FEDERAL COURT OF AUSTRALIA

Ali v Minister for Home Affairs [2018] FCA 1895

File number:	NSD 1407 of 2018
Judge:	**BROMWICH J**
Date of judgment:	30 November 2018
Catchwords:	**MIGRATION** – application for judicial review of decision of Administrative Appeals Tribunal to affirm decision of delegate of first respondent to refuse to revoke decision to cancel applicant's visa – whether Tribunal misconstrued *Direction No. 65* by misconstruing [14.2(1)], by incorrectly relying upon a "*balance of probabilities*" standard, by erroneously assessing expectations of the Australian community, or in erroneously expressing its final conclusions – whether decision of Tribunal was infected by jurisdictional error by reason of legal unreasonableness – **held:** both grounds of review must fail – **held**: application dismissed
Legislation:	*Judiciary Act 1903* (Cth) s 39B *Migration Act 1958* (Cth) ss 499, 501(3A), (6)(a), (7)(c), 501CA(4)(b)(ii)
Cases cited:	*Afu v Minister for Home Affairs* [2018] FCA 1311 *Buadromo v Minister for Immigration and Border Protection* [2017] FCA 1592 *Contreras v Minister for Immigration and Border Protection* [2015] FCAFC 47 *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166; 153 ALD 338 *DAF18 v Minister for Home Affairs* [2018] FCA 1367 *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26; 310 ALR 1 *Hooton v Minister for Home Affairs* [2018] FCAFC 142 *Minister for Home Affairs v Buadromo* [2018] FCAFC 151 *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158 *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 *QSVS v Minister for Home Affairs* [2018] FCAFC 124

	Romanov v Minister for Home Affairs [2018] FCA 1494 *Schmidt v Minister for Immigration and Border Protection* [2018] FCA 1162 *Siueve v Minister for Home Affairs (Migration)* [2018] AATA 1079 *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 *Tupai v Minister for Home Affairs* [2018] FCA 986 *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348 *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116 *Wehi v Minister for Immigration and Border Protection* [2018] FCA 1176 *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466
Date of hearing:	9 November 2018
Registry:	New South Wales
Division:	General
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	63
Counsel for the Applicant:	Mr J Donnelly with Mr J Adamopoulos
Solicitor for the Applicant:	Kyu & Young Lawyers
Counsel for the First Respondent:	Mr M Cleary
Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

NSD 1407 of 2018

BETWEEN:	**SHAMSHER ALI** Applicant
AND:	**MINISTER FOR HOME AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
JUDGE:	**BROMWICH J**
DATE OF ORDER:	**30 NOVEMBER 2018**

THE COURT ORDERS THAT:

1. The amended originating application be dismissed.

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

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

REASONS FOR JUDGMENT

BROMWICH J:

Introduction

1 The applicant, Mr Shamsher Ali, is a 59-year-old citizen of Fiji. He came to Australia in 1988 when he was approximately 29 years of age. In 2012, he was granted a Class BB Subclass 155 Five Year Resident Return visa, which enabled him to live and work in Australia and also to return to Fiji, which he ostensibly did for a short time in 2013. That visa was the subject of mandatory cancellation on character grounds, by reason of a substantial criminal conviction (Mr Ali having been sentenced to imprisonment for 12 months or more, albeit suspended) and serving a gaol term for a later criminal conviction at the time of the cancellation decision. Each conviction arose from domestic violence offences. By reason of no longer having a visa, Mr Ali was taken into immigration detention upon concluding his prison sentence.

2 Mr Ali sought revocation of the decision of his visa cancellation. A delegate of the first respondent, the Minister for Home Affairs, refused to revoke the cancellation decision. Mr Ali applied to the second respondent, the Administrative Appeals Tribunal, for merits review of the delegate's decision. On 17 July 2018, the Tribunal affirmed the delegate's decision. Mr Ali challenges the Tribunal's decision by way of judicial review under s 39B of the *Judiciary Act 1903* (Cth).

3 It was not in dispute that the schemes for visa cancellation on character grounds and revocation of a cancellation decision in the *Migration Act 1958* (Cth) meant that:

(1) by reason of Mr Ali's 2010 conviction and gaol sentence of a year or more (albeit suspended) and the fact that in 2017 he was serving a gaol term for a subsequent conviction at the time of the visa cancellation decision, he failed the "*character test*" and his visa was subject to mandatory cancellation: s 501(3A), (6)(a) and (7)(c);

(2) by reason of his prior 2010 conviction and sentence, he could not pass the "*character test*" as a means of securing the revocation of the visa cancellation decision: s 501CA(4)(b)(i); and

(3) the question for determination by the Tribunal was whether there was "*another reason*" why the cancellation decision should be revoked: s 501CA(4)(b)(ii).

Direction No. 65 under s 499 of the Migration Act

4 In conducting merits review of the delegate's revocation decision, and in particular in determining whether there was "*another reason*" why the cancellation decision should be revoked, the Tribunal (like the delegate, but unlike the Minister) was bound by **Direction** No. **65**, made by the Minister under s 499 of the *Migration Act*.

5 Mr Ali's challenge concerns the way in which the Tribunal determined that the reasons he advanced for revocation should not prevail so as to reverse the delegate's adverse revocation decision. It was common ground that the mandatory "*other*" considerations in [14(1)] of Direction 65 were not exhaustive. In the Tribunal, Mr Ali relied in particular upon the following parts of Direction 65, which are reproduced below:

(1) the strength, nature and duration of his ties to Australia: [14(1)(b)]; and

(2) the extent of the impediments he would face if he were made to return to Fiji by reason of his visa remaining cancelled: [14(1)(e)].

6 Because Mr Ali's case turns in significant measure on the precise terms of particular paragraphs of Direction 65, and because the Minister relies on the precise terms of other paragraphs, it is convenient to reproduce the following extracts that are raised by, or relevant to, the competing arguments, so as to make the consideration of those arguments below easier to follow:

> **6. Preamble**
>
> **6.1 Objectives**
>
> …
>
> **6.2 General Guidance**
>
> (1) The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The principles below are of critical importance in furthering that objective, and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable.
>
> …
>
> **6.3 Principles**
>
> (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement network, and will not cause or threaten harm to individuals or the Australian community.

(2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.

(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

(4) 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.

(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, or 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.

(6) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.

(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.

…

Section 2 Exercising the discretion

7. How to exercise the discretion

(1) Informed by the principles in paragraph 6.3 above, a decision-maker:

…

b) must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked.

…

8. Taking the relevant considerations into account

…

(4) Primary considerations should generally be given greater weight than the other considerations.

(5) One or more primary considerations may outweigh other primary considerations.

…

PART C

13. Primary considerations – revocation requests

…

(2) In deciding whether to revoke the mandatory cancellation of a non-citizen's visa, the following are primary considerations:

a) Protection of the Australian community from criminal or other serious conduct;
b) The best interests of minor children in Australia;
c) Expectations of the Australian community.

[This is followed by the following topics addressing the primary considerations list in [13(2)]:
13.1 Protection of the Australian community
13.1.1 The nature and seriousness of the conduct
13.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct
13.2 Best interests of minor children in Australia affected by the decision
13.3 Expectations of the Australian community]

…

14. Other considerations – revocation requests

(l) In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):
a) International non-refoulement obligations;
b) Strength, nature and duration of ties;
c) Impact on Australian business interests;
d) Impact on victims;
e) Extent of impediments if removed.

14.1 International non-refoulement obligations

…

14.2 Strength, nature and duration of ties

(1) The strength, nature and duration of ties to Australia. Reflecting the principles at 6.3, decision-makers must have regard to:

a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:

i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and

ii. More weight should be given to time the non-citizen has spent contributing positively to the Australian community.

b) The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of non-revocation on the non-citizen's immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely).

14.3 Impact on Australian business interests

…

14.4 Impact on victims

(1) Impact of a decision not to revoke on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims where that information is available and the non-citizen being considered for revocation has been afforded procedural fairness.

14.5 Extent of impediments if removed

(1) The extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

a) The non-citizen's age and health;

b) Whether there are substantial language or cultural barriers; and

c) Any social, medical and/or economic support available to them in that country.

Tribunal reasons

7 Mr Ali's family and personal history was summarised by the Tribunal at the outset, before being considered in more detail, as follows (at [2] and [3]):

> Mr Ali is 59 years of age and arrived in Australia from Fiji in 1988. He has resided here since that date. He has a partner, Munifa Bibi, who he met in Australia in 1989 and with whom he has lived ever since. They are united in the bonds of a religious marriage, although that partnership, which I accept as entirely genuine, has not been formally registered under the *Australian Marriage Act 1961* (Cth). The Alis have two adult children and three grandchildren, all of whom are Australian citizens. In addition, Mr Ali has three sisters (two of whom are Australian citizens, and one a citizen of New Zealand) and an Australian citizen brother.
>
> During his time in Australia, Mr Ali initially was in the full-time workforce for a period of some 20 years until he sustained a severe work injury in 2009, since when he has been unable to work and, in more recent years, his partner has become his full-time carer. There is medical evidence before the Tribunal which confirms the degree of Mr Ali's resultant disability.

8 The Tribunal found that Mr Ali had an extensive criminal record. The general nature of that criminal record, and the specific convictions leading to the visa cancellation, were summarised in the Tribunal's reasons as follows (at [4], [9] and [10]):

> Mr Ali has made at least 23 appearances before the Courts between April 1993 and April 2017. His convictions include 2 for refusing to undertake a breath analysis; 6 for driving while disqualified or while his license was suspended; 5 for mid-range prescribed content of alcohol (PCA); 1 for resisting police; 3 for assaulting police; 2 for common assault; 2 for assault occasioning actual bodily harm; and 2 for common assault (domestic violence).

> …
>
> Over the course of his offending, Mr Ali has received sentences involving two Community Service Orders (totalling 300 hours); four periods of periodic detention; and the following four sentences of imprisonment:
>
> > ***20 November 2006*** *– driving while disqualified from holding a licence – imprisonment for 6 months suspended on entering into bond s12 (6 months);*
> >
> > ***17 March 2010*** *– common assault (domestic violence) – imprisonment for 12 months suspended on entering into bond s12 (121 months);*
> >
> > ***17 March 2010*** *– common assault – imprisonment for 4 months suspended on entering into bond s12 (4 months); and*
> >
> > ***13 April 2017*** *– assault occasioning actual bodily harm (domestic violence) – imprisonment 9 months commencing 13 April 2017 concluding 12 January 2018 – non-parole period with conditions: 4 months commencing 13 April 2017 concluding 12 August 2017 – release subject to supervision.*
>
> The April 2017 assault concerns a conviction of Mr Ali for a serious act of domestic violence perpetrated against his wife who was also the victim of the March 2010 assault. In the April 2017 assault Ms Bibi suffered facial injuries and the assault resulted in her calling the police, as is detailed at paragraph 76 below.

9 It is convenient to summarise the balance of the Tribunal's reasons in the form of a narrative to contextualise the specific complaints that Mr Ali makes about them. Certain parts of the reasons from which this narrative is drawn are considered in more detail in the course of addressing the grounds of review.

10 The Tribunal summarised the evidence presented in support of Mr Ali by various members of his family, with a particular focus on exculpatory explanations and qualifications given for the domestic violence incident, which were not found to be particularly credible. In substance, that was because of attempts made to downplay the seriousness of the offending, and in part to suggest an account of events that was different to the findings made on sentence. The Tribunal preferred to rely upon the findings of the magistrate in the Local Court of New South Wales.

11 The Tribunal then turned to Direction 65. The Tribunal considered each of the three primary considerations in [13(2)] in some detail, concluding that:

(1) the primary consideration of protection of the Australian community would be better served if Mr Ali's visa remained cancelled (the precise words used were "*being revoked*"), noting that the Tribunal was not prepared to assess Mr Ali's risk of reoffending as low, but instead agreed with the delegate that there was a likelihood that his offending would reoccur;

(2) the primary consideration of the best interests of minor children in Australia, being Mr Ali's three young grandchildren to his single-parent daughter, who lived with him and his wife, should be counted as weighing in Mr Ali's favour. However, the Tribunal considered this to be qualified by the fact, to which the sentencing magistrate had given considerable weight, that Mr Ali was prepared to assault and beat his wife in front of one of his young grandchildren and that it could not be in the best interests of any minor child to watch his grandfather assault and beat his grandmother and to see her be injured, flee into the street in fear of her safety and call the police; and

(3) in relation to the primary consideration of the expectations of the Australian community, that expectation was that a man who beats his wife in front of one of his grandchildren, has been before the courts on some seven occasions for assaulting people, has been sentenced to three separate terms of imprisonment, has an appalling driving record which evidences a complete contempt for laws of Australia and blames his wife for her own victimhood, should not be the holder of an Australian visa.

12 The Tribunal considered the five "*other*" considerations in [14(1)] in some detail, concluding in relation to the three operative considerations that:

(1) as to the strength, nature and duration of ties to Australia, Mr Ali obviously has significant ties to Australia, having:

(a) lived here for just over half of his life;

(b) contributed to the Australian community while he was in gainful employment for some 20 years, where he would have worked longer but for an industrial accident;

(c) been a taxpayer;

(d) with his wife, freehold title to the family home;

(e) extensive family ties and connections through his children, grandchildren, siblings, nephews and nieces, whose support for him was manifest and sincere;

(f) contributed emotionally and financially to the welfare of members of his extended family; and

(g) several family members who express a degree of dependence on him and record a significant impact on their lives as a result of his removal into custody, with him being uniformly described as helpful and caring,

but that, against those factors, Mr Ali did not appear to have accepted that domestic violence was unacceptable to the Australian community and his very poor driving record demonstrated a continuing contempt for and disregard of the laws of Australia – in balancing these competing factors, the Tribunal found that, overall, this consideration counted in favour of Mr Ali's revocation application being granted;

(2) as to the impact on victims, despite the fact that Mr Ali's wife was the victim of his domestic violence assaults, it would be improperly disrespectful if the Tribunal were not to give weight to her continuing support for him and, accordingly, despite misgivings, this consideration did not of itself weigh against his revocation application being granted; and

(3) as to the extent of impediments he would face if removed, there were undoubtedly "*some impediments*" facing Mr Ali if he were required to return to Fiji that were not necessarily easy to assess, namely:

(a) removal from his extended family network;

(b) the poorer quality of healthcare available in Fiji, his age and his disabilities (with the Tribunal having footnoted Mr Ali's medical reports that indicated a combined total of 50% whole person impairment); and

(c) it being hard to secure employment and therefore a regular income, given his lack of fitness to work;

but, on the other hand:

(d) Mr Ali was in Fiji until he was 29 years of age, was educated and grew up there and it could not be asserted that he would be unfamiliar with the country, its language, social customs, mores or culture; and

(e) on the basis of his indication at the Tribunal hearing that he would sell the family home, he would have considerable financial resources by Fijian standards, even if his wife had indicated an intention to continue living in the family home and was perhaps not aware of his intentions,

and that overall, the impediments he faced in relation to this consideration weighed in favour of his revocation application.

13 The Tribunal's conclusions referred to prior Tribunal decisions on the approach taken to weighing competing considerations under a prior version of Direction 65, and the decision of this Court in *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 to

the effect that "*other*", or non-primary, considerations were not necessarily of "*lesser weight*". The Tribunal then gave the following reasons for affirming the delegate's decision (at [152]-[154]):

> In terms of the "primary considerations", in the opinion of the Tribunal, while the best interests of the minor children weigh marginally in favour of setting aside the revocation, the safety of the Australian community and its expectations weigh significantly in favour of sustaining that revocation.
>
> In terms of the "other considerations", on balance, they weigh in Mr Ali's favour, although only marginally so, and only by giving the benefit of the doubt to the testimony of Ms Bibi.
>
> Taken together, the Tribunal comes to a firm conclusion that due to Mr Ali's repeated offences of a violent nature; his disregard for the laws of Australia; his failure to appreciate the gravity of domestic violence and to accept responsibility for his actions; and above all, his failure to have taken the opportunity, after having two custodial sentences imposed on him but suspended, to avoid further acts of violence, he has forfeited any entitlement to the benefits of having a visa to remain in Australia.

Grounds of review

14 Mr Ali relies upon two grounds of review in an amended originating application filed on 17 October 2018, asserting, with detailed particulars, that:

(1) the Tribunal had misconstrued Direction 65 in four different ways; and

(2) the Tribunal's decision was infected by jurisdictional error by reason of legal unreasonableness in numerous aspects of the process of weighing "*other considerations*" as only marginally in favour of revocation.

15 Each ground of review raises a number of different issues for consideration. It is convenient to address each of the grounds in the manner advanced in Mr Ali's written submissions in chief and in reply, as also addressed in oral submissions at the hearing of the application, and as responded to by the Minister orally and in writing.

Ground 1 – misconstruing Direction 65

Limb 1 – misconstruing [14.2(1)] of Direction 65

16 The second sentence of [14.2(1)] of Direction 65, reproduced at [6] above, required the Tribunal, in assessing the "*other consideration*" of Mr Ali's strength, nature and duration of ties to Australia, to have regard to:

(1) how long Mr Ali had been residing in Australia (giving less weight to those factors if any offending took place soon after arriving in Australia, and giving more weight by reference to time spent contributing positively to the Australian community); and

(2) family or social links with Australian citizens and others with a right to remain in Australia, including immediate family in particular.

17 There is no complaint that this requirement was observed. The Tribunal took into account Mr Ali's 30 years in Australia, his employment for 20 years and his extensive family ties and aspects of the quality of those ties. The Tribunal also noted that there was no evidence of any contribution by Mr Ali to community or social organisations beyond family. Rather, Mr Ali's complaint lies in the Tribunal going beyond the matters specifically adverted to in [14.2(1)] of Direction 65. Before concluding that this "*other consideration*" favoured revocation, the Tribunal stated the following (at [132]):

> On the other hand, the Tribunal is also conscious of the fact that Mr Ali has been in Australia for a sufficient length of time to know that domestic violence is unacceptable to the Australian community and contrary to the standards expected of responsible members of it. He does not appear to have accepted or internalised this premise. Equally, his very poor driving record demonstrates a continuing contempt for, and disregard of, the laws of Australia.

18 Mr Ali contends that this additional reasoning entailed an erroneous (in the sense of being a forbidden and thus vitiating) consideration of the domestic violence and driving matters referred to because:

(1) his domestic violence and driving record had already been considered when addressing the primary considerations of protection of the Australian community and expectations of the Australian community, and he had not committed any offences until five years after coming to Australia, which was not "*soon after*" he had arrived;

(2) his driving record was not "*continuing*" because his last driving offence was 12 years ago; and

(3) consideration of domestic violence was not the exercise "*mandated*" by [14.2(1)].

19 In the course of oral argument, counsel for Mr Ali accepted the proposition that his objection to [132] as argued was due to it being where it was in the Tribunal's reasons, and that it would not have been a problem if the same paragraph had appeared either in the primary consideration part (that is, proximate to [70], [78], [110] or [119]) or in the conclusions part, proximate to [149]. This entirely appropriate concession revealed a fatal flaw in the assertion of

jurisdictional error. It is impossible to accept that a consideration is irrelevant, in the sense of being forbidden, by reason of when and where it is considered, rather than whether it is considered, in the absence of the text of Direction 65 precluding such a course by express words or necessary inference or implication. There are no such express words. For the reasons that follow, such implication or inference as may reasonably be drawn is against Mr Ali's argument.

20 Mr Ali's argument itself entails a misreading of [14.2(1)]. By mandating that less weight should be given to the strength, nature and duration of ties to Australia if offending has taken place soon after arriving in Australia, Direction 65 necessarily contemplates that the fact of offending having taken place may be relevant to the weight to be attached to this "*other consideration*". The limitation requiring less weight to be given to ties when offences have been committed soon after arriving in Australia does not support any inference that offences committed a longer period after arrival are irrelevant. Rather, it leaves the weighing exercise unfettered in this way when offences have not been committed soon after arrival.

21 Moreover, criminal offending is not inherently a factor that only relates, in a stand-alone and quarantined fashion, to the protection of, and expectations of, the Australian community. The commission of criminal offences may be seen also to have a bearing on the quality of a revocation applicant's ties, or asserted ties, to Australia, at least as to the strength or nature of those ties, and perhaps also their duration. That may be seen to be particularly so when, as here, the ties relied upon pertain to family, and yet offences have taken place in relation to a family member and could well have affected other family members, such as the grandchild who witnessed one of the assaults.

22 Similarly, driving offences, especially those involving risk to the public, such as through intoxication, may similarly reflect qualitatively upon the nature of an applicant's asserted ties with Australia, insofar as they may have a bearing on claims of a positive contribution to Australian society, or even indicate a negative contribution.

23 The Tribunal was entitled to assess the strength, nature and duration of Mr Ali's ties to Australia holistically and in context, and not just in isolation. This includes having regard to whether, and, if so, how, the quality of those ties was affected by Mr Ali's record of domestic violence and his poor driving record. That is so even though that driving record was misdescribed at one in point in the Tribunal's reasons as "*continuing*", and correctly described elsewhere as being in the past. Paragraph 14.2(1) of Direction 65 did not preclude this approach to the assessment of the strength, nature and duration of Mr Ali's ties to Australia. To the

contrary, by expressly mandating how offending closer to the time of arrival in Australia was to be weighed in assessing the strength, nature and duration of ties to Australia, the appropriateness of taking offending into account in the assessment of this "*other consideration*", which was already apparent as a matter of logic, is made express. It follows that no error is manifested by [132] of the Tribunal's reasons, let alone jurisdictional error.

Limb 2 – incorrectly relying upon a "balance of probabilities" standard

24 Under the heading "*Matters for the Tribunal's consideration*", the Tribunal correctly described the statutory framework for the revocation of a mandatory visa cancellation, and the undisputed fact that Mr Ali did not past the character test. In those circumstances, the issue before the Tribunal was correctly described as whether, for the purposes of s 501CA(4)(b)(ii) of the *Migration Act*, there was "*another reason*" why the visa cancellation decision should be revoked. The Tribunal then stated (at [38]-[40], with footnotes embedded in the text in square brackets and emphasis in original):

> In *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166, North ACJ elaborated on how to approach this discretion:
>
> > *The preferable conclusion is that s 501CA(4)(b)(ii) requires the Minister to examine the factors for and against revoking the cancellation. If satisfied, following an assessment and an evaluation of those factors, that the cancellation should be revoked, the Minister is obliged to act on that view. There is a single, not a two stage, process and the Minister does not have a residual discretion to refuse to revoke the cancellation if satisfied that it should be revoked.* [at [38]]
>
> It has also been stated by this Tribunal that:
>
> > *The existence or otherwise of "another reason" should be established on the balance of probabilities.* [*Siueva v Minister for Home Affairs (Migration)* [2018] AATA 1079 at [21]]
>
> **The Evidence on the Applicant's Behalf**
>
> However, before proceeding to consider matters according to the requirements set out in the Direction, the Tribunal thinks it appropriate to interpolate a summary of the evidence presented in support of Mr Ali by various members of his family.

25 No issue was taken by Mr Ali as to the correctness of the Tribunal relying on the passage quoted above from *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166; 153 ALD 338 at [38]. However, Mr Ali contended that the subsequent quote from the prior Tribunal decision of *Siueve v Minister for Home Affairs (Migration)* [2018] AATA 1079 at [21] entailed asking the wrong question, so as to constitute jurisdictional error.

26 Reliance was placed by Mr Ali upon the following propositions established by authority that he cites as to the application of the "*another reason"* criterion under s 501CA(4)(b)(ii) of the *Migration Act*:

(1) the necessary state of satisfaction as to whether or not there is "*another reason*" why the visa cancellation decision should be revoked requires weighing the factors for and against that outcome: *Romanov v Minister for Home Affairs* [2018] FCA 1494 at [2]; *Hooton v Minister for Home Affairs* [2018] FCAFC 142 at [52]; *DAF18 v Minister for Home Affairs* [2018] FCA 1367 at [29]; *Wehi v Minister for Immigration and Border Protection* [2018] FCA 1176 at [28]-[29]; *QSVS v Minister for Home Affairs* [2018] FCAFC 124 at [20]; *Tupai v Minister for Home Affairs* [2018] FCA 986 at [30];

(2) there is a statutory obligation to consider whether the required state of satisfaction is met by reference to the material presented in the representations made in support of revocation: *Buadromo v Minister for Immigration and Border Protection* [2017] FCA 1592 at [49] (it is noted that that decision was overturned by the Full Court of this Court in *Minister for Home Affairs v Buadromo* [2018] FCAFC 151, but not in such a way as to cast doubt on this proposition); ***Viane*** *v Minister for Immigration and Border Protection* [2018] FCAFC 116 at [66], [72] and [75]; *Hay v Minister for Home Affairs* [2018] FCAFC 149 at [13]; *Tupai v Minister for Home Affairs* [2018] FCA 986 at [116];

(3) the civil standard in the *Evidence Act 1995* (Cth) is not applicable to a decision under s 501CA(4)(b)(ii): *Schmidt v Minister for Immigration and Border Protection* [2018] FCA 1162 at [28];

(4) the "*other reason*" must be a reason that carried "*sufficient weight or significance*" to satisfy the decision-maker that the cancellation decision should be revoked: *Viane* at [64];

(5) a party to Tribunal proceedings bears no onus of proof, nor any onus to establish facts to any particular pre-determined standard, citing *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26; 310 ALR 1 at [34] for the fundamental proposition that notions of standard and onus of proof do not find "*ready accommodation in administrative decision making, where no issue is joined between parties*";

(6) the concept of community expectations is not a matter to be measured as though it were a provable fact, but, rather, as an assessment made on behalf of the community: *Afu v Minister for Home Affairs* [2018] FCA 1311 at [85] (see also ***YNQY*** *v Minister for*

Immigration and Border Protection [2017] FCA 1466 at [76]-[77] and ***Uelese*** *v Minister for Immigration and Border Protection* [2016] FCA 348 at [64]-[65], relied upon by Mr Ali in relation to the next limb of this ground of review, considered below).

27 In reliance upon the above authority, Mr Ali submits that the primary consideration of community expectations is not to be determined by reference to the evidentiary standard of the balance of probabilities.

28 The Minister did not dispute that the Tribunal should not be applying the curial and adversarial evidentiary standard of balance of probabilities to ascertain whether it had the requisite state of satisfaction as to whether "*another reason*" advanced by Mr Ali was sufficient. However, the Minister submitted that this reference complained of was, in effect, inoperative, because it could not be shown that this inappropriate test had in fact been applied by the Tribunal. Rather, the Minister submitted, it was clear that when the Tribunal's reasons were read as a whole, it had engaged in the necessary weighing process identified in *Viane* at [65].

29 Counsel for Mr Ali was asked to identify where in the Tribunal's reasons this erroneous reference was said to have infected the decision. He submitted that it should be inferred that the Tribunal's reasons was infected by this error on the topic of the extent of the impediments that Mr Ali would face if required to return to Fiji. Particular reliance was placed on [145] of the Tribunal's reasons.

30 Before turning to the argument advanced as to [145] of the Tribunal's reasons, it is necessary to provide the context as well as the text of that paragraph. The Tribunal, at [142]-[143], noted the loss of family support that Mr Ali was facing, and his serious health problems and lack of access to employment and accommodation in Fiji. The following was then said (emphasis added):

> 144. On the other hand, Mr Ali lived in Fiji until he was 29 years of age, was educated and grew up there, and so it cannot be asserted that he would be unfamiliar with the country, its language, social customs, mores or culture. This is not a case of a person facing removal to a country which they have never visited or where they have no familiarity with the language and culture.
>
> 145. **He would, on the other hand, have considerable financial resources (by Fijian standards) as he informed the Tribunal that if he were required to return, he would "*sell the house*". The Tribunal has no way of assessing the value of a four bedroom house in Ropes Crossing, but it cannot imagine, given the nature of the dwelling and the location, that it would be negligible and Mr Ali apparently owns it freehold.**

> 146. On this point, the Tribunal noted that while Mr Ali stated very clearly that, if he were forced to return to Fiji:
>
> *I would sell the house and the family would have nowhere to live.*
>
> 147. This does not appear to be the understanding of Ms Bibi (or perhaps she is unaware of Mr Ali's intentions) who told the Tribunal that if Mr Ali were removed, she would not follow him to Fiji and would "*continue to live*" in the family home.
>
> 148. On balance, this criterion should be assessed as weighing in Mr Ali's favour.

31 Mr Ali submitted that [145], emphasised above, appeared to involve the Tribunal making a finding that the applicant would have considerable financial resources by Fijian standards, and that, in doing so, had applied the balance of probabilities in choosing between the evidence of Mr Ali's intentions and the competing evidence from Mr Ali's wife referred to at [147] in reaching the conclusion expressed at [148]. This argument is sought to be reinforced by the absence of an express reference to the state of satisfaction that was required to be considered and either reached or not reached by the Tribunal in its conclusions at [149]-[155] (which are addressed as part of ground 1, limb 4 at [40]-[42] below).

32 I am unable to detect in the text of the impugned [145], in the context of the preceding [141]-[144], the following [146]-[148], or the concluding paragraphs from [149]-[155], any sign that the references to "*on the other hand*", or any other aspect of the reasoning deployed by the Tribunal, entailed the Tribunal doing anything more than was permitted – indeed, required – in weighing up the competing factors and reaching its ultimate conclusion. There is no reference, for example, to any finding that the Tribunal was satisfied, by the application of the curial standard of balance of probabilities, that a finding should be made one way or the other. To interpret the passages impugned in any other way is to consider the reasons with an eye keenly attuned to the perception of error, rather than the required beneficial reading: *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** (1996) 185 CLR 259 at 271-2.

33 It follows that this basis for asserting jurisdictional error fails not on the point of principle, which is not in doubt, but on a want of establishing that any such error has in fact taken place in the process of the Tribunal making its decision so as to vitiate the conclusion reached. For completeness, I should add that no such error is apparent in any other passages in the Tribunal's reasons, going beyond those identified and relied upon by Mr Ali.

Limb 3 – error in assessing the expectations of the Australian community

34 As part of its assessment of the primary consideration of the expectations of the Australian community, the Tribunal set out in some detail relevant passages of Direction 65, and numerous decisions of this Court and of the Tribunal, including specifically on the topic of domestic violence. The Tribunal concluded by saying (at [120]-[121], emphasis added):

> The Tribunal's assessment of the calculus referred to above, is that the Australian community would expect that a man who beats up his wife in front of one of his tiny grandchildren, has been before the courts on some seven occasions for assaulting people, has been sentenced to three separate terms of imprisonment, has an appalling driving record which evidences a complete contempt for the laws of Australia and actually blames his wife for her own victimhood, should not be the holder of an Australia visa.
>
> On this criterion, that is also **the opinion of the Tribunal**.

35 Mr Ali relied upon the cases cited above of *YNQY* and *Uelese* as to the expectations of the Australian community being a statement of the views or policy of the government, rather than being something ascertainable as some kind of objective fact. A delegate or the Tribunal is required to act upon the Government's views as to such expectations. Mr Ali contends that the Tribunal transgressed on its proper function in this regard when it referred to its opinion as to what the community would expect, because this injected an impermissible subjective dimension into this consideration. In making that assertion, reliance was placed on the statement of Griffiths J in *Minister for Immigration and Border Protection v* ***Stretton*** [2016] FCAFC 11; 237 FCR 1 at [70(d)] as to the concept of community expectations having the potential to "*mask a subjective value judgment and to distort the objectivity of the decision-making process*". In aid of this argument, Mr Ali also relied upon the earlier subjective expression by the Tribunal (at [110], emphasis added):

> **I believe** that the Australian community would want this Tribunal to weigh up its proper disapproval and rejection of repeated offences of assault and domestic violence, especially those committed against vulnerable women against the prospect of affording a "second chance" to offenders who are, in the Tribunal's opinion, not without risk of re-offending.

36 The nub of Mr Ali's complaint is the use of the emphasised words "*I believe*" at [110] and the words "*the opinion of the Tribunal*" at [121] as reflecting an impermissible slide into irrelevant subjective reasoning and a corresponding impermissible step of attempting to ascertain, as an objective fact, the expectations of the Australian community, vitiating the conclusion reached on this topic, and thereby the reasons of the Tribunal as a whole.

37 The Minister takes a more global or holistic approach to the Tribunal's reasons. The Minister submits that the Tribunal undertook a comprehensive consideration of the expectations of the Australian community and correctly referred to Direction 65 on this topic. This, it is submitted, included an acknowledgement by the Tribunal of authority to the effect that Direction 65 amounted to a statement of the views or policy of the government to which the Tribunal was obliged to have due regard, as against the individual circumstances of a revocation applicant. Thus, the Minister argues, the Tribunal had done no more than properly have regard to Mr Ali's circumstances, rather than making a simplistic finding as to community expectations that was adverse to him. On that view, the Tribunal had engaged in a balancing exercise of the type described and required by the Full Court in *Contreras v Minister for Immigration and Border Protection* [2015] FCAFC 47. That approach, the Minister argues, did not entail any resort to any irrelevant considerations.

38 In my view, Mr Ali's argument reads too much into the Tribunal's reasons and, in so doing, fails to read them beneficially as this Court is required to do: see again *Wu Shan Liang* at 271-2. While there may be some infelicity in the Tribunal referring to its opinion or belief, and while references of that kind are best avoided because of the risk of it leading to error, the passing use of those subjective phrases without more cannot and should not be used to obscure an assessment of the Tribunal's evaluative exercise in the absence of infected reasoning being demonstrated. Mere personal agreement, by way of opinion or belief, with a prior understanding of the expectations of the Australian community is an unnecessary gloss on the state of satisfaction required, but does not deny that state of satisfaction having been reached, nor, in this case, impugn the process by which it was reached. An agreement with what is assessed to be community expectations is a distraction. It might, in some cases, be seen to cloud the formation of the requisite state of mind, but not in this instance. I can see no error, let alone jurisdictional error, in the substantive way in which the Tribunal assessed and applied the primary consideration of community expectations. The competing factors were properly weighed against one another and a conclusion reached, as to which no error is alleged or identified.

Limb 4 – error in the expression of the final conclusions

39 The substance of Mr Ali's complaint is that the Tribunal, having posed the correct question at [37] of its reasons, namely whether under s 501CA(4)(b)(ii) there was "*another reason*" why

the cancellation decision should be revoked, failed to repeat that question in its final conclusions and squarely and precisely answer it.

40 Under the heading "*Conclusions*", the Tribunal quoted from two prior Tribunal decisions for guidance as to the general approach to be taken, each having been made under an antecedent version of Direction 65, together with a more recent decision of this Court which addressed the current Direction 65, as follows (at [149]-[151], footnotes embedded in the text in square brackets):

> After consideration of all the primary and other considerations which are required under the Direction, the Tribunal must come to a final conclusion. This final "calculus" has been characterised by the Tribunal in the following terms:
>
> > *Having considered the applicable primary considerations and the other relevant considerations in this case, the ultimate task of the Tribunal is to determine, on the basis of the appropriate weight to be given to each of those considerations having regard to Direction [41], whether or not those considerations, on balance, favour cancellation, or non-cancellation, of the visa.* [*Applicant 4262 of 2011 v Minister of Immigration and Citizenship* [2011] AATA 920 at [88]. *Ministerial Direction No. 41* was an earlier version of *Ministerial Direction No. 65*.]
>
> Giving appropriate weight is not a mechanical process, it must by the very nature of the Act and the Direction be essentially subjective – a matter of fine judgment. As the Tribunal has said elsewhere:
>
> > *The balancing process contemplated by the Direction is not a simple mechanical exercise. One does not reach a conclusion by assigning values to particular considerations and tallying the differences. Beginning with each of the primary considerations – and without forgetting other considerations that are generally regarded as being of lesser weight – we must ask ourselves: what is the preferable decision in this case?* [*Visa Cancellation Applicant v Minister for Immigration and Citizenship* [2011] AATA 690 at [49]]
>
> That is the broad approach which this Tribunal takes, although with the modification set out in *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594.

41 Mr Ali relies upon the fact that the two quotes from the earlier Tribunal decisions, at least one of which addressed the predecessor to Direction 65 (being Direction 41), did not entail restating, in terms, the language of satisfaction as to there being "*another reason*" to revoke the cancellation decision. With respect to counsel for Mr Ali, that is hardly surprising. The two quotes from those decisions, and indeed the quote from *Suleiman*, were concerned with the process of weighing and assessing competing considerations, rather than the particular statutory expression that such a process was addressing. The passages from [149]-[151] quoted

at [40] above, in the context of the correct test set out at [37], explained how the following final conclusions were reached as a process of reasoning (at [152]-[155]):

> In terms of the "primary considerations", in the opinion of the Tribunal, while the best interests of the minor children weigh marginally in favour of setting aside the revocation, the safety of the Australian community and its expectations weigh significantly in favour of sustaining that revocation.
>
> In terms of the "other considerations", on balance, they weigh in Mr Ali's favour, although only marginally so, and only by giving the benefit of the doubt to the testimony of Ms Bibi.
>
> Taken together, the Tribunal comes to a firm conclusion that due to Mr Ali's repeated offences of a violent nature; his disregard for the laws of Australia; his failure to appreciate the gravity of domestic violence and to accept responsibility for his actions; and above all, his failure to have taken the opportunity, after having two custodial sentences imposed on him but suspended, to avoid further acts of violence, he has forfeited any entitlement to the benefits of having a visa to remain in Australia.
>
> The decision under review is affirmed.

42 It does not even take a beneficial reading to appreciate that the Tribunal clearly concluded that the factors favouring revocation were outweighed by the factors that favoured not revoking the cancellation decision, summarising the substance of those conclusions at [154]. In those circumstances, having correctly stated at [34]-[37] the legislative framework, the state of satisfaction required to be reached and the issue to be determined, there is no room to doubt that the Tribunal was not satisfied that there was "*another reason*" of sufficient cogency to warrant revoking the cancellation decision. A rote and repetitive exercise of the kind that Mr Ali contends was necessary would subject the reasons of the Tribunal to a test of form ahead of substance. No error, let alone jurisdictional error, is established once the Tribunal's reasons are read as a whole.

Ground 2 – legal unreasonableness

43 The parties were not in any disagreement as to what, broadly speaking, may constitute legal unreasonableness. A court exercising a judicial review function on this basis is not entitled to remake the decision or substitute its own concepts of what is and is not reasonable, thereby straying beyond its function. What is required is an identification of the metes and bounds of the executive power being exercised by reference to its terms, scope and purpose to see if they have been exceeded: *Stretton* at [8]-[13], [52]-[59] and [92].

44 The Full Court in *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158 provided a useful summary of the leading authorities (at [58]-[60]):

> 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).
>
> 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 197at 203[23]. Nor does it involve the Court remaking the decision according to its own view of reasonableness: *Stretton* at [8] (Allsop CJ).
>
> 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).

45 A pithy exposition of the nature of the burden faced by Mr Ali in establishing legal unreasonableness was stated by Allsop CJ in *Stretton* at [11]:

> … The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, insufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

46 As Wigney J pointed out in *Stretton* at [92]:

> The critical point is that, in reviewing a decision on the ground of legal unreasonableness, the Court's role is strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. …

(1) In relation to the four limbs in ground 1

47 For the reasons already expressed, there was no error of the kind expressed in the four limbs for ground 1. Mr Ali did not develop any separate arguments to establish legal

unreasonableness for any of those four limbs. It was therefore not shown that, in any of those four respects, the intermediate outcomes complained of fell outside the range that could be justified in relation to the Tribunal's exercise of its power, without embarking upon impermissible merits review. The conclusions reached by the Tribunal in each of those four respects, while in places going beyond what was necessary, were not, either of themselves or by way of process, of a kind capable of vitiating the Tribunal's ultimate conclusion by reason of falling outside the permissible exercise of the power.

(2) In assessing the extent of impediments (Tribunal's reasons [141]-[143])

(3) In finding that Mr Ali would have considerable financial resources in Fiji (Tribunal's reasons [145], in the context of [146]-[147])

(4) In finding that it could not be asserted that Mr Ali would be unfamiliar with Fiji (Tribunal's reasons [144])

48 Each of these three bases for asserting legal unreasonableness turn on the Tribunal's consideration of the impediments that Mr Ali would face if required to return to Fiji. It is convenient to set out the entirety of this part of the Tribunal's reasons before turning to each individual complaint (footnotes embedded and emphasis in original):

> ***Extent of Impediments if Removed***
>
> 141. There would no doubt be some impediments facing Mr Ali were he to be required to return to Fiji. They are not necessarily easy to assess.
>
> 142. Obviously, removal from an extended network of family support would be an impediment and there is no indication that family members would return to Fiji with him where, in any case, they would not be citizens.
>
> 143. The Tribunal accepts that the quality of health care is not as great in Fiji as in Australia, although it is not unacceptable and that Mr Ali would be disadvantaged in this respect. It is also obvious that, at his age, and with his disabilities, he would find it hard to secure employment and hence regular income. He does not have any close relatives in Fiji and has no access to accommodation.
>
> 144. On the other hand, Mr Ali lived in Fiji until he was 29 years of age, was educated and grew up there, and so it cannot be asserted that he would be unfamiliar with the country, its language, social customs, mores or culture. This is not a case of a person facing removal to a country which they have never visited or where they have no familiarity with the language and culture.
>
> 145. He would, on the other hand, have considerable financial resources (by Fijian standards) as he informed the Tribunal that if he were required to return, he would "*sell the house*". The Tribunal has no way of assessing the value of a four bedroom house in Ropes Crossing, but it cannot imagine, given the nature of the dwelling and the location, that it would be negligible and Mr Ali apparently owns it freehold. [footnote: *G Documents* 16.]
>
> 146. On this point, the Tribunal noted that while Mr Ali stated very clearly that, if he were forced to return to Fiji:

I would sell the house and the family would have nowhere to live.

147. This does not appear to be the understanding of Ms Bibi (or perhaps she is unaware of Mr Ali's intentions) who told the Tribunal that if Mr Ali were removed, she would not follow him to Fiji and would "*continue to live*" in the family home.

148. On balance, this criterion should be assessed as weighing in Mr Ali's favour.

(2) In assessing the extent of impediments (Tribunal's reasons [141]-[143])

49 The substance of this complaint is that the Tribunal at [141] referred to Mr Ali only facing "*some impediments*" if he were required to return to Fiji, and that this did not reflect the severity of the impediments that the Tribunal then described. Mr Ali submits that the global description of "*some impediments*" lacked a rational foundation, was devoid of any evident or intelligible justification, was lacking common sense and was obviously disproportionate to the nature of the representations and material that was before the Tribunal. Mr Ali submits that the process of reasoning adopted by the Tribunal was indicative of only one conclusion, namely that he would face *significant* impediments if removed to Fiji. This conclusion was said to be further fortified by the absence of any evidence that he would have a full-time carer in Fiji for his significant disabilities, being a role that had long been played by his wife in Australia.

50 In resisting this conclusion, the Minister submits that two reasons stood in the way of this argument succeeding. First, the Tribunal did not make any adverse findings against Mr Ali in relation to the impediments he would face if removed, finding that this should be assessed as weighing in his favour. Secondly, the Tribunal's consideration of this factor was evaluative, with each of the factual findings relied upon being open to the Tribunal to make on the evidence before it.

51 In my view, it was open to the Tribunal to state as it did that there "*would no doubt be some impediments facing Mr Ali were he to be required to return to Fiji*", before turning to outline what they were, observing that they were not "*necessarily easy to assess*". The reference to the difficulties in assessment appears to be an acknowledgement that the assessment was predictive in nature and thus may be seen to be inherently uncertain. The Tribunal then considered each of the impediments that had been raised and found that overall they favoured Mr Ali's revocation application.

52 Mr Ali's bald assertions of irrationality, a lack of intelligible justification, a lack of common sense or of the Tribunal's statements being obviously disproportionate do not rise any higher than being rhetorical assertions. It is not shown how a somewhat vanilla term such as "*some*

impediments" was not a description that was open to the Tribunal to use, especially in circumstances when that is immediately followed by consideration of each impediment that was relied upon. Mr Ali's argument does not rise any higher than being an emphatic disagreement with the assessment that was carried out by the Tribunal, especially when it came to weighing the impediments against other considerations. This basis for asserting legal unreasonableness must accordingly fail.

(3) In finding that Mr Ali would have considerable financial resources in Fiji (Tribunal's reasons [145], in the context of [146]-[147])

53 This complaint relies upon the Tribunal's finding that Mr Ali would have "*considerable financial resources (by Fijian standards)*" if he was removed to Fiji by reason of his own evidence that he would sell his residential home in Sydney. Mr Ali describes this as a finding that was sufficiently "*lacking a rational foundation*", "*lacking common sense*", "*devoid of an evident or intelligible justification*" and "*illogical/irrational*" so as to be legally unreasonable, and warranting careful scrutiny given the consequences for him. The reasons given for that conclusion by Mr Ali are difficult to summarise without losing their intended meaning. It is therefore convenient to reproduce them verbatim (omitting footnotes):

> (1) The [Tribunal] assumes that the property will be sold, when market forces may dictate no potential purchaser in the immediate or foreseeable future.
>
> (2) There was no evidence adduced which said anything about financial resources in the context of 'Fijian standards'.
>
> (3) The [Tribunal]assumes that the property will be sold, when the applicant's wife gave evidence that if the applicant were removed to Fiji, she would not follow him and would "continue to live" in the family home. This evidence was not expressly rejected by the [Tribunal]. Thus, the absence of an express finding of fact may thus assist in reaching a conclusion that no finding was implicitly made on this apparently critical issue.
>
> (4) Logically, before even contemplating that the applicant may have considerable financial resources in Fiji by reason of selling the Australian family property, the [Tribunal] had to logically reject (or otherwise resolve) the evidence given by the applicant's wife extracted at (3) above. A decision may expose legal error where the reasoning process merely notes submissions and evidence without resolving the issues raised by the material or making findings of fact on those issues.
>
> (5) The [Tribunal]'s finding that the applicant would have "considerable financial resources (by Fijian standards)" is speculative at best and unsupported by probative material. A more likely possibility is that if the applicant's wife seeks to remain in the family home and the applicant seeks for the property to be sold, it may well be that litigation may result to legally resolve the conflict or tension in objectives between the parties (which is likely to result in substantial legal costs, thus diminishing the proceeds in the property when

ultimately sold).

54 Each of the above submissions may readily be seen to be engaging in a process of merits assessment and review. There is no suggestion that most of the points taken above were ever raised with the Tribunal, and yet the issue of selling the family home in Sydney was clearly and emphatically raised by Mr Ali. Each point also involves overworking what actually transpired. The Tribunal was faced with a difficult issue to evaluate. It relied upon the fact that Mr Ali had clearly said that he would sell his home. If he did as he said he would, then this would give him access to what the Tribunal would be entitled to infer was a substantial sum of money. Australia's relatively greater wealth than Fiji and the property boom that has taken place in Sydney since 2012 are not matters that required evidence to establish that the sale of a house in Sydney would provide considerable financial resources to Mr Ali. The point that the Tribunal was making was that having access to such funds would go some way to offset the economic and other disadvantages that he would face in Fiji.

55 The Tribunal also recorded the contrary understanding of Mr Ali's wife to the effect that she intended to continue to live in the family home.

56 Overall, the Tribunal found that the impediments that Mr Ali would face if he were required to return to Fiji favoured the revocation he was seeking.

57 The process of reasoning engaged in by the Tribunal was rational and, in the context of the material referred to, unremarkable. I am unable to see any basis beyond bald rhetoric for describing it as "*lacking a rational foundation*", "*lacking common sense*", "*devoid of an evident or intelligible justification*" or "*illogical/irrational*". It is another example of emphatic disagreement, rather than establishing legal unreasonableness. Mr Ali has not discharged the burden in this Court of showing otherwise. This basis for asserting legal unreasonableness must fail.

(4) In finding that it could not be asserted that Mr Ali would be unfamiliar with Fiji (Tribunal's reasons [144])

58 This complaint asserts that the findings of the Tribunal at [144] sufficiently lacked a rational foundation or intelligible justification. The reasons given for that conclusion by Mr Ali are again best explained by reproducing them verbatim (omitting footnotes):

> (1) The [Tribunal] accepted that the Applicant resided in Australia since 1988, thus effectively residing in Australia for the last 30 years.

> (2) There is no evidence that Fiji, its language, social customs, mores or culture (as at 1988) are the same or analogous in 2018. It follows that it is far from clear that the applicant would be 'familiar' with modern-day Fiji in the manner described by the [Tribunal], especially since he has resided in Australia for the last 30 years.
>
> (3) Logically, with the passing of a significant period of time, the social customs, language, mores or culture of a country will change (both as part of the natural evolution of time and the broader changes occurring in the world that impact on a given country and its people).

59 Each of the above submissions may readily be seen to be engaging in a process of merits assessment and review. Doubtless, the Tribunal could have reached a different conclusion on this topic, but disagreeing with the reasoning adopted does not make it wrong or unavailable, let alone legally unreasonable. Moreover, this aspect of the Tribunal's reasons is again being overworked. The applicant's submissions overlook the last sentence in [144]: "*This is not a case of a person facing removal to a country which they have never visited or where they have no familiarity with the language and culture.*" The point that the Tribunal was making was that, unlike numerous visa cancellation/revocation cases in this Court in which the judicial review applicant has come to Australia as a child, or has never even been to the country in which he or she is liable to end up, Mr Ali spent just under half of his life in Fiji and necessarily has some familiarity with the language and culture of his country of origin and citizenship, even if there has been some change since he left. There is no lack of a rational foundation or intelligible justification for that conclusion. This basis for asserting legal unreasonableness must therefore fail.

(5) In finding that the "other considerations" only weighed marginally in Mr Ali's favour

60 The Tribunal's conclusion in relation to "*other considerations*" was (at [153]):

> In terms of the "other considerations", on balance, they weigh in Mr Ali's favour, although only marginally so, and only by giving the benefit of the doubt to the testimony of Ms Bibi.

61 Mr Ali asserts that in light of the findings made on the various "*other considerations*", in the "*peculiar circumstances*" of this case, it was not open to the Tribunal to ascribe only marginal weight to those considerations, and to do so constituted legal unreasonableness by reason of this conclusion "*lacking rational foundation,* [being] *devoid of an evident or intelligible justification…plainly unjust, lacking common sense and obviously disproportionate*" and because it "*cannot be comprehended*". None of these assertions were supported by any

convincing arguments, nor any clear identification of which aspect of the Tribunal's reasons met any of these descriptions. At no point did the argument advanced rise any higher than merits review and emphatic disagreement with the evaluative exercise conducted by the Tribunal.

62 Each step along the way was carefully reasoned and explained by the Tribunal. Reasonable minds may differ as to some of the conclusions reached, but the proper limits of the exercise of power were not shown to have been exceeded. This basis for asserting legal unreasonableness, and thereby jurisdictional error, must therefore fail.

Conclusion

63 As every ground of review fails, the amended originating application must be dismissed. There is no reason why Mr Ali should not pay the Minister's costs.

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.

Associate:

Dated: 30 November 2018