FEDERAL COURT OF AUSTRALIA

BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1429

Review of:	Application for judicial review of the Administrative Appeals Tribunal decision delivered on 7 May 2021.
File number:	NSD 578 of 2021
Judgment of:	**BROMWICH J**
Date of judgment:	19 November 2021
Catchwords:	**MIGRATION** – application for review of a decision of the Administrative Appeals Tribunal to affirm a decision of a delegate of the first respondent not to revoke the mandatory cancellation of the applicant's Refugee visa – whether the Tribunal made a finding for which there was no evidence – whether the Tribunal acted on a misunderstanding of the applicable law – whether the Tribunal's decision was legally unreasonable, irrational and/or illogical – whether the Tribunal denied the applicant procedural fairness – held: appeal dismissed.
Legislation:	*Australian Constitution* s 75(v) *Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (8 March 2021) *Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (2 December 2018) *Migration Act 1958* (Cth) ss 48A, 48B, 195A, 197AB, 499, 501, 501A, 501CA *Convention Relating to the Status of Refugees*
Cases cited:	*Ali v Minister for Home Affairs* [2018] FCA 1895 *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707; 148 FCR 446 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 *DQM18 v Minister for Home Affairs* [2020] FCAFC 110; 278 FCR 529 *FRH18 v Minister for Home Affairs* [2018] FCA 1769; 266 FCR 413

	FTZK v Minister for Immigration and Border Protection [2014] HCA 26; 88 ALJR 754; 310 ALR 1 *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123 *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66; 250 FCR 548 *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 *Minister for Immigration and Multicultural Affairs v Epeabaka* [1999] FCA 1; 84 FCR 411 *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12 *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 35 *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* [2001] HCA 23; 206 CLR 128 *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; 77 ALD 402 *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 263 FCR 531 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 144; 278 FCR 386 *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	96
Date of hearing:	6 August 2021
Counsel for the Applicant:	J Donnelly
Solicitor for the Applicant:	Scott Calnan Lawyer

Counsel for the First Respondent:	T Reilly
Solicitor for the First Respondent:	Clayton Utz

ORDERS

NSD 578 of 2021

BETWEEN:	**BOE21** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**BROMWICH J**
DATE OF ORDER:	**19 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. The amended originating application dated and filed 22 July 2021 be dismissed.

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

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

REASONS FOR JUDGMENT

BROMWICH J:

1 The applicant is a citizen of Somalia who experienced significant trauma arising out of the war-torn state of his country of birth. He came to Australia in his late adolescence with family members, and was granted a Class XB Subclass 200 Refugee visa. He is now in his late 20s and is the father of two children born in Australia, with whom he has had little contact since birth. He fears for his safety if he is made to return to Somalia, for reasons that have been accepted as legitimate, but not found to be specific to him as opposed to the situation there more generally.

2 The applicant started committing criminal offences within two years of his arrival in Australia, commencing with relatively minor offences, and progressing to more serious offences, ultimately resulting in several terms of imprisonment. By the time that his visa was the subject of mandatory cancellation on character grounds in May 2019, he had an extensive criminal history. Upon his release from prison in August 2020 he was taken into immigration detention, where he remains.

3 The applicant made a request that his visa cancellation be revoked, in response to an invitation to do so under s 501CA(3) of the *Migration Act 1958* (Cth). That request was denied in February 2021 by a delegate of the first respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, under s 501CA(4) of the *Migration Act*. The applicant immediately sought merits review of the delegate's decision by the second respondent, the Administrative Appeals Tribunal. The Tribunal conducted a video hearing over two days in late April 2021, and affirmed the delegate's decision just over a week later. By an amended originating application the applicant seeks judicial review of the Tribunal's decision.

4 The decision of the Tribunal was required to be made in accordance with a direction made by the Minister under s 499 of the *Migration Act*, *Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (8 March 2021) (**Direction 90**). Direction 90 commenced on 15 April 2021, just before the Tribunal hearing, replacing *Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (2 December 2018) in similar

terms that had applied to the delegate's decision. Direction 90 contains both mandatory and aspirational considerations to be taken into account in exercising the discretion to refuse a visa, cancel a visa, or revoke the cancellation of a visa, on character grounds. The Tribunal's reasons closely track the terms of Direction 90.

5 It was common ground that the applicant failed the character test in s 501(6) of the *Migration Act*. Accordingly the Tribunal's decision turned on whether there was "*another reason why the original* [visa cancellation] *decision should be revoked*": s 501CA(4)(b)(ii), *Migration Act*. The Tribunal was satisfied that the primary considerations identified in Direction 90 of the expectations of the Australian community and protecting the Australian community from harm, outweighed considerations related to the personal interests of the applicant and his family. The Tribunal was not satisfied that there was "*another reason*" to revoke the visa cancellation decision.

The grounds of review

6 The applicant's original ground 3 has been abandoned in the amended originating application. The remaining grounds are as follows, renumbering pleaded grounds 4 and 5 as grounds 3 and 4 respectively for ease of reading:

> **1. The Tribunal made findings for which there was no evidence.**
>
> (a) Citing cl 8.1.1(1)(g) of Direction no. 90 (**Direction 90**), the Tribunal found that the applicant has been warned about the consequences of further offending in terms of the applicant's migration status in Australia; this was also held against him.
>
> (b) However, cl 8.1.1(1)(g) of Direction 90 is conditioned on a non-citizen being made aware in writing about the consequences of further offending in terms of their migration status in Australia. There was no evidence that the applicant had received a copy of the remarks on sentence of the District Court of Queensland, in writing, before he re-offended.
>
> **2. The Tribunal acted on a misunderstanding of the applicable law.**
>
> (a) Strand 1. Under cl 8.1.1(1)(g) of Direction 90, the Tribunal is required to consider whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).
>
> (b) The Tribunal appears to have held against the applicant, for cl 8.1.1(1)(g), comments made by a sentencing judge that the applicant was at risk of being deported on account of the sentence to be imposed upon him (**sentencing judge comment**). The sentencing judge's comment was not

'a warning' that fell within the scope of cl 8.1.1(1)(g).

(c) The Tribunal acted on a misunderstanding of the correct construction of cl 8.1.1(1)(g); which did not extend to judicial comments that did not refer to s 501 of the Act; or, in the alternative, the warning referred to under cl 8.1.1(1)(g) means a warning *issued by or on behalf of the Department of Home Affairs* (there was no such warning in this case).

(d) Strand 2. The Tribunal concluded that the existence or otherwise of "another reason" under s 501CA(4)(b)(ii) of *the Migration Act 1958* (Cth) (**the Act**) should be established on the 'balance of probabilities'.

(e) The Tribunal should not be applying the curial and adversarial evidentiary standard of the balance of probabilities to ascertain whether it had the requisite state of satisfaction regarding whether "another reason" advanced by the applicant was sufficient.

(f) Strand 3. The Tribunal found that the applicant has strong and enduring ties which weigh in favour of revocation (i.e. given the applicant's extensive family in Australia). However, the Tribunal concluded the relative weight to be given to these ties is diminished because the applicant began offending shortly after arriving in Australia (**less weight consideration**).

(g) This reasoning demonstrates a misunderstanding of cl 9.4.1 of Direction 90. The less weight consideration is *causally linked* to cl 9.4.1(2)(a), not cl 9.4.1(2)(b). That is, a non-citizen's residence in Australia should be given less weight where that non-citizen began offending soon after arriving in Australia. Nothing in cl 9.4.1(2)(b), which is related to a non-citizen's ties to Australia, mandates less weight to be given to this criterion due to the less weight consideration.

(h) The Tribunal incorrectly applied the less weight consideration to cl 9.4.1(2)(b); when it was a matter that only applied to cl 9.4.1(2)(a).

3. The Tribunal's decision was legally unreasonable, irrational and/or illogical.

(a) Strand 1. When considering the question of remorse, the Tribunal concluded that genuine remorse requires that the person accept their wrongdoing and take appropriate responsibility for their offending. The Tribunal proceeded to hold against the applicant that he denied any wrongdoing concerning the matters contained in the police report used as the basis of the domestic violence orders made to protect the mother of the applicant's ex-partner (**domestic violence allegation**).

(b) Contrary to 4(a) above, the Tribunal elsewhere concluded that court briefs of this kind (i.e., related to the domestic violence allegation) are to be treated cautiously as they contain untested assertions that are often not based on first-hand accounts. The Tribunal concluded it was reluctant to draw any adverse conclusion regarding the domestic violence allegation against the applicant.

(c) The Tribunal's findings extracted at [3(a) and 3(b)] above cannot be lawfully reconciled.

(d) Strand 2. The Tribunal concluded that if the applicant were to revert to his

prior criminal conduct, it would likely have a significant negative impact on the applicant's child. That finding is legally unreasonable, irrational and/or illogical in circumstances where none of the applicant's prior offending has had any significant negative impact on the applicant's [child] at all. The Tribunal adopted contrary reasoning concerning the applicant's siblings and nephew.

(e) Strand 3. The Tribunal concluded that there are other options available including the granting of a protection visa which would allow the applicant to avoid deportation. This reasoning is incongruous, if not somewhat bizarre. It is plainly illogical and/or irrational. There was not a realistic possibility that the applicant would be granted a protection visa in the foreseeable future.

4. The Tribunal denied the applicant procedural fairness.

(a) The Tribunal concluded that given the applicant's criminal record, it seems likely that the applicant would find it difficult to secure full-time employment upon his release. (**criminal record and employment finding**).

(b) A decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. The criminal record and employment finding would not obviously be open on the known material before the Tribunal. Had the applicant been put on notice of the proposed criminal record and employment finding, the applicant could have put on submissions and evidence to rebut the proposed finding.

Ground 1 – no evidence

7 This ground of review relies upon an asserted misinterpretation and thereby misapplication of a mandatory consideration within Direction 90 to the applicant. The applicant submits that a finding that the consideration did apply to him was not supported by any evidence.

8 One of four primary considerations mandated by Direction 90 is "*protection of the Australian community from criminal or other serious conduct*". That primary consideration is then broken into two separate considerations of the "*nature and seriousness*" of the conduct in question, and of the "*risk to the Australian community*" should further offences be committed or further conduct be engaged in by a non-citizen. This ground of review is concerned with the Tribunal's assessment of the nature and seriousness of the conduct giving rise to the applicant's criminal history.

9 In considering the nature and seriousness of a non-citizen's conduct, a list of factors from (a) to (g) are set out at [8.1.1(1)] of Direction 90 as follows:

8.1.1 The nature and seriousness of the conduct

(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:

a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:

(i) violent and/or sexual crimes;

(ii) crimes of a violent nature against women or children, regardless of the sentence imposed;

(iii) acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

(i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

(ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;

(iii) any conduct that forms the basis for finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));

(iv) where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken to immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;

c) with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;

d) the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;

e) the cumulative effect of repeated offending;

f) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;

g) whether the non-citizen has re-offended since being formally

> warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).

10 Thus the Tribunal was required by factors (a) to (f) to have regard to the particular types of crimes or conduct, sentences imposed, the frequency of offending or conduct (including any trend of increasing seriousness), the cumulative effect of repeat offending, and whether information about the conduct given to the Minister's Department was false or misleading (including by way of non-disclosure). Factor (g) required the Tribunal to have regard to whether reoffending had taken place after the non-citizen had been warned or made aware in writing of the consequences of further offending for a visa holder's migration status. The key point is that the warning or awareness had to come about by way of a written communication before this factor was required to be considered, so as to be an express mandatory relevant consideration.

11 None of factors (a) to (g) are exhaustive in the sense of being a closed universe of considerations going to the question of the nature and seriousness of a non-citizen's conduct. Rather, they are a mandatory minimum set of considerations. In particular they do not preclude the Tribunal from having regard to similar considerations that fall short of any mandatory threshold, including any warning or awareness communicated to the applicant other than in writing about the risks to his migration status in reoffending. Not meeting the threshold for being a mandatory relevant consideration does not, and cannot, render something an irrelevant forbidden consideration.

12 In relation to factor (g), and the ultimate conclusion reached after considering each of the seven factors, the Tribunal said (footnote imbedded):

> [60] The Applicant was not formally warned by the Respondent about the consequences of further offending. However, on 29 August 2018 in handing down sentence the sentencing judge in the District Court of Queensland stated: [G2, p 34]
>
> > *You are at risk, as a result of the sentence I have to impose on you today, of the minister revoking your residency here and being deported. But that is just the logical consequence of someone who is not a citizen breaking the law and committing serious offences.*
>
> [61] Despite that warning, the Applicant went on to commit further serious offences for which he was sentenced to imprisonment on 6 November 2019.
>
> ***Conclusion***

> [62] Having regard to the factors set out in paragraphs 8.1.1(1)(a)–(g) of Direction 90, the Tribunal is satisfied that the Applicant's criminal conduct over the period from 2014 until his conviction in November 2019 is very serious conduct and should it be repeated constitutes a serious threat of harm to the Australian community.

13 The first step in considering a "*no evidence*" ground of judicial review is to focus on what this ground is capable of encompassing and vitiating. The impugned finding must be either:

(a) a precondition to the exercise of jurisdiction: *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12, per Gummow and Hayne JJ at [39]; or

(b) at the very least, a critical step in the ultimate decision that is made: *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231; 77 ALD 402 at [19].

14 Taking the lesser stance most favourable to the applicant, can the impugned finding of fact relied upon be properly characterised as a critical step in the ultimate decision that was made? In my opinion, for the following reasons it cannot. It is therefore not necessary to decide whether the even higher threshold for establishing jurisdictional error in [13(a)] above is met by the applicant's case.

15 The footnote to the Tribunal's quote at [60] from the remarks on sentence, reproduced above, directs attention to the three-page transcript of the sentencing remarks that was before the Tribunal. The sentencing remarks commenced with the sentencing judge telling the applicant to stand up, a common feature of criminal sentencing practice, reflective of the solemn importance of what is taking place. The passage quoted by the Tribunal was said just before the applicant was told he would not be returning to custody, apparently having been remanded in custody until that time. Read fairly and in context, the Tribunal plainly treated this as the direct delivery of a verbal warning to the applicant as to the risk to his immigration status from the offending for which he was being sentenced. It was not, in terms, a warning about future offending.

16 The Tribunal's reasons at [60]–[61] reproduced above, when read with [62], may have been erroneous if read as amounting to a conclusion that the kind of warning contemplated by factor (g) had been given. However, a fair reading of those passages is that the Tribunal acknowledged that a formal warning of the kind referred to in factor (g) had not taken place, but that a warning without that formality and referring only to the offending that had already

taken place had been given by the sentencing judge, and that despite this warning the applicant had committed further serious offences for which he was imprisoned. Those passages should not be read, even without resort to the beneficial reading ordinarily required, as concluding that a factor (g) style warning had been given, so as to render it a mandatory relevant consideration.

17 That way of reading the Tribunal's reasons accords with the undoubted reality that a warning that did not meet the terms of factor (g) did not and could not preclude the Tribunal having regard to a warning or awareness in relation to the effect of the applicant's instant offending that was communicated directly to the applicant orally by a Queensland District Court judge at the time of imposing a sentence of imprisonment in respect of that offending. What mattered was the substance: that he was in fact clearly put on notice when he was being sentenced that he had already put his immigration status in peril from his past offending. The Tribunal was entitled to treat this as making the applicant aware of the impact future criminal offending could also have on his immigration status. That is especially so as he was expressly told that this was "*just the logical consequence of someone who is not a citizen breaking the law and committing serious offences*." The awareness conveyed by those words applied to any non-citizen who committed serious offences, a category which necessarily included the applicant. By those words he was necessarily and as a matter of logic also put on notice of the likely impact that any future offending might have on that status. The Tribunal was entitled to have regard to that, even though it did not meet the requirements of being a mandatory relevant consideration by reason of being given in accordance with the requirements of factor (g).

18 More importantly, even if that was not an error derived by reading the Tribunal's reasons with an eye keenly attuned to the perception of error, it was manifestly incapable of vitiating the conclusion reached by the Tribunal that the applicant's criminal conduct over a five-year period was very serious and would be a serious threat of harm to the Australian community if repeated. It was at most a further factor contributing to that conclusion. It is impossible to accept that the absence of taking this into account could realistically have made any material difference to that overall conclusion.

19 Put another way, even a factor (g) warning would have had no realistic capacity to "*affect the weight given by the Tribunal to the particular consideration in question*" as is submitted on his behalf, being the consideration as to the seriousness of the applicant's conduct, because it was not of itself a critical step in the determination of whether the applicant's offending was serious. That is so even applying rather than distinguishing *Viane v Minister for Immigration,*

Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 144; 278 FCR 386 at [52] and [62], noting that the High Court heard an appeal by the Minister from that majority decision on 9 September 2021 and has reserved its decision.

20 In any event, that finding was able to be reached in part relying upon the indisputable fact that a warning of a different kind had been given and was properly able to be taken into account by the Tribunal, even though it did not fit within the terms of the mandatory consideration in factor (g). Regardless, it is not enough that the evidence in support of a factual finding is unconvincing, because the "*no evidence*" ground of judicial review is to be read literally as meaning no evidence at all to ground the finding that has been made: *Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707; 148 FCR 446 at [575].

21 It follows that ground 1 must fail.

Ground 2 – misunderstanding of the law

22 This ground contains three separate grounds of judicial review, described as "*strands*", each relying upon an asserted misunderstanding of the law by the Tribunal said to amount to a jurisdictional error.

Ground 2, Strand 1 – [8.1.1(1)(g)] of Direction 90

23 This ground of review has the same factual substratum as ground 1. The Tribunal's reliance on the sentencing judge's verbal warning to the applicant is asserted to be a vitiating error of law because it rises to the level of being a jurisdictional error. It is doubtful that any mistake made by the Tribunal as to the application of factor (g) to a warning communicated orally instead of in writing could properly be characterised as an error of law if read fairly, let alone beneficially as required.

24 The Tribunal's reasons at [60]–[62], reproduced at [12] above, should be read as I suggest above. But even if not read in that way, they do not constitute a failure to comprehend the threshold requirement that the warning or awareness be as a result of a communication in writing, however perfunctory, before factor (g) would become a mandatory relevant consideration. Instead they can readily be seen to be little more than a slippage of language or expression. There cannot be any serious suggestion that not meeting the factor (g) threshold to make the warning that was in fact communicated by the sentencing judge a mandatory relevant consideration stopped that from nonetheless being a generally relevant consideration.

25 The absence of the written form needed before a warning *had* to be taken into account did not somehow make the oral communication that did take place an irrelevant consideration that therefore could not be taken into account. However, it is convenient for present purposes to assume in the applicant's favour that there was indeed a failure by the Tribunal to appreciate the distinction between a written and a non-written communication of a warning, or of awareness. I will also assume that to be a legal error on the part of the Tribunal as to when factor (g) applied so as to make communication of a warning (or awareness) a mandatory relevant consideration, albeit one that was technical in nature. Even having made those favourable assumptions, such an error could not create a requirement that the Tribunal *not* take into account the oral warning or awareness that was in fact communicated to the applicant by the sentencing judge in the assessment of the seriousness of the applicant's instant offending.

26 While the conclusions reached by the Tribunal are undoubtedly ideally meant to be reached on a correct understanding of the law, not every error of law will be of sufficient gravity or impact on the decision that has been made to be material, so as to constitute a jurisdictional error: see ***Hossain*** *v Minister for Immigration and Border Protection* [2018] HCA 34; 264 CLR 123 per Kiefel CJ, Gageler and Keane JJ at [25], [31]. An error, including an error in the understanding of the law, will only be material and thereby constitute a jurisdictional error if it operated to deprive the applicant of the possibility of a successful outcome. The applicant bears the onus of proving that is a realistic possibility: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 per Bell, Gageler and Keane JJ at [3]–[4]; see also *Hossain* per Kiefel CJ, Gageler and Keane JJ at [30]. For the reasons set out above, it is simply not possible to characterise any legal error that was made in relation to factor (g) as giving rise, in the circumstances, to the applicant being deprived of a realistic possibility of a successful outcome on this account. There is nothing material in having regard to a warning that was merely a generally relevant consideration erroneously as though it was a mandatory relevant consideration. That distinction could not have had any material impact on the weight given to it.

27 It follows that strand 1 of ground 2 must also fail.

Ground 2, Strand 2 – "another reason" under s 501CA(4)(b)(ii) of the Migration Act

28 After an introduction and background summary, the Tribunal reasons set out the legislative framework as follows (footnote embedded, bold and italics in original):

> [13] Section 501CA(4) of the Act enables the Tribunal on review to revoke the mandatory visa cancellation decision if it is satisfied that:
>
> *(a) the Applicant passes the character test as defined in s 501; or*
>
> *(b) there is another reason why the cancellation should be revoked.*
>
> [14] The Applicant's visa was cancelled under s 501(3A) of the Act as the delegate was satisfied that he did not pass the character test. Section 501(6)(a) provides that a person is deemed not to pass the character test if they have a *substantial criminal record*. Section 501(7)(c) provides that for the purpose of the character test a person has a substantial criminal record if *the person has been sentenced to a term of imprisonment of 12 months or more*. The Applicant was convicted and sentenced to an aggregate three years imprisonment on 29 August 2018.
>
> [15] The Applicant does not dispute that he does not pass the character test in s 501(3A) of the Act.
>
> [16] Accordingly, the sole issue before the Tribunal was whether, under s 501CA(4)(b)(ii), *there is* ***another reason*** *why the mandatory cancellation should be revoked*.
>
> [17] The existence or otherwise of *another reason* should be established on the balance of probabilities. [*Re Gordon v Minister for Immigration and Border Protection (Migration)* [2018] AATA 39, [57].]

29 This strand turns on [16]–[17] above, taking issue with the reference to the "*balance of probabilities*", and asserting that the Tribunal had subsequently acted upon this stated test and erroneously applied the curial and adversarial evidentiary standard in order to ascertain whether it had formed the requisite state of a satisfaction as to the existence of "*another reason*". As will be seen, this is sought to be established by the Tribunal's use of the words "*on balance*" in two paragraphs of its reasons. I have also considered another paragraph of the Tribunal's reasons in which the phrase "*on balance*" was used.

30 The answer to the question of whether or not it is permissible for the Tribunal to apply the "*balance of probabilities*" in relation to fact-finding is not as obvious or as universal as it might first appear. In *Minister for Immigration and Ethnic Affairs v* ***Wu Shan Liang*** (1996) 185 CLR 259, a seminal case on the "*real chance*" test in the determination of refugee status, Brennan CJ, Toohey, McHugh and Gummow JJ considered the proper role of a court conducting judicial review. Drawing on the Full Court's reasons below, their Honours considered that where "[a] *delegate starts and finishes with the correct test*" and "*it is only some phraseology in between which provides the basis for a conclusion that* [they] *had slipped from an assessment of a real chance to an assessment of balance of probabilities*" the delegate, and I further infer a decision maker such as the Tribunal, is entitled to a beneficial construction

of their reasons. Their Honours later criticised submissions that drew too closely upon analogies in the conduct and determination of civil litigation, observing as follows (at 282-283; footnotes omitted):

> Where facts are in dispute in civil litigation conducted under common law procedures, the court has to decide where, on the balance of probabilities, the truth lies as between the evidence the parties to the litigation have thought it in their respective interests to adduce at the trial. Administrative decision-making is of a different nature. A whole range of possible approaches to decision-making in the particular circumstances of the case may be correct in the sense that their adoption by a delegate would not be an error of law. The term "balance of probabilities" played a major part in those submissions, presumably as a result of the Full Court's decision. As with the term "evidence" as used to describe the material before the delegates, it seems to be borrowed from the universe of discourse which has civil litigation as its subject. The present context of administrative decision-making is very different and the use of such terms provides little assistance.
>
> In *Fernandez v Government of Singapore*, the House of Lords considered the test to be applied to determine if a fugitive offender "might, if returned, be prejudiced at his trial". This raised a similar issue to the assessment of a real chance of persecution. Lord Diplock said:
>
> > "I think it only leads to confusion to speak of 'balance of probabilities' in the context of what the court has to decide under … the Act [the *Fugitive Offenders Act 1967* (UK)]. It is a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences. But the phrase is inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future."
>
> We would adopt that reasoning as applicable to the present case. The term "balance of probabilities" is apt to mislead in the context of s 22AA, even if it be used in reference to "what has already happened".

31 The above passage was cited, and the concluding paragraph above quoted by the Full Court (Black CJ, von Doussa and Carr JJ) in *Minister for Immigration and Multicultural Affairs v* ***Epeabaka*** [1999] FCA 1; 84 FCR 411 at [12] (unaffected by a different issue addressed by the High Court in dismissing an application for relief under s 75(v) of the *Constitution*: [2001] HCA 23; 206 CLR 128). The Full Court in *Epeabaka* then said:

> [13] The impugned sentence from the judgment of the primary judge must be understood in the context of statements that preceded it. The full paragraph in which the sentence appears reads:
>
> > "When deciding a case the Tribunal must have regard to what is an appropriate standard of persuasion. In *Sodeman v The King* (1936) 55 CLR 192 at 216 Dixon J said that the common law only knew of two such standards, that applicable to criminal cases, beyond reasonable doubt, and that applicable to civil cases, the preponderance of probability. However, Dixon J pointed out

> that 'questions of fact vary greatly in nature and, in some cases, greater care in scrutinising the evidence is proper than in others, and a greater clearness of proof may be properly looked for'. In *Liang* the High Court observed that the decision-making processes that are applicable to civil litigation, such as notions of burden of proof and the like, are not always applicable to administrative decision-making: see *Sodeman* at 282. In some contexts, such as when the Tribunal is seeking to determine what might happen in the future or even what has already happened, the use of the term burden of proof might be misleading. But when the Tribunal is required, as a step in the process of arriving at its decision, to determine whether a fact does or does not exist generally the civil standard should be held to apply to its decision-making with due regard being paid to serious issues: compare *Re Letts v Secretary to the Department of Social Security* (1984) 7 ALD 1 at 4. Unless the Tribunal is required to apply some standard of proof it is not easy to see how the Tribunal should direct itself in determining whether the evidence before it permits it to make a particular finding of fact. On one view the Tribunal could approach the matter solely by reference to 'natural justice and common sense' (see *McDonald v Director-General of Social Security* (1984) 6 ALD 7 at 9) but this does not give a sufficiently clear guide to the Tribunal in my opinion. It is more likely to arrive at the correct or preferable decision if its obligation is to determine the existence of facts in accordance with the civil standard except in respect of those matters where the nature of what must be decided makes this inappropriate."
>
> [14] The primary judge was not advancing the civil standard as one to be applied without exception in migration cases. Rather, his Honour was advocating the use of the civil standard as a guide likely to produce the correct or preferable decision "except in respect of those matters where the nature of what must be decided makes this inappropriate". This is an important qualification.

32 Similar reasoning is at least implicit in aspects of ***FTZK*** *v Minister for Immigration and Border Protection* [2014] HCA 26; 88 ALJR 754; 310 ALR 1, in which a protection visa applicant had been implicated in serious criminal activity in his home country. In issue was:

(a) the application of Art 1F(b) of the *Convention Relating to the Status of Refugees*, which excluded the operation of that convention if there were "*serious reasons for considering*" that the visa applicant had committed a serious non-political crime outside the country of refuge; and

(b) the approach to be taken by an administrative decision-maker in reaching satisfaction that there existed such serious reasons for considering that the commission of such a crime had occurred.

33 The Tribunal in *FTZK* had stated that it sufficed that there was "*strong evidence*" but that it did not have to be of such weight as to meet the civil or criminal standard of proof, nor did the decision-maker have to be satisfied that the alleged crime had been committed: see *FTZK* at

[5]. French CJ and Gageler J said at [15] that standards of proof that are applied in judicial proceedings were not substitutes for the ordinary words in Art 1F(b), and that the "*risk with the use of domestic standards of proof as analytical tools is that they can evolve into substitutes for the words of the article and may result in the bar being placed too high or too low, according to the circumstances*". It may be observed that a risk of erroneous use does not necessarily equate to a blanket prohibition, let alone to jurisdictional error.

34 Hayne J in *FTZK* gave three reasons why describing the convention test of "*serious reasons for considering*" as a "*standard of proof*" was apt to mislead. These included that the decision is to be made in the first instance by an administrative decision-maker outside the adversarial processes of a court in which issue is joined. There is no joinder of issues in administrative decisions: *FTZK* at [33]–[34].

35 Crennan and Bell JJ in *FTZK* said (at [79]) that the mere usage of the term "*standard of proof*" would not have sufficed to establish error, and said (at [97]) that the criminal standard of proof of beyond reasonable doubt was not be "*subsumed into 'serious reasons for considering' that an alleged crime has been committed*". Their Honours found jurisdictional error in the way in which an aspect of the material before the Tribunal had been addressed.

36 The conclusion to be drawn from *Wu Shan Liang* and *FTZK* in the High Court, and *Epeabaka* in the Full Court, is that the balance of probabilities may sometimes properly inform some aspect of the process of reaching the correct or preferable decision, but that there are dangers in taking that approach as it may lead to error. However, the Tribunal in this case did not merely say that the balance of probabilities was informing the decision-making process, or being used as a fact-finding evaluative guide, but that "*the existence or otherwise of another reason should be established on the balance of probabilities*". While this statement is an indicator that the balance of probabilities was stated to be a test to be applied, that does not of itself establish legal error, let alone jurisdictional error. The actual application of an inappropriate standard must be demonstrated, as must the materiality of the application of such a standard to the ultimate decision, albeit without a beneficial reading following the discussion of *Wu Shan Liang* at [30] above.

37 The various approaches in *FTZK* indicate that asking a wrong, or at least inapt, question will need to be shown to have been carried through to the decision-making process through the reasons given and also to have vitiated the decision reached. The mere use of such a label may

or may not be incorrect, or lead to error, depending on the fact or issue to which it is directed and how it has been deployed, including the statutory context. However, more than an erroneous label is needed to demonstrate vitiating error. The relevant question is whether that description in the Tribunal's outline of the legislative framework at [17] has been shown to be operative in the decision that was made, and if so, whether that constituted jurisdictional error.

38 The asserted basis for the balance of probabilities standard being erroneously applied is the use of the phrase "*on balance*" at [97] and [102] of the Tribunal's reasons, to which may be added for completeness the use of that phrase also at [151]. The full text of those paragraphs, with "*on balance*" emphasised is as follows, in which the Tribunal is expressing the conclusion reached in relation to the applicant's children "H" and "N", and in relation to his immediate family:

> [97] **On balance**, there is little force to the proposition that H's best interests would be served, by the Applicant remaining in Australia.
>
> …
>
> [102] **On balance**, the Tribunal is not satisfied that there is a sufficient objective basis to conclude that it is in N's best interests for the Applicant to remain in Australia.
>
> …
>
> [151] The Tribunal accepts that a decision not to revoke the cancellation of the Applicant's visa would have an impact on the Applicant's immediate family. As the oldest sibling in his mother's household, he has provided practical and financial support for his mother in caring for her young children and especially A who has epilepsy. The continuity of this support has been interrupted by periods of imprisonment and he has now been absent from the family for over two years, due to his sentencing on 6 November 2019 and subsequent immigration detention. His contribution to his family as a role model and 'father figure' is diminished by his extensive involvement in criminal activity and the abuse of alcohol and drugs. **On balance**, the Tribunal accepts that there would be a negative impact on the Applicant's immediate family members if the cancellation of his visa is not revoked, but it does not give this consideration great weight.

39 The applicant submits that reading the Tribunal's reasons as a whole and fairly, it is clear that the reference to the expression "*on balance*" involved applying the "*balance of probabilities*" test stated at [17]. He submits that in doing so, the Tribunal made adverse findings against him concerning the best interests of two minor children in Australia at [97] and [102]. For the reasons set out below, I am unable accept this is an inference which can be reasonably drawn for [97] and [102] and also for [151], in the context of the full sentence in which the phrase is used each time, and in the context of the immediately preceding reasons.

40 The ordinary usage of the phrase "*on balance*" is to indicate that a conclusion has been reached one way or the other, usually after considering the relevant facts and circumstances, rather than that such a conclusion has been reached to any particular standard. It reflects choice between competing conclusions, rather than the application of any onus or standard of proof in making that choice. Ordinary usage of this kind does not entail any beneficial reading being applied.

41 The applicant also relies upon a comment in my decision in ***Ali*** *v Minister for Home Affairs* [2018] FCA 1895 to the effect in context that in that case it was not considered to be in doubt that applying such a curial standard of proof, if proven, was inappropriate: see [33]. At [32] of that decision, I addressed the use of the phrase "*on the other hand*" used in a paragraph of that Tribunal's reasons, concluding that I was unable to detect in that paragraph in its context, or any other aspect of the reasoning deployed, anything that entailed doing anything more than was permitted, and indeed required, in weighing up the competing factors to reach the ultimate conclusion. There is a difference between this case and *Ali*, in that the expression "*on the other hand*" in *Ali* only occurred once, while the phrase "*on balance*" was repeated in this case. However, *Ali* did have an equivalent paragraph to [17] in this case. The question of whether the balance of probabilities should or should not apply in *Ali* was also less determinative. It is appropriate to carry out the same evaluative exercise as I did in *Ali* for the two paragraphs of the present Tribunal's reasons relied upon, [97] and [102], and for completeness and context for those paragraphs also [151].

42 In the case of [97], the preceding paragraphs refer in some detail to the nature and extent of the applicant's contact with his 6-year-old child, with whom he was found to have had little meaningful involvement since birth, having not disclosed to the child's mother that he was in custody. The Tribunal's assessment of the best interests of this child contains references to what is likely or unlikely, to objective assessment, and to the presumption that it is usually but not always in the best interests of children to have direct and regular contact with their parents. The Tribunal ultimately concluded that "*on balance*", at the end of the entire section dedicated to the child H, having all these likely or unlikely predictive factors set out, "*there is little force to the proposition that H's best interests would be served, by the Applicant remaining in Australia*". Given that this balancing exercise is done at the conclusion of the consideration of all other factors from [90]–[96], I am not satisfied that the use by the Tribunal of the phrase "*on balance*", is a reference to the application of the test of the balance of probabilities as set out as being the framework for deciding the overarching question of whether there is "*another*

reason" in the reasons at [17]. In the context of the sentence containing the phrase "*on balance*" and in the context of the preceding reasons, I consider that the Tribunal was recording no more than that a conclusion had been reached after considering the relevant facts and circumstances, without reliance on any particular standard. The phrase as deployed carries its ordinary meaning.

43 In the case of [102], the preceding paragraphs refer in somewhat less detail to the nature and extent of the applicant's contact with his 5-year-old child, because he was taken into custody shortly after that child's birth. By the time he was released the next year, child protection authorities had assumed full custody and the child therefore had no meaningful contact with the applicant since birth. The Tribunal's assessment of this child's best interests is similarly predictive, with the Tribunal ultimately being unable to be satisfied that the applicant remaining in Australia was in the child's best interests, as set out in [102]. The Tribunal concludes "*on balance*" at the end of the section dedicated to the child N, and the predictive reasoning made across [98]–[101], that it is "*not satisfied that there is a sufficient objective basis to conclude that it is in N's best interests for the Applicant to remain in Australia*". The Tribunal expressly said that it was difficult to assess the likelihood that the applicant would play a positive parental role in N's future. Given that this balancing exercise is done at the conclusion of the consideration of all other factors from [98]–[101], again I am not satisfied that the use by the Tribunal of the phrase "*on balance*", is a reference to the application of the test of the balance of probabilities as set out as being the framework for deciding the overarching question of whether there is "*another reason*" in the reasons at [17]. Again, in the context of the sentence containing the phrase "*on balance*" and the preceding reasons, I consider that the Tribunal was recording no more than that a conclusion had been reached after considering the relevant facts and circumstances, without reliance on any particular standard. Again, the phrase as deployed carries its ordinary meaning.

44 In the case of [151], the use of the phrase "*on balance*" occurs in the part of the Tribunal's reasons addressing the applicant's ties to Australia. In the preceding paragraphs the Tribunal concluded in his favour that he had strong and enduring ties which weighed in favour of revocation of the cancellation of his visa, but found that the impact of a decision not to revoke was reduced due to his inability to support his family by reason of his incarceration and drug and alcohol abuse. The use of the phrase "*on balance*" even more clearly indicates a weighing

up of competing considerations, rather than being satisfied to any particular standard, albeit applied to reach a conclusion in the applicant's favour.

45 I therefore conclude that the phrase "*on balance*" in each of [97], [102] and [151] signifies no more than that a conclusion has been reached on each of the issues being addressed after considering the relevant facts and circumstances, rather than that each intermediate conclusion has been reached to any particular standard. I am fortified in this view because [17] is referring to the ultimate conclusion reached as to "*another reason*", not to any standard being applied to the consideration of parts of the evidence or other material under consideration. It is inherently unlikely that a statement of a standard of satisfaction as to the ultimate conclusion would then be applied to each item or evidence or other material relevant to that ultimate conclusion.

46 Unaddressed in this strand of submissions by the applicant were [154]–[173] of the Tribunal's reasons. At [154] under the heading "*Conclusion*", the Tribunal quoted from ***Gaspar*** *v Minister for Immigration and Border Protection* [2016] FCA 1166 at [38], where North ACJ said:

> The preferable conclusion is that s 501CA(4)(b)(ii) requires the Minister to examine the factors for and against revoking the cancellation. If satisfied, following an assessment and an evaluation of those factors, that the cancellation should be revoked, the Minister is obliged to act on that view. …

47 The approach to s 501CA(4)(b)(ii) set out in the passage from *Gaspar* has been adopted by the Full Court in *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66; 250 FCR 548 at [30]–[32] per Collier J, with whom Logan and Murphy JJ agreed, and *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 263 FCR 531 at [73]–[74] per Colvin J, Reeves J agreeing at [3]; see also *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 at [3] per Katzmann J.

48 The Tribunal then proceeded to set out, under the headings "*Factors against revocation*" and "*Factors in favour of revocation*", the weight and consideration of points raised in the main body of the reasons. This was an apparent exercise of consideration of the factors almost exactly in the terms of the first sentence of the principle in *Gaspar* set out above.

49 The applicant also could not direct me to any evidence that within primary considerations 1, 2 and 4, or within any of the other considerations save for the applicant's ties to the community, there had been any suggestion of the application of any particular, let alone inappropriate,

standard of proof to the ultimate conclusion. Most of the reasons are set out in terms more similar to the exercise drawn from *Gaspar*.

50 It follows that strand 2 of ground 2 must also fail.

Ground 2, Strand 3 – the application of paragraph 9.4.1 of Direction 90

51 Direction 90 mandates that consideration be given to a revocation applicant's ties to Australia as follows:

> **9.4.1 The strength, nature and duration of ties to Australia**
>
> (1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.
>
> (2) Where consideration is being given to whether to cancel a non-citizen's visa or whether to revoke the mandatory cancellation of their visa, the decision-maker must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:
>
> a) how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:
>
> i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and
>
> ii. more weight should be given to time the non-citizen has spent contributing positively to the Australian community.
>
> b) the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.

52 The Tribunal's reasons reproduced the above text, and then said as follows:

> [149] The Applicant has lived in Australia since he arrived as a young man in November 2012. He has strong family ties to Australia. He has a mother and stepfather and ten siblings living in Australia who are all Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely. The family lives together in two separate houses in close proximity in Brisbane. He also has two [children] who were born in Australia, although the Applicant has had very limited contact with either [child]. The Applicant also has a nephew. In addition, since 2015, the Applicant has established a role in the Muslim community centred on the [redacted] Mosque where he has friends and he is involved in community activity and religious observance.
>
> [150] These are strong and enduring ties which weigh in favour of revocation. However, the relative weight to be given to these ties is diminished by the fact that the Applicant began offending in 2014, shortly after arriving in Australia.

> [151] The Tribunal accepts that a decision not to revoke the cancellation of the Applicant's visa would have an impact on the Applicant's immediate family. As the oldest sibling in his mother's household, he has provided practical and financial support for his mother in caring for her young children and especially A who has epilepsy. The continuity of this support has been interrupted by periods of imprisonment and he has now been absent from the family for over two years, due to his sentencing on 6 November 2019 and subsequent immigration detention. His contribution to his family as a role model and 'father figure' is diminished by his extensive involvement in criminal activity and the abuse of alcohol and drugs. On balance, the Tribunal accepts that there would be a negative impact on the Applicant's immediate family members if the cancellation of his visa is not revoked, but it does not give this consideration great weight.

53 The applicant contends that [150] constitutes vitiating legal error for the following reasons:

(a) First, it is contended that this demonstrates a misunderstanding of [9.4.1] of Direction 90 because the reference to "*less weight*" in [9.4.1(2)(a)(i)] is "*causally linked*" to [9.4.1(2)(a)], not [9.4.1(2)(b)], so that a non-citizen's residence in Australia should only be given less weight when they began offending soon after arriving in Australia.

(b) Secondly, it is contended that nothing in [9.4.1(2)(b)] mandates that less weight be given to the applicant's ties to Australia because he began offending soon after arriving here.

(c) The third argument relies upon a contrast with my observation in *Ali* at [21]:

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

54 The applicant contends that he was found to have strong and enduring ties, and that there was no permissible basis for the Tribunal to attribute less weight to this consideration by reason of him having committed offences relatively soon after arriving in Australia.

55 True it is that less weight should be given to the mandatory consideration of a revocation applicant's length of residence in Australia if offending commences soon after arrival, and that there is no requirement to take it into account in relation to ties in Australia. However, this does not mean that offending soon after arrival in Australia cannot be taken into account as a

generally relevant consideration, including in relation to the strength of ties in Australia more generally. That is, the argument depends upon a confusion between mandatory relevant considerations, and considerations that are generally relevant but not mandatory, treating the latter as if they are irrelevant forbidden considerations. Direction 90 does not create any such false dichotomy.

56 It follows that strand 3 of ground 2 must also fail.

Ground 3 – legal unreasonableness, irrationality, illogicality

Ground 3, strand 1 – treatment of domestic violence allegations

57 At [49], as part of dealing with factor (a) going to the assessment of the nature and seriousness of the applicant's offending, the Tribunal referred to the applicant's criminal record featuring regular and serious violent offences. The Tribunal quoted from the remarks on sentence for the January 2019 offence of wounding by stabbing, being an aspect of his participation in the assault with others on a 17-year-old boy. The combined effect of the assault by the applicant and others left the boy badly injured and lucky to be alive, and was described by the sentencing judge as gratuitous violence for no real purpose. The Tribunal then turned to the topic of violence against women and children (as required by factor (a)(ii), reproduced at [9] above) as follows:

> While the offences for which the Applicant was convicted did not involve violence against women or children (other than the seventeen year old victim referred to above), the Tribunal notes that the Applicant was convicted of contravening a domestic violence order on 16 April 2016. The circumstances justifying the making of the order were described in a court brief presented to the court by Queensland Police. The report details an assault by the Applicant on the aggrieved person in which he struck the aggrieved to the head several times and kicked her in the stomach (while pregnant) while she lay on the ground. The Applicant accepted in his oral evidence that the aggrieved person to whom the report related was his ex-partner N's mother. The Applicant denied that the incident described in the court brief was true and alleged that N's mother had lied and made up the story. He insisted that he had never struck her, or any other woman. The Tribunal recognises that court briefs of this kind are to be treated cautiously as they contain untested assertions that are often not based on first-hand accounts. Applications for domestic violence orders are generally heard on an ex parte basis. In the absence of further evidence, the Tribunal is reluctant to draw any conclusions regarding the Applicant's conduct other than to note that he was found guilty of having breached a court order imposed for the express purpose of protecting his ex-partner from domestic violence and the Tribunal regards this as adding to the seriousness of his offending.

58 Thus, the Tribunal approached allegations of domestic violence cautiously in assessing the seriousness of the applicant's past criminal offending conduct. This was addressing what he

had done, not his attitude to what he had done, or been accused of doing, as relevant to the risk of future reoffending.

59 At [78]–[79], the Tribunal was dealing with the different but not unrelated topic of the risk of reoffending, assessing each of a series of claims made by the applicant as to why he would be able to avoid recurrence of offending in the future despite his lengthy criminal history. The Tribunal reasoned as follows (sentences in bold relied upon by the applicant):

> [78] The final matter raised by the Applicant is his remorse for his actions. The Applicant assured the Tribunal that he is a changed man and is remorseful for the effect his conduct has had on himself, his family and his victims.
>
> [79] Genuine remorse requires that the person accept their wrongdoing and that they take appropriate responsibility for their offending. Without such acceptance, words of regret ring hollow. In this regard, it is noteworthy that the Respondent repeatedly downplayed or denied his wrongdoing when questioned about his criminal record. **He denied any wrongdoing in relation to the matters contained in the police report which was used as the basis of the domestic violence order made to protect N's mother. He accused N's mother of making the allegations up and lying to the police.** He claimed the summary of facts recited by the Sentencing Judge in sentencing him for armed robbery and assault on 29 August 2018 were not true, notwithstanding that he had plead guilty to the charges. The Applicant proffered an alternative set of facts which cast him in a favourable light. He said he only pleaded guilty because of advice from his lawyer. He similarly disputed the Sentencing Judge's statement of the facts concerning the serious assault conviction on 6 November 2019 when again he had plead guilty. He said he plead guilty on the advice of his lawyers and gave an alternative version of the facts which sought to cast him as the person trying to stop the assault. He accused other witnesses of lying and attempted to explain his confrontations with police by saying that their uniforms reminded him of the people who killed his father.

60 Thus when it came to predicting the future, rather than assessing the past, the Tribunal approached the topic of domestic violence in a different way. This was part of the process of assessing the issue of remorse raised by the applicant as an indication that he would not reoffend. I acknowledge that the insinuation in the impugned sentence that the applicant should have shown remorse for something which in another paragraph the Tribunal accepted he denies having done, is at least jarring and lacking logic to some degree, subject to the observations below.

61 The applicant asserts, in summary, that the Tribunal did not use the domestic violence allegations "*against him*" at [53], but did so at [79], and that this could not be lawfully reconciled because it was irrational or otherwise illogical. To advance this argument, the applicant isolates two short sentences from the lengthy paragraph at [79] and contrasts them

with the approach taken at [53]. The reference in those two sentences from [79] relied upon was an aspect of the Tribunal not measuring and assessing the seriousness of the past conduct, but rather evaluating the applicant's response to being accused of wrongdoing, of which this was the least significant point listed. It needs to be remembered that there was sufficient in the allegations to warrant an apprehended domestic violence order being made, for which some explanation beyond accusation and blanket denial might have lent some support for his claim that he had indeed changed. The Tribunal was not doing any more than that. The Tribunal was entitled to test the applicant's assertions of being a changed man not just by reference to his attitude to proven criminal conduct, but in relation to his attitude towards other allegations made against him.

62 There is no suggestion that the applicant's stance in relation to those allegations was incorrectly recorded. Debates may be had as to the weight or significance to be attributed to denials of any wrongdoing in the context of ex parte domestic violence allegations, but the point that the Tribunal was making is that the expressions of remorse were not accompanied with any acknowledgment of any wrongdoing at all in relation to a range of conduct. That was part and parcel of the merits assessment jurisdiction bestowed upon the Tribunal. I am not satisfied that this was illogical or irrational reasoning, let alone constituting jurisdictional error. Rather, it was within the scope of the Tribunal's exercise of jurisdiction. To make any further assessment than required for determining the issue as to the proper exercise of jurisdiction is to stray into merits review. It follows that differences in the way in which the topic of domestic violence allegations was addressed in assessment of the past at [53] and prediction of the future at [79], understood and read in their proper context, do not establish jurisdictional error.

63 It follows that strand 1 of ground 3 must also fail.

Ground 3, strand 2 – assessment of the impact on his 6-year-old child if he did assume a parental role and then reoffended cf the assessment of impact on siblings and nephew

64 This ground again seeks to establish a jurisdictional error by reference to differential reasoning by the Tribunal, this time by contrasting the approach taken to his child as against the approach taken to his siblings and nephew. The short answer is that he was found to be in a markedly different relationship with his child, which was practically non-existent, to his relationship with his siblings and nephew, which did have some content and therefore some capacity for adverse impact upon them. This characterisation is addressed as follows.

65 In relation to his child, as an aspect of the Tribunal's reasons for concluding, at [97] (reproduced above at [38]) that there was not much to support the applicant remaining in Australia being in his child H's best interests, the Tribunal said:

> [92] The likelihood that the Applicant would play a positive parental role in H's future is difficult to assess. The Applicant is 26 years old and has mental health issues. Since arriving in Australia, he has been involved in numerous crimes and has suffered significant drug and alcohol abuse. He has spent lengthy time in prison and detention. He has no financial resources and has challenges ahead in terms of employment opportunities. He does not have a history of enduring and stable relationships. He currently has not established any legal right to custody or access for H. Looked at objectively, the indications are that the Applicant would struggle to fulfil a positive parental role. If the Applicant were to revert to his prior criminal conduct, which the Tribunal assesses as a high risk, it would be likely to have a significant negative impact on H.
>
> …
>
> [94] There is no evidence that H has been, or would be, at risk of family violence whether physically, sexually or mentally or be exposed to personal trauma due to the Applicant's conduct.

66 When it came to the Tribunal's consideration of the applicant's siblings and nephew, and overall conclusion as to the potential impact on family and children, the Tribunal's reasons were as follows:

> The Applicant's Siblings
>
> [103] Prior to his incarceration, the Applicant lived in a house with his mother and five of his siblings. His other siblings lived with his stepfather Mohamed Juneidi, from whom his mother is divorced, in the same suburb.
>
> [104] The Applicant described himself as a father figure to his younger siblings. He said that he is heavily involved in the care and upbringing of his siblings. He assists in transporting them to school and had assisted the family financially from his employment earnings.
>
> [105] His sister NJM gave evidence that the Applicant is a good support for her mother in caring for the children and her stepfather who is sick is not able to assist her.
>
> [106] The Tribunal accepts that the Applicant has played a supportive role for his mother in caring for the minor children in the family, and especially for A, who suffers from epilepsy and needs assistance, including frequent visits to hospital. However, the Applicant has spent a considerable time in prison and detention over recent years including a continuing period commencing with his arrest in 2019. During this time, his mother has carried the main responsibility in the parental role for the minor children with a lesser contribution from her ex-husband. In addition, the Tribunal notes that NJM turns 18 in July 2021 and another sibling in June 2023, so there is a limited opportunity for the Applicant to play a positive role in either of their lives as minor children.
>
> [107] Having regard to these factors, the Tribunal is satisfied that it would be in the

> best interests of the Applicant's minor siblings for him to remain in Australia, but because he does not fulfilled a parental role and he has had limited contact with his siblings while in custody, this consideration attracts limited weight.
>
> The Applicant's nephew I
>
> [108] I is six years old. He does not live with the Applicant's immediate family. The Applicant has not provided any evidence about his nephew or his role in his life. The Tribunal notes that the Applicant has been in custody for over two years and so his impact on his six year old nephew is likely not to be significant. As a matter of general experience, it can be expected that I's interests would be served by the Applicant remaining in Australia but given the limited contact between them to date and the existence of alternative parental figures, the Tribunal gives this consideration little weight.
>
> Conclusion
>
> [109] The best interests of minor children is a primary consideration under Direction 90. For the reasons discussed, the Tribunal is not satisfied that there is an objective basis to conclude that it is in the best interests of the Applicant's [children] for him to remain in Australia. The Tribunal accepts that it would be in the interests of the Applicant's younger siblings and his nephew for him to remain in Australia, but given the limited role that the Applicant has played in their lives to date, and the fact that his mother and stepfather already play a parental role, the Tribunal gives this consideration limited weight.

67 Read as a whole, [92] is assessing the likelihood of the applicant playing a positive parental role in H's future, including the risks associated with coming into H's life, only to leave again by reason of further offending; while [94] is acknowledging the absence of the more serious risk of family violence and personal trauma. It is attempting to predict the future, without the benefit of much of a past. In contrast, the assessment of the situation with the siblings and nephew was one in which there had been prior contact and thus history, but also the applicant had entered and left their lives as a result of incarceration.

68 The applicant describes [92] as being "*highly problematic*", submitting that:

(a) the Tribunal did not "*particularise*" how the applicant's future criminality would likely negatively impact the child;

(b) the reasoning in [92] was difficult to reconcile with the reasoning in at [94]; and

(c) it is difficult to reconcile [92] with the findings in relation to the applicant's siblings and nephew at [107]–[108], the latter not including any finding of a significant negative impact on them, and it being therefore illogical and irrational to make such a finding for the child.

69 After careful consideration, I am not satisfied that any of these points establish jurisdictional error. Dealing with each point in turn, and in the context of the Tribunal's reasons set out at [66] above:

(a) The particulars for the conclusion at [92] said to be absent readily emerge from the rest of the paragraph, including the nature of the applicant's offences, his lack of financial resources, the lengthy time he spent in prison and the risk of further offending and incarceration. The Tribunal was entitled to conclude that if such offending recurred, this would likely have a negative impact on his child if he was in the child's life as he said he would be, albeit (per [94]) falling short of family violence or personal trauma.

(b) There is nothing inherently irrational in pointing out that there was no evidence of risk of family violence or exposure to personal trauma, and finding that the consequences of further offending would likely have a significant negative impact on that child, implicitly falling short of violence or trauma. The absence of a risk of the more serious impact does not detract from the presence of the risk of other, lesser, but still significant negative impacts. Put another way, the Tribunal was entitled to have regard to the risk of a significant negative impact falling short of family violence or exposure to personal trauma.

(c) This assertion of error entails reading and comparing two separate and different parts of the Tribunal's reasons with an eye keenly attuned to the perception of error. The Tribunal did not say that there would not be an impact on the applicant's siblings and nephew if he reoffended, but rather was making the point that he had a history of some positive engagement with them when he was there, even though he had also had periods away due to his incarceration. The Tribunal was giving positive weight to the historic contribution that he had been able make to the lives of his siblings and nephew when he had been there. This was an assessment and evaluation of past events. By contrast, the situation with his child did not have any real past history, let alone a past history that in part was positive. This meant that the Tribunal was engaged in a wholly or substantially predictive exercise when it came to the applicant's own children, and fell short of being able to say that the difficult to assess prospect of the positive was likely to outweigh the risk of the negative.

70 Any error of the kind asserted, which has not been established, was not in any event capable of rising to the high threshold of vitiating the exercise of jurisdiction.

71 Strand 2 of ground 3 must also fail.

Ground 3, strand 3 – taking into account the possibility of getting a protection visa

72 This ground of review arises from the Tribunal's summary of the factors favouring the revocation of the visa cancellation. It is worth reproducing them in full to give context to the point that the applicant is making:

> [163] The principal considerations in favour of revocation relate to the interests of the Applicant personally, and in particular to the adverse consequences of him being deported to Somalia. The detriments the Applicant would face if deported to Somalia are substantial and weigh strongly in favour of revocation. Somalia is a poor country with very limited opportunities for a person with the Applicant's skills and experience. It is a dangerous place and there are very limited medical and other basic services. The Applicant is vulnerable due to his inexperience, his ethnicity and his mental health. The Tribunal accepts that he is a person to whom Australia owes an obligation of non-refoulement.
>
> [164] The Tribunal is very mindful of these considerations and weighs them heavily in favour of revocation. However, in assessing the relative weight to be given to all factors the Tribunal notes that deportation to Somalia does not automatically flow from a decision not to revoke the cancellation of the Applicant's visa. There are other options available including the granting of a protection visa which would allow the Applicant to avoid deportation. Nevertheless, non-revocation would expose the Applicant to the risk of deportation and the dire consequences that would entail for him and also require the Applicant to remain in detention in Australia while those options were considered.
>
> [165] To this consideration can be added the strength of the Applicant's links to Australia. The Applicant has strong extended family links to Australia, has lived here for almost 10 years and has significant community connections through his involvement with the Kuraby Mosque. His family would be negatively impacted if he were deported. This consideration is tempered, somewhat, by the Applicant's offending shortly after arriving in Australia and by his extended time in prison. Nevertheless, the Tribunal gives this consideration substantial weight in favour of revocation.
>
> [166] These considerations are not primary considerations under Direction 90, but they are important considerations which weigh in favour of revocation.
>
> [167] In addition, the Tribunal accepts that it is in the best interests of the Applicant's younger siblings and his nephew that he remain in Australia, but it gives this consideration limited weight in favour of revocation notwithstanding that it is a primary consideration under Direction 90. The Tribunal is not persuaded that the best interests of the Applicant's [children] require that the cancellation of his visa be revoked.

73 The Tribunal's reasons therefore assessed the consequence of refoulement taking place and the possibility that it might not take place, and took into account detention while a decision was being made as to how to address Australia's non-refoulement obligations, each of them in a

way that was in favour of the applicant, and with the overall conclusion being reached that this consideration strongly favoured revocation.

74 The applicant argues that:

(a) the Tribunal determined that he posed an unacceptable risk of harm to the Australian community, noting that he had a high risk of reoffending; and

(b) the Minister advanced a substantial case before the Tribunal that he should not have his visa cancellation revoked, for the same reasons as given by the delegate,

such that it was illogical and irrational for the Tribunal to reason that the applicant had the option available of being granted a protection visa.

75 In support of that conclusion, the applicant relies upon the Tribunal's reasoning at [164] reproduced above at [72] as being of a similar character to that found to constitute jurisdictional error in a number of cases decided by judges of this Court. In those cases, it has been found that the suggestion that a protection visa would be granted when revocation of a visa cancellation had been refused was not realistic, or words that effect:

(a) ***FRH18*** *v Minister for Home Affairs* [2018] FCA 1769; 266 FCR 413 per Rares J at [52]–[53].

(b) ***DQM18*** *v Minister for Home Affairs* [2020] FCAFC 110; 278 FCR 529 per Bromberg and Mortimer JJ at [108];

(c) ***MNLR*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 35 per Wigney J at [55]; and

(d) ***WKMZ*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 per Kenny and Mortimer JJ at [124].

76 The substance of the applicant's case on this review ground did not turn on much more than relying on comments made in the above cases about the lack of a real possibility of a protection visa being granted once revocation of a visa cancellation on character grounds had taken place. However, all of those comments are far removed from the present circumstances, and the applicant did not attempt to demonstrate otherwise. I have considered each of those cases, but, for reasons that will become clear, they offer little assistance because of the importance of the particular factual context in each case. A conclusion of the kind the applicant seeks reached in

another case on different facts and on different Tribunal reasoning, as opposed to a common body of principles, has limited value in the task before me.

77 In *FRH18*, the applicant had held a partner visa. The Minister in person exercised the visa cancellation power in s 501A of the *Migration Act* and decided to cancel the visa upon forming a reasonable suspicion that the applicant did not pass the character test, and upon being satisfied that cancellation was in the national interest because of the risk of reoffending (which was objectively slight). As failing in fact to meet the character test was inevitable on the undisputed facts, as it was in this case, the key issue was the national interest determination. There had been a prior independent assessment that Australia owed the applicant non-refoulement obligations, which the Minister accepted. Section 48A prevented the applicant from applying for a protection visa after such cancellation. The Minister had the option to exercise personal powers to bypass s 48A, or to grant a visa to a person in detention, or to determine the applicant was to reside in a particular place instead of being in detention if any of those decisions were thought by the Minister to be in the public interest: see ss 48B, 195A and 197AB of the *Migration Act* respectively. When addressing Australia's non-refoulement obligations, the Minister's reasons stated that the potential for using s 195A was encompassed in the consideration of alternative management options to address those obligations, and essentially left it at that.

78 The applicant in *FRH18* challenged the Minister's decision upon the grounds of failing to give proper, genuine and realistic consideration to Australia's non-refoulement obligations and failing to take into consideration the possibility that the applicant could be held in immigration detention indefinitely. The underlying issue raised was that both the power to cancel the visa, and the power to grant another visa, turned on the national interest, both of which had to be determined by the Minister in person.

79 In order for the Minister in *FRH18* both to cancel the existing visa and to grant another visa, the same question of national interest had to be resolved by the Minister in person in opposite ways. This was the critical context for Rares J to conclude that the Minister had, in the sense of must have, closed his mind to the possibility of *him* granting a visa within any reasonable time after *he had* cancelled the partner visa. That was because the Minister had found that the possibility of reoffending, no matter how low the risk, was unacceptable and gave rise to the conclusion of a national interest in cancelling the visa. Thus, his Honour found that the s 195A management option for dealing with Australia's non-refoulement obligations was effectively

non-existent. This gave rise to a conclusion that the Minister had misunderstood and therefore failed to take into account the legal consequences of his decision.

80 By contrast, in this case there was no impediment to a protection visa application being made, and indeed the applicant had foreshadowed making such an application; and the Tribunal plainly accepted that it might not be granted and other options might not work either by referring to there still being a risk of deportation. It is difficult to characterise that assessment of the options as being unrealistic, let alone irrational or illogical to the high degree necessary to constitute jurisdictional error. In relation to the option of applying for a protection visa, as foreshadowed, having failed the character test, and being likely to fail the character test again, does give rise to a discretion to refuse the grant of a protection visa, but no more. That is, the same (and indeed inevitable) conclusion as to character was not a necessary or inevitable impediment to a protection visa being granted, although it certainly was a risk.

81 Strictly speaking, there is no need to go further to show that *FRH18* is so different factually and legally so as to offer little assistance to the present applicant. However, it may be further observed for completeness that such a protection visa application would be considered by either the Minister or more likely by a delegate, not the Tribunal member in this case. If there was an adverse decision made by a delegate, that could be sought to be merit reviewed by the Tribunal. If so, that application most likely would not be before the same member given how many Tribunal members there are even in the Migration and Refugee Division. Even if it was, a compelling if not unanswerable application could be made that the same member should not conduct the merits review in light of the present Tribunal decision.

82 For the preceding reasons, it could not be said that the Tribunal's reference to the possibility of the grant of a protection visa in these circumstances, including the risk that the application might not succeed, was an inherently unrealistic way to view the possible fate of such an application. This way of addressing Australia's non-refoulement obligations in the future did not fall within the scope of *FRH18*, such that Rares J's reasoning in that case does not assist the present applicant.

83 In *DQM18*, one of the successful grounds of appeal upheld unanimously by the Full Court was that the appellant's submission that he was at risk of indefinite detention if his visa cancellation was not revoked had not been considered by the Assistant Minister for Immigration as required. That risk in part arose from the improbability of a protection visa being granted, but in

circumstances where this was not considered, such a failure not being a feature of the Tribunal's reasons in this case as already explained above. Unlike *DQM18*, it cannot be said that the present Tribunal ignored the realities of the applicant's situation by referring to the option of the applicant applying for a protection visa as he said he would, and also effectively acknowledging that this and other options would not remove the risk of deportation. The errors identified in *DQM18* are not present in this case, such that the reasoning based upon such errors does not assist the present applicant.

84 In *MNLR*, the Full Court was considering the application of Direction 79, which, in relation to non-refoulement obligations provided a different regime applicable to visa cancellation revocation decisions to the more recent Direction 90 applicable to this case. Of particular contrast is [9.1(6)], quoted by the Tribunal at [116] when considering non-refoulement obligations, which is not relied upon as a basis for any ground of review in this proceeding.

85 While there was a unanimous decision in *MNLR* to dismiss the appeal, Perram J agreed with SC Derrington J, and Wigney J wrote a separate judgment. The appeal grounds that were pressed concerned questions of indefinite detention and whether there was jurisdictional error arising out of a failure to consider the issue of Australia being in breach of its international obligations pertaining to non-refoulement. Neither of the appeal grounds succeeded, but in any event no such issues are raised in this appeal. Wigney J's comments at [55], upon which the applicant relies, were not conclusions on a similar appeal ground. That is so even though they were directed to there being no meaningful consideration of whether there was a realistic possibility of a protection visa being granted in the context of those issues. The contrast is stark given the particular and very different facts in that case, and the lengthy discussion that followed about jurisdictional error. That was a situation far removed from the present where the Tribunal did consider both a protection visa being granted and risk of deportation which could only arise if such an application was either not made or was refused.

86 Wigney J concluded at [53] in *MNLR* that it was clear that the Tribunal in that case did not give any meaningful consideration to whether there was a realistic possibility of a protection visa being granted after visa cancellation if it was applied for, which did not ultimately result in a finding of jurisdictional error in that case. Such a conclusion is not available in this case. The present Tribunal considered both the possibility of a protection visa being applied for and being granted, and the risk of deportation taking place which had to mean that none of the options for avoiding refoulement, including seeking and obtaining a protection visa, had transpired. It

cannot be said that in this case Australia's non-refoulement obligations were put to one side by an unrealistic view that the applicant might be granted a protection visa. The pleaded allegation that the Tribunal was illogical and irrational in reasoning that the applicant had the option available of being granted a protection visa takes that part of the reasons out of context and does not do justice to what the Tribunal was actually saying. *MNLR* does not assist the present applicant.

87 In *WKMZ*, Kenny and Mortimer JJ gave some consideration to the operation of ss 197C and 198 of the *Migration Act*. The passage relied upon by the applicant at [124] was directed to the paradox that those provisions permit detention while a likely fruitless protection visa application is considered. However, there is no ground of review directed to indeterminate detention. Moreover *WKMZ* at [124] was addressing a situation like that in *FRH18*, citing Rares J's reasoning, but still dismissing the appeal. It follows that this decision cannot assist the present applicant any more than *FRH18* can.

88 The substance of the complaint then comes to a submission that it was illogical and irrational for the Tribunal to reason that the applicant had the option available of being granted a protection visa when this was not a realistic possibility. Even assuming this is the correct way to read what the Tribunal was saying at [164], which is doubtful in light of the reference to the risk of deportation and the prior assessment of how detrimental that would be, the Tribunal was going no further than raising this as a possibility in the face of the applicant indicating that he had prepared a protection visa and would be lodging it within days of the merits review hearing, as noted by the Tribunal at [132]. By referring to a risk of deportation, the Tribunal was necessarily acknowledging that it was possible that the applicant would be refused a protection visa notwithstanding that he attracts non-refoulement obligations. With that context in mind, it is clear enough that the Tribunal was doing no more than explaining why the prospect of the applicant returning to Somalia weighed heavily in favour of the visa cancellation decision being revoked. The possibility of a protection visa being granted to prevent deportation did not detract from the strong conclusion in favour of the applicant based upon such deportation taking place. While I do not accept that the asserted illogicality or irrationality has been established, even if I was wrong about that, it was not material to the conclusion reached in the sense that it could realistically have made a difference, such that it could not amount to jurisdictional error.

89 It follows that strand 3 of ground 3 must also fail.

Ground 4 – denial of procedural fairness

90 Two of the factors that the applicant relied upon as enabling him to avoid reoffending were a commitment to obtaining full-time employment; and a commitment to taking responsibility for his children and supporting his younger siblings. In not accepting those factors at [76], the Tribunal's reasons were as follows (footnote omitted, sentence relied upon in bold):

> As to the prospects of employment, the Applicant has not identified any specific steps he has taken to secure employment on his release, beyond an offer of support services from the Salvation Army. He merely expressed the hope or expectation that he will be able to regain his previous job as a process worker at the chicken processing plant. He has undertaken some courses while in prison, including a number of subjects in the Certificate II – Engineering Pathways, a basic construction industry safety unit, a basic unit in Automatic Servicing and two basic first aid courses as well as courses in English. These courses do not amount to a coherent program of study which would equip the Applicant with skills to make him more employable and he demonstrated in the hearing that he requires the assistance of an interpreter to converse effectively. **Given his criminal record, it seems likely that the Applicant would find it difficult to secure full time employment upon his release.** Employment is a key component of the Applicant's stated plans upon release; without a job he would lack the financial security to support his family and progress towards custody of his daughters. If the Applicant is unable to secure employment it would also expose him to an enhanced risk of being drawn into further offending.

91 The applicant contends that the finding in bold would not obviously be known on the material that was before the Tribunal. Accordingly, he submits, it was a denial of procedural fairness not to put him on notice that such a finding might be made, and give him an opportunity to respond.

92 It is well-established that an administrative decision-maker has no procedural fairness obligation to reveal the thought processes and reasoning prior to making and communicating a decision. As the Full Court (Northrop, Miles and French JJ) pointed out in *Commissioner for Australian Capital Territory Revenue v **Alphaone** Pty Ltd* (1994) 49 FCR 576 at 590-591:

> It is a fundamental principle that where the rules of procedural fairness apply to a decision-making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material: *Dixon v Commonwealth* (1981) 55 FLR 34 at 41. However, as Lord Diplock said in *F Hoffman-La Roche and Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369:
>
> > "… the rules of natural justice do not require the decisionmaker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If that were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would be abolished."

> A person likely to be affected by an administrative decision to which requirements of procedural fairness apply can support his or her case by appropriate information but cannot complain if it is not accepted. On the other hand, if information on some factor personal to that person is obtained from some other source and is likely to have an effect upon the outcome, he or she should be given the opportunity of dealing with it: *Kioa v West* at 587 (Mason J), 628 (Brennan J). Within the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case: *Sinnathamby v Minister for Immigration and Ethnic Affairs* (1986) 66 ALR 502 at 506 (Fox J), 513 (Neaves J).

93 The Full Court in *Alphaone* towards the bottom of 591 acknowledged that the above may be qualified to the extent that the subject of a decision is entitled to have his or her mind directed to the critical issues or factors on which the decision is likely to turn, and is entitled to respond to any adverse conclusion drawn by the decision-maker on material known or supplied by the subject which is not an obvious and natural evaluation of that material.

94 *Alphaone* squarely applies to this ground of review, and the qualifications identified in that case do not apply here. The Tribunal was assessing the applicant's claim that he was committed to gaining full time employment as one of the factors weighing against him reoffending. It was obvious that a lengthy criminal history might be an impediment to that aspiration being successful, reducing the likelihood of this mitigating the risk of reoffending. The Tribunal said no more than this was likely to be a problem, not that it was impossible or insurmountable. The Tribunal noted the applicant's hope of regaining his previous job, but that was before the serious offending for which he was given his last sentence of imprisonment, and was in any event no more than a hope or expectation. Properly considered, this ground of review seeks to be given the opportunity to criticise the Tribunal's mental processes and reasoning in advance. Not being given that opportunity was not a denial of procedural fairness.

95 It follows that ground 4 must also fail.

Conclusion

96 As all of the grounds of review have failed, the application must be dismissed with costs.

I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate: 

Dated: 19 November 2021