FEDERAL COURT OF AUSTRALIA

Makasa v Minister for Immigration and Border Protection [2018] FCA 1639

File number(s):	NSD 2053 of 2017
Judge(s):	**BURLEY J**
Date of judgment:	31 October 2018
Catchwords:	MIGRATION – s 501 of *Migration Act 1958* (Cth) – prior criminal convictions led to failure of character test and cancellation of visa – whether there was legal unreasonableness in the decision of the Minister
Legislation:	*Acts Interpretation Act 1901* (Cth) s 33 *Crimes Act 1900* (NSW) ss 61J, 66C(3) *Migration Act 1958* (Cth) ss 476A(1)(c), 501
Cases cited:	*BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; (2016) 240 FCR 158 *Minister for Immigration & Multicultural & Indigenous Affairs v Watson* [2005] FCAFC 181; (2005) 145 FCR 542 *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 2000; (2017) 255 FCR 81 *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185; (2016) 247 FCR 500 *Poroa v Minister for Immigration and Border Protection* [2017] FCA 826; (2017) 252 FCR 505
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	55
Counsel for the Applicant:	Mr J Donnelly with Mr A Ahmad
Solicitor for the Applicant:	Morning Star Legal and Migration Services
Counsel for the Respondent:	Mr D Hughes

Solicitor for the Respondent: Sparke Helmore

ORDERS

NSD 2053 of 2017

BETWEEN:	**LIKUMBO MAKASA** Applicant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** Respondent
JUDGE:	**BURLEY J**
DATE OF ORDER:	**31 OCTOBER 2018**

THE COURT ORDERS THAT:

1. The application for review be dismissed.

2. The applicant pay the respondent's costs.

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

REASONS FOR JUDGMENT

BURLEY J:

1. INTRODUCTION

1 The applicant, Mr Likumbo Makasa, seeks judicial review of a decision of the Minister for Immigration and Border Protection (**Minister**) made under s 501(2) of the *Migration Act 1958* (Cth) (**Act**) to cancel his Class BS Subclass 801 Partner (Residence) **Visa**.

2 At the hearing of the application, Mr Makasa, who was represented by Mr J Donnelly of counsel, sought leave to rely on an Amended Originating Application for Review. The Minister, who was represented by Mr D Hughes of counsel, did not oppose the grant of leave and the hearing proceeded on the basis of the two grounds that were raised therein. Both grounds contend that the decision of the Minister was vitiated by reason of jurisdictional error. The first on the basis that the decision was legally unreasonable, the second on the basis that the Minister misconstrued the statutory operation of s 501 of the Act and thereby misconceived the nature of the function that he was to perform.

2. BACKGROUND

3 Mr Makasa is a citizen of the Republic of Zambia. He arrived in Australia in 2001 on a student visa when he was 18 years of age. He has committed a number of offences since his arrival in Australia. In 2005, he was convicted of three counts of common assault against his former partner, for which he was sentenced to a good behaviour bond for 18 months on each count. In 2006, he was convicted of negligent driving, driving with a high range prescribed concentration of alcohol (**PCA**) and driving without a licence. In 2009, Mr Makasa was found guilty of three charges under s 66C(3) of the *Crimes Act 1900* (NSW) (**Crimes Act**) of having had sexual intercourse on 31 August 2006 with a female over the age of 14 and under the age of 16 years (**the underage sex offence**) for which he was sentenced to two years' imprisonment with a non-parole period of one year. It was accepted that Mr Makasa did not use violence or coercion with respect to these offences and the trial judge commented that the jury's verdict did not go so far as to support a finding that the complainant had not consented to having sex with Mr Makasa. The initial conviction was also for aggravated sexual assault under s 61J of the Crimes Act, but this was quashed by the NSW Court of Criminal Appeal on 8 October 2010. The Crown lodged an appeal on the basis that the sentence was manifestly inadequate, but it was dismissed by the NSW Court of Criminal Appeal. Mr Makasa then appealed his three convictions under s 66C(3) of the Crimes Act. His application for an extension of time to appeal in relation to these offences was refused by the NSW Court of Criminal Appeal on 14 August 2015.

4 In 2011, a delegate of the Minister cancelled Mr Makasa's Visa under s 501(2) of the Act. That decision was ultimately set aside by the AAT on 8 November 2013 (**the 2013 AAT decision**), following a successful judicial review of the 2011 decision in this Court before Perram J, whose decision was upheld on appeal by the Full Federal Court of Australia (Jacobson, Siopis and Murphy JJ).

5 On 24 January 2017, Mr Makasa was convicted of failing to comply with reporting obligations (**failure to report offence**) and was fined $300 (Mr Makasa is obliged to report to police until discharged in 2025). This related to Mr Makasa's failure to advise the police in a timely fashion that he had downloaded the social media application "Snapchat" which he used to communicate with his daughter. The Magistrate noted that, on any view, his conduct fell at the very lowest end of the range of sentencing for such an offence and imposed a very modest fine to ensure that he knew in future that he has a time limit within which to report actions of this nature.

6 On 3 May 2017, Mr Makasa was convicted of driving with a middle range PCA. He was disqualified from driving for 12 months and fined $1,200. I refer below to the **PCA offence** and failure to report offence collectively as the "**2017 offences**".

7 On 14 June 2017, an officer of the Minister advised Mr Makasa that consideration was being given to cancelling his Visa under s 501(2) of the Act. Mr Makasa responded with representations why his Visa should not be cancelled. On 18 October 2017, the Minister personally decided to cancel the Visa. Since that decision, Mr Makasa has been detained in immigration detention.

8 Mr Makasa instituted proceedings in this Court on 21 November 2017 against the Minster's decision pursuant to s 476A(1)(c) of the Act.

3. THE MINISTER'S DECISION

9 In the Statement of Reasons for Cancellation of Visa, the Minister states that Mr Makasa does not pass the character test defined by s 501(6) of the Act because he has a substantial criminal record, as defined by s 501(7)(c) of the Act, and that Mr Makasa has not satisfied the Minister that he passes the character test.

10 The Minister elected not to exercise his discretion not to cancel Mr Makasa's Visa, taking into account the following matters: protecting the Australian community; the risk to the Australian community; the best interests of minor children; Mr Makasa's ties to Australia and the extent of impediments facing Mr Makasa should he be removed from Australia.

11 In considering the Government's commitment to **protecting the Australian community** from harm as a result of criminal activity by non-citizens, the Minister considered Mr Makasa's criminal convictions as outlined above. He found the convictions for domestic violence and driving offences to be "serious", and his conviction for sexual intercourse with a person under the age of 16 years to be "very serious"

12 The Minister noted that at trial, Mr Makasa had been convicted of the more serious offence of "aggravated sexual assault", but that this offence was quashed on appeal. That offence concerned events that took place on 30 August 2006. The conduct for which Mr Makasa was convicted took place during the following day. The Minister noted at [25] that he makes no findings in relation to the events of the evening of 30 August 2006 and has given this no weight in considering the seriousness of Mr Makasa's conduct.

13 The Minister then noted that on 24 January 2017 Mr Makasa was convicted of failing to comply with reporting obligations of his parole, for which he was fined $300. He took into account that this offence, which concerned the failure to advise the police in a timely fashion that he had downloaded a social medial application which he used to communicate with his daughter (who lives in Perth, Mr Makasa was located in Sydney), was noted by the Magistrate to be "at the very lowest end of the range" and warranted a "very modest fine". The Minister also noted that on 3 May 2017 Mr Makasa was convicted of "drive with middle range PCA – 1st offence" for which he was disqualified from driving for 12 months and fined $1,200.

14 The Minister then considered whether Mr Makasa poses a **risk to the Australian community through reoffending.** In this regard he took into account the following matters:

(1) That the majority of Mr Makasa's offending, including his most serious offending occurred when he was in his early 20s and he is now 34 ([30]);

(2) That alcohol has been a factor in Mr Makasa's criminal conduct to date. He stated:

> [31] Alcohol has been a factor in Mr MAKASA's criminal conduct to date. I note in 2005, Mr MAKASA caused a motor vehicle accident whilst under the influence of alcohol, and he has recently been convicted of a further drink driving offence in 2017. The trial judge presiding over Mr MAKASA's sexual offences observed that Mr MAKASA had been drinking the evening prior to the sexual offences and highlighted his mother's evidence that he was drinking a lot more than he should have at the time of the offences.

(3) The Minister then noted that the trial judge in 2009 had found Mr Makasa to be a "very different person" from the person he was at the time of the offences in 2006, and that his Honour had found Mr Makasa had "good prospects for rehabilitation", was "very unlikely to reoffend" and "highly likely" to lead a "fruitful and productive life" (at [32]). He noted that Mr Makasa had abided by his bail conditions and that he maintained satisfactory conduct whilst in prison and in immigration detention. He noted that the AAT record indicates that Mr Makasa participated in an offenders program organised by the Hillsong Church whilst in jail. The Minister accepted at [34] that this was "a step towards rehabilitation". The Minister also noted (at [36]) that in 2013 the AAT had found Mr Makasa to be a "relatively low risk of reoffending", that he had extremely strong family support, and that he had expressed genuine regret for having involved his family in the events arising from his offending. The AAT found that this would act as a substantial deterrent, and the Minister accepted that these experiences should have had a salutary effect on Mr Makasa.

(4) The Minister also noted that Mr Makasa had been in the community for about three and a half years since his release from immigration detention after receiving a favourable outcome from the AAT in 2013, and takes into account that Mr Makasa has reoffended since then by committing the 2017 offences.

(5) The Minister then accepted that the 2017 offences took place more than 10 years after his more serious offending in 2005 and 2006, that they did not involve violent or aggressive behaviour, and that they are relatively minor and did not attract any sentence of imprisonment.

(1) In relation to the 2017 PCA offence the Minister said:

> [43] In relation to his most current conviction for *drive with middle range PCA – 1st offence*, I note Mr MAKASA states he takes full responsibility and that he believed he had let enough time pass and consumed enough water after drinking alcohol to enable him to drive. However, I also note that Mr MAKASA's most recent offending involves drink driving in the mid-range, and I considered this is his second drink driving offence, albeit 11 years apart. I find the repeat drink driving offence demonstrates disregard for community safety and that further rehabilitative progress with respect to alcohol is required.

(6) It is appropriate to set out the balance of the Minister's reasons on the subject:

> [44] Mr MAKASA is now 34 years of age and I accept that his most serious conduct, the sexual offences, occurred approximately eleven years ago when he was aged in his early twenties. I have taken into account Mr MAKASA's submissions regarding his offending and I note that in relation to the offences of *sexual intercourse with a person above the age of 14 years and under the age of 16 years*, Mr MAKASA states he takes full responsibility for his actions. I have also had regard to his expressed remorse in his statements.
>
> [45] I have considered the assessment made by Psychologist, Dr Peter Ashkar on 12 August 2013 regarding Mr MAKASA's risk of recidivism. I note that he reported that Mr MAKASA does not constitute a serious risk to the Australian community and that Mr MAKASA's offending was limited to three sequences of offences between November 2005 and August 2006. I also note he reports the offending occurred during a time when Mr MAKASA was consuming large amounts of alcohol to manage stress. He reported Mr MAKASA had matured considerably and had reduced his alcohol consumption. He concluded Mr MAKASA was not a violent man and did not have an antisocial personality or a juvenile offending history. Dr Ashkar considered these factors placed him at the low end of the spectrum in terms of violence risk. His risk of sexual recidivism was estimated to be nine percent over a five year period which he also believed to be an overestimate inflated by Mr MAKASA's conviction for common assault.
>
> [46] I note that Dr Ashkar reported Mr MAKASA required treatment for significant symptoms of anxiety and depression to minimise his risk of sexual recidivism. He identified that Mr MAKASA also required psychological treatment for management of his negative mood to minimise the risk of recidivism and that

> he would benefit from psychological treatment to assist with management of aspects of his personality that contribute to poor regulation.
>
> [47] I have had regard to Dr Ashkar's conclusion that Mr MAKASA has a strong prosocial orientation which is reflected in his commitment to *'education, employment, family and church.'* He states that Mr MAKASA has strong cognitive resources and considerable vocational potential with further education which can lead to satisfying employment allowing him to make a positive contribution to the community.
>
> [48] I have had regard to Mr MAKASA's present circumstances which include his focus on trying to *'better himself'* and ensuring that he provides support to his family and in particular his children. I note Mr MAKASA sought counselling and support through church groups and has contacted groups such as Beyond Blue and Mensline for assistance. Mr MAKASA also receives ongoing support from Pastor Alosio from the Hillsong Church who has been a support person for Mr MAKASA. I note that Mr MAKASA has attended a men's support group which assists individuals who have been in prison or immigration custody in reintegrating back into society and becoming productive members of the community. I accept this may assist Mr MAKASA in his ongoing rehabilitation.

(7) The Minister's conclusion at [49] is significant to the grounds of review advanced by Mr Makasa. It provides:

> [49] Taking the above matters into account, I acknowledge that Mr MAKASA is a low risk of sexual reoffending, however I find Mr MAKASA to represent an ongoing likelihood of non-sexual reoffending. I find that Mr MAKASA's ongoing family support, his past term of imprisonment and visa cancellation matters have not had the deterrent effect considered by the AAT, and I therefore view his long term prospects with some caution. While Mr MAKASA's recent offences are less serious, I am concerned that he still requires further progress with respect to alcohol rehabilitation. If Mr MAKASA were to commit further sexual offences against a minor he could cause very serious physical and psychological harm to a member of the Australian community. If Mr MAKASA were to commit further domestic violence there is a risk he may cause physical harm or psychological harm to members of the Australian community. If Mr Makasa were to commit further driving offences whilst under the influence of alcohol there is a risk he could cause an accident resulting in physical harm or financial loss to members of the Australian community.

15 In relation to the **best interests of minor children**, the Minister notes that Mr Makasa has two children: Tiana, aged 11, and Rashon, aged 8, both of whom are Australian citizens living with their mother, Ms Tasneem Fredericks in Perth. He has an amicable relationship with them. Tiana has been diagnosed with Down syndrome and requires constant supervision. Mr Makasa lives with his mother in Sydney, but the Minister notes that he has visited his children and they have visited him on a number of occasions. He contacts them regularly by telephone whilst in immigration detention and had planned for them to visit him in September 2017. The Minister

also notes that Mr Makasa provides financial support to Ms Fredericks for the children and that she would be affected financially if he is removed to Zambia.

16 The Minister also notes that Mr Makasa has not advised the children of the possibility that he may be removed to Zambia because he does not want to affect their schooling. The Minister accepted that Mr Makasa's removal to Zambia may result in him being unable to provide support or respite care for Tiana. The Minister notes the submission made by Ms Fredericks that she would be unable to fund trips for Tiana and Rashon to visit Zambia and accepts that they may have difficulties funding regular telephone contact.

17 The Minister also notes that Mr Makasa has been in a relationship with Ms Bianca Rhodes since 2009, and that he is a stepfather and a father figure to Ms Rhodes' 12 year old daughter, Mena. He notes that Ms Rhodes suffers from depression and that Mr Makasa provides support to her in managing her illness and practical and financial support in caring for Mena.

18 The Minister refers to the submission that it is in the best interests of the children's mother and the children not to cancel Mr Makasa's Visa and treated this as a primary consideration.

19 The Minister refers to the report of Dr Peter Ashkar dated 2013 that states that the removal of Mr Makasa from Australia would destroy his relationship with Mena and limit his ability to pursue relationships with Tiana and Rashon. He notes that the AAT found in 2013 that it would be in the best interests of these children for his visa not to be cancelled and that there was potential for him to play a "significant role in their future development". Later in his reasons (at [91]) the Minister notes that visits to Zambia may be impractical, particularly for the children.

20 Taking these matters into account, the Minister concluded that it is in the best interests of Ms Fredericks and the children not to cancel the visa.

21 The Minister then considered the **strength, nature and duration of Mr Makasa's ties to Australia**. This included the fact that Mr Makasa has resided in Australia for approximately 16 years. He has been employed in Australia since his arrival and his regular employment has enabled him to support his family and make a contribution to the Australian community through the taxation system. He also has ties to the community through his association with the Hillsong Church in Sydney, which the Minister recognised as a positive connection to the community. The Minister acknowledges that Mr Makasa's partner and step-daughter are Australian citizens; he plans to marry and start a family with his partner, who has demonstrated

longstanding support for him, including through his court proceedings and immigration detention; his children and former partner are in Perth; and that he has a relationship with his mother and step-father who also reside in Australia. The Minister accepted that Mr Makasa's immediate family in Australia, particularly his partner, mother and step-father, would experience emotional hardship, psychological hardship and some financial hardship if he were removed from Australia.

22 The Minister then considered the **impediments that Mr Makasa will face** if removed from Australia to Zambia in establishing himself and maintaining basic living standards in the context of what is generally available to other citizens of Zambia. He notes Mr Makasa's submission that since coming to Australia he has kept very little contact with Zambia and concludes:

> [95] While I accept that Mr MAKASA's immediate family reside in Australia, I am also aware that Mr MAKASA does have extended family in Zambia. I note that he has an aunt who resides in Zambia and while he does not have a relationship with her and while the support of his extended family in Zambia may be limited it will go some way to assisting with his adjustment to life in Zambia. Nonetheless given the economic situation in Zambia, and taking into account Mr MAKASA's skills and employment prospects I accept that he will face practical and financial hardship in adjusting to life in Zambia.

23 Taking the above-mentioned matters into account, the Minister **concludes**:

> [99] In considering whether or not to cancel Mr MAKASA's visa, I gave primary consideration to the best interests of Mr MAKASA's two minor Australian citizen children, Tiana Fredericks and Rashon Makasa and his minor Australian citizen stepdaughter Mena Rhodes and found that their best interests would be served by not cancelling the visa.
>
> [100] Mr MAKASA has committed a very serious crime, that of *sexual intercourse with a person above the age of 14 years and under the age of 16 years*, which is of a sexual nature, and involved a vulnerable member of the community, that being a minor, and Mr MAKASA and non-citizens who commit such an offence should not generally expect to be permitted to remain in Australia.
>
> [101] I find that the Australian community could be exposed to great harm should Mr MAKASA reoffend in a similar fashion. I could not rule out the possibility of further offending by Mr MAKASA. The Australian community should not tolerate any further risk of harm.
>
> [102] I found the above consideration outweighed the countervailing considerations in Mr MAKASA's case, including the best interests of the child, being his two children and stepdaughter, treated as a primary consideration and the impact on family members. I have also considered the length of time Mr MAKASA has made a positive contribution to the Australian community, taking into account that he has lived in Australia for some 16 years.
>
> [103] I find that in Mr MAKASA's case the risk of further harm is of such a

seriousness that even the strong countervailing considerations outlined above are insufficient for me not to cancel the visa.

[104] In reaching my decision I concluded that Mr MAKASA represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed any countervailing considerations above.

4. STATUTORY FRAMEWORK

24 Section 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 he or she passes the character test.

25 There is no dispute that Mr Makasa does not pass the character test. He does not do so because he has been sentenced to a term of imprisonment of 12 months or more; per s 501(6)(a) and 501(7)(c) of the Act.

26 The present challenge to the decision of the Minister is to the exercise of discretion conferred by the use of the word "may" in s 501(2).

5. THE GROUNDS OF REVIEW

27 Mr Makasa relies on the following grounds:

1 The decision of the Respondent was infected by jurisdictional error on account of legal unreasonableness:

Particulars

The Respondent found that the Australian community could be exposed to great harm should the Applicant reoffend in a similar fashion (i.e. commit further sexual offences). The Respondent found that he could not rule out the possibility of further offending by the Applicant. As a result, the Respondent concluded that the Australian community should not tolerate any further risk of harm (paras [100]-[102]). These findings were not logically or rationally open to the Respondent to draw on the evidence before the Respondent:

1. The Respondent accepted that the impugned sexual offences occurred more than 11 years before the Respondent decided to personally exercise the statutory power under s 501(2) of the *Migration Act 1958* (Cth) (paras [16], [38] and [44]). The Respondent found that the Applicant's sexual offences occurred when he was aged in his early twenties and that the Applicant was now aged 34 (paras [30] and [40]).

2. The Respondent expressly acknowledged that there had been no repetition of sexual offences committed by the Applicant since the index sexual criminality in August 2006 (para [38]). In this context, the Respondent accepted that the Applicant was in the Australian community for three and a half years before exercising the power under s 501(2) of the *Migration Act 1958* (Cth) (para [38]).

3. The Respondent accepted that the Applicant abided by his bail conditions, maintained satisfactory conduct whilst in prison and maintained satisfactory conduct whilst in immigration detention. The Respondent gave these matters weight in the context of the Applicant's rehabilitation (paras [34]-[35]).

4. The Respondent had regard to the Applicant's submissions with respect to the Applicant taking 'full responsibility for his actions' and 'expressed remorse' (para [44]). The Respondent also had regard to the fact that the Applicant has 'strong prosocial orientation which is reflected in his commitment to education, employment, family and church' (para [47]).

5. The Respondent found that the Applicant was a low risk of sexual reoffending (para [49]). The Respondent further found that the Applicant represented an 'ongoing likelihood of non-sexual reoffending' (para [49]). The Respondent viewed the Applicant's long-term prospects 'with some caution' (para [49]). Given that the Respondent's ultimate 'unacceptable risk of harm' finding (para [104]) *squarely and solely* related to the Applicant's index sexual offences in 2006 (see the effect of paras [100]-[102]), the findings made by the Respondent in relation to recent 'non-sexual reoffending' bear no relevance to assessing the Applicant's ongoing risk of harm to the Australian community.

6. Viewed in the abstract, there might be a logical connection between the past offence findings and the likelihood of similar re-0ffending [sic] had the Respondent relied on evidence capable of supporting a conclusion that it is possible that the Applicant would resume committing sexual offences. However, of themselves, the past sexual offences from 2006 are not capable of supporting that conclusion, especially in light of the Respondent's express favourable findings towards the Applicant.

In assessing the extent of impediments the Applicant would face if removed to Zambia, the Respondent found that the Applicant's aunt and extended family in Zambia would "go some way to assisting" the Applicant adjust to life in that country (para 95]) [sic]. This finding both lacks a rational foundation and is devoid of intelligible justification, since the Respondent otherwise found that the Applicant does not have a relationship with his aunt (para [95]). Further, there is no evidence that the Applicant's extended family in Zambia would provide him with any assistance whatsoever (should he be removed to that country).

2 The decision of the Respondent was infected by jurisdictional error as the Respondent misconstrued the statutory operation of s 501 of the *Migration Act 1958* (Cth) and thereby misconceived the nature of the function which he purported to perform in the circumstances of this particular case:

The power in s 501(2) of the *Migration Act 1958* (Cth) is *not* available for exercise in relation to the same person on the same facts and circumstances, where the original exercise of power resulted in a decision not to cancel a person's visa.

First, the Administrative Appeals Tribunal ('AAT') decided (in 2013) not to exercise the statutory power in s 501(2) of the*Migration Act 1958* (Cth) [sic] to cancel the Applicant's visa on account of the Applicant's index sexual offences from 2006.

Secondly, despite the preceding, the Respondent purported to cancel the Applicant's visa in 2017 under s 501(2) of the*Migration Act 1958* (Cth) [sic] *squarely and solely*

by reference to the Applicant's index sexual offences from 2006:

1. In the conclusion section of the Statement of Reasons, the Respondent found that the Applicant 'committed a very serious crime' (namely, sexual intercourse with a person above the age of 14 and under the age of 16 years) (para [100]).

2. On the premise of the index sexual criminality from 2006, the Respondent found that the Applicant should not generally be expected to be permitted to remain in Australia (para [100]).

3. Based on the findings above (i.e. (1) and (2)), the Respondent found that the Australian community could be exposed to great harm should the Applicant reoffend in a 'similar fashion' (para [100]). In this context, the Respondent found that he could not rule out the possibility of further offending by the Applicant (para [100]). As a result, the Respondent found that the Australian community should not tolerate any further risk of harm (para [100]).

4. Given the preceding matters in (1)-(3) above, the Respondent found that the Applicant's criminality (related to the index sexual offences) outweighed the favourable countervailing consideration in the Applicant's case (paras [102]-[103]). Ultimately, on that basis, the Respondent concluded the Applicant represented an unacceptable risk of harm to the Australian community (para [104]).

5. Given the preceding (and the general thrust of paras [97]-[105] of the Respondents decision), it is clear that the Respondent*did* [sic] *not rely* upon new facts and circumstances in the ultimate statutory application of s 501(2) of the *Migration Act 1958*(Cth) [sic].

6. Although it is clear that the Respondent considered the Applicant's more recent criminality regarding 'non-sexual matters' (paras [26]-[27], [31], [40], [42]-[43], [49]) in a general sense, the Respondent did not consider the Applicant's recent criminality (i.e. non-sexual offences) for the purposes of assessing the Applicant's ongoing risk of harm to the Australian community (which was limited to revisiting the Applicant's index sexual offences in 2006).

6. GROUND 1 – LEGAL UNREASONABLENESS

6.1 The arguments

28 Mr Makasa first submits that in his conclusions at [97] – [104] the Minister found that the sole factor that led him to cancel the visa was the consideration that there was an unacceptable risk that sexual offences of the kind committed in 2006 would be repeated if he were permitted to remain in Australia. He submits that this finding is predicated on an inference that there was a possibility that Mr Makasa might reoffend, and that this inference was not logically open to the Minister. Mr Makasa points to 9 reasons why the finding is illogical:

(1) the Minister's finding that Mr Makasa's sexual offending took place when he was in his early 20s and he is now 34;

(2) the Minister's finding that some 11 years have passed since the offences were committed;

(3) the Minister's finding that there has been no repetition of sexual-related offending;

(4) that given the length of time since 2006 there is no basis to infer that Mr Makasa might reoffend in a similar fashion;

(5) the Minister's finding at [34] that Mr Makasa has taken steps towards his rehabilitation, even if he does not expressly find that he has rehabilitated entirely;

(6) the finding that Mr Makasa has maintained satisfactory conduct during his periods of detention;

(7) the Minister's finding that he has been in the community for three and a half years since his release from detention in November 2013;

(8) the Minister's finding at [44] that he had accepted full responsibility for his criminality and expressed remorse; and

(9) the Minister's finding at [47] that the applicant has a strong pro-social orientation reflected in a commitment to education, employment, family and the church.

29 Mr Makasa submits that the Minister's observations concerning the 2017 offences in the section of his reasons addressing "Risk of harm to the Australian community" were illogical insofar as those more recent offences can logically have no bearing on the risk that Mr Makasa will repeat the 2006 sexual offence. To the extent that [43] – [48] of the Minister's decision place weight on those offences, it was illogical to do so.

30 Mr Makasa further submits that the decision of the Minister was arbitrary, plainly unjust and capricious having regard to the circumstances leading up to and the content of the decision of the AAT in 2013. In that decision Deputy President Tamberlin QC considered the circumstances prevailing as at that date and found:

> [70] Having regard to the seriousness and nature of the relevant conduct as well as the above matters, I do not consider that there is an unacceptable risk of harm to the Australian community if the visa of Mr Makasa is not cancelled.

31 Mr Makasa submits that in circumstances where the conclusion of the Minister in the present decision focused solely on the question of his likelihood of repeating the 2006 sexual offences it is arbitrary, plainly unjust or capricious to revisit the exercise of discretion conducted by the AAT. Alternatively, it was arbitrary, plainly unjust or capricious for the Minister to use the

façade of the more recent 2017 offences as a basis to focus yet again on the 2006 sexual offences.

32 The Minister responds first by accepting that as a matter of construction the conclusions expressed in his reasons at [100] – [103] indicate that the factor that was dispositive for the Minister is the risk of further sexual reoffending. However, the Minister contends that there is a connection between the 2017 offences and the risk of a repeat of the sexual offences of 2006. This is because there is a connection between those offences and alcohol. As a result, the finding that there was a low, but not zero, risk of a repeat of the offences was open and within the discretionary freedom available to the Minister.

6.2 Relevant principles

33 In *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; (2016) 240 FCR 158 (***Eden***) the Full Court (Allsop CJ, Griffiths, and Wigney JJ) identified, as is the case here, that the Minister's power to cancel a visa is only enlivened if the Minister reasonably suspects that the visa-holder does not pass the character test (as defined in s 501(6) of the Act) and the visa-holder does not satisfy the Minister that he or she satisfies the character test (*Eden* at [15]). There is no question that the discretion was enlivened in the present case. Once enlivened, the court in *Eden* identified that some of the relevant principles concerning legal unreasonableness are:

> 58 First, the concept of legal unreasonableness concerns the lawful exercise of power. Legal reasonableness, or an absence of legal unreasonableness, is an essential element in the lawfulness of decision-making: *Li* at 350[26] and 351[29] (French CJ), 362[63] (Hayne, Kiefel and Bell JJ) and 370[88] (Gageler J); *Singh* at 445[43]; *Stretton* at [4] (Allsop CJ) and [53] (Griffiths J).
>
> 59 Second, the Court's task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory (*Li* at 363[66]). It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision's reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision maker: *Li* at 363[66] (Hayne, Kiefel and Bell JJ); *Stretton* at [12] (Allsop CJ) and [58] (Griffiths J); see also *M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) 90 ALJR 197 at 203[23]. Nor does it involve the Court remaking the decision according to its own view of reasonableness: *Stretton* at [8] (Allsop CJ).
>
> 60 Third, there are two contexts in which the concept of legal unreasonableness may be employed. The first involves a conclusion after the identification of a recognised species of jurisdictional error in the decision making process, such as failing to have regard to a mandatory consideration, or having regard to an irrelevant consideration. The second involves an "outcome focused" conclusion without any specific jurisdictional error being identified: *Li* at

350[27]-351[28] (French CJ), [72] (Hayne, Kiefel and Bell JJ); *Singh* at [44]; *Stretton* at [6] (Allsop CJ).

…

62 Fourth, in assessing whether a particular outcome is unreasonable, it is necessary to bear in mind that within the boundaries of power there is an area of "decisional freedom" within which a decision-maker has a genuinely free discretion: *Li* at 351[29] (French CJ), 363[66] (Hayne, Kiefel and Bell JJ). Within that area, reasonable minds might differ as to the correct decision or outcome, but any decision or outcome within that area is within the bounds of legal reasonableness: *Li* at 363[66] (Hayne, Kiefel and Bell JJ); *Stretton* at [7] (Allsop CJ). Such a decision falls within the range of possible lawful outcomes of the exercise of the power: *Li* at 375[105] (Gageler J); *Stretton* at [11] (Allsop CJ).

63 Fifth, in order to identify or define the width and boundaries of this area of decisional freedom and the bounds of legal reasonableness, it is necessary to construe the relevant statute: *Li* at 349[24] (French CJ), 363[67]-364[67] (Hayne, Kiefel and Bell JJ); *Stretton* at [55] and [62] (Griffiths J). The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making: *Stretton* at [7] and [11] (Allsop CJ). The evaluation is also likely to be fact dependant and to require careful attention to the evidence: *Singh* at 445[42].

64 Sixth, where reasons for the decision are available, the reasons are likely to provide the focus for the evaluation of whether the decision is legally unreasonable: *Singh* at 446[45]-447[47]. Where the reasons provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered to be legally unreasonable: *Singh* at [47]. However, an inference or conclusion of legal unreasonableness may be drawn even if no error in the reasons can be identified. In such a case, the court may not be able to comprehend from the reasons how the decision was arrived at, or the justification in the reasons may not be sufficient to outweigh the inference that the decision is otherwise outside the bounds of legal reasonableness or outside the range of possible lawful outcomes: *Li* at 367[76] (Hayne, Kiefel and Bell JJ); *Stretton* at [13] (Allsop CJ).

65 Seventh, and perhaps most importantly, the evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions. The concept of legal unreasonableness is not amenable to rigidly defined categorisation or precise textural formulary: *Stretton* at [2] and [10] (Allsop CJ) and [62] (Griffiths J). That said, the consideration of whether a decision is legally unreasonable may be assisted by reference to descriptive expressions that have been used in previous cases to describe the particular qualities of decisions that exceed the limits and boundaries of statutory power. A number of those cases, and the descriptive expressions used in them, are referred to in *Li* and in the judgment of Allsop CJ in *Stretton* (at [5]). The expressions that have been utilised include decisions which are "plainly unjust", "arbitrary", "capricious", "irrational", "lacking in evident or intelligible justification", and "obviously disproportionate". It must be emphasised again, however, that the task is not an *a priori* definitional exercise. Nor does it involve a "checklist"

> exercise: *Singh* at 445[42]. Rather, it involves the Court evaluating the decision with a view to determining whether, having regard to the terms, scope and purpose of the relevant statutory power, the decision possesses one or more of those sorts of qualities such that it falls outside the range of lawful outcomes.

34 In the fifth point above the Full Court emphasises the need evaluate the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making. In *Eden*, as in the present case, s 501(2) was under consideration. At [19] that Court observed that there are a number of indicators that suggest that the Minister's discretion under s 501(2) is, and is intended to be, broad. That is a relevant consideration in assessing whether a decision under s 501(2) of the Act is unreasonable in a legal sense. The indicators include, but are not necessarily limited to, the following: the absence of an express list of considerations to be taken into account; the broad statement of the object of the Act in s 4(1) as being to "regulate, in the national interest, the coming into and presence in, Australia of non-citizens"; the fact that the discretion is conferred upon the Minister who holds political office and is accountable to Parliament; the fact that a decision under s 501(2) which is made by the Minister personally is not subject to merits review; and the fact that the Minister is obliged by s 501G(1)(e) of the Act to provide a written statement of reasons. See also; *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 at [24] (Bromberg, Davies and Mortimer JJ); *Poroa v Minister for Immigration and Border Protection* [2017] FCA 826; (2017) 252 FCR 505 at [10] (Perry J).

6.3 Consideration

35 The Minister accepts that in his conclusion the exclusive focus of his reason for deciding to exercise his discretion to cancel the visa is the possibility that Mr Makasa will reoffend in a similar fashion to his 2006 underage sex offence. This is apparent from the language used in [100] – [102] (see [23] above).

36 Attention then first focuses on whether it was legally unreasonable for the Minister to reach that conclusion, having regard to his earlier reasons and findings. In this regard it is to be noted that the Minister found at [18] that the 2006 underage sex offence took place during the day on 31 August 2006. Whilst he finds that the events of the night before involved Mr Makasa in the consumption of alcohol, he makes no specific finding that alcohol was a contributing factor to the offence and at [25] disavows taking into consideration the events of 30 August in exercising his discretion. However, at [31] of his reasons the Minister says:

> [31] Alcohol has been a factor in Mr MAKASA's criminal conduct to date. I note in 2005, Mr MAKASA caused a motor vehicle accident whilst under the influence of alcohol, and he has recently been convicted of a further drink driving offence in 2017. The trial judge presiding over Mr MAKASA's sexual offences observed that Mr MAKASA had been drinking the evening prior to the sexual offences and highlighted his mother's evidence that he was drinking a lot more than he should have at the time of the offences.

37 Mr Makasa submits that the finding that alcohol has been a factor in his criminal conduct to date was incorrect. He submits that there was no finding at the criminal trial or during the judge's sentencing remarks that alcohol was a factor. Those remarks were before the Minister, and Mr Makasa's submission in this respect is factually correct.

38 Later, however, the Minister refers to an assessment made by a psychologist, Dr Peter Ashkar, on 12 August 2013 regarding the likelihood that Mr Makasa will repeat any of his criminal offences. The Minister summarises at [45] the effect of the report as follows:

> I have considered the assessment made by Psychologist, Dr Peter Ashkar on 12 August 2013 regarding Mr MAKASA's risk of recidivism. I note that he reported that Mr MAKASA does not constitute a serious risk to the Australian community and that Mr MAKASA's offending was limited to three sequences of offences between November 2005 and August 2006. I also note he reports the offending occurred during a time when Mr MAKASA was consuming large amounts of alcohol to manage stress. He reported Mr MAKASA had matured considerably and had reduced his alcohol consumption. He concluded Mr MAKASA was not a violent man and did not have an antisocial personality or a juvenile offending history. Dr Ashkar considered these factors placed him at the low end of the spectrum in terms of violence risk. His risk of sexual recidivism was estimated to be nine percent over a five year period which he also believed to be an overestimate inflated by Mr MAKASA's conviction for common assault.

39 The report of Dr Ashkar was before the Minister. It had been prepared for the purpose of the 2013 hearing before the AAT. In it, Dr Ashkar reports on his interview with Mr Makasa where he is said to have reported that alcohol has been a factor in all of his offending behaviour. Dr Ashkar goes on to give his assessment of the likelihood of Mr Makasa reoffending and observes that one factor associated with his offending behaviour is that he had alcohol in his system after a night of heavy drinking when he committed the 2006 underage sex offence.

40 These materials make it apparent that there was evidence before the Minister upon which it was open for him to conclude at [31] that alcohol was a factor in Mr Makasa's criminal conduct to date, including when Mr Makasa committed the 2006 underage sex offence.

41 I have summarised at [14] above the other matters to which the Minister referred in considering the risk to the Australian community. That section of his reasons concludes at [49] with the finding that there is a "low risk" of sexual reoffending. The Minister finds that Mr Makasa's

ongoing family support, his past term of imprisonment and visa cancellation matters have not had the deterrent effect that the AAT thought that they would in 2013 and so views his long term prospects "with caution". He says "[w]hile Mr Makasa's recent offences are less serious, I am concerned that he still requires further progress with respect to alcohol rehabilitation".

42 I understand [49], when read in context of the earlier paragraphs in the Minister's decision, to amount to a finding that there is a low risk that Mr Makasa will reoffend with a sexual offence, but that there has in the past been a connection between his criminal conduct and alcohol use. His most recent alcohol-related offence indicates that he has not been rehabilitated in that respect. There is, as a consequence, a risk, albeit low, that he will reoffend with a crime of a sexual nature.

43 The first strand of Mr Makasa's submission is that there was no evidence capable of supporting a conclusion that he might commit further sexual offences. Mr Makasa submits that facts of the present case are analogous to those in *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 2000; (2017) 255 FCR 81 (***Muggeridge***). In that case, Charlesworth J (Flick and Perry JJ agreeing) noted that in the exercise of his discretion under s 501(2) of the Act the Minister must necessarily postulate what might occur in the future should the visa not be cancelled and should he remain present in Australia (at [36]), but that it is necessary for the hypothesis underlying any decision to bear some rational connection to the evidentiary materials upon which the Minister is said to have relied. There, the Minister made express findings that included that Mr Muggeridge had not committed any offence since 1991, that he was fully engaged in his community and a close family and that, critically, he had demonstrated rehabilitation. In view of those findings the Court found that it could not be concluded that the Minister implicitly found Mr Muggeridge to be a person having the propensities of a past offender to reoffend. Even if the starting point of the Minister's reasoning was an unstated presumption that Mr Muggeridge had a propensity to offend, the court could not see how such an unstated concern could have survived the Minister's express conclusion, properly based on the weight of the evidence, that he had demonstrated rehabilitation (at [49]).

44 However, the facts in the present case are not directly analogous. In particular, two matters were stated by the Minister at [49] of his reasons to influence the conclusion that there was a low risk of sexual reoffending. First, that since the 2013 AAT decision the deterrent effects of his past terms of incarceration, visa cancellation and effects on family had not been effective. That is a matter that might not have much weight, because of the minor nature of those offences

and the lack of bearing they have on the 2006 underage sex offence, but the question of weight is the province of the decision maker. The second is the finding that Mr Makasa "still requires further progress with respect to alcohol rehabilitation". That conclusion is expressed against the background of the Minister's notation of the report of Dr Ashkar, which linked all of his prior offences to the consumption of alcohol, and the Minister's observation (at [43]) that one of the 2017 offences was alcohol related, namely a mid-range PCA drink driving offence. Accordingly, unlike *Muggeridge*, this is not a case where the Minister relies only on the fact of the prior offence (here, the 2006 underage sex offence) to form the basis of a finding that there is a likelihood of similar offending. The Minister also relies on the connection between alcohol and Mr Makasa's prior criminal conduct. Whilst alcohol was not identified by the Court as a factor in the commission of the 2006 underage sex offence, the psychologist did identify a connecting factor with it and it was not legally unreasonable for the Minister to take this into account in balancing the considerations that led to his conclusion.

45 Mr Makasa next contends that the Minister's critical findings at [101] of his decision are no more than the Minister seeking to revisit the cancellation of Mr Makasa's visa under s 501(2) of the Act, which had already been considered in the 2013 AAT decision. In that decision at [70], Deputy President Tamberlin QC had found that there was not an unacceptable risk of harm to the Australian community if Mr Makasa's visa was not cancelled. Mr Makasa submits that it was legally unreasonable for the Minister to cancel the visa under s 501(2) of the Act on the primary foundation of the 2006 sexual offences, when the AAT had already resolved not to exercise the power conferred by the same section of the Act by reference to the same 2006 offences. However, where several years have passed since the decision of the AAT was made, and further factual matters such as the 2017 offences have arisen, the Minister is able to take those matters into account in considering his position. As I have noted, in the present case, the decisive factor was the conviction of Mr Makasa for driving with a mid-range PCA. That was a factor that could not have been the subject of consideration before the AAT.

46 The next argument advanced by Mr Makasa is that in assessing the extent of impediments that he would face if removed to Zambia, the Minister found that his aunt and extended family in Zambia would "go some way to assisting" him to adjust to life in that country. This finding, Mr Makasa submits, lacks a rational foundation and is devoid of intelligible justification.

47 The criticised finding of the Minister is at [95]:

> While I accept that Mr MAKASA's immediate family reside in Australia, I am also

> aware that Mr MAKASA does have extended family in Zambia. I note that he has an aunt who resides in Zambia and while he does not have a relationship with her and while the support of his extended family in Zambia may be limited it will go some way to assisting with his adjustment to life in Zambia. Nonetheless given the economic situation in Zambia, and taking into account Mr MAKASA's skills and employment prospects I accept that he will face practical and financial hardship in adjusting to life in Zambia.

48 That reasoning is not arbitrary or irrational in the relevant sense. The Minister here decides that the existence of an extended family, including an aunt in Zambia, "will go some way" to assisting with Mr Makasa's adjustment to life in Zambia. Nevertheless, he observes that the assistance will be "limited".

49 In conclusion, ground 1 of the application for review must fail.

7. GROUND 2: NO POWER

50 In ground 2, Mr Makasa contends that the power in s 501(2) of the Act is not available for exercise in relation to the same person on the same facts and circumstances, where that original exercise of power resulted in a decision not to cancel a person's visa. In this regard, he relies on *obiter dicta* advanced by Dowsett J in *Minister for Immigration & Multicultural & Indigenous Affairs v Watson* [2005] FCAFC 181; (2005) 145 FCR 542 at [7] (***Watson***). Mr Makasa submits if the Minister disagreed with the decision of the AAT not to cancel his visa, then he should have attempted to set it aside. In the case of the Minister's decision in the present case, he determined that Mr Makasa's visa should be revoked on the basis of the same 2006 offences as those that were the subject of the 2013 AAT decision. Mr Makasa submits that the Minister was not permitted to exercise the statutory power in s 501(2) again in the present case. Mr Makasa accepts that had the Minister relied upon his more recent offending to determine that Mr Makasa posed an unacceptable risk of harm to the Australian community, then this ground of appeal would have no merit. But, he submits, given that the findings of the Minister in relation to the 2017 offences were not relevant to the Minister's assessment of the risk of Mr Makasa representing an ongoing risk of harm to the Australian community, the ground has merit.

51 In my view the predicate to the success of the ground articulated by Mr Makasa does not exist. For the reasons that I have explained, on a fair reading of the decision, the Minister did take into account the 2017 offences, and most particularly the 2017 PCA offence, as forming the basis for his conclusion under s 501(2).

52 Section 33(1) of the *Acts Interpretation Act 1901* (Cth) provides:

> **33 Exercise of powers and performance of functions or duties**
>
> *Powers, functions and duties may be exercised or must be performed as the occasion requires*
>
> (1) Where an Act confers a power or function or imposes a duty, then the power may be exercised and the function or duty must be performed from time to time as occasion requires.

53 In *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185; (2016) 247 FCR 500 (Griffiths, Mortimer and Perry JJ), Griffiths and Perry JJ held at [36] that, consistent with that provision:

> …where a new relevant fact which potentially bears upon the exercise of the power under s 501(2), that power may be exercised in an appropriate case to cancel a person's visa notwithstanding that there was an earlier decision based on more limited facts not to cancel the visa.

54 In view of these matters, ground 2 of the application for review cannot succeed.

8. DISPOSITION

55 The application for review must be dismissed. Mr Makasa must pay the Minister's costs.

I certify that the preceding fifty-five (55) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Burley.

Associate:

Dated: 31 October 2018