FEDERAL COURT OF AUSTRALIA

Makasa v Minister for Immigration and Border Protection [2020] FCAFC 22

Appeal from:	*Makasa v Minister for Immigration and Border Protection* [2018] FCA 1639
File number:	NSD 2124 of 2018
Judges:	**ALLSOP CJ, KENNY, BESANKO, BROMWICH AND BANKS-SMITH JJ**
Date of judgment:	28 February 2020
Catchwords:	**MIGRATION** – appeal from a single judge of this Court dismissing an application for judicial review of a decision of the Minister, acting personally, to cancel the respondent's visa under s 501(2) – whether the Minister can re-exercise the discretion conferred by s 501(2) to cancel a visa where the Tribunal has earlier set aside a delegate's decision to cancel the visa under that same provision – whether the Minister can re-exercise the discretion relying on the very same facts to enliven the discretion in s 501(2) as the Tribunal did on review – appeal allowed for the reasons set out in *Minister for Home Affairs v Brown* [2020] FCAFC 21
Legislation:	*Acts Interpretation Act 1901* (Cth), s 33(1) *Migration Act 1958* (Cth), ss 501(2), 501A
Cases cited:	*Brown v Minister for Home Affairs* [2018] FCA 1722 *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34; (2019) 373 ALR 196 *Minister for Home Affairs v Brown* [2020] FCAFC 21 *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 *Parker v Minister for Immigration and Border Protection* [2016] FCAFC 185; 247 FCR 500
Date of hearing:	4 June 2019
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights

Category:	Catchwords
Number of paragraphs:	51
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ORDERS

NSD 2124 of 2018

BETWEEN:	**LIKUMBO MAKASA** Appellant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** Respondent
JUDGES:	**ALLSOP CJ, KENNY, BESANKO, BROMWICH AND BANKS-SMITH JJ**
DATE OF ORDER:	**24 DECEMBER 2019**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The orders made by the Court on 31 October 2018 be set aside and in lieu thereof the Court orders:
    a. the respondent's decision of 18 October 2017 to cancel the applicant's visa be quashed;
    b. the applicant, Mr Likumbo Makasa, be released from immigration detention forthwith;
    c. the respondent pay the applicant's costs.
3. The costs of the appeal be dealt with at the time of publication of reasons.
4. Reasons to be published on a date to be fixed on or after 3 February 2020.
5. To the extent necessary and to the extent the Court has power, time for the filing and serving of any application for special leave to appeal be extended or enlarged to a date 21 days after reasons for judgment are published.

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

ORDERS

NSD 2124 of 2018

BETWEEN:	**LIKUMBO MAKASA** Appellant
AND:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** Respondent
JUDGES:	**ALLSOP CJ, KENNY, BESANKO, BROMWICH AND BANKS-SMITH JJ**
DATE OF ORDER:	**28 FEBRUARY 2020**

THE COURT ORDERS THAT:

1. The respondent pay the appellant's costs of the appeal and costs of the application before the primary judge as agreed or assessed.

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

REASONS FOR JUDGMENT

ALLSOP CJ, KENNY AND BANKS-SMITH JJ:

1 On 24 December 2019, by at least a majority, the Court ordered that:

(1) The appeal be allowed.

(2) The orders made by the Court on 31 October 2018 be set aside and in lieu thereof the Court orders:

(a) the respondent's decision of 18 October 2017 to cancel the applicant's visa be quashed;

(b) the applicant, Mr Likumbo Makasa, be released from immigration detention forthwith;

(c) the respondent pay the applicant's costs.

(3) The costs of the appeal be dealt with at the time of publication of reasons.

(4) Reasons to be published on a date to be fixed on or after 3 February 2020.

(5) To the extent necessary and to the extent the Court has power, time for the filing and serving of any application for special leave to appeal be extended or enlarged to a date 21 days after reasons for judgment are published.

2 For the reasons identified in *Minister for Home Affairs v* ***Brown*** [2020] FCAFC 21 and in the circumstances of the matter under appeal as described in the reasons for judgment of Bromwich J, we allowed the appeal.

3 The hearing of this appeal coincided with the resumed hearing of an appeal from the judgment of a single judge of this Court in another matter, *Brown v Minister for Home Affairs* [2018] FCA 1722. The hearing of the Minister's appeal against the judgment in that matter began on 28 May 2019 and resumed on 4 June 2019 before a Full Court of this Court, as presently constituted. Also on 4 June 2019, the Full Court, constituted in the same way, heard Mr Makasa's appeal from the judgment of a single judge of this Court: *Makasa v Minister for Immigration and Border Protection* [2018] FCA 1639. The two appeals gave rise to the following question: whether the Minister can re-exercise the discretion conferred by s 501(2) of the *Migration Act 1958* (Cth) to cancel a person's visa where the Tribunal has set aside a delegate's decision to cancel the visa under s 501(2) and decided instead not to cancel the visa;

and if so, whether the Minister can rely on the very same facts to enliven the discretion in s 501(2) as the Tribunal did on review?

4 The facts relevant to this appeal are set out in Bromwich J's reasons for judgment. Mr Makasa filed written submissions in support of his appeal and was represented by counsel at the hearing. In *Brown*, whilst the visa-holder was unrepresented, the Court had the assistance of amici curiae. The substance of the submissions of Mr Makasa, the Minister in both appeals and amici curiae are set out in *Brown* at [77]–[89].

5 For the reasons set out in *Brown*, the Minister had no power to re-exercise his discretion under s 501(2) of the *Migration Act* to cancel Mr Makasa's visa in circumstances where the Minister (acting through his delegate) had already exercised that power of cancellation, such cancellation had been set aside by the Tribunal, and where the Minister relied on the same facts as the Tribunal to enliven the discretion in s 501(2).

6 It was open to the Minister, acting personally, to set aside the decision of the Tribunal and substitute the Minister's own decision under s 501A (providing the conditions enlivening the power in ss 501A(2) or (3) were met) but it was not open to the Minister to re-exercise the power in s 501(2) with respect to Mr Makasa, relying on the same 2009 convictions as the Tribunal to enliven the power.

7 Accordingly, we allowed the appeal, set aside the orders made by the primary judge on 31 October 2018 and, in lieu thereof, ordered that the respondent's decision of 18 October 2017 to cancel Mr Makasa's visa be quashed and Mr Makasa be released from immigration detention forthwith.

8 It follows that the respondent is to pay the appellant's costs of the appeal and the application before the primary judge as agreed or assessed.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop, and Justices Kenny and Banks-Smith.

Associate: 

Dated: 28 February 2020

REASONS FOR JUDGMENT

BESANKO J:

9 I refer to the orders made by the Court in this appeal on 24 December 2019. I agree that this appeal should be allowed and that in lieu of the orders made by the Court on 31 October 2018, there should be an order that the respondent's decision of 18 October 2017 to cancel the applicant's visa be quashed and an order that the respondent should pay the applicant's costs. I also agree that the respondent should pay the appellant's costs of the appeal as agreed or assessed.

10 I refer to my reasons in *Minister for Home Affairs v Brown* [2020] FCAFC 21. I will not repeat those reasons. I take the same approach in this appeal.

11 I have reached the conclusion that the Minister failed to take into account a relevant consideration of great importance namely, the earlier decision of the Tribunal and that that constituted jurisdictional error. My reasoning is minority reasoning and, in those circumstances, I will confine myself to the key points.

12 It is trite that on an application for judicial review this Court is not reviewing the merits of, in this case, the Minister's decision. Furthermore, this Court is to read the reasons under review fairly and not in an unduly critical manner (*BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34; (2019) 373 ALR 196 at [38]). At the same time, the interest affected by the decision is an important one — the ability to remain in Australia — and in circumstances where the issue is whether the decision-maker took into account a relevant consideration of great importance, the Court will closely scrutinise the decision under review.

13 The starting point is to identify the matters relevant to the exercise of the discretion aside from the decision of the Tribunal. They are the matters identified in the directions made under s 499 of the *Migration Act 1958* (Cth) (the Act). I will not set them out in detail, other to mention that they include primary and secondary considerations and the primary considerations are the protection of the Australian community from criminal and other serious conduct, the strength, duration and nature of the person's ties to Australia, the best interests of minor children in Australia and whether Australia has international non-refoulement obligations to the person.

14 Of significant importance in this case was the protection of the Australian community from criminal or other serious conduct and that included for consideration the seriousness and nature

of the criminal conduct, the risk of it being repeated and the nature of the consequences of it being repeated.

15 In this case, the Minister relied heavily on his opinion concerning the need to protect the Australian community from criminal or other serious conduct. The Minister expressed his conclusions as follows:

> 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 step-daughter, 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.

16 It is significant that the risk of reoffending of which the Minister expresses concern is the risk of the appellant reoffending in a similar fashion, that is, serious crimes of a sexual nature. Earlier in his reasons, the Minister described that risk of sexual reoffending as low (at [49] of his reasons which I set out below). Nevertheless, the Minister concluded that the appellant represented an unacceptable risk of harm to the Australian community.

17 In the decision of the Tribunal, the member described the risk to the Australian community as "relatively low" and in reaching that conclusion the member had regard to the nature and seriousness of the appellant's criminal conduct, the likelihood of reoffending and the consequences of reoffending if it occurred. The member said that the risk of harm to the Australian community if the appellant's visa was not cancelled was not unacceptable. The Tribunal member expressed himself as follows (at [92]):

> Having taken into account the above considerations, I do not consider that the visa of Mr Makasa should be cancelled. The extent of the serious conduct in this case is not sufficient to outweigh the more powerful considerations arising from the best interests of the children, the relatively low risk to the Australian community, the strong family attachments and support which make recidivism unlikely, and the deterrent effect of the severe adverse impact of incarceration and the extensive legal proceedings. These all point in favour of this conclusion.

18 On the face of it, it is difficult to see how the Minister treated the decision of the Tribunal as a consideration of great importance. It is not just a matter of referring to the decision which, on my count he did on a dozen or so occasions, but recognising that based on the same criminal conduct that engaged s 501(2) and after a full review and with detailed reasons the Tribunal had decided some years before, that the appellant's visa should not be cancelled. In my opinion, in circumstances where what might be described as the intermediate conclusions of the Tribunal and the Minister are so similar, the inference should be drawn that the Minister has failed to treat the decision of the Tribunal as a relevant consideration of great importance unless a clear and evident justification appears in the Minister's reasons.

19 The Court was referred to various passages in the Minister's reasons which identified matters related to the appellant's consumption of alcohol (for example, at [13] on 18 May 2006 Drive with high range PCA; at [16] and [31] Drinking on 30 August 2006 and mother's evidence of high alcohol consumption; at [43] further rehabilitative progress with alcohol was required; Dr Peter Ankor`s assessment on 12 August 2013). The Court was also referred to the following passage in the Minister's reasons (at [49]):

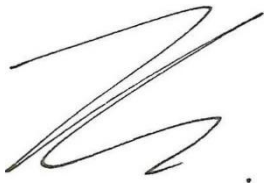
> Taking the above matters into account, I acknowledge that Mr MAKASA is a low risk of sexual reoffending, however I find Mr MAKASA to represent an ongoing likelihood of non-sexual reoffending. I find that Mr MAKASA's ongoing family support, his past term of imprisonment and visa cancellation matters 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.

20 As was seen earlier when considering the Minister's conclusion, his concern with reoffending was with serious crimes of a sexual nature. The passages to which the Court was referred come close to articulating a line of reasoning by the Minister that abuse of alcohol is the common thread in the sexual offending and the drive under the influence offence. In other words, the

recent drive under the influence offence indicates that the appellant has a problem with alcohol which he does not have under control and this makes it more likely he will reoffend by way of sexual offences.

21 In my respectful opinion, if the Minister took that view then, in light of the previous decision of the Tribunal, he needed to clearly articulate it and presumably an increased risk (to whatever degree) of reoffending. He has not done that and, in my opinion, the proper inference is that he has not treated the earlier decision of the Tribunal as a relevant consideration of great importance. As I have said, that constitutes jurisdictional error.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Besanko.

Associate: 

Dated: 28 February 2020

REASONS FOR JUDGMENT

BROMWICH J:

Introduction

22 The appellant, Mr Likumbo Makasa, appealed from orders made by a judge of this Court on 31 October 2018, dismissing his application for judicial review of a decision of the respondent, the Minister for Immigration and Border Protection (now known as the Minister for Home Affairs). The Minister had cancelled his Class BS Subclass 801 Partner (Residence) visa under s 501(2) of the *Migration Act 1958* (Cth). His Honour rejected two grounds of review asserting jurisdictional error on the part of the Minister in making that decision. Mr Makasa's grounds of appeal in substance replicated his grounds of review before the primary judge, asserting that his Honour erred in failing to uphold them.

23 On 24 December 2019, orders were made by the Court, by majority, allowing the appeal. These are my reasons for dissenting from that decision.

Background

24 Mr Makasa, a citizen of Zambia, who is now 36 years old, arrived in Australia in 2001 when he was 18 years old. About four years later, in 2005, he was convicted of three counts of common assault against his then domestic partner, receiving a concurrent 18 month good behaviour bond for each. In 2007 he was convicted of negligent driving, drink driving and driving without a licence. The drink driving offence involved a high range prescribed concentration of alcohol in his blood (**PCA**).

25 A further two years later, in 2009, Mr Makasa, along with two other men, was tried before a jury on sexual offences alleged to have taken place on the night of 30 August 2006, or in the early hours of 31 August 2006, and later in the morning of 31 August 2006. The trial ran for three months. In relation to the night of 30-31 August 2006, Mr Makasa was found guilty, but acquitted by majority on appeal, on one count of having sexual intercourse without consent, knowing there was no consent. The presence of the other two men was a charged circumstance of aggravation. He was acquitted by the jury on other counts arising from that night.

26 In relation to the same complainant, concerning events that took place during the next day, 31 August 2006, Mr Makasa was found not guilty on five offences of sexual intercourse without consent in the circumstance of aggravation that the victim was above the age of 14, but

under the age of 16 (she was 15). He was found guilty on three alternative counts of having sexual intercourse when he did not have an honest and reasonable belief that she was over 16. He was sentenced to three concurrent terms of imprisonment of 2 years, with a single 12 month non-parole period.

27 In 2011, a delegate of the Minister cancelled Mr Makasa's visa under s 501(2). That decision was ultimately set aside by the Administrative Appeals Tribunal in 2013 (a prior Tribunal decision affirming the delegate's decision was set aside by a judge of this Court, and an appeal to the Full Court was dismissed). The 2013 Tribunal decided not to cancel Mr Makasa's visa.

28 On 24 January 2017, Mr Makasa was convicted of a summary offence of failing, apparently as a parolee, to report early enough his use of social media, which he said was to communicate with his daughter, and fined $300. On 3 May 2017, Mr Makasa was again convicted on a charge of drink driving, this time for a mid-range PCA. He was disqualified from driving for 12 months, and fined $1,200. These two 2017 convictions triggered a process of reconsideration of the cancellation of his visa. On 18 October 2017, the Minister personally cancelled his visa under s 501(2). He was in immigration detention from then until at least his appeal was allowed on 24 December 2019.

29 The Minister's reasons described the overall circumstances of the 2006 sexual offence allegations, the 2009 trial, convictions and sentences, and the 2010 appeal outcome. The reasons stated that the Minister made no findings as to the events of the night of 30-31 August 2006 and gave this no weight in considering the seriousness of Mr Makasa's conduct.

30 The grounds of appeal, maintaining the grounds of review before the primary judge, asserted:

(1) that it was legally unreasonable for the Minister to take into account his 2017 PCA conviction in finding that he remained an ongoing risk of engaging in further (underage) sexual offences; and

(2) the power in s 501(2) was not available to be exercised either:

(a) on the same facts and circumstances as had been before the Tribunal in 2013, being the 2009 sexual offences convictions;

or, alternatively,

(b) by taking into account the 2017 PCA conviction because that conviction did not relevantly bear upon the 2009 sexual offences convictions.

Ground 1 – legal unreasonableness

31 This ground took issue with:

(1) the Minister's reasons at [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.

(2) the Ministers' reasons at [101] to [104]:

> 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.
>
> 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 step-daughter, 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.
>
> 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.
>
> 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.

and

(3) the reasoning of the primary judge at [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.

32 Mr Makasa submitted that the above findings by the Minister lacked a rational or intelligible justification, were plainly unjust and capricious, were not supported by probative evidence and demonstrated illogical or irrational reasoning, citing well-established authority that if such characterisations are proven, then there is likely to be jurisdictional error. Mr Makasa sought to make good those characterisations by submissions to the effect that:

(1) there was no real prospect that he would commit further sexual offences when regard is had to the 11 years that have passed since his commission of those offences, the lack

of any repetition of such offences since 2006, the time he spent in the Australian community without demonstrating any propensity to engage in further sexual offences, the Minister's express findings that he had abided by his bail conditions, maintained satisfactory conduct while in prison and in immigration detention, and the Minister's acceptance of him taking responsibility for his conduct and his remorse, together with a strong prosocial orientation reflected in his commitment to education, employment, family and church;

(2) the Australian community would tolerate his continued presence in Australia even accepting the characterisation that he posed a low risk of committing further sexual offences similar to those committed in 2006, having regard to the 2013 Tribunal finding to that effect, the minor nature of his 2017 convictions which did not demonstrate he had any propensity to engage in future sex-related offending, and the factors already referred to in the preceding subparagraph;

(3) the Minister's apparent finding that alcohol was a factor in his sexual offences was not supported by probative material, because the sentencing remarks referred to only drinking the previous evening, the trial judge made no express finding that alcohol was a factor in the commission of the sexual offences, the Minister said he would make no findings with regard to the events of the prior night such that it was not open to demonstrate that alcohol was a factor, and because the evidence of his mother to the effect that he'd been drinking a lot more than he should have at the time of the offences did not demonstrate how alcohol influenced or played a role in committing those offences;

(4) the evidence of the psychologist relied upon by the Minister to the effect that he had alcohol in his system after a night of heavy drinking when he committed the sexual offences had to be tempered by the Minister expressly declining to make findings as to what occurred the night before, and even if alcohol was in his system it was not clear how it played any role in the commission of the sexual offences – overall, neither the Minister nor the primary judge explained how alcohol was a factor in the sexual offending;

(5) the Minister's decision demonstrated illogicality or irrationality as to the possibility that he would reoffend in a similar fashion to his 2006 sexual offences, given that the Minister and the primary judge accepted that the exclusive focus of the reasons for deciding to exercise the discretion to cancel his visa was the possibility that he would

> reoffend in a similar fashion, the potential of him engaging in future non-sexual offending had no logical or rational bearing on him engaging in further sexual-related offending, and it was not open to the primary judge to find that it was legally reasonable for the Minister to have regard to the 2017 PCA offence to demonstrate that he remained a low risk of committing further sexual offences in Australia, due to the lack of any demonstrated connection between alcohol and the sexual offending and the absence of any logical connection between the 2017 PCA offence and the 2006 sexual offences.

33 Each of the submissions summarised above indicate how a different conclusion could have been reached. However, it is not enough to establish legal unreasonableness that reasonable minds could differ and produce a different result. The conclusions reached by the Minister have to be shown to be outside the range of possible outcomes that could be acceptably reached, as a matter of the exercise of jurisdiction, on the material before him. For example, as the consideration below demonstrates, there was no need for the Minister to make any cause and effect finding between alcohol consumption and sexual offending before alcohol consumption-related offences could be treated as a risk factor in predicting future sexual offending. That is especially so as that was a contextual feature of past offending, including in particular the 2006 sexual offending.

34 The real substance of Mr Makasa's complaint is met by two parts of the Minister's reasons, which demonstrate that this ground of appeal, and the corresponding ground of review before the primary judge, is not supported by more than an emphatic disagreement with the Minister's reasoning and conclusions, as the tenor of the submissions made on appeal also suggests. As such, it did not rise higher than impermissible merits review.

35 First, the Minister considered the nature and circumstances of the 2017 PCA conviction (at [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.

36 Secondly, the Minister summarised the effect of the assessment of a psychologist, Dr Ashkar, made in 2013, with a focus on the increased risk of sexual offending arising from alcohol consumption (at [45]-[46]):

> 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.
>
> 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.

37 When regard is had to [26]-[27] of the report from which the above observations were derived, it is clear that Dr Ashkar found that Mr Makasa had alcohol in his system at the time of his sexual offending, from heavy drinking the night before, and that substance abuse, including by way of alcohol consumption, is a well-documented and researched general risk factor in sexual offending recidivism. The primary judge was therefore correct to find (at [39]) that there was evidence by which it was open to the Minister to conclude (at [31], reproduced above at [31]) that alcohol consumption had been a factor in Mr Makasa's sexual offending.

38 Thirdly, the Minister summarised the effect of the material before him concerning the risk to the community (at [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.

39 The above passages led to the conclusions at [101] to [104], reproduced at [31] above.

40 The primary judge was correct (at [42]) to characterise [49] of the Minister's reasons as amounting to findings that:

(1) there was a low risk of Mr Makasa reoffending with a sexual offence;

(2) in the past there had been a connection between Mr Makasa's criminal conduct and alcohol use;

(3) the 2017 PCA offence indicated that he had not been rehabilitated in relation to alcohol; and

(4) there was, as a consequence, a low risk that he would reoffend with a crime of a sexual nature.

41 Mr Makasa's arguments as to legal unreasonableness in relation to the Minister finding a low risk of sexual reoffending therefore could not be accepted. The Minister sufficiently considered the effect of Mr Makasa's continued consumption of alcohol, in the context of the 2017 PCA conviction, and concluded that this contributed to a low, but continuing, risk of sexual re-offending. While this was a very pessimistic way in which to regard the effect of continued alcohol consumption-related summary offending on the risk of sexual re-offending, it cannot be said to rise to the level of legal unreasonableness. It was within the wide scope of discretion afforded to the Minister in considering the exercise of the visa cancellation power in s 501(2). That is especially so when the power is being exercised by the Minister in person. The Minister as a decision-maker in person, is a significantly different repository of power than a non-ministerial and non-elected executive decision-maker, freely able to make decisions in accordance with government policy within the framework of the *Migration Act*: see *Minister for Immigration and Multicultural Affairs v Jia* [2001] HCA 17; 205 CLR 507 at [61]-[63], [181] and [244].

42 Mr Makasa also took issue with the Minister's consideration of the extent of the impediments he would face if he was removed to Zambia. This complaint concerned the finding that his aunt and extended family in Zambia would go some way in assisting him to adjust to live there, which Mr Makasa asserts lacked a rational foundation and was devoid of an intelligible justification when regard was had to the Minister's finding that he did not have a relationship

with his aunt, and there was no overt evidence that his extended family would provide any support to him. This complaint went nowhere. The primary judge was correct to conclude, at [48], that the Minister's reasoning was not arbitrary or irrational in the relevant sense, given that the Minister made a predictive finding that, although the support may be limited, it would go some way to assisting him.

43 Ground 1 should have failed.

Ground 2

44 This ground of appeal, in keeping with the ground of review before the primary judge, in substance raises the issue of whether the Minister's exercise of the visa cancellation power in s 501(2) was properly engaged. The detail shifted as to why that is said to have been absent, but the underlying contention of a power being exercised when it was not legally available remained.

45 The judicial review argument before the primary judge was predicated upon the 2013 Tribunal decision not to cancel Mr Makasa's visa constituting an exercise of the visa cancellation power in s 501(2). Based upon that commonly understood legal framework, his Honour:

(1) noted that Mr Makasa accepted that this ground had no merit if it was found that the Minister had relied upon the 2017 PCA offending to determine that he posed an unacceptable risk of harm to the Australian community, but that the argument was that he had not done so;

(2) found that, on a fair reading, the Minister did take into account the 2017 convictions, and in particular, the 2017 PCA offence, as forming the basis for his conclusion under s 501(2);

(3) applied s 33(1) of the *Acts Interpretation Act 1901* (Cth) and the reasoning in ***Parker*** *v Minister for Immigration and Border Protection* [2016] FCAFC 185; 247 FCR 500 at [36] that was consistent with that provision, to find that the power was able to be exercised again by reason of the 2017 PCA offence, and thereby to conclude that the ground could not succeed.

46 This ground of appeal, as developed in written submissions, relied upon the first instance decision in *Brown v Minister for Home Affairs* [2018] FCA 1722, and sought to distinguish *Parker* upon the same basis as the primary judge had done in that case. It was understandably not known at that time that his Honour's decision had been appealed by the Minister.

47 The appeal from the first instance decision in *Brown v Minister for Home Affairs* was the subject of a second appeal hearing day, which took place at the same time as the hearing of this appeal, and by the same bench: see *Minister for Home Affairs v* ***Brown*** [2020] FCAFC 21.

48 The aspect of this appeal ground asserting that the power in s 501(2) could not be exercised again based upon the 2017 PCA offence should have failed, because, for the reasons I expressed in *Brown*, there was no re-exercise of that power, it having not been exercised when the 2013 Tribunal set aside the decision of the delegate, and decided not to cancel Mr Makasa's visa, so decided not to exercise the cancellation power. However, that conclusion invites consideration of whether or not the ground of appeal can be understood as also effectively raising, although not in express terms, the issue of whether the Minister's treatment of the 2017 PCA offence gave rise to the lawful exercise of the power in s 501(2) by a finding that the change or difference represented by that offence was material.

49 It is not necessary to explore further whether such a ground of appeal is properly raised. That is because, even if it was raised, applying the principles I described in *Brown* as to what is required, in a jurisdictional sense, before the power in s 501(2) may be exercised by reason of a material change or difference since the 2013 Tribunal decision not to cancel was made, that requirement was met. That is because, in substance, if not in the express language used, a material change or difference was found to exist by the Minister by reference to the 2017 PCA offence, and that difference was also applied to reach the decision to cancel Mr Makasa's visa. That is evident from the reasoning in reaching the conclusion about ground 1. Moreover, there was no legal unreasonableness in the way in which that change or difference was addressed and applied, as also flows from the conclusion reached on ground 1.

50 Ground 2 should also have failed.

Conclusion

51 Contrary to the decision of the rest of this Court, I remain of the view that the appeal should have been dismissed with costs.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich.

Associate: 

Dated: 28 February 2020