FEDERAL COURT OF AUSTRALIA

PYDZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1050

Appeal from:	*PYDZ v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1138
File number:	QUD 163 of 2021
Judgment of:	**MIDDLETON J**
Date of judgment:	2 September 2021
Catchwords:	**MIGRATION** – judicial review of decision of decision of Administrative Appeals Tribunal under s 501CA(4) of the *Migration Act 1958* (Cth) to not revoke delegate's decision under s 501(3A) to cancel visa – whether validity of decision under s 501(3A) affects Tribunal's ability to conduct review under s 501CA(4) – whether the Court has jurisdiction to review s 501(3A) decision under s 476A of the Act or under its accrued or associated jurisdiction – where Tribunal misapplied Direction 90 in considering the expectations of the Australian community – whether error material – whether there was a failure to consider country information – whether applicant was denied procedural fairness by the Tribunal failing to consider claims – whether the Tribunal's decision was legally unreasonable, illogical and irrational – application dismissed
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) *Judiciary Act 1901* (Cth) *Migration Act 1958* (Cth)
Cases cited:	*AFX17 v Minister for Home Affairs* [2020] FCA 807 *Ali v Minister for Home Affairs* (2020) 278 FCR 627 *Applicant S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 32 *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496 *DDP16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 275 *Kelekci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1000 *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 *Frugtniet v Australian Securities and Investments*

Commission (2019) 266 CLR 250
FYBR v Minister for Home Affairs [2019] FCA 500
FYBR v Minister for Home Affairs (2019) 272 FCR 454
Hands v Minister for Immigration and Border Protection (2018) 267 FCR 628
Ibrahim v Minister for Home Affairs (2019) 270 FCR 12
KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] HCA 24
Minister for Home Affairs v Omar (2019) 272 FCR 589
Minister for Immigration and Border Protection v SZSSJ (2016) 259 CLR 180
Minister for Immigration and Border Protection v SZVFW (2018) 264 CLR 541
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PWDL [2020] FCA 394
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19 [2021] FCAFC 153
MZAPC v Minister for Immigration and Border Protection [2021] HCA 17; (2021) 390 ALR 590
Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd (1981) 148 CLR 457
Re Wakim; Ex Parte McNally (1999) 198 CLR 511
Tang v Minister for Immigration and Citizenship (2013) 217 FCR 55
Viane v Minister for Immigration and Border Protection (2018) 263 FCR 531
XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 619
Zyambo v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 545

Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	175

Date of hearing:	3 August 2021
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Scott Calnan Lawyer
Counsel for the First Respondent:	Ms R Francois
Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Applicant:	The Second Respondent filed a submitting notice

ORDERS

QUD 163 of 2021

BETWEEN:	**PYDZ** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent **ADMINISTRATIVE APPEALS TRIBUNAL** Second Respondent
ORDER MADE BY:	**MIDDLETON J**
DATE OF ORDER:	**2 SEPTEMBER 2021**

THE COURT ORDERS THAT:

1. The application for an extension of time for the review of a migration decision dated 11 August 2021 be dismissed.
2. The application be dismissed.
3. The applicant pay the first respondent's costs.

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

REASONS FOR JUDGMENT

MIDDLETON J:

INTRODUCTION

1 The applicant is a 44 year old male citizen of the Philippines. He arrived in Australia in 1991 and has lived continuously in Australia since that date. He has a long history of offending, including some offences which have led to periods of imprisonment. He is currently in immigration detention.

2 On 12 December 2019, while the applicant was serving a sentence of imprisonment, the applicant's visa was cancelled pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ('**Act**'). On 29 January 2021, a delegate of the first respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('**Minister**') determined not to revoke the cancellation decision.

3 The applicant applied to the second respondent, the Administrative Appeals Tribunal ('**Tribunal**') for review of the delegate's decision. On 23 April 2021 the Tribunal affirmed the delegate's decision not to revoke the cancellation of the visa under s 501CA(4) of the Act and subsequently published its reasons: *PYDZ v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1138. The applicant now seeks to review that decision in this Court.

4 In his amended originating application, the applicant seeks writs of certiorari and mandamus quashing the Tribunal's decision and requiring it to determine the application according to law, as well as a declaration that the cancellation decision was invalid.

5 At the outset, I note that there is a dispute as to the jurisdiction of this Court to review the cancellation decision (as distinct from the Tribunal's decision about whether the cancellation decision ought to be revoked). I will return to this issue later in my reasons in relation to Ground 1B of the application. At this point, it suffices to say that as a precautionary measure, in case I were to find that this Court has jurisdiction in respect of the cancellation decision but the 35 day period under s 477A(2) of the Act had expired, at the hearing I gave leave to the applicant to file a written application seeking an extension of time. The applicant filed such an application and a supporting affidavit on 12 August 2021, and the Minister filed submissions in response on 17 August 2021.

6 At the hearing, I also granted leave to both the applicant and the Minister to file further written submissions in respect of issues that arose during oral argument. I will deal with these submissions where relevant in the course of my reasons. I will deal with the affidavit of the applicant's legal representative filed on 2 August 2021, which annexes excerpts from the transcript of the hearing before the Tribunal, in the same manner as these submissions.

7 The applicant raises four grounds of review, which are split into various limbs (or "strands") in the amended originating application. I will briefly summarise those grounds as follows:

- **Ground 1A:** the Tribunal misunderstood *Direction no. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ('**Direction 90**') and incorrectly applied 'other' considerations when having regard to the fourth 'primary' consideration of the expectations of the Australian community;
- **Ground 1B:** the Tribunal erroneously assumed that it had power to determine whether to revoke the decision, when in fact the Tribunal did not have such power as the 2019 cancellation decision was invalid and the exercise of power under s 501CA(4) is subject to a condition precedent that the relevant cancellation decision is valid;
- **Ground 2:** the Tribunal failed to have regard to, or properly engage with, evidence in the DFAT Country Report for the Philippines ('**DFAT Report**') about the risk of harm to drug users and the availability of mental health services in the Philippines;
- **Ground 3:** the applicant was denied procedural fairness as the Tribunal failed to address his claims that future drug use by him in the Philippines would lead to him getting shot and killed and that his partner needs him for emotional and financial support;
- **Ground 4A:** the Tribunal's decision was legally unreasonable, illogical and irrational as it erred in concluding the third 'primary' consideration in relation to the best interests of minor children in Australia weighed heavily against revocation;
- **Ground 4B**: the Tribunal's decision was legally unreasonable, illogical and irrational as it erred in concluding that the 'other' consideration in relation to the extent of impediments on return to the Philippines weighed only moderately in favour of revocation;
- **Ground 4C:** the Tribunal's decision was legally unreasonable, illogical and irrational for the reasons stated in respect of Grounds 1A to 3; and

- **Ground 4D:** the Tribunal's decision was legally unreasonable, illogical and irrational as it made inconsistent findings in respect of the difficulties the applicant would face in returning to the Philippines.

RELEVANT HISTORY OF THE APPLICANT

8 The applicant has a long history of drug use and health issues, including mental health issues. He has been diagnosed and treated for chronic paranoid schizophrenia, type II diabetes and chronic hepatitis C. In respect of his drug use, there is some dispute as to whether this is only a matter of the applicant's history and past conduct. I will address this later in my reasons. For now, I note that it is common ground that the applicant has an extensive history of illicit drug use which has continued throughout his adult life, and he has a history of reverting to using drugs after periods of imprisonment or rehabilitation.

9 The applicant's history of offending is set out at [212] of the Tribunal's decision. It is unnecessary to repeat that detail here, but I will refer to the 2004 offences that are relevant to the 2019 cancellation decision (and a previous cancellation decision in 2015) as well as the most serious offences that occurred after 2015.

10 On 8 October 2004, the applicant was convicted in the District Court of Queensland for an offence of causing grievous bodily harm and sentenced to four years' imprisonment ('**2004 offending**'). The applicant was subsequently convicted of other serious offences, although none with more than one year's imprisonment (excluding concurrent sentences).

11 On 31 March 2010, the applicant was convicted in the Magistrates' Court of Queensland for various charges including assaulting or obstructing a police officer and was sentenced to six months' imprisonment (concurrent) for each of five offences, as well as two months imprisonment (concurrent) for one offence, and one month (concurrent) for each of two offences.

12 On 9 April 2015, the applicant was convicted in the Magistrates' Court of Queensland for charges including five counts of contravening a domestic violence order and two counts of possessing dangerous drugs for which he was sentenced to eight months' imprisonment (concurrent) for five offences, and one month imprisonment (concurrent) for two offences.

13 On 21 November 2017, the applicant was convicted in the Magistrates' Court of Queensland for charges including possessing dangerous drugs, burglary and failure to properly dispose of needle and syringe and was sentenced to nine months' imprisonment (concurrent) for each of

two offences, six months' imprisonment for one offence, three months' imprisonment (concurrent) for one offence, and one month's imprisonment for one offence.

14 On 16 October 2019, the applicant was convicted in the Magistrates' Court of Queensland for charges including receiving and possessing tainted property and sentenced to 10 months' imprisonment to be suspended for 12 months after serving two months (concurrent).

15 I will now refer to the applicant's migration history. As I have already indicated, the applicant's visa was cancelled under s 501(3A) of the Act in 2015 but then revoked, and then cancelled again later in 2019. I should note one matter which was raised for the attention of the Court but taken no further. In the affidavit in support of the application for review of the mandatory cancellation decision filed on 12 August 2021, the applicant's legal representative gave evidence that the applicant's visa had been purportedly cancelled under s 501(3A) on 24 August 2018 and that he was detained in immigration detention before being released in September 2018. The applicant's legal representative has sought further information from the Minister's legal representative in relation to this purported cancellation. In response, the Minister advised that the purported cancellation was of no legal effect "due to a misdescription of [the applicant's] visa in the cancellation decision", and has otherwise declined to provide further documentation.

16 In the notice of cancellation issued to the applicant in respect of the decision on 7 December 2015, the stated basis on which the delegate was satisfied that the applicant did not pass the character test was as follow:

> You have a substantial criminal record within the meaning of s 501(6)(a) on the basis of s 501(7)(a), (b) or (c) of the Act. On 08 October 2004 you were convicted of Grievous Bodily Harm and sentenced to four years imprisonment. On 09 April 2015 you were convicted of Breach of Probation Order Imposed on 08 April 2013 and sentenced to eight months imprisonment for which you are currently serving a full time sentence of imprisonment in a custodial institution.

17 On 13 October 2016 that cancellation was revoked under s 501CA(4) of the Act.

18 As I have already noted, on 12 December 2019 the applicant's visa was cancelled again under s 501(3A) of the Act. In the notice of cancellation, the stated basis on which the delegate was satisfied that the applicant failed to pass the character test was as follows:

> You have a substantial criminal record within the meaning of s501(6)(a) on the basis of s501(7)(a), (b) or (c) of the Act. Under s501(7)(c) a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

> On 08 October 2004 you were convicted…for the offence of Grievous bodily harm and sentenced to four years imprisonment.
>
> […]
>
> On 16 October 2019 you were convicted…for the offences of Receiving tainted property and Possess tainted property and sentenced to five months imprisonment on each offence. You are currently serving this sentence on a full-time basis.

19 For reasons which I will return to later, it is relevant to note that both the 2015 and 2019 notices refer to the 2004 offending as the stated basis for mandatory cancellation. The basis for the purported cancellation in 2018 is unknown.

RELEVANT LEGISLATION

20 Section 501(3A) of the Act is a mandatory cancellation provision. It relevantly provides that the Minister must cancel a visa if satisfied that the person does not pass the **character test** because of a substantial criminal record where the person is serving a full-time sentence of imprisonment. It provides as follows:

> The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph 6(e) (sexually based offences involving a child); and
>
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

21 Section 501(3A) introduces a narrower version of the character test provided for in s 501 (specifically, sub-ss (6), (7) and (7A)) for the purposes of mandatory cancellation. Section 501(6) sets out a number of grounds on which a person does not pass the character test, including where a person has a substantial criminal record. Section 501(7) then provides for six grounds on which a person will be considered to have a substantial criminal record for the purposes of the test. By operation of s 501(3A)(a)(i), only the first three grounds in s 501(7) are relevant to this narrow character test, being:

> (a) the person has been sentenced to death; or
>
> (b) the person has been sentenced to imprisonment for life; or
>
> (c) the person has been sentenced to a term of imprisonment of 12 months or more...

22 Section 501CA(4) of the Act then provides that the Minister may revoke the mandatory cancellation decision in certain circumstances. For the purposes of exercising this power, the character test is broader and refers to the entirety of the character test as defined in s 501 of the Act. Section 501CA relevantly provides:

> (1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.
>
> […]
>
> (4) the Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked.
>
> (Underline emphasis added.)

23 Section 501(6) defines the character test as follows:

> For the purposes of this section, a person does not pass the character test if:
>
> (a) the person has a substantial criminal record (as defined by subsection (7)); or
>
> (aa) the person has been convicted of an offence that was committed:
>
> (i) while the person was in immigration detention; or
>
> (ii) during an escape by the person from immigration detention; or
>
> (iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or
>
> (ab) the person has been convicted of an offence against section 197A; or
>
> (b) the Minister reasonably suspects:
>
> (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
>
> (ii) that the group, organisation or person has been or is involved in criminal conduct; or
>
> (ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:

(i) an offence under one or more of sections 233A to 234A (people smuggling);

(ii) an offence of trafficking in persons;

(iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

(e) a court in Australia or a foreign country has:

(i) convicted the person of one or more sexually based offences involving a child; or

(ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or

(f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

(i) the crime of genocide;

(ii) a crime against humanity;

(iii) a war crime;

(iv) a crime involving torture or slavery;

(v) a crime that is otherwise of serious international concern; or

> (g) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*); or
>
> (h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.
>
> Otherwise, the person passes the character test.

24 As is apparent, the whole of s 501(6) is much broader than paragraphs (a) and (e), which are all that are relevant to the character test for the exercise of the mandatory cancellation power as set out at [20] above: s 501(3A)(a)(i).

25 Section 501(7) then includes the following grounds for when a person will be deemed to have a "substantial criminal record", which are additional to those set out at [21] above:

> […]
>
> (d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or
>
> (e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
>
> (f) the person has:
>
> (i) been found by a court to not be fit to plead, in relation to an offence; and
>
> (ii) the court has nonetheless found that on the evidence available the person committed the offence; and
>
> (iii) as a result, the person has been detained in a facility or institution.

26 And s 501(7A) provides as follows:

> For the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.
>
> Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.

27 It is worth noting here that the applicant claims that the Tribunal, in exercising the s 501CA(4) revocation power, is also confined to the narrow version of the character test and contends that the words in s 501CA(4)(b)(i) ought to be read co-extensively with or limited by those same words as they appear in s 501(3A)(a)(i). I do not accept this construction of s 501CA(4) and will explain this position in more detail below.

28 I will now turn to Direction 90, which took effect on 15 April 2021 and revoked the previous Direction 79. Section 499(2A) of the Act requires a person or body performing functions of exercising powers under the Act to comply with directions given under s 499(1). Relevantly, this includes Direction 90. It is useful to set out the relevant parts of that Direction now.

29 Clause 5.2 of the Direction provides a framework of five principles within which decision-makers are to approach their decision-making.

30 Part 2 of the Direction then identifies the factors that must be considered when making such a decision.

31 Clause 8 of the Direction sets out the following **primary considerations**:

> (1) protection of the Australian community from criminal or other serious conduct;
>
> (2) whether the conduct engaged in constituted family violence;
>
> (3) the best interests of minor children in Australia;
>
> (4) expectations of the Australian community.

32 The content of these primary considerations is set out in further detail in sub-cll 8.1 to 8.4 of the Direction.

33 Clause 9(1) of the Direction then sets out a non-exhaustive list of **other considerations** which must be taken into account where relevant, being:

> (a) international non-refoulement obligations;
>
> (b) extent of impediments if removed;
>
> (c) impact on victims;
>
> (d) links to the Australian community, including:
>
> > (i) strength, nature and duration of ties in Australia;
> >
> > (ii) impact on Australian business interests.

34 The content of these other considerations is set out in further detail in sub-cll 9.1 to 9.4 of the Direction.

35 In respect of how these considerations are to be applied, cl 7 of the Direction provides:

> (1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.
>
> (2) Primary considerations should generally be given greater weight than the other

considerations.

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

36 Returning to the Act, it is also convenient to set out s 476A(1), which provides for the circumstances in which this Court has original jurisdiction in respect of migration decisions as follows:

> Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:
>
> (a) the Federal Circuit Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Circuit Court of Australia Act 1999*; or
>
> (b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or
>
> (c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B, 501BA, 501C or 501CA; or
>
> (d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.

37 Section 474 relevantly provides:

> (1) A privative clause decision:
>
> (a) is final and conclusive; and
>
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
>
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
>
> (2) In this section:
>
> ***privative clause decision*** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5)…

THE TRIBUNAL'S DECISION

38 The Tribunal determined not to revoke the cancellation decision of 12 December 2019 by reference to the requirements in s 501CA(4) of the Act and Direction 90. There was no dispute before the Tribunal that the applicant had made the representations required by s 501CA(4)(a)

of the Act, and it was also conceded that the applicant did not pass the character test for the purpose of s 501CA(4)(b)(i) of the Act.

39 In finding that the applicant did not pass the character test, the Tribunal held:

> [17] The Applicant was convicted in the District Court of Queensland on 8 October 2004 of *Grievous Bodily Harm*, and sentenced [sic] four years' imprisonment.
>
> [18] As the custodial term imposed was "*a term of imprisonment of 12 months or more*", the Applicant does not pass the character test by virtue of his "*substantial criminal record*" as defined in section 501(7)(c) of the Act.
>
> [19] At the hearing, the Applicant conceded that he does not pass the character test prescribed by section 501 of the Act.
>
> [20] The Tribunal therefore finds that the Applicant does not pass the character test pursuant to section 501(6)(a) of the Act and that the Applicant therefore cannot rely on section 501CA(4)(b)(i) of the Act for the mandatory cancellation of his visa to be revoked.

40 It then proceeded to consider whether there was another reason to revoke the cancellation decision as required by s 501CA(4)(b)(ii) by applying the 'primary' and 'other' considerations in cll 8 and 9 of Direction 90.

41 In relation to the first primary consideration, being protection of the Australian community, the Tribunal set out the applicant's history of offending from 1993 to 2019 in a table that runs for more than 12 pages. It concluded (at [215], [217]) that there was substantial evidence as to crimes of a violent nature and noted the frequency of the applicant's offending. The Tribunal found that the nature of the applicant's offending conduct was very serious and that there was a real likelihood that he would engage in further violent criminal or other very serious conduct if returned to the Australian community. The Tribunal considered that this primary consideration weighed heavily against the application.

42 In relation to the second primary consideration, being whether the conduct engaged in constituted family violence, the Tribunal found that the applicant had engaged in serious family violence; the most serious instance being when the applicant stabbed his ex-wife and later threatened to kill her. It noted that the applicant's offending in terms of family violence appeared to have improved since his medication as changed in about 2013 but regarded the totality of the applicant's conduct as very serious. The Tribunal considered that this primary consideration weighed heavily against the application.

43 In relation to the third primary consideration, being the best interests of minor children in Australia, the Tribunal considered the applicant's relationship with the daughter of his partner

who was under the age of 18. The Tribunal noted that the applicant has had "practically no contact with her for the last year and a half" and even if he remained in Australia it was unlikely he would be having any significant contact with the child for a number of years: at [248], [249]. The Tribunal then expressed concern that contact between the child and the applicant may have a negative impact on the child as it may lead to her witnessing drug-taking and drug fuelled conduct, and concluded that "the Applicant's sad history of drug induced psychosis raises strong concerns for her welfare in the mind of the Tribunal were he to find himself in the role of primary caregiver": at [250], [251]. The Tribunal ultimately considered that this primary consideration weighed heavily against the application.

44 In relation to the fourth primary consideration, being the expectations of the Australian community, the Tribunal considered the Australian community would strongly expect that this applicant should not hold a visa, given that he has breached his obligation to obey Australian law on about 100 occasions and there was an unacceptable risk that he would do so again given the opportunity: at [254]-[256]. Having identified what the expectations of the community would be, the Tribunal then considered the weight to be given to those expectations. In doing so, the Tribunal referred to the other consideration in cl 9.4 of Direction 90, and ultimately considered that this primary consideration weighed heavily against the application.

45 The Tribunal then turned its attention to the other considerations identified in cl 9 of Direction 90.

46 In relation to international non-refoulement obligations, the Tribunal noted that it must assess the risk of harm or hardship that the applicant would face if removed to the Philippines. It set out an extract of the respondent's submissions, including the following:

> [98] The Applicant has made a number of claims in respect of the harm he fears if returned to the Philippines. Specifically, the Applicant has claimed (errors in originals):
>
> > (a) "I probably get shot cause tha Phillipines kill anyone that uses drugs and with mental health they probably tie me up and put me somewhere I couldn't be seen" (G2, 118); and
> >
> > (b) "I wont breack tha law again I got nobody back in pilipines and make thing worse I probably face the firing squad if I get deported" (G2, 243)
>
> […]
>
> [100] The Applicant has referred to no evidence in support of the generalised assertion that he will be shot if returned to the Philippines. It is a matter of public record that the Philippines maintains harsh drug laws and that the country's government, led by President Duterte, has conducted a particularly

> aggressive "war" against drugs since 2016. However, in circumstances where the Applicant has no criminal record in the Philippines, has had no involvement in drug activity in the Philippines, and where he has repeatedly stated that he has given up drugs, there is no reason to suggest that he would be a target of such governmental action.
>
> [101] ....There is nothing in the country information provided to suggest that individuals suffering from mental health conditions are "tied up" in the Philippines. Indeed, there appears to be no evidence that individuals suffering from mental health disorders are targeted or persecuted in any way in the Philippines. Rather, the 2018 DFAT Country Information Report states that (SG33, 692):
>
>> *Stigma around mental health conditions does exist, but the issue is not taboo. Many young people in particular have better knowledge and understanding of mental health issues and are more willing to openly discuss the topic…*

47 The Tribunal concluded that the evidence currently before the Tribunal did not support a conclusion that the applicant has a well-founded fear of persecution on the basis of his past drug use or mental health should he be removed to the Philippines, and therefore Australia did not have non-refoulement obligations in respect of him. It gave this consideration neutral weight.

48 In relation to the extent of impediments if removed, the Tribunal accepted that the applicant would face some difficulties resettling himself in the Philippines and took into account the applicant's age, mental illness and diabetes: at [276]. It gave this consideration moderate weight in favour of the application.

49 In relation to the impact on victims, the Tribunal did not make any finding as there was no specific evidence, and gave this consideration neutral weight.

50 In relation to links to the Australian community, the Tribunal accepted that the applicant had lived continuously in Australia for 30 years and his closest relatives and friends resided in Australia. It accepted that if the applicant were to be deported, then there would be significant emotional hardship for himself and his mother and sister. The Tribunal gave this consideration weight in favour of the application.

51 The Tribunal then weighed up the primary considerations and other considerations. The Tribunal found that all of the primary considerations weighed against revocation (some "extremely heavily"), and that the two other considerations weighing in favour of revocation (being the extent of impediments if removed and links to the Australian community) could not outweigh the first, second and fourth primary considerations: at [287(e)]. It did not expressly

refer to the third primary consideration in its conclusion. The Tribunal ultimately concluded that it could not exercise the discretion to revoke the cancellation of the applicant's visa: at [289].

THE JURISDICTION ISSUE: GROUND 1B OF THE APPLICATION

52 It is convenient to deal first with Ground 1B of the application, which raises issues about the validity of the 2019 mandatory cancellation decision and the jurisdiction of both the Tribunal and this Court. The issue in relation to the Tribunal's jurisdiction is whether, if the s 501(3A) decision was invalid, the Tribunal then has power to determine whether to revoke or affirm that decision under s 501(4) of the Act. The issue in relation to the jurisdiction of this Court is whether, notwithstanding that it does not have original jurisdiction in respect of the s 501(3A) decision pursuant to s 476A(1) of the Act, it nonetheless has some form of associated or accrued jurisdiction in respect of it such that it could order declaratory relief in favour of the applicant.

53 I will deal first with the jurisdiction of the Tribunal and the nature of the s 501CA(4) exercise. The applicant submits that a valid decision under s 501(3A) is a precondition to the exercise of the Tribunal's powers to determine whether to revoke the decision under s 501CA(4) and that this precondition was not satisfied. The applicant submits that, when making the mandatory cancellation decision in 2019, the Minister's delegate relied on the same failure of the character test under s 501(3A)(a) as had been relied on in respect of the previous 2015 cancellation decision (ie the 2004 offending) and so the decision was invalid.

54 The Minister contends that the s 501(3A) decision was valid but says that in any event, the power under s 501CA(4) is enlivened where there has been a decision made as a matter of fact regardless of whether that decision as in law a valid or effective decision. In respect of the operation of s 501CA(4), the Minister relies on the decision of *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 619 ('***XJLR***'), wherein Burley J found that the Tribunal had power to conduct its review under s 501CA(4) notwithstanding that his Honour considered the delegate's decision under s 501(3A) to be affected by jurisdictional error: see [90]. His Honour held:

> [88] As a consequence of the separation of the cancellation power under s 501(3A) from the revocation power under s 501CA(4), a Tribunal review under s 501CA(4) does not involve the Tribunal standing in exactly the same shoes as the decision-maker who exercised the power under s 501(3A). Indeed, s 500(4A)(c) forecloses such a proposition by precluding the Tribunal from conducting a merits review of a decision of a delegate made under s 501(3A). Section 501CA(4) is the only means by which a review can be conducted of a

> decision under s 501(3A) on its merits. This power is only enlivened in circumstances when s 501CA(1) is satisfied; s 501CA(1) is the gateway to s 501CA(4). These matters indicate that the fundamental reason why the Full Court in *Brian Lawlor* adopted its construction of the word "decision" in the context of s 25 of the AAT Act, is equally applicable in this context; if only valid decisions made under s 501(3A) are amenable to review under s 501CA(4) then certain decisions most in need of review, being those made in want or excess of jurisdiction, would be precluded from merits review: *Plaintiff S174/2016* at [39].
>
> [89] Furthermore, if the power under s 501CA(4) is conditioned on the existence of a valid decision under s 501(3A), technicality would be introduced at the outset of every decision under s 501CA(4) because the Tribunal would first need to consider the validity of the decision made under s 501(3A) in order to be satisfied that it has jurisdiction to commence its task under s 501CA(4). Similarly, if s 501CA(1) is construed as applying only to valid decisions made under s 501(3A), the Tribunal would have no power to set aside a decision made under s 501(3A) that was made in jurisdictional error. This is because the Tribunal's powers to revoke a s 501(3A) decision are found in s 501CA(4), a provision which does not apply unless s 501CA(1) is satisfied. This would be remarkable result.

55 This approach is consistent with the reasoning of Edelman J in the recent decision *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCA 24. In considering the operation of s 501A of the Act (which provides for a mechanism by which the Minister can set aside an original decision made by a delegate or the Tribunal), his Honour found (at [68]):

> Section 501A applies, by ss 501A(1)(b) and 501A(1)(c), if the Tribunal makes a decision "not to exercise the power conferred by subsection 501(1) to refuse to grant a visa to the person". This precondition for the operation of s 501A is concerned with a decision, described as the "original decision" that is made, as a matter of fact, by the Tribunal. The precondition is not concerned with whether the decision of the Tribunal is, or is not, valid as a matter of law. Just as the Tribunal had jurisdiction to make its decision under s 501(1) even if the decision of the Second Delegate were invalid, so too the Minister had jurisdiction to make a decision under s 501A(2) even if the decision of the Tribunal were invalid: *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 at 313-315, 335, 337; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217 at 232-233 [39], 248 [95].

56 Applying this principle to the present case, I consider it to be clear that the Tribunal can exercise its powers to revoke or affirm a mandatory cancellation decision under s 501CA(4) of the Act notwithstanding any purported invalidity of that decision.

57 The next question goes to the scope or nature of that power. As I have alluded to above, the applicant submits that the Tribunal in making the s 501CA(4) decision is limited by what the delegate could do in making the s 501(3A) decision. That is, the Tribunal's revocation powers

are co-extensive with the Minister's cancellation powers and the Tribunal is thus confined to the narrow version of the character test in s 501(3A)(a) of the Act.

58 The applicant relies on this construction of s 501CA(4) in order to contend that it was not open to the Tribunal to apply the broad version of the character test to 'cure' the s 501(3A) cancellation decision that he says is invalid. I do not accept that, in determining whether to revoke a cancellation decision in exercise of the powers in s 501CA(4), the Tribunal is confined to the narrow version of the character test in s 501(3A)(a). As I have already indicated by reference to the decision of Burley J in *XJLR* (at [88]-[89]), the Tribunal is not standing in the shoes of the original decision-maker when exercising the revocation power. The Tribunal has a separate task that it is required to perform under the Act. As the Minister submits, s 501CA(4) effectively provides for merits review of a decision made under s 501(3A) and in doing so the Tribunal is entitled to consider the broad version of the character test. This construction of s 501CA(4) is supported by the express reference in paragraph (b)(i) to "the character test (as defined by section 501)" and the notable absence of any reference to s 501(3A)(a) of the Act.

59 In support of his preferred construction, the applicant refers to *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 ('***Frugtniet***'), a decision where, in the context of review of an administrative decision by the Tribunal under s 25 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('**AAT Act**'), the High Court (Kiefel CJ, Keane and Nettle JJ) held that the Tribunal was subject to the same constraints as the original decision-maker: at [51]. The applicant notes that this decision did not appear to have been brought to the attention of Burley J in *XJLR* and that suggests that reference to this authority may have changed his Honour's conclusions. However, the High Court in *Frugtniet* was considering a review process which in fact required the Tribunal to stand in the shoes of the original decision-maker. In the present case, the review process is different. In s 501CA(4) there is an express statutory intent for the Tribunal to go beyond what was before the delegate, and for the Tribunal to look at the entirety of the character test in determining whether to revoke the relevant decision.

60 I agree with the following observations of Burley J in *XJLR*:

> [90] …as noted above, s 501CA(4) provides a means for the Minister or a delegate of the Minister and, on review, the Tribunal, to consider whether to revoke the cancellation decision. Section 501CA(4)(b)(i) introduces consideration of a broader version of the character test than that which was under consideration at the time of the mandatory cancellation decision made pursuant to s 501(3A) and, of particular relevance to the present case, opens consideration of multiple

> offences, including those served concurrently by the applicant at the time of the decision being made under s 501CA(4).
>
> [91] The application of the broader version of the character test accords with the statutory scheme of enabling mandatory cancellation under s 501(3A) to take place only in the clearest of cases, and more nuanced consideration to take place under s 501CA(4), when an application has been made to review the mandatory cancellation.

61 Once it is accepted that the Tribunal is entitled to look at the broad character test in s 501 then it was clearly open to the Tribunal on the evidence before it to find that the applicant did not pass the character test for the purpose of s 501CA(4)(b)(i) of the Act.

62 The Minister submits that the applicant was sentenced to many further offences after the 2015 cancellation decision and the sentences received amounted to well over 12 months' imprisonment (applying s 501(7)(d) which allows two or more sentences to be combined for the purposes of the character test) such that the applicant plainly did not pass the character test. In the Tribunal's reasons, and particularly at [17]-[20], it is somewhat unclear whether it reached the conclusion that the applicant did not pass the character test on the basis of the 2004 offending (see [17]) or after noting the applicant's concession that he did not pass the test (see [19]). Either way, it is clear from the Tribunal's reasons in respect of the evidence before it that it would have found that the applicant did not pass the character test by reference to the applicant's history of offending, even without relying on the 2004 offending. I consider any error made by the Tribunal to be immaterial to its conclusion that the applicant failed the character test.

63 I also note that there are conflicting decisions in this Court as to whether a decision-maker can rely upon the same set of circumstances for the purpose of s 501(3A)(a) of the Act if the circumstances for s 501(3A)(b) are different. In *Zyambo v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 545 ('***Zyambo***'), Derrington J found (at [41]-[46]) that the combination of matters made a difference. In *XJLR*, which is currently the subject of a notice of appeal, Burley J disagreed and declined to follow *Zyambo*: at [83]. Given the conclusions I have reached in respect of this Ground 1B it is unnecessary for me to deal with this issue. I will now say something about the jurisdiction of this Court in respect of the cancellation decision.

64 Section 476A of the Act provides that "[d]espite any other law….the Federal Court has original jurisdiction in relation to a migration decision if, and only if" it meets the description in any of

the sub-paragraphs (a)-(d). There is no dispute that the s 501(3A) cancellation decision does not meet the description in any of those sub-paragraphs.

65 At the hearing, counsel for the applicant appeared to accept that review of the s 501(3A) cancellation decision was outside the original jurisdiction of this Court as it is prescribed in relation to migration decisions in s 476A(1). However, the applicant relied on the Court's accrued or associated jurisdiction and the potential ambit of the words "in relation to" in s 476A(1). In this regard, the applicant referred to the decision of Flick J in *AFX17 v Minister for Home Affairs* [2020] FCA 807 ('***AFX17***'). In that proceeding, the applicant sought a writ of mandamus in this Court requiring the Minister or his delegate to determine a visa application under s 65 of the AAT Act. Justice Flick found that the Court had jurisdiction to grant the relief sought by the applicant and relevantly held:

> [39] The terms in which the jurisdiction vested in this Court by s 476A is expressed identifies four classes of decision, namely those identified in paras (a) to (d). And a decision made pursuant to s 65 is not one of those identified. **But to confine those matters entrusted to this Court's jurisdiction to those four matters alone is, with respect, to ignore the potential width of application on the facts of an individual case as to what may fall within the phrase "in relation to"**. That is a phrase "of wide and general import, [and] should not be read down in the absence of some compelling reason for so doing": *Fountain v Alexander* (1982) 150 CLR 615 at 629 per Mason J. As in that case, there is no "compelling reason" for reading down in the present case the width of that phrase when employed in s 476A.
>
> [40] On the facts of the present case, **the decision to be made in respect to the application for a protection visa and the decision to be made pursuant to s 501A(2) are inextricably intertwined. They have remained inextricably linked since at least the February 2020 decision of the Minister.** And the 2 June 2020 letter expressly acknowledges that the decision-making path proposed to be followed by the Minister is again to consider the Applicant's outstanding application for a protection visa in the context of setting aside the Tribunal decision and the refusal of a visa under s 501A(2) of the Migration Act.
>
> (Emphasis added.)

66 I respectfully disagree with Flick J's construction of s 476A and do not consider it appropriate for it to be followed. The words "in relation to" in s 476A(1) are not words of expansion: *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 ('***SZSSJ***') at [60]. Rather, they are to be given a "circumscribed meaning" (*Tang v Minister for Immigration and Citizenship* (2013) 217 FCR 55 ('***Tang***') at [6]) such that, except where expressly permitted by s 476A(1)(a)-(d), this Court does not have jurisdiction to directly review the validity of a migration decision.

67 In *Tang*, the Full Court (Rares, Perram and Wigney JJ) outlined the operation of the statutory scheme as follows:

> [6] In this case the statutory context requires that the phrase be given a circumscribed meaning. Section 476A of the Act appears in Division 2 of Part 8 of the Act which is entitled, and governs, 'Judicial Review' of migration decisions. Whether valid or invalid, a decision of a tribunal dealing with issues of migration is defined to be a 'privative clause decision' (s 474) and all such decisions are defined to be 'migration decisions' (s 5). The High Court has jurisdiction to hear suits in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: Constitution, s 75(v). The members of the Tribunal are officers of the Commonwealth. Consequently, the High Court has original jurisdiction to entertain a suit in which a writ of mandamus is sought to compel the Tribunal to decide a matter according to law and an accrued jurisdiction incidental thereto to vacate by a writ of certiorari a decision not reached in that manner. Section 476(1) of the Act grants to the Federal Circuit Court 'the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution'. Correspondingly, s 476A(1) (set out above) deprives this Court of that same original jurisdiction.
>
> [7] The expression 'in relation to a migration decision' appears throughout Division 2 of Part 8. In particular, ss 477 and 477A require proceedings 'in relation to a migration decision' in the original jurisdiction of the Federal Circuit Court and in this Court's circumscribed original jurisdiction to be commenced within 35 days of the migration decision. These time limits make little sense if proceedings 'in relation to a migration decision' were to include collateral challenges to the underlying migration decision such as might occur in a case alleging false imprisonment…

68 Having regard to *SZSSJ* and *Tang*, being decisions that Flick J did not appear to have been referred to in *AFX17*, as well as *XJLR* where Burley J found (at [90]) that the Court lacked jurisdiction in respect of the cancellation decision, I consider it clear that this Court does not have jurisdiction to review the mandatory cancellation decision and thus to grant the declaratory relief sought by the applicant. The applicant is seeking to invoke the jurisdiction of this Court in relation to a migration decision, and s 476A(1) of the Act operates so as to limit the Court's jurisdiction in relation to such decisions. While the applicant refers to the decision *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PWDL* [2020] FCA 394 (**'*PWDL*'**), where Wigney J found that the court had original jurisdiction to deal with a habeas corpus application, this is not an instance where the Court may exercise jurisdiction under s 39B of the *Judiciary Act 1901* (Cth) in respect of a "collateral challenge… to the underlying migration decision": *Tang* at [7]; *PWDL* [at [77). The present case falls squarely within the terms of s 476A(1) of the Act.

69 I would also add that *AFX17* is readily distinguishable from the present case. Even if s 501(3A) and s 501CA(4) form an "interlocking" scheme (*XJLR* at [72]), that is not the same thing as

being "inextricably linked" with the exercise of power under s 43(1)(a) of the AAT Act (read with s 401CA(4) of the Act) — at least not in the jurisdictional sense or in the sense that phrase is used in *AFX17*. As I have already stated above, determining whether to exercise the revocation power is a separate task that the Tribunal is required to perform under the Act, and it is not conditional on the valid exercise of the mandatory cancellation power under s 501(3A). The mandatory cancellation power and the revocation power are separate statutory tasks required to be performed by separate decision-makers, and those tasks were in fact performed separately and at different times. I do not consider this to be an instance where the claims arise out of "a common substratum of facts" or where "determination of one is essential to the determination of the other": *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 512 (Mason J), quoted in *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511 at [140] (Gummow and Hayne JJ). It follows that *AFX17* does not assist the applicant to seek judicial review of the s 501(3A) mandatory cancellation decision in this Court, including by invoking the accrued or associated jurisdiction of the Court.

70 Given these conclusions (putting aside the issue of delay) I refuse the application for an extension of time to file an application for review in respect of the cancellation decision, as I consider that the Court would lack jurisdiction in respect of such an application. I should indicate in respect of the issue of delay, I would not have refused the application for an extension of time if I considered there was merit in the application and the Court had jurisdiction to consider the cancellation decision.

71 I would dismiss Ground 1B of the application.

THE IRRELEVANT CONSIDERATION ISSUE: GROUND 1A OF THE APPLICATION

72 I will now deal with Ground 1A of the application, which goes to the Tribunal's application of cl 8.4 of Direction 90 in relation to the fourth primary consideration, the expectations of the Australian community. The applicant contends that the Tribunal erred in its analysis of the expectations of the Australian community by having regard to matters in cl 9.4 of the Direction, which sets out the other consideration of links to the Australian community.

73 As I have already observed, after having identified the expectations of the Australian community, the Tribunal at [257] of its reasons expressly referred to cl 9.4 of Direction 90, specifically cl 9.4.1(2)(a)(i) and cl 9.4.1(2)(a)(ii) which provide as follows:

> (2) …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.

74 The Tribunal then proceeded to consider the level of tolerance afforded to the applicant by the Australian community: at [258]-[261]. In this part of the Tribunal's reasons, there is a brief reference to cl 9.2 of Direction 90 which appears to be a typographical error. The Tribunal then refers to the principles in cl 5.2 of the Direction and emphasises cl 5.2(4) which provides as follows:

> Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other noncitizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by noncitizens who have lived in the Australian community for most of their life, or from a very young age.

75 The applicant accepts that the Tribunal was required to have regard to the principles in cl 5.2 in its application of the fourth primary consideration, but says that the Tribunal ought not to have had regard to cl 9.3 which is an 'other' consideration that is required to be considered separately. In this regard, the applicant relies on the decision of this Court in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454 ('***FYBR***').

76 In *FYBR*, the Full Court of this Court (Flick, Charlesworth and Stewart JJ) considered cl 11.3 of Direction 65, being the predecessor to Direction 79 which in turn was the predecessor to Direction 90. Clause 11.3 of Direction 65 concerned expectations of the Australian community but was in a different form to cl 8.4 of Direction 90.

77 The three members of the Full Court reasoned differently as to the proper construction of cl 11.3 of Direction 65 and the range of considerations that might be taken into account when applying it and, significantly, identifying the expectations of the Australian community. Justice Charlesworth (who delivered a separate judgment but formed a majority with Stewart J in upholding the primary judge's decision) rejected an argument that the decision-maker ought to have had regard to the applicant's personal circumstances when considering the expectations of the Australian community and held (at [74]):

> To construe cl 11.3 in that way would be to ignore the fact that the clause is intended to express a consideration that is capable of being given more weight relative to "other considerations" in the exercise of the discretion, as cl 8(4) of the Direction generally

> requires. **The primary judge was correct to say that importing into cl 11.3 all countervailing factors bearing on the ultimate decision would render cl 8(4) of the Direction unworkable.**
>
> (Emphasis added.)

78 I note that cl 8(4) of Direction 65 was identical to cl 7.2 of Direction 90, which provides that "[p]rimary considerations should generally be given greater weight than the other considerations".

79 Justice Stewart also held (at [92]):

> There is also an important structural consideration, which is identified in the reasons of the primary judge (at [39]-[41]) and Charlesworth J (at [73]). It is that community expectations are to be taken into consideration (as a primary consideration) with other factors to inform the decision-maker's decision. The consequence of that is twofold. ***First*****, not every factor relevant to the decision will inform the content of community expectations** and, *second*, the ultimate decision may differ from the community expectations.
>
> (Emphasis added.)

80 In respect of the emphasised text in the above passages, it is also helpful to have regard to the following passage from the primary judgment in *FYBR v Minister for Home Affairs* [2019] FCA 500 where the primary judge held (at [39]):

> Contrary, therefore, to the applicant's submissions, in my view there is nothing in the text or context of cl 8(3) which suggests that a primary consideration must be of the latter, fact-sensitive kind as opposed to establishing a "*norm*". Furthermore, as the Minister submitted, **it would render cl 8(3) unworkable if an "*other consideration*", which was required by cl 8(4) to be given less weight than an "*primary consideration*", was nonetheless to be taken into account as an aspect of a "*primary consideration*"**…
>
> (Emphasis added.)

81 I note that special leave to appeal from the Full Court decision to the High Court was refused: *FYBR v Minister for Home Affairs* [2020] HCATrans 56.

82 As I have already indicated, the provisions in Direction 90 are different to those considered in *FYBR*. Relevantly, cl 8.4(4) of Direction 90 provides that decision-makers "should proceed on the basis of the Government's views as articulated above without independently assessing the community's expectations in the particular case". This makes it clear that decision-makers are to stay within the confines of cl 8.4(1)-(3) when determining the content of the expectations of the Australian community, which is consistent with the reasoning of Charlesworth and Stewart JJ in *FYBR*.

83 However, cl 8.4 of Direction 90 does not specify what considerations a decision-make may have regard to when determining the *weight* to be given to the expectations of the Australian community. This point is central to the Minister's argument that the Tribunal did not err in its application of the fourth primary consideration. The Minister says there is nothing in the text of Direction 90 which makes cl 9.4.1 mandatorily irrelevant to consideration of the weight to be given to the expectations of the Australian community (as distinct from when considering the content of those expectations).

84 At the hearing, counsel for the Minister said that the applicant mistakenly construes the Direction as if it were a confined document, when instead the decision-maker is allowed to look at the specified considerations and any other matters that it considers relevant in the process of giving weight to the relevant consideration.

85 There is some force to this submission, although in the context of cl 7.2 which expressly provides for the manner in which a decision-maker should "generally" weigh up primary considerations against other considerations, I do not think it can be sustained. The Direction sets out a regime under which there is a stark demarcation between those considerations that are deemed to be 'primary' and those that are deemed to be 'other'. Although the comments of Charlesworth J in *FYBR* (and the primary judge at first instance) were made in a slightly different context, I have the same concerns as expressed by their Honours in relation to the operation of cl 8(4) and cl 11.3 of Direction 65 — that is, to allow a decision-maker to import the 'other' considerations into its analysis of the fourth primary consideration in cl 8.4 of Direction 90 would render cl 7.2 of the Direction unworkable. When one has regard to the text of Direction 90, it is clear that the decision-maker is not left at large to pick and mix from the primary and other considerations. The Direction has been structured so that the primary and other considerations are distinct steps in the decision-maker's analysis and in the ultimate balancing act of weighing up the various considerations against each other.

86 I consider that the Tribunal erred in its application of cl 8.4 of Direction 90. Even though the reference to cl 9.4 in the context of considering the fourth primary consideration was fleeting, I do not accept the Minister's submission that it was only a minor misstatement. I also do not accept that the Tribunal only had regard to the factors in cl 9.4.1 based upon the principle in cl 5.2(4), which specifically directs the Tribunal that "Australia may afford a higher level of tolerance of criminal or other serious conduct by noncitizens who have lived in the Australian

community for most of their life, or from a very young age". The entirety of [257] is directed to cl 9.4. It provides as follows:

> It is also clear that the Applicant commenced offending about two years after his arrival in Australia, when he was about 16 years of age. This therefore does lessen the weight which should be given to this Other Consideration in accordance with paragraph 9.4.1(2)(a)(i) of Direction 90. The Applicant has spent limited time contributing positively to the Australian community, but the Tribunal does give this some weight in his favour paragraph 9.4.1.2(a)(ii) of Direction 90.

87 This is clearly part of the Tribunal's analysis of cl 8.4 of the Direction in relation to the fourth primary consideration and goes beyond the principle in cl 5.2(4).

88 The next question is whether this error could have made a realistic difference to the outcome of the decision. The applicant takes a different approach to cl 9.4.1(2)(a)(i) and cl 9.4.1(2)(a)(ii).

89 In respect of cl 9.4.1(2)(a)(i), the applicant says that if the Tribunal had acted on a correct understanding of the law and applied the principles in cl 8.4 and cl 5.2, instead of incorrectly applying cl 9.4.1(2)(a)(i) to cl 8.4, there was a realistic possibility that the Tribunal would not have concluded that the further primary consideration weighed heavily in favour of non-revocation on account of the applicant's lengthy residence in Australia over three decades.

90 In respect of cl 9.4.1(2)(a)(ii), which relates to contribution to the Australian community, the applicant submits the Tribunal erred in giving weight to this factor in the applicant's favour *at this stage of its analysis*. That is, by considering this factor in the context of the fourth primary consideration, which the applicant says will always inevitably weigh against revocation of the mandatory cancellation decision, the Tribunal did not give this other consideration weight in favour of the applicant. At the hearing, the applicant submitted that, by taking into account other considerations at the primary consideration stage, the Tribunal effectively "wasted" the other consideration as it was subsumed into a consideration that can never weigh in favour of the applicant.

91 In respect of the reference to cl 9.4.1(2)(a)(i), the Minister says the applicant does not credibly point to any aspect of the Tribunal's evaluation of the facts which, absent this alleged error, could have realistically yielded a different result: *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 390 ALR 590 at [37]-[40]; cf *XJLR* at [105]-[110].

92 I agree with the Minister's submission. Indeed, before it had regard to cl 9.4, the Tribunal had already concluded that the Australian community would strongly expect the applicant should

not hold a visa: at [256]. In accordance with cl 5.2(4), the Tribunal then considered whether Australia would afford a higher level of tolerance for the applicant's conduct given he has lived in Australia from a young age (at [259]-[261]) but found that the applicant had exhausted that tolerance. This analysis (which results in the Tribunal concluding that the fourth primary consideration is to be given heavy weight in favour of revocation) stands alone without any reference to the fact that the applicant began offending shortly after arriving in Australia. Having regard to the rest of the Tribunal's reasons, I do not consider that this error could have made a realistic difference to the outcome of the Tribunal's decision.

93 I have reached the same conclusion in respect of the reference to cl 9.4.1(2)(a)(ii). As the Minister submits, it is plain that when considering the other consideration of links to the Australian community in cl 9.4 at [281]-[283] — that is, in its correct place — the Tribunal did give weight to the applicant's ties to the Australian community. The Tribunal held:

> [281] The Tribunal accepts that this Applicant has lived in Australia for all but approximately fourteen years of his life. Indeed, he has lived in Australia continuously for thirty years. The Tribunal accepts that to the extent that he has friends, they reside in Australia, as do his closest relatives, his mother and sister, each of whom have an indefinite right to remain in Australia. However, other than the pandemic, there does not appear to be any legal impediment to any of them visiting him in the Philippines, and indeed there is an incentive to do so in so far as his mother and sister are concerned as they have relatives there.
>
> [282] The Tribunal nevertheless accepts that if the Applicant is to be deported, there will be significant emotional hardship for both himself, and his entirely undeserving mother, and sister, both of whom have enough to cope with. Both of them, in their evidence tried hard to paint the best possible picture of the Applicant and his prospects of rehabilitation.
>
> [283] The Tribunal gives this consideration weight in favour of revocation of the decision to cancel his visa.

94 It is clear that the Tribunal's earlier consideration of the strength, nature and duration of the applicant's ties to Australia in the particular context of the fourth primary consideration did not affect how the Tribunal applied the other consideration later in its reasons. The Tribunal plainly understood the other consideration and viewed it in favour of the applicant; it was not "wasted".

95 I would dismiss Ground 1A of the application.

THE DFAT REPORT ISSUE: GROUND 2 OF THE APPLICATION

96 In Ground 2 of the application, the applicant contends that the Tribunal failed to have regard to, or properly engage with, critical material in the DFAT Report about the risk of harm to drug users and the availability of mental health services in the Philippines.

97 The applicant points to the following passages in the DFAT Report in relation to the treatment of drug users in the Philippines:

> **Extra-Judicial Killings and the Anti-drug Campaign**
>
> 4.1 During his election campaign, Duterte promised to eliminate drug dealers and drug users. Following his election, he launched an anti-drug campaign, 'Oplan Tokhang', implemented by the Philippine National Police (PNP) whereby drug users and pushers are encouraged to 'surrender' to authorities or risked being killed. As of the end of 2017, an estimated 1.9 million people had surrendered to police. Police have a network of informants and police have conducted campaigns in which they visit suspects' houses and 'encourage' them to cease drug activities.
>
> 4.2 According to the US Department of State, between January and the end of September 2017, media reports listed more than 900 fatalities in police operations suspected to be connected with the government's anti-drug campaign. Estimates of the number of fatalities vary, and some civil society groups and media outlets put the number much higher. Some of these killings may be carried out by vigilante groups or be related to other kinds of crime. However, many cases involve corpses holding handwritten notes that identify them as drug users, or telling others not to use drugs, which police attribute to vigilantes. Police investigations of claims of extra-judicial killings have often not been thorough. However, three police officers who were filmed killing an unarmed teenager in an anti-drug operation in August 2016 were convicted in 2018.
>
> 4.3 Some of the drug pushers who have surrendered have been detained. Users who have surrendered have largely been released but are expected to undergo a rehabilitation process. Some large drug rehabilitation centres have been built and the effectiveness of these centres is variable.
>
> 4.4 Suspected drug users may be forced to take drug tests. These tests used to be conducted by police, but are now taken by Drug Enforcement Agency agents. Tests have previously been conducted in schools, but this practice has reportedly ceased. There may be quotas for these tests and relatives and neighbours may provide samples to disguise the drug use of their relatives.
>
> 4.5 Drug 'watch lists' containing the names of suspected drug users and pushers have been created by barangay officials and the police. They may not always be in the form of a written list, and they are generally not vetted or investigated. The drug lists are not confidential; many communities know who in their neighbourhood is on the list and lists are sometimes leaked. Some people use bribes or personal connections to have people with whom they have a personal dispute listed as drug suspects. DFAT is aware of reports that lists may allegedly also be associated with quotas of people to test, arrest or kill for drug use. According to the US Department of State, some individuals named on these published lists have subsequently been killed by police or suspected

vigilantes.

> 4.6 People accused of drug crimes may have difficulty accessing legal representation. Many lawyers are reluctant to take on those cases. The indigent, subject to strict means-testing, may have access to a government funded lawyer but these services have capacity and funding constraints.
>
> […]
>
> 4.8 DFAT assesses that poor people who are suspected methamphetamine users and pushers face a high risk of violence, including death, from both the Philippine National Police and vigilantes. The existence of drug 'watch lists' and the ease of obtaining these lists would make it difficult to avoid being targeted.
>
> […]
>
> **Police**
>
> […]
>
> 5.4 Police, or off-duty police in civilian clothing, have been accused of extra judicial killings of suspected drug users. Human Rights Watch reports examples of local police conducting their own rogue operations. This may involve plain-clothed or retired police officers. Police openly admit the presence of rogue officers. There is a strong fear of the police in some communities, particularly those affected by the 'War on Drugs'. The US Overseas Security Advisory Council has reported that the PNP is limited in its capacity to respond to victims of crime due to reasons as simple as a lack of essential equipment like response vehicles and radios.

98 The applicant also points to the following passages in the DFAT Report in relation to access to mental health services in the Philippines:

> 2.18 The 1987 Philippines Constitution requires the state at a national level to 'protect and promote the right to health and instil health consciousness among [the population].' It also requires the state to make healthcare available to people 'at an affordable cost' and includes an undertaking to 'provide free medical care to paupers'. In reality, despite the availability of a national health insurance agency, numerous out-of-pocket expenses make health care costly and hinder access for poor people. The poor may have difficulty understanding or accessing healthcare bureaucracy, especially if they are located in rural areas, far from services. Middle class people generally have private health insurance.
>
> […]
>
> 2.21 Mental healthcare is available, but is limited. Local media reported in 2017 that only about seven per cent of public and private hospitals have mental health wards or units. Payment for mental health services, like all health services, may be required. The National Centre for Mental Health, a large government teaching hospital in Manila, caters mostly to indigent clients. Local experts told DFAT that the number of mental health professionals such as psychiatrists, psychologists and mental health nurses is not enough to meet demand. However, the data on mental health conditions is limited, making the problem difficult to measure. Other health providers that people are more likely to come into contact with, such as generalist nurses and doctors, may

not have any awareness of mental health conditions or care.

99 In respect of the material in relation to the risk of harm to drug users, the applicant says that the Tribunal failed to intellectually engage with any of the relevant material in the DFAT Report, and erred in concluding (at [271]) that there was "insufficient evidence before the Tribunal that the applicant's past drug history would result in any risk of harm should he be returned to the Philippines". In regard to the latter point, the applicant submits that it was not open to the Tribunal to limit the applicant's drug use to a matter of past history given its other findings. For the purposes of the task of this Court in reviewing the Tribunal's decision for jurisdictional error, I consider the submission to be relevant to Ground 4 of the application and will consider it later in my reasons. In considering Ground 2 of the application, I will focus on whether the Tribunal engaged with the relevant material in the DFAT Report.

100 At [55] of its reasons, the Tribunal recorded the delegate's summary of the applicant's submission to the delegate, which included "[h]e is mindful of the current Philippines government's reputation for having people with a drug history like himself killed."

101 As I have already noted, at [268] of its reasons, when applying the other consideration in relation to Australia's non-refoulement obligations, the Tribunal set out an extract of the Minister's submissions in response to the applicant's claims. In respect of drug use, the Tribunal recorded the Minister's submission as to the potential risk to the applicant as a drug user in the Philippines. This included the observation that "[i]t is a matter of public record that the Philippines maintains harsh drug laws and that the country's government, led by President Duterte, has conducted a particularly aggressive 'war' against drugs since 2016".

102 The Tribunal then went on to state:

> [269] There is no evidence before this Tribunal that this Applicant has ever engaged in illicit drug use in the Philippines, or has previously come to the adverse notice of police or courts in the Philippines in relation to drugs, or indeed for any reason. The Applicant has assured the Tribunal of his intended efforts to avoid falling back into drug usage. Hopefully he is able to sustain these efforts, and if he keeps his word he ought not to be the subject of any concerns arising from possible treatment as a drug user.
>
> [270] The Applicant's articulated concerns for his safety in the Philippines are largely implicitly founded on an assumption that he will fail in his stated objective of taking all steps to remain drug free. There is however insufficient evidence before the Tribunal that the Applicant's drug use would result in him being at any risk of harm should he be returned to the Philippines.
>
> [271] Whilst there is no doubt that the Applicant has a significant and concerning drug history, in the process of his return to the Philippines, he has the

> opportunity of leaving that past behind him, and if he takes this path, the impact of his drug history on his life in the Philippines should be minimised. There is insufficient evidence before the Tribunal that the Applicant's past drug history would result in any risk of harm should he be returned to the Philippines.

103 It is clear from the Tribunal's reasons that the risk to drug users in the Philippines, which is what the evidence in the DFAT Report goes to, was accepted as a matter of fact. While the Tribunal may have given little weight to the material in the DFAT Report it is clear that the Tribunal both had regard to and engaged with the relevant material — albeit in a way that the applicant says was in error. I will return to the Tribunal's treatment of the applicant's drug use later in my reasons, but for the purposes of Ground 2 of the application, I consider that the Tribunal's obligation to have regard to the material in the DFAT Report was satisfied.

104 Given this conclusion, it is unnecessary for me to deal at this stage with the Minister's submission that the Tribunal was not required to refer to all the evidence before it in the absence of an express claim by the applicant. I will consider the nature of the applicant's claim as to future drug use by him when I deal with Ground 3 of the application.

105 In respect of the material in relation to the availability of mental health services in the Philippines, the applicant says that the Tribunal also failed to intellectually engage with this material which led to error in its reasoning in respect of the other considerations of international non-refoulement obligations and the extent of impediments the applicant may face in establishing himself and maintaining basic living standards in the Philippines.

106 The applicant submits the Tribunal erred in concluding (at [272]) that there was "insufficient evidence before the Tribunal that the Applicant's mental health would result in any risk of harm should he be returned to the Philippines" when considering the non-refoulement obligations, as the DFAT Report evidenced the considerable financial and practical limitations the applicant would face in addressing his mental healthcare needs in the Philippines.

107 The applicant submits the Tribunal erred in concluding (at [278]) that there was "no country information before the Tribunal that the Applicant will not be able to seek and receive any medication, counselling or other treatment which he may require in the Philippines" when considering the extent of impediments if removed. The applicant says that the country information made it plain that mental health care services in the Philippines were limited, payment may be required for those services and there are not enough mental health care providers in the Philippines to meet demand. In those circumstances, there was country

information that demonstrated the applicant might not receive treatment for his mental health problems.

108 In response, the Minister says that the Tribunal did specifically consider and resolve the applicant's claim of fear upon being returned to the Philippines in relation to his mental health, again noting what the Minister submits to be the absence of certain express claims in relation to the applicant's mental health and support available to him. The Minister also refers to the oral evidence of the applicant's mother that if the applicant were deported that she would "try help him, everything in way can to support him" (T24.31-32) which is said to indicate that she would support him to obtain health services in the Philippines.

109 It is useful to closely examine the Tribunal's reasons in respect of the applicant's mental health concerns. At [55] of its reasons, the Tribunal recorded the delegate's summary of the applicant's submissions, which included "[h]e's concerned about the level of medical support he will receive for his mental health concerns if returned […] to the Philippines". At [58], the Tribunal also noted that the Applicant said he needed medication which was not available in the Philippines and that his mental illness would be left untreated there.

110 As I have already noted, at [268] of its reasons, the Tribunal quoted from the Minister's submissions which included an express reference to the DFAT Report and a statement that there was "nothing in the country information provided to suggest that individuals suffering from mental health conditions are 'tied up' in the Philippines" and "there appears to be no evidence that individuals suffering from mental health disorders are targeted or persecuted in any way in the Philippines". Obviously, this goes to the treatment of individuals with mental health issues rather than the availability of mental health services in the Philippines.

111 The Tribunal went on to conclude (at [272]):

> In relation to his claims regarding mental health, no medical practitioner who has provided evidence to this Tribunal has expressed the view that the Applicant will not be able to source any necessary medical treatment to assist him to address his mental health issues. However the Tribunal accepts that the onus will be on him to seek out such treatment. There is insufficient evidence before the Tribunal that the Applicant's mental health would result in any risk of harm should he be returned to the Philippines.

112 When one has regard to this analysis, it is clear the Tribunal did have regard to and engaged with the substance of the information in the DFAT Report and the issues in relation to the availability of mental health services in the Philippines. In referring (at [272]) to the applicant's "claims regarding mental health", it is clear that the Tribunal is referring to the applicant's

claims as to the potentially adverse impacts on his mental health that may eventuate if the applicant were returned to the Philippines, including the issue of availability of mental health services. Then, when the Tribunal concludes that there is "insufficient evidence that the applicant's mental health would result in any risk of harm should he be returned to the Philippines", it is apparent that the Tribunal is not referring to any absence of evidence about the availability of mental health services in the Philippines but is instead identifying what it perceives to be a lack of evidence about whether the applicant in particular would be able to source the treatment he needs. The evidence in the DFAT Report (at [2.21]) was that mental health care services in the Philippines were available but limited. At [272] of its reasons, the Tribunal found there to be insufficient evidence for it to determine this issue in the applicant's favour and declined to find that he would be at risk of harm to him if he returned to the Philippines.

113 While the Tribunal may not have given the evidence in the DFAT Report weight in favour of the applicant because it considered there to be insufficient evidence that the applicant would not be able to source necessary medical treatment, this does not mean there was any relevant failure to have regard to the information before it.

114 I would dismiss Ground 2 of the application.

THE CLAIM ISSUE: GROUND 3 OF THE APPLICATION

115 In Ground 3 of the application, the applicant contends that he was denied procedural fairness by the Tribunal as it failed to address his claims that future drug use in the Philippines would lead to him being killed, and that his partner needed him in Australia for emotional and financial support.

116 I will first address the future drug use issue. The applicant notes that the Tribunal recorded the effect of his claim that future drug use by him in the Philippines would lead to him getting shot and killed. At [264] of its reasons, the Tribunal observed:

> The Applicant made claims within his submissions to the Department that he would be at risk of the harm, if he were removed to the Philippines, because of the following grounds:
>
> - I probably get shot cause tha Phillipines kill anyone that uses drugs and with mental health they probably tie me up and put me somewhere I couldn't be seen';
> - 'They kill people in tha Phillipines with drug history the now President do I don't feel safe at all';

- ‘pilipnies is nott a place for me they kill people there with a drug history just like that’; and
- ‘I wont breack tha law again i got nobody back in pilipines and make thing worse i probably face the firing squad if i get deported’.

(Footnotes omitted.)

117 Then at [268] the Tribunal quoted from the Minister’s submissions which included the following:

> [98] The Applicant has made a number of claims in respect of the harm he fears if returned to the Philippines…
>
> […]
>
> [99] In short, the Applicant’s contention appears to be that, because he uses illicit drugs, and because the Philippines has very strict laws about the use of illicit drugs, he will face serious criminal or extra-judicial sanctions if returned to the Philippines.

118 The applicant submits that the Tribunal only recorded the future drug use claim but failed to resolve it, even though it concluded (at [275]) that the evidence before the Tribunal does not support a conclusion that the applicant has a well-founded fear of persecution on the basis of his *past* drug use.

119 The Minister submits that the Tribunal was not required to resolve any claim relating to future drug use in the Philippines as such a claim was not in fact made by the applicant. At the hearing, counsel for the Minister was asked to consider whether the statement commencing “probably get shot” set out at [116] above amounted to a claim. In response, counsel for the Minister said that this statement ought to be understood as a statement of principle about the treatment of drug users in the Philippines and it ought to be read in the context of the applicant telling the Tribunal that he would not use drugs in the future. The Minister contends that while the applicant has been in prison and immigration detention he has been drug free for a number of years and that the evidence was that his triggers for reverting to drug use were specific to Australia. The Minister also notes that there was no medical evidence before the Tribunal that, given the applicant’s prolonged lack of drug use since being placed in immigration detention, he required rehabilitation services absent needing help to address particular triggers in Australia.

120 The Minister points to the following evidence summarised by the Tribunal:

> [144] The Applicant agreed that exposure to destabilisers, including drug using peers (such as his girlfriend) was a risk for him, and that was why he wanted to go into rehab for a year. He admitted that he and his girlfriend used to take illicit

> drugs together. He said she is still using drugs. His children are not close to him.
>
> [...]
>
> [153] The Applicant was referred to the statutory declaration he made on 14 February 2016, in which he stated that he had been through a hard life and declared that since he got his house and girlfriend he wanted to be there for her. He had also declared that he would stop hanging around people that took drugs, and that he knew that drugs triggered his mental health, and was willing to go to rehab if he got the chance. He commented about his girlfriend "She was crazier than others – she needed help more than me". He acknowledged that he continued reoffending after he wrote this statutory declaration, and said that this time he has spent more time in the detention centre and is more mature. He has thought about his life, and knows what is better for everyone.

121 The Minister says that the evidence before the Tribunal was that the applicant's triggers were very fact-specific to Australia and would not apply in the Philippines. The Minister also refers to a report on the applicant from a Queensland prison psychiatrist dated 30 August 2018 that does not refer to any drug use by the applicant.

122 Having regard to the material before the Tribunal, I consider it to be clear that the applicant claimed to be at risk due to future drug use, even if he also stated that it was his intention to get off drugs. This claim was made at the hearing, alluded to in the applicant's submissions to the delegate (which were before the Tribunal), and was even recorded in the Tribunal's reasons. This conclusion is consistent with my earlier findings in respect of the information in the DFAT Report — that is, the fact that the Tribunal had regard to information about the treatment of drug users in the Philippines is consistent with it being on notice of a claim that the applicant would be at risk as a drug user in the Philippines.

123 The issue thus becomes whether the Tribunal failed to resolve the claim such that the applicant was denied procedural fairness. In its reasons (at [269]-[271]), which I have set out above, the Tribunal makes findings on the basis of the evidence before it as to whether or not the applicant would be at risk in the Philippines because of drug use. The Tribunal expressly acknowledged the applicant's "articulated concerns for his safety" but did not find that the applicant would be at risk in Philippines. This part of the analysis of the Tribunal was on the basis that the applicant would fall back into drug use in the Philippines. The Tribunal proceeded at [270] on an assumption that that the applicant would fail in his stated objective to get off drugs, and then found on that basis that there was insufficient evidence that the applicant's drug use would result in risk of harm should he be returned to the Philippines.

124 In these passages, it is clear that the Tribunal both records and resolves the applicant's claim, albeit not in favour of the applicant. It follows that I do not consider the applicant to have been denied procedural fairness in the way now alleged by the applicant.

125 I will now turn to the issue of the applicant's partner.

126 It is said that the applicant advanced a claim that his partner of ten years also has a mental illness and needs him for emotional and financial support. The applicant submits that the Tribunal failed to address this claim at all, even though the Tribunal accepted that there would be significant emotional hardship for the applicant's mother and sister if he were to be removed to the Philippines.

127 The applicant submits that cl 9(1) of Direction 90 makes it plain that in making a decision under s 501CA(4), other considerations must also be taken into account where relevant, and the specified considerations are non-exhaustive. The applicant contends that had the Tribunal had regard to the hardship to partner claim, it was a matter that could have been given weight in the applicant's favour and there was a realistic possibility that the ultimate outcome would have been different.

128 The applicant relies on the statement of Allsop CJ in *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [3]: "[where] decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people". The applicant also refers to other decisions where this Court has found the Tribunal to have committed jurisdictional error on account of a failure by the decision-maker to take into account the adverse practical and emotional consequences for relevant members of the Australian community as a result of a s 501 decision, citing *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 at [31]; *Kelekci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1000 at [39]-[40]; *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 at [81].

129 In response, the Minister submits that the proposition that the applicant positively contributed to his girlfriend's management of her mental health issues given his own chronic offending and drug use is not credible and is without any medical foundation or corroboration. The Minister submits that the evidence before the Tribunal as to the nature of the relationship demonstrates

only that on one occasion the applicant had done the cooking, cleaning and housework for his girlfriend which is not the critical support required by an active drug user.

130 The Minister also says the applicant's argument is inconsistent with the applicant's evidence to the Tribunal about the toxic nature of their relationship, which the Tribunal summarised at [140] as follows:

> The Applicant agreed that exposure to destabilisers, including drug using peers (such as his girlfriend) was a risk for him, and that was why he wanted to go into rehab for a year. He admitted that he and his girlfriend used to take illicit drugs together. He said she is still using drugs. His children are not close to him.

131 It is also said to be inconsistent with the fact that the applicant intended, if allowed to remain in Australia, to move to South Australia with his mother and sister: see [248] of the Tribunal's reasons. The Minister contends that, on any view, the applicant's claims in relation to his girlfriend could not have rationally been "another reason" for revoking the cancellation decision and therefore did not need to be considered: citing *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at [34], [45] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

132 At [55] of its reasons, the Tribunal recorded the delegate's summary of the applicant's submission to the delegate, which included "[h]e has been in a de facto relationship with his partner, an Australian citizen, who suffers from schizophrenia, and needs his support, for around 10 years". The effect of this claim was then repeated by the Tribunal at [59].

133 The Tribunal also referred to evidence that was relevant to this claim as follows:

> [63] The Applicant acknowledged that he had a drug problem and said he wanted to take responsibility for it. He promised to attend church, stop taking drugs, not to re-offend or breach domestic violence orders again. He was prepared to go to rehabilitation, meetings, and counselling. He expressed a desire to help the homeless and disabled, and to do as much as he could for his baby stepdaughter, caring for his sick girlfriend, and trying get a full-time job. He said that his girlfriend had found a stable home for him, and he could stay with her and look for job to secure his future. He said that he would have a full-time job when he gets out as a carer for his girlfriend.
>
> […]
>
> [81] Mr PYDZ gave evidence in chief and promised that if he is given a chance to stay in Australia, he will go to rehab, counselling, look after his girlfriend and his mother and children and step daughter. The Applicant told Mrs PYDZ that he would stay away from drugs and his past conduct, and promised that he would be of good behaviour for the community. He will be the carer for his sick girlfriend, and will be a good person.
>
> […]

> [100] Mrs PYDZ said that if the Applicant is released into the community he will live with his girlfriend, and do all the housework. Mrs PYDZ also said that the Applicant's case manager would help him find a place in Queensland. She said that she usually visited Brisbane and stayed with his ex-wife and children and saw him every day. However, she had not been to Queensland since Covid-19 struck.
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> […]
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> [119] The Applicant was also referred to a statutory declaration he made dated 19 June 2007 wherein he stated that he was in the process of trying to obtain work, and that there was nothing stopping him from making a positive contribution to the Australian community if he was provided with a second chance. The Applicant agreed he was given support in 2006-7 to avoid drugs etc, and that despite living with his wife and children and undertaking courses in prison he returned to drug use and offending. He was aware at the time that this might impact on his visa. When asked why this time would be different, he said he was more mature now. He said it would be risky on his release living with his girlfriend, but that he wanted to change.

134 There was some conflicting evidence before the Tribunal as to whether the applicant did in fact intend to live with his partner if he remained in Australia. This was also summarised by the Tribunal as follows:

> [140] The Applicant said that if released he would follow his doctors and case workers, and go into rehabilitative. He said that he plans to live with his mother and sister who live together in South Australia, which was different from the evidence both he and his mother gave earlier in the hearing. He was referred to Exhibit A2 where he stated that he was going to live with his girlfriend but said that he and his mother and sister had just decided over the weekend that he would live with them in South Australia. The two moved there in 2014 after a series of protection orders had been taken out. He denied that they had moved to get away from him.
>
> [141] This time would be different if he lived with his mother because he knows she is getting old and he always wanted to be with her and spend time with her. He will get off drugs to make her happy. He had made similar promises in the past but never had proper care back then. When asked what help not previously available to him would be available this time, he said a home, but acknowledged he had a home to go to in 2007. He had previously gone back to drugs and re-offending after living with his family.
>
> […]
>
> [161] The Applicant was referred to a statement where he had said that he had been with his girlfriend for ten years, when in fact they had only been together about six years, since 2015. He confirmed his statement that she hits herself in the head if she does not get what she wants or offers herself to other men. He confirmed that "She's got the mind of a kid".
>
> […]
>
> [185] The [applicant's sister] confirmed that the Applicant will live with her and her mother if he is released into the community. She will be his carer, and take action to get him treated. She said he has actually asked for help this time. She

> proffered that if he reverts to drug use, she will continue to ask for professional help. She expects it will take 3-5 years to rehabilitate him.
>
> […]
>
> [187] Mr Avriram put to the witness, that prior to last weekend he was planning to live with his girlfriend, and that this plan had changed over the weekend. She denied the plan to live with her and her mother was a brand new plan, as they have been asking him for a long time to come and live with them.

135 The Tribunal also dealt with the evidence as to the applicant's change in plans in respect of his living arrangements. In relation to the risk of re-offending, it held:

> [193] In particular in 2007, he had a number of protective factors – he was the father of four children, living with his wife, he had completed courses in prison, had access to support services and family. Today he has almost none of the protective factors. He would not live with his wife or children, who have little contact with him. His initial desire was to live with his girlfriend who has her own history of drugs and violence against him, and appears to need significantly more support than he does. He has previously had support from his mother and sister and has returned to re-offending. The recent change in plans should not be accepted as a protective factor to prevent returning to illicit drug use and offending. He had had the benefit of past support from his mother. Notwithstanding the various protection orders as varied, he repeatedly abused her trust by reverting to drug use. He has shown little insight into his offending and continues to minimise his offending and his responsibility for it, and suggesting he himself was also a victim.
>
> […]
>
> [198] It was further submitted that the Applicant had changed his plan of action over the weekend and this demonstrated a lack of a clear plan. There is no evidence as to what type of counselling he would undertake. The Tribunal should not be satisfied that he has a protective social environment. There is little evidence of social connections outside his mother, sister and girlfriend. There is no evidence of support from his ex-wife or children. His mother and sister have in the past not been able to stop him from re-offending.
>
> [199] There is no clear evidence of a beneficial impact of re-uniting with his girlfriend.

136 Then, in relation to the likelihood of the applicant having contact with his ex-partner's child, it held (at [248]):

> He has had practically no contact with her for the last year and a half, and based on his most recent evidence, if he is released back into the community, he will be moving to South Australia to live with his mother and sister. He is therefore unlikely to have any significant contact with her for at least one further year during which time he has stated he intends to undergo further rehabilitation. His sister told the Tribunal that she thought this could take several years. In the circumstances it appears unlikely that the Applicant would be having any significant contact with the child for a number of years and would therefore not be playing a parental role. The Tribunal nevertheless notes that it would be possible to maintain contact with the child through means such as FaceTime or Zoom. He could employ the same measures from overseas.

137 The Tribunal later concluded, in relation to the other consideration of links to the Australian community (at [281]), that there did not appear to be any impediment to his “friends” or “closest relatives” visiting him in the Philippines. The Tribunal also accepted (at [282]) that there would be “significant emotional hardship” for the applicant’s mother and sister if the applicant were deported. There is a notable absence of any reference to the applicant’s partner in this analysis. However, when the Tribunal’s reasons are read as a whole, it is apparent that after it accepted the evidence of the applicant’s change in plans and intention to live with his mother and sister in South Australia, the Tribunal no longer considered the applicant’s partner to be relevant to the decision.

138 I accept that, at least initially, the applicant did make a claim that he needed to remain in Australia in order to care for his de facto partner. However, the applicant made this claim on the basis that he would be living with his partner and caring for her full time. The important and defining point is this. The applicant subsequently changed his evidence to the effect that he would be living with his mother and sister in South Australia, and intended to spend a significant amount of time in rehabilitation. This was consistent with evidence given by his sister. It is clear from the Tribunal’s reasons that it accepted this evidence of a change in position and as a result no longer considered the applicant’s role in relation to his de facto partner to be a relevant factor. The new evidence before the Tribunal was that even if he stayed in Australia, he would not have a constant physical presence in his partner’s life and would not be acting as a full time carer. On that basis, the applicant’s partner was no longer a relevant consideration. The applicant was not denied procedural fairness in respect of his claim.

139 I would dismiss Ground 3 of the application.

LEGAL UNREASONABLENESS ISSUE: GROUND 4 OF THE APPLICATION

140 In Ground 4 of the application, the applicant contends that the Tribunal’s decision was legally unreasonable, illogical and irrational on several bases.

141 Any statutory discretionary power is subject to the presumption of law that the legislature intends the powers to be exercised reasonably: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [63] (Hayne, Kiefel and Bell JJ); *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 (‘***SZVFW***’) at [6] (Kiefel CJ); [53] (Gageler J); [89] (Nettle and Gordon JJ).

142 In *DDP16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 275 at [53], Wheelahan J set out the following helpful summary of the relevant principles as to when a decision will be legally unreasonable, illogical and irrational:

> The duty of the Authority to review decisions that are referred to it under Part 7AA of the Act is imposed on the implied condition that the duty must be performed within the bounds of reasonableness: *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34; 94 ALJR 928 at [3] (Kiefel CJ, Bell, Gageler and Keane JJ). Findings by the Authority on material questions of fact are therefore amenable to judicial review on the ground of excess of power if material findings are attended by legal unreasonableness. However, in discharging the Court's function to review decisions of the Authority on the ground of legal unreasonableness, care should be taken not to exceed that supervisory role by undertaking a merits review. That is because the merits of the referred application for a protection visa, to the extent that they can be distinguished from legality, are for the Authority as the repository of the duty to undertake a de novo review: *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 36 (Brennan J); *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [66] (Hayne, Kiefel and Bell JJ). The test for legal unreasonableness is therefore necessarily stringent: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [11] (Kiefel CJ). Without being definitive, a factual finding as to a material matter may be outside the scope of the statutory review function conferred on the Authority if there was no evidence to support it, or if there was otherwise no intelligible justification for the finding, or if the finding was the product of illogical or irrational reasoning such as reasoning that is arbitrary or capricious, or if it was one at which no rational or logical decision maker could arrive on the same evidence: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [130]-[131], [135] (Crennan and Bell JJ). These overlapping categories represent different ways in which excess of power may arise. However, any illogical or irrational reasoning, or the absence of an intelligible foundation, must involve more than emphatic disagreement with the result by the reviewing court: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [40] (Gleeson CJ and McHugh J).

143 I agree with this summary and consider the principles to be equally applicable to review of decisions by the Tribunal, appreciating that the statutory task of the Tribunal in exercising the statutory discretionary power under s 501CA(4) of the Act is to arrive at the correct or preferable decision according to the material before it: see *SZVFW* at [94].

Ground 4A

144 Ground 4A of the application relates to the Tribunal's reasoning in respect of the third primary consideration, the best interests of minor children in Australia. Clause 8.3(4) of Direction 90 sets out eight factors that must be considered, where relevant, when determining the best interests of a child affected by a cancellation decision. These include:

> a) the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts

> contact);
>
> b) the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;
>
> c) the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have, a negative impact on the child;
>
> d) the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;
>
> […]
>
> h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

145 The applicant submits that there are serious problems with the reasoning of the Tribunal in respect of the third primary consideration in concluding that "the Applicant's sad history of drug induced psychosis raises strong concerns for [the child's] welfare in the mind of the Tribunal were he to find himself in the role of a primary caregiver": at [251]. It says that the Tribunal was only required (by cl 8.3(4)(c) of Direction 90) to consider any *likely* future conduct that would have a negative effect on the child. The applicant submits the Tribunal made findings which demonstrated the applicant was *not likely* to assume the role of a primary caregiver, by:

(a) concluding "it appears unlikely that the applicant would be having any significant contact with the child for a number of years and would therefore not be playing a parental role": at [248]; and

(b) finding the applicant's future plans of living in South Australia provided little scope for him to play any role in the child's life in the near foreseeable future: at [249].

146 The applicant says the Tribunal was in fact "hamstrung" by the findings at [248]-[249], which cannot be reconciled with the finding at [251] because on the Tribunal's view the applicant was unlikely to have any significant contact with the relevant child in the foreseeable future, let alone assume a parental role.

147 The applicant submits that, on a correct approach, this primary consideration could have weighed neutrally; at best, consistent with the findings made by the delegate at first instance and the concession by the Minister, limited favourable weight could have been given to the applicant for this primary consideration.

148 However, as the Minister submits, cl 8.3 of Direction 90 is not an exhaustive list. The Tribunal was required to determine the best interests of the child and it was open to it to conclude (as it in fact did at [250]) that any contact with the applicant could have had a very negative impact on the child. At [251] of its reasons, the Tribunal is considering the application of cl 8.3(4)(e) (whether the child has suffered or experienced any physical or emotional trauma arising from the applicant's conduct) as it is required to do. It then goes on to express concern about the child's welfare were he to find himself in the role of a primary caregiver, as was open to it to do. I do not consider the Tribunal to have acted unreasonably, illogically or irrationally.

149 Given this conclusion, it is unnecessary for me to deal with the Minister's submission that, as this primary consideration as not referred to in the Tribunal's description of the ultimate balancing exercise at [287(e)] of its reasons, any alleged error could not be material.

150 I would dismiss Ground 4A of the application.

Grounds 4B and 4D

151 It is convenient to deal with these grounds together, as they both relate to the Tribunal's consideration of the extent of impediments the applicant would face on return to the Philippines.

152 In Ground 4B of the application, the applicant submits that the Tribunal's conclusion that the applicant would face "*some* difficulties re-settling himself in the Philippines" (emphasis in applicant's submissions), which was reached in assessing the "other consideration" of the extent of impediments if removed to the Philippines, lacked an evident and intelligent justification and is otherwise plainly unjust. The applicant submits the Tribunal had made other findings that meant the only reasonable conclusion was that the applicant would face *substantial* difficulties in establishing himself and maintaining basic living standards in the Philippines, including the following:

(a) the applicant was suffering from longstanding mental illness problems: at [276];

(b) the applicant has no very close friends in the Philippines: at [277];

(c) the applicant has lived in Australia continuously for the last 30 years: at [55];

(d) the applicant's long adverse history provides "strong reason to believe he is incorrigible": at [232];

(e) there was "a strong likelihood" that the applicant would commit further violent offences or engage in other serious conduct: at [232], [235];

(f) there was a real prospect the applicant would continue taking illicit substances into the future: at [250]-[251];

(g) the applicant would not have the direct support of his mother and sister in the Philippines: at [276], [281]; and

(h) the applicant will suffer significant emotional hardship personally upon return to the Philippines: at [282].

153 The applicant contends that Tribunal's approach led it to attribute moderate weight in favour of the applicant for this consideration, but had it acted rationally and logically then it was open to give this other consideration greater weight in favour of the applicant.

154 However, the Minister says that the applicant has done no more than express emphatic disagreement with the Tribunal's conclusion in not giving this factor more weight, citing *CQG15 v Minister for Immigration and Border Protection* (2016) 253 FCR 496, 518 at [61] (McKerracher, Griffiths and Rangiah JJ) citing *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 645-646 at [124] (Crennan and Bell JJ). The Minister submits that the Tribunal's decision was rational having regard to the its findings, including that the applicant's mother and sister had consistently sought apprehended violence orders to protect themselves from the applicant and that he spoke the native language in the Philippines and still had extended family there. While another decision-maker might have given this consideration more weight, that does not render the Tribunal's decision unreasonable.

155 I accept the Minister's submissions.

156 In Ground 4D of the application, the applicant says the Tribunal's findings that the other consideration in relation to the extent of impediments he would face on return to the Philippines was of "moderate weight in favour of revocation" (at [279]) and that it was of "slight weight" (at [285]) are inconsistent and led the Tribunal's ultimate balancing exercise to miscarry.

157 In respect of the Tribunal's use of the words "moderate" and "slight" at [279] and [285] in describing the weight it gave to the extent of the impediments, the Minister says there is no basis to find that a difference in labelling of the Tribunal's thought processes would be a jurisdictional error. The Minister states that the Tribunal's reasons should not be "construed minutely and finely with an eye keenly attuned to the perception of error": *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272. On any

view, it is said that the Tribunal found this consideration to only lightly favour the applicant, and that it could not outweigh the primary considerations.

158 I accept the Minister's submissions.

159 I would dismiss both Ground 4B and Ground 4D of the application.

Ground 4C

160 The applicant repeats its submissions in respect of Grounds 1 to 3 and the particulars pleaded therein to allege unreasonableness, illogicality and irrationality for the purpose of Ground 4.

161 The Minister says the applicant has provided no explanation as to why some different outcome might arise in respect of these grounds if the applicant alleges unreasonableness, illogicality and irrationality in respect of them. I agree with the Minister's submission save in respect of the issues raised by the applicant as to future drug use by the applicant in respect of Grounds 2 and 3 of the application. Properly understood, most of the applicant's submissions about the risk of harm arising from the future drug use if the applicant were to return to the Philippines go to the issue of whether the Tribunal's findings were unreasonable, illogical or irrational.

162 It is important to put each of the comments of the Tribunal on drug use in context, and to focus upon the approach of the Tribunal. When considering the events which may in the future occur in Australia, all the Tribunal could do was analyse the evidence of past history and other evidence before it and make an evaluation. The Tribunal considered together issues of drug taking, mental health and re-offending. An example of this is at [231]-[232] of the Tribunal's reasons where the view of the Tribunal is expressed in terms of "risk" and "likelihood". In these paragraphs, the Tribunal did <u>not</u> find in the context of future activities in Australia that the applicant would deliver "his promised self-reform". The Tribunal's inclination was to the contrary. Equally, when discussing the best interests of the children in Australia, the Tribunal is again seeking to predict future conduct. By way of conclusion, the Tribunal refers to the applicant's sad history of drug induced psychosis raising "strong concerns" for the welfare of the child. Then the Tribunal says in conclusion (at [251]), "[g]iven the [applicant's] mental illness and repeated past failures to abstain permanently from drugs and offending, the Tribunal considers that it is not in the interests of this child to have any exposure to the [applicant]".

163 When the Tribunal comes to view the future position in the Philippines, the debate was not just about the likelihood of the taking of drugs by the applicant but also about the risk of harm if he did take drugs in the Philippines. The Tribunal considered both these matters.

164 The Tribunal (at [269]) observed that the authorities in the Philippines do not have notice of the applicant's past drug history, nor that he has been involved in illicit drug use in the Philippines. The Tribunal also commented on the applicant's stated objective to remain drug free (at [270]) but made no prediction itself as to whether he would succeed or fail in this objective. Nevertheless, the Tribunal noted (at [269]) that if the applicant "keeps his word" he ought not be concerned about being treated as a drug user. Then the Tribunal (at [271]) noted the applicant's "significant and concerning drug history", but also noted that he will have the "opportunity" of leaving the past behind him if he goes to the Philippines. However, apart from making this observation, the Tribunal also concludes (as a separate matter, assuming the applicant keeps taking drugs) at [270] that "[t]here is however insufficient evidence before the Tribunal that the [applicant's] drug use would result in him being at any risk of harm should he be returned to the Philippines."

165 The concern raised by the applicant before me is that the Tribunal proceeded on the basis that the applicant would likely revert to drug use if he remained in Australia — a view which informed its evaluation of both primary and other considerations — but adopted a different position in respect of what the applicant would do if he were returned to the Philippines.

166 I accept that at [192]-[193] of its reasons the Tribunal was of the view that the applicant would likely revert to drugs and crime in Australia having regard to past history in Australia.

167 The applicant also points to evidence that was before the Tribunal that the applicant needed ongoing assistance with his significant drug problem in the future, including:

(a) the applicant agreeing in cross-examination that he "demonstrated long-term issues in compliance with treatment and rehabilitation requests": T138.11-12;

(b) the applicant stating that he wanted to attend rehabilitation after being released from immigration detention: T140.40-41, T133.42-44; and

(c) the applicant's sister starting in respect of the applicant's drug addiction that "[t]his is a long battle" which "is not going to be easy": T136.5-6.

168 In addition, the applicant points to the comment of the Member to the applicant at the hearing that "the past unfortunately suggests you've got some major issues to overcome": T144.40-41.

169 The Minister says that the difference in the Tribunal's reasoning in respect of what he would do in the Philippines can be explained by reference to the evidence before the Tribunal of the applicant's drug use triggers. The Minister submits that this evidence was all fact-specific to

Australia. I accept that there was evidence before the Tribunal of the applicant's various triggers in Australia, including his peer group and his partner's drug use. However, it is also obvious that the evidence of the applicant's triggers was specific to Australia because he had lived in Australia continuously since the age of 14.

170 Nevertheless, I do not accept that the Tribunal undertook two inconsistent approaches that would amount to legal unreasonableness. As I have indicated, the Tribunal is attempting to make future evaluative findings on both scenarios of the applicant staying in Australia or going to the Philippines. All the Tribunal was indicating in relation to the applicant going back to the Philippines is that if his stated intent to get off drugs did prove to come to pass then he would in fact have little to fear of any harm. But the Tribunal did go on to say at [270] that "however" if there was illicit drug use by the applicant in the Philippines, based on the country evidence, then even then there was insufficient evidence to indicate that this would result in him being at risk. This was based on the information before the Tribunal as to the approach of the authorities in the Philippines, and the applicant having no history of illicit drug taking or offending in the Philippines.

171 On this basis there is no inconsistency of approach of the Tribunal and no basis to say it reasoned unreasonably. Its approach was not outside the range of possible outcomes that are defensible so as to ground jurisdictional error.

FURTHER OBSERVATION

172 By email dated 18 August 2021 (after the hearing of the application) I was advised that the Minister's legal representatives in this case had recently become aware that the Minister had argued before a five member Full Court in *Minister v CZW20* (NSD1154/2020) and *Minister for Immigration v FAK19* (SAD129/2020) and in a stated case currently before the High Court of Australia which is yet to be heard, being *Plaintiff M1/2021 v Minister for Immigration* (M1/2021) ('***Plaintiff M1/2021***'), that *Ali v Minister for Home Affairs* (2020) 278 FCR 627 ('***Ali***') and *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12 ('***Ibrahim***') are wrongly decided and that the effect of the reasoning of the majority in *Applicant S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 32 indicates that where Australia's international non-refoulement obligations feature in a former visa holder's representations about revocation, a decision-maker is not required to consider those representations in the exercise of power under s 501CA(4) of the Act in circumstances where the former visa holder is able to make a valid application for a protection visa.

173 It was suggested that if the Court is of the view that the Tribunal erred in its consideration of non-refoulement obligations, the Minister considered that it may be appropriate for the Court to reserve judgment pending the outcome of *Plaintiff M1/2021*. The applicant resisted this approach.

174 In view of my reasons, and the fact that a non-refoulement claim was raised, I see no basis to reserve judgment pending the outcome of *Plaintiff M1/2021*. I also observe that since receiving this email, the Full Court has delivered judgment in the proceedings referred to above and has found that *Ali* and *Ibrahim* were correctly decided: *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 at [1] (Allsop CJ), [80], [90] (Mortimer and Kerr JJ).

DISPOSITION

175 In view of the above reasons I will order that:

(1) The application for an extension of time for the review of a migration decision dated 11 August 2021 be dismissed.

(2) The application be dismissed.

(3) The applicant pay the first respondent's costs.

I certify that the preceding one hundred and seventy-five (175) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Middleton.

Associate:

Dated: 2 September 2021