FEDERAL COURT OF AUSTRALIA

GXXS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 468

Appeal from:	Application for judicial review from: *GXXS and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 3094 (1 September 2021)
File number:	QUD 316 of 2021
Judgment of:	**DERRINGTON J**
Date of judgment:	4 May 2022
Catchwords:	**MIGRATION** – cancellation on character grounds – cancellation not revoked – whether Tribunal failed to address a relevant matter – whether matter clearly emerged from materials or findings – whether decision unreasonable – application dismissed
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*Aboriginal Affairs, Minister for v Peko-Wallsend Ltd* (1986) 162 CLR 24 *ADU18 v Minister for Home Affairs* [2020] FCA 366 *Ali v Minister for Home Affairs* (2020) 278 FCR 627 *AWT15 v Minister for Immigration and Border Protection* [2017] FCA 512 *AXT19 v Minister for Home Affairs* [2020] FCAFC 32 *AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503 *Batson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1660 *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29 *CAI18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1310 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 276 FCR 75 *DKN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 1

DNQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2020) 275 FCR 517

El Khoueiry v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 247

Guclokol v Minister for Home Affairs [2020] 279 FCR 611

Hands v Minister for Immigration and Border Protection (2018) 267 FCR 628

LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1039

McLachlan v Assistant Minister for Immigration and Border Protection [2018] FCA 109

Minister for Home Affairs v HSKJ (2018) 266 FCR 591

Minister for Immigration and Border Protection v MZZMX (2020) 280 FCR 1

Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421

Minister for Immigration and Border Protection v SZUXM (2016) 69 AAR 210

Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1423

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

MZAPC v Minister for Immigration and Border Protection (2021) 390 ALR 590

PQSM v Minister for Home Affairs (2020) 279 FCR 175

QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 166

Raibevu v Minister for Home Affairs [2020] FCAFC 35

Saeed v Minister for Immigration and Citizenship (2010) 241 CLR 252

Singh v Minister for Home Affairs (2020) 274 FCR 506

Uelese v Minister for Immigration and Border Protection (2016) 248 FCR 296

Viane v Minister for Immigration and Border Protection (2018) 263 FCR 531

Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2020) 278 FCR 386

Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	127

Date of hearing:	27 January 2022
Counsel for the Applicant:	Mr J Donnelly and Mr E Vuu
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the Respondents:	Mr B McGlade
Solicitor for the Respondents:	Sparke Helmore

ORDERS

QUD 316 of 2021

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

ORDER MADE BY:	**DERRINGTON J**
DATE OF ORDER:	**4 MAY 2022**

THE COURT ORDERS THAT:

1. The application for review made on 20 September 2022 be dismissed.

2. The applicant pay the first respondent's costs of the application.

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

REASONS FOR JUDGMENT

DERRINGTON J:

Introduction

1 By an originating application filed on 20 September 2021 the applicant sought judicial review of a decision of the Administrative Appeals Tribunal (the Tribunal) which had affirmed a decision of a delegate of the first respondent (the Minister) that in the circumstances there was no power to revoke the cancellation of his visa. He advances two grounds. First, that the Tribunal failed to exercise jurisdiction because it failed to consider a claim which clearly emerged on the materials and findings. The second is that the Tribunal's reasoning was irrational, illogical or legally unreasonable because it was based upon a finding for which there was no rational or intelligible justification.

2 For the following reasons neither of these grounds succeed and the application must be dismissed.

Background

3 In 1989 the applicant, who was then an infant, migrated from New Zealand to Australia with his family. He has visited New Zealand from time to time and was last granted a Class TY444 Special Category (Temporary) Visa (referred to as the visa) on his arrival into Australia in September 2014.

4 The applicant has a lengthy criminal history in Australia. His convictions commenced in 2006 and over the subsequent years his offences have tended to increase in severity. He was last convicted in December 2020 in respect of a charge of doing grievous bodily harm and was sentenced to 2 years imprisonment, albeit suspended after six months. During his incarceration for that offence the Minister's delegate cancelled his visa pursuant to s 501(3A) of the *Migration Act 1958* (Cth) (the Act). The delegate was bound to exercise that power as a result of the applicant not passing the character test set out in s 501(6) of the Act.

5 Following that cancellation decision the applicant made representations to the Minister pursuant to an invitation issued under s 501CA(3).

6 On 8 June 2021 the delegate, after considering the applicant's representations, concluded that he was not satisfied that the applicant had established there was another reason why the

cancellation decision should be revoked. He identified that the consequence was that the power under s 501CA(4) was not enlivened such that the applicant's visa remained cancelled.

7 On 14 June 2021 the applicant sought review by the Tribunal.

8 The Tribunal conducted a hearing on 16 and 17 August 2021 in Brisbane. The applicant was legally represented at the hearing which occurred by videolink.

9 In the course of the hearing the applicant gave evidence as did his partner, a former employer, and two of his sisters.

The Tribunal's decision

10 On 1 September 2021, the Tribunal affirmed the Minister's decision. It too was not satisfied there was another reason to revoke the cancellation decision with the consequence being that it was unable to exercise the discretion under s 501CA(4).

11 Given the nature of the grounds of the present application it is necessary to set out at some length parts of the Tribunal's decision.

12 The Tribunal identified the two main issues before it were whether the applicant passed the character test and whether there was another reason why the cancellation decision should be revoked. It was clear from the applicant's criminal record that he did not pass the character test and so it was the latter question which dominated the Tribunal's consideration.

13 In addressing it the Tribunal correctly noted that it was required by s 499(2A) of the Act to comply with Direction No 90 – Visa Refusal and Cancellation under s 501 and Revocation of Mandatory Cancellation of Visa under s 501CA (the Direction).

14 The Direction replaced the earlier Direction No 79 and in doing so corrected some, but not all, of the inconsistencies between s 501CA and the statements in that earlier direction. In particular, it still refers to the exercising of a discretion under s 501CA(4), whereas it ought to refer to the determination of whether the Minister is satisfied that there is another reason why the cancellation decision should be revoked. In any event, the Tribunal applied it to the issue of whether the requisite satisfaction had been reached. No party suggested any error by the Tribunal in proceeding in this way.

15 The applicant's substantial criminal history was directly relevant to the primary considerations identified in the Direction and, appropriately, the Tribunal addressed it in detail. For present

purposes the following summary of the Tribunal's findings is sufficient. It identified the applicant had accrued the following convictions:

(a) his conviction for assaults occasioning bodily harm in March 2006 in respect of which he was sentenced to probation and community service;

(b) assaults occasioning bodily harm committed in September 2007 in respect of which he was sentenced to six months imprisonment to be served by way of an intensive correction order;

(c) his convictions for possession of dangerous drugs in December 2007 and February 2008 in respect of one of which he received a conviction and a fine;

(d) two counts of occasioning bodily harm whilst in company in respect of which he was convicted in November 2007 and for which he was sentenced to 15 months imprisonment, although he was immediately paroled;

(e) his convictions for common assault and being drunk or disorderly in premises to which a permit/licence relates in April 2012. He was originally convicted and sentenced to six months imprisonment to be served by way of an intensive correction order. He was later dealt with after having breached the intensive correction order and was resentenced to two months imprisonment with immediate parole;

(f) a conviction for "commit public nuisance" in January 2013 in respect of which he was sentenced to imprisonment of two months with immediate parole;

(g) a further conviction for "commit public nuisance" in June 2014 in respect of which he was fined;

(h) offences for being drunk or disorderly in premises to which a permit/licence relates in August 2015 in respect of which he was convicted and fined;

(i) his conviction for grievous bodily harm in 2016 in respect of which he was sentenced to imprisonment for a period of 18 months and given immediate parole;

(j) his conviction for "assault or obstruct police officer in licensed premises" in July 2018 in respect of which a conviction was recorded and he was fined;

(k) a further conviction for grievous bodily harm in July 2018, in respect of which he was sentenced in December 2020 to a term of imprisonment for two years albeit suspended after six months. It was the term of imprisonment imposed on him for this offence which triggered the cancellation decision.

16 The Tribunal considered the evidence from the applicant's partner and sisters in relation to his criminal conduct. Whilst his partner alleged that his criminal offending occurred whilst he was under the influence of alcohol and due to him associating with the wrong people, his sisters attributed it to his poor childhood environment, namely exposure to domestic violence, an alcoholic parent, and a lack of attention.

17 In addressing the primary consideration of the protection of the Australian community from criminal or other serious conduct, the Tribunal (TR [64]ff) took into account the nature and substance of the applicant's criminal conduct and, in particular, its violent aspects. It considered that his conduct should be viewed "very seriously". It noted (at TR [79]) that he had appeared before a lawful authority on 19 separate occasions for 23 offences, six of which resulted in the imposition of terms of imprisonment. It also noted that none of the sentencing options had any deterrent effect on the applicant's criminal conduct.

18 The Tribunal further observed that his criminal offending was frequent and becoming increasingly more serious over time (at TR [84]). It concluded that the nature and seriousness of his conduct ought to also be described as "very serious". It applied the same epithet to the cumulative effect of his repeat offending. Subsequently, it concluded that the harm which could be caused by him should his past conduct be repeated was so serious that any risk that it may be repeated is unacceptable to the Australian community.

19 The Tribunal considered at length the risk of the applicant reoffending. It considered his claim that his offending was related to his consumption of alcohol and referred to the evidence he had adduced as to his attempts to avoid or limit alcohol. It was not, however, satisfied that there were adequate measures in place to reduce or control his consumption such that the risk of reoffending remained. At [117] it held:

> Whilst the Tribunal accepts the remorse expressed by the Applicant, the Tribunal does not have before it independent evidence from a suitably qualified clinician verifying any deterrent effect from his incarceration, or the realisation that he could be subject to deportation as a result of the sentences of imprisonment handed down for his criminal convictions. There is nothing to indicate that the deterrent effect is such that: (1) the Applicant's risk of recidivism has been reduced to an acceptable level; and (2) that the factors which lead to the Applicant's risk of recidivism (e.g. alcohol consumption) are under remedial management and control such that the Applicant's risk of recidivism has been reduced to an acceptable level.

20 In the result, the Tribunal concluded (at [121]) that there was a significant risk of his reoffending "due to the incomplete nature of his rehabilitation with respect to factors leading to his risk of recidivism".

21 In relation to Primary Consideration 1 of the Direction, the Tribunal determined that each of the relevant considerations it was required to address led to the conclusion that it weighed heavily in favour of non-revocation.

22 The Tribunal also paid significant attention to Primary Consideration 3, being the best interests of minor children in Australia. After a careful analysis of the relationship between the applicant and minor children in Australia it concluded that the best interests of those minor children overall weighed moderately in favour of revocation of the decision (TR [134] – [174]). However, it qualified this finding by confirming that the weight it had attributed to Primary Consideration 3 did not in any way outweigh the very heavy weight it had attributed to Primary Consideration 1.

23 Conversely, after considering the applicant's prolonged and serious criminal history, the Tribunal concluded that Primary Consideration 4, being the expectations of the Australian community, weighed heavily in favour of non-revocation (TR [175] – [188]).

24 It then turned to consideration of the extent of the impediments to the applicant if he were removed from Australia. In doing so it particularly noted that he did not indicate any health concerns in his Personal Circumstances Form and nor did he disclose any when the Tribunal asked him about that in the course of the hearing. It recorded that it specifically questioned him as to whether he was on any medications or had been diagnosed with any medical or psychological conditions. The applicant indicated he was not being treated with any medications, or by a doctor or health professional.

25 The Tribunal observed that, in any event, should the applicant be deported to New Zealand he would have access to similar health care and rehabilitation services as are available in Australia. He would also not suffer any language or cultural barriers. Overall, the existence of any impediments to his return to New Zealand was a slight measure of weight in favour of the revocation of the visa.

26 The Tribunal also addressed the other considerations listed in the Direction but, for present purposes, there is no need to reference those issues.

27 Ultimately, it concluded that, having regard to the considerations and particularly that Primary Consideration 1 weighed heavily in favour of non-revocation as did Primary Consideration 4, it was not satisfied that there was another reason to revoke the cancellation decision.

Consequently, it concluded (at TR [238]) that it could not exercise the discretion in s 501CA(4) of the Act. Necessarily the Minister's decision was upheld.

Grounds of the application

Ground one

28 As articulated in the applicant's written submissions, Ground 1 is as follows:

> The Tribunal constructively failed to exercise its jurisdiction as it did not lawfully consider the applicant's alcohol dependency claim which had clearly emerged on the evidence and otherwise was invoked based on the Tribunal's own findings.

29 The particulars of this are set out in the Originating Application in a somewhat discursive manner though they are to the effect that the applicant had a "serious problem with alcohol that remained unresolved". In the submissions the alleged issue was referred to as being "a significant alcohol dependency which had not been resolved" and was given the nomenclature of an "Alcohol Dependency Claim". It is said that if this had been taken into account the Tribunal could have given greater weight to the factor of the impediments the applicant might suffer if removed from Australia.

The obligation to consider under s 501CA(4)

30 Pursuant to s 501CA(4)(b) the Minister is obliged to ascertain whether he is satisfied that there is another reason why the original cancellation decision should be revoked. There are no expressly specified considerations which the Minister is required to take into account in the possible formation of that state of mind. However, by the application of the principles in *Aboriginal Affairs, Minister for v Peko-Wallsend Ltd* (1986) 162 CLR 24, 30 and *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 270 at [54]; it has been concluded that the subject-matter, scope and purpose of s 501CA requires that the Minister take into account the representations made by an applicant pursuant to an invitation given under s 501CA(3): *Ali v Minister for Home Affairs* (2020) 278 FCR 627, 643 [44] (*Ali*). See also *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423; *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, 546 [67] (*Viane*).

31 However, there exists a further obligation on the Minister and that is to obey the requirements in the Direction which, in part identifies certain matters which must be taken into account in performing the function under s 501CA(4). By cl 6 of the Direction it is provided that:

> Informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

The reference to "where relevant" is important and shows an acceptance that the factors identified are not invariably applicable in every case. There may be cases where the applicant adduces no evidence about a particular consideration with the consequence that it will remain irrelevant to any decision.

32 Clause 8 of the Direction is concerned with "Primary Considerations" whereas cl 9 is concerned with what are referred to as, "Other Considerations". Clause 9.1 provides:

> **9. Other considerations**
>
> (1) In making a decision under section 501(1), 501(2) or 501CA(4), other considerations must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):
>
> 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;
>
> ii) impact on Australian business interests.

33 Again, the reference to "where relevant" emphasises that in any particular case there may be an absence of any evidence or material relating to the particular factors. In the recent decision of *DKN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 1 (*DKN20*) the Full Court (Collier, Markovic and Anastassiou JJ) analysed a similar clause in Direction No 79 which required consideration of a matter only "where relevant". The Full Court held (at 11 – 12 [39]) that:

> The Minister correctly submitted that the Other Considerations in Direction No 79 need only be taken into account by the Tribunal "where relevant": *Minister for Home Affairs v HSKJ* (2018) 266 FCR 591 (Greenwood, McKerracher and Burley JJ) at [52]. What is "relevant" to a decision under s 501CA of the Act depends in part on the representations made by the applicant for revocation. The Tribunal is required to consider those representations for the purposes of deciding whether they are satisfied there is another reason why the visa cancellation should be revoked: *Navoto v Minister for Home Affairs* [2019] FCAFC 135 (*Navoto*) at [88] (Middleton, Moshinsky and Anderson JJ).

34 In the decision of *Minister for Home Affairs v HSKJ* (2018) 266 FCR 591, 608 [52] (*HSKJ*) referred to by the Full Court, an earlier Court had adopted the view in relation to the words "where relevant" that:

> The Minister is, with respect, correct to submit that the inclusion of the words "where relevant" in paragraph 14(1) of Direction 65 indicate that the duty to consider the matters raised in it is not an invariable one, and that what is "relevant" is a matter of opinion for the individual decision-maker.

35 With respect, there appears to be some dissonance between these two statements. However, as this issue was not debated before the Court it is preferable to proceed, albeit without deciding, by adopting the approach most favourable to the applicant and follow the approach in *DKN20* which is more consistent with *Ali* and *Viane*. It should be added, however, that even if a matter is relevant because it has been raised, the mere fact that it is not referred to in a decision-maker's reasons does not necessarily evidence that it was not considered. It may not have been referred to because the decision maker did not regard it as being material to the decision to be made.

36 In the ordinary course there is a confluence of the two sources of relevant considerations; being the applicant's submissions and the matters identified in the Direction. That occurs because the invitation to the party applying for revocation of the cancellation decision is usually accompanied by information from the Department indicating that, in undertaking the task pursuant to s 501CA(4), the Minister will take into account the matters set out in the Direction. The resulting submissions are then generally made in accordance with the structure and issues in the Direction. In general, the applicant attempts to provide evidence and information to the Minister which will bolster those considerations of the Direction which might weigh in favour of revocation and will diminish those which might weigh against. There is, however, nothing which might prevent the applicant from raising other matters which might, by themselves or with other matters, be another reason for revoking the cancellation decision.

37 In the present matter the applicant's solicitors made written submissions on his behalf of some 22 pages in length and which followed the structure of the Direction. Those submissions identified information and material in support of the assertion that consideration of the several matters in the Direction should result in the Minister being satisfied that there was another reason to revoke the visa's cancellation. Those submissions included evidence and arguments as to why the applicant would suffer impediments were he to be returned to New Zealand. The impediments identified related to his unfamiliarity with life there, his lack of employment

contacts, and the possibility that his partner would not settle there. As was submitted on behalf of the Minister, there was nothing in his representations document, his legal representative's submissions to the Minister, his primary statement of evidence, his statement of facts, issues and contentions to the effect that he would suffer impediments as a result of his unresolved alcohol dependency and nor was anything said orally during the Tribunal's hearing. This was not contested by Mr Donnelly for the applicant.

38 It follows that, at least *prima facie*, there was no obligation on the Tribunal to consider the matter on which the applicant now relies.

Relevant legal principles as to whether a claim has "clearly emerged"

39 Despite the applicant, by his solicitors, not making any submission to the effect that he would suffer impediments in establishing himself in New Zealand by reason of his claimed alcohol consumption, it was submitted that the Tribunal erred by failing to consider it.

40 It is beyond doubt that in the context of claims for protection visas under Part 7 of the Act, the decision-maker is required to consider "claims" which fall into either of two categories. First, claims which are expressly made (that is claims that are the subject of a "substantial clearly articulated argument, relying on established facts"). Second, the decision-maker must consider claims which, although not expressly made, clearly emerge from the materials and the decision-maker's own reasons: *AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503 (*AYY17*), 509 – 510 [18]. Mr McGlade for the Minister acknowledged that there is some authority for the proposition that a not dissimilar principle applies in relation to the application of s 501CA(4): *Raibevu v Minister for Home Affairs* [2020] FCAFC 35 [87] – [88], but he also submitted that the concept of "a claim" for the purposes of a protection visa is different from that of a reason for revoking a cancellation decision for the purposes of s 501CA(4). For present purposes it can be assumed, without deciding, that in performance of the function under s 501CA(4), a decision-maker is required to consider any relevant "claim" or "factor" which supports a reason for revoking the cancellation decision, which clearly emerges on the material or the decision-maker's findings.

41 In *AYY17* the Full Court adopted the principles stated by Barker J in *AWT15 v Minister for Immigration and Border Protection* [2017] FCA 512 at [67] – [68] as to the proper approach to ascertaining whether or not a claim has "clearly emerged". The Full Court (at 510 [18]) framed the principles as follows:

(a) such a finding is not to be made lightly (*NABE* at [68]);

(b) the fact that a claim **might** be said to arise from materials is not enough (*NABE* at [68]);

(c) to clearly emerge from the materials, the claim must be based on "established facts" (*SZUTM v Minister for Immigration and Border Protection* (2016) 241 FCR 214 (*SZUTM*) per Markovic J (at [37]-[38])). In *SZUTM*, Markovic J said:

> 37 While the tribunal is not required to deal with claims which are not clearly set out and which do not clearly arise from the material before it, the tribunal is not limited to dealing with claims expressly articulated by an applicant. A claim not expressly advanced by an applicant will attract the review obligation of the tribunal when it is plain on the face of the material before it.
>
> 38 Both the appellant and the Minister have made submissions on whether there is a requirement that there be a claim based on "established facts". At [35], the primary judge found, relying on *NABE* and *Dranichnikov* that, as the threshold point the claim must "emerge clearly from the materials before the Tribunal and should arise from established facts". I agree with the primary judge's approach: the decision in *NABE* must be read in light of the principle set out in *Dranichnikov*.

(d) while there is no precise standard to determining whether an unarticulated claim has been "squarely raised" or "clearly emerges" from the materials "a court will be more willing to draw the line in favour of an unrepresented party": *Kasupene v Minister for Immigration and Citizenship* (2008) 49 AAR 77 per Flick J (at [21]); and

(e) understanding whether a claim has clearly emerged from materials cannot be assessed in a vacuum. Consideration must be given to the way an applicant's claims are presented over time.

42 Subsequent to *AYY17* it has been emphasised that, in the context of s 501CA(4), "considerable caution needs to be exercised in resolving an argument that a claim has been made in sufficiently clear terms that it should in turn be considered by the Tribunal": *AXT19 v Minister for Home Affairs* [2020] FCAFC 32 [56]. In that case Flick, Griffiths and Moshinsky JJ observed that the degree of clarity by which a claim is said to emerge affects the degree to which it might have to be considered by the decision-maker. Their Honours held:

> … The greater the degree of clarity in which a claim has been made and advanced for consideration, the greater may be the need for the Tribunal to consider the claim in clear terms. Conversely, the more obscure and less certain a claim is said to have been made, the less may be the need for the Tribunal to consider the claim. The need for caution arises lest a reviewing Court is propelled from its sole task of undertaking judicial review and into the murky waters of impermissible merits review. The task of a court undertaking judicial review is not to elevate a statement that may have been made in passing by a claimant into a clearly articulated claim in need of resolution. For a Court undertaking judicial review to engage in such a process has all the dangers of the Court resolving a different factual case to the one advanced to the Tribunal and thereby trespassing into merits – and not judicial – review.

43 It has also been observed that the threshold requirement that a claim "clearly emerge from the materials" is not made out where there is a degree of equivocation about its existence: *ADU18 v Minister for Home Affairs* [2020] FCA 366 at [72] – [73] ; *CAI18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1310 at [62].

The alleged representation/claim

44 In the applicant's written submissions, it was stated that the Tribunal was obliged by the Direction, under the heading of "Other considerations", to take into account the extent of impediments to the applicant if he were removed from Australia. By its full terms, cl 9.2 of the Direction provides:

> **9.2 Extent of impediments if removed**
>
> (1) Decision-makers must consider the extent of any impediments that the noncitizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:
>
> a) the non-citizen's age and health;
>
> b) whether there are substantial language or cultural barriers; and
>
> c) any social, medical and/or economic support available to them in that country.

45 He further submitted that there was evidence before the Tribunal that he had a "significant alcohol dependency" which had not been resolved and the consequence of that was that the Tribunal was bound to but failed to address this in relation to cl 9.2. Necessarily, as properly articulated, the applicant's claim must be that in fulfilment of the statutory obligation under cl 9.2 of the Direction the Tribunal was obliged to consider the consequences of his unresolved alcohol dependency in the context of what impediments he may face in establishing himself and maintaining basic living standards in New Zealand.

Did the claim clearly emerge on the material?

The applicant's assertion as to how the claim emerged

46 The applicant submitted that the claim that he suffered from "significant alcohol dependency" emerged in the following way:

(a) The Tribunal had noted that the applicant had taken steps towards his rehabilitation, including attending Alcoholics Anonymous meetings whilst he was incarcerated and in

immigration detention and that he had admitted drinking alcohol up until the point of his incarceration.

(b) His partner had opined that he had been using alcohol to numb the pain of the tragedies in his life and that most of his criminal offending had occurred whilst under the influence of alcohol.

(c) His partner had also asserted that he would go out on most weekends with his friends following football and have a few drinks, but rarely when they were together.

(d) His partner further referred to his attendance at Alcoholics Anonymous meetings to try and educate himself.

(e) The Tribunal had referred to a report by a forensic psychologist (Mr Peter Perros) which was used in December 2020 in relation to one of the applicant's criminal proceedings. The Tribunal noted that Mr Perros had not been called as a witness with the consequence that the weight given to comments in his report might be limited. Nevertheless, Mr Perros had opined that the applicant needed professional help for his anxiety and maladaptive use of alcohol, although the current level of alcohol consumption was unclear. He identified the chronicity of the applicant's alcohol abuse and suggested possible treatment.

47 The applicant further submitted that the following findings by the Tribunal added to the emergence of the alleged issue:

(a) That the Tribunal had concluded that the applicant had a long history of violent criminal convictions over many years, often as a result of his intoxication (at TR [71]) and that his substance abuse had existed alongside much of his offending (TR [104]).

(b) The Tribunal, when assessing the risk that the applicant might reoffend, concluded that the applicant had sought to minimise his use of alcohol during social occasions but that his desire to abstain from future use of alcohol had not been tested outside of detention (TR [113] – [114]).

(c) The Tribunal found that unless the applicant could abstain from abusing alcohol his risk of reoffending remained a real possibility and that he was likely to reoffend due to the incomplete nature of his rehabilitation.

Was the claim based on established facts?

48 The first difficulty with the applicant's claim is that the alleged emergent claim was not based on "established facts". Rather, it was sought to be supported by reference to disparate pieces of evidence, some of which had not been embraced by the Tribunal. The Tribunal had, in fact, accepted that the applicant engaged in the consumption of alcohol and that his offending was a related aspect of that. It also accepted that he was unable to abstain completely from using alcohol. However, those findings do not amount to anything approaching a "significant alcohol dependency" as the applicant claimed or even an "alcohol dependency" of any sort. At most, the findings amount to an inability to refrain from using alcohol from time-to-time.

49 The Tribunal's conclusion to that effect was wholly justified by the material before it which consisted largely of the opinions of several people.

50 Whilst it may be accepted that the applicant was a consumer of alcohol, there is nothing which is suggestive of a dependency let alone that such a dependency was "significant". The mere fact that he attended Alcoholics Anonymous meetings whilst incarcerated did not identify any dependency and it is noted that his partner indicated that he attended the meetings to educate himself. Whilst it might be accepted that many of the applicant's crimes were associated with his consumption of alcohol, that does not indicate any significant dependency on it. It merely tends to indicate that when he does use alcohol his ability for self-control diminishes.

51 Despite the existence of evidence disclosing that the applicant's use of alcohol played a part in his criminal behaviour, the evidence as to the nature and degree of his present consumption of alcohol or his dependence upon it was sparse. Whilst his partner indicated that the applicant used alcohol to numb tragedies in his life, her statement that he would go out most weekends and have a few drinks does not bespeak of alcohol dependency. Her comment that he did not drink in her company negates the suggestion of significant dependency. In fact, it suggests the contrary, namely that he can control his consumption of alcohol when he chooses. It is relevant that neither of the applicant's sisters referred to the applicant's alcohol consumption at all and did not attribute it any causative effect to the applicant's criminal behaviour. Although the Tribunal referred to the statements of the psychologist, Mr Perros, it is clear that he was not aware of the applicant's then current level of alcohol consumption. It should also be kept in mind that the applicant himself had stated that in the previous five years the occasions on which he consumed alcohol were very rare. Although the Tribunal made no detailed findings as to

the applicant's precise use of alcohol, it appears that it preferred the view of his partner that he sought to minimise his use of alcohol to social occasions.

52 Whilst it can be accepted that his continued use of alcohol contributed to his criminal behaviour there was, with respect, no evidence to suggest that he had a dependency on it or that the dependency (if any) was significant. That was not an established fact.

53 It is worthy of remark that Mr Donnelly was unable to correctly identify the severity of the applicant's own alcohol issues. First, he described it as a "significant alcohol dependency" and later referred to it as an unresolved alcohol issue. This tends to emphasise that no issue in relation to the claimed degree of alcohol used emerged at all, let alone clearly. In the result, this ground fails at the first hurdle.

The incomplete nature of any issue emerging under cl 9.2

54 Even if it were assumed that the evidence or material before the Tribunal raised an issue of the applicant's health, including that he suffered from some addiction to alcohol, that would be insufficient to make cl 9.2 a relevant consideration. This is a major flaw with the applicant's main ground of review. It is, with respect, an error to construe cl 9.2 as having the consequence that if some evidence emerges that an applicant has an adverse health condition, is of a certain age, is of a particular culture, or speaks a particular language, the decision-maker is automatically required to undertake an inquiry into the other elements of the clause and then reach some conclusion about it. However, the applicant's submissions proceed upon such an implicit assumption. They suggest that because an issue arose as to his use of alcohol the Tribunal was then bound to independently assess the impact of that on his earning capacity, ascertain the level of social, medical or economic support available in New Zealand, identify the basic living standards available to New Zealanders and, in the light of those matters, determine whether and to what extent the alcohol use would impede him in maintaining similar basic living standards. That is not how cl 9.2 or the Direction operates.

55 Obviously, the issue to be considered in cl 9.2 is a composite one. By its terms, it is generally concerned with certain detriment which an applicant might suffer on being returned to their home country and which may be a reason or part of a reason for revoking a cancellation decision. At a greater level of particularity, it is concerned with the existence of any impediments which an applicant may face in establishing themselves and maintaining basic living standards. Moreover, the impediments must arise from the applicant's age, health, or language or cultural barriers and in the context of any social, medical or economic support

available in the home country. It follows that, in order for there to be a relevant consideration under cl 9.2, there must exist before the decision-maker evidence or material to suggest that:

(a) the applicant may face an impediment in establishing themselves and maintaining basic living standards;

(b) the impediment arises or is caused by the applicant's age, or health, or language or cultural barriers in the context of the level of social, medical and economic support available in the applicant's home country;

(c) this impediment may arise if the applicant is removed from Australia to their home country.

56 Axiomatically, in order for an applicant to raise the issue mentioned in cl 9.2 for consideration they must point to more than the existence of a medical condition. Necessarily, the condition must be of such a nature that it may impede the applicant in establishing themselves or maintaining a basic standard of living. If the condition is not likely to have that effect, it would not enliven any consideration. In the present case for instance, there was nothing to suggest that whatever the applicant's "problems" were with alcohol, they had the result that he was unable to maintain a basic standard of living. Certainly, that was not the position in Australia where, when he was not incarcerated, he was able to maintain steady employment in the construction industry.

57 Further, in assessing whether any impediment existed, it is necessary to consider the support available to the applicant in their home country. Therefore, in order to raise a relevant issue under cl 9.2 there needs to be some evidence of the relevant support in the home country and that it is of such a nature that it does not prevent the applicant's condition becoming an impediment to them establishing themselves and maintaining a basic living standard. This is substantially in excess of merely raising the existence of a medical issue.

58 By way of example, the fact that there existed before a decision-maker evidence of an applicant's age does enliven cl 9.2, and that is so even if the applicant was of advanced years. More would be required to raise the issue that the applicant may suffer some consequential impediment if returned to their home country. That may include evidence of the applicant's wealth or lack of it, lack of social or family support or lack of economic support.

59 As mentioned, in this case the applicant wrongly assumed that evidence of some health issue raised as being relevant to the subject matter of cl 9.2. That was incorrect with the result that,

even if there were some relevant evidence of a significant alcohol dependency, no issue under cl 9.2 clearly emerged.

Qualitative comparisons between Australia and the home country

60 As is apparent from the above discussion, it is also necessary that there be some evidence or material to demonstrate there is some qualitative difference between the circumstances in Australia and those in the applicant's home country. Although Mr Donnelly submitted that there was authority for the proposition that no such comparison should take place, none was produced and it is apparent that cl 9.2 can only become a relevant issue if the impediments may exist in the applicant's own country and not in Australia.

61 The issue to which the matter in cl 9.2 is directed is whether there is another reason why the cancellation decision should be revoked. Clause 9.2 is obviously directed to the personal hardships in terms of living conditions which the applicant may face if they were to be returned to their home country. As such, they could only weigh in the applicant's favour if the applicant's prospect of maintaining a basic standard of living there were impaired. If, for instance, the issue was concerned with the applicant's health but the public health services in the applicant's home country were at least equal to those in Australia the issue could, at best, be only neutral for the applicant. In the context of ascertaining whether there was another reason why the cancellation decision should be revoked, it could not be a factor in favour of the applicant that any impediments to establishing and maintaining themselves in their home country due to medical or other support, are the same or less than they are in Australia.

62 Therefore, in order for the issue under cl 9.2 to be positively raised or to clearly emerge and to be relevant to the decision-maker's deliberation, there would need to be some evidence of the reduced availability of social, medical or economic support in the applicant's home country when compared to Australia. The importance of this was averted to by Robertson J in *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296, 310 [68] – [69]:

> [68] When addressing the extent of impediments if the applicant were removed, the Tribunal noted that there was no specific evidence of any social, medical and/or economic support available to Mr Uelese in either New Zealand or Samoa, but said: "I take into account that at least in New Zealand Mr Uelese would have access to government benefits similar to those available to him in Australia".
>
> [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.

(Emphasis added).

63 See also the consideration of this issue in *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386.

64 The consequence is that unless there is something to suggest that the impediments will be greater in the applicant's home country, it is most unlikely that this matter could be relevant to whether there was another reason to revoke the cancellation decision.

The applicant's reliance on Mukiza v Minister for Immigration

65 In the course of the hearing Mr Donnelly submitted that in the application of cl 9.2 the decision-maker was not required to compare circumstances in Australia and New Zealand. He submitted that one need only consider the impediments that the applicant will face in New Zealand (ts 74) and that it is not to the point whether the home country was a third world country which did not have any available medical services (ts 72). In support he relied on the recent decision by Rofe J in *Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503 (*Mukiza*) in respect of which he contended:

> … I appeared in that case, and the reason why it's relevant is because in that case that's exactly what had happened. The tribunal sought to compare Australia to Canada and said, "Well, there will be similar rehabilitation services", and although her Honour found, yes, perhaps at a broad level of abstraction a finding of that level could be made of rehabilitation services, the more granular, lower level of abstraction finding about alcohol, or in that case it was mental health rehabilitation services, was not something that was open to be found. That more specific level of generality required evidence from the tribunal – or, sorry, from the Minister, or the tribunal would have to be proceeding that it was acting on some specialised knowledge.

66 The decision of *Mukiza* does not support this submission, if anything it is to the contrary. In *Mukiza*, the applicant sought review of a decision of the Tribunal affirming the earlier decision of the Minister that a cancellation decision could not be revoked. The applicant was a Rwandan-born 28-year-old citizen of Canada who had an extensive criminal record in Australia as well as a history of significant mental illness, having suffered from schizophrenia for approximately 10 years. The Tribunal had accepted that he suffered from schizophrenia for a considerable period and considered his criminal conduct in the context of that diagnosis. One of the grounds for review was that the Tribunal made findings for which there was no evidence,

specifically, that (i) Canada had a similar standard of rehabilitation services to Australia (Rehabilitation Finding); and (ii) Canada is a wealthy democracy that enjoys a high standard of living, similar to Australia in many ways (Standard of Living Finding).

67 The applicant submitted that if those errors had not been made, the Tribunal could realistically have given greater weight to the particular "other consideration" in which the findings were made, namely the extent of the impediments if removed from Australia: *Mukiza* [73]. In relation to the Standard of Living Finding, Rofe J considered (at [75] – [80]) various authorities where the 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. In relation to that ground, her Honour held that it was of a "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". Accordingly, the applicant did not make out that ground. There is nothing in her Honour's analysis to suggest that a comparative analysis should not be undertaken for the purposes of clauses such as cl 9.2 and its progenitors.

68 It should be observed that Rofe J distinguished the Rehabilitation Finding from the broad propositional nature of the Standard of Living finding. At [82] her Honour stated:

> … 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.

69 Rofe J concluded that the Rehabilitation Support Finding was made without evidence. Central to her conclusion was the evidence of a clinical psychologist in his report which stated (at [84]) that he was "not familiar enough with Canada's social support systems to guess the likelihood of [the support services] being effective". There was no other evidence as to what rehabilitation services were available in Canada, nor was the standard of Canadian support for rehabilitation services a matter of common knowledge: [89].

70 It is apparent that her Honour was concerned with the issue of whether there was evidence of the level of health standards in the applicant's home country which supported the Tribunal's findings. All that her Honour did was to examine the method of identifying standards of

available medical care in other countries by recognising similarities between those countries and Australia which might suggest a comparable availability. In that respect she referenced the observations of McKerracher J in *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 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.

71 On that basis her Honour accepted at [91] that 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, that approach was rejected in relation to Canada. At [87] her Honour said, "unlike the UK and New Zealand, it is not clear the extent to which Australia and Canada have shared historical, cultural and ethnic ties". Consequently, her Honour found at [97] that the finding in dispute amounted to jurisdictional error:

> 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.

72 In a number of ways, therefore, the decision in *Mukiza* does not support Mr Donnelly's submission, but rather contradicts it. The purpose of undertaking a comparison between the health services in the applicant's home country and those in Australia is to ascertain whether the applicant will suffer any and what relevant impediments if returned there. If the health care system in the applicant's home country are similar to Australia, cl 9.2 cannot become relevant in this respect because the applicant would not suffer any impediment from being returned. They would be in precisely the same position if they were not removed.

73 For the purposes of the present case, even if it were shown that the applicant's occasional use of alcohol on the weekends might have given rise to a relevant impediment, as it was accepted that New Zealand has a comparable health care system to Australia, cl 9.2 cannot weigh in his favour.

Conclusion as to whether a relevant issue clearly emerged

74 In this case, where all that was relied upon was evidence of an alleged health condition – alcohol dependency – no issue under cl 9.2 could have emerged for consideration. In the first instance the suggestion that the applicant suffered from a "significant alcohol dependency" or any reasonably identifiable alcohol related disease did not emerge on any "established facts" whether as found by the Tribunal or otherwise. Second, even if it could be said that the applicant had some relevant alcohol related health issue, there was no evidence of any of the other matters in cl 9.2 from which it might be said that the issue in it had been raised. There was nothing which suggested that the alleged medical condition would impede the applicant from establishing or maintaining basic living standards. Rather, the evidence which showed that the applicant was able to maintain his employment suggested to the contrary. Further, there was nothing to suggest that any relevant impediment would arise taking into account the social, medical and economic support available or that such support was less effective than was the position in Australia.

The Tribunal appropriately considered the applicability of cl 9.2

75 It is appropriate to turn to how the Tribunal dealt with the question of the impediments which the applicant faced if returned to New Zealand. Importantly, it considered this issue and sought to assess how, given his conditions, the applicant would fare if he were returned to New Zealand.

76 In the course of its discussion the Tribunal observed that he did not indicate any health concerns in his Personal Circumstances Form and nor did he disclose any when questioned by the Tribunal during the hearing (TR [198]). This appears to be a reference to the question of whether he received any treatment or medication. It also observed (at TR [200]) that should the applicant be deported to New Zealand he would have similar access to health care and rehabilitation services as are available in Australia. There is no challenge to that conclusion in this application.

77 Mr McGlade for the Minister submitted that the reference to "rehabilitation services" by the Tribunal is an obvious reference to the issue of the applicant's rehabilitation from alcohol use or abuse. He submitted that this indicated that the Tribunal considered whether the applicant's alcohol issues would provide a relevant impediment to him were he to be returned to New Zealand. It is, with respect, fair to say that in the circumstances the Tribunal determined that

whatever rehabilitation services the applicant required due to his alcohol consumption, they would be catered for by the New Zealand health services.

78 It was submitted on behalf of the applicant that there was no reference to the Alcohol Dependency Claim by the Tribunal. Whilst that may be so, the submission proceeds on the unwarranted assumption that any claim to that effect was raised. As indicated above, that conclusion cannot be reached.

79 Mr Donnelly further submitted (AS 14(b)) that at [200] the Tribunal was only concerned with rehabilitation services directed to an alleged borderline personality disorder suffered by the applicant. That inference is difficult to draw. The concept of rehabilitation is more likely intended to refer to the alcohol abuse rather than an illness. That conclusion is fortified because elsewhere in its reasons the Tribunal had referred to the applicant's rehabilitation in connection with his use of alcohol on a number of occasions: at [105], [109], [121], [127] and [185]. On a fair reading of its reasons it is apparent that its consideration was as to the availability of rehabilitation services which would be available to the applicant in relation to his use of alcohol. It concluded (at TR[200]) that he would have similar access to health care and rehabilitation services comparable to those in Australia and the necessary corollary is that no impediment of the type specified in cl 9.2 would arise. It is not possible to draw the conclusion that the Tribunal did not relevantly consider under cl 9.2 the potential impediments which might flow from whatever alcohol related issues the applicant suffered.

The removal of the applicant from his social group

80 Mr Donnelly also submitted that the applicant's removal to New Zealand would impact his rehabilitation because he would be separated from his family, siblings, friends and ties is also flawed. In that regard, Mr Donnelly made the following submission (TS 75):

> The difference in this case is that all of his family are in Australia, all of them, that he has been with since he was one years of age when he came to this country. I mean, apart from not being Australian in name, he's Australian in everything else, at least on the evidence as was put forward and, with respect, that would be a matter of common sense, since he has lived here since he was one years of age. The position is, your Honour, is that he would suffer impediments to his health, i.e., alcohol rehabilitation, because he doesn't have the support of his family in that country; in New Zealand.

81 By this submission Mr Donnelly sought to shift the focus of his submission from the availability of health services to assist in the applicant's rehabilitation to the alleged greater difficulties the applicant would encounter in rehabilitating himself due to an absence of social support. Again, no claim to this effect had previously been made by the applicant or his legal

advisors. In addition, there was a deficit of evidence or material as to what social support would be available in New Zealand or what if any impediments may arise because of that. The connection between the absence of family members and the inability to maintain a basic living standard was not apparent. Necessarily, no matter under cl 9.2 arose for consideration by the Tribunal in this regard.

No evidence that the issue was not considered

82 Even if it is assumed in the applicant's favour that an issue emerged that his alleged significant alcohol dependency would cause him relevant impediments were he to be returned to New Zealand, there is force in the Minister's submission that, if it was not taken into account, that was because it was not considered to be material given that it could not affect the outcome of the application. This submission is, of course, founded upon the observations as to the meaning of "where relevant" as articulated in *HSKJ* which is discussed above. Mr McGlade submitted that this conclusion could be reached because, there was no significant evidence of how the alleged alcohol dependency might impede the applicant from establishing himself or maintaining basic living standards. On the assumption that his alcohol dependency had not altered, it appears that he was often gainfully employed in Australia and there was nothing to suggest that his use of alcohol would more adversely affect his job opportunities or his ability to establish himself in New Zealand. To the above it can added that, as the Tribunal concluded that New Zealand has comparable health care to Australia, the issue of any impediments arising from his alleged alcohol related health issues could not weigh in his favour. It follows that, given the manner in which the Tribunal expressed its reasons in relation to the operation of cl 9.2, there are good grounds on which to conclude that it regarded the issue as being immaterial to the outcome.

83 Despite there being some degree of force in the Minister's submissions in this respect, given the other reasons as to why this ground fails, there is no need to reach a final conclusion on it.

The applicant did not discharge the relevant onus

84 The Minister further submitted that there was no evidence on which this Court could conclude that the Tribunal failed to consider the applicant's potential impediments.

85 It is well established that an applicant for judicial review of an administrative action has the onus of establishing on the balance of probabilities the facts on which a claim to relief is founded: *BVD17 v Minister for Immigration and Border Protection* (2019) 268 CLR 29, 45

[38]. In this context, the applicant bears the onus of establishing on the balance of probabilities that the relevant element of the potential impediments were not considered. Moreover, the obligation of the applicant is to establish that the Tribunal did not "consider" (being to give active intellectual consideration to) the relevant impediments. Such a finding will not be made lightly and must be supported by clear evidence: *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 (*Carrascalao*), 364 [48]. It must also be kept in mind that even in cases where there is a substantial and clearly articulated representation or claim, the Tribunal's obligation to consider it does not require it to make a finding or conclusion concerning its veracity: *Guclokol v Minister for Home Affairs* [2020] 279 FCR 611, 624 – 625 [49]. The inference that a matter which is not clearly articulated, prominently advanced or objectively weighted has been overlooked is more difficult to draw: *AXT19 v Minister for Home Affairs* [2020] FCAFC 32 [52] – [58].

86 Here the issue now advanced was omitted from the range of other issues which the applicant asked the Minister and then the Tribunal to consider. The Tribunal addressed all those issues which were expressly raised for its consideration and, overall, they weighed against the conclusion that there was another reason to revoke the cancellation decision. Given the discussion of cl 9.2 undertaken by the Tribunal and the above principles it is not possible to draw the conclusion that it did not consider the claim said to have emerged. It might equally have disregarded it as being immaterial.

87 Ground 1 also fails for this reason as well.

Reliance on LRMM

88 Mr Donnelly, in his oral submissions, relied on the decision of Logan J in *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 (*LRMM*). He submitted that the present case was "on all fours" with it (TS 7) and, indeed, that the applicant's case here is stronger because, in *LRMM*, the Tribunal had given very heavy weight to the extent of impediments, but in this case only slight weight had been given (TS 27). Logan J's finding on materiality at [32] was also said to apply by analogy (TS 24).

89 Reliance on *LRMM* does not advance the applicant's case but, given the emphasis placed on it, it is necessary to consider it in some detail.

The decision in LRMM

90 *LRMM* involved a non-citizen who was born in Kenya but whose home country of reference was considered to be Ethiopia. His protection visa had been cancelled under s 501(3A) and, although he made written representations to the Minister requesting revocation of the cancellation, the Minister was not satisfied that there was another reason why the cancellation decision should be revoked such that the visa remained cancelled. The Tribunal affirmed the Minister's delegate's decision and the applicant sought judicial review in the Federal Court.

91 One of the grounds for review was that there was a constructive failure by the Tribunal to exercise jurisdiction because it did not consider the unexpressed but allegedly clearly emerged claim that the applicant would suffer relevant impediments (within the meaning of cl 14.5 of Direction No 79) by reason of his established alcohol dependency. Logan J contextualised the issue for consideration at paragraph [9] of his reasons as being whether the Tribunal had failed to take into account a relevant consideration in making its decision, that being the applicant's health concern which was characterised as an "alcohol dependency disorder". There was evidence in the form of a report before the Tribunal from a clinical psychologist that, as a provisional diagnosis, the applicant suffered from "alcohol dependency disorder" (*LRMM* at [14]). This issue was a feature of the Tribunal's reasoning in respect of the risk of the applicant reoffending and weighed heavily against revocation of the cancellation of the applicant's visa (*LRMM* at [18]). However, his Honour observed that the Tribunal did not address the applicant's alcohol disorder as was required under cl 14.5 of Direction No 79 (the progenitor of cl 9.2 of Direction No 90); and in relation to that issue, noted at [12] that there was no reference to what medical support, if any, might be available to the applicant in Ethiopia. The Tribunal, however, did consider another condition specified by the clinical psychologist, that being diagnosed adjustment disorder. It had regard to a DFAT report which provided that mental health services were available in Ethiopia, but no consideration was given to whether any services were available to support his alcohol dependency disorder. An important aspect of His Honour's reasoning on this issue appears at [27] where he said:

> 27 Indeed, so important was the subject of the applicant's difficulties with alcohol to its reasoning process in respect of risk, it seems to me that the Tribunal on this occasion, and with all respect, has just forgotten that it was additionally necessary to advert to this health condition separately, as ministerially required, when addressing the requirements of [14.5]. Had the Tribunal addressed this subject, it may well have had to confront the discounting promoted in the reply submission on behalf of the applicant. It might also have had to confront the presence or otherwise of any medical facilities in Ethiopia to provide programs for rehabilitation or treatment of those with alcohol

> dependency disorder. A fair reading of the reference of the minister's specification of health in his direction is that, necessarily, that reference embraces alcohol dependency disorder.

92 His Honour held that the failure by the Tribunal to take this into account was a relevant consideration which constituted jurisdictional error because there was a realistic possibility that the decision could have been different. His Honour reasoned as follows at [32]:

> 32 The Minister, understandably, pointed to the strength of the Tribunal's finding in respect of risk as indicative of an absence of any realistic possibility. However, when one looks to the reasoning process in respect of the assessment of risk, one finds as I have indicated within that, reliance, amongst other things, upon the history of the applicant's drinking problem. Quite what might be the ramifications for the applicant if removed to Ethiopia was addressed not at all in relation to his alcohol dependency. One might apprehend that it would intrude not just on health but also upon ability to obtain work or otherwise settle in that country. In my view, consideration of that subject does carry with it a realistic possibility that the administrative decision might be different. It is not for me, obviously, to make any such decision, only to recognise the existence of a realistic possibility.

93 It is apparent that all of the evidence which was before the Tribunal in that case was not recited in his Honour's *ex tempore* reasons. It may well have been that there was some evidence of the nature of the medical services available in Ethiopia to support the applicant's alcohol dependency and the extent to which that might have been prevented him from establishing a basic living standard in the absence of assistance. However, Mr Donnelly submitted that *LRMM* stands for the proposition that all that is required to raise a relevant issue under cl 14.5 of Direction No 79 (or cl 9.2 of the Direction) is evidence that the applicant suffered from some medical condition. Given that all of the relevant facts in that case are not apparent on the learned judge's reasons that should not be accepted. As indicated above, it would involve an unreal construction of those clauses to suggest that as soon as there is evidence that the applicant suffers from some ailment, is of a particular age, speaks a particular language or is of a particular culture, the Tribunal must then undertake its own factual inquiries as to ascertain any evidence which would have the consequence that they would result in some impediment.

The alleged applicability to the present case

94 Mr Donnelly submitted that *LRMM* should apply by analogy given the similarities with the present case. Primarily, he relied on the applicant in the present matter having an "alcohol dependency disorder", that there was an expert report stating that the applicant needed treatment for alcohol issues which were not under remedial management and control (ts 19); that although the Tribunal specifically turned its mind to certain aspects of the expert report, it

made no reference at all to any alcohol abuse or alcohol issues (ts 20); that despite the reference at TR [200] there was simply no analysis or reference to alcohol at all; and that on the principle in *Carrascalao* an active intellectual process would require the Tribunal to refer to the alcohol issue and make findings of it in relation to the extent of impediments (ts 21). Relying on the observations of Logan J at [26] and [27] of *LRMM*, it was submitted that an inference could be drawn that the Tribunal had simply forgotten to address such an important issue which was "held against the applicant and led to a finding that he was a significant risk of reoffending but … the fact that it's not referred to at all; exactly like *LRMM*, the inference is drawn that it simply was not lawfully considered" (ts 23).

LRMM is distinguishable

95 The first flaw in Mr Donnelly's submission that the present case was on "all fours" with *LRRM* lies in his assertion that the applicant had an "alcohol dependency disorder". In his written submission he referred to the applicant's condition as being a "significant alcohol dependency", no doubt in an attempt to give the facts of this case some parallel with *LRRM*. However, there was no evidence that the applicant suffered from that condition and the Tribunal cannot be faulted for not referring to it. In the course of his address, Mr Donnelly subsequently retreated from using that nomenclature and described the applicant's condition as "longstanding alcohol issues" (ts 19), but even that description is questionable. It should be noted that the applicant in *LRMM* was the subject of a formal diagnosis of alcohol dependency disorder which is far from the circumstances of the present case. Whilst it may be accepted that the word "health" in cl 9.2(1)(a) does not necessitate a formal diagnosis of a medical condition before a relevant consideration might arise, there must be, at least, evidence of some health related issue which is of such significance that it might interfere with the applicant's capacity to establish themselves in their home country. Here, that evidence was absent. Indeed, the available material pointed in the opposite direction. It is apparent that, despite the applicant's use of alcohol he was able to maintain employment. Although there was evidence of the report of a pre-sentencing report prepared by Mr Perros in December 2020, it was given limited weight by the Tribunal (TR [102]). It follows that on the "established facts" there was no evidence of any health related issue which might begin to raise cl 9.2 for consideration.

96 The second difficulty in applying *LRRM* in the present circumstances is that it cannot be inferred that the Tribunal failed to consider any impediments the applicant would face in connection with his alcohol dependency disorder or other vaguely described alcohol issues.

No such difficulty arose in *LRMM*. In determining whether it can be inferred that something has been overlooked each case must be considered on its own facts. As Mr McGlade rightly submitted, there did not appear to have been any dispute in *LRMM* that the Tribunal was required to and did not consider the impediments associated with the applicant's alcohol dependency, whereas in this case those matters were live issues (ts 60).

97 In the result, the circumstances of *LRMM* are far removed from those of the present case and there is no relevant comparison. Moreover, on the correct interpretation of cl 9.2 it can only clearly emerge as a "relevant" consideration where there is some evidence of each of its several elements.

Other attempts to rely upon LRRM

98 In *El Khoueiry v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 247 (*El Khoueiry*) the applicant unsuccessfully sought to rely on the reasoning in *LRMM*. It had been contended that on the face of the Tribunal's several findings about his serious and sustained drug habit, the Tribunal was mandatorily required to consider that habit as a health issue when considering cl 9(1)(b). It was submitted that this was so regardless of whether Mr El Khoueiry raised that matter himself, because it was an unarticulated claim that 'clearly emerged' on the material in the context of the Tribunal's consideration of the primary consideration of the protection of the Australian community.

99 SC Derrington J held that, not only did Mr El Khoueiry make no specific representation about any health issue, on a fair reading of the material none could be said to 'clearly emerge' in the same manner found in *LRMM*. The only medical report referred to in the materials, and by the Tribunal (Tribunal's reasons at [14] – [15]), was that of psychologist whose report was dated 22 December 2010 and which appears to have been prepared in respect of the applicant's sentencing before the District Court of South Australia on 9 March 2011. Nothing more recent was in evidence. Her Honour also found that even if error were established, that error would not be material. In other words, there was no possibility of a different decision had Mr El Khoueiry's drug addiction been considered expressly as a health issue within the meaning of cl 9.2 of Direction No 90.

100 *LRRM* was also distinguished by Logan J in *Batson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1660.

Materiality of error

101 It was submitted by Mr Donnelly that, if the Tribunal had complied with its mandatory obligation and had regard to the applicant's health issues in relation to alcohol, then greater attribution of weight could have been given to the other consideration of extent of impediments if removed (ts 24). Relying on Logan J's materiality finding in LRMM (at [32]), it was contended that the applicant's long-standing alcohol issues could impact his ability to obtain work in New Zealand and to stay in work, especially due to his criminal history.

102 It is for the applicant to establish that any error committed by the Tribunal was material. It will be if, but for the error, there was on the balance of probabilities a "realistic possibility" that the decision could have been different: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [4] and [45] – [50]; *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590 (*MZAPC*) at [38] – [39]. Where it is improbable that the result could have been different, the "realistic probability" threshold is not satisfied: *DNQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 275 FCR 517 at [60].

103 In order to assess the materiality of an error, a reconstruction must occur by reference to a counterfactual considered in light of the totality of the evidence: *Chamoun v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 276 FCR 75 at [70]; *MZAPC* at [38]; and the question is one of fact which the Court must resolve by reference to whatever inferences are available on the evidence: *PQSM v Minister for Home Affairs* (2020) 279 FCR 175 (*PQSM*) at [145] – [155]; *MZAPC* at [38]. In performing this task the Court should have regard to the Tribunal's reasons and findings as well as the objective weight capable of being attributed to the relevant evidence relating to the materiality issue: *PQSM* at [153].

104 As the Minister submitted, in the present case given the findings and weight attributions, this case was far from a borderline one. Given the Tribunal's strong conclusions as to the weight attributable to Primary Consideration 1 and Primary Consideration 4, it was highly unlikely that even if the impact of other considerations was increased the result would change. As the Tribunal found, to the extent to which the other considerations weighed in favour or revocation, even combined with Primary Consideration 3, "they did not in any way outweigh the very heavy and determinative weight the Tribunal has attributed to Primary Consideration 1,

supported by the heavy weight the Tribunal has attributed to Primary Consideration 4 of the Direction" (at TR [236]).

105 In those circumstances, even if the Tribunal had committed the alleged error there was no realistic possibility that it would have reached any different conclusion. It had found that the applicant had engaged in very serious criminal conduct, that he represented a significant likelihood of reoffending (which, if that occurred would likely cause significant physical or psychological harm to his victims). In circumstances where it observed that any risk of harm would have been unacceptable to the Australian community, "even strong countervailing consideration may be insufficient to justify not revoking the cancellation decision". In these circumstances it is difficult to see any pathway by which it could be said that there was any realistic possibility of the Tribunal reaching a different conclusion had it not made the error which the applicant alleges.

106 However, the immateriality of cl 9.2 to the outcome of the decision occurs at a more fundamental level. It was not submitted that the finding that the medical services in New Zealand are the same as those in Australia was in error (TR [200]) and, it follows, that any relevant impediments arising from the applicant's alcohol issues would be no different to those he would suffer in Australia. The consequence is that if this issue had been considered as the applicant claims it should have been, it would not have weighed in his favour.

107 The conclusion is that Ground 1 must also necessarily fail because any error was immaterial.

Ground 2 – legal unreasonableness

108 The second ground of review is that the decision of the Tribunal was irrational, illogical and/or legally unreasonable. The applicant submitted that the Tribunal's finding that any hardships which the applicant would face (emotional, financial or otherwise) were he to be returned to New Zealand, were likely to be temporary until he is able to establish himself and potentially reconnect with distant relatives was unreasonable or illogical. This was referred to by the applicant as "the Hardship Finding" and is said to be found at paragraph [201] of the Tribunal's reasons where it said:

> Should the Applicant be deported to New Zealand, he would suffer no language or cultural barriers. Any hardships the Applicant may face (emotional, financial, or otherwise) with resettlement would likely be temporary until he is able to establish himself and potentially re-connect with distant relatives. With respect to finding work, the Tribunal observes that the Applicant stated he as a Certificate III in Building and Construction, and that his former employer Mr SL would provide a reference for him should he face deportation. As the Applicant is still relatively young at 33 years of

> age, it is not unreasonable to assume that he would be able to reinvolve himself in the concreting industry in New Zealand should he be deported.

109 Mr Donnelly submitted that the Tribunal should have concluded that the applicant would suffer pronounced emotional and psychological hardship were he to be removed to New Zealand. In this respect he relied upon the following evidence which was before the Tribunal:

(a) That the applicant had given evidence that if he was removed it would lead him to lose his whole life, that he had never had to survive on his own previously and that he did not know whether he could do that in New Zealand;

(b) That in his Personal Circumstances Form, he indicated that he was in a 16 year relationship with his partner, was looking to get married, build a home and grow his family. He added that the emotional and financial strain would be devastating not to mention the impact it would have on the relationship and the future child;

(c) That the applicant's partner had given evidence that he had no family in New Zealand and does not know anything about what might confront him there. Sending him there would likely open old wounds of abandonment and would disadvantage him;

(d) That a statement from one of his close friends, indicated that deporting him would cause him to suffer old trauma and damage his mental health and well-being;

(e) In a statement from his eldest sister, it was alleged that deporting the applicant to New Zealand to continue that path on his own would cause him more harm than good and he knows no other family or friends than here in Australia and that the family in New Zealand are strangers to him;

(f) In a statement from the applicant's partner's mother it was said that the applicant did not know how to control the hurt and fear that had pervaded his life and that deporting him to a country where he will not have any support would "destroy a family and a future for my daughter, their child and her hopes and dreams".

(g) In a statement from the applicant's sister it was said that the applicant's whole support network is in Australia and it would keep him on track where he has no strong connection in New Zealand.

The alleged irrationally or illogicality

110 The applicant's apparent concern focuses upon what it says is the finding of temporary emotional hardship which will be suffered by him if deported and that a finding of prolonged, protracted, lifelong emotional hardship should have been made. Whilst he accepted the

Tribunal (at TR [204]) acknowledged he claimed not to be familiar with relatives who reside in New Zealand, that his family remains in Australia including his partner and soon-to-be-born child, it was submitted that this conclusion ignored the profound emotional and psychological hardship advanced by the evidence. It was further submitted that the Tribunal's hardship finding was made without it accepting or rejecting the evidence and without any regard for common sense bearing in mind the inevitable emotional and psychological hardships that would flow from removal from the country to a strange place. It was also submitted that the Tribunal did not act rationally in making the hardship finding and that the only conclusion would be that the removal of the applicant would be a crushing blow to him deeply affecting him, his family and his community.

Relevant principles

111 Mr McGlade for the Minister correctly identified that the principles of unreasonableness are not apposite to the present circumstances: *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 166 at [21] (*QYFM*). The correct principles are those concerned with illogicality or irrationality and they necessitate a very high threshold requiring extreme illogicality or irrationality to be shown before a decision may be set aside: *Minister for Immigration and Border Protection v MZZMX* (2020) 280 FCR 1 [23] – [25]. In general terms it will have to be shown that no other logical or rational decision-maker could come to the decision or conclusion reached by the decision-maker: *QYFM* [21]; *Singh v Minister for Home Affairs* (2020) 274 FCR 506, 524 – 525 [72] – [78].

112 Further, where, as here, the alleged illogicality or irrationality occurs in the process of fact finding, that of itself will not necessarily vitiate the decision. As was explained by Wigney J in *Minister for Immigration and Border Protection v SZUXM* (2016) 69 AAR 210:

> 55 Even if an aspect of reasoning, or a particular factual finding, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result… Where the impugned finding is but one of a number of findings that independently may have led to the Tribunal's ultimate conclusion, jurisdictional error will generally not be made out…

No illogicality arose

113 A substantial difficulty with the applicant's submissions is that they focus on the so-called Hardship Finding in isolation. This can be most clearly discerned in paragraph 18 of the written submissions:

> The Tribunal was required to take into account the extent of any impediments that the Applicant would face if removed to New Zealand, including any hardships he would face. The Tribunal found that any hardships including any "*emotional, financial or otherwise*" hardship "*would likely be temporary until he is able to establish himself and potentially re-connect with distant relatives*".

114 In the context of cl 9.2 of the Direction, the first sentence of that core submissions is erroneous. The Tribunal was not required to take into account "any impediments that the Applicant would face if removed to New Zealand". It was required to consider any impediments if the applicant were removed in *establishing themselves and maintaining basic living standards*. In that respect it is only where the emotional impact of removal on an applicant may impede them in that manner that it could be relevant to the Tribunal's determination.

115 It is obvious from the Tribunal's reasons that its assessment of any emotional impact on the applicant of his removal related to the weight to be given to the issue in cl 9.2, being the extent of any impediments which the applicant may face in establishing himself in New Zealand and maintaining a basic living standard. The passage of which the applicant complains appears under that part of the reasons which is headed "Extent of impediments if removed" which is immediately followed by a recitation of the wording of cl 9.2 itself. Thereafter, the Tribunal identified that the applicant was then 33 years of age and had not disclosed any health concerns in his Personal Circumstances statement and nor did he disclose any during the hearing. It also identified that it specifically questioned the applicant about medication or diagnoses of any illnesses. After considering these matters the Tribunal then accepted that the medical support which the applicant might receive in New Zealand would be the same as in Australia.

116 It is, with respect, sufficiently clear that in [201] the Tribunal was not concerned with, and had no reason to be concerned with, the isolated issue of whether deportation would have a profound and lasting emotional impact on the applicant. It was only if there were some evidence that his emotional state would impede him in establishing himself or maintaining basic living standards that it would become relevant. That was not an issue raised by the applicant in any of his submissions or in the material provided to the Minister or to the Tribunal, and there was not one iota of evidence which suggested that the applicant's emotional state would have that effect. To the extent to which the applicant now submits that the Tribunal ought to have considered that the applicant would have been impeded in establishing himself or maintaining a basic living standard due to his emotional state if deported, he is seeking to assert in a circuitous manner that it failed to consider a further claim which, although not

expressly articulated, "clearly emerged" on the material. This is even more obscure than the issue raised in Ground 1.

117 It is clear from the Tribunal's reasoning in paragraph [201] that it was addressing the issue of the applicant establishing himself and his living conditions in New Zealand rather than his ongoing emotional state. In particular, reference was made by the Tribunal to his qualifications in building and construction and that his former employer would provide a reference for him should he face deportation. It also identified that he was relatively young, at 33 years of age, and that he would be able to reinvolve himself in the concreting industry in New Zealand. It is, with respect, pellucid that the Tribunal in that paragraph was referring specifically to the issues to be considered under cl 9.2 of the Direction. Indeed, within the impugned sentence, the Tribunal expressly stated that it was concerned with the applicant's resettlement in New Zealand rather than with the applicant's emotional state generally.

118 It follows that this ground of the application is founded upon a misconstruction of the Tribunal's determination in this respect and can be dismissed for this reason.

The finding was available to the Tribunal

119 Even if one were to construe the Tribunal as having determined that the applicant would face only temporary emotional hardship if removed, such a finding was open to it.

120 Although the applicant relied to a not insignificant extent on the decision in *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 (*Hands*) that case represented no more than a conclusion based on the whole of the evidence of the particular case. It has been repeatedly said that a real danger exists in attempting to draw analogies based upon factual similarities as between different cases. In *Hands* it was held that all the material before the decision-maker was only logically and rationally consistent with a finding that a non-revocation decision would cause lifelong grief and psychological hardship. No similar conclusion can be reached in the present case.

121 As the Minister submitted, here the impugned finding is essentially one concerned with futurity and probability. The Tribunal concluded that if the applicant is removed any hardships would be "likely" to be temporary. This might be compared to the finding in *Hands* that the emotional hardship would be short term. In this sense the making of a probabilistic finding (as to what is likely to occur into the future) renders it more difficult to suggest that no other logical or rational decision-maker could reach it. That is particularly so in the case of a relatively young

and fit man with good employment qualifications. It is difficult to discern from the applicant's extensive criminal history and the lack of deterrent effect of future punishment, that he suffered from any particular emotional sensitivity. Further, as the Tribunal noted, he had the potential to reconnect with distant relatives in New Zealand. This factor also distinguishes this case from that in *Hands*. On this basis it could not be said that a logical and rational decision-maker would not be able to reach the same conclusion as did the Tribunal and, indeed, the conclusion was supported by an evident and intelligent justification.

122 The circumstances in *Hands* were, with respect, particularly unique. The appellant was an accepted member of an Aboriginal community and had grown up and lived with that community from a young age. He also had four adult children with whom he had a good relationship with and saw regularly. Further, he had a long term partner whom he intended to marry and who was not able to travel to New Zealand such that the relationship would necessarily come to an end. Further, there was a significant body of evidence about the "huge" mental and emotional impact on Mr Hands were he to be removed. In the present case the evidence did not have the same quality or objective effect. Whilst a number of individuals said substantially the same thing, namely that removal to New Zealand would be damaging to the applicant's mental health and wellbeing, this does not come close to the type of evidence that existed in *Hands*. The evidence in this case was cast at a high level of generality and in imprecise and emotive terms. Further, as the Minister submitted, the applicant gave evidence before the Tribunal (both in his written statement and orally) and at no time did he indicate in a prominent or significant way that his removal would create any substantial emotional hardship for him, let alone on a lifelong basis.

123 It also ought to be accepted that, even if the alleged Hardship Finding were made by the Tribunal as alleged, it was neither illogical nor irrational. Even if it is thought to be harsh, or that one might express disagreement with it in emphatic terms, that is insufficient to found a jurisdictional error.

124 It necessarily follows that the applicant has not made out the claimed illogicality or irrationality.

Materiality

125 The principles relating to materiality have been set out above. Applied to this instance, if a conclusion of illogicality was reached, such an error would not have vitiated the Tribunal's conclusion in the sense that without the error there was a realistic possibility of a different

outcome. Importantly, the applicant did not attempt to show whether a different result could be reached. He did not submit that a finding that he would suffer irreparable emotional harm could impact on his ability to establish himself and maintain a "basic standard of living". Even if that were assumed in his favour, such that the consideration in cl 9.2 of the Direction was given some more weight, for the reasons which have been given previously it is most unlikely that any alternative conclusion would have been reached. There was no a realistic possibility that could have been the case.

126 It follows that the applicant also fails on Ground 2.

Conclusion

127 It follows that none of the grounds of the application have succeeded. The application must be dismissed. The applicant ought to pay the first respondent's costs of the application to be taxed.

I certify that the preceding one hundred and twenty-seven (127) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Derrington.

Associate: 

Dated: 4 May 2022