FEDERAL COURT OF AUSTRALIA

XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1138

Appeal from:	*XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 939 (14 April 2021)
File number:	NSD 399 of 2021
Judgment of:	**HALLEY J**
Date of judgment:	22 September 2021
Catchwords:	**MIGRATION –** cancellation of special category (subclass 444) visa of New Zealand citizen pursuant to s 501(3A) of the *Migration Act 1958* (Cth) (Act) – decision not to revoke cancellation pursuant to s 501CA(4) of the Act – where primary considerations of protection and expectations of the Australian community outweighed considerations of the best interests of minor children and the applicant's ties to the community and extent of impediments if removed – procedural fairness – no evidence – misunderstanding of applicable law – irrationality, illogicality and/or unreasonableness – materiality – application for judicial review dismissed.
Legislation:	*Migration Act 1958* (Cth) ss 476A, 501, 501CA Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction no. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*
Cases cited:	*Applicants M1015/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1309 *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109; [2016] FCAFC 174 *Australian Postal Corporation v D'Rozario* (2014) 222 FCR 303; [2014] FCAFC 89 *Bale v Minister for Immigration, Migrant Services and Multicultural Affairs* [2020] FCA 646 *BZD17 v Minister for Immigration and Border Protection* (2018) 263 FCR 292; [2018] FCAFC 94 *CGA15 v Minister for Home Affairs* (2019) 268 FCR 362; [2019] FCAFC 46

CNY17 v Minister for Immigration and Border Protection (2019) 268 CLR 76; [2019] HCA 50

Craig v The State of South Australia (1995) 184 CLR 163; [1995] HCA 58

DAO16 v Minister for Immigration and Border Protection (2018) 258 FCR 175; [2018] FCAFC 2

DQM18 v Minister for Home Affairs (2020) 278 FCR 529; [2020] FCAFC 110

FCFY v Minister for Home Affairs (No 2) [2019] FCA 1990

FYBR v Minister for Home Affairs (2019) 272 FCR 454; [2019] FCAFC 185

Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123; [2018] HCA 34

Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421; [2019] HCA 3

Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326; [2015] HCA 40

Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16

Minister for Immigration and Citizenship v SZQKB (2012) 133 ALD 495; [2012] FCA 1189

Minister for Immigration and Citizenship v SZRKT and Another (2013) 212 FCR 99; [2013] FCA 317

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6

MZAPC v Minister for Immigration and Border Protection [2021] HCA 17

Navoto v Minister for Home Affairs [2019] FCAFC 135

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2003) 214 CLR 1; [2003] HCA 6

R v Ibrahim (unreported, New South Wales Court of Criminal Appeal, Sully J and Bell AJ, 4 September 1996)

SFGB v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 231

SZOOR v Minister for Immigration and Citizenship (2012) 202 FCR 1; [2012] FCAFC 58

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

Date of hearing:	16 August 2021
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Scott Calnan, Lawyer
Counsel for the First Respondent:	Mr G Johnson
Solicitor for the First Respondent:	MinterEllison
Counsel for the Second Respondent:	The Second Respondent submitted to any order of the Court, save as to costs

ORDERS

NSD 399 of 2021

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

ORDER MADE BY:	**HALLEY J**
DATE OF ORDER:	**22 SEPTEMBER 2021**

THE COURT ORDERS THAT:

1. The originating application be dismissed.

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

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

REASONS FOR JUDGMENT

HALLEY J:

INTRODUCTION

1 This is an application made under s 476A(1)(b) of the *Migration Act 1958* (Cth) (**Act**). The applicant is seeking judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**) made on 14 April 2021, affirming a decision of a delegate of the first respondent (**Minister**) not to revoke the mandatory cancellation of the applicant's visa pursuant to s 501CA(4) of the Act.

2 Section 476A(1)(b) of the Act gives the Court jurisdiction to review the decision of the Tribunal. Section 476A(2) provides that the jurisdiction is the same as the jurisdiction of the High Court pursuant to s 75(v) of the *Constitution*. Consistently with that conferral of jurisdiction, the relief sought by the applicant in his originating application is a writ of certiorari quashing the decision of the Tribunal and a writ of mandamus remitting the matter to the Tribunal for determination according to law.

3 For the reasons that follow, I find that the Tribunal did not err in affirming the decision of the Minister's delegate to refuse to revoke the mandatory cancellation of the applicant's visa pursuant to s 501CA(4) of the Act.

BACKGROUND

4 The applicant is a male citizen of New Zealand who was born in New Zealand on 4 July 1979.

5 He first arrived in Australia from New Zealand in December 2003 when he was 24 years old.

6 Between his original arrival and the date of the Tribunal's decision, the applicant resided in Australia for 17 years and three months. He spent approximately 32 days outside the country during that period, returning to New Zealand briefly on a handful of occasions.

7 It is accepted that the applicant held a Class TY (subclass 444) Special Category (Temporary) Visa (**visa**) on his most recent arrival into Australia in 2018.

8 On 10 August 2018, the visa was mandatorily cancelled pursuant to s 501(3A) of the Act. Section 501(3A) provides:

> (3A) 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.

9 Subsections 501(6) and 501(7) relevantly provide:

(6) 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));

…

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

…

(c) the person has been sentenced to a term of imprisonment of 12 months or more; …

10 If a visa is cancelled pursuant to s 501(3A) of the Act, the former visa holder can seek to have the cancellation revoked pursuant to s 501CA. 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:

…

(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 test should be revoked.

11 On 21 January 2020, a delegate of the Minister (**delegate**) notified the applicant of their decision not to revoke the mandatory cancellation of the visa.

12 By originating application filed on 6 May 2021, the applicant seeks judicial review of the Tribunal's decision to affirm the decision of the delegate not to revoke the mandatory cancellation of the visa.

13 There is no dispute that the conditions leading to mandatory cancellation pursuant to s 501(3A) were met. In the notice of mandatory cancellation sent to the applicant on 10 August 2018, the delegate was satisfied that the applicant had a substantial criminal record pursuant to s 501(7)(c) for the purposes of the character test. The delegate relied on the applicant's conviction in the District Court of New South Wales on 13 April 2007 of supplying a prohibited drug and the corresponding sentence of 12 months' imprisonment.

14 The delegate was also satisfied that the applicant was imprisoned on a full-time basis at the time of the decision. The delegate relied on the applicant's conviction on 8 November 2017 in the Supreme Court of the Northern Territory of supplying a commercial quantity of methamphetamine and the corresponding sentence of six years' imprisonment.

15 The issue before the Tribunal, therefore, was only whether there was "another reason" to revoke the original cancellation decision under s 501CA(4)(b)(ii).

16 The applicant contends that, in affirming the delegate's decision, the Tribunal fell into jurisdictional error on four grounds which are variously alleged to constitute: failures to accord the applicant procedural fairness; making decisions in the absence of probative evidence; misunderstanding of the applicable law; and illogicality, irrationality and/or unreasonableness.

TRIBUNAL DECISION

17 The Tribunal considered each of the "primary considerations" and "other considerations" stipulated in Part C of 'Direction no. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA' (**Direction 79**), which was issued by the Minister for Immigration, Citizenship and Multicultural Affairs on 20 December 2018 under s 499 of the Act.

Primary Consideration A – Protection of the Australian community

The nature and seriousness of the applicant's conduct

18 Clause 13.1.1 of Direction 79 outlines the factors that decision-makers must regard when considering the nature and seriousness of a non-citizen's criminal offending or other conduct.

19 Subparagraph (a) of cl 13.1.1(1) of Direction 79 concerns the principle that violent and/or sexual crimes are viewed very seriously (without limiting the range of offences that may be considered serious). In this regard, the Tribunal noted that there was nothing before it to indicate that the applicant had ever been convicted of a crime of a sexual nature. The Tribunal

observed that the applicant's crimes involving actual or potential violence in New Zealand comprised common assault and aggravated assault and in Australia comprised assault or obstruct police officer and two counts of assault occasioning actual bodily harm in the company of others.

20 The Tribunal placed particular emphasis on the applicant's convictions for "assault occasioning actual bodily harm in the company of others" for which the applicant was convicted in the District Court of New South Wales in Sydney on 12 June 2009. The Tribunal noted that the offending had involved the administration of serious and significant violence upon at least two victims. It observed that given the injuries sustained by the initial victim it was not "beyond the realms of possibility that the violence could have resulted in a fatality".

21 The Tribunal found that these considerations militated very strongly in favour of a finding that the totality of the applicant's offending must be viewed as extremely serious.

22 As to subparagraph (b) of cl 13.1.1(1) of Direction 79, which concerns the principle that crimes of a violent nature against women or children are viewed very seriously, the Tribunal noted that the applicant had no convictions for such offending in either New Zealand or Australia. The Tribunal noted with concern, however, that the material before it, contained in a psychological report in documents produced by the New South Wales Department of Family and Community Services (now consolidated in the New South Wales Department of Communities and Justice), disclosed some suggestions of domestic violence between the applicant and a former partner. The Tribunal concluded, however, that as the complainant in the alleged domestic violence incident was not called to give evidence it was difficult to fairly allocate any weight against the applicant on this consideration.

23 Subparagraph (c) of cl 13.1.1(1) of Direction 79 concerns the principle that crimes committed against vulnerable members of the community, or government representatives or officials due to their position or in the performance of their duties, are serious. The Tribunal stated that there was no conviction against the applicant in either New Zealand or Australia for offending against vulnerable members of the community. The Tribunal did, however, note that the applicant had committed offences against police officers in both New Zealand and Australia. The Tribunal stated that this amounted to a direct challenge to lawful directions given by government representatives in the performance of their duties and fell "squarely within the ambit of sub-paragraph (c) which stipulates that such conduct is to be regarded as 'serious'". Although the Tribunal was prepared to "discount" the two offences in New Zealand given the

relatively young age of the applicant at the time the offences were committed, it considered that this was more than outweighed by the offence committed in New South Wales, which was part of more serious offending involving illicit drugs.

24 As to subparagraph (d) of cl 13.1.1(1) of Direction 79, which concerns any criminal sentences imposed by courts, the Tribunal calculated that the total terms of imprisonment imposed on the applicant in New Zealand was seven years and nine months and the custodial terms imposed in Australia in aggregate were approximately 12 years and nine months. It observed that the head custodial terms were in the order of 20 years, which represented almost half of the applicant's life.

25 The Tribunal concluded that the totality of the sentences imposed upon the applicant very strongly militated in favour of a finding that the applicant's offending had been of an extremely serious nature.

26 As to subparagraph (e) of cl 13.1.1(1) of Direction 79, which involves an examination of the frequency of offending and whether there is any trend of increasing seriousness, the Tribunal calculated that in New Zealand the applicant had found himself before lawful authority on approximately two occasions per year with respect to the commission of almost four offences per year. In Australia, the Tribunal calculated that the applicant had found himself before lawful authority on an average of one occasion per year with respect to the commission of just over two offences per year. It therefore concluded that there could be no finding other than that the totality of the applicant's offending had been committed on a frequent basis.

27 The Tribunal observed that a review of the convictions imposed on the applicant demonstrated what it described as a "crescendo in the seriousness of the offending", culminating in a conviction by the Supreme Court of the Northern Territory in November 2017 of supplying a commercial quantity of methamphetamine for which a six year head custodial term was imposed with a non-parole period of three years. This was followed by a sentence of imprisonment of two years, five months and 28 days with a non-parole period of 362 days imposed by the District Court of New South Wales in May 2018 for manufacturing a prohibited drug in excess of a large commercial quantity. The Tribunal noted that the sentence was appealed by the Crown and resulted in an increase in the sentencing regime to a head custodial term of four years and a non-parole period of two years.

28 The Tribunal concluded that this consideration resulted in "an inevitable finding that both the frequency of the Applicant's offending and its increasing seriousness strongly militate in favour of a finding that the totality of the Applicant's offending has been at least of a very serious, more likely extremely serious, nature".

29 As to subparagraph (f) of cl 13.1.1(1) of Direction 79, being the cumulative effect of the applicant's repeated offending, the Tribunal considered that from "the very beginning, there is no semblance of him learning any lesson from past offending". The Tribunal further found that none of the initial phase of the applicant's offending in Australia from April 2007 to June 2009 – which included property offences, drug offences, offences against the lawful authority of police and offences of violence (assault) – deterred him from continuing to offend.

30 The Tribunal noted that the failure of the applicant's offending to have any deterrent effect can best be seen from 2010 onwards, a phase of offending that the Tribunal described as "the most significant". In 2010, the applicant was involved in an operation for the manufacture of drugs in the course of which the facility exploded and the applicant's co-offender was severely injured, subsequently dying in hospital. This drug manufacturing activity saw the applicant charged with a range of drug offences together with a charge of manslaughter. While on bail awaiting trial for those "very serious" charges, the applicant then committed some of his most serious offending involving the trafficking of unlawful drugs between New South Wales and the Northern Territory.

31 The Tribunal also emphasised the extent to which the applicant failed to demonstrate any measurable respect for the lawful authority governing the Australian community and how his propensity to offend caused him to disrespect what the Tribunal described as the "privilege of bail", which had been afforded to him after he was charged with drug manufacturing and manslaughter.

32 The Tribunal also emphasised the predominant role of offending in the applicant's life by reference to the number of offences that he had committed in both Australia and New Zealand, the extent to which the applicant's offending had supplanted his role as a parent and had precluded him from working in his trade as a panel beater. The Tribunal further concluded that:

> There can be no challenge to the suggestion that the Applicant will have been aware of concerted government and community-based campaigns against the significant social and economic difficulties arising from illicit drugs.

33 The Tribunal concluded that the cumulative effects of the nature and extent of the applicant's repeated offending in both Australia and New Zealand supported a finding that the totality of his offending had been "of at least a very serious, more likely extremely serious, nature".

34 As to subparagraph (g) of cl 13.1.1(1) of Direction 79, as to whether the non-citizen had provided false or misleading information to the Department of Home Affairs (including by not disclosing prior criminal offending), the Tribunal concluded that the applicant had re-entered Australia four times and on each of those four occasions he had incorrectly answered the relevant question concerning his past criminal convictions. The Tribunal allocated a moderate level of weight to this consideration in favour of a finding that the totality of the applicant's unlawful conduct to date had been serious.

35 Subparagraph (h) of cl 13.1.1(1) of Direction 79 concerns whether the non-citizen has reoffended since being formally warned, or since otherwise being made aware in writing, of the consequences of further offending in relation to their migration status. The Tribunal concluded that it was not able to find any communication of any formal warning from the Minister or any other element of lawful authority. The Tribunal therefore considered this factor was not relevant to its determination.

36 As to subparagraph (i) of cl 13.1.1(1) of Direction 79, the Tribunal concluded there was nothing in the material before it that suggested any facts or circumstances pointing to the applicant's commission of a crime while in immigration detention. It therefore concluded this consideration was not relevant to its determination.

37 The Tribunal did consider that there was material before it that fell within the reference to "other conduct" appearing in the chapeau to the considerations outlined in cl 13.1.1(1) of Direction 79. These comprised a failed urine drug screen test in September 2007 and the applicant's "poor compliance" with the conditions of a bond in March 2016 concerning attendance at appointments and maintaining contact in accordance with the conditions of his parole.

38 The Tribunal concluded that, having regard to all the matters outlined above, the nature of the applicant's conduct could be readily characterised as "at least very serious, more likely extremely serious".

Risk to the Australian community

39 Paragraph 13.1.2(1) of Direction 79 provides that:

> (1) In considering the risk to the Australian community, decision-makers must have regard to, cumulatively:
>
> a. The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and
>
> b. The likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen re-offending (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

40 The Tribunal considered that were the applicant to "again involve himself in the commission of very serious to extremely serious types of offending in the realm of illicit drugs, the impact on the community would be much more severe". This impact would not only be on the "consumers/users/addicts" of illicit substances, but also on the families and other close connections of those adversely affected by illicit drugs.

41 The Tribunal was also concerned that the applicant had committed an extremely serious offence of "supplying a commercial quantity of methamphetamine" in circumstances where the presence of his infant children in his life did not "deter, dissuade or discourage the applicant from offending in such an extremely serious way". The Tribunal concluded:

> I find that the Applicant's offending – especially in the realm of the supply and manufacture of illicit drugs – has been so serious that any risk of its re-commission would be unacceptable to the Australian community. Were he to re-offend in a similar way, I am of the view that there is a convincing likelihood that such future offending would result in very significant physical, psychological and/or financial harm to the Australian community including, quite conceivably, to a catastrophic level. The nature of the harm to be occasioned by individuals or the Australian community in the event of similar or identical offending would be very serious, more likely extremely serious.

42 The Tribunal accepted that there could be little or no argument about the traumatic nature of the applicant's early childhood. The Tribunal noted the evidence from the applicant to the effect that there was "absolutely no chance of [him] re-offending", that he was "going to gain employment immediately after release", that he had gained "extra qualifications while incarcerated" and that he wanted to be a "good father and partner and set a good example for [his] family". However, the Tribunal considered that this "self-reported evidence from the applicant" having "absolutely no chance" of reoffending had to be received with considerable caution. It found that his statements with respect to further work, including returning to the panel beating trade, taking up employment in traffic control type work, taking online courses to become a personal trainer or entering the electrical services industry were "largely speculative and aspirational".

43 The Tribunal identified a number of positive and negative factors relevant to assessing the risk of recidivism by the applicant from the matters advanced in:

(a) the applicant's statements of facts, issues and contentions;

(b) the statement of the applicant dated 3 January 2021 addressing his risk of recidivism;

(c) the oral evidence in chief and cross-examination of the applicant before the Tribunal;

(d) the expert evidence of Ms Juliet Ardren, a social worker and alcohol and other drugs specialist, Mr Sam Borenstein, a clinical psychologist, and Dr Olav Nielssen, a psychiatrist; and

(e) the evidence of other witnesses, including the father of the applicant's partner and another close friend of the applicant.

44 The Tribunal considered that a number of "positive factors" emerged from this evidence which may have suggested a "low-medium risk of recidivism" by the applicant. These positive factors comprised:

(a) sobriety in immigration detention/prison;

(b) his employment prospects upon a return to the Australian community;

(c) the passage of time since his last offence(s);

(d) his level of insight into the effects of drug use, and his mental health;

(e) the deterrent effect of the potential loss of his visa status, particularly because this will lead to separation from his three minor children;

(f) the extent of his engagement with mental health services and programs comprising the courses he has completed in immigration detention, and his proposed continued counselling with Ms Ardren (or equivalent);

(g) his good conduct in immigration detention and prison;

(h) his remorse for his offending; and

(i) his engagement with religion.

45 The Tribunal concluded, however, that the positive factors identified above were convincingly challenged by the following "negative factors" that it found emerged from the same evidence:

(a) his sobriety in immigration detention/prison has occurred within the closed confines of those institutions and remains to be tested in the broader community;

(b) his employment prospects are not clearly defined and are ultimately uncertain;

(c) the fact that he has not offended for some time is not impressive because he has been removed from the Australian community in prison/immigration detention since August 2016;

(d) while he contends that he has insight about the effects of his illicit drug use and the state of his mental health, he nevertheless has sought to level some measure of blame upon others for his unlawful activity because those others apparently failed to warn him about its adverse impact on his visa status and, further, that he and he alone will form a view about whether his depressive symptoms become "*a problem*" in his life;

(e) his contention that the threat of deportation will remove him from the lives of his children is not credible because the factor of the children in his life was no deterrent to him offending on an extremely serious basis shortly after the children were born;

(f) in terms of the extent of his engagement with mental health services and programs, I am not convinced that the Applicant's proposed sessions with Ms Ardren and the several courses he has done in immigration detention is sufficient to meet Dr Nielssen's threshold for "*ongoing counselling for substance use, given the history of long term abstinence and relapse, and the complications of past relapses*", and likewise, I am not satisfied that the Applicant's self-diagnosis or analysis of the state of his depressive symptoms can be safely relied upon as a sufficiently protective factor against him disengaging and relapsing into abusing illicit drugs;

(g) I am doubtful that he is genuinely remorseful about the nature and extent of his offending. Whatever remorse he does have is, to my mind, most clearly seen in his apprehension about a possible permanent removal from the lives of his three infant children with the result that they may very well be permanently in the care of other people.

(Original emphasis.)

46 The Tribunal made the following principal findings with respect to Primary Consideration A:

(a) the nature of the applicant's offending conduct to date was "very serious, more likely, extremely serious";

(b) there was a "convincing likelihood" that if the applicant were to reoffend, "the Australian community would conceivably suffer catastrophic physical, psychological and/or financial harm"; and

(c) the applicant's "risk of recidivism ranges from, at best, low-moderate, to, more likely, his risk now being no different than what it was at the time of his most recent removal from the Australian community".

Primary Consideration B – Best interests of minor children in Australia

47 Clause 13.2(1) of Direction 79 states that "[d]ecision-makers must make a determination about whether revocation is in the best interests of [any] child" who would be affected by the decision. Subparagraph 13.2(4) outlines that the following factors must be considered where relevant:

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;

e) Whether there are other persons who already fulfil a parental role in relation to the child;

f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and

h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

48 The Tribunal identified four children who were relevant to the proceeding, comprising the three children of the applicant ranging in age from five to seven years old and a nine year old nephew who was a child of the applicant's sister.

49 The Tribunal considered the following evidence against each of the factors identified in cl 13.2(4) of Direction 79 relevant to the best interests of those minor children:

(a) the applicant's statements of facts, issues and contentions;

(b) the report of a psychologist that appeared as an annexure to a statement of the applicant's partner's father;

(c) the applicant's statutory declaration of 26 February 2020 and the applicant's statement dated 3 January 2021;

(d) the applicant's oral evidence in chief and in cross-examination before the Tribunal;

(e) the written and oral evidence of the father of the applicant's partner and Ms GP, the close friend of the applicant;

(f) the written and oral evidence of Ms JW, the aunt of the applicant's partner;

(g) the written and oral evidence of Ms JH, the duly and lawfully appointed foster carer for one of the applicant's children; and

(h) a range of other statements contained in the material before the Tribunal (where none of the makers of those statements were called to give evidence) comprising:

(i) a statement from a case manager at Lifestyle Solutions (an authorised out of home care service provider that has case management responsibility for one of the applicant's children);

(ii) an adult nephew of the applicant;

(iii) a fellow detainee of the applicant at Villawood Immigration Detention Centre;

(iv) a "long-term dear friend" of the applicant;

(v) a New Zealand high school friend of the applicant; and

(vi) a case worker with the New South Wales Department of Communities and Justice.

50 The Tribunal ultimately found that the best interests of the four relevant minor children in Australia weighed moderately in favour of revocation of the mandatory cancellation of the applicant's visa, having regard to the following factors:

> (a) the relatively young ages of the three biological children and the relative absence of any parental relationship between the Applicant and those children because of the Applicant's removal from the Australian community for most of their lives, and the state care arrangements which have been in place for each child from time to time;
>
> (b) the relatively young age of [the applicant's nephew] and the reality that he is primarily cared for by the Applicant's sister and thus the Applicant cannot be said to have any durable parental relationship with that child;
>
> (c) the reality that the Applicant already maintains contact with the four relevant children through telephonic and other electronic real-time means and that this level of connectivity is very likely to continue in the event of his removal to New Zealand;
>
> (d) the reality that others primarily parent [two of the applicant's children and his nephew], and that Ms J H is the lawfully appointed foster carer for [his third child];
>
> (e) the further reality that any stated intention by the Applicant to lawfully re-introduce himself into the lives of his biological children as their primary carer remains an intention only and is a long way from being realised;
>
> (f) the reality that the Applicant has been absent from the lives of all of the children since August 2016;
>
> (g) in relation to each of [the applicant's biological children], considered individually, the moderate level of weight I have allocated to sub- paragraphs (a), (b) and (d) and the slight level of weight I have allocated to sub-paragraph (c);

(h) with reference to [the applicant's nephew], the minimal levels of weight I have allocated to sub-paragraphs (a), (d), and (e) and the moderate level of weight I have allocated to sub-paragraph (b);

(i) the Respondent's position that this Primary Consideration B "*should be given limited weight in favour of revocation*".

(Original emphasis.)

51 The Tribunal qualified its finding by saying that the moderate weight attributable to Primary Consideration B did not outweigh the very heavy weight attributable to Primary Consideration A.

Primary Consideration C – Expectations of the Australian community

52 Clause 13.3(1) of Direction 79 provides that a decision-maker should consider whether a non-citizen has breached, or whether there is an unacceptable risk that they would breach, the trust of the Australian community that they will obey Australian laws while in Australia.

53 The Tribunal had regard to the following circumstances in assessing the weight to be allocated to Primary Consideration C:

(a) the applicant was 24 years old when he arrived in Australia and is now 41 years old;

(b) there were four relevant minor children in Australia;

(c) the applicant had had two relationships in Australia that had resulted in three biological children;

(d) the applicant had a very lengthy, frequent and extremely serious criminal history in both New Zealand and Australia with extensive head custodial terms;

(e) if the applicant's offending especially with respect to drug manufacturing and supply was repeated, the Australian community could be exposed to significant physical, psychological and/or financial harm;

(f) the risk of recidivism ranged from "(1) at best, low-moderate; and (2), more likely, a risk of reoffending that is now little or no different than what it was at the time of his most recent removal from the Australian community";

(g) the applicant commenced offending in Australia less than three years after his arrival;

(h) its misgivings about the extent to which the applicant's proposed sessions with the social worker, Ms Ardren, or her equivalent, and the several courses he had done in immigration detention was sufficient to meet Dr Nielssen's threshold for ongoing counselling for substance abuse; and

(i) the applicant's self-diagnosis of his depressive symptoms could not safely be relied upon as a sufficiently protective factor that he would not disengage from any necessary therapy and relapse into abusing illicit drugs.

54 The Tribunal took into account the following factors and findings in determining the weight it attributed to Primary Consideration C:

> (a) the Applicant has made a modest level of contributions to the Australian community via his limited employment history and whatever assistance he may have rendered to fellow detainees;
>
> (b) putting aside the time he has spent in criminal and other custody in Australia, it can be fairly found that the Applicant has spent some 10-15 years in the Australian community;
>
> (c) the removal of the Applicant will have a negative impact on the four relevant children in Australia;
>
> (d) the extremely serious nature of the Applicant's offending to date;
>
> (e) my finding that his risk of re-committing similar or identical offences (particularly those dealt with in November 2017 and August 2018) upon any return to the Australian community is at best low-moderate, and more likely, no different to what it was at the time of his most recent removal from the Australian community;
>
> (f) My assessment that, were the Applicant's offending to be repeated, particularly in the realm of supply or manufacture of illicit drugs, the nature of harm to members of the Australian community could involve significant physical, psychological and/or financial harm including, quite conceivably, to a catastrophic level.

55 In the light of those factors and findings the Tribunal concluded that, read as a whole, they militated in favour of not revoking the cancellation of the applicant's visa. The Tribunal accordingly found that Primary Consideration C was of "heavy weight in favour of affirming the non-revocation decision under review".

Other considerations

International non-refoulement obligations – cl 14(1)(a) and cl 14.1

56 The Tribunal noted that no claim was made by or on behalf of the applicant that his removal to New Zealand would engage any of Australia's non-refoulement obligations. The Tribunal therefore considered that this factor was not relevant to its determination.

Strength, nature and duration of ties – cl 14(1)(b) and cl 14.2

57 The Tribunal concluded that because the applicant had offended less than three years after his arrival in Australia, no weight could be allocated in favour of the applicant on the basis of

cl 14.2(1)(a)(i) of Direction 79, which states: "less weight should be given where the non-citizen began offending soon after arriving in Australia".

58 The Tribunal, however, concluded that "some measure of weight" may be able to be allocated in favour of the applicant pursuant to cl 14.2(1)(a)(ii), which states that "more weight should be given to time the non-citizen has spent contributing positively to the Australian community". The Tribunal pointed to what are described as the applicant's modest history of remunerative employment in the country and his "modest contributions" to the Australian community by his positive activities in immigration detention. However, these matters had to be weighed against the fact that the applicant had spent approximately seven years in custody or detention and also that he had not been engaged in any remunerative employment since 2010. "Applying the terms of paragraph 14.1(1)(a)(ii) of the Direction as favourably towards the Applicant" as it could, the Tribunal found that he had made some measure of cumulatively positive contributions to the Australian community. However, the Tribunal concluded that in the circumstances only a "slight measure" of weight could be allocated to the applicant pursuant to this subparagraph.

59 The Tribunal found that more compelling weight could be given to the strength, duration and nature of the applicant's social and family links with Australia for the purposes of cl 14.2(1)(b) of Direction 79. The Tribunal concluded that the strength, nature and duration of the applicant's relationships with members of the Australian community that fell within the scope of cl 14.2(1)(b) were "strong and palpable" and that this consideration weighed strongly, but not determinatively, in favour of revocation of the delegate's decision to cancel the applicant's visa.

Impact on Australian business interests – cl 14(1)(c) and 14.3

60 The Tribunal found there was no evidence that the cancellation of the applicant's visa would have any impact on Australian business interests and therefore concluded that consideration was not relevant to the determination of the application.

Impact on victims – cl 14(1)(d) and 14.4

61 The Tribunal noted that there was no victim impact statement (or equivalent) before it and in those circumstances it would be unsafe to allocate any weight to this consideration. The Tribunal was therefore of the view that this consideration was of neutral weight.

Extent of impediments if removed – cl 14(1)(e) and 14.5

62 In assessing the extent of any impediments on the applicant if he was removed to New Zealand, the Tribunal placed particular emphasis on the decision by the applicant in his Personal Circumstances Form to tick the "no" box in response to the question "Do you have any diagnosed medical or psychological conditions?". The Tribunal concluded from this response that the applicant can be "safely found to be a relatively young man in a good state of health".

63 The Tribunal noted in its reasons that the applicant had identified the following impediments if he were removed to New Zealand:

(a) the absence of any family support;

(b) an employment position "ready to go" in the Australian community;

(c) a likely negative impact on his mental health and wellbeing given his horrific and disadvantaged upbringing in New Zealand;

(d) although he might be entitled to some social welfare in New Zealand this would not mean that it would not suffer substantial hardships in that country; and

(e) the remote prospect that he might be the subject of harm at the hands of his sister's former partner.

64 The Tribunal concluded that these matters considered together provided moderate weight in favour of revocation. In reaching that conclusion, the Tribunal noted that: the applicant had school friends in New Zealand; the applicant's employment prospects in Australia are less than certain and more accurately described as aspirational; to the extent that the applicant might suffer any mental distress on returning to New Zealand, he would have access to the same, or nearly the same, level of community mental health support that is currently available to him in Australia; any hardships that he incurred with respect to social welfare in New Zealand would be no different to those expressed by any other citizen of that country; and to the extent the applicant had any fear of harm at the hands of his sister's former de facto partner, he would have the right to access police and law enforcement protection in New Zealand against any such perceived threat.

65 The Tribunal concluded with respect to the other considerations in paragraph 14 of Direction 79 that, to the extent that they weighed in favour of revoking the mandatory visa cancellation decision, they were outweighed by Primary Considerations A and C which favoured non-revocation "very heavily" and "heavily" respectively.

GROUNDS OF REVIEW

Materiality

66 Before turning to the specific grounds of review relied upon by the applicant, it is necessary to address the approach that the applicant has taken to materiality. The applicant separately addressed the issue of materiality in his submissions after dealing with each of its grounds of review. For the purposes of clarity and to avoid unnecessary duplication, I have addressed materiality at the same time as considering each of the alleged errors advanced by the applicant.

67 It is also necessary, however, as a preliminary matter to address the submission advanced by the applicant that, considered globally, the approach of the Tribunal had been as follows:

> - The primary consideration related to the protection of the Australian community weighed **very heavily** in favour of non-revocation.
> - The primary consideration related to expectations of the Australian community weighed **heavily** in favour of non-revocation.
> - The primary consideration related to the best interests of minor children in Australia weighed **moderately** in favour of revocation.
> - The other considerations of strength, nature, and duration of ties to Australia weighed **strongly** in favour of revocation.
> - The other consideration of the extent of impediments if removed from Australia weighed **moderately** in favour of revocation.
>
> (Original emphasis.)

68 The applicant contended that as three considerations were in favour of the applicant and two held against him, "it follows that the individual circumstances of the applicant's case were a *finely balanced one*" (original emphasis) and therefore in the broad exercise of discretion required by s 501CA(4) of the Act, the balancing exercise could have gone either way.

69 The applicant then, in that context, submitted variously with respect to each ground of review, there was a "realistic possibility" that had the error alleged to have been committed by the Tribunal not occurred, it could have offset the "adverse ascription of weight" to that consideration. The applicant submitted that this "could have" made a critical difference to the balancing exercise undertaken by the Tribunal or it was open to the Tribunal to give greater weight to the impugned consideration in favour of the applicant.

70 I do not accept that the exercise undertaken by the applicant to conclude that the Tribunal should be taken to have proceeded on the basis that the applicant's case was a "finely balanced one" is valid or otherwise persuasive. It proceeds on the assumption that the considerations

were equally relevant and determinative and ascribes some form of empirical calculation to the terms "very heavily", "heavily", "strongly" and "moderately".

71 An identification of the considerations to which the Tribunal had regard and the weight that it attached to each consideration does not permit, in the absence of any statement to that effect by the Tribunal, any conclusion that the Tribunal considered that the applicant's case was "finely balanced".

72 Materiality falls to be determined by well-established principles.

73 An applicant seeking judicial review must demonstrate that the alleged error of the decision-maker was material in the sense that there was a "realistic possibility" that the decision in fact made could have been different had the error not occurred: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 (***SZMTA***) at [45] and [48]-[50] (Bell, Gageler and Keane JJ); *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17 (***MZAPC***) at [2]-[3] (Kiefel CJ, Gageler, Keane and Gleeson JJ). As the majority explained in *MZAPC* at [31], referring to the common law principle of statutory construction enunciated in the plurality's earlier reasoning in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34 at [17]-[30] (Kiefel CJ, Gageler and Keane JJ):

> The principle enunciated is that a statute conferring decision-making authority is not ordinarily to be interpreted as denying legal force to every decision made in breach of a condition which the statute expressly or impliedly requires to be observed in the course of a decision-making process. The statute is instead "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance".

74 This principle recognises that the legislature is unlikely to have intended that a breach that gave rise to no "practical injustice" would deprive a decision of its statutory force: *MZAPC* at [32].

75 The determination of materiality involves a counterfactual analysis in order to determine as a matter of objective possibility whether the identified failure to comply with the statutory condition resulted in a decision that has been made without statutory authorisation: *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76; [2019] HCA 50 at [47]. The majority explained in *MZAPC* at [38]:

> The counterfactual question of whether the decision that was in fact made could have been different had there been compliance with the condition that was in fact breached cannot be answered without determining the basal factual question of how the decision that was in fact made was in fact made. Like other historical facts to be determined in other civil proceedings, the facts as to what occurred in the making of the decision

> must be determined in an application for judicial review on the balance of probabilities by inferences drawn from the totality of the evidence. And like other counterfactual questions in civil proceedings as to what could have occurred – as distinct from what would have occurred – had there been compliance with a legal obligation that was in fact breached, whether the decision that was in fact made could have been different had the condition been complied with falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities.
>
> (Footnotes omitted.)

Ground 1 – Procedural fairness

76 The applicant contends that he was denied procedural fairness because the Tribunal failed to advise him of its adverse conclusion that his "propensity to offend caused him to *disrespect the privilege of bail* which had been afforded to him" (original emphasis) (**bail finding**).

77 The applicant contends that:

(a) there was no evidence before the Tribunal that bail was a "privilege";

(b) the bail finding was made by the Tribunal in the context of cl 13.1.1(1)(f) of Direction 79, which is concerned with the cumulative effect of "repeated offending", not with any "conduct that was seen to be disrespectful to some espoused purported principle"; and

(c) the bail finding "would not obviously be open per the known material", it was not reflected in Direction 79 and was not a matter put to the applicant by the Tribunal or the Minister.

78 The content of the obligation of procedural fairness in a particular case is determined by "what is required in order to ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is to be made": *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40 at [30] (Kiefel, Bell and Keane JJ). Procedural fairness is not an abstract concept. It reflects a concern of the law to avoid practical injustice: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 (***Ex parte Lam***) at [37] (Gleeson CJ).

79 Whether any failure to give an applicant the opportunity to respond to adverse information relied upon by a decision-maker gives rise to a denial of procedural fairness depends upon a range of factors, including the importance of the material to the ultimate decision and the nature of that material. The fact that there has been no opportunity to respond to information that is "purely factual and entirely incontrovertible" or "so blindingly obvious as not to require any

comment or submission" will be of little or no significance: *Applicants M1015/2003 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1309 (***Applicants M1015***) at [54] (Weinberg J).

80 The applicant's serious offending while on bail was clearly established on the evidence before the Tribunal and was not challenged. That information was "purely factual and entirely incontrovertible". The finding by the Tribunal that the applicant had, in breaching his bail conditions, disrespected the privilege of bail could fairly be characterised as "so blindingly obvious" as not to require any comment or submission. The finding flowed inexorably from the serious breaches of the bail conditions imposed on the applicant.

81 The only practical injustice that the applicant relied upon was the absence of an opportunity to address the "disrespecting the privilege of bail" contention. The applicant did not specify any particular matters that could have been advanced if such an opportunity had been provided. There is conflicting authority on whether an applicant complaining of a lack of procedural fairness bears a positive onus to establish that they would have taken a different course and that they had thereby suffered "practical injustice". On balance, I do not consider that there is any general rule that this is required in all cases. The absence of such evidence, however, may well prove decisive in some cases and is a factor to be taken into account in determining whether there has been any "practical injustice": see *Applicants M1015* at [52]-[53] (citing *Ex parte Lam, Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* (2003) 201 ALR 437; [2003] HCA 60 and J Basten QC 'Constitutional elements of judicial review' (2004) 15(3) PLR 187 at 195-8); and *Minister for Immigration and Citizenship v SZQKB* (2012) 133 ALD 495; [2012] FCA 1189 at [38] (Yates J).

82 Contrary to the submissions advanced by the applicant, I do not accept that there is any material difference between addressing submissions directed at the significance of the offences committed by the applicant while on bail and any characterisation of that conduct as "disrespecting the privilege of bail" as a general principle. Submissions addressing the significance and relevance of the underlying facts would necessarily address the actual basis upon which those facts were characterised by the Tribunal.

83 I do not accept that there was any practical injustice to the applicant because of any failure by the Tribunal to provide any opportunity to the applicant to comment upon its finding that the applicant had disrespected the "privilege" of bail.

84 Nor do I accept that the Tribunal committed any jurisdictional error in having regard to the bail finding in its assessment of the "cumulative effect of repeated offending" consideration in cl 13.1.1(1)(f) of Direction 79 for the purpose of determining the nature and seriousness of the applicant's criminal offending. The Tribunal approached the task of determining the cumulative effect of the applicant's repeated offending by making findings with respect to matters that it found could be "gleaned from the Applicant's offending history". The Tribunal found that these matters relevantly demonstrated:

(a) a failure of the offending conduct and the sentences imposed to have any measurable deterrent effect on the applicant;

(b) a failure by the applicant to demonstrate any measureable respect for Australian lawful authority;

(c) the predominant role of offending in the applicant's life;

(d) the supplanting of the applicant's role as a parent and preclusion from working in his trade; and

(e) the effect of drugs on the Australian community, including the death of his co-manufacturer.

85 The bail finding was made in the context of the "failure to demonstrate respect for lawful authority" finding. More specifically, it formed part of the second of two matters relied upon by the Tribunal in support of its conclusion at [74] that:

> To an extent analogous with the immediately preceding discussion around a failure to experience a deterrent effect is the reality that the Applicant has failed to demonstrate any measureable respect for the lawful authority governing the Australian community back into which he now seeks re-admission.

86 I consider that it was open for the Tribunal to have regard to the bail finding for the purpose of determining the cumulative effect of the repeated offending of the applicant for the purposes of the protection of the Australian community to "which he now seeks re-admission" from criminal offending or other serious conduct. The Tribunal found that the cumulative effect of the applicant's offending, including committing serious offences while on bail, demonstrated a disrespect for lawful authority. There was no jurisdictional error in that finding.

87 Finally, there is no substance in the applicant's complaint that the "*purported principle* that the applicant has disrespected the 'privilege of bail'" is not reflected in Direction 79. The bail finding was made in the context of the consideration by the Tribunal of the cumulative effect

of the applicant's offending for the purposes of addressing cl 13.1.1(1)(f), not pursuant to some "purported principle" that otherwise may or may not have been "reflected" in Direction 79.

Ground 2 – No evidence

88 The applicant advanced four discrete strands to his "no evidence" ground of review.

89 Where a finding of fact made in the complete absence of any evidence is purported to constitute a jurisdictional error, it is necessary that the relevant finding be "a precondition to the exercise of jurisdiction" or alternatively "a critical step in the ultimate conclusion of the decision maker": *SFGB v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 231 at [19] (Mansfield, Selway and Bennett JJ); *Australian Postal Corporation v D'Rozario* (2014) 222 FCR 303; [2014] FCAFC 89 at [15]-[16] (Besanko J), [47]-[67] (Jessup J) and [116]-[117] (Bromberg J); *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [64]-[66] (Middleton, Moshinsky and Anderson JJ). For present purposes, for the reasons explained below, it is not necessary for me to come to a view as to which approach is correct or to be preferred.

90 *First*, the applicant submitted that there was no probative evidence before the Tribunal that the applicant had disrespected the "privilege of bail" afforded to him. Moreover, the applicant submitted that bail is not described as a privilege in the *Bail Act 2013* (NSW).

91 The "disrespected the privilege of bail" finding was not a finding of fact. Rather it was a characterisation made by the Tribunal of the necessary consequence of the applicant's commission of serious offences while on bail. The description of bail as a "privilege" was to my mind apposite. As was explained in *R v Ibrahim* (unreported, New South Wales Court of Criminal Appeal, Sully J and Bell AJ, 4 September 1996) (***Ibrahim***):

> It is trite law - but a case of the present kind makes it worthwhile to make the point perhaps one more time - that bail is a privilege. Breach of bail is always regarded by the Courts as a serious matter because of the light it casts upon the reliability of the person who has been granted, and who has abused, the privilege of bail.

92 I do not accept, contrary to the oral submissions by counsel for the applicant, that the apparent absence of any explicit statement reaffirming that principle since *Ibrahim* in any way diminishes from the force of the statement by Sully J in *Ibrahim*, with which Bell AJ agreed.

93 The "disrespected the privilege of bail" finding was not a precondition to the exercise of jurisdiction, nor was it a "critical step" in the Tribunal's reasons. The finding did not enliven any decision-making power and it did not form part of any relevant statutory test. It was not a

finding of fact, but rather an unexceptional characterisation by the Tribunal of the serious offending by the applicant while on bail. The finding had a relatively subordinate position in the reasons of the Tribunal for its findings with respect to cl 13.1.1(1)(f) of Direction 79 and an even more subordinate position with respect to its findings regarding the nature and seriousness of the applicant's conduct (cl 13.1.1) and the protection of the Australian community (cl 13.1). It does not follow that because a finding of fact is included in a statement of reasons that it is a critical step in a decision-maker's reasoning. Even less likely would a matter which is in truth a characterisation of uncontroversial or accepted facts be a critical step in a decision-maker's reasoning.

94 This ground has not been established.

95 *Second*, the applicant submitted that there was no evidence that his difficulties with law enforcement had come to dominate his life, both in this country and across his entire 40 year life span.

96 The applicant's extensive record of convictions in both New Zealand and Australia provided significant support for the Tribunal's finding that the applicant's difficulties with law enforcement had come to dominate his life. The complaint advanced by the applicant appears to be directed at the reference to his "entire 40 year lifespan" and the absence of any evidence of difficulties with law enforcement prior to him turning 17 years old.

97 While it may be accepted that there was no evidence before the Tribunal of the applicant experiencing any difficulties with law enforcement prior to the age of 17, that does not relevantly detract from a conclusion that those difficulties have come to dominate his life.

98 In any event, I do not accept that the "entire 40 year lifespan" finding was anything other than an imprecise reference to the extent to which problems with law enforcement had dominated the applicant's life. The reasons of an administrative decision-maker should be read as a whole and should not "be scrutinised upon over-zealous judicial review" in a bid to glean some inadequacy from the particular expression of those reasons. The Court should not be concerned with "looseness in the language … nor with unhappy phrasing" when approaching such a judicial review challenge: *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 (***FCFY***) at [47] (Thawley J) citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

99 The extent to which the applicant's difficulties with law enforcement had dominated "his life" was the critical step in the Tribunal's reasoning, not that those difficulties had been encountered literally over his "entire 40 year lifespan". On any view, there was ample material before the Tribunal that the applicant's difficulties with law enforcement dominated the whole of his adult life, being the most relevant issue for the purposes of the reasoning of the Tribunal.

100 This ground has not been established.

101 *Third*, the applicant submitted that the finding by the Tribunal that there could be "no challenge to the suggestion that the Applicant will have been aware of concerted government and community-based campaigns against the significant social and economic difficulties arising from illicit drugs" was "mere speculation and conjecture without a skerrick of evidence".

102 It can be readily accepted that there was no specific evidence of any awareness by the applicant of any specific "concerted government and community-based campaigns" addressing the significant difficulties arising from illicit drugs. The Tribunal's finding, however, was not that the applicant "was aware" of such campaigns, but rather a finding that the applicant "will have been aware" of such campaigns. It was not so much a finding of fact but rather the expression of an expectation on the part of the Tribunal. To the extent that it might be construed as a finding of fact, there was ample material before the Tribunal from which such an inference could be drawn. It would be almost inconceivable that the applicant was not aware of the impact on society of illicit drugs, both from the evidence of his personal experience as a user and as a manufacturer and supplier of illicit drugs over a lengthy period of his life.

103 In any event, the applicant's alleged knowledge of "the concerted government and community-based campaigns against the social and economic difficulties arising from illicit drugs" was not a precondition to the exercise of jurisdiction nor a critical step in the reasoning of the Tribunal. It was an inference drawn by the Tribunal, readily available from the extent of the applicant's personal experiences with illicit drugs, that the applicant must have been aware of the harm that they cause to the community. It played no more than a subordinate role in the reasoning of the Tribunal. The principal focus of the Tribunal's reasoning was on the impact of the applicant's offending with respect to illicit drugs on the Australian community.

104 This ground has not been established.

105 *Fourth*, the applicant submitted that there was no support for the following statements by the Tribunal, with emphasis added by the applicant in his written submissions:

> [113] He seems to contend that the lack of any previous formal warning about this possible adverse impact on his visa status will somehow act as a deterrent against future offending. Looking at his history of offending, it is very difficult to discern how any asserted failure by others to warn him about adverse outcomes arising from his sustained unlawful conduct is somehow explanatory of that conduct (own emphasis) (**warning contention**); [a defined term inserted by the applicant in his submissions]
>
> [114] His purported attribution of blame for his offending on others apparently failing to warn him about the consequences of his offending is, in and of itself, indicative of a failure to take responsibility for his past offending. The applicant contends that he did not advance the warning contention. He submitted in both his written and oral evidence before the Tribunal that the prospect of a future visa cancellation would act as a significant deterrent against him engaging in future criminality in Australia. Further, the applicant contends that in his closing submissions he had submitted (by his counsel) that his visa cancellation and the various adverse experiences associated with the cancellation had acted as a deterrent against him reoffending and the prospect of a future visa cancellation would act as a significant deterrent against him reoffending.

106 In order to determine whether this ground of jurisdictional error has been established, it is important to understand the context in which the Tribunal made the statements at [113] and [114], which were extracted by the applicant in his written submissions as above (**Extracted Statements**). The relevant context is provided when the Tribunal's reasons at [112]-[114] are read as a whole, including the Extracted Statements:

> [112] The prospect of a future visa cancellation proceeding arising from any further offending is also contended to represent a *"significant deterrent against the Applicant engaging in future criminality […]"* The main point seems to be that the difficulties he has faced with the current attack on his visa status has, in itself, had a deterrent effect on his future risk of recidivism.
>
> [113] To properly assess any weight attributable to this contention, it is first necessary to understand the context in which it was made. The Applicant now claims to have experienced some sort of shock or epiphany arising from the reality that his visa may be cancelled if he continues to engage in criminal conduct in Australia or elsewhere. He seems to contend that the lack of any previous formal warning about this possible adverse impact on his visa status will somehow act as a deterrent against future offending. Looking at his history of offending, it is very difficult to discern how any asserted failure by others to warn him about adverse outcomes arising from his sustained unlawful conduct is somehow explanatory of that conduct. The Applicant cannot now be heard to say: "*well if I knew that my continued offending would threaten my visa status to remain here, I would have stopped offending.*"
>
> [114] The harsh reality to be taken from the applicant's offending history is that it has resulted in harm and dreadful outcomes for his children and the broader Australian community. His purported attribution of blame for his offending on others apparently failing to warn him about the consequences of his offending is, in and of itself, indicative of a failure to take responsibility for his past offending.

107 The Tribunal at [113] was seeking to assess the weight it could give to the applicant's contention that the prospect of a future visa cancellation would operate as a significant deterrent against him engaging in any future criminality. The Tribunal approached the task by considering whether the lack of any prior formal warning about an adverse impact on his visa status could explain the applicant's "sustained unlawful conduct". At [113] the Tribunal observed that the applicant "seems to contend" that the lack of any prior formal warning would act as a deterrent against future offending and then at [114] states that the applicant's "purported attribution of blame for his offending on others apparently failing to warn him about the consequences of his offending" is indicative of a failure to take responsibility for that offending.

108 The Minister sought to rely upon a submission purportedly made by the applicant that he "was never formally warned that his Australian visa might be cancelled if he continued to engage in criminal conduct in Australia or elsewhere" to support the observation made by the Tribunal at [114] that the applicant had not accepted responsibility for his offending (**warning contention submission**).

109 The applicant submitted in relation to the warning contention submission that:

(a) it was a submission made in the applicant's statement of facts, issues and contentions in an earlier proceeding before the Tribunal, which was not relied upon by the applicant in the decision of the Tribunal that is the subject of this proceeding;

(b) it was made by the applicant's previous counsel and did not constitute evidence; and

(c) the analysis by the Tribunal at [112]-[114] was undertaken by reference to the applicant's oral evidence before it, not by reference to the material from the earlier Tribunal hearing.

110 It is not necessary to resolve that dispute. If the warning contention submission was advanced, there would be an evidentiary basis for the warning contention submission and hence the no evidence submission must fail.

111 If the warning contention submission was not advanced, I do not consider that the "failure to take responsibility for his past offending" conclusion by the Tribunal on the submission could constitute jurisdictional error. This is because I do not accept that this conclusion was a precondition to the exercise of jurisdiction, nor was it a "critical step" in the Tribunal's

reasoning. The Tribunal made no subsequent reference to the characterisation in its decision and it did not form a necessary link or premise to any of the Tribunal's other findings.

112 In the circumstances, I am satisfied that there was either an evidentiary basis for the warning contention submission or, if there was no evidentiary basis for the warning contention submission, it was not a precondition to the exercise of jurisdiction or critical step in the reasoning of the Tribunal. Regardless, I am not satisfied there was a realistic possibility that the decision of the Tribunal could have been different if the Tribunal had not characterised the warning contention as "indicative of a failure" by the applicant "to take responsibility for his past offending" for the reasons stated above.

113 This ground has not been established.

Ground 3 – Misunderstanding of applicable law

114 The applicant contended that the Tribunal was required to form a state of satisfaction, reasonably and on a correct understanding of the law, as to whether there was "another reason why" the visa cancellation decision should be revoked.

115 The High Court explained in *Craig v The State of South Australia* [1995] HCA 58; (1995) 184 CLR 163 at 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) that an error of law may comprise jurisdictional error by an administrative tribunal:

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

116 Direction 79 is a written direction that was given by the Minister pursuant to s 499(1) of the Act to delegates and the Tribunal about the performance of their functions and the exercise of their powers under the Act. By reason of s 499(2A) of the Act, both the delegate and the Tribunal were required to comply with Direction 79 in performing their respective functions. A failure to comply with a lawful direction made pursuant to s 499(1) can constitute jurisdictional error: *FCFY* at [63] citing: *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112; [2014] FCA 674 at [34]-[35] (Mortimer J); *FKP18 v Minister for Immigration and Border Protection* [2018] FCA 1555 at [34] (Kenny J).

117 The state of satisfaction that the Tribunal was required to reach for the purpose of determining whether the visa cancellation decision should be revoked for "another reason" pursuant to s 501CA(4)(b)(ii) must be formed reasonably and on a correct understanding of the law. It is an implied condition of the valid exercise of that power: *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 at [54] (Robertson J) citing *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22; [2015] HCA 51 at [33] (Gageler and Keane JJ) and the authorities referred to in the footnote to that paragraph of their reasons.

118 The applicant contends that the Tribunal acted on a misunderstanding of the applicable law in four respects.

119 *First*, the applicant contends that the Tribunal erred in having regard to its finding that the applicant's offending had severely impacted on the capacity of the applicant to play a hands-on parenting role to his three children (**parenting finding**) and its finding that the applicant's criminality in Australia effectively precluded him from earning his living as a qualified panel beater (**work finding**) in its approach to the consideration in cl 13.1.1(1)(f) of Direction 79. The applicant submitted that neither finding was relevant to the assessment of the nature and seriousness of the applicant's criminal offending to date.

120 I do not accept that the Tribunal erred in taking into account the parenting finding and the work finding in its consideration of the "cumulative effect of repeated offending" for the purposes of cl 13.1.1(1)(f). Given the scope and purpose of the Tribunal's power under cl 13.1 of Direction 79, I do not consider that there is any warrant to limit the matters that can be taken into account in determining the "cumulative effect of repeated offending".

121 The applicant submits that to take into account the parenting finding and the work finding in its consideration of cl 13.1.1(1)(f) would be to impermissibly "double count" these considerations against the applicant, because they are expressly addressed in the context of the considerations in cl 13.2(4) (Best interests of minor children) and cl 14.2 (Strength, nature and duration of ties to Australia) of Direction 79.

122 The applicant sought to rely on the reasoning in *Bale v Minister for Immigration, Migrant Services and Multicultural Affairs* [2020] FCA 646 (Perram J) (***Bale***) in support of his alleged impermissible double counting submission. That reliance was misconceived. His Honour was addressing in *Bale* an argument that the Tribunal had failed to take into account a specific

matter, not that a matter had been taken into account for multiple purposes. His Honour stated at [26]:

> I do not accept this argument because whichever way one looks at it, the fact that Mr Bale's wife desired for him to remain in Australia was taken into account by the Tribunal. Where a matter is relevant to two or more mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously: see *Hodgson v Minister for Immigration and Border Protection* [2017] FCA 1141 at [40] per Tracey J; *RZSN v Minister for Home Affairs* (2019) FCA 1731 at [67] ff per Anderson J. And, as [54] of the Tribunal's reasons shows, the Tribunal was well-aware that she was one of his victims.

123 Not being required to take into account a matter "repetitiously" is a fundamentally different proposition to prohibiting a matter being taken into account for two or more mandatory considerations. The matters to be taken into account in addressing mandatory and other considerations may well overlap, particularly in circumstances where a consideration is expressed in general terms. It is neither desirable nor, in my view, permissible not to have regard to material that is otherwise relevant to a consideration in Direction 79 on the basis that it is more directly relevant to another consideration in that direction.

124 I am not satisfied, therefore, that any error of law is demonstrated simply on the basis that the Tribunal has taken into account a matter in addressing more than one mandatory or other consideration in Direction 79.

125 *Second*, the applicant contends that the Tribunal at [97] of its decision applied a "reasonably-minded members test" in relation to cl 6.3(4) of Direction 79. Moreover, the applicant submitted it was unclear what the Tribunal even meant by the "reasonably-minded members test".

126 Clause 6.3(4) provides:

> In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.

127 The applicant submits that it is not permissible for the Tribunal to adopt a "reasonably-minded" member of the Australian community test for the purpose of addressing the consideration in cl 6.3(4) of Direction 79. In the course of his oral submissions, counsel for the applicant sought to rely on the reasoning of the majority in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454; [2019] FCAFC 185 (***FYBR***) in support of the contention that the Tribunal had erred in applying a "reasonably-minded members test". The majority in *FYBR* (Charlesworth and

Stewart JJ) accepted a submission by the Minister that cl 11.3 of Direction 65 (the predecessor to Direction 79) was a deeming provision in that it reflected what the Government has deemed the community's expectations to be, rather than inviting any enquiry as to what the Australian community in fact might expect. It is important to bear in mind that the opening sentence of cl 11.3 provides:

> The Australian community expects non-citizens to obey Australian laws while in Australia.

128 It was in that context that Charlesworth J stated in *FYBR* at [67] that:

> To the extent that cl 11.3 contains a statement of the expectations of the Australian community, the clause is "deeming", in the sense explained by Mortimer J in the limited passage from *YNQY* upon which the Tribunal relied at [54] of its reasons … It is not for the decision-maker to make his or her own assessment of the community expectations and to give that assessment weight as a "primary consideration".

and Stewart J stated at [103]:

> The community expectations, as I construe cl 11.3(1), speak normatively; they are to be applied in every case but they are not expressed in relation to any particular case. This means that it would be wrong for the decision-maker to ask themselves a question along the lines of "what would the community expect in this case?" It is also incorrect to construe the community expectation as expressing or requiring, in any particular case, either the grant or the refusal of the visa. In a particularly egregious case, the weight to be afforded the community expectations would be such that a refusal might be thought to be inevitable, and at the other end of the spectrum a refusal might be thought to be unlikely, but in either case and in all the area in-between the community expectation will not express or require one or the other. That is a matter for the decision-maker.

129 The reliance by the applicant on the statements of principle in *FYBR* to establish jurisdictional error is misplaced.

130 Unlike cl 11.3(1) and the similarly prefaced cl 6.3(2) of Direction 79, there is no express statement in cl 6.3(4) of any expectation of the Australian community. At most, there is a generic reference to the risk of similar conduct in the future being "unacceptable". There is no deemed expectation by the use of the preface "The Australian community expects". Accordingly, the reasoning in *FYBR* is not apposite.

131 Nor, unlike each of cl 6.3(5) and cl 6.3(6) of Direction 79, is there any statement that speaks in definitive terms as to an expectation of the Australian community, such as the preface to both of those clauses which is in these terms: "Australia has a low tolerance of any criminal or other serious conduct".

132 The Tribunal stated at [97] of its decision:

> The terms of paragraph 6.3(4) of the Direction have clear application to the instant facts. Were the Applicant's record of criminal offending in the realms of supplying and/or manufacturing illicit drugs to be repeated, the resulting consequences and harm may very well be so serious that any risk of similar conduct in the future is unacceptable. I am of the view (and I find) that reasonably-minded members of the Australian community would regard this Applicant's history of drug offending to be so serious that they would refuse to accept any risk of its re-occurrence.

133 Even if, contrary to my finding above, it was established that the Tribunal had erred by making a finding as to the views of "reasonably-minded members of the Australian community" in the last sentence of [97], I am not satisfied that there is a realistic possibility that the Tribunal could have reached a different decision. The Tribunal made a number of other findings as to the seriousness of the applicant's drug offences independently of the finding in the last sentence at [97], not least the finding in the second sentence of [97]. Accordingly, such an error would not have deprived the applicant of the "possibility of a successful outcome": *SZMTA* at [3] (Bell, Gageler and Keane JJ).

134 Accordingly, the applicant has not demonstrated jurisdictional error in this regard.

135 *Third*, the applicant contends that the Tribunal erred in finding that it was "bound" by the terms of cl 13.2(4)(a) of Direction 79 (concerning the nature and duration of the relationship between any relevant children and the non-citizen) to give less weight to this factor because there had been "long periods of absence". The applicant submits that cl 13.2(4)(a) provides that less weight should "generally be given" where there have been long periods of absence and the use of the word "generally" gives the Tribunal a discretion where less weight "does not necessarily" need to be given because of a factor that takes a case out of that which might pertain "generally".

136 The Minister contends that to seek to identify jurisdictional error by reference to an isolated word reveals an examination of the Tribunal's reasons with "an eye attuned to error". The Minister submitted that the Tribunal's reference to it being "bound" to give less weight to cl 13.2(4)(a) with respect to the applicant's second eldest child was no more than the Tribunal making a determination to give less weight to that subparagraph.

137 The applicant contends that the Minister unsuccessfully sought to advance a similar argument in *FCFY*.

138 In *FCFY* at [59], Thawley J identified the error of the Tribunal as follows:

> The Tribunal's language, read fairly in accordance with the principles earlier identified, indicates that the Tribunal misunderstood cl 14.2(1). The Tribunal thought

> that paragraph (a)(ii) *required* it to give less weight to how long a non-citizen had resided in Australia if there had been limited positive contribution to the Australian community. Paragraph (a)(ii) does not operate in that way. It provides that, where there was positive contribution to the Australian community, there should be an increase in the weight given to "how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child". Paragraph (a)(ii) did not *require* a decrease in the weight to be given to the length of residence where a positive contribution was limited or absent.
>
> (Original emphasis.)

139 I do not accept that the reasoning of Thawley J assists the applicant in the present context.

140 The alleged error in this case was conflating "bound to give less weight" with "less weight should generally be given".

141 The error in *FCFY* was "giving less weight" to a consideration because of the limited nature of a factor in circumstances where that factor was expressed as a matter that should provide "more weight" in support of a consideration. It was in that context that his Honour found that paragraph (a)(ii) of cl 14.2(1) did not "require" a decision-maker to give less weight to the length of residence where a positive contribution was limited or absent. His Honour noted that the Minister had submitted that the Tribunal was doing no more than merely stating that less weight was given to that factor because of the applicant's limited contribution. His Honour found that a fair reading demonstrated that the Tribunal considered that it had "no choice" in the matter and that Direction 65 (as Direction 79 then was) required it to give less weight to that consideration. His Honour concluded at [63] that by reason of the error that he had identified at [59], the Tribunal had failed to form a state of satisfaction as to whether there was "another reason why" the visa cancellation decision should be revoked reasonably and on a correct understanding of the law. He found that the Tribunal's misunderstanding was material in the sense that the Tribunal might have reached a different outcome if it had not misunderstood how the clause operated.

142 His Honour concluded at [65] that:

> The length of the applicant's residence in Australia, being effectively his entire life, did not have to be given less weight because of his limited contribution to the Australian community. If the Tribunal had decided to give the length of residence more weight than it did, then the strength, nature and duration of ties (including length or residence) would have been more persuasive when it came to balancing the considerations which favoured revocation against those which favoured non-revocation in order to reach the ultimate decision.

143 These findings, however, have to be understood in context. As explained above, in *FCFY* the Tribunal had proceeded on the basis that if a paragraph in Direction 79 stated that the existence

of a matter required it to give more weight to a consideration, then it followed that if the matter did not exist the paragraph also required it to give *less* weight to the consideration. In this case the position is very different. Here the Tribunal proceeded on the basis that it was "bound" to give less weight to a factor that was otherwise expressed as a factor that should generally be given less weight.

144 Further, the chapeau to cl 13.2(4) provides: "[i]n considering the best interests of the child, the following factors must be considered where relevant …". Paragraph (a) is one of eight factors that are identified. The use of the qualification "where relevant" in the chapeau is consistent with giving a factor no weight in considering the interests of the child where the statement of the factor provides that the factor should generally be given less weight if a particular negative consideration is present.

145 In the circumstances, I am not satisfied that the Tribunal necessarily erred in conflating "bound to give less weight" with "less weight should generally be given". In any event, I am not satisfied that there was a realistic possibility that the Tribunal could have come to a different decision had the alleged error not been made because:

(a) the application of a "less weight should generally be given" approach rather than a "bound to give less weight" approach was unlikely to have resulted in the Tribunal giving any materially different weight to this consideration as "the long periods of absence" would have been relevant to both approaches;

(b) the Tribunal gave significant weight to the considerations in Direction 79 other than "the best interest of the child"; and

(c) the Tribunal's overall decision was not "finely balanced", as submitted by the applicant.

146 *Fourth*, the applicant contends that the Tribunal erred in finding that no weight could be allocated in favour of the applicant on the basis of cl 14.2(1)(a)(i) of Direction 79. The applicant submitted that the use of the words "less weight" in cl 14.2(1)(a)(i) is not coextensive with "no weight".

147 Clause 14.2(1)(a) of Direction 79 provides:

> (1) The strength, nature and duration of ties to Australia. Reflecting the principles at 6.3, decision-makers must have regard to:
>
> a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:

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

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

148 It is important to observe at the outset that the question of "less weight" in subparagraph (i) is a reference to "less weight" being given to the factor identified in cl 14.2(1)(a). The factor in cl 14.2(1)(a), in turn, is a factor that must be taken into account in determining the weight to be given to the "strength, nature and duration of ties to Australia" consideration in cl 14.2(1) of Direction 79. Hence if the non-citizen began offending soon after arriving in Australia then it would follow that less weight should be given to the "how long the non-citizen had resided in Australia" factor in cl 14.2(1)(a).

149 The Tribunal found at [331]:

> [The applicant] offended less than three years after his arrival. Accordingly, no weight can be allocated in favour [of] the Applicant on the basis of paragraph 14.2(1)(a)(i).

150 The Tribunal did, however, give some weight to the matter identified in subparagraph (ii) in its consideration of the factor in cl 14.2(1)(a). It stated at [332]:

> Some measure of weight may be allocable in favour of the Applicant via an application of paragraph 14.2(1)(a)(ii). This is on the basis that he has spent at least some time in Australia contributing positively to the Australian community … Applying the terms of paragraph 14.2(1)(a)(ii) of the Direction as favourably towards the Applicant as I can, I will find that he has made some measure of cumulative positive contributions to the Australian community. That said, only a slight measure of weight is allocable to him pursuant to this sub-paragraph 14.2(1)(a)(ii).

151 There is a certain degree of imprecision in the manner in which the Tribunal expressed its reasoning in this regard. Read literally, the Tribunal appears to have been focusing on the weight it was giving to the two matters identified in the two subparagraphs to cl 14.2(1)(a), rather than the impact of those two matters on the weight it was to give to the consideration in cl 14.2(1)(a).

152 The reference by the Tribunal to the allocation of "no weight" being able to be allocated "in favour" of the applicant with respect to cl 14.2(1)(a)(i) is in substance, if not in form, relevantly a finding that this factor would not favour the applicant in assessing the weight to be given to the "length of residence in Australia" factor in cl 14.2(1)(a).

153 For the reasons outlined above, I am not satisfied that the Tribunal made the alleged error in [331] of its decision. The alleged error proceeds on a misapprehension as to the *matter* to be given less weight.

154 In any event, I do not accept that there was a realistic possibility that the Tribunal could have made a different decision had it proceeded explicitly on the basis that it would give less weight to the "length of residence in Australia factor" because of the applicant's offending soon after arriving in Australia, rather than proceeding on the basis that no weight would be allocated in favour of the applicant because of his offending shortly after arriving in Australia.

Ground 4 – Unreasonableness, illogicality and irrationality

Legal Principles

155 If particular findings or reasoning on the way to a decision-maker's ultimate conclusion and decision are challenged on the basis of illogicality, irrationality or unreasonableness, jurisdictional error will not be made out unless it "was open to the [decision-maker] to engage in the process of reasoning in which it did engage and to make the findings that it did make on the material before it". The relevant test is to ask "whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding". If so, "a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion": *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 (***SZMDS***) at [130]-[133] (Crennan and Bell JJ); *SZOOR v Minister for Immigration and Citizenship* (2012) 202 FCR 1; [2012] FCAFC 58 at [84] (Rares and McKerracher JJ, Reeves J agreeing).

156 Illogicality, irrationality and unreasonableness, do not solely arise in respect of a decision-maker's ultimate conclusion or in respect of the decision itself. They may also arise in respect of subsidiary findings or reasoning leading to that conclusion, albeit that the overarching question is whether the decision itself is affected by jurisdictional error: *Minister for Immigration and Citizenship v SZRKT and Another* (2013) 212 FCR 99; [2013] FCA 317 at [150]-[156] (Robertson J); *ARG15 v Minister for Immigration and Border Protection* (2016) 250 FCR 109; [2016] FCAFC 174 at [47] (Griffiths, Perry and Bromwich JJ); *CGA15 v Minister for Home Affairs* (2019) 268 FCR 362; [2019] FCAFC 46 at [58]-[61] (Murphy, Mortimer and O'Callaghan JJ); and the cases referred to therein in each of those references.

157 In order for the applicant to succeed, it is necessary for him to show that the Tribunal's decision to affirm the delegate's decision not to revoke the mandatory cancellation of his visa was one which no reasonable, rational or logical decision-maker could have arrived at on the same evidence: *SZMDS* at [130]-[131].

158 The relevant question is whether on the probative evidence before the Tribunal, a reasonable, logical or rational decision-maker could have come to the same conclusion as the Tribunal: *SZMDS* at [131] and [135]. If a reasonable, logical or rational decision-maker could have done so, the relevant findings will not be illogical, irrational or unreasonable, even if one may emphatically disagree with the Tribunal's reasoning: *SZMDS* at [124], [131] and [135].

159 Nevertheless a decision may be affected by jurisdictional error on the basis of illogicality or irrationality where "the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn": *SZMDS* at [135]. This may arise where, for example, a decision-maker relies upon "unexpressed and unwarranted assumptions not based in any evidence": *DAO16 v Minister for Immigration and Border Protection* (2018) 258 FCR 175; [2018] FCAFC 2 at [45] (Kenny, Kerr and Perry JJ); *BZD17 v Minister for Immigration and Border Protection* (2018) 263 FCR 292; [2018] FCAFC 94 at [58] (Perram, Perry and O'Callaghan JJ). Findings require a probative basis and "some intellectual engagement that is beyond stereotyping and speculation": *DQM18 v Minister for Home Affairs* (2020) 278 FCR 529; [2020] FCAFC 110 at [52]-[53] (Bromberg and Mortimer JJ).

Risk of recidivism

160 The applicant contends that the Tribunal's reasoning process for determining the likelihood of the applicant engaging in further criminal or other serious conduct for the purposes of cl 13.1.2(1)(b) of Direction 79 was "unreasonable, illogical and/or irrational". The applicant submitted that the Tribunal had first reasoned that the applicant's risk of recidivism ranged from at best "low-moderate" and then reasoned that the applicant's risk of recidivism was more likely to be "now little or no different than what it was at the time of his most recent removal from the Australian community".

161 The applicant advances three contentions in support of its challenge to this reasoning of the Tribunal. *First*, he contends that the Tribunal did nothing more than speculate that the applicant's risk of recidivism was "low-moderate" and otherwise did not state what the level of risk was at the time the applicant was most recently removed from the Australian community. *Second*, he contends that it was illogical to reason that the applicant was a "low-moderate risk of recidivism" or otherwise a "high risk of recidivism". *Third*, he contends that cl 13.1.2(1)(b) of Direction 79 requires the Tribunal to undertake a more precise risk

assessment to determine whether the applicant posed an "unacceptable risk" of harm to the Australian community.

162 The applicant submitted that although the risk of reoffending may be assessed by reference to a range, it was difficult to reconcile if considered logically and rationally that a non-citizen posed both a "low to moderate risk" of reoffending and a "high risk" of reoffending.

163 It is necessary to have regard to the specific reasoning of the Tribunal at [178] of its decision:

> Weighing the "*positive factors*" against the "*negative factors*" identified above, I am not satisfied that this Applicant represents a low risk of recidivism. Having regard to the totality of the evidence and my findings thereon, I am of the view that his risk of recidivism ranges from (1) at best, low-moderate; and (2), more likely, a risk of re-offending that is now little or no different than what it was the time of his most recent removal from the Australian community.
>
> (Original emphasis.)

164 When regard is had to the specific reasoning of the Tribunal it is readily apparent that the applicant has misconstrued that reasoning.

165 *First*, the Tribunal was not expressing two ranges, but rather a single range. It was a range from "low-moderate" to "a risk of reoffending that is now little or no different than that when it was the time of his most recent removal from the Australian community". That it was a single range is clear from the insertion of the word "from" immediately prior to (1) and the insertion of "; and" immediately prior to (2).

166 *Second*, the reference to "more likely" is no more than a statement that, in the Tribunal's opinion, the risk of recidivism was more likely to be at the higher end of the range (namely the level prior to the applicant's most recent removal from the Australian community), rather than the bottom end of the range identified by the Tribunal as being "low-moderate".

167 I therefore do not accept that the expression of a single range of the likelihood of recidivism, with a qualification that the risk of recidivism is more likely to be at the higher end of that range, can be construed as illogical, irrational or unreasonable.

Applicant's state of health

168 The second basis upon which the applicant alleged that the decision of the Tribunal was illogical, irrational and/or unreasonable was the finding for the purposes of cl 14.5(1)(a) of Direction 79 that the applicant was a relatively young man in a good state of health. The applicant contended that it was illogical and irrational for the Tribunal to reason that the

applicant was in a "good state of health" given that it earlier concluded at [135] of its decision that the applicant had difficulties with illicit substances across a long period and must engage in an ongoing regime of mental health review to deal with mental health issues and psychological symptoms.

169 It is important to understand the context in which these two findings were made by the Tribunal.

170 The basis for the finding by the Tribunal that the applicant was in a good state of health was the applicant's own admission of good health in his Personal Circumstances Form. The applicant ticked the "No" box in response to the question "Do you have any diagnosed medical or psychological conditions?". The finding was made in the context of the Tribunal's consideration of potential impediments that had been identified by the applicant to his removal to New Zealand. Those impediments included that if he was returned to New Zealand, his "many bad memories" of New Zealand were "likely to be bad for [his] mental health and well-being".

171 The Tribunal's finding with respect to the applicant's ongoing regime of mental health review was made in the context of the Tribunal's consideration of the risk of recidivism by the applicant. At [135] the Tribunal stated:

> It is, to my mind, a matter of concern that the Applicant addresses Dr Nielssen's observation that the Applicant may be at increased risk of developing depression simply on the basis that he does not think "*that it's a problem to be honest*". With due respect to the Applicant, this is not necessarily an analysis that can be safely made by him alone. His difficulties with illicit substances across a long period of time and its causative effects beyond his very significant offending history, to my mind, mandate that he must engage in an on-going regime of psychological/psychiatric review such that he satisfactorily deals with the emotional pain arising from his childhood trauma. It is equally a matter of concern (for the purposes of his risk of recidivism) that if he alone thinks his psychological symptoms are causing him difficulty, only then will he "*reach out and talk with [Ms Ardren]*". This self-regulation of his symptomatology does not bode well for his risk of recidivism.
>
> (Original emphasis.)

172 I do not accept that the "good health" finding and the "ongoing regime of mental health review" finding established that the decision of the Tribunal was illogical, irrational and/or unreasonable.

173 *First*, finding that a person was in good health consistently with their own statement to that effect is not necessarily inconsistent with a finding that the applicant should engage in psychiatric or psychological treatment for past issues in order to remain at a lower risk of reoffending.

174 *Second*, as to materiality, the Tribunal in the context of assessing impediments to the removal of the applicant expressly addressed the mental health issues raised by the applicant in the context of that consideration, notwithstanding its finding about the applicant's "good state of health". The Tribunal found at [352]:

> [T]o the extent that a return to New Zealand may cause him any mental distress and/or anguish in terms of the difficult childhood he experienced there, he will have access to the same (or nearly the same) level of community mental health support that is currently available to him in Australia. Put simply, he will be entitled to mental health support to the same standard as that available to other New Zealand citizens.

DISPOSITION

175 For the reasons outlined above, I reject each of the grounds of review advanced by the applicant. It follows that the application should be dismissed with 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 Halley.

Associate: 

Dated: 22 September 2021