FEDERAL COURT OF AUSTRALIA

LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1039

File number:	QUD 140 of 2021
Judgment of:	**LOGAN J**
Date of judgment:	26 August 2021
Catchwords:	**MIGRATION** – application for judicial review of the decision of the Administrative Appeals Tribunal to affirm the decision of a delegate of the Minister not to revoke the mandatory cancellation of the applicant's protection visa – where Tribunal required by ministerial Direction 79 to consider the applicant's "health" as an impediment to removal – whether Tribunal had considered the applicant's dependency on alcohol – where said alcohol dependency featured prominently in Tribunal's consideration of the risk of re-offending – where applicant's statement of personal information and submissions to the Tribunal did not address the alcohol dependency as a health concern – held: the Tribunal erred in not taking into account a relevant consideration – application granted **MIGRATION** – whether the Tribunal erred in not making a finding in respect of the applicant's citizenship – where Tribunal clearly considered the applicant a citizen of Ethiopia – where Tribunal considered the prospect of prolonged detention – held: ground not made out **MIGRATION** – whether the Tribunal's finding that the applicant would face "some difficulty" in establishing himself in Ethiopia was illogical or irrational – where the real error is a failure to take into account a relevant consideration – held: ground not made out
Legislation:	*Migration Act 1958* (Cth) ss 499, 5013A, 501CA
Cases cited:	*AAL19 v Minister for Home Affairs* (2020) 277 FCR 393 *Frugtniet and Australian Securities and Investments Commission* (2019) 266 CLR 250 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 *Jebb v Repatriation Commission* (1988) 80 ALR 329 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986)

	162 CLR 24 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 *Re Easton and Repatriation Commission* (1987) 6 AAR 558 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	41
Date of hearing:	26 August 2021
Counsel for the Applicant:	Mr J Donnelly with Mr K Tang
Solicitor for the Applicant:	Scott Calnan Lawyer
Counsel for the First Respondent:	Mr JD Byrnes
Solicitor for the First Respondent:	Minter Ellison
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

QUD 140 of 2021

BETWEEN:	**LRMM** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**LOGAN J**
DATE OF ORDER:	**26 AUGUST 2021**

THE COURT ORDERS THAT:

1. A writ of certiorari issue from the Court directed to the second respondent, quashing the second respondent's decision made on 7 April 2021.
2. A writ of mandamus issue directed to the second respondent, requiring the second respondent to reconsider and determine the applicant's application for review according to law.
3. The first respondent pay the applicant's costs of and incidental to the application to be fixed by a Registrar if not agreed.
4. In respect of the affidavit of the applicant, filed 4 August 2021, no person other than a party to the proceeding, a legal representative of a party, or a registry officer, may inspect or copy that affidavit in un-redacted form without the leave of the Court or a judge first had and obtained. Nothing in this order is intended to prejudice the disclosure on application if permitted by the Court's rules or by a court or a judge of a redacted copy of that affidavit, redacted in a way that preserves the anonymity of the applicant.

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

REASONS FOR JUDGMENT

(REVISED TRANSCRIPT)

LOGAN J:

1 The applicant was born in Kenya in 2001 in a refugee camp. His father was born in Ethiopia. His mother was born in Somalia. In 2012, with the benefit of the grant to the applicant, his parents and others in their family of that class of visa under the *Migration Act 1958* (Cth) (the Act) known as a Refugee (Class XB), (Subclass 200) visa, the applicant and his family arrived in Australia. Since his arrival, the applicant has embarked upon a course of criminal conduct of ever increasing severity, the nature and extent of which is detailed in the reasons of the Administrative Appeals Tribunal (Tribunal).

2 That course of offending conduct culminated in November 2019 in a series of nasty street robbery with violence in company offences. One of those offences entailed the applicant's stabbing the victim twice in the right arm and punching the victim in the head with a closed fist. On 29 July 2020, the applicant was convicted and sentenced in the Queensland District Court in respect of those particular offences committed in 2019, along with other offences. The appellant was sentenced to imprisonment for four years to be suspended after having served 10 months in prison.

3 On 10 August 2020, a delegate of the respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Minister), made a decision under s 501CA of the Act to cancel the applicant's protection visa. That decision was made on the basis of satisfaction that he did not pass the character test as set out in that section.

4 On 16 August 2020, the applicant applied to the Minister under s 501(3A) of the Act for the revocation of that cancellation decision. On 12 January 2021, a delegate of the Minister decided not to revoke that cancellation.

5 The applicant then applied to the Tribunal for the review on the merits of the decision to refuse to revoke the cancellation of the applicant's visa. After a hearing in which the applicant was represented by a lawyer, and the Minister by solicitor and counsel, the Tribunal, constituted by Member R. Bellamy, decided on 7 April 2021 to affirm the Minister's delegate's decision not to revoke the cancellation of the applicant's visa. On 16 April 2021, the Tribunal furnished reasons in respect of the making of that decision.

6 The applicant has now applied to this Court for the judicial review of the Tribunal's decision. The grounds of review are as follows:

> **Grounds of Application**
>
> **1. There was a constructive failure to exercise jurisdiction by the Administrative Appeals Tribunal.**
>
> Strand 1
>
> (a) At [91], the Tribunal (**T**) accepted that the applicant (**A**) had a problem with alcohol.
>
> (b) At [99], the T noted the effect of expert evidence that diagnosed the A with alcohol dependency disorder that is in partial remission in a controlled environment.
>
> (c) At [105], the T concluded that it largely accepted the expert's assessment of the A. The T did not reject the alcohol dependency disorder diagnosis.
>
> (d) At [119], the T concluded that it had no confidence in the A's parents to influence the A to abstain from alcohol abuse and to avoid re-offending.
>
> (e) At [174], the T noted that it was required to have regard to the mandatory considerations in cl 14.5 of Direction 79 when considering the extent of impediments a non-citizen may face if removed from Australia to their home country.
>
> (f) Clause 14.5(1)(a) requires the T to have regard to, *inter alia*, a non-citizen's health. Despite that mandatory consideration, when addressing this other consideration at [174]-[183], the T entirely failed to address the A's health condition related to alcohol dependency disorder. The T's failure was a material error to the T's ultimate decision.
>
> (g) The A's alcohol dependency disorder played an important part in the A's case, at least as the T so determined in various parts of the reasons for the decision.
>
> Strand 2
>
> (a) First, at [172], the T concluded that it would be premature to make a finding about the likelihood that the A would not be able to prove his citizenship, and what may flow from that, as the Australian government has not yet attempted to facilitate his removal to Ethiopia. In essence, the T concluded it was not required to determine whether the A was a citizen of Ethiopia (**lack of citizenship finding**).
>
> (b) Secondly, the T's lack of citizenship finding demonstrates a constructive failure to exercise jurisdiction.
>
> (c) Thirdly, cl 14.5(1) of Direction 79 requires a decision-maker to consider the extent of impediments that the non-citizen may face if removed from Australia to their home country. The expression 'home country' means either the country of which the person is a citizen or

the country of which the person is usually a resident: *Migration Regulations 1994* (Cth), 1.03.

(d) Fourthly, it is uncontroversial that the A is not usually a resident of Ethiopia (having never been there). Accordingly, cl 14.5(1) of Direction 79 imposed a duty on the T to determine whether the A was a citizen of Ethiopia. It expressly declined to do so.

(e) Fifthly, the error was material because the T could have determined it was not satisfied the A was presently a citizen of Ethiopia. Had that occurred, the T could have found that the A would be subject to indefinite immigration detention. At [172], the T only found that the A would be subject to prolonged immigration detention (not indefinite detention – they being distinctive concepts).

(f) Essentially, had the T acted on a correct understanding of the law, there was a realistic possibility that the T could have given favourable weight to the A's indefinite detention claim; which could have tipped the balance in the A's favour in the ultimate balancing exercise undertaken by the T.

2. The decision of the Tribunal was legally unreasonable, illogical and/or irrational.

(a) First, at [182], the T concluded that if the A were removed from Australia to Ethiopia, he will likely face some difficulty in re-establishing himself. That finding is illogical, irrational and/or otherwise legally unreasonable for the following collective reasons:

- When considering cl 14.5(1)(a), the T failed to lawfully consider the A's health condition related to alcohol dependency disorder: [174]-[183].
- Expert evidence before the T demonstrated that the A had diagnosed adjustment disorder that could solidify into major depressive disorder if he is deported: [175].
- Ethiopia is one of the world's poorest countries: [176].
- The A would have no financial assistance from his family in Australia: [177].
- The A has never lived in Ethiopia: [179]. The A is not familiar with the culture in Ethiopia: [179].
- The A will be in a completely foreign place where he knows no one, has no social support, and may find it difficult to make connections: [181].
- The A will be less able to communicate with his family: [181].
- The A may develop depression: [181].
- The A will have to find a way to use the skills he has to make out a living in Ethiopia: [182]. That finding seems to ignore the T's earlier finding at [121], where the T determined that it could not be confident that he has developed the maturity and discipline to maintain gainful employment in the wider community on a long-term basis (this latter finding was

ignored by the T when addressing cl 14.5(1) of Direction 79).

- When considering cl 14.5(1), the T failed to have regard to a critical finding it made earlier concerning the A. At [121], the T determined that the A would not abstain from drug or alcohol abuse, the A was at the very early stages of the rehabilitation process and faced 'a lot of challenges'.

- When considering cl 14.5(1), the T failed to have regard to a critical finding it made earlier concerning the A. At [122], the T determined that the A was a moderate to high risk of reoffending. Logically, if the A was a substantial prospect of reoffending, as the T so determined, it was a matter that could impact the A's prospects of establishing himself in a foreign country.

(b) Secondly, having regard to the matters particularised directly above, the only logical or rational conclusion was that the A would face *substantial or insurmountable difficulties* in establishing himself in Ethiopia.

(c) Thirdly, in any event, when considering the other consideration of the extent of impediments if removed from Australia, the T could not ignore critical findings made under other aspects of Direction 79 in circumstances where those impugned findings bore a logical and rational relationship to the question of the A's prospects in his home country under cl 14.5(1). Section 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth) is subject to an implied restraint that it is to be exercised reasonably and rationally.

7 The only active party respondent is the Minister. The Tribunal, quite properly, has filed a submitting appearance.

8 The first issue which falls for consideration is whether or not the Tribunal failed to take into account a relevant consideration, namely the applicant's health, and more particularly an alcohol dependency disorder, in making the decision.

9 Section 499 of the Act empowers the Minister to give directions to those of his officers who, amongst other things, come to decide as a delegate whether to revoke, under s 501CA, the cancellation of a visa. Such directions are, by virtue of s 499 of the Act, binding upon delegates. In turn, the effect of the very nature of the merits review jurisdiction consigned to the Tribunal to sit in place of such delegates means that such directions are also binding on the Tribunal. The direction and the items specified therein are, in terms of the discussion of the statement of principle by Sir Anthony Mason in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 40, relevant considerations.

10 The direction prevailing at the time when the Tribunal made its decision was that given by The Hon David Coleman MP as Minister in 2018; Direction 79. Within that direction, and under

the heading "How to exercise the discretion", the Minister stated, at [7], that "(b) at paragraph [a decision-maker] must take into account the considerations in part C". Within part C, [14.5] provides, under the heading "Extent of impediments if removed", at paragraph (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.

11 The applicant's submission is that, having regard to the Tribunal's reasons, the Tribunal has failed to take into account the prescription by ministerial direction in respect of health. The Tribunal made reference, although not specifically referring to the paragraph, to the content of paragraph 14.5 in the ministerial direction, at [174] of its reasons. Having so done, the Tribunal stated, at [175]:

> 175. The Applicant is a 20 year old man who is able bodied and does not claim to have any medical or psychological conditions, although Professor Freeman diagnosed adjustment disorder caused by the Applicant's current situation and speculated that it could solidify into major depressive disorder if he is deported.

12 Neither in that paragraph nor elsewhere in that part of the Tribunal's reasons which addresses the considerations specified in paragraph 14.5 of the ministerial direction is there any reference whatsoever to the alcohol disorder; much less is there any reference in that part of the Tribunal's reasons to whatever, if any, medical support might be available to the applicant in the home country of reference, namely Ethiopia.

13 Of course, the Tribunal's reasons must be read as a whole. Doing so makes it clear to the point of demonstration that the Tribunal was very well aware indeed of the applicant's difficulties over a number of years with alcohol. These dated back to his school years, such as they were, during which he was introduced to the consumption of alcohol by older students.

14 In a report of 16 March 2021, the clinical psychologist Professor Freeman opined in respect of the applicant that, as a provisional diagnosis, the applicant suffered from alcohol dependency disorder, which was in:

> … partial remission within a controlled environment.

15 That controlled environment was, at the time and for that matter, remains to this day immigration detention. The Tribunal commenced at [20] of its reasons by charting out the origins of the applicant's drinking of alcohol namely, introduction by older children at his high school, to which I have already made reference. One finds thereafter, throughout the Tribunal's reasons, repeated references by the Tribunal to the applicant's consumption of alcohol – along, in due course, with drugs – and a related need to find money to provide for such consumption as a motivating factor in relation to much of his offending conduct. Once again, recognition of that factor permeates the Tribunal's reasons.

16 The Tribunal, at [105], largely accepted Professor Freeman's assessment of the applicant, save that on the basis of the Tribunal's assessment, having heard the applicant give evidence in person and observed his demeanour, the Tribunal's opinion was that he showed little remorse for his victims and an alarming lack of insight into offending against the police and the stabbing in the course of the robbery which I have mentioned.

17 The applicant's consumption of alcohol – his drinking problem – was a feature of the Tribunal's reasoning in respect of the risk of reoffending presented by the applicant. That assessment is to be found at [121] of the Tribunal's reasons, in which the Tribunal states:

> 121. My task is to assess the risk of re-offending in the present. Professor Freeman considered there to a moderate to high risk, however the Applicant's prospects are better if he addresses his risk factors, and I accept this. The Applicant is at the very early stages of the rehabilitation process and he faces a lot of challenges. The maturation process that Professor Freeman discussed occurs throughout the twenties in males. The Applicant has only just turned 20. He does not have any pro-social friends, and he will be living in the same area as he was when he was associating with other offenders. Employment is normally a stabilising factor and it would seem to be particularly helpful for a person who is prone to boredom such as the Applicant. I accept that Mr S will assist the Applicant to obtain employment. However, the Applicant has never held gainful employment outside the structured environment of prison where there is little else to fill in one's time, and on the evidence before me I cannot be confident that he has developed the maturity and discipline to maintain gainful employment in the wider community on a long term basis. His family cannot be relied on to curb any inappropriate behaviour. His intoxication following the breakup of a significant relationship led him to use methamphetamine which was a factor in him to commit serious violent offences. He has not undergone specific counselling to help him to manage emotional trauma, and his ability to remain sober in the wider community without the structure, supervision and predictability of prison and detention is untested. He has been on probation before and he continued to offend.

18 That particular reasoning yielded an assessment, at [122] of the Tribunal's reasons, that the applicant presented:

> … a moderate to high risk that the Applicant will commit further offences of the kind he has committed.

Based on that risk assessment, the Tribunal considered – unsurprisingly, with respect that this weighed heavily against revocation of the cancellation of the applicant's visa.

19 The Tribunal is part of an administrative continuum: see *Frugtniet and Australian Securities and Investments Commission* (2019) 266 CLR 250 (*Frugtniet*), at [53]. In *AAL19 v Minister for Home Affairs* (2020) 277 FCR 393, at [24], having referred to *Frugtniet*, the Full Court stated:

> … The ramifications of being part of an administrative continuum are necessarily dictated by the particular statutory scheme, …

The Full Court then made reference with approval to an observation by the Tribunal in *Re Easton and Repatriation Commission* (1987) 6 AAR 558, at 561:

> The ambit of a review by the [Tribunal] is necessarily influenced by the ambit of the steps and proceedings that have taken place prior to its review, for the function of the [Tribunal] is to review a decision.

The Full Court noted that that particular statement by the Tribunal had been endorsed by Davies J in *Jebb v Repatriation Commission* (1988) 80 ALR 329, at 333 – 334, and in turn by Kirby J in *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [45].

20 The statutory context in which a decision falls to be made and the administrative continuum necessarily give colour and shape to the reasons which the Tribunal comes to furnish in respect of its decision. Issues emerge or are given prominence or are abandoned, as the case may be, from the moment when the making of a primary administrative decision is sought, up to and including the time when the Tribunal comes to make its decision on review.

21 The decision-making by the Tribunal, though made in place of the primary decision, is not, in that sense, insular. This is an important factor to take into account, in my view, in this particular case. This was, with respect, rightly recognised by counsel both for the applicant and the Minister. The Tribunal's practice includes the filing and service, prior to a hearing, of a statements of facts, issues and contentions. Even before that, at a primary decision-making level, the Minister's department's practice includes provision for the submission of a form when revocation of a cancellation is sought, which contains within it subjects which have obviously been chosen with a careful eye to subjects specified by ministerial direction for consideration.

22 The personal circumstances form submitted by the applicant in this case was handwritten, inferentially, by him personally. He ascribes his citizenship or home country to be Somalia in that form. By the same token, he makes reference in that form to his father being born in Ethiopia and his mother in Somalia. He also makes reference in that form to his problem with alcohol, yet having so done, he also leaves blank whether there is any particular diagnosed medical condition which might affect any return to his home country. At the time, of course, it appears that there was not any formal diagnosis, provisional or otherwise, of the kind made by Professor Freeman.

23 I mention the contents of the form because of the way in which the applicant's case for revocation came to evolve administratively. The applicant's statement of facts, issues and contentions does not seek to make an issue of alcoholism or any ongoing problem with alcohol. Further, by the time the case came to be presented for review by the Tribunal, the home country of reference had consensually changed from Somalia to Ethiopia. Shortly prior to the hearing and also shortly after receiving a copy of Professor Freeman's report, the applicant, by his solicitors, lodged a statement in reply with the Tribunal, in which, in light of Professor Freeman's diagnosis in respect of alcohol dependency disorder, the following statement was made:

> The first is the submission in the Applicant's Statement of Facts, Issues and Contentions (AS), at [43], regarding the absence of evidence to indicate he suffers from alcoholism or dependency, need to be re-calibrated in light of Prof Freeman's findings at [10.3]. While accepting his reportedly daily consumption of alcohol until December 2019 may be suggestive of dependency, it could also be reflective of a pattern of opportunistic binge drinking. In our view, there remains no firm basis to conclude he lacks the capacity or volitional control to maintain abstinence upon his release. In any event, Prof Freeman accepts his Alcohol Dependency Disorder (for which he made a provisional diagnosis) is in partial remission within a controlled environment.

24 It is not hard to discern why the applicant's submission in reply was cast in this way in light of Professor Freeman's report, and in particular the provisional diagnosis in respect of alcohol dependency disorder. The applicant was represented by an experienced firm of solicitors. A dependency on alcohol was, as indeed it proved to be in the Tribunal's reasoning, a factor of singular relevance in the context of risk assessment.

25 This recitation highlights a particular difficulty faced by the Tribunal, both in terms of home country of reference and health condition. There was a change from when the applicant had first sought revocation, but the underlying claim in respect of a problem with alcohol was not

one from which the applicant himself had ever deviated, and that claim was, in a way, accepted by the Tribunal, confirmed, at least to the point of provisional diagnosis, by expert evidence.

26 Against this background, including, as I have mentioned, the pervasive reference in the Tribunal's reasons to the applicant's drinking and his problem with alcohol, it was put on behalf of the Minister that it could be inferred that the Tribunal took into account the alcohol dependency disorder under the required subject, health. The Tribunal certainly specified another condition diagnosed by Professor Freeman at [175], but the fact that the Tribunal did this, against a background of otherwise being aware of the problem of alcohol, seems to me to make it inherently unlikely that the subject was somehow subliminally considered.

27 Indeed, so important was the subject of the applicant's difficulties with alcohol to its reasoning process in respect of risk, it seems to me that the Tribunal on this occasion, and with all respect, has just forgotten that it was additionally necessary to advert to this health condition separately, as ministerially required, when addressing the requirements of [14.5]. Had the Tribunal addressed this subject, it may well have had to confront the discounting promoted in the reply submission on behalf of the applicant. It might also have had to confront the presence or otherwise of any medical facilities in Ethiopia to provide programs for rehabilitation or treatment of those with alcohol dependency disorder. A fair reading of the reference of the minister's specification of health in his direction is that, necessarily, that reference embraces alcohol dependency disorder.

28 Contrary to an initial impression formed by the Tribunal's otherwise repeated reference to the applicant's consumption of alcohol over the years, but as a result of determined and focused advocacy on his behalf by his counsel, I am persuaded that the Tribunal has failed to take into account a relevant consideration namely, health, as specified in paragraph 14.5 of the ministerial direction. Of course, that consideration only applies where relevant, but the applicant, from the moment he sought revocation, made reference to his drinking, and by the time of the hearing, that particular reference had matured into an expert diagnosis.

29 In these circumstances, and even taking into account as was rightly emphasised, with respect, on behalf of the Minister by his counsel, the course of the administrative continuum, the Tribunal was obliged, under the heading health, to acknowledge and then address the ramifications of the alcohol dependency disorder.

30 A failure on the part of an administrator, which includes the Tribunal, to take into account a relevant consideration is not necessarily productive of jurisdictional error. For the error to be jurisdictional, it must be material.

31 Recently, and by reference to statements made in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 as to the requirement for materiality and to an explanation of that requirement to be found in *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, it was stated in the joint judgment in *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 (*MZAPC*), at [2]:

> Materiality was subsequently explained in *Minister for Immigration and Border Protection v SZMTA* to involve a realistic possibility that the decision in fact made could have been different had the breach of the condition not occurred. Existence or non-existence of a realistic possibility that the decision could have been different was explained to be a question of fact in respect of which the plaintiff in an application for judicial review of the decision on the ground of jurisdictional error bears the onus of proof.
>
> [footnote references omitted]

Their Honours then went on at [3] to state, in *MZAPC*, that:

> The explanation in *SZMTA* is sound in principle and consistent with precedent. *SZMTA* ought not to be revisited.

32 Thus, it falls to the applicant to demonstrate that there is a realistic possibility that the decision could have been different. The Minister, understandably, pointed to the strength of the Tribunal's finding in respect of risk as indicative of an absence of any realistic possibility. However, when one looks to the reasoning process in respect of the assessment of risk, one finds as I have indicated within that, reliance, amongst other things, upon the history of the applicant's drinking problem. Quite what might be the ramifications for the applicant if removed to Ethiopia was addressed not at all in relation to his alcohol dependency. One might apprehend that it would intrude not just on health but also upon ability to obtain work or otherwise settle in that country. In my view, consideration of that subject does carry with it a realistic possibility that the administrative decision might be different. It is not for me, obviously, to make any such decision, only to recognise the existence of a realistic possibility.

33 That being so, the error concerned is jurisdictional. That in itself provides a basis upon which the Tribunal's decision must be quashed and the matter referred back to the Tribunal for a decision according to law. There were, however, other grounds which were pressed. These should be addressed, if only rather more briefly than might otherwise have been the case had

the applicant not succeeded in respect of the failure to take into account a relevant consideration.

34 It was also put that the Tribunal had constructively failed to exercise its jurisdiction, again by reference to the ministerial direction, in respect of a lack of finding about the applicant's citizenship. The Tribunal's reasons commence at [1] with the statement:

> The Applicant is a 20-year-old citizen of Ethiopia.

35 Reading the reasons as a whole, however, one finds that the Tribunal's view is that the applicant is a citizen of Ethiopia based on patrilineal descent from a person born in Ethiopia, his father. The point made on behalf of the Minister was that there is a difference apparent in the Tribunal's reasons between the Tribunal's conclusion that he is a citizen of that country and his ability to prove to the authorities of that country that he holds such citizenship.

36 The Tribunal goes to quite some length in its reasons to address the subject of citizenship and proof thereof, at [166] through to and concluding at [172]:

> 166. I am satisfied that if the Applicant does not get his visa back, and Ethiopia initially refused to accept him, it would not be reasonably practicable to remove him to Ethiopia and he would therefore remain in immigration detention while efforts were made to facilitate his removal to Ethiopia or a third country unless the Minister exercises an alternative option such as granting a visa under s 195A of the Act, however any such option is speculative.
>
> 167. The Applicant has put forward evidence of recent communications between his legal representative and the Ethiopian embassy with respect to establishing the Applicant's Ethiopian citizenship or obtaining a passport or laissez passport. The evidence shows that the embassy indicated that the immigration agency in Ethiopia would search for relevant documents there and enquiries would be made as to whether any living relatives could provide relevant documentation. If sufficient documentation could not be obtained, there is a very remote possibility that a laissez passport would be issued. In fairness to the Tribunal, those paragraphs should be set out in full, and I will incorporate those by reference.
>
> 168. The DFAT report contains information relevant to the Applicant's situation. Ethiopian citizenship can be obtained through descent (where at least one parent must be an Ethiopian citizen), marriage or a lengthy and complicated naturalisation process. The Applicant's father did not expressly claim to be an Ethiopian citizen but he claimed he was born in Ethiopia and lived there until he left as an adult, and he claimed to be of the Oromo tribe – identifiable through language and tribal traditions. It was not contended by either party that the Applicant's father might not be an Ethiopian citizen. I take it that he is an Ethiopian citizen. The Applicant's claim to citizenship is therefore through his father. Logically, this means his father would have to establish his own Ethiopian citizenship and provide evidence that the Applicant is his biological child.

169. The Applicant's father claims that he had never been issued with any identity documents by the Ethiopian government except for a driver's license issued by the Addis Ababa transport office in approximately 1982. Ethiopian law requires the registration of all children within 90 days of birth. In practice, only a small percentage of births are registered and children issued birth certificates. Accordingly, the Applicant's father's lack of identify documents does not appear to be unusual.

170. According to the DFAT report, Ethiopian civil documents such as birth and death certificates are issued on the basis of statements made by the person applying and supporting witnesses - limited supporting documentation is required. One of the documents required to obtain a passport is a birth certificate. It therefore appears that the information the Ethiopian embassy provided to the Applicant's lawyer in relation to issuing a passport was incomplete.

171. DFAT reports that Ethiopia has previously accepted large numbers of returnees. In 2013, Saudi Arabia expelled over 100,000 Ethiopian citizens as part of a crackdown on migrant workers. In 2017, 300,000 Ethiopians who were in Saudi Arabia undocumented were returned to Ethiopia, most of whom were deported (less than 30,000 returns were voluntary). Given the low rate of birth registrations, it must be the case that some of those returnees did not have birth certificates or registered births but were able to establish citizenship. To date the Australian government has not made any efforts to work with the Ethiopian government to assist the Applicant to establish his Ethiopian citizenship.

172. Given that, and the country information, I accept the Respondent's contention that it would be premature for the Tribunal to make a finding about the likelihood that the Applicant would not be able to prove his citizenship, and what may flow from that, as the Australian government has not yet attempted to facilitate his removal to Ethiopia. However, I also accept the Applicant's contention that prolonged detention would be likely while those efforts were made. The Applicant does not like being in immigration detention. Professor Freeman has diagnosed an adjustment disorder which he thinks is a result of the Applicant's unhappiness with being in detention and stress at the prospect of being deported. I accept that this is likely to continue, and possibly become worse, while the Applicant remains in detention. On the other hand, being in a structured environment that does not permit alcohol consumption has benefitted the Applicant: he achieved sobriety in prison, he has maintained it in detention and he has generally stayed out of trouble. The evidence does not indicate that he is at risk of harm or hardship in detention apart from the prospect of his adjustment disorder worsening. He has not sought treatment for his mental health but help is available in detention.

[footnote references omitted]

37 In my view, the point made on behalf of the Minister is a good one. The case was promoted to the Tribunal on the basis that the applicant's home country of reference was and should be Ethiopia. As the Tribunal's reasons expose, there was good reason for the Tribunal to proceed on that basis. There was equally good reason, in my view, for the Tribunal's statement at [172] that it would be premature to make any finding as to likelihood that the applicant would not be able to prove his citizenship.

38 The Tribunal, it seems to me, was plainly aware and accepted that there might be a period of prolonged detention whilst efforts were made to facilitate removal to Ethiopia, but the evidence before the Tribunal did not show a prospect of indefinite – only prolonged – detention. In my view, the Tribunal addressed all that it had to address in relation to the ministerial direction by making reference to Ethiopia as the home country and accepting that there may be a period of prolonged detention in relation to steps to establish what appeared to the Tribunal to be his Ethiopian citizenship.

39 It was also put, on behalf of the applicant in ground 2, that illogicality or irrationality was apparent in [182] of the Tribunal's reasons in relation to establishing himself in Ethiopia. The Tribunal stated, in that paragraph:

> 182. It is likely that the Applicant will face some difficulty in re-establishing himself in Ethiopia as he does not have an existing support network there and he is unfamiliar with local customs, culture and support services, he will have to secure accommodation, and he will have to find a way to use the skills he has to eke out a living.

40 The real error, in my view, in relation to the applicant's establishing himself in Ethiopia is the result of a failure to take into account a relevant consideration. But for that error, the Tribunal's discussion at [181] contains within it a particularly reflective consideration of factors relevant to re-establishment. The Tribunal's conclusion that he would, in light of those, face "some difficulty" is not illogical or irrational; neither is it unreasonable in the sense of not being supported, or capable of reasonably being supported, by the material before the Tribunal. The difficulty about the conclusion is, as I have mentioned, the absence of consideration at all of his alcohol dependency disorder, the health condition sitting there on the material before the Tribunal.

41 What follows from the foregoing is that the application must, in respect of a failure to take into account a relevant consideration, succeed.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan.

Associate:

Dated: 14 September 2021