court material; the Minister may choose to rely on other sources for the requisite information.

59 Ultimately Wilcox J dissented because his Honour considered that, having relied on the sentencing judge's remarks, the Minister was bound to properly consider the matter and was therefore bound to have regard to the Court of Criminal Appeal's correction of the sentencing judge's findings concerning Ms Huynh's degree of complicity.

60 Difficult questions may arise concerning how far it is possible to take the broad statement by the majority in *Huynh* that the Minister is not bound to consider "specific factors, personal to the visa holder". There is no doubt, for example, that the Minister is not free to entirely disregard the particular circumstances of the visa-holder. As pointed out in *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 at [26] (Allsop CJ and Katzmann J) and [153] (Buchanan J) and *NBNB v Minister for Immigration and Border Protection* (2014) 220 FCR 44 at [123] (Buchanan J; Allsop CJ and Katzmann J agreeing at [7]), it is not permissible to put to one side, or fail to address, the merits of a particular visa-holder's case; see also *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164 at [26].

61 It does not follow, however, that the Minister is bound, in the *Peko-Wallsend* administrative law sense, to take into account every or any particular facts or factors personal to the visa-holder that might be relevant to the exercise of the s 501(2) discretion in the particular circumstances of the case. It is ultimately up to the Minister to decide, in the light of the matters put before him (or her), what facts are relevant and what weight should be given to them. In some cases, a failure by the Minister to take into account certain facts concerning the offence or offences committed by the visa-holder may indicate error on the Minister's part. It may, for example, indicate that the Minister failed to address at all the merits of the visa-holder's case, or failed to give proper and genuine consideration to the risk of harm in the particular circumstances, or even made a legally unreasonable or irrational decision. That

will depend on the particular facts and circumstances of the case and the particular fact or facts that it is alleged the Minister ignored. The point is, however, that the error in such a case is best addressed in these terms, rather than as a failure to take into account a mandatory consideration.

62 In any event, the point remains that, contrary to the Minister's submissions, *Huynh* is not authority for the proposition that risk of harm is not a mandatory consideration in the exercise of the s 501(2) discretion.

63 Nor is the Minister assisted by the fact that the majority of the High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 (***Nystrom***) at [127] (Hayden and Crennan JJ; Gleeson CJ agreeing at [1]) referred, with apparent approval, to the statement by the majority in *Huynh* that it is not possible to imply into the Act "some obligation on the Minister's part to consider specific factors, personal to the visa holder, such as the circumstances surrounding the offences they have committed." Read in context, that approval again does not support the broad proposition advanced by the Minister that risk of harm is not a mandatory relevant consideration.

64 The issue in *Nystrom* was whether there was an implied obligation on the part of the Minister to ascertain the existence of, and take into account, the qualifications for every substantive visa which would be cancelled either directly or indirectly by reason of the Minister's decision. It was held that there was no such implied obligation. To use the language of *Huynh*, the Minister was not obliged to consider that "specific factor". That is not to say that the risk or potential of harm is not a mandatory relevant consideration. Indeed, it appeared to be accepted in *Nystrom* that protection of the Australian community was a relevant consideration.

65 The Minister also relies on the recent decision of Tracey J in *MZAGK* as providing some support for the proposition that risk of harm is not a mandatory consideration and that Mortimer J was wrong to conclude otherwise in *Tanielu*.

66 As in *Gbojueh*, the decision in issue in *MZAGK* was the decision of the Minister to cancel a visa under s 501A(2) of the Act, rather than under s 501(2). The applicant in *MZAGK* claimed that the Minister was bound to evaluate the seriousness of any future harm which the visa-holder might cause to the community and the likelihood of that harm occurring. The applicant relied on the decisions of Bromberg J in *Gbojueh* and Mortimer J in *Tanielu.* It

appears that the Minister contended that those decisions were wrongly decided on the basis of the decisions in *Huynh* and *Nystrom.* Tracey J considered *Huynh* and a number of other authorities concerning s 501 and s 501A of the Act, including *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400; *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326; and *Re Patterson*; *Ex parte Taylor* (2001) 207 CLR 391. His Honour then said (at [34]):

> These decisions emphasise the breadth of the power conferred on the Minister by s 501A of the Act. If the Minister is entitled to form the view that it is not in the national interest for a visa holder to be allowed to remain in Australia solely because of the serious nature of the crime or crimes of which the person has been convicted, it is difficult to discern a principled basis upon which the exercise of the power (either in determining where the national interest lies or in the exercise of the residual discretion) should be fettered by Court-imposed requirements that additional matters *must* be taken into account. The protective nature of the power is not compromised by such restraint. Indeed, it may be enhanced. The approach reflected in these authorities ensures that the Minister is not required to speculate on the degree of likelihood of the visa holder re-offending should he be permitted to remain in Australia. If the offence of which the visa holder stands convicted is open to be characterised as serious, the Minister will be able to decide (as he has done in the present case) that *a* risk exists and that *any* risk of re-offending is unacceptable and should be avoided.

67 It should be noted that, in this passage, Tracey J appears to accept that s 501A is "protective" and requires some consideration to be given to the risk of harm. His Honour concludes, however, that in considering the potential for harm, the Minister is not in all cases bound to have regard to specific considerations, such as the risk of re-offending. Or, as his Honour puts it in the following paragraph of the judgment (at [35]):

> It is one thing to require the Minister to consider the potential for harm to the Australian community should the visa holder remain part of it; it is another, altogether, to prescribe the manner in which the Minister must undertake such a consideration.

68 It was ultimately unnecessary for Tracey J to decide whether the Minister was bound to have regard to considerations such as the likelihood of the visa-holder re-offending. That is because his Honour held that, in any event, the Minister had regard to such considerations.

69 The reasoning of Tracey J in *MZAGK* does not provide any support for the Minister's submission that risk of harm is not a mandatory consideration for the Minister in the exercise in his discretion under s 501(2) of the Act. Rather, it simply supports the proposition that, in addressing that consideration, the Minister is not bound to consider, in all cases, any specific matters, such as the risk of re-offending.

70 To the extent that there is any difference of opinion between Mortimer J in *Tanielu* and Tracey J in *MZAGK*, the difference is not whether risk of harm is a relevant mandatory consideration. Rather, the difference concerns what flows from that fact. Does it follow, for example, that in every case the Minister must consider and make findings concerning the risk or likelihood that the visa-holder will re-offend, as well as findings concerning the nature and seriousness of the further offences that might be committed? Does it follow, therefore, that these matters are also mandatory considerations?

71 It is unnecessary to resolve these questions here. The better view, however, would appear to be that the fact that the Minister is bound to consider the risk of harm to the community if the person's visa is not cancelled does not necessarily mean that the Minister is bound in every case to consider that issue in any particular or precisely defined way. It does not give rise to a series of additional mandatory considerations in every case. For example, it does not mean that in every case the Minister is bound to determine the risk or likelihood of the visa-holder re-offending.

72 One can readily imagine cases where the Minister, in assessing the risk to the Australian community of a visa-holder who has committed a serious offence being allowed to remain in Australia, might properly consider that the likelihood of the visa-holder re-offending is not a material or weighty consideration. For example, the Minister might consider that the continuing presence in Australia of a person who has been convicted of serious terrorism related offences would pose a serious risk of harm to the community, even if there was no risk of the person re-offending. That might be because of fear or concern that the person's continuing presence in Australia might inspire or provoke other like-minded supporters to commit similar or "copycat" offences. It is difficult to see why that approach would not be open to the Minister, or could be struck down on the basis that the Minister did not have regard to the likelihood of the visa-holder re-offending.

73 There may equally also be cases where the failure by the Minister to consider the risk of the person re-offending might indicate error. The preferable approach in such cases, however, would not be to ask whether the failure to consider that matter amounted to a failure to have regard to a mandatory relevant consideration. Rather, the question in such a case would be whether, in the particular circumstances and context of the case, the failure to consider the likelihood of the visa-holder re-offending reveals that the Minister failed to consider or decide the visa-holder's case on its individual merits, or failed to give proper or genuine

consideration to the risk of harm posed by the visa-holder's continuing presence in Australia, or misunderstood the correct approach to the assessment of the risk of harm, or otherwise made a legally unreasonable decision.

74 In any event, for the reasons given earlier, the first proposition advanced by Mr Te Puke in support of ground 1 of his application is correct. The Minister was bound to have regard to the risk of potential harm to the Australian community if Mr Te Puke's visa was not cancelled and he was permitted to remain in Australia. This finding is supported by the authorities and it is not, as contended by the Minister, contrary to the judgments of the majority in *Huynh* or the majority in *Nystrom.*

75 The more difficult question is whether, as contended by Mr Te Puke, the Minister failed to have regard to this mandatory consideration.

Did the Minister fail to have regard to the risk of harm?

76 The difficulty for Mr Te Puke is that the Minister made an express finding that there was a risk of harm to the Australian community if Mr Te Puke remained in Australia. The Minister found, at paragraph 17 of the statement of reasons, that there was "a risk of [Mr Te Puke] re-offending, albeit a low risk." At paragraph 32 of the statement of reasons, the Minister found that the Australian community could be exposed to "great harm" should Mr Te Puke "reoffend in a similar fashion." In so finding, the Minister was plainly referring back to his finding (at paragraphs 8 and 30) that Mr Te Puke's offence was very serious and resulted in significant harm to the victim. The Minister then concludes, in paragraph 32, that the Australian community "should not tolerate any further risk of harm." Read fairly, this would appear to amount to a finding that, whilst the risk of Mr Te Puke re-offending was low, because the potential harm from any further offence was "great", the Australian community should not have to tolerate it.

77 Having regard to these findings, it is difficult to conclude other than that the Minister gave some consideration to whether there was a risk of harm to the Australian community. Whilst aspects of the Minister's reasoning may be open to criticism as being somewhat simplistic, that is not to the point.

78 Mr Te Puke submits that whilst the Minister may have adverted to the risk of harm in the statement of reasons, he nonetheless did not give it "proper or genuine" consideration.

79 The question whether a decision-maker has given proper or genuine consideration to a mandatory consideration can raise difficult issues. As Perram J recently pointed out, in not entirely dissimilar circumstances, in *Fraser v Minister for Immigration and Border Protection* [2014] FCA 1333 at [22], use in this context of formulations such as "more than mere lip-service" (*Anderson v Director General of the Department of Environmental and Climate Change* (2008) 163 LGERA 400; (2008) 251 ALR 633 at [58]), "a real or conscientious way" and "proper, genuine and realistic consideration" are "apt to cause a slide into impermissible merits review": see also *Belmorgan Property Development Pty Ltd v GPT RE Ltd* (2007) 153 LGERA 450; [2007] NSWCA 171 at [76]-[77]. Similarly, there is the danger of subjecting the Minister's reasons to overzealous scrutiny. It is erroneous to adopt an approach whereby the reasons of an administrative decision-maker are construed minutely and finely "with an eye keenly attuned to the perception of error" or "with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law": *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 (***Pozzolanic***) at 287; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 (***Wu Shan Liang***) at 291 (Kirby J).

80 In contending that the Minister did not have regard to the mandatory consideration of risk of harm in his case, Mr Te Puke relies to a significant extent on the reasoning of Mortimer J in *Tanielu*. In *Tanielu*, as in this matter, the applicant argued that in cancelling his visa under s 501(2) of the Act, the Minister did not give any, or any genuine, consideration to the risk of harm should his visa not be cancelled. In considering this argument, Mortimer J gave detailed consideration to what was involved, at law, in assessing the risk of harm and equally detailed consideration to whether the Minister's reasoning revealed that he had not given proper or genuine consideration to the risk of harm in Mr Tanielu's case. Her Honour found, amongst other things, that "a risk of harm posed by an individual can only be ascertained by evaluating the seriousness of any future harm which might be caused and the likelihood of that harm occurring (at [155])." Her Honour also concluded (at [156]) that the Minister's reasons in relation to Mr Tanielu showed that the Minister did not undertake that task because "he undertook no evaluation at all of how likely it was the applicant would engage in such conduct again."

81 There is no doubt that the Minister's reasons in *Tanielu* are in some respects similar to the Minister's reasons in Mr Te Puke's case. As in this case, the Minister in *Tanielu* found that there was "a risk" that Mr Tanielu would re-offend based on his criminal history. Mortimer J

concluded, however, that this did not amount to an assessment of the likelihood of Mr Tanielu re-offending. In *Tanielu,* again as in this case, the Minister reasoned that there was a risk of harm "should" Mr Tanielu re-offend. In relation to that reasoning, her Honour said (at [110]):

> It is notable that the Minister refers to the "potential risk" and says "should" the applicant reoffend. That is not the language of a decision-maker who has for himself assessed the likelihood of reoffending and reached a conclusion about it. It is the language of a decision-maker who is, at best, speculating about whether a person might reoffend. That is not the task in assessing risk of harm to the Australian community. The task is more concrete than that. It is rooted in an assessment of the characteristics of the particular applicant – not only his or her previous offences, but all aspects of his or her history, and the "dynamic factors" to which I have referred. Consideration of those factors must then be combined with consideration of what kind of offences the applicant might commit in the future – bearing in mind this may or may not be the kind of offences an applicant has committed in the past – with some evidentiary basis being disclosed for that consideration.

82 As already indicated, the Minister submits that *Tanielu* was wrongly decided. The Minister's submissions in that regard, however, are primarily directed to Mortimer J's finding that the risk of harm was a mandatory consideration. In relation to her Honour's finding that the Minister did not properly or genuinely assess the risk of harm, the Minister submits that the Minister's reasons in *Tanielu* are distinguishable from the Minister's reasons in this matter. He points instead to the judgment of Tracey J in *Roesner v Minister for Immigration and Border Protection* [2015] FCA 68 (***Roesner***) as providing an example of a case where indistinguishable reasoning by the Minister was found not to be wanting.

83 In *Roesner*, as in this matter, the applicant claimed that the Minister had failed to make an assessment of the likelihood of the applicant re-offending. This contention was based on the fact that the Minister found only that there was "a risk" of re-offending which the Minister appeared to assess as a low risk. This finding appeared to be based solely on the fact that Mr Roesner's ability to refrain from re-offending in the community was "untested". The Minister then concluded that even a low risk of re-offending was "unacceptable" to the Australian community.

84 Tracey J referred to *Tanielu* and concluded that the Minister had not fallen into the same sort of error. His Honour said (at [20]):

> In the present case the Minister had limited material before him to inform his assessment of the likelihood of the applicant reoffending. This was not a case where, for example, the applicant had a history of recidivism, had failed to heed warnings or had refused to participate in rehabilitation programmes: cf *Moana v Minister for*

> *Immigration and Border Protection* [2014] FCA 1084 at [18] (Davies J). Nor did the Minister have available to him any recent professional assessments of the applicant's mental condition. Despite the paucity of the material before him the Minister did not fall into the same error as his predecessor had done in *Tanielu*. He did undertake an evaluation of the likelihood of the applicant again committing a serious criminal offence. So much is evident from the passages of his reasons at [17], [33] and [34] (quoted above at [13] and [14]). In substance the Minister reasoned that, although the risk of the applicant reoffending was low, even such a low risk was unacceptable given the magnitude of the harm which would be occasioned by any repetition of the applicant's violent conduct. He was not obliged to attempt a more precise quantification of the risk: cf *Coderre v Minister for Immigration and Border Protection* [2014] FCA 769 at [36] (Besanko J).

85 It is ultimately not particularly useful or fruitful to compare and contrast the Minister's reasons in this matter with the Minister's reasons in both or either of *Tanielu* and *Roesner*. The Minister's reasons in both those cases bear some similarities to the Minister's reasoning in this case. There are, however, also some material differences. There are also other cases where reasoning similar to that adopted by the Minister in this case has been considered and ultimately upheld by single judges of this Court: see for example *Coderre v Minister for Immigration and Border Protection* (2014) 143 ALD 675; *Gbojueh; MZAGK*. Ultimately, the question whether the Minister gave proper or genuine consideration to the risk posed by Mr Te Puke if his visa was not cancelled is not properly answered by simply considering what other judges have said about similar reasoning in other cases.

86 For the reasons essentially already given, it is not open to conclude that the Minister failed to give proper or genuine consideration to the risk of harm. Whilst the Minister's reasons are, to an extent, somewhat simplistic, they nonetheless address the fundamental issue. The Minister found that there was a risk that Mr Te Puke would re-offend. That finding was based (as in *Roesner)* on two matters; first, the fact that Mr Te Puke's rehabilitation had only been tested for a short time; and second, the somewhat crude, but nonetheless not entirely illogical, finding that, given that Mr Te Puke had offended before, it could not be said that there was no risk of him re-offending. Whilst it may be correct that this finding was based on a generalisation not firmly rooted in Mr Te Puke's particular circumstances, it does not follow that the Minister failed to give the issue proper and genuine consideration. To conclude otherwise would be to impermissibly intrude on the merits of the Minister's decision.

87 The Minister also reasoned that, even though the risk of Mr Te Puke re-offending was low, the Australian community should not be required to tolerate that risk given that, should he re-

offend, the harm that would be suffered would be great. Whilst again the reasoning is somewhat simplistic, and the language somewhat infelicitous, it cannot be said there was no assessment of the seriousness of any future harm. The finding about the seriousness of any future harm was based on the finding concerning the seriousness of the harm that Mr Te Puke had caused in the past.

88 As has already been said, in addressing a ground such as this, the Court is not to be concerned with looseness in language or unhappy phrasing in the Minister's reasons: *Pozzolanic; Wu Shan Liang.* The Minister's reasons must be considered as a whole and in "a practical and realistic manner": *Salahuddin v Minister for Immigration and Border Protection* (2013) 140 ALD 1 at [22]. When read this way, it cannot be concluded that there was no assessment by the Minister of the risk of harm or the seriousness of the potential harm.

89 It follows that ground 1 of Mr Te Puke's application is rejected.

Postscript

90 Well after the hearing, and at a time when these reasons had effectively been finalised, the Full Court handed down a decision in a matter that addressed a number of the issues and questions raised in this matter: *Moana v Minister for Immigration and Border Protection* [2015] FCAFC 54 (***Moana***).

91 In *Moana*, Rangiah J (with whom North J agreed) held that the Minister was bound to consider the risk of harm to the Australian community when exercising the discretion under s 501(2) of the Act. His Honour held, however, that in considering the risk of harm, the Minister was not bound to conduct an evaluation of the likelihood of the visa-holder engaging in future conduct that may cause harm. Jessup J held that the Minister was not bound to consider the risk of harm and that *Tanielu* misstated the law and should not be followed.

92 The findings of the majority in *Moana* are similar to the findings independently reached in this matter in relation to ground 1. Rangiah J's reasons for arriving at these findings are also not dissimilar to these reasons. They are certainly not inconsistent in any material respect such as to warrant any reconsideration of these reasons.

GROUND 2 – DID THE MINISTER ERR IN CONCLUDING THAT THE OFFENCE WAS VERY SERIOUS?

93 This ground can be disposed of shortly.

94 Mr Te Puke contends that in arriving at the finding that his offending was very serious, the Minister failed to have regard to various findings made by the sentencing judge that relate to the seriousness of his offending. He also contends that because the Minister ignored some of the sentencing judge's findings, the Minister's finding that the offending was very serious was illogical.

95 Neither contention has any merit.

96 Even if, in assessing the risk of harm, the Minister was effectively required to consider the seriousness of Mr Te Puke's offence, he was not bound to accept the sentencing judge's findings concerning the seriousness of the offence. Nor was he bound to consider factual findings made by the sentencing judge that the sentencing judge may have considered to be relevant to that issue. It was entirely open to the Minister to form his own view about the seriousness of the offence based on the objective facts. It was also entirely up to the Minister to decide what facts he considered relevant to that issue and the weight to be afforded to them.

97 The sentencing judge's findings or opinions about certain matters relating to the seriousness of the offence are "specific factors" that the Minister could, but was not obliged to, have regard to in exercising his discretion: *Huynh* at [74] (Kieffel and Bennett JJ); see also Wilcox J at [43]-[44]. As Kieffel and Bennett JJ said in *Huynh* (at [76]):

> The remarks of the sentencing judge and of the Court of Criminal Appeal as to the extent of the respondent's involvement in the drug offence in question only become necessary to the Minister's consideration if there is some obligation, on the Minister's part, to take that matter into account in each case. No such obligation arises from s 501. Nor, in our view, can it be said that there is some general obligation to take account of what is said by the courts on these occasions. It is for the Minister to determine, in the exercise of the discretion given by the section, whether they assume importance in a particular case. It follows in our view that neither the topic referred to by his Honour the primary judge nor what the courts had to say about it can be regarded as relevant considerations in an administrative law sense.

98 In any event, there is no basis for concluding that the Minister did not have regard to the relevant findings of the sentencing judge. The Minister had the sentencing judge's remarks before him. The Department's submissions made extensive reference to them. The statement of reasons refers to some of the sentencing judge's findings, including findings concerning mitigating factors. The fact that the statement of reasons makes no explicit reference to some of the sentencing judge's findings, being those upon which Mr Te Puke now relies, does not

mean that the Minister failed to have regard to those findings. It may simply mean that the Minister considered them, but did not regard them as material: *Acts Interpretation Act 1901* (Cth), s 25D; *King v Minister for Immigration and Border Protection* (2014) 142 ALD 305 at [44]. That is not indicative of any error on the part of the Minister in the circumstances of this case.

99 It was open to the Minister to give little or no weight to the various findings made by the sentencing judge that are the subject of this ground. Those findings were no doubt relevant to the exercise of the sentencing discretion by the sentencing judge. They do not detract in any way, however, from the obviously open conclusion that Mr Te Puke's offence was very serious. Indeed, it is plain that the sentencing judge regarded the offence as very serious.

100 Mr Te Puke's submission that the Minister's finding was illogical also has no merit.

101 A finding can be considered to be "legally unreasonable", in judicial review proceedings, if it appears to be arbitrary, capricious, without common sense or plainly unjust: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) at [28], [110]; *Minister for Immigration and Border Protection v Singh* (2014) 139 ALD 50 (***Singh***) at [44]. It might also be legally unreasonable if there is no evident, transparent or intelligible justification for it in the decision-making process: *Li* at [105], *Singh* at [44]-[45].

102 The Minister's findings and reasons relating to the seriousness of the offence satisfies neither of these tests. Indeed, the Minister's findings and reasons in relation to this issue are neither unreasonable nor illogical in any sense.

103 Whatever the sentencing judge may have found, in the context of sentencing Mr Te Puke, in relation to mitigating circumstances, and however he may have characterised the offence in terms of the hierarchy of seriousness of offences of this nature, it was open to the Minister to regard the offending as "very serious." That conclusion was open from the objective facts of the offence, which do not bear repeating. On just about any view, the offence was very serious.

GROUND 4 – WAS THE MINISTER'S FINDING CONCERNING PRIOR "VIOLENT OFFENCES" ILLOGICAL OR UNSUPPORTED BY PROBATIVE EVIDENCE?

104 The short answer to this question is "no". This ground has no merit.

105 In relation to the "no evidence" ground, the Minister had before him evidence that Mr Te Puke had previously been convicted of two offences, being one offence of common assault and one offence of affray. It is correct, as Mr Te Puke submits, that neither offence has, as an essential element, the actual infliction of unlawful force (see *Darby v Director of Public Prosecutions* (2004) 61 NSWLR 558 at [71] in the case of assault and s 93C of the *Crimes Act 1900* (NSW) and *Colosimo v Director of Public Prosecutions* (2005) 64 NSWLR 645 in the case of affray). Both of these offences can be committed by acts which merely cause another person to apprehend the infliction of unlawful force or to fear for their safety. The actual infliction of force is unnecessary.

106 It does not follow, however, that they are not necessarily violent offences. An act which causes a fear of the infliction of unlawful force, or which causes a person to fear for their personal safety, is nonetheless capable of being characterised as a violent act. So much so is clear from the definition of "violence" in s 93A of the Crimes Act, which applies to the offence of affray. That definition makes it clear that "violence" is not restricted to conduct that causes injury or damage, but includes any other violent conduct "for example, throwing at or towards a person a missile of a kind capable of causing injury which does not hit or falls short."

107 It was therefore open to the Minister to characterise these offences as violent offences, even though he had no detail of the precise circumstances in which the offences were committed. Mr Te Puke's "no evidence" ground must therefore be rejected.

108 In any event, Mr Te Puke concedes, properly, that to establish jurisdictional error on this ground, he is required to demonstrate that the relevant fact was a critical fact, or was at least material, in relation to the Minister's ultimate decision: *Soliman v University of Technology, Sydney* (2012) 207 FCR 277 at [23]; *Minister for Immigration and Multicultural and Indigenous Affairs v Voao* [2005] FCAFC 50 at [5] and [13]; *SZMWQ v Minister for Immigration and Citizenship* (2010) 187 FCR 109 at [121], [125]; *Australasian Meat Industry Employees' Union v Fair Work Australia* (2012) 203 FCR 389 at [92]. The finding concerning Mr Te Puke's previous violent offences was neither critical nor material to the Minister's exercise of discretion. The statement of reasons, read fairly, discloses that this finding played no part in the Minister's assessment of the risk of Mr Te Puke re-offending, or his assessment of the extent of the harm that would be suffered by the community if Mr Te Puke did re-offend. It ultimately played no role in the Minister's exercise of discretion.

109 Mr Te Puke's submission that this finding was illogical must also be rejected for essentially the same reasons. The finding was open on the evidence before the Minister, was therefore not illogical and was, in any event, largely immaterial to the Minister's decision.

DISPOSITION

110 Mr Te Puke has failed to make out any ground that would support his claim that the Minister's decision should be quashed. His application is accordingly dismissed with costs.

I certify that the preceding one hundred and ten (110) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wigney.

Associate:

Dated: 29 April 2015