FEDERAL COURT OF AUSTRALIA

Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1503

Appeal from:	Application for judicial review from: *Mukiza and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1488 (25 May 2021)
File number(s):	NSD 577 of 2021
Judgment of:	**ROFE J**
Date of judgment:	30 November 2021
Catchwords:	**MIGRATION** – appeal from a decision of the Administrative Appeals Tribunal (**Tribunal**) affirming a decision not to revoke the mandatory cancellation of the applicant's visa – whether Tribunal's decision was unreasonable, illogical, or irrational – whether Tribunal's decision was vitiated by jurisdictional error by making findings for which there was no evidence – whether evidence was required for findings about healthcare and standard of living in Canada – whether finding was a critical step in the Tribunal's reasons – application allowed
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420 *EZA20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1775 *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 *Minister for Immigration and Border Protection v Schmidt* [2018] FCA 1162 *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 *Plaintiff S157/2002 v Commonwealth of Australia* (2003)

	211 CLR 476 *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 *Soliman v University of Technology, Sydney* [2012] FCAFC 146 *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	100
Date of hearing:	17 September 2021
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Scott Calnan Lawyer
Counsel for the First Respondent:	Ms N Laing
Solicitor for the First Respondent:	Clayton Utz

ORDERS

NSD 577 of 2021

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

ORDER MADE BY: **ROFE J**

DATE OF ORDER: **[30 NOVEMBER 2021]**

THE COURT ORDERS THAT:

1. A writ of certiorari be issued quashing the decision of the Second Respondent dated 25 May 2021.
2. A writ of mandamus be issued requiring the Second Respondent to determine the Applicant's application for review according to law.
3. The First Respondent pay the Applicant's costs.

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

REASONS FOR JUDGMENT

ROFE J:

INTRODUCTION

1 The applicant seeks judicial review of a decision of the Administrative Appeals Tribunal (the **Tribunal**) affirming the earlier decision of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the **Minister**) not to revoke the cancellation of the applicant's visa under the *Migration Act 1958* (Cth) (the **Migration Act**).

2 The applicant is a Rwandan-born 28-year-old citizen of Canada, who has an extensive criminal record in Australia including multiple convictions for serious traffic offences, driving under the influence of drugs, motor vehicle theft and police pursuits. The applicant also has a history of significant mental illness, having suffered from schizophrenia for approximately 10 years. As will be elaborated below, his mental illness has apparent links with his criminal offending.

3 On 18 March 2020, while the applicant was serving a term of imprisonment, a delegate of the Minister cancelled the applicant's Class BS Subclass 801 Spouse Visa under s 501(3A) of the Migration Act (the **cancellation decision**). That provision, set out below, provides for the mandatory cancellation of visas in certain circumstances.

4 The applicant applied for a revocation of the cancellation decision. On 2 March 2021, a different delegate declined to exercise the discretion to revoke the cancellation decision under s 501CA(4) of the Migration Act (the **non-revocation decision**).

5 On 9 March 2021, the applicant applied to the Tribunal for review of the of the non-revocation decision. On 25 May 2021, the Tribunal affirmed the non-revocation decision and published reasons (the **Reasons**). On 16 June 2021, the applicant applied to this Court for judicial review of this decision.

6 The applicant relies on two grounds of review, being in summary:

(a) It was not legally reasonable, rational, or logical for the Tribunal to conclude that any of the hardships the applicant may face in Canada (including relating to his mental illness) would be overcome in time if the applicant were deported.

(b) The Tribunal made findings for which there was no evidence, specifically that:

(i) Canada had a similar standard of rehabilitation services to Australia; and

(ii) Canada is a wealthy democracy that enjoys a high standard of living, similar to Australia in many ways.

7 The applicant previously had a mandatory cancellation of their visa revoked by an earlier decision of a differently constituted Tribunal (the **Previous Tribunal** and the **Previous Tribunal Decision**). The Minster relies on certain representations made to the Previous Tribunal in support of their contention that there was no error in the Tribunal's reasoning on the present application.

8 In my view, for the reasons that follow, the Applicant has made out one aspect of his second ground for review. As such, I will make orders for the decision to be quashed and remade according to law.

KEY PROVISIONS

9 Section 501(3A) of the Migration Act states:

> (3A) The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

10 A person does not pass the "character test" referred to in s 501(3A)(a) if they have a "substantial criminal record" (s 501(6)(a)). Relevantly for present purposes, a person has a "substantial criminal record" if they have been sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)).

11 Section 501CA provides:

> (1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.
>
> …
>
> (3) As soon as practicable after making the original decision, the Minister must:
>
> (a) give the person, in the way that the Minister considers appropriate in

the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

(5) If the Minister revokes the original decision, the original decision is taken not to have been made.

…

BACKGROUND

12 The following summary of the background facts is largely based on the Reasons.

13 The applicant arrived in Australia with his mother in November 2009, when he was 17 years old. He was granted a visa upon arrival and has remained in Australia ever since.

14 The applicant escaped Rwanda with his father and mother in 1994, and lived in Zambia until approximately 2002 when he and his mother moved to Canada. His father passed away just prior to moving to Canada. After residing in Canada for a number of years, the applicant's mother decided that they would leave Canada and move to Australia in 2009.

15 The applicant's criminal history in Australia commenced relatively soon after his arrival, with convictions recorded in his criminal history from 2012 for offences relating to drugs and property. Later, his offending evolved into more serious offending including very serious traffic related offences including those involving police pursuits.

16 A full account of the applicant's extensive offending is set out at [32] of the Reasons.

17 As mentioned above, the applicant had an earlier mandatory cancellation of his visa revoked by the Previous Tribunal Decision dated 1 November 2019.

18 In January 2020, shortly after having had his visa restored following the Previous Tribunal Decision, the applicant was again involved in further criminal offending, this time involving serious traffic related offences. On 9 March 2020, the Queanbeyan Local Court convicted the applicant of six offences and sentenced him to a term of 12 months' imprisonment.

19 The Minister made the cancellation decision on 18 March 2020. Following the cancellation decision, the applicant made representations to the Minister and, on 2 March 2021, the applicant was notified of the non-revocation decision. The applicant sought review of that decision by the Tribunal.

20 On 10 May 2021, the Tribunal heard the application. The applicant was self-represented and the Minister was represented by a solicitor. All parties appeared via video link. The Tribunal heard oral submissions from the applicant and the Minister. The Tribunal also heard evidence from the applicant's mother and step-father.

21 As mentioned above, the Tribunal affirmed the non-revocation decision and on 16 June 2021 the applicant applied to this Court for review of the Tribunal's decision.

22 The hearing of the application before the Court took place on 17 September 2021 via Microsoft Teams due to the movement restrictions in place in Victoria and NSW due to the COVID-19 pandemic. The parties were both represented and filed written submissions ahead of the hearing. The applicant relied on the material before the Previous Tribunal, including a 2019 psychological assessment prepared by Mr Matt Visser. The applicant did not rely on any further material other than an affidavit affirmed on 13 June 2021 by his solicitor Mr Ziaullah Zarifi, which annexed a copy of the Reasons.

PROCEEDINGS BEFORE THE TRIBUNAL

23 The Tribunal's reasons first set out the background facts and established that the applicant did not pass the character test due to his term of imprisonment of 12 months or more. There is no challenge to this part of the Tribunal's decision.

24 The Tribunal then went on to consider whether there was "another reason" under s 501CA(4)(b)(ii) to justify the revocation of the cancellation decision. The Tribunal applied the considerations identified in *Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (the **Direction**).

25 Paragraph 8 of the Direction specifies certain "Primary Considerations" that are relevant in the context of a revocation decision, namely:

(a) protection of the Australian community from criminal or other serious conduct (**Primary Consideration 1**);

(b) whether the conduct engaged in constituted family violence (**Primary Consideration 2**);

(c) the best interests of minor children in Australia (**Primary Consideration 3**); and

(d) expectations of the Australian community (**Primary Consideration 4**).

26 Given the applicant's circumstances and nature of his past offending, Primary Considerations 2 and 3 were not relevant to the Tribunal's decision.

27 The other considerations which must be taken into account where relevant are listed at paragraph 9 of the Direction:

(a) international non-refoulement obligations;

(b) extent of impediments if removed;

(c) impact on victims;

(d) links to the Australian community, including:

(i) strength, nature and duration of ties to Australia; and

(ii) impact on Australian business interests.

28 Some of the other considerations were not relevant to the Applicant. The Tribunal determined that international non-refoulement obligations were not engaged, the impact on Australian business interests was not relevant, and, in the absence of evidence, any impact on victims was of neutral weight. The Tribunal also considered one additional other consideration, being the applicant's mental health.

29 While the Tribunal's findings with respect to Primary Considerations 1 and 4 are not challenged, it is convenient to briefly set out the findings to provide context to the impugned findings. The impugned findings arise from the Tribunal's Reasons relating to other considerations.

Primary Consideration 1

30 In the general context of Primary Consideration 1 (protection of the Australian community), the Tribunal referred to the applicant's mental health history and the psychological report provided by Mr Visser. At [34], the Tribunal accepted that the applicant has suffered from schizophrenia for a considerable period and that it considered his criminal conduct in the context of his diagnosis. At [35], the Tribunal noted its sympathy towards the applicant's condition and personal history, but that the applicant was not absolved of his failure to take adequate steps to address his schizophrenia or engage in rehabilitation to abstain from prohibited drug use.

31 Additionally, the Tribunal referred to the sentencing remarks of various judges before whom the applicant had appeared. At [26] the Tribunal noted that none of the sentencing judges had concluded the applicant was unable to be held responsible for his criminal conduct, or unfit to plead against the relevant offences.

32 When addressing Primary Consideration 1, the Direction requires the Tribunal to consider and address two particular factors: the nature and seriousness of the applicant's conduct; and the risk to the Australian community should the applicant commit further offences or engage in other serious conduct.

33 In considering the nature and seriousness of the applicant's conduct, the Tribunal in summary found:

(a) the nature of the applicant's offending should be viewed seriously (at [63]);

(b) the custodial sentences imposed by the Courts on the applicant were lengthy and reflective of the very serious nature of the applicant's criminal offending (at [69]);

(c) there was a pattern of frequency and increasing seriousness when considering the applicant's criminal offending history over time (at [71] and [76]); and

(d) the applicant's repeated offending supported a finding that the applicant's offending is of a very serious nature (at [82]).

34 At [88], the Tribunal noted that in November 2019 the applicant was given a "second chance" to remain in Australia because of the Previous Tribunal Decision. However, the applicant then went on to seriously offend in a very short space of time (in January 2020). This aggravated the seriousness with which the Tribunal viewed the applicant's offending conduct.

35 The Tribunal concluded at [90] that the nature and seriousness of the applicants conduct can "only be characterised as very serious".

36 The Tribunal went on to consider the risk to the Australian community should the applicant commit further offences or engage in other serious conduct.

37 The Tribunal noted that if the applicant were to reoffend, there would be a significant risk of harm to the Australian community (including the potential to cause catastrophic harm to an individual) and such a risk was not acceptable to the broader Australian community (at [100]).

38 The Tribunal then assessed the likelihood of the applicant to reoffend. At [125], the Tribunal found that there was a significant likelihood of the applicant engaging in further criminal conduct, basing this conclusion on several findings including the following:

(a) the applicant's schizophrenia was "central" to much of his offending (at [102]);

(b) the Tribunal had difficulty accepting the applicant's assurances about managing his schizophrenia with medication, given his similar assurances to the Previous Tribunal were not honoured (at [107]);

(c) despite the applicant's assurances, the Tribunal was not persuaded that the applicant would remain drug free in an uncontrolled environment (at [115]); and

(d) given the applicant's past engagement with drug rehabilitation programs (described by Mr Visser as "sporadic"), the Tribunal considered there was no guarantee that the applicant's rehabilitation was assured through attendance at a residential rehabilitation facility (at [120]).

39 As a result of the matters above, the Tribunal found at [129] that the risk posed by the applicant to the Australian community was unacceptable and that Primary Consideration 1 weighed very heavily in favour of non-revocation.

Primary Consideration 4

40 In turning to Primary Consideration 4 (the expectations of the Australian community), the Tribunal outlined the facts relevant to the assessment of the community's expectations, stating at [150]:

> In determining the weight attributable to Primary Consideration 4, the Tribunal refers to the following:
>
> (i) The Applicant has failed to obey Australian laws whist residing in Australia and has amassed a large number of convictions for very serious offences during

their criminal history.

(ii) It is the Tribunal's assessment that any tolerance afforded by the Australian community to the Applicant has surely been exhausted when objectively considering (1) the Applicant's very serious and repeated criminal offending; and (2) the Applicant's continual lack of respect for lawful authority, and the personal rights of others.

(iii) The Tribunal's view that (1) the factors causing the Applicant to offend have not been adequately addressed as at the time of this decision; and (2) the Applicant poses a significant risk of substantial harm (not precluding catastrophic harm) to the Australian community were he to reoffend.

41 The Tribunal concluded at [151] that the above factors meant that Primary Consideration 4 "weigh very heavily in favour of not revoking the cancellation" of the applicant's visa.

Other considerations

42 The Tribunal addressed three other considerations relevant to the applicant, namely the extent of impediments if removed, the applicant's ties to the Australian community, and the applicant's mental health.

43 In considering the extent of the applicant's impediments if removed, the Tribunal considered the applicant's submissions in relation to his Schizophrenia, including his rehabilitation and counselling needs, as well as his age. At [157], the Tribunal referred to Mr Visser's assessment, which stated:

> While he has not managed his mental health well during his time in Australia, placing him in an environment where he has no familial support and no awareness of support services will significantly increase his risk of harm. The most likely outcome is that he will quickly fall into drug use, cease his medication, and become acutely psychotic. If that occurs in Canada, the best case scenario is that he is arrested relatively quickly for a minor or drug related crime and is incarcerated. In that case there would be some chance of being integrated into support services, although I am not familiar enough with Canada's social support systems to guess the likelihood of that being effective. Homelessness, with all of the associated risks, for at least some period would be more likely. Should his mother not move to support him, I would estimate the chances of survival for a drug dependent person with no support in acute psychosis in Rwanda to be very low.

44 The Tribunal considered the specific impediments that the applicant may face if returned to Canada. As this section is at the heart of the applicant's challenge and I consider it later in detail, it is useful to set out paragraphs [158]–[162] in their entirety (emphasis added; citations omitted):

> **The Tribunal makes the observation that should the Applicant be deported to Canada he would be entitled to access a comparable standard of health care to that in Australia, in addition to a comparable standard of support for rehabilitation services.**

> The Tribunal observes the Applicant stated they had two uncles (brothers of his father who has since passed away) who resided in Canada, within their Personal Circumstances Form to the Respondent. Evidence from the Applicant and his mother before the Tribunal was that he does not have a close relationship with these relatives, with the Applicant's mother stating that at least one of these uncles had moved back to Rwanda.
>
> **An important point in the Tribunal's mind is the fact that there will be initial challenges for the Applicant in establishing clinical relationships should he be deported to Canada with respect to managing his Schizophrenia.** There is no doubt that this will require a level of discipline from the Applicant which he has so far failed to avail himself of to date. In the Tribunal's mind, with respect to the application of paragraph 9.2 of the Direction, **this is a difficult consideration which favours a decision to revoke the mandatory cancellation of the Applicant's Visa**.
>
> **Whilst the Applicant has resided in Canada previously, the Tribunal accepts that this was at a time when he was predominantly a minor and in his mother's care. However, should the Applicant be deported to Canada he would suffer no language or cultural barriers given the similarities between Australia and Canada. Canada is a wealthy democratic democracy, enjoys a high standard of living, and is similar to Australia in many ways. Any hardships the Applicant may face (emotional, financial, or otherwise) associated with resettlement would be overcome in time once the Applicant has had an opportunity to establish himself.**
>
> In view of the reasons outlined by the Tribunal with respect to the extent of any impediments a non-citizen may face if removed from Australia to Canada, it is the Tribunal's view that paragraph 9.2 of the Direction weighs moderately in favour of revocation. **However, the Tribunal is of the view that the weight given to this factor does not outweigh the very heavy and determinative weight the Tribunal has found for both Primary Considerations 1 and 4.**

45 In terms of the applicant's ties to Australia, the Tribunal noted the applicant's family members in Australia would suffer emotional hardship if he were to be deported. The Tribunal also noted it gave limited weight to the applicant's modest contribution to the Australian community through his employment. Overall, the Tribunal was of the view that the nature and duration of his ties to Australia weighed moderately in favour of revocation for the applicant.

46 Finally, the Tribunal considered the applicant's mental health condition as a separate consideration at [180]–[190]. The Tribunal noted that throughout its reasons the Tribunal had given consideration to the applicant's mental health condition, and the impact which it has had on his criminal conduct. The Tribunal summarised its findings with respect to the mental health consideration given how central it is to the applicant's life, and given the Minister had raised it as a separate consideration. The Tribunal concluded that, in assessing the applicant's mental health condition as a separate and relevant consideration, the Tribunal was of the view that this consideration was of neutral weight.

47 The Tribunal was therefore of the view that, to the extent that any of the other considerations weighed in favour of revocation of the cancellation decision, they were far outweighed by Primary Considerations 1 and 4, which the Tribunal considered both weighed very heavily in favour of non-revocation and were "determinative considerations" in respect of the applicant. Given its conclusions on the considerations in Direction 90, the Tribunal considered it could not exercise its discretion to revoke the cancellation of the applicant's visa and affirmed the non-revocation decision.

THE GROUNDS OF REVIEW

48 By his first ground of review, the applicant submits that the Tribunal's decision was legally unreasonable and/or illogical and irrational. In the originating application dated 13 June 2021, the applicant set out the ground of review as follows (emphasis in original):

> (a) At [161], the Tribunal found that <u>any hardships</u> the Applicant may face associated with resettlement <u>would be overcome in time</u> (emotional, financial, or otherwise) once the Applicant has had an opportunity to establish himself. This finding was not legally open in circumstances where the Tribunal elsewhere concluded:
>
> - the Applicant has had Schizophrenia for a considerable period in Australia ([34])
> - citing remarks on sentence of a learned sentencing judge, noted that the Applicant 'is a person with serious mental health issues' ([36])
> - it was not persuaded that the Applicant would remain drug-free and adhere to medication for Schizophrenia in an uncontrolled environment (i.e. the community) ([115])
> - given the Applicant's past history, there is certainly no guarantee that the Applicant's future rehabilitation is assured ([120])
> - the Applicant will have no familial support network in Canada ([157], [159])
> - noted expert evidence (that was before the Tribunal) that opined placing the Applicant in an environment where he has no familial support and no awareness of support services will significantly increase the Applicant's risk of harm ([157])
> - noted expert evidence (that was before the Tribunal) that opined that the Applicant was a likely prospect of being homeless (with all of the associated risks) ([157])
> - made no express findings that the Applicant would be entitled to economic welfare support in Canada (see [156]-[162])
> - the Applicant's immediate family, including his mother (being his previous carer), would remain in Australia ([170])
> - the Applicant was a 'significant likelihood' of re-offending ([187]).

(b) The general tenor of the evidence before the Tribunal demonstrated that the Applicant had suffered longstanding significant hardships in Australia related to serious, persistent, mental health problems ([34]), homelessness, and practical difficulties in not being able to sustain social ties through enduring friendships in Australia ([170]).

(c) Given the preceding context, it was not legally reasonable, rational, or logical to conclude that any hardships the Applicant may face in Canada would be overcome in time ([161]). The point is that throughout the Applicant's entire residence in Australia, he has not been able to overcome the various hardships that he has faced.

49 By his second ground of review, the applicant submits that the Tribunal made findings for which there was no evidence, namely:

(a) Canada had a 'comparable standard of support for rehabilitation services' as in Australia ([158]).

(b) Canada is a wealthy democratic democracy that enjoys a high standard of living, similar to Australia in many ways ([161]).

CONSIDERATION

50 For the reasons set out below I have concluded that the second ground of review relied upon by the applicant is made out, but not the first.

First ground of review

51 The first ground of review centres on the finding of the Tribunal at [161] of the Reasons (the **Resettlement Finding**), in particular that:

> Any hardship the Applicant may face (emotional, financial or otherwise) associated with resettlement would be overcome in time once the Applicant has had an opportunity to establish himself.

52 It is said that in the circumstances of the Tribunal's earlier conclusions (as set out above) the Resettlement Finding was not legally open to the Tribunal, and as such it was not legally reasonable or rational.

53 A decision will be unreasonable, illogical or irrational in a legal sense where it lacks an evident or intelligible foundation: see, eg, *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1; *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 420.

54 Counsel for the applicant submitted that the evidence before the Tribunal showed that for almost the applicant's entire time in Australia he had faced significant impediments (including

long term mental health and drug use problems) that he has not been able to overcome, and that it was inconsistent with that evidence for the Tribunal to find that the hardships would be overcome in time in Canada.

55 Counsel for the applicant further submitted that the hardships faced in Canada be they emotional, financial or practical hardships such as getting a job, were not short term hardships, but lifelong hardships.

56 The oral submissions put by the applicant at the hearing departed from the first ground in the originating application and highlighted the flaws with the first ground of challenge. The oral submissions analogised the present case to that in *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 (***Hands***).

57 By the first ground of challenge the applicant seeks to remove one element of the Tribunal's reasoning, the Resettlement Finding, from the context in which it was made, and then to examine it with an eye keenly attuned to the perception of error: contra *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. The applicant alights upon the Resettlement Finding at [161], deprives it of the context in which it was made, and submits that it is akin to the finding in *Hands*.

58 The applicant's approach is flawed for the following reasons.

59 First, the Resettlement finding was not an isolated finding. It was made in the section of the Reasons dealing with one of the "other considerations" required by the Direction: impediments upon return to Canada. The finding followed on immediately from the Tribunal making a specific finding at [160] as to the applicant's ability to manage his Schizophrenia if deported to Canada, which the Tribunal concluded was a difficult consideration that favoured a decision to revoke the mandatory cancellation of the applicant's visa.

60 Second, the Tribunal did not find that the applicant's long term mental health and drug use problems would be "short lived" or would be overcome in time. The hardships referred to by the Tribunal in [161] were separate to his specific mental health problems and related to the hardships that would be specifically experienced during resettlement. Read fairly and in context, the Tribunal's finding rose no higher than to acknowledge that in addition to the applicant's ongoing hardships related to his mental health and drug use, there would be other hardships faced by the applicant in the process of relocation to and resettlement in Canada.

61 The Tribunal's reasons are structured so that the four primary considerations of the Direction were considered first. After considering the four primary considerations, the Tribunal turned to consider the other considerations from the non-exhaustive list of other considerations in the Direction. Lastly, the Tribunal gave consideration to one further other consideration: the applicant's mental health condition.

62 The Tribunal referred to the applicant's mental health and drug abuse problems throughout its consideration of the primary considerations and the other considerations prior to its consideration of the impediments upon return. The Tribunal also devoted a separate consideration to the applicant's mental health condition later in its Reasons commencing at [180].

63 The Tribunal first referred to the applicant having been diagnosed with schizophrenia – multiple episodes at [33] where it quoted from the report of the clinical psychologist, Mr Visser, which additionally noted that there was also strong evidence to suggest substance dependence, specifically cannabis and methamphetamines. Mr Visser's report was before the Previous Tribunal. No updated or further report as to the applicant's mental health was before the Tribunal. The Tribunal continued to make reference to Mr Visser's report throughout the Reasons.

64 At [34] the Tribunal accepted that the applicant had suffered from Schizophrenia for a considerable period of time, since he was in high school.

65 At [102] the Tribunal noted that the applicant's diagnosis of Schizophrenia was central to much of his criminal conduct and that the conduct was exacerbated by the applicant's inability to adhere to prescribed treatments and medications in addition to his substance dependence issues/polysubstance abuse issues.

66 The Tribunal's consideration of impediments to the applicant's resettlement commenced at [157] with an acknowledgement that it had had regard to the applicant's submissions with respect to his Schizophrenia, including his rehabilitation and counselling needs, and age. The Tribunal then referred to Mr Visser's report, and his statement with respect to the health and prospects of the Applicant should he be deported to Canada:

> …placing him in an environment where he has no familial support and no awareness of support services will significantly increase his risk of harm. The most likely outcome is that he will quickly fall into drug use, cease his medication and become acutely psychotic. If that occurs in Canada, the best-case scenario is that he is arrested relatively quickly for a minor or drug related crime and is incarcerated. In that case

there would be some chance of being integrated into the support services.

67 After making a general statement that should the applicant be deported to Canada he would be entitled to access a comparable standard of health care to that in Australia, the Tribunal made a more specific observation as to there being a comparable standard of support for rehabilitation services in Canada. This latter observation, and the evidential basis for it founds the applicant's successful second ground of challenge which is discussed later.

68 The Tribunal then noted at [159] that the applicant would have effectively no family in Canada.

69 Importantly, the Tribunal then stated at [160]:

> An important point in the Tribunal's mind is the fact that there will be initial challenges for the applicant in establishing clinical relationships should he be deported to Canada with respect to managing his Schizophrenia. There is no doubt that this will require a level of discipline from the Applicant which he has so far failed to avail himself of to date. In the Tribunal's mind, with respect to the application of paragraph 9.2 of the Direction, this is a difficult consideration which favours a decision to revoke the mandatory cancellation of the Applicant's Visa.

70 The applicant's long term mental health condition and drug abuse in particular were clearly confronted by the Tribunal in coming to its decision: cf *Hands* at 630 [3].

71 The Tribunal's Resettlement finding was materially different to that with which the Full Court was concerned in *Hands*. The first ground is not made out.

Second ground of review

72 In the second ground, the applicant contends that in considering the impediments that he would face if he is returned to Canada, the Tribunal wrongly made findings in the absence of any evidence:

(a) that "Canada had a 'comparable standard of support for rehabilitation services' as in Australia: [158] (the **Rehabilitation Finding**); and

(b) that "Canada is a wealthy democratic democracy that enjoys a high standard of living, similar to Australia in many ways": [161] (the **Standard of Living Finding**).

73 The applicant submits that each of the findings establishes a jurisdictional error as they each affect a critical step in the Tribunal's ultimate conclusion as to whether or not there was another reason to revoke the original decision. If the errors had not been made the applicant submits

that Tribunal could realistically have given greater weight to the particular other consideration in which the findings were made: the extent of the impediments if removed from Australia.

74 The onus was on the applicant to show that the Tribunal's decision was affected by jurisdictional error: Migration Act s 474; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

75 In *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 (***Viane***), the majority reviewed earlier cases in which an administrative tribunal had made findings as to the comparability of other countries' welfare systems to those of Australia, and whether those findings made without any specific evidence amounted to jurisdictional error. Their Honours said at [36]–[40]:

> In *Uelese* an administrative tribunal made a finding to the effect that a former visa holder would have access to government benefits in New Zealand that were of a similar standard to those available to him in Australia. On judicial review of the Tribunal's decision, it was submitted that the finding was unsupported by evidence and so constituted jurisdictional error. Rejecting that submission, Robertson J said (at [69]):
>
> > In my opinion, that statement is no more than a broad proposition as to the availability of government benefits in New Zealand and not one that required evidence as to the amount of a benefit, the terms and conditions of that benefit or the eligibility criteria for that benefit. The applicant did not put forward to the Tribunal that the non-availability of welfare benefits constituted an impediment which he may face if removed from Australia. I also note that the applicant before me has not put forward any material which suggests that the Tribunal was mistaken in its statement. In any event, I am not satisfied that, in the circumstances, the Tribunal's statement could constitute jurisdictional error.
>
> Like *Uelese*, *McLachlan* concerned the non-revocation of a decision to cancel the visa of a New Zealand citizen. The Minister in that case made findings to the effect that mental health treatments were available in New Zealand and that New Zealand was culturally and linguistically similar to Australia with comparable standards of health care, education and social welfare support. On judicial review, McKerracher J held (at [37]) that the decision-maker:
>
> > … was not required to refer to any specific evidence in order to arrive at those conclusions, which were based on an understanding that New Zealand is a country with equivalent standards of health, welfare and education to Australia.
>
> In *Schmidt*, Burley J upheld a ground of review alleging that the Minister committed jurisdictional error in respect of finding that the United States of America had a government welfare system offering a level of support that was broadly comparable to that available in Australia. His Honour said that the unavailability of welfare support was a central issue: at [26]-[27]. It was common ground that there was no objective evidence before the Minister to support the findings: at [28]. His Honour continued:
>
> > Were it to be a question of judicial notice under s 144(1) of the Evidence Act 1995 (Cth), one might say that this is an unsafe conclusion to reach. Indeed it might be said that the common knowledge in Australia, or alternatively, the knowledge of the ordinary wide-awake person, used by one who is trained to express it in terms of precision (*Brisbane City Council v Attorney-General (Qld)* (1978) 19 ALR 681 at 425

> (Privy Council)), indicates that the welfare systems of the United States and Australia are not broadly comparable. However, the standard required by s 144(1) of the Evidence Act is not applicable to an administrative decision such as the present.
>
> The relevant test for jurisdictional error arising by reason of an absence of evidence is set out in *SFGB* the Full Court (Mansfield, Selway and Bennett JJ) at [19]:
>
> > … If the Tribunal makes a finding and that finding is a critical step in its ultimate conclusion and there is no evidence to support that finding then this may well constitute a jurisdictional error: see *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355-7…

There was no suggestion, his Honour said, that the Minister had relied upon built up "expertise", nor that he had considered or informed himself of country information concerning the welfare system in the United States of America available to him at the time of the decision: at [33]. His Honour said that the case was not comparable to the situations that arose in Uelese and McLachlan, where the welfare system under consideration was that of New Zealand: at [34].

In *Webb v Minister for Home Affairs* [2020] FCA 831 (*Webb*) Anastassiou J considered whether it was permissible for the Minister in that case to base factual findings about the availability of public health and welfare in the United Kingdom on "common knowledge". After considering the authorities referred to above, his Honour said it was "conceivable that common knowledge about one country compared to another is more 'common' or 'widely understood'", for reasons possibly including "geographic or regional proximity, historical ties, cultural, religious and ethnic ties, political systems and so on": at [97]. His Honour concluded (at [98]):

> Given the historic ties between Australia and the United Kingdom, if common knowledge is a sufficient basis for findings concerning the availability of public health and welfare in New Zealand, it would be surprising if common knowledge would not be equally valid for like characteristics in relation to the United Kingdom.

76 In *Viane*, the majority (Kerr and Charlesworth JJ) held that there was no evidence supporting the Minister's findings that English was widely spoken in American Samoa and Samoa, and that the applicant and his family would be able to access health and welfare services in either of those countries. Their Honours stated at [44]:

> Second, it cannot be said that the facts stated by the Minister are commonly known. Unlike the cultural, linguistic and political circumstances in American Samoa and Samoa, the circumstances in countries such as New Zealand and the United Kingdom are matters of common knowledge, so explaining the outcomes in *Uelese, McLachlan* and *Webb*. As Burley J observed in *Schmidt*, the outcomes in such cases are "unexceptional". In contrast, the proposition that there are comparable welfare systems as between Australia and the United States of America is neither notorious nor patently correct, as Burley J found in *Schmidt*. Similarly, it is not a notorious fact that English is widely spoken in American Samoa and Samoa.

77 In *EZA20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1775, Stewart J upheld a challenge to the Minister's finding (extracted at [49]) that:

> … Ireland is linguistically and culturally similar to Australia, and has comparable standards of healthcare, social and economic support, I consider that [the applicant]

> would be entitled to the same level of services as other citizens of Ireland in a similar position.

78 In that case there was no evidence as to the applicant's entitlement to access social services such as a pension in Ireland. At [78] Stewart J distinguished the finding in question from those in *Uelese, McLachlan* and *Webb* by reason of the highly specific finding by the Minster that the applicant would be entitled to social services in Ireland in the same way as any other citizen of Ireland.

79 As discussed above in relation to ground 1, the challenged findings were made in the context of considering impediments to the applicant's relocation to Canada. This consideration, largely due to the challenges for the applicant in establishing clinical relationships for the management of his schizophrenia, was found by the Tribunal to weigh in favour of a decision to revoke the mandatory cancellation of the applicant's visa.

80 It is clear from the Tribunal's Reasons that the applicant has significant and long-term mental health and substance abuse issues. It was the opinion of Mr Visser that the interaction between the applicant's psychotic disorder (schizophrenia) and his drug use is clinically inseparable. The applicant's drugs of abuse — methamphetamine and cannabis — are both well known for their impact on psychotic illness according to Mr Visser.

81 The Standard of Living finding is of the broad propositional statement kind discussed by Roberston J in *Uelese* at [69], as not requiring evidence. The Tribunal was entitled to make a finding of the general nature of the Standard of Living finding without evidence. The applicant has not made out the second ground in relation to the Standard of Living finding.

82 The Rehabilitation Finding is to be distinguished from the broad propositional nature of the Standard of Living finding. The Tribunal's finding as to rehabilitation support services is more detailed and specific to the particular personal circumstances of the applicant. It follows a more general statement about there being a comparable standard of health care to that in Australia. After the general statement, the Tribunal makes a specific statement about a category of healthcare: rehabilitation services. The area of rehabilitation services was a very important one in the context of the Tribunal's observations about the applicant's interconnected mental health and drug issues, in the context of its consideration of impediments.

83 The Minister rejected the proposition that the findings were made without any evidence. The Minister pointed to two pieces of evidence: the first, a concession made by the applicant in the first hearing before the Previous Tribunal, that "there is a decent health system in Canada"; and

the second, the fact that the applicant had received drug counselling at the Ottawa hospital when he was a minor. Further, the Minister submitted that the applicant had not suggested that that the Rehabilitation Finding is wrong, and that a comparable standard of rehabilitation services was not available in Canada.

84 The applicant's purported concession goes to a broad proposition as to the state of the Canadian health system. It was made by the applicant in the context of representation as to his mental health and his inability to cope with a move to Canada. It was not suggested that the applicant had any actual knowledge of the state of rehabilitation support services in Canada to inform a concession. The unfounded purported concession should not outweigh the evidence of Mr Visser, the clinical psychologist noted in his report (quoted in the Reasons at [157] and extracted above) that "I am not familiar enough with Canada's social support systems to guess the likelihood of [the support services] being effective".

85 The drug counselling occurred some 16 years ago when the applicant was 12 years old. It was not stated if that was private or publicly funded counselling or if it was available for adults. It provides no information about the current availability and accessibility of rehabilitation support services for impecunious adult citizens with long term substance abuse problems.

86 In *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 (***McLachlan***), the Minister made findings to the effect that mental health treatments were available in New Zealand and that New Zealand was culturally and linguistically similar to Australia with comparable standards of health care, education and social welfare support. McKerracher J held at [37] that the decision maker:

> …was not required to refer to any specific evidence in order to arrive at those conclusions which were based on an understanding that New Zealand is a country with equivalent standards of health, welfare and education to Australia.

87 Unlike the UK and New Zealand, it is not clear the extent to which Australia and Canada have shared historical, cultural and ethnic ties. Although, as the Minister submitted, Australia and Canada share British colonisation, Canada was also colonised by the French and parts of Canada, such as Quebec, speak French as their primary language.

88 It was not suggested that the Tribunal had specialised knowledge of the state of support for rehabilitation services in Canada.

89 Nor is the standard of Canadian support for rehabilitation services a matter of common knowledge, even to those in the field of psychology. Indeed, as noted above and referred to in

the Reasons, Mr Visser stated he was not familiar enough with Canada's social support systems to guess the likelihood of the support services being effective for the applicant.

90 To my mind, Canada falls between the UK and New Zealand on the one hand, and the United States on the other. Whilst Canada shares a history of British colonisation and language with Australia, it is geographically distant. Unlike Australia, Canada was also colonised by the French and French is the official language in some parts of Canada. It shares an extensive border with the United States. There is no evidence as to what extent Canada (in particular, the standard of its support for rehabilitation services) has been influenced by its close proximity to the US, or its French heritage.

91 The authorities support the proposition that a Tribunal or Minister can make general high level statements as to the comparability of healthcare across countries such as the UK, New Zealand and Ireland. However, findings as to more specific or detailed matters, such as entitlement to social security, *EZA20* and *Minister for Immigration and Border Protection v Schmidt* [2018] FCA 1162 (***Schmidt***), require evidence. The Rehabilitation Support Finding falls within the latter category, given its level of specificity.

92 Once I have concluded that the Rehabilitation Support Finding was made without evidence, I must also address the further inquiry as to whether or not the finding constituted a jurisdictional error.

93 The relevant test for jurisdictional error arising by reason of an absence of evidence is set out by the Full Court (Mansfield, Selway and Bennett JJ) in *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 231 at [19]:

> …If the Tribunal makes a finding and that finding is a critical step in its ultimate conclusion and there is no evidence to support that finding then this may well constitute jurisdictional error.

94 This passage, and the "critical step" approach has been endorsed in a number of decisions of this Court concerning findings made without evidence: see, for example, the analysis of Burley J in *Schmidt* at [29]–[32] and the analysis of Stewart J in *EZA20* at [72]–[75]; see further *Soliman v University of Technology, Sydney* [2012] FCAFC 146 at [23].

95 In *Viane,* the majority at [48] explained:

> Section 501CA(4) is not to be interpreted as denying legal force and effect to every decision made in breach of the condition to which we have referred. As the plurality said *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123

> "the statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance": at [29] (Kiefel CJ, Gageler and Keane JJ). Ordinarily, the threshold of materiality would not be met "in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which the decision was made": *Hossain* at [30] (Kiefel CJ, Gageler and Keane JJ). See also *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [57]. In the context of s 501CA(4), an error in the performance of the Minister's fact finding function may amount to jurisdictional error if the finding affects a critical step in the Minister's ultimate conclusion as to whether or not there is "another reason" to revoke the original decision: *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [45]–[48] (Allsop CJ, Markovic and Steward JJ agreeing).

96 Their Honours continued at [52]:

> Given that Mr Viane could not pass the character test, the Minister's task was to form a state of satisfaction or non-satisfaction as to whether there existed another reason to revoke the cancellation decision: s 501CA(4)(b). The task was an evaluative one in two respects: the Minister was required to decide questions of fact that arose on the materials and to assess the relative weight to be ascribed to the countervailing considerations. *Marzano v Minister for Immigration and Border Protection* (2017) 250 FCR 548 at [30] – [32] (Collier J, Logan and Murphy JJ agreeing). The ascription of weight to each consideration necessarily depended on the factual circumstances as the Minister had determined them to be. In the given statutory context, an error in a finding of fact (here facts relating to the social circumstances in a country) has the capacity to affect the weight given by the Minister to the particular consideration in question. Expressed in terms of the test for materiality stated in *Hands*, the weight to be ascribed to the hardship that would be suffered by child A should she relocate to Samoa or American Samoa was a critical step in the Minister's ultimate conclusion as to whether there was another reason to revoke the cancellation decision. That conclusion is reinforced by the historical, factual and legal circumstances in which the Minister's decision was made: *Hossain* at [30] (Kiefel CJ, Gageler and Keane JJ).

97 The Rehabilitation Finding was a critical step in the Tribunal's path of reasoning, in that the weight ascribed to the impediments the applicant would face if removed comprised a critical step in the Tribunal's conclusion as to whether there was "another reason" under s 504CA(4) to revoke the cancellation decision. Had the Tribunal not made the Rehabilitation Finding, in light of the applicant's life-long mental health and substance abuse problems, it could have afforded more weight to its ultimate determination of the extent of impediments if removed, and accordingly come to a different conclusion as to whether there was another reason not to revoke the cancellation of the applicant's visa.

98 Ground 2 is made out in respect of the Rehabilitation Finding and the matter should be re-mitted for redetermination.

CONCLUSION

99 For the reasons above, the Tribunal's decision should be quashed and remade according to law.

100 The Minister should pay the applicant's costs.

I certify that the preceding one hundred (100) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rofe.

Associate:

Dated: 30 November 2021