FEDERAL COURT OF AUSTRALIA

SZRTN v Minister for Immigration and Border Protection [2014] FCA 303

Citation:	SZRTN v Minister for Immigration and Border Protection [2014] FCA 303
Appeal from:	Confidential v Minister for Immigration and Border Protection [2013] AATA 818
Parties:	**SZRTN v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and ADMINISTRATIVE APPEALS TRIBUNAL**
File number:	NSD 2551 of 2013
Judge:	**KATZMANN J**
Date of judgment:	31 March 2014
Catchwords:	**MIGRATION –** refusal of visa on character grounds under s 501 of the *Migration Act 1958* (Cth) – whether exercise by Administrative Appeals Tribunal of its discretion to refuse to grant the visa miscarried – refusal by Tribunal to give weight to certain written statements where makers not called to give oral evidence – Ministerial Direction No 55 – application of paragraph 6.3(4) of Direction **ADMINISTRATIVE LAW** – jurisdictional error – whether denial of procedural fairness to give no weight to written statements – whether illogical or irrational to give no weight to the statements – whether Tribunal failed to take into account relevant considerations – whether Tribunal failed to take into account evidence of remorse – whether Tribunal ignored part of paragraph 6.3(4) of Ministerial Direction No 55 – whether Tribunal took into account irrelevant considerations – whether considerations not expressly mentioned in Direction are irrelevant – whether Tribunal failed to complete the exercise of its jurisdiction by failing to expressly weigh in the balance all relevant considerations or by failing to consider whether the other considerations carried more weight than any of the primary considerations
Legislation:	*Migration Act 1958* (Cth) ss 496, 499, 501
Cases cited:	*Bulstrode v Trimble* [1970] VR 840 *Commissioner for Australian Capital Territory Revenue v*

Alphaone Pty Ltd (1994) 49 FCR 576
Ellis v Wallsend District Hospital (1989) 17 NSWLR 553
F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry [1975] AC 295
Fletcher v Commissioner of Taxation (1988) 19 FCR 442
Goldie v Minister for Immigration and Multicultural Affairs (2001) 111 FCR 378
Kim and Minister for Immigration and Multicultural and Indigenous Affairs [2005] AATA 239
Kioa v West (1985) 159 CLR 550
Minister for Aboriginal Affairs v Peko-Wallsend Limited (1986) 162 CLR 24
Minister for Immigration and Border Protection v SZSRS [2014] FCAFC 16
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611
Minister for Immigration and Citizenship v SZRKT (2013) 212 FCR 99
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
Msumba and Department of Immigration and Multicultural Affairs (2000) 31 AAR 192; [2000] AATA 87
Ngaronoa v Minister for Immigration and Citizenship (2007) 244 ALR 119; [2007] FCAFC 196
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476
Reedy and Minister for Immigration and Citizenship [2011] AATA 363
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152
Telstra Corporation Limited v Kendall (1995) 55 FCR 221
Uelese v Minister for Immigration and Citizenship (2013) 60 AAR 534; [2013] FCAFC 86

Date of hearing:	11 March 2014
Date of last submissions:	18 March 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	123
Counsel for the Applicant:	Mr J D Donnelly

Counsel for the First Respondent:	Mr M J Smith
Solicitor for the First Respondent:	DLA Piper
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2551 of 2013**

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN:	**SZRTN** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	ADMINISTRATIVE APPEALS TRIBUNAL **Second Respondent**

JUDGE:	**KATZMANN J**
DATE OF ORDER:	**31 MARCH 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the first respondent's costs.

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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BETWEEN:	**SZRTN** **Applicant**
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **First Respondent**
	ADMINISTRATIVE APPEALS TRIBUNAL **Second Respondent**

JUDGE:	**KATZMANN J**
DATE:	**31 MARCH 2014**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 By s 501 of the *Migration Act 1958* (Cth), the Minister for Immigration may refuse to grant a person a visa if the person does not satisfy the Minister (or his delegate as the case may be) that (s)he passes the character test. Relevantly, a person does not pass the character test if the person has "a substantial criminal record". A person has "a substantial criminal record" if the person has been sentenced to a term of imprisonment of 12 months or more, or has been sentenced to two or more terms of imprisonment for a total term of two years or more.

2 The applicant is such a person. He is a Samoan national with a lengthy criminal history who was refused a Bridging E (Class WE) visa after a delegate of the Minister determined that he did not pass the character test. The applicant concedes that he does not pass the character test. He tried, but failed, to persuade the delegate to exercise his discretion to grant him a visa.

3 A decision of a delegate may be reviewed on its merits in the Administrative Appeals Tribunal. In that event, the Tribunal may exercise the discretion reposed in the Minister or his delegate as the case may be. In the present case, the delegate's decision was affirmed by the Tribunal, which found that there was an unacceptable risk that the applicant would

commit further serious offences and cause serious harm to the Australian community if he were granted a visa. Although a decision under s 501 of the Act is a "privative clause decision" (Migration Act, s 474), it may be challenged for jurisdictional error: *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476. In this application, the applicant seeks to do just that. For the following reasons, however, his challenge fails.

Background

4 The applicant has a tragic background. He arrived in Australia from New Zealand at the age of five in the company of his father, after his parents' marriage had broken down. He claims to have never known his mother.

5 The applicant arrived in Australia on a one-month visitor visa. When the visa expired, no application was made for any other visa. Consequently, the applicant's presence in Australia was unlawful. That remained the position until sometime in 2008, when he was about 27, at which time he was granted a Bridging E (Class WE) visa. Since then, he has held a succession of bridging visas.

6 Within months of his arrival, the applicant was abandoned by his father, who returned to New Zealand. At this point, he was taken to live with an uncle and aunt and their children. He remained in their care until he was 13, but he was never permitted to go to school or anywhere else, even to see a doctor. He said that when he fought with his cousins, he would receive a "hiding" from his uncle. From the age of about 9, he lived in his uncle's garage, which made him feel isolated from the family. He said he was only permitted to eat if there was food left over.

7 At about the age of 13, he moved in with another uncle who also gave him a "hiding" from time to time. After six months, he left his uncle's house and lived on the streets, sleeping rough or at the homes of friends or acquaintances. There he was introduced to drugs and alcohol. From the age of 18, he moved around from suburb to suburb. At 24 or 25, he moved to the Central Coast of New South Wales. Thereafter, he spent various periods of time in gaol, had an on-off relationship with a woman, and spent short periods of time living at the homes of two of his uncles.

8 According to the evidence before the Tribunal, the applicant's history of offending began when he was a juvenile. He was convicted of larceny at the age of 16. His offending

thereafter ranged from relatively minor offences, such as driving while disqualified, to crimes of violence, such as armed robbery.

9 In 2011, he was convicted of a number of offences, including resisting and assaulting a police officer. He spent about eight months in gaol for these offences. On his release in April 2012, he was taken to the Villawood Immigration Detention Centre, where he has remained ever since. The only formal education he ever undertook occurred in gaol and in immigration detention. It was in gaol that he was first given tuition in reading and writing, although he admitted to very limited literacy skills.

10 Before the Tribunal, the applicant acknowledged that part of his criminal offending related to problems with anger management. He claimed that taking anger management courses whilst in immigration detention had helped him to address these problems.

11 On 14 February 2013 the applicant married a young woman whom he first met in 2010 and with whom he developed what he described as a serious romantic relationship in June 2012 (whilst he was in detention at Villawood). She gave birth to the applicant's daughter in October 2013. In statements tendered before the Tribunal, the applicant said that, in contrast to his own situation, he wanted his child to know his or her father. He claimed to have reformed since being taken into immigration detention. He expressed remorse for his past conduct and said that his sole focus now was on his family "and changing [his] life for a positive future in Australia". His application was supported by statements from friends and family members.

12 Though he is a Samoan national, the applicant claims to have no ties to Samoa.

13 In May 2012, aged 30, the applicant applied for a Protection (Class XA) visa. The Minister's delegate refused the application. The Refugee Review Tribunal affirmed the delegate's decision and the Federal Circuit Court dismissed his application for judicial review. This Court dismissed his appeal from the Federal Circuit Court and on 12 March 2014 (the day after the present matter was argued), he was denied special leave to appeal to the High Court. In the result, he has now exhausted all his avenues for seeking judicial review.

14 While his judicial review proceedings were on foot, the applicant applied for a Bridging (Class WE) visa, which would have enabled him to be released from immigration detention and remain in Australia pending the outcome of his special leave application (and, if that application was successful, his appeal). That is the decision that spawned the present

proceeding. In a written statement provided to the Tribunal, the applicant said that, if he was granted a bridging visa, he would apply for a spouse visa so that he could live lawfully in Australia with his wife and child. He could not apply for such a visa whilst in immigration detention: Migration Act, ss 194 and 195.

15 After the Tribunal affirmed the delegate's decision to refuse the bridging visa on character grounds, the applicant applied to this Court for judicial review, contending that the Tribunal's decision was affected by jurisdictional error. He seeks writs of certiorari and mandamus to quash the Tribunal's decision and to require the Tribunal to reconsider his application according to law.

The manner in which the discretion under s 501 must be exercised: Direction No 55

16 The Tribunal was obliged to exercise the discretion under s 501 of the Act in accordance with "Direction No. 55 – Visa refusal and cancellation under s 501" (the Direction), issued by the Minister under s 499(1) of the Act: Migration Act, s 499(2A).

17 The Tribunal summarised the content and effect of the Direction at [10]–[15] of its reasons. It is sufficient at this point to observe that the Tribunal (at [12]) described its task as one of determining whether the risk of harm by a non-citizen to the community was unacceptable. The Tribunal recognised that a balancing exercise was required and that this involved considering the likelihood and extent of any future harm and the extent to which the risk of that harm should be tolerated by the Australian community. This reflects the injunction in paragraph 7 of the Direction as to how the discretion is to be exercised. Paragraph 7 relevantly provides:

> Informed by the principles in paragraph 6.3 above, a decision-maker:
> a) must take into account the considerations in Part A or Part B, where relevant, in order to determine whether a non-citizen will forfeit the privilege of being granted … a visa; and
> b) is required to determine whether the risk of future harm by a non-citizen is unacceptable. This requires a balancing exercise, involving a consideration of the likelihood of any future harm, the extent of the potential harm should it occur, and the extent to which, if at all, any risk of future harm should be tolerated by the Australian community.

18 The considerations in Part A relate to visa cancellation. The considerations in Part B, which is the relevant part in this case, relate to visa refusal.

19 The principles in para 6.3 of the Direction stipulate, amongst other things, that the capacity to come to or remain in Australia is a privilege conferred on non-citizens in the expectation that

they are and have been law-abiding, will respect Australian laws and will not cause or threaten harm to individuals or the Australian community. Subparagraph (3) provides that:

> In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.

20 The considerations in Part B of the Direction are divided into "primary considerations" and "other considerations".

21 The primary considerations that must be taken into account in deciding whether to refuse a visa are listed in para 11:

> a) Protection of the Australian community from criminal or other serious conduct;
> b) The best interests of minor children in Australia;
> c) Whether Australia has international non-refoulement obligations to the person.

22 Notwithstanding his application for a protection visa, the applicant did not contend that (c) was applicable in this case.

23 The issue of the protection of the Australian community is explored in para 11.1 of the Direction. Decision-makers are required to have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Paragraph 11.1(1) recites that "[t]here is a low tolerance for visa applicants who have previously engaged in criminal or other serious conduct". It states that decision-makers should also give consideration to the nature and seriousness of the person's conduct to date and the risk to the Australian community in the event that the person were to commit further offences or engage in other serious conduct.

24 In para 11.1.1, directions are given to decision-makers about the factors to which they must have regard in considering the nature and seriousness of a person's criminal offending or other serious conduct.

25 Paragraph 11.1.2 addresses the risk to the Australian community should the person commit further offences or engage in other serious conduct. It provides:

> (1) In considering whether the person represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, decision-makers should have regard to the principle that the Australian community's tolerance for any risk of future harm becomes lower as the

> seriousness of the potential harm increases. Some conduct, and the harm that would be caused if it were to be repeated, is so serious that any likelihood that it may be repeated may be unacceptable.
>
> (2) Decision-makers should also consider whether the purpose of the intended stay reflects strong or compassionate reasons for granting a short-stay visa. In making the risk assessment, decision-makers must have regard to, cumulatively:
>
> a) The nature of the harm to individuals or the Australian community should the person engage in further criminal or other serious conduct; and
>
> b) The likelihood of the person engaging in further criminal or other serious conduct, taking into account:
>
> i. information and evidence from independent and authoritative sources on the likelihood of the person reoffending; and
>
> ii. evidence of any rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken); and
>
> iii. the duration of the intended stay in Australia.

26 The "other considerations" must be taken into account where relevant, but should generally be given less weight than the primary considerations: paras 8 and 12 of the Direction.

27 Only one other consideration was said to be relevant in this case. That was the consideration in para 12(1)(a):

> Impact of visa refusal on immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely[.]

The Tribunal's decision

28 After summarising the relevant parts of the Direction, the Tribunal proceeded to consider the primary considerations.

29 On the subject of the protection of the Australian community from criminal or other serious conduct, the Tribunal examined first the nature and seriousness of the applicant's conduct and then the risk to the Australian community were he to commit further offences or engage in other serious conduct.

30 The Tribunal considered that the applicant posed an unacceptable risk of future harm to the Australian community. It noted that he had a criminal history spanning more than 14 years from his first conviction at age 16. While it understandably discounted his first offence, which it ascribed to his youth and homelessness, it noted that he had continued to offend, and

that his offences ranged from "repeatedly driving while disqualified, to crimes of violence including robbery, assault with a weapon, and assaulting police officers". It recorded that he had been sentenced to two terms of 12 months' imprisonment and to lesser terms on six occasions. It observed that between 1997 and 2011, the applicant had committed over 30 offences with an average of one or two years between offences. The Tribunal said that the applicant's record showed that he had not been deterred from crime, had not learned from his mistakes, and showed "a continuing disregard for the law in many ways". A table of the applicant's convictions and sentences was annexed to the Tribunal's reasons. The Tribunal emphasised the statement in the Direction that there is low tolerance for visa applicants with a criminal history like that of the applicant.

31 The Tribunal considered the evidence going to the question of rehabilitation but was unimpressed by it. It stated (at [32]):

> There is no expert assessment before us of the probability of future offending by the Applicant, but the regular repetition of offences, the lack of an alternative law-abiding structured life and the apparent inability to be deterred by penalties must point to a high likelihood that the Australian public would be at risk of further harm of the same kind if he were to be free in the community.

32 While observing that the Direction recognises that Australia may afford a higher level of tolerance of criminal or other serious conduct in the case of a non-citizen who has lived in the Australian community for most of his life, the Tribunal found (at [37]) that the applicant had "contributed little if anything to the Australian community" and had been "largely removed from the education, work and social structures of it".

33 The Tribunal considered that a bridging visa was not a "short-stay visa" within the meaning of the Direction and so did not consider whether there were compassionate grounds for granting the visa.

34 The Tribunal accepted that it was in the best interests of the applicant's daughter that he remain in Australia. Although she was only a few weeks old at the time, the Tribunal accepted that there was an existing relationship between them, and observed (at [44]) that the effect of his removal on her "would almost certainly be less than if she were older and their relationship of longer standing".

35 Finally, the Tribunal considered the impact of visa refusal on the applicant's immediate family members in Australia. It accepted that the applicant and his wife had a genuine loving

relationship, and that both the applicant's wife and her mother would be distressed if the applicant were refused a bridging visa.

36 The Tribunal concluded, however, that the risk that the applicant would commit further serious offences and cause serious harm to the Australian community if granted a bridging visa was unacceptable.

The application for judicial review

37 The application is lengthy and needlessly repetitive. Nine grounds are pleaded, ostensibly as particulars to broader assertions. Those assertions are:

1. By giving no weight to several written statements and statutory declarations, the Tribunal denied the applicant procedural fairness, and/or made an illogical or irrational finding, and/or failed to take into account relevant considerations (grounds 1, 2 and 6);

2. The Tribunal took into account irrelevant considerations (grounds 3, 4 and 5);

3. The Tribunal failed to take into account a relevant consideration by ignoring or failing to apply a particular part of the Direction (ground 7); and

4. The Tribunal failed to complete the exercise of its jurisdiction (grounds 8 and 9).

38 The first series of complaints (grounds 1, 2 and 6) relates to the way the Tribunal dealt with the contents of various documents tendered by the applicant without objection. These documents (which became Exhibits A5–A13) were written statements and statutory declarations from the applicant's friends and extended family members. The Tribunal said of these (at [50]):

> Statements from members of the Applicant's extended family and several friends are before the Tribunal. They speak of his difficult upbringing, his remorse about his past conduct and the distress the writer would suffer at his removal from Australia. Other than Ms KG, her mother, and Mr WZ, none gave oral evidence and we place no weight on their statements. In particular, given his largely itinerant history, questions arise as to what, if any, support the writers have given to the Applicant in the past and the strength of their relationships with him now.

39 The applicant contends that the Tribunal denied him procedural fairness, by giving no weight to the statements "merely" because the writers did not give oral evidence, and further, by failing to give the applicant notice that his "largely itinerant history" would be a basis for giving no weight to the statements (ground 1). Alternatively, he contends that the Tribunal's "finding" that the evidence should be given no weight was not open because it was "illogical

or irrational" (ground 2). In the further alternative, he contends that the Tribunal failed to take into account relevant considerations, by giving no weight to the statements in circumstances where they provided evidence of the applicant's remorse and change of character (ground 6).

40 The second series of complaints (grounds 3, 4 and 5) relates to the Tribunal's reasons at [31] and [33].

41 At [31], the Tribunal noted that the possibility that the applicant's wife (Ms KG) and their daughter would accompany him to Samoa if he were deported "does not appear to be within their contemplation". The applicant contends that no part of the Direction permits the Tribunal to take it into such a consideration, with the result that the Tribunal took into account an irrelevant consideration (ground 3).

42 At [33], the Tribunal said:

> We note that Incident Detail Reports provided by the Department of Immigration show that the Applicant has been involved in a number of incidents described as minor "abusive/aggressive behaviour" and assault, and an alleged assault, while in detention. No doubt they reflect everyday life in detention but they do not reflect especially well on the Applicant.

43 The applicant asserts that the "assault" was not particularised, he had not been charged or found guilty in relation to any "assault" or "alleged assault", and the Tribunal had not made any finding as to whether it was satisfied that the applicant had committed any "alleged assault". In such circumstances, the applicant contends that it was not open to the Tribunal to find that the "assault" and the "alleged assault" did "not reflect especially well" on him. The applicant submits that in making such a finding, the Tribunal took into account irrelevant considerations (grounds 4 and 5).

44 The next complaint (ground 7) is that the Tribunal, whilst mentioning some principles of critical importance outlined in para 6.3 of the Direction, ignored the second part of subpara 6.3(4) (appearing in bold below). Subparagraph 6.3(4) states:

> Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. **However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.**
>
> (Emphasis added.)

45 The final allegations in the pleading are that the Tribunal "failed to exercise its statutory power according to law" (grounds 8 and 9).

46 In ground 8, the applicant alleges that, whilst the Tribunal mentioned the applicant's evidence as to his remorse and rehabilitation (at [29]), it made no findings about whether it accepted that evidence.

47 In ground 9, the applicant challenges the concluding statement in the Tribunal's reasons that the primary consideration of the best interests of the applicant's child was outweighed by the primary consideration of the protection of the Australian community from criminal or other serious conduct. The applicant asserts that the Tribunal, in concluding, failed to expressly consider the "other considerations" as part of the balancing exercise it was obliged to undertake, and failed, in particular, to consider whether the "other considerations" carried more weight than any of the primary considerations in the circumstances of the case.

48 The Minister argues that there is no basis for any of these complaints but that, even if jurisdictional error should be established, the application should be dismissed because it would be futile to grant the relief sought. The basis for this submission is that once the applicant's special leave application was dismissed, he could no longer meet the primary criteria for the grant of a bridging visa. The Minister submits that to be granted a bridging visa, the applicant must: (1) satisfy one of the subclauses in cl 050.212 of Schedule 2 to the *Migration Regulations 1994* (Cth) at the time of the visa application; and (2) continue to satisfy that subclause at the time of the visa decision. At the time of application, the applicant satisfied only subcl 050.212(3A), since judicial review proceedings were on foot in relation to his protection visa application. The Minister submits that once the applicant's special leave application was dismissed, judicial review proceedings were completed, with the result that the applicant could no longer satisfy subcl 050.212(3A).

Ground 1: Did the Tribunal deny the applicant procedural fairness by giving no weight to Exhibits A5-A13?

49 This complaint relates to the Tribunal's statement (at [50] of its reasons, extracted above at [38]) that it would place "no weight" on written statements and statutory declarations from friends of the applicant and those members of the applicant's extended family who did not give oral evidence (Exhibits A5–A13). The Minister did not object to the tender of these statements, nor seek to cross-examine the writers of these statements. The applicant argues that it was a denial of procedural fairness to give no weight to a witness statement merely

because the witness did not give oral evidence, in circumstances where the witness was not required for cross-examination.

50 The applicant contends that it was also a denial of procedural fairness to give no weight to these documents when he was not put on notice that his "largely itinerant history" would be a basis for rejecting the evidence in those statements. For this reason, the applicant claims he was not given a reasonable opportunity to present his case, contrary to s 39(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**).

51 The applicant pointed out that the Tribunal must not base its decision on a ground not relied upon by the parties or raised at the hearing, referring to *Fletcher v Commissioner of Taxation* (1988) 19 FCR 442 ("*Fletcher*"). He argued that if the Tribunal was concerned about the nature of the relationship that he had with any of the makers of the statements, the Tribunal ought to have brought that concern to the attention of the parties.

52 The applicant also submitted that, in effect, the Tribunal had fallen into jurisdictional error through its "arbitrary rejection of probative material".

53 I find none of these arguments persuasive.

54 The rules of procedural fairness are concerned with providing a person liable to be directly affected by a decision with the opportunity of a fair and impartial hearing. Impartiality is not an issue here. The relevant principles were summarised by Brennan J in *Kioa v West* (1985) 159 CLR 550 at 628–9:

> A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise … The person whose interests are likely to be affected does not have to be given an opportunity to comment on every adverse piece of information, irrespective of its credibility, relevance or significance. Administrative decision-making is not to be clogged by inquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made. Administrative decisions are not necessarily to be held invalid because the procedures of adversary litigation are not fully observed. …

55 Of course, what is fair in any given case depends on the circumstances. But procedural fairness does not require the decision-maker to disclose what he or she is thinking or what provisional views he or she has formed so as to give the parties a further opportunity to comment before the decision is made: *F Hoffman-La Roche and Co AG v Secretary of State*

for Trade and Industry [1975] AC 295 at 369, cited with approval in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 ("*Alphaone*") at 590–1 and *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 ("*SZBEL*") at [48]. As the Court put it in *SZBEL*, "[p]rocedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given". *SZBEL* was concerned with the Refugee Review Tribunal, but the principle is not confined in its operation to that tribunal.

56 *Fletcher* is plainly distinguishable on its facts. That case involved an appeal against a decision of the Administrative Appeals Tribunal, which affirmed a decision of the Commissioner of Taxation to disallow certain taxpayers' objections to his decision to reject their claims for deductions. The Administrative Appeals Tribunal affirmed the Commissioner's decision by purporting to exercise the discretion conferred upon the Commissioner by a provision of the *Income Tax Assessment Act 1936* (Cth). The Commissioner had not himself invoked this provision, and the Tribunal did not at any stage indicate to the applicants that it might invoke this provision. As the matter was not raised, the applicants had no opportunity to be heard on the question of whether the provision should be invoked. The Full Court held that, by reason of the course the Tribunal had taken, the applicants had been denied procedural fairness. This case bears not a passing resemblance to the circumstances in *Fletcher*. No issue of this kind arises here.

57 In *Telstra Corporation Limited v Kendall* (1995) 55 FCR 221 at 230–1, the Full Court held that Telstra did not deny procedural fairness to the user of certain telephone services when it decided to disconnect the services on the basis of information, including advertisements for the use of the premises to which the services were connected, indicating that the services were being used for the purposes of prostitution. The advertisements used the term "escort services", which the decision-maker concluded in his reasons for decision was "a euphemism for prostitution". The user complained that the decision-maker had not afforded him procedural fairness in reaching this conclusion. The basis for the complaint was that he had not been informed of the decision-maker's intention to arrive at that conclusion or been given an opportunity to make submissions about it. The primary judge held that the conclusion was such an important part of the decision-maker's process of reasoning that procedural fairness required that it be communicated to the user. The Full Court disagreed. It held (at 230) that, as the content of the advertisements were known to the user, procedural fairness did not require the decision-maker to specifically communicate the conclusions he might seek to

draw from them. The Court went on to say that, if those conclusions were so unreasonable that no reasonable decision-maker could have reached them, then they would have been open to attack on that basis.

58 In the present case, the applicant should be taken to have been aware of the deficiencies in the statements. The opportunity to present his case was not impeded or curtailed either by the attitude of the Minister or the silence of the Tribunal. The Tribunal's treatment of these exhibits does not amount to a denial of procedural fairness. The Tribunal did not find that the witnesses were dishonest. The mere fact that the documents went into evidence without objection or without the authors being required for cross-examination said nothing about the strength of the evidence. As the Full Court observed in *Alphaone* (at 591):

> A person likely to be affected by an administrative decision to which requirements of procedural fairness apply can support his or her case by appropriate information but cannot complain if it is not accepted … Within the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case …

59 The Full Court proceeded to point out that these general propositions are subject to qualifications in particular cases, such as:

- the right of a person the subject of the decision to have his or her mind directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with them; and

- the right to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject of the decision "which is not an obvious and natural evaluation of that material".

60 This case does not fall within any qualification. The applicant's "largely itinerant history" was not a critical issue or factor on which the decision was likely to turn. Indeed, it was not an issue at all. It was an inference (and an inescapable one at that) from the applicant's own evidence. The Tribunal's conclusion as to the weight to be attached to the evidence contained in the statements was "an obvious and natural evaluation of that material". A brief analysis of that evidence is sufficient to support these observations.

61 The makers of the statements included three of the applicant's cousins (the children of the uncle and aunt in whose house and garage the applicant had lived between the ages of 4 and 13). They did not provide particulars as to the contact the applicant had had with them

between the time he left those premises at the age of 13 and the time the statements were prepared. There is nothing in the applicant's own evidence to suggest that he had any contact with these people while he was living on and off the streets or during his several periods in gaol.

62 In so far as the makers of these statements said anything about their involvement with the applicant over the years they expressed themselves at a high level of generality. Given the applicant's account of his movements, it would have been obvious that the weight to be attached to their statements of both fact and opinion would depend on the level of contact he had had with them over the years.

63 One of his cousins asserted in her statement that "the Applicant has always been there for me" and that the applicant had been "very close" to her most of her life. Yet, on the applicant's own evidence that was unlikely. This cousin said that, if the applicant were released into the community, she would provide him with emotional and financial assistance and help him survive. What she actually meant by this was not explored.

64 Another cousin said he and the applicant were inseparable when growing up and did everything together. On the face of things, that evidence was inconsistent with the applicant's evidence. In a written statement tendered to the Tribunal, the applicant said that, unlike his cousins, he was not allowed to leave the house or go to school. Furthermore, the applicant told the Tribunal that from the age of about nine, when he started living in the garage of this cousin's house, he felt further isolated from that family. These apparent inconsistencies were unexplained.

65 One "good friend" said that, since the applicant had been in immigration detention, he had had the opportunity to speak to the applicant "on numerous occasions" but said little about the level of his contact with him before then. He said he first met the applicant 15 years earlier, and that the applicant "has always been a loyal friend who would do anything for his family and friends". How this assertion could be reconciled with the applicant's evidence of his estrangement from his family was never explained. Indeed, neither the applicant nor the people who provided these statements gave sufficient particulars of the extent of their contact to enable the Tribunal to evaluate the strength of their evidence.

66 In these circumstances, it was open to the Tribunal to attach no weight to this evidence.

67 While I accept that disregarding relevant evidence can in some cases amount to jurisdictional error (see, for example, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16), the Tribunal did not disregard the evidence. Having considered the evidence, it decided that it was not entitled to any weight. This is not a case, as the applicant contended, of the Tribunal arbitrarily rejecting probative material. The Tribunal held that the material was not probative. That conclusion, as I have already said, was open to it.

68 The proposition that treating the evidence in this way amounts to a denial of procedural fairness was said to be supported by the Migration Act. The applicant submitted, in effect, that s 500(6H) precluded the applicant from calling oral evidence. He argued that the effect of the subsection is that the Tribunal was required not to have regard to "information presented orally" unless the information was set out in a written statement given to the Minister at least two business days before the hearing. The result, he contended, was that the makers of the statements were precluded from giving oral evidence that exceeded the scope of their written statements, including evidence in relation to the applicant's "largely itinerant history".

69 Section 500(6H) provides:

> If:
> (a) an application is made to the Tribunal for a review of a decision under section 501; and
> (b) the decision relates to a person in the migration zone;
> the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review.

70 The purpose of the scheme in s 500 is to prevent an applicant from changing the nature of the case, catching the Minister by surprise and forcing the Tribunal into adjourning the proceedings: *Goldie v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 378 at [25]; *Uelese v Minister for Immigration and Citizenship* (2013) 60 AAR 534; [2013] FCAFC 86 at [31]–[32]. If the oral evidence does not change the nature of the case and merely puts flesh on the bones, so to speak, it may be doubted whether it can be excluded. There seems to me to be no reason why a witness could not be called to speak to his or her statement, to correct any inaccuracies, to explain any ambiguities, or to elaborate upon certain matters as long as in so doing the witness does not stray outside the subject matter of the

material covered in the statement. Indeed, the Tribunal has decided as much itself. In *Kim and Minister for Immigration and Multicultural and Indigenous Affairs* [2005] AATA 239 at [106], Block DP held that "statement" in s 500(6H) refers to a statement that contains the information to be presented orally. There would, however, be no point in having a witness merely repeat what is said in writing. As McMahon DP observed in *Msumba and Department of Immigration and Multicultural Affairs* (2000) 31 AAR 192; [2000] AATA 87 at [5]:

> Read literally, the subsection would restrict a witness simply to reading the statement which had been previously furnished. It would preclude any information elicited by the Department's advocate by way of cross examination, unless it could be said that such information was not in support of the applicant's case. I have taken the view that the policy of the legislation at least allows examination in chief to explain or amplify material in the written statement and allows that information to be tested by way of cross-examination.

71 See, too, *Reedy and Minister for Immigration and Citizenship* [2011] AATA 363 at [20], which followed these cases.

72 Be that as it may, assuming that the evidence was available, there was nothing to preclude the applicant from including in the documents in the first place, or serving on the Minister supplementary statements, the material that might have given the assertions in the documents some probative value. Certainly, neither the Minister nor the Tribunal deprived the applicant of the opportunity to do this.

73 There was no denial of procedural fairness. Ground 1 must be rejected.

Ground 2: Was it illogical or irrational for the Tribunal to find that Exhibits A5–A13 should be given no weight?

74 The applicant submitted that the Tribunal's reasoning process was illogical or irrational for four reasons.

75 First, he argued that it is illogical simply to give no weight to a written statement on the basis that the maker of the statement did not give oral evidence, when he or she was not required for cross-examination. The problem with this argument is that this was not the only basis upon which the Tribunal declined to give the statements any weight. The Tribunal found that the statements did not address its concerns as to what support the applicant had received from his family and friends and the strength of his current relationships with them.

76 The second argument was that the reasoning did not make clear what was meant by the words "largely itinerant history". I disagree. The reasons refer to the applicant's evidence of spending many years living on the streets and his periods in and out of custody and in immigration detention. On the face of things, those circumstances, as I have already said, raised concerns that the contact the applicant had with family and friends was, at best, sporadic.

77 Third, the applicant submitted that it is not entirely clear why a person who has a "largely itinerant history" cannot have maintained a strong emotional relationship with family and friends. As a general proposition that may be true. But it is beside the point. There is nothing illogical or irrational to conclude that Exhibits A5–A13 should be given no weight when they came from witnesses who provided little information about how that relationship was preserved over the years during which they were physically apart.

78 Fourth, the applicant complained that the Tribunal made no "real findings" about whether the makers of the statements supported the applicant or as to the nature of their present relationships. That is also true. But the Tribunal found, in substance, that it was unable to do so on the limited evidence before it.

79 There is no principle of law that requires a court to accept unchallenged or untested evidence: *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 588; JD Heydon, *Cross on Evidence* (9th ed), [17460]. Where the evidence-in-chief of a witness on a particular subject appears unconvincing, the fact that the witness was not cross-examined "would, or might, be of little importance in deciding whether to accept his evidence": *Bulstrode v Trimble* [1970] VR 840 at 848. There is no reason to suppose that these principles do not apply equally to tribunals. The legislative direction that the Tribunal is not bound by the rules of evidence (AAT Act, s 33) says nothing about the sufficiency of the material upon which the parties might rely to satisfy it that the decision under review should be set aside. For the reasons given in relation to ground 1 at [61]–[66] above, the Tribunal's finding was neither illogical nor irrational. In those circumstances, this ground of review does not lie. As Crennan and Bell JJ put it in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [135], "a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker".

Ground 6: Did the Tribunal fail to take into account relevant considerations by giving no weight to Exhibits A5–A13?

80 As the applicant acknowledged, an administrative decision will only be vitiated by a failure to take into account a relevant consideration if the consideration is one the Tribunal was bound to take into account. If the relevant factors are not expressly stated, they are to be determined by implication from the subject matter, scope and purpose of the statute: *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 39–40.

81 Here, the Tribunal was bound to take into account the matters referred to in the Direction: Migration Act, s 499(2A). Exhibits A5–A13, however, were not relevant considerations in this sense. The considerations that were relevant to the task the Tribunal was obliged to carry out "are to be identified primarily, perhaps even entirely, by reference to the Act rather than the particular facts of the case that the Tribunal is called on to consider": *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 ("*Yusuf*") at [73]. Whilst it is true, as the applicant submitted, that the evidence of the makers of the statements may have pertained to various matters referred to in the Direction, the fact that the Tribunal did not give any weight to the statements does not mean that the Tribunal failed to take those matters into account.

82 The fact is the Tribunal did consider the evidence but declined to give it any weight. The Tribunal was not bound to give the statements any weight. Certainly, as I have already observed, the fact that they were admitted without objection and the authors had not been required for cross-examination did not by themselves make the evidence in the statements compelling. Whether they should have been accorded any weight depended on their contents. It was for the Tribunal to decide whether they were persuasive and therefore what weight to attach to them. The Tribunal did not fall into jurisdictional error in concluding that they should not be given any weight.

83 This ground must be rejected.

Grounds 3–5: Did the Tribunal take into account an irrelevant consideration?

84 Ground 3 concerns the Tribunal's observation at [31] that the applicant's wife and child did not appear to contemplate moving to Samoa. The applicant submitted that no paragraph in the Direction allowed the Tribunal to take this into account as a relevant consideration. In particular, he argued that the Tribunal's observation was made when it was dealing with the risk to the Australian community if the applicant were to commit further offences or engage

in other serious conduct. He argued that there was nothing in the terms of para 11.1.2 of the Direction which either expressly or implicitly permitted a decision-maker to have regard to "whether the wife and child of the Applicant would contemplate the possibility of joining [him] overseas if he was deported". Further, the applicant submitted that this consideration was not dealt with in the evidence and was not raised as an issue during the hearing.

85 There are several problems with this ground and the submissions made in support of them.

86 First, the applicant wrongly assumes that where a matter is not mentioned in the Direction, it is irrelevant (in that the Tribunal is bound not to consider it). Paragraph 12 of the Direction, which refers to "other considerations" mentions three considerations but expressly states that they are not exhaustive. The three considerations are prefaced by the words "[t]hese considerations include but are not limited to".

87 Second, the observation was made in the context of the Tribunal's consideration of the applicant's alleged rehabilitation from a life of crime. Part of his case was that he was unlikely to reoffend because of the commitment he had made by marrying, the love and support he was receiving from his wife and her family, and his desire to be a good role model for his wife and child. As the applicant had been in gaol or immigration detention for most of the time he had known his wife, the Tribunal expressed serious doubts about the depth and future stability of the relationship. The impugned remark was apparently offered by way of illustration. As such, it was not irrelevant to the issues the Direction required the Tribunal to consider in para 11.1.2(2).

88 Third, the contention that the issue was not raised in evidence or with the parties during the hearing does not bear on this ground. As the Minister submitted, the Tribunal's remark merely reflected the fact that neither the applicant nor his wife gave evidence to suggest that the applicant's wife and daughter would move to Samoa if the application failed.

89 This ground must therefore be rejected.

90 The fourth and fifth grounds relate to the Tribunal's observations at [33] (extracted above at [42]), drawn from the Minister's evidence about the applicant's involvement in various incidents which had taken place in immigration detention.

91 These grounds are misconceived. At [33], the Tribunal referred to evidence that the applicant had been involved in various incidents whilst in immigration detention and observed that this did not reflect especially well on him. The references to an "assault" and "an alleged assault"

were not the Tribunal's own findings. Rather, the Tribunal was referring to descriptions of events in the Incident Detail Reports provided by the Department.

92 The applicant's behaviour whilst in immigration detention was not irrelevant to the question of whether he posed a risk to the Australian community if he were to commit further offences or engage in other serious conduct, which is the issue the Tribunal was then considering. The fact that he had not been convicted did not escape the Tribunal. At [33], the Tribunal did not find that the applicant had been convicted of any assault (or any offence for that matter) committed in immigration detention. But the absence of a conviction does not make conduct of this kind immune from consideration: *Ngaronoa v Minister for Immigration and Citizenship* (2007) 244 ALR 119; [2007] FCAFC 196 at [11]. Nor did it matter whether the applicant had been charged. What mattered was whether he was likely to be a risk to the Australian community. The applicant's conduct in immigration detention was plainly not irrelevant to this question.

93 Although the applicant denied committing any assault, he did admit to being involved in a number of incidents whilst in immigration detention. He characterised these incidents as "minor verbal altercations" or incidents in which he was the victim rather than the perpetrator. In one instance, he acknowledged that he became aggressive and abusive, albeit in self-defence or under provocation. The Tribunal did not refer in its reasons to the applicant's evidence about these matters but that is not the complaint.

94 In the light of the applicant's evidence (upon which he was not challenged in cross-examination), the Tribunal's assessment of the applicant's behaviour in immigration detention might seem a little harsh. But it was for the Tribunal to decide what weight to attach to the Department records and where there were discrepancies in the accounts, which version should be accepted. It was open to the Tribunal to conclude, however, even on the applicant's own account, that his conduct did not reflect particularly well on him. The Tribunal's observation discloses no jurisdictional error.

95 The fourth and fifth grounds should be rejected.

Ground 7: Did the Tribunal ignore the second part of paragraph 6.3(4) of the Direction or err by failing to apply the paragraph to the facts of the case?

96 This ground is baseless. The Tribunal did not ignore the second part of para 6.3(4) (which provides that "Australia may afford a higher level of tolerance of criminal or other serious

conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age"). To the contrary, the Tribunal referred to the content of it at two points in its reasons: first, at [11], when summarising the principles in para 6.3, and then at [35].

97 At [11], the Tribunal said that one of the principles "of critical importance" in furthering the Government's objective of protecting the Australian community from harm was that:

> the degree of tolerance of criminal or other serious conduct may be lower or higher depending on the length of time a person has been participating in, and contributing to, the Australian community;

98 At [35], the Tribunal observed:

> Clause 6.3 of Direction 55 provides that Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, and the length of time that a person has been making a positive contribution to the Australian community is a relevant consideration.

99 The Tribunal then proceeded to consider the applicant's evidence about his positive contribution to the Australian community. It recognised that the applicant had been living in Australia from an early age and considered the applicant's evidence about his positive contribution to the Australian community which consisted of playing football and helping out with the little league, and providing emotional support to his extended family and friends. At [37], the Tribunal noted that his involvement with football as an adult was short-lived. The Tribunal also said it was unclear what emotional support he had given to his family and friends but, allowing for that support, the Tribunal observed that there was nothing to suggest that it went beyond any normal friendship. The Tribunal said it was not persuaded that either matter "is a positive contribution to the Australian community of any weight" and said that he had contributed little, if anything, to the Australian community.

100 The applicant asserts that the effect of the second sentence in subpara 6.3(4) is that "it is clear that Australia would afford a high level of tolerance with respect to the criminality of the Applicant" as he has lived in Australia for most of his life and from a very young age. He emphasises that the Tribunal is to be guided by all the principles in para 6.3 in determining whether the risk of harm by a non-citizen is unacceptable.

101 In effect, the applicant elevates the effect of the second sentence of subpara 6.3(4) to a direction that a decision-maker must look favourably upon a seasoned criminal who has spent the best part of his life in this country. Yet, there is no such requirement. The Direction only states that Australia "may" afford a high level of tolerance of criminal or other serious conduct in those circumstances. Whether the Tribunal considers that a high level of tolerance should be extended to a particular visa applicant will depend on the facts of his or her case. Here, the Tribunal did not overlook the length of time the applicant had been in Australia. The Tribunal considered at [35]–[37] whether the applicant's criminal conduct should be afforded a high level of tolerance but decided otherwise.

102 The applicant complains, however, that the Tribunal erred at [35] by merging two considerations into one, emphasising the use of the singular ("consideration"), rather than the plural ("considerations"), at the end of the paragraph. This is an example of the type of nit-picking upon which the courts have consistently frowned. The reasons of an administrative decision-maker are "meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed": *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. In any event, the two considerations are interrelated. As a matter of common sense, a greater level of tolerance of misbehaviour might be extended to a visa applicant who has spent the greater part of his or her life making a positive contribution to the community.

103 There is no substance to the submission that the Tribunal was not guided by the principles in para 6.3 when it determined whether the risk of harm by the applicant was unacceptable.

104 The final submission the applicant advanced in support of this ground was that the Tribunal erred because it did not rule on a narrow construction of subpara 6.3(4) advanced by the Minister. That submission was to the effect that this subparagraph is not concerned with people like the applicant who have been unlawfully in the country for some time. While the Tribunal did not rule on this submission, I am not satisfied that the Tribunal wrongly construed subpara 6.3(4).

105 Ground 7 must be rejected.

Ground 8: Did the Tribunal fail to complete the exercise of its jurisdiction by failing to take into account evidence of the applicant's rehabilitation?

106 In ground 8, the applicant alleges that the Tribunal failed to take into account evidence of the applicant's rehabilitation by the time of the decision, contrary to subpara 11.1.2(2) of the Direction because it failed to make a finding about whether the applicant was genuinely remorseful.

107 The underlying premise of this submission is that the Tribunal was bound to make a finding on this question and that the failure to do so is a jurisdictional error. It was not.

108 Section 43(2B) of the AAT Act provides that, where the Tribunal gives its reasons in writing, those reasons must include its findings on material questions of fact. A failure to make a particular finding by no means necessarily results in jurisdictional error. The High Court made this plain in *Yusuf* in the analogous context of s 430 of the Migration Act (relating to the obligation of the Refugee Review Tribunal to prepare a written statement setting out its findings on material questions of fact). In *Yusuf*, McHugh, Gummow and Hayne JJ said (at [68]) that the obligation to set out material questions of fact did not impose an obligation to make findings on every matter of fact objectively material to the decision the Tribunal was required to make. It required no more than that the Tribunal set out its findings on those questions of fact which it considered to be material to the decision which it made. Their Honours held (at [68]):

> Neither expressly nor impliedly does this section require the Tribunal to *make*, and then set out, some findings additional to those which it actually made.

109 It is true, however, as their Honours went on to point out at [69], that a court asked to review a decision of the Refugee Review Tribunal may infer that if a matter is not mentioned in the Tribunal's reasons, the Tribunal did not regard it as material, and that might reveal some jurisdictional error. The same may be said of the Administrative Appeals Tribunal. But that is not this case. Whether the applicant was remorseful, was not a material question of fact. Indeed, it was not in question at all. The Minister did not advance any submission suggesting that the applicant's evidence on the subject should be rejected. What was in question was whether, notwithstanding his expressions of remorse, he remained a risk to the Australian community. That was the issue the Tribunal addressed. To that end, the Tribunal was required by the Direction to take a number of matters into account. Relevantly, that included evidence of rehabilitation.

110 The obligation to take into account evidence of rehabilitation appears in subpara 11.1.2(2) of the Direction. It reads:

> **The risk to the Australian community should the person commit further offences or engage in other serious conduct**
> (1) …
> (2) Decision-makers should also consider whether the purpose of the intended stay reflects strong or compassionate reasons for granting a short-stay visa. In making the risk assessment, decision-makers must have regard to, cumulatively:
> a) The nature of the harm to individuals or the Australian community should the person engage in further criminal or other serious conduct; and
> b) The likelihood of the person engaging in further criminal or other serious conduct, taking into account:
> i. information and evidence from independent and authoritative sources on the likelihood of the person reoffending; and
> ii. **evidence of any rehabilitation achieved by the time of the decision**, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken); and
> iii. the duration of the intended stay in Australia.
>
> (Emphasis added.)

111 That is not to say, however, that remorse, if genuine, will not be relevant to whether the applicant has achieved rehabilitation. The Tribunal had regard to the applicant's evidence on the subject in this very context.

112 The Tribunal considered the evidence led on the question of rehabilitation at [24]–[37] of its reasons. It referred specifically to subpara 11.1.2(2) at [25] and then proceeded to deal with the evidence touching upon the applicant's rehabilitation at [26] and following. Read fairly, the reasons show that the Tribunal did not doubt the genuineness of the applicant's statements that he was remorseful and that he had changed for the better, but the Tribunal was not persuaded (having regard to his particular circumstances) that his self-belief was sufficient to keep him out of trouble. It referred to the applicant's evidence at [29]:

> The Applicant says he wants to live a law-abiding life with his wife and child; he has had time to reflect while in detention and is truly remorseful for his past behaviour; he has stopped blaming others and takes responsibility for his own conduct.

113 But at [30], the Tribunal expressed its opinion that these good intentions were not reflected in any "concrete plans" for the future:

> A very real difficulty with this is that it is clear that the Applicant has no concrete plans for his future except to live with his wife and child. He regards his life as being

> changed by his marriage and the arrival of his child but he has little actual experience of such relationships and their pressures. Other than some labouring work, he has no work skills and he is barely literate – through no fault of his own.

114 The Tribunal went on to note the evidence given by the applicant's mother-in-law that she would provide him with emotional and financial assistance if he were released and he could live at her home with her and her two daughters. However, the Tribunal was concerned that the applicant had no means of supporting himself and his family, and that his relationship with his wife had been brief and had developed whilst he was in gaol and immigration detention. The Tribunal said that "the depth and future stability of the relationship must be open to serious question". The Tribunal referred to the lack of any expert assessment on the probability of future offending but observed that "the regular repetition of offences, the lack of an alternative law-abiding structured life and the apparent inability to be deterred by penalties must point to a high likelihood that the Australian public would be at risk of further harm of the same kind if he were to be free in the community".

115 There is no doubt that the Tribunal took into account the evidence going to the question of the applicant's rehabilitation. Although it did not say in so many words that it accepted the applicant's evidence as to his remorse, it is clear from its reasons that it did.

116 Ground 8 must be dismissed.

117 In written submissions, the applicant also argued that by taking into account the applicant's lack of work skills, illiteracy and lack of concrete plans, the Tribunal also took into account irrelevant considerations. These submissions are outside the scope of the application and were not developed during oral argument. They are, in any event, without substance. Matters of this nature are not irrelevant to the question of rehabilitation. In effect, the submissions invite merits review.

Ground 9: Did the Tribunal fail to complete the exercise of its jurisdiction by failing to refer in its concluding paragraph to the impact of visa refusal on the applicant's family?

118 The final contention is that the Tribunal erred by weighing the protection of the community only against the best interests of his child to the exclusion of all other considerations. The genesis of the contention is the Tribunal's conclusion, which only referred to these two considerations. Nevertheless, the Tribunal did explore (at [46]–[52]) whether there were any "other considerations". As I have already mentioned, it canvassed at some length the impact of visa refusal on immediate family members in Australia. It explored whether there were

any other relevant considerations and found none. The applicant makes no complaint in this respect.

119 The Tribunal accepted that both the applicant's wife and his mother-in-law would be distressed if the application were refused. It is true, however, that the Tribunal did not indicate how much weight this consideration should have. It is nonetheless implicit from a reading of the decision as a whole that it attached little weight to it. It was not a primary consideration. The Tribunal referred to the statement in the Direction to the effect that "other considerations" were generally entitled to less weight than primary considerations. It expressed its doubts about the "depth and future stability" of the marriage.

120 The Direction requires decision-makers to take "other considerations" into account, where relevant. It cannot be said that the Tribunal failed to do so. The Tribunal gave greater weight to the primary considerations as the Direction generally requires. By finding that the risk of future harm was unacceptable, the Tribunal was saying that that risk trumped all other considerations. By referring in the concluding paragraph to the best interests of the child, the Tribunal should not be taken to have ignored the interests of the wife and mother-in-law, especially as it had only dealt with the matter only four paragraphs earlier. Rather, the reference in the conclusion to only two primary considerations should be taken to be a reflection of the primacy the Tribunal accorded to those considerations and the little weight it attached to the other considerations (being the interests of the wife and mother-in-law, having regard to its concern about the stability of the relationship).

121 Ground 9 should also be dismissed.

Conclusions

122 None of the grounds upon which relief is sought has been made out. In these circumstances, it is unnecessary to decide whether relief would be futile.

123 The application should be dismissed with costs.

I certify that the preceding one hundred and twenty-three (123) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann.

Associate:

Dated: 31 March 2014