FEDERAL COURT OF AUSTRALIA

CVRZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 205

Appeal from:	*CVRZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 126
File number(s):	WAD 56 of 2021
Judgment of:	**KENNY, DAVIES AND BANKS-SMITH JJ**
Date of judgment:	22 November 2021
Catchwords:	**MIGRATION** – appeal from single judge dismissing application for judicial review of a decision of the Administrative Appeals Tribunal – leave to raise new grounds – constructive failure to exercise jurisdiction on *Omar* ground – no evidence ground – unreasonableness ground – leave refused – appeal dismissed
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804; 231 FCR 452 *AWV18 v Minister for Home Affairs (No 2)* [2019] FCA 1315 *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; 248 FCR 456 *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94; 277 FCR 420 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 *Guclukol v Minister for Home Affairs* [2020] FCAFC 148; 279 FCR 611 *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628 *Minister for Home Affairs v Omar* [2019] FCAFC 188; 272 FCR 589 *Minister for Immigration and Border Protection v Aulakh* [2018] FCAFC 91; 265 FCR 143 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332

	Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 240 CLR 611 *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590 *PXYJ v Minister for Home Affairs* [2018] FCAFC 193 *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 196; 281 FCR 578 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 144; 278 FCR 386 *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588
Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs	71
Date of hearing:	3 August 2021
Counsel for the Appellant:	Dr J Donnelly with Mr K Tang (both pro bono)
Solicitor for the Appellant:	Scott Calnan, Lawyer
Counsel for the First Respondent:	Mr G J Johnson
Solicitor for the First Respondent:	Sparke Helmore
Counsel for Second Respondent:	The Second Respondent filed a submitting notice.

ORDERS

WAD 56 of 2021

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

ORDER MADE BY:	**KENNY, DAVIES AND BANKS-SMITH JJ**
DATE OF ORDER:	**22 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. Leave to raise grounds 1, 2 and 3 of the further amended notice of appeal be refused.
2. The appeal be dismissed.
3. The appellant pay the first respondent's costs of the appeal, as agreed or assessed.

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a judgment of a judge of the Court delivered on 24 February 2021, dismissing an application for judicial review of a decision made by the Administrative Appeals Tribunal on 17 August 2020. By this decision, the Tribunal affirmed the decision of a delegate of the respondent Minister not to revoke the cancellation of the appellant's protection visa.

2 For the following reasons, we would dismiss the appeal.

BACKGROUND

3 The appellant, CVRZ, is a citizen of Zimbabwe. He arrived in Australia in December 2007 on a visitor visa. He has lived in Australia continuously since then, except for about two weeks in July 2009 when he returned to Zimbabwe. He was granted a Class XA Subclass 866 Protection Visa ("protection visa") on 4 February 2009.

4 Between 2009 and 2018, while living in Australia, CVRZ was convicted of numerous criminal offences. It suffices to note here that, on 17 July 2018, the Magistrates Court of Queensland convicted him of assaults occasioning bodily harm, in respect of which he was sentenced, concurrently, to twelve months imprisonment. CVRZ's protection visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) ("the Act") on 27 September 2018. This was because a delegate of the respondent Minister was satisfied that CVRZ did not pass the character test and that he was then serving a sentence of full-time imprisonment at Maryborough Correctional Centre in Queensland for a relevant offence. By virtue of ss 501(6)(a) and 501(7)(c) of the Act, a person will not pass the character test if he has a substantial criminal record, and this will be so if the person has been sentenced to twelve months imprisonment or more. Section 501(3A) mandated the cancellation of CVRZ's visa in the circumstances that existed at the time. CVRZ sought revocation of the cancellation decision under s 501CA(4) of the Act and was subsequently notified, by letter dated 25 May 2020, that he had failed. On 28 May 2020, CVRZ applied to the Tribunal for review.

5 An International Treaties Obligation Assessment ("ITOA") was finalised on 31 July 2020, prior to the Tribunal hearing on 13 August 2020. This assessment was that Australia's non-refoulement obligations were not engaged in CVRZ's case. On 17 August 2020, the Tribunal affirmed the non-revocation decision and, as indicated, CVRZ sought judicial review of the Tribunal's decision in this Court.

THE TRIBUNAL'S DECISION

6 Before the Tribunal, CVRZ, who was legally represented, argued that, although he did not pass the character test as contemplated by s 501CA(4)(b)(i) of the Act, there was another reason why the original cancellation decision should be revoked, as contemplated by s 501CA(4)(b)(ii). CVRZ submitted that he belonged to the Ndebele group, an ethnic minority group in Zimbabwe; that he supported the Movement for Democratic Change ("MDC"), a political party in Zimbabwe whose supporters were subject to violent attacks; and that he would be persecuted for his political views, ethnicity and time spent in Australia if he were returned to Zimbabwe. CVRZ also submitted that he had two minor children in Australia, both of whom were citizens, and that he intended to re-establish a relationship with one of them. He submitted that this child would lose the emotional and financial support that he could provide if the cancellation decision were not revoked. CVRZ also submitted that these matters meant that his visa cancellation constituted "extremely severe punishment" disproportionate to his previous offending history, such that the Australian community would expect the cancellation decision to be revoked.

7 The Tribunal noted that the "Protection of the Australian community from criminal or other serious conduct" was described in the applicable Ministerial Direction made under s 499 of the Act as a primary consideration in deciding whether the mandatory cancellation of CVRZ's protection visa should be revoked: see *Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* ("Direction 79"), cl 13(2)(a). The Tribunal held that this consideration weighed "very heavily in favour of non-revocation": Tribunal reasons ("TR"), [206]. The Tribunal held that the primary consideration described in cl 13(2)(c) of Direction 79 as "Expectations of the Australian Community" was "of heavy weight in favour of … non-revocation": TR, [261]. It also held that the primary consideration described in cl 13(2)(b) as "The best interests of minor children in Australia" weighed in favour of non-cancellation but that "the weight attributable to this [consideration] was "of a very slight level" and did not outweigh the protection of the Australian community consideration: TR, [247].

8 The Tribunal also considered a number of other considerations. The Tribunal found that CVRZ's claims concerning the risk to him of harm if returned to Zimbabwe were contrary to information in the relevant DFAT Country Information Report for Zimbabwe ("DFAT Country Information Report"): TR, [271]-[272]. It stated (TR, [274]-[275]):

> … Having regard to the Country Information Report's specific reference to the "*voluntary assisted return and reintegration program*" for returnees, it is difficult to attribute any level of credibility to the Applicant's claim that he would be adversely dealt with at or shortly after his arrival in Zimbabwe. Similarly, it is difficult to accept the Applicant's analysis of the political situation in Zimbabwe and how, according to him, it adversely impacts members of the Ndebele ethnic minority, when the Country Information Report tells us that Ndebele people have participated at all levels of Zimbabwean society, commerce and government, and otherwise "*have played prominent roles in public life, including as Vice Presidents, Ministers, and key opposition figures*."
>
> Ultimately, doubt must be cast on the Applicant's claims of harm upon a return to Zimbabwe in view of the findings in the Country Information Report, which makes it clear that the Ndebele and Shona generally coexist harmoniously in daily life, and, with relative commonality, intermarry. As mentioned in the Country Information Report, DFAT has no knowledge of any recent cases "*in which Ndebele have been harassed or physically attacked on the basis of their ethnicity*." To my mind, these claims of harm by and on behalf of the Applicant amount to little more than bald and unsupported statements. Apart from the Applicant's own self-serving version, there is no detailed and independently verified explanation or particularisation of how this risk of harm would crystallise or manifest in reality.
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> (Italics in original)

9 The Tribunal rejected CVRZ's claims that, with respect to him, Australia had international non-refoulement obligations. The Tribunal noted that "[t]he author of the ITOA reaches similar conclusions to mine in terms of the absence of any *current evidence* that the Applicant's involuntary return to Zimbabwe as a known supporter of the MDC would place him at any level of measurable risk": TR, [288] (italics in original). The Tribunal stated (at [297]) that:

> … [f]or reasons I have sought to outline, I place significant weight on the findings expressed in the ITOA, bearing in mind its very close proximity in time to the instant hearing and in circumstances where the Applicant acknowledges that procedural fairness was afforded to him in terms of having the opportunity to make submissions in response both prior to and after its publication to the parties.

The Tribunal thus placed no weight on the consideration identified in cl 14(1)(a) of Direction 79, being "international non-refoulement obligations": TR [308].

10 The Tribunal accepted that CVRZ "has a slight level of ties and connection to Child TATD in Australia, and that a slight measure of weight in [his] favour is warranted for that reason": TR, [313]-[314]. It held, however, that this consideration was heavily outweighed by the protection of the Australian community and expectations of the Australian community, both of which were primary considerations for the purposes of Direction 79: TR, [314].

11 Regarding "Extent of impediments if removed" (as identified in cl 14(1)(e)), the Tribunal referred to CVRZ's statements in the two Personal Circumstances Forms and, after some

analysis, went on to conclude that this consideration "at best, weighs moderately in favour of revocation": TR, at [322]-[325].

12 The Tribunal put to one side the consideration mentioned in cl 14(1)(c) of Direction 79 ("Impact on Australian business interests") on the basis that there was "no evidence before the Tribunal that cancellation of the Applicant's visa would have an impact on Australian business interests": TR, [315]. As to the consideration in cl 14(1)(d), "Impact on victims", the Tribunal held that it was "safest to allocate a neutral measure of weight" to this consideration: TR, [318]. The Tribunal ultimately concluded that there was not another reason for it to revoke the cancellation decision under s 501CA(4)(b)(ii) of the Act: TR, [328]. Since it was accepted that CVRZ did not pass the character test, the Tribunal affirmed the decision under review: TR [330].

THE DECISION OF THE PRIMARY JUDGE

13 In his originating application for judicial review, CVRZ advanced two grounds, neither of which he advanced on appeal. Both concerned s 500(6L) of the Act. The first ground alleged that the Tribunal made a jurisdictional error by purporting to make a decision on his application outside the time limit set by s 500(6L). The second ground was that the Tribunal made a jurisdictional error by misunderstanding s 500(6L) of the Act and misapprehending the extent of its jurisdiction.

14 The primary judge found that the receipt signed by CVRZ and dated 25 May 2020 acknowledged that he had been notified of the decision on that date. Therefore, the time limit set by s 500(6L), and the 84 days to which s 500(6L) referred, expired on 17 August 2020, that is, the date of the Tribunal's decision: see *CVRZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 126, [5]. The primary judge rejected the first ground on which CVRZ relied on this basis. For related reasons, his Honour also rejected CVRZ's second ground.

THE APPEAL TO THIS COURT

15 On appeal, by way of a twice amended notice of appeal, CVRZ alleged that there was error in the primary judge's judgment because: (1) there had been a constructive failure by the Tribunal to exercise its jurisdiction; (2) the Tribunal made findings for which there was no evidence; and (3) the Tribunal's decision was legally unreasonable, illogical and irrational.

LEAVE TO RAISE NEW GROUNDS

16 Each of the appeal grounds upon which CVRZ sought to rely was, incontestably, new in the sense that none had been raised before the primary judge. The appellant clearly required the Court's leave to raise them on appeal.

17 The appellant, who was represented by Dr Donnelly and Mr Tang of counsel, sought the requisite leave, having regard to various considerations. First, it was said that the case for CVRZ, as prepared by his previous solicitor, had no prospect of success because the effect of s 500(6L) of the Act was that the decision CVRZ sought to have reviewed by the Tribunal was deemed to be affirmed if the Tribunal failed to make a decision within 84 days. Secondly, although CVRZ had been assisted by a solicitor prior to the hearing before the primary judge, he was unrepresented at the hearing because his solicitor filed a notice of discontinuance shortly before the hearing. Thirdly, it was said that there was no apparent prejudice to the Minister because the appellant agreed to pay the Minister's costs thrown away. Fourthly, citing *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628 ("*Hands*") at [3], it was said that, having regard to the consequences for the appellant if leave were not granted, the court should exercise its broad discretion in his favour; and that the integrity of the court's appellate jurisdiction would not be impaired. In this connection, the appellant sought to distinguish some of the authorities on which the respondent relied. Finally, it was submitted that there was no hard and fast rule about the grant of leave, with the assessment of what was expedient and in the interests of justice depending on the circumstances of the case, citing *Minister for Immigration and Border Protection v Aulakh* [2018] FCAFC 91; 265 FCR 143 ("*Aulakh*") at [104], [111]. It was said that the proposed grounds have merit and it was desirable to correct an error that might affect future decisions if the challenged Tribunal decision were permitted to stand.

18 Citing *Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7, *AAM15 v Minister for Immigration and Border Protection* [2015] FCA 804; 231 FCR 452 at [14], *Aulakh* at [107], *PXYJ v Minister for Home Affairs* [2018] FCAFC 193 at [16] and *AWV18 v Minister for Home Affairs (No 2)* [2019] FCA 1315 at [10], the respondent Minister opposed the grant of leave on a number of bases, including that the grant of leave would undermine the role of the court at first instance and the integrity of the appellate process. The Minister further submitted that the appellant had the benefit of legal representation when drawing the grounds of his originating application and, in any event, there was insufficient merit in the circumstances of the case to support the grant of leave.

19 It may be accepted that the Court may grant leave to raise a new ground on appeal where it considers this to be expedient and in the interests of justice. As the Full Court said in *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 158; 238 FCR 588 at [48], "[t]he Court may grant leave if some point that was not taken below, but which clearly has merit, is advanced, and there is no real prejudice to the respondent in permitting it to be agitated". The Full Court added that, "[w]here, however, there is no adequate explanation for the failure to take the point, and it seems of doubtful merit, leave should generally be refused". The need to show that the grant of leave is, in the circumstances of the case, expedient and in the interests of justice endeavours to strike an appropriate balance between securing the role of the court at first instance, protecting the integrity of the appellate process, and meeting the needs of justice as understood within the judicial process.

20 The appellant had legal representation until shortly before the hearing before the primary judge. In our view, there has been no adequate explanation for the failure to raise the three entirely new grounds at that earlier date. Most importantly, for the reasons explained below, it seems to us that the proposed grounds have insufficient merit to justify a grant of leave. In these circumstances, leave to raise them should be refused.

GROUNDS OF APPEAL

The parties' submissions

21 The appellant submitted that there had been a constructive failure by the Tribunal to exercise its jurisdiction because:

(a) contrary to *Minister for Home Affairs v Omar* [2019] FCAFC 188; 272 FCR 589 ("*Omar*") at [39]-[41], the Tribunal failed to consider a substantial or significant claim concerning the risk of harm to him if returned to his country of nationality independently of Australia's non-refoulement obligations, being a claim that was clearly raised by him before the Tribunal;

(b) the Tribunal made two findings of fact that were not open on the evidence before it, being errors that were, relevantly, material to its decision; and

(c) the Tribunal's decision was legally unreasonable, illogical and irrational as it was dependent on legally erroneous reasoning and involved a failure to engage with relevant evidence before the Tribunal.

The *Omar* ground

22 Although he did not challenge the Tribunal's findings, the appellant submitted that, contrary to *Omar*, the Tribunal did not consider his claims concerning the risk of harm he faced if returned to Zimbabwe independently of the claims about breach of Australia's non-refoulement obligations. Rather, so the appellant said, the Tribunal considered this risk only through the lens of non-refoulement. The appellant referred in this regard to the following elements of the Tribunal's reasons.

(1) Under the heading, "Other Considerations" and below [262] of the Tribunal's reasons, the only relevant heading is "International non-refoulement obligations". The only subheading between [262] and [269] is "Assessment of the Applicant's claims", under which *Omar* is discussed. The appellant submitted that there was no mention here of the appellant's claims about his risk of harm independently of the Tribunal's discussion of Australia's non-refoulement obligations. The absence of consideration of the human consequences for CVRZ of being returned to Zimbabwe other than with regard to international non-refoulement obligations was also apparent, so it was said, in the heading above [269], "The Applicant's written position regarding international non-refoulement obligations", there being no mention in this part of the Tribunal's reasons of the appellant's risk of harm other than in the context of these obligations.

(2) The introductory paragraph at [262] stated that the Tribunal gave consideration in the following paragraphs to the topics listed in cl 14(1)(a)-(e) of Direction 79, which, so the appellant said, indicated that the Tribunal planned to address only the express criteria in clause 14 of Direction 79.

(3) From [263] to [298], the Tribunal's reasons focussed on the appellant's claims concerning Australia's international non-refoulement obligations, mentioning the human consequences for him only in that context.

(4) At [308] of its reasons, the Tribunal made global findings that the appellant was not a person to whom Australia owed non-refoulement obligations and made no findings about the appellant's human consequences claims independently of such non-refoulement obligations.

23 The appellant submitted that there was a realistic possibility that the Tribunal's ultimate decision might have been different had the error not been made, because if the Tribunal had addressed his claims outside the international non-refoulement context, there was a realistic

possibility that the Tribunal might have made a decision favourable to the appellant. The appellant submitted that it would have been "open to the Tribunal to give significant weight to the appellant's persecution claims independent of … international non-refoulement obligations". In this context, the appellant referred to *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; 248 FCR 456 at [49], where Bromberg and Mortimer JJ stated that "[i]n the process for the exercise of the s 501CA(4) discretion, the Minister or his delegate is able to give greater weight to a small risk, if on the material the decision-maker reasonably determines that is justified". In written submissions, the appellant submitted that "it was open for the Tribunal to give this other consideration significant weight in [his] favour … (which could have subsequently tipped the balance – such that there was another reason as to why the mandatory cancellation decision should be set aside)".

24 In response, the Minister accepted that the effect of *Omar* was that the Tribunal was required, in the exercise of its jurisdiction to conduct a review of the delegate's decision under s 501CA(4), to give meaningful consideration to a clearly articulated and substantial or significant representation as to the risk of harm independently of a claim concerning Australia's non-refoulement obligations. The Minister submitted, however, that *Omar* was distinguishable from the present case, in that the Tribunal in this case (unlike in *Omar*) did not overlook the appellant's claims that he feared harm in connection with his ethnicity, his political views and affiliation with the MDC, and the fact that he had spent some years living in Australia. The Minister noted that it specifically referred (at TR [270]) to CVRZ's Statement of Facts, Issues and Contentions ("SFIC"), where CVRZ described his risks of harm if returned to Zimbabwe.

25 The Minister noted that the Tribunal expressly acknowledged the effect of *Omar* and contended that "it considered the appellant's representations about prospective harm in Zimbabwe ***both*** as to whether the representations were themselves a reason to revoke the visa cancellation, and as to whether they gave rise to non-refoulement obligations" (italics and bold in original). The Minister submitted that the Tribunal addressed the factual matters underlying the appellant's claims as to risk of harm and found that these claims were inconsistent with the relevant country information. The Minister contended that, while these factual matters were addressed at [271]-[275] under the heading, "International non-refoulement obligations", "reading the Tribunal's reasons fairly, and having regard to its reference to the Full Court's judgment in *Omar*", [275] should be read as the Tribunal's consideration of the factual underpinnings of CVRZ's claims concerning the risks he faced if returned to Zimbabwe, both in terms of the likely human

consequences for him and in terms of non-refoulement obligations under international law. Counsel for the Minister submitted that:

> There is a distinction between the factual claims or what one might call the human consequences claim, and non-refoulement obligations. The non-refoulement obligations if they exist are a recognition of international law obligations that overlay factual findings about what the risk is. And the Tribunal in this case was careful to distinguish in its own mind that it had to first look at the claims, consider whether they were a reason to revoke the cancellation. And then move on to consider the question of international obligations. So that – that is the task it performed and I emphasised the Tribunal's rejection of those claims as being little more than bald and unsupported statements.

Counsel for the Minister submitted that it was clear from [271]-[275] and [278] and [288] of the Tribunal's reasons that the Tribunal "(1) understood the distinction between considering factual matters of harm relevant to its exercise of discretion and the consideration of non-refoulement obligations as separate matters and, (2) it made findings about those factual matters as it was required to do".

The no evidence ground

26 Under this ground, the appellant challenged the Tribunal's finding that CVRZ "as a citizen of [Zimbabwe] … will have access to social, medical and/or economic support in the context of what is generally available to other citizens of Zimbabwe". Referring to *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; 197 CLR 611 at [147], the appellant submitted that there was no probative material before the Tribunal that indicated that citizens of Zimbabwe would have access to economic support, or that the appellant would have access to the same economic support as other citizens of Zimbabwe.

27 In this context, citing *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 144; 278 FCR 386 ("*Viane*") at [47], the appellant submitted that the power in s 501CA(4)(b)(ii) was subject to an implied condition that the Tribunal's state of satisfaction, or non-satisfaction, be formed on the basis of factual findings that were open on the evidentiary material before it. Citing *Viane* at [48], the appellant submitted that where a finding lacks such an evidentiary basis, there will be a jurisdictional error if the finding affects a critical step in the Tribunal's reasoning leading to its ultimate conclusion as to whether there is "another reason" to revoke the original decision. The appellant submitted that, without the alleged error, the Tribunal could have given greater weight to the "[e]xtent of impediments if removed" in cl 14(1)(e) of Direction 79, and that the attribution of greater weight to this consideration could realistically have tipped the balance in

favour of CVRZ when the Tribunal came to make its ultimate decision. Referring to *Hands* at [45]-[47], the appellant submitted that the weight to be accorded the hardship suffered by the appellant if returned to Zimbabwe was a critical step in the Tribunal's ultimate conclusion as to whether there was another reason to revoke the cancellation decision.

28 At the hearing, counsel for the appellant emphasised that the focus of the appellant's case was on the absence of probative material regarding the economic support for Zimbabwean citizens. Regarding the Minister's reliance on *Guclukol v Minister for Home Affairs* [2020] FCAFC 148; 279 FCR 611 ("*Guclukol*"), counsel submitted that *Guclukol* was to be distinguished from this case because the decision in *Guclukol* was made by the Minister personally and said nothing about cl 14.5 of Direction 79 (also relating to the "[e]xtent of impediments if removed"). Further, the appellant noted that *Guclukol* was concerned with health services, and the appellant was not here concerned with health services. In *Guclukol*, moreover, the Tribunal referred to "*any* available health or other support services as that [sic] generally available to *other Turkish citizens*" (italics added). The Tribunal in this case did not use the italicised language. Counsel for the appellant submitted that these differences were material, referring to *Guclukol* at [12]-[13]; and that the relevance of the challenged finding was difficult to see if the finding was not to be understood as a finding that the appellant would have economic support.

29 The appellant's counsel also submitted that the decision of the Full Court of this Court in *Viane* gave analogical support to CVRZ's case in this context. In *Viane* the Court held that the Minister fell into jurisdictional error in making material findings of fact, for which there was no objective evidence, that Mr Viane and his family would have access to health and welfare services in American Samoa or Samoa, as there was no objective evidence about the availability and quality of such services: *Viane* at [31], [61].

30 The appellant's counsel conceded that part of this ground would fall away if the statement at [324] of the Tribunal's reasons was interpreted as saying that, whatever services existed, whether social, medical or economic, then the appellant would have access to these services to the extent that such services were generally available to other citizens of Zimbabwe. Counsel maintained, however, that this interpretation did not affect his further submission that there was no evidence that the appellant would have access to economic support "at the same level as other citizens of Zimbabwe". In this regard, the appellant's counsel submitted that there was evidence that the appellant might be treated differently because of his ethnic background and his mental health issues.

31 In response, the Minister submitted that the Tribunal did not make a finding of fact that Zimbabwe had any particular economic support available to its citizens. Rather, according to the Minister, it found only that the appellant would have access to such services as were "generally available" to other Zimbabwean citizens. The Minister contended that this approach was approved in *Guclukol* at [24]. Counsel for the Minister submitted that the present case was therefore different from *Viane*, where the findings were "far more direct".

The unreasonableness ground

32 The appellant submitted that the Tribunal's decision was unreasonable in the legal sense. Referring to *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94; 277 FCR 420 ("*BHL19*") at [143], the appellant submitted that there would be jurisdictional error if the Tribunal exercised its discretion in relation to non-revocation based on factual findings that were illogical, irrational or not supported by probative material. The appellant added that "[i]llogical or irrational findings made by a decision-maker 'on the way' to a final conclusion may establish jurisdictional error", citing *BHL19* at [143], *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at [132] and other cases. Citing *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590 at [181], the appellant submitted that a decision that is legally unreasonable will, by definition, involve an error that is not trivial or harmless.

33 In written submissions, the appellant identified three "strands" to his argument in support of the unreasonableness ground. First, referencing TR [322], it was said that:

> The Tribunal concluded that there is nothing to suggest that the appellant would not be able to obtain access to healthcare services in Zimbabwe to the same level as is generally available to other citizens of that country. That includes treatment for mental health symptoms. With respect, that reasoning is legally erroneous.
>
> (Underlining in original)

34 The appellant contended that the Tribunal failed to "intellectually engage" with all the material relevant to its finding about the appellant's access to health care, referring to *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352. The appellant referred to the ITOA Report, which, it was said, provided "clear evidence" that the Ndebele community were subject to official and societal discrimination, as a consequence of which a Ndebele may not be able to access health care services in Zimbabwe to the same extent as other citizens. The appellant also referred to the DFAT Country Information Report, which

it was said indicated that there was "considerable social stigma against mental health issues", creating a potential further impediment to the appellant's health care.

35 Secondly, referencing TR [322] and [324], it was said in written submissions that:

> The Tribunal concluded that the appellant would have access to healthcare services for his mental health issues in Zimbabwe. However, the DFAT Report on Zimbabwe provided clear evidence that Zimbabweans seeking health care are generally required to bring their own drugs, syringes and to pay for their treatment in US Dollars. In that context, without financial capital, the appellant could be hamstrung in seeking access to healthcare services in Zimbabwe.
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> (Underlining in original, citations removed)

The appellant submitted that the DFAT Country Information Report "also demonstrated that those with mental health issues are often not properly diagnosed and do not receive adequate treatment".

36 Thirdly, referencing TR [325], it was said in written submissions that:

> The Tribunal concluded that there was little or nothing precluding the appellant from doing the same type of work in Zimbabwe as he had done in Australia. However, the evidence before the Tribunal showed:
>
> - the appellant has severe depression
> - the appellant has extremely severe anxiety and stress
> - as a Ndebele member, the appellant would be the subject of official and societal discrimination in Zimbabwe
> - there is considerable social stigma against people with mental health issues, which many religious Zimbabweans regard as 'spiritual' problems
> - the DFAT Report assessed that there were poor economic and employment opportunities in Zimbabwe and that there were high levels of unemployment in that country
> - the DFAT Report opined that persons with disabilities continue to face considerable official and societal restrictions that limit their ability to participate fully in society
> - the appellant remained at high risk of returning to alcohol abuse in the community
>
> (Underlining in original, citations removed)

37 The appellant submitted that "[l]ogically, having regard to the preceding matters, various factors may have precluded the appellant from gaining lawful employment in Zimbabwe (which was the same or analogous to what the appellant had done in Australia previously).

Once again the appellant submitted that the Tribunal did not engage with all the material before it.

38 The Minister contended that, given the well-accepted limitations on legal unreasonableness as outlined by French CJ in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 ("*Li*") at [30] and reiterated by the Full Court of this Court in *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 196; 281 FCR 578 ("*Stewart*") at [66], the appellant's unreasonableness ground was not made out. The Minister submitted that, with respect to the Tribunal's finding as to the appellant's ability to access healthcare services, it was open to the Tribunal to make the finding it did.

39 In written submissions and at the hearing, the Minister contended that it was a matter for the Tribunal to consider and weigh the country information before it, noting that the discrimination faced by Ndebele as described in the DFAT Country Information Report was specific, and not related to health issues; and nor was it related to the availability of healthcare services to Ndebele or others in Zimbabwe. The Minister also submitted that the reference in that report to social stigma did not indicate that the appellant would have less ability to access healthcare in Zimbabwe than others. The Minister maintained that the Tribunal's findings about health care only concerned the appellant's ability to access services "like other citizens in Zimbabwe". The Minister submitted that the appellant's challenge to the Tribunal's finding about the appellant's work in Zimbabwe was no more than a disagreement about the merits of the Tribunal's decision.

CONSIDERATION OF THE APPELLANT'S GROUNDS

The *Omar* ground

40 It may be accepted that, in conducting a review of a non-revocation decision under s 501CA(4) of the Act, the Tribunal must give meaningful consideration to a clearly articulated and substantial or significant representation concerning the risk of harm to the former visa holder if returned to his country of nationality independently of a claim concerning Australia's international non-refoulement obligations, and that a failure to do so may give rise to jurisdictional error: see *Omar* at [39]-[41].

41 Reading the Tribunal's reasons as a whole, we would not conclude that the Tribunal failed to consider the appellant's claims concerning the risk of harm that he faced if returned to Zimbabwe independently of his claim concerning Australia's non-refoulement obligations.

We do not consider that the fact that the Tribunal's reasons include some possibly inapt headings is sufficient to qualify the significance of the substance of the Tribunal's reasons.

42 First, the Tribunal's reasons for its decision at [267]-[268] show that the Tribunal understood the effect of the Full Court's decision in *Omar*, including its implications for the Tribunal in making its own decision on review of a decision under s 501CA(4)(b)(ii) of the Act. In these paragraphs, the Tribunal said, with regard to *Omar*:

> The Full Court found that the Assistant Minister's decision was affected by jurisdictional error. This error derived from the incumbent obligation on the Minister or his delegate to give meaningful consideration to a representation of harm *independently* of a claim concerning Australia's non-refoulement obligations. That obligation, said the Full Court, requires "*an active intellectual engagement with the matters raised … relating to the risk of harm*". The Full Court further held that failure to consider a substantial or significant and clearly articulated claim may constitute a failure to carry out the statutory task and give rise to jurisdictional error. The Full Court found the Assistant Minister had not satisfied the requirement of the obligation.
>
> To my mind, the Full Court's decision in *Omar* means: (1) it is not sufficient for a decision-maker to merely have regard to only some of the significant matters raised in the representations; and (2) deficiencies in the decision-making process are not overcome by the adoption of a broad statement such as "*I have considered all relevant matters …*" and "*Having given full consideration to all of these matters …*". The Full Court's decision in *Omar* compels a decision-maker to meaningfully engage with the significant representations which have been clearly expressed by the Applicant relating to the risk of harm. I acknowledge that this obligation is not discharged by the generalised statements as quoted in this paragraph of my Reasons.
>
> (Footnotes omitted, italics in original)

43 Secondly, the Tribunal's reasons at [269]-[270] and [273] demonstrate that the Tribunal acknowledged and understood the appellant's claims about the risk of harm he faced in Zimbabwe because of his Ndebele ethnicity, affiliation with the MDC, and the time he had spent in Australia. At [269], the Tribunal specifically referred to CVRZ's SFIC, noting that it "contain[ed] … commentary in relation to [CVRZ's] fear of harm in the event of his removal to Zimbabwe". In this context, the Tribunal set out that part of the SFIC that relevantly concerned "the human consequence" for the appellant of his return to Zimbabwe. The passage of the SFIC, which the Tribunal quoted, commenced as follows:

> "16. The human consequence which the Tribunal must recognise in this matter is a combination of the following:
>
> a. The applicant contends that he cannot be removed to Zimbabwe. The applicant belongs to the Ndebele ethnic group, which is a minority in Zimbabwe, making up about 14% of the population, compared with the Shona majority of about 83%. The applicant fears that if he is returned to Zimbabwe, he will be persecuted because of his political views, ethnicity and the time spent in Australia. The applicant is a supporter of the opposition MDC political party. Sympathisers of

> MDC are commonly victims of physical attacks by or on behalf of the governing ZANU-PF political group.
>
> …

The Tribunal also referred to a further and lengthier statement regarding these matters in CVRZ's Summary of Evidence.

44 Thirdly, the Tribunal's reasons demonstrate that it assessed CVRZ's claims about human consequences by reference to the evidentiary material before it. As it happened in CVRZ's case, this material was not only relevant to those consequences, independently of any international non-refoulement obligations that Australia might owe, but was also relevant to the existence of those international obligations. The result was that the Tribunal's assessment of the cogency and effect of this particular evidentiary material was relevant not only to the Tribunal's consideration of whether CVRZ would face the personal risks of harm as he claimed but also whether, as regards CVRZ, Australia owed any international non-refoulement obligations. As *Omar* indicates, the determination of both these issues might bear on whether CVRZ's claims gave rise to "another reason" within s 501CA(4)(b)(ii) of the Act as to why the visa cancellation decision should be revoked.

45 CVRZ failed to satisfy the Tribunal that the relevant evidentiary material supported the case he sought to make about the human consequences for him of return to Zimbabwe such as to provide "another reason", within the meaning of s 501CA(4)(b)(ii). That is, at [270] of its reasons, the Tribunal disclosed its clear understanding of CVRZ's claims but stated that there were "difficulties" with them in that they were contrary the DFAT Country Information Report. The Tribunal, at [270], said CVRZ's SFIC:

> … refers to a claimed fear of harm in Zimbabwe based on (1) [CVRZ's] affiliation with the Ndebele ethnic group, which apparently is a minority in Zimbabwe comprising 14% of the population, and (2) [CVRZ's] apparent political affiliation with "*the MDC political party*". As a consequence, it is contended that supporters of the MDC "*are commonly victims of physical attacks*" from other groups including the "*governing ZANU-PF political group*". There are two difficulties with both of these contentions.
>
> (Italics in original)

46 The Tribunal's reasons went on to disclose (at [271]-[272]) that this Report included information that: (1) DFAT was "unaware of any cases to date in which returnees … have faced persecution or mistreatment on return"; and (2) "Ndebele participate in all areas of Zimbabwean society, including government, business, civil society, and politics, although not proportionally"; (3) "Ndebele and Shona generally co-exist harmoniously in daily life, and

intermarriages are relatively common"; and (4) DFAT was "not aware of any recent cases in which Ndebele have been harassed or physically attacked on the basis of their ethnicity". This material led the Tribunal to decline to accept that CVRZ would face the risks on return to Zimbabwe that he had intimated (TR, [274], [275], [278]) with the result that CVRZ failed to establish "another reason", independently of any non-refoulement obligation, why the visa cancellation decision should be revoked.

47 As already remarked, there was plainly a significant overlap in the evidentiary material relevant to CVRZ's claims respecting the human consequences of his return to Zimbabwe and claims regarding any non-refoulement obligations with respect to him, in large part because CVRZ relied on substantially the same matters to establish both "reasons" to support the revocation of the cancellation of his visa. This does not mean, however, that the Tribunal failed to give meaningful consideration to CVRZ's representations concerning his risk of harm if returned to Zimbabwe, independently of his claim concerning Australia's international non-refoulement obligations. Having regard to CVRZ's claims, it was unsurprising that the Tribunal considered the same evidentiary material with respect to both the human consequences to him if returned to Zimbabwe and the existence of non-refoulement obligations respecting him at international law. There was, however, at least one significant difference in the material, to which the Tribunal had regard in considering the two different matters. With respect only to non-refoulement obligations, the Tribunal also took into account the ITOA (TR, [280] and following) before concluding (at [288]) that the author of the ITOA had reached the same conclusion as the Tribunal "in terms of the absence of any *current evidence* that [CVRZ's] involuntary return to Zimbabwe as a known supporter of the MDC would place him at any level of measurable risk". This evidently fortified the Tribunal in finding that it should accept the conclusions reached by the author of the ITOA as to the situation in Zimbabwe, including that the Zimbabwean authorities "would have little or no interest" in CVRZ if he were to return to Zimbabwe: see TR, [290], [295], [297].

48 It seems to us that the appellant invited the Court to read the Tribunal's reasons with an eye attuned to error, and that this would be to make a fundamental error. This is not a case like *Omar* where the Tribunal failed actively to engage with an evidently significant and substantial representation, and to make findings relevant to such a representation. On a fair reading of the whole of the Tribunal's reasons, it does not appear to us that the Tribunal failed to give anything other than careful consideration to any significant or substantial representation made by CVRZ concerning the risk of harm to him if returned to Zimbabwe. Having regard to the way in which

this and the non-refoulement claims were made by CVRZ and considered by the Tribunal, the Tribunal did not offend any aspect of *Omar*, the effect of which the Tribunal clearly recognised. That is, the Tribunal properly considered the evidentiary material relevant to the different claims, concluding first that the factual basis of the human consequences claim was not made out, and secondly, by reference to additional material, that Australia did not owe any non-refoulement obligation with respect to CVRZ.

49 For the foregoing reasons, the appellant's first proposed ground has no merit.

The no evidence ground

50 As will have been seen, this ground turned on the appellant's submission that there was no probative evidence to support the Tribunal's statement at [324] of its reasons that "[a]s a citizen of [Zimbabwe], [CVRZ] will have access to social, medical and/or economic support in the context of what is generally available to other citizens of Zimbabwe" in so far as that statement related to "economic support". Paragraph [324] was in the following terms:

> The Applicant arrived in Australia from Zimbabwe in his mid-20s. There are no significant or substantial language or other cultural barriers to the Applicant's return and reestablishment in Zimbabwe. As a citizen of that country, he will have access to social, medical and/or economic support in the context of what is generally available to other citizens of Zimbabwe.

A footnote at the end of the second sentence referred to cl 14.5(1)(b) of Direction 79 and another footnote at the end of the last sentence referred to cl 14.5(1)(c).

51 Reference to the place of [324] in the Tribunal's reasons and to cl 14.5(1) of Direction 79 supports the view that, notwithstanding the differences noted by the appellant, the last sentence in the above passage was substantially the same in force and effect as the like statement considered in *Guclukol.* That is, in the last sentence of [324] the Tribunal was not saying that there would be any particular level of economic support available to CVRZ on his return to Zimbabwe. Rather, the Tribunal was doing no more than affirming that the appellant would have access to such economic support as was "generally available to other citizens of Zimbabwe" at the relevant time.

52 The Full Court in *Guclukol* saw no difficulty in the Tribunal's approach with respect to the similar finding in that case. While we accept that each case depends on its particular circumstances, we too can discern no difficulty with the challenged finding in this case; and, indeed, the appellant accepted that part of his argument in support of this ground fell away if we reached this view of the effect of that finding. The present case is relevantly different from

Viane in which the Tribunal made the much more specific finding that that Mr Viane and his family would have access to health and welfare services in American Samoa or Samoa although there was no objective evidence about their availability: see *Viane* at [31], [61].

53 As we have seen, the appellant's further submission was that, even if we interpreted the last sentence of [324] in this way, there remained the difficulty that there was no evidence that the appellant would have access to economic support "at the same level as other citizens of Zimbabwe". As already noted, counsel for the appellant sought to sow the seeds of doubt about this latter proposition by referring to evidence that the appellant might be treated differently because of his ethnic background and his mental health issues. It is relevant to note at this point, however, that the Tribunal rejected the appellant's analysis of the political situation in Zimbabwe, particularly the appellant's narrative of its adverse effect on the Ndebele. It should also be borne in mind that, although the DFAT Country Information Report (at pp 12-14) referred to the lack of adequately resourced mental health services and the fact that "many persons with mental health issues suffer from extremely poor living conditions", there was no suggestion that whatever economic support was generally available to other Zimbabwean citizens was not also available to such people. In any event, what this discussion demonstrates is that the appellant's submission at this point invites the Court to second guess the merits of the Tribunal's decision: this would be to pursue a forbidden path, which we cannot do.

54 For the reasons stated above, it seems to us that proposed ground 2 has no merit.

The unreasonableness ground

55 It is unnecessary to say anything here about the applicable law, about which there was little or no dispute: some of the relevant authorities are referred to in *Stewart* at [64]-[65]. To explain our conclusion, it is sufficient to examine each of the three principal contentions advanced by the appellant in support of this ground. These contentions focussed on [322]-[325] of the Tribunal's reasons, which generally concerned the consideration identified in cl 14(1)(e) of Direction 79 as "[e]xtent of impediments if removed".

56 The first contention focussed on [322], which was as follows:

> [CVRZ] is a relatively young man of 36 years of age. In response to a question about "***Do you have any diagnosed medical or psychological conditions?***" the Applicant ticked the "*No*" box in both of his Personal Circumstances Forms. I accept the standard of community medical services between Zimbabwe and Australia may differ. However, there is nothing to suggest that he would not be able to obtain access to healthcare services in Zimbabwe to the same level as is generally available to other citizens of that country. This would include treatment for the mental health symptoms

referred to by the psychologist.

(Citations omitted)

57 As we have seen, the appellant argued that the statement that there was "nothing to suggest" that CVRZ "would not be able to obtain access to healthcare services in Zimbabwe to the same level as is generally available to other citizens of that country" was indicative of the Tribunal's failure to engage with all the material relevant to the appellant's access to health care. In this context, the appellant made reference to the ITOA Report and the DFAT Country Information Report.

58 The appellant specifically relied on the ITOA Report at p 17. At pp 16-17 the Report recorded that:

- "DFAT assesses that Ndebele face a moderate level of official discrimination, in that systemic marginalisation makes them far less likely than Shona to be able to achieve senior positions in state institutions, despite the lack of any official policy of discrimination";
- notwithstanding tensions, Ndebele participate in all areas of society, "including government, business, civil society, and politics"; and many have played prominent roles in public life;
- "Ndebele and Shona generally co-exist harmoniously in daily life and intermarriages are relatively common";
- the Ndebele people have historically been prominent in the MDC, which was Zimbabwe's "primary opposition party";
- the MDC had been "highly competitive in Zimbabwean elections since its establishment" in 1999;
- politically motivated violence had affected MDC members and supporters at all levels, including the senior leadership;
- in the lead-up to the 30 July 2018 elections human rights observers reported that neither the ruling nor the opposition parties publicly disparaged any race or ethnicity.

59 None of this information specifically concerned health care services in Zimbabwe and whether Zimbabwean citizens, including people in CVRZ's position, generally had the same level of access to these healthcare services.

60 The DFAT Country Information Report contained information specifically about health services, however, including (at pp 13-15) to the effect that:

- the Constitution of Zimbabwe committed that State to take all practical measures to ensure the provision of basic, accessible, and adequate health services throughout Zimbabwe (p 13);
- Zimbabwe's Ministry of Health and Child Care has responsibility for delivering health services to citizens, although there were other non-governmental health providers (p 13);
- economic and political crises and major disease outbreaks had adversely affected the health system and health outcomes in Zimbabwe and, in consequence, Zimbabweans seeking healthcare are generally required to bring their own drugs, syringes, bandages, and water, and to pay for their treatment in US dollars (p 14);
- shortages of drugs and trained mental health professionals meant that patients with mental health issues are often not properly diagnosed and treated (p 14); and
- there is considerable social stigma against mental health issues, which many Zimbabweans regard as 'spiritual' problems.

61 It does not appear to us that the material to which we were referred by the appellant provided "clear evidence" of a degree of official and societal discrimination against people of Ndebele ethnicity such that it was not reasonably open to the Tribunal to make the challenged finding about the appellant's "access to healthcare services in Zimbabwe to the same level as is generally available to other citizens of that country".

62 The appellant's second contention focussed on [322] (set out above) and [324] of the Tribunal's reasons. At [324], the Tribunal said:

> [CVRZ] arrived in Australia from Zimbabwe in his mid-20s. There are no significant or substantial language or other cultural barriers to [his] return and re-establishment in Zimbabwe. As a citizen of that country, he will have access to social, medical and/or economic support in the context of what is generally available to other citizens of Zimbabwe.

As already stated, in this part of his argument the appellant focussed on what the Tribunal said about health care in the last sentence of this paragraph. We do not accept that, as the appellant argued, this sentence contained an affirmative finding that the appellant would have access to

health care services for his mental health issues in Zimbabwe. Rather, the Tribunal did no more than affirm that the appellant would have access to such medical support as was "generally available to other citizens of Zimbabwe" at the relevant time. Paragraph [322] conforms to this understanding. None of the material to which we were referred indicated that it was not reasonably open to the Tribunal to make this finding.

63 As already noted, the appellant's third contention was focussed on [325] of the Tribunal's reasons, which read as follows:

> As stated, the Applicant has a record of engaging in remunerative employment in this country. There is little or nothing precluding him from doing the same type of work in Zimbabwe, as that which he has done in Australia and Zimbabwe in the past, were he compelled to return there. Having regard to the totality of the evidence relevant to this Other Consideration (e), I am thus of the view it, at best, weighs moderately in favour of revocation.

64 Also as we have seen, the appellant referenced material about his mental health and risk of alcohol abuse, discrimination in Zimbabwe, societal attitudes to mental health issues in Zimbabwe, and information in the DFAT Country Information Report about employment and treatment of people with disabilities in support of his argument that this was a third strand supporting his unreasonableness ground.

65 In this context, we note that we have already referred to information in the ITOA Report and DFAT Country Information Report concerning official and societal discrimination in Zimbabwe, and health care (including mental health care). As the appellant noted in his submissions, the DFAT Country Information Report also referred to other information to the effect that:

- different sources place the unemployment rate as low as 4 per cent and as high as 95 per cent, and that it is clear that the majority of the labour force that participates economically did so in the informal economy;
- conditions for workers in the formal sector are generally poor;
- Zimbabwe has a volatile security situation fuelled, amongst other things, by high levels of unemployment.

As the appellant also noted, the same Report also described the generally very poor conditions for people with disabilities. Further, as the appellant noted, the Tribunal also had expert evidence concerning (amongst other things) the appellant's mental health and alcohol abuse.

66 It was in this context that the appellant challenged the Tribunal's finding that there was "little or nothing precluding the appellant from doing the same type of work in Zimbabwe as he had done in Australia". There was evidence before the Tribunal that the appellant had worked in Australia as a rafting guide, as a form worker for a construction company, a labourer, a cleaner, a strawberry picker and doing gardening and maintenance work. The appellant gave evidence before the Tribunal that, if his application for review were successful, he intended to find work in Australia as a labourer or start a kayaking business.

67 Having regard to the material to which we have been referred, we can accept that it may have been open to the Tribunal to have taken a different view of the appellant's employment prospects in Zimbabwe. We do not accept, however, that it was not reasonably open to the Tribunal to have made the finding in question.

68 It must be borne in mind that as French CJ stated in *Li* at [30]:

> The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision-maker.

This principle was mentioned again in *Stewart* at [66]-[67].

69 In effect, the appellant's complaint under this ground is about the evaluative judgment made by the Tribunal, which depended on the weight it gave various items of evidence. In this case, it cannot be said that the Tribunal's evaluation was not reasonably open to it, given that the weight to be given to the evidentiary material is generally a matter for the Tribunal. It was for the Tribunal, within the bounds of legal reasonableness, to weigh the evidence that it considered relevant to the appellant's employment prospects in Zimbabwe. We are not persuaded that it exceeded those bounds in this case.

70 For these reasons, there is no merit in proposed ground 3.

DISPOSITION

71 For the foregoing reasons, we would order that CVRZ's application for leave to raise grounds 1, 2 and 3 of the further amended notice of appeal be refused, and that the appeal be dismissed, with costs.

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Kenny, Davies and Banks-Smith.

Associate: 

Dated: 22 November 2021