FEDERAL COURT OF AUSTRALIA

Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 450

Review of	Application for judicial review of the Administrative Appeals Tribunal decision delivered on 12 October 2021
File number(s):	QUD 356 of 2021
Judgment of:	**SC DERRINGTON J**
Date of judgment:	29 April 2022
Catchwords:	**MIGRATION** – application to review decision of Administrative Appeals Tribunal affirming decision of Minister's delegate not to revoke mandatory cancellation of a visa under s 501CA decision – whether drug use and/or dependency, considered relevant to the risk of recidivism, ought to have been considered as an independent, albeit unarticulated, claim that 'clearly emerged' – whether a mandatory relevant consideration pursuant to s 9(1)(b) of Direction 90.
Legislation:	*Migration Act 1958* (Cth) ss 36, 499, 501(3A), 501(6)(a), 501(7)(c), 501CA, 501CA(3)
Cases cited:	*Ali v Minister for Home Affairs* [2020] FCAFC 109; 278 FCR 627 *AWT15 v Minister for Immigration and Border Protection* [2017] FCA 512 *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503 *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34; 268 CLR 29 *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 73 ALD 321 *El Khoueiry v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 247 *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 *Haritos v Commissioner of Taxation* [2015] FCAFC 92; 233 FCR 315 *Hong v Minister for Immigration and Border Protection*

	[2019] FCAFC 55; 269 FCR 47 *Hong v Minister for Immigration and Border Protection* [2019] HCATrans 230 *Jones v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 285 *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; 267 FCR 320 *Minister for Home Affairs v HSKJ* [2018] FCAFC 217; 266 FCR 591 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590 *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 *Raibevu v Minister for Home Affairs* [2020] FCAFC 35
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	44
Date of hearing:	5 April 2022
Counsel for the Applicant:	Ms L De Ferrari SC
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr B McGlade
Solicitor for the First Respondent:	Sparke Helmore

ORDERS

QUD 356 of 2021

BETWEEN:	**RAMI IBRAHIM** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
ORDER MADE BY:	**SC DERRINGTON J**
DATE OF ORDER:	**29 APRIL 2022**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the first respondent's costs to be assessed if not agreed.

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

REASONS FOR JUDGMENT

SC DERRINGTON J

1 This application raises the sole issue of whether, in the context of a review pursuant to s 501CA of the ***Migration Act*** *1958* (Cth) of the mandatory cancellation of a visa, there was a constructive failure to exercise jurisdiction by the Administrative Appeals **Tribunal** in failing to consider the applicant's 'health' when considering the extent of any impediments that Mr Ibrahim may face if removed from Australia to Lebanon. It is an issue that has arisen in a series of recent proceedings. In each of those proceedings, the gravamen of the complaint has been that a non-citizen's drug or alcohol use and/or dependency, which contributed to the relevant offending and which was considered relevant to the decision-maker's consideration of the non-citizen's risk of recidivism, was not identified by the decision-maker as an independent, albeit unarticulated, claim that 'clearly emerged' from the decision-maker's own findings and the material on which such findings were based, and which was therefore a mandatory consideration in relation to the extent of any impediments the non-citizen may face if removed from Australia to their home country.

2 In the present case, similarly to the previous cases, it is contended that had the Tribunal addressed the subject, it could realistically have led the Tribunal to attribute greater weight to the other consideration of the extent of impediments if removed, which may in turn have altered the balancing of the primary and other considerations in favour of Mr Ibrahim.

3 For the reasons that follow, Mr Ibrahim's application must be dismissed.

Direction 90

4 The requirement that a decision-maker consider the 'extent of any impediments if removed' is imposed by Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (**Direction 90**), which came into force on 15 April 2021, and which was made pursuant to s 499(1) of the Migration Act.

5 Specifically, s 9(1)(b) of Direction 90 provides that the 'extent of any impediments if removed' is one of four 'other considerations' made mandatory, where relevant, for those decision-makers who are tasked with making a decision under s 501 or 501CA of the Migration *Act*. The inclusion of the words 'where relevant' indicate that the duty to consider the matters raised in s 9(1) is not an invariable one, and that what is 'relevant' is a matter of opinion for the

individual decision-maker: *Minister for Home Affairs v HSKJ* [2018] FCAFC 217; 266 FCR 591 at [52] per Greenwood, McKerracher and Burley JJ.

6 Section 7(2) provides that 'primary considerations' (those specified in s 8, being (1) protection of the Australian community, (2) whether the conduct engaged in constituted family violence, (3) the best interests of minor children in Australia, and (4) expectations of the Australian community) should generally be given greater weight than the other considerations. Further guidance in relation to the 'extent of any impediments if removed' is given to decision-makers in paragraph 9.2(1) which provides:

> **9.2 Extent of impediments if removed**
>
> (1) Decision-makers must consider the extent of any impediments that the non-citizen 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;
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> b) whether there are substantial language or cultural barriers; and
>
> c) any social, medical and/or economic support available to them in that country.

The relevant legislative provisions

7 It is important to understand the statutory scheme which underpins the mandatory cancellation of a visa on character grounds and a subsequent application for revocation of such a decision. Section 501(3A) of the *Migration Act* provides that the Minister must cancel a visa that has been granted to a person if:

> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
> . . .; and
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

8 Section 501(6)(a) provides that a person does not pass the character test if the person has a substantial criminal record (as defined by subsection (7)). Section 501(7)(c) provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more. It is not in dispute that Mr Ibrahim did not pass the character test in s 501(1) of the *Migration Act*, because of the operation of subsection (6)(a),

on the basis of subsection (7)(c), having been sentenced to a term of two and a half years' imprisonment for an offence of criminal damage by fire.

9 Section 501CA(3) of the *Migration Act* requires the Minister to invite the person whose visa has been mandatorily cancelled to provide representations about revocation of the original decision.

The Tribunal's decision

10 Mr Ibrahim made representations about revoking the original decision to cancel his visa. As such, his representations are a mandatory relevant consideration: *Minister for Home Affairs v* ***Buadromo*** [2018] FCAFC 151; 267 FCR 320 at [41].

11 The Tribunal is bound by Direction 90. It is required to have regard to the primary considerations and the other considerations identified in that Direction 'where relevant to the decision'. Any such considerations are 'relevant considerations' in a jurisdictional sense: *Minister for Aboriginal Affairs v* ***Peko-Wallsend*** *Ltd* [1986] HCA 40; 162 CLR 24 at 39-40.

12 The Tribunal dealt with the extent of the impediments Mr Ibrahim may face if removed from Australia at [212]-[223] of the **Tribunal's reasons**. After reciting the relevant part of Direction 90, the Tribunal said:

> 213. The Applicant contended that he is unable to return to Lebanon because they have no government and the living conditions would not be as they are in Australia. His immediate family members are all in Australia and his wife and children will remain in Australia if he returns to Lebanon. He submitted he would not be able to support himself there. As noted above, he submitted that general security, economic and political situation in Lebanon would prevent him resettling there.
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> 214. In his request for revocation the Applicant submitted:
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> > I believe after returning to Lebanon after over 14 years in Australia would be near impossible for me. I have no support network, as my family in Lebanon cannot afford to support me. I have no way of making a living. I am informed that it would be difficult if not impossible for me to obtain work in Lebanon and, if I am able to obtain work, it would likely be low paid. I would have to find accommodation, most likely rental accommodation as I do not have any personal savings to enable me to purchase property. I do not know where I would go or how I would find somewhere to live.
>
> As mentioned earlier with respect to the Applicant's fears of returning to Lebanon, the Applicant told the Tribunal that the government in Lebanon was bad and there was no stability there.
>
> 215. The Respondent accepted that the Applicant may face some difficulty in re-establishing himself in Lebanon due to his time spent in Australia, but

submitted these factors would only present short-term hardship and would not preclude resettlement.

216. The Applicant was born in Lebanon, lived and was educated there until he came to Australia when he was 23 years old. He met and married his wife in Lebanon. He speaks Arabic as his first language and is a practicing [sic] Sunni Muslim. He has immediate and extended family remaining in Lebanon, including his parents, three brothers and a sister, aunts and uncles. He indicated that he has ongoing contact with his family, though he indicated that his family members are trying to leave Lebanon to move to another country because it wasn't safe there.

217. There was no medical evidence before the Tribunal to suggest that the Applicant has any particular health needs. When asked at the hearing if he had any current health conditions, the Applicant said he did not. This was consistent with the information in his request for revocation form where he answered '*no*' to the question of whether he had any diagnosed medial [sic] or psychological conditions. It is also consistent with the prison and detention records, and the parole material which indicated that the Applicant did not have any health conditions. However, in the Applicant's son's statement there was a reference to the Applicant suffering two strokes in prison and detention. When asked about this at the hearing the Applicant said he had two heart attacks while in prison or detention. He described fainting and going to the hospital, and being told he had a heart attack. He confirmed he was not taking any medication or receiving treatment for this.

218. As discussed with the Applicant at the hearing, there was no mention in the records from prison or detention which were before the Tribunal of the Applicant being treated for a heart attack or stroke. As expressed to the Applicant, were he to have suffered a significant health issue of that kind, the Tribunal would have expected to find a mention of it in records. There was mention in the material of medical treatment, however no mention of cardiac arrest or stroke. Prison intake records mention that on 24 February 2020, the Applicant indicated '*yes*' to a question whether he had any serious medical issues requiring immediate attention. Records indicate he was taken to 'Crisis Care Unit', but no other details were provided. From the intake record it appears the Applicant was taken to Crisis Care Unit , because he was unresponsive and uncooperative, and health staff considered he required further assessment. On 25 February 2020, he was assessed by medial [sic] staff and rated as having '*no urgent medical problems*'. Parole records indicated that at interview, he reported to be 'in good health and has no diagnosed physical or mental health conditions impacting on his overall wellbeing'. There were records of the Applicant being given sleep medication and pain medication for a toothache.

219. The Tribunal finds that the Applicant has no physical or mental health issues which would present an impediment to his removal.

220. The DFAT Country Information Report indicates that unemployment is a significant problem in Lebanon, particularly for young people. Social protection, government support and access to employment is far more limited in mountainous rural areas than in the coastal belt. Lebanese health outcomes compare favourably with other countries in the region and with middle-income countries elsewhere. The Tribunal considers that there was nothing in the information available to it to suggest that the Applicant would be impeded in establishing himself and maintaining basic living standards in Lebanon, in the

> context of what is generally available to other citizens of that country, taking into account the Applicant's particular circumstances including mature age, generally good health, any lack of language or cultural barriers and a network of family support available to him in Lebanon.
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> …
>
> 223. Overall, taking into account all of the evidence, the Tribunal finds that the extent of impediments if removed, weighs only slightly in favour of revocation of the Cancellation Decision.

[Footnotes omitted]

The complaint

13 Mr Ibrahim's complaint is that the Tribunal simply did not deal at all with his drug use when taking into account his 'health' when considering the extent of any impediments. It is important to recall that where a discretion is unconfined by the terms of the statute, a court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he or she is bound to do so is found in the subject matter, scope and purpose of the Act: *Peko-Wallsend* at 39-40; *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 at [56] per Robertson J; *Buadromo* at [41].

14 Mr Ibrahim sought to support this contention by reference to the decision of Logan J in ***LRMM*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 at [27] who was considering the predecessor to paragraph 9.2(1):

> 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] … 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.

15 As I observed, however, in ***El Khoueiry*** *v Minister for Immigration, Citizenship, Migrant* Services *and Multicultural Affairs* [2022] FCA 247 at [33], where a similar argument was put, *LRMM* concerned a different set of circumstances from those in *El Khoueiry*. The circumstances of the present case are also different from those in *LRMM*. Simply because the Court found in *LRMM* at [29], that 'the Tribunal was obliged, under the heading health, to acknowledge and then address the ramifications of the [diagnosed] alcohol dependency disorder', it does not follow that a similar obligation fell upon the Tribunal in relation to Mr

Ibrahim's drug use when considering his health. Self-evidently, every case must turn on the particular facts and circumstances that are before the decision-maker.

Did the Tribunal fail to take into account a mandatory consideration?

16 In circumstances such as these, the Direction issued under the statute requires a decision-maker to take into account the non-citizen's health *to the extent that his or her health may be an impediment to establishing themselves and maintaining basic living standards* (in the context of what is generally available to other citizens of that country) (emphasis added). The requirement is not an open-ended one in relation to the non-citizen's health.

17 Not only was no representation made by Mr Ibrahim that he had any matter affecting his health which would be an impediment to his establishing himself in Lebanon or that might hinder his maintenance of basic living standards — before the Tribunal, he positively disavowed 'any current health conditions' (Tribunal's reasons at [217]). This was consistent with the position Mr Ibrahim had maintained since his Request for Revocation of a Mandatory Visa Cancellation sent to the Department of Home Affairs through his lawyers on 18 November 2020. In his personal Circumstances Form, Mr Ibrahim answered, 'No' to the question 'Do you have any diagnosed medical or psychological conditions; 'N/A' to 'Medication"; and in his attached statement wrote 'I have now completely stopped taking drugs. I do not think I would be a risk to the community as I no longer take drugs. I have overcome this habit'.

18 Before this Court, it was submitted by Senior Counsel for Mr Ibrahim, relying on the authority of Haritos v Commissioner of Taxation [2015] FCAFC 92; 233 FCR 315 at [126], that the word 'health' in paragraph 9.2(1)(a) of Direction 90 is to be given its ordinary plain meaning, unadorned by the addition of any qualifier such as 'condition' or 'diagnosed medical or psychological condition'. The principle is not in dispute. It was submitted that, by failing to consider Mr Ibrahim's drug dependency and his inability to self-regulate his emotions during the course of his offending as relevant to his 'health', the Tribunal gave a meaning to 'health' that cannot be the ordinary meaning of the word. This error, it is said, has caused the Tribunal to fail to consider an unarticulated claim that 'clearly emerged' before it from its own findings and the material before it, in the sense articulated in AYY17 v Minister for Immigration and Border Protection [2018] FCAFC 89; 261 FCR 503.

19 The Tribunal adverted to Mr Ibrahim's drug use throughout its reasons. From these various observations, it was submitted that the Tribunal 'was content to hold the applicant's health issues concerning unresolved drug addiction and mental health challenges against him' when

considering the primary consideration of protection of the Australian community but 'seems to have entirely forgotten the earlier adverse findings' when 'purporting to consider the applicant's health for the purpose of paragraph 9.2(1)(a)' of Direction 90.

20 First, in assessing the likelihood of his engaging in further criminal conduct, the Tribunal recorded that it had no medical or psychological evidence to confirm the underlying causes of the offending although Mr Ibrahim had claimed 'he was addicted to methylamphetamines and was "high" at the time' of the offence. He also stated that he was 'stressed' and 'depressed' because of his wife's depression and his familial responsibilities (Tribunal's reasons at [114]). The Tribunal referred to a Pre-Sentence Report that was before the sentencing judge which indicated that Mr Ibrahim presented 'with treatment needs with regard to methamphetamine use and with regard to communication and self-regulation deficits' (Tribunal's reasons at [115]).

21 Secondly, the Tribunal said that it 'has serious concerns regarding his insight into his offending and his claimed efforts to address its causes, or managing the stressors that lead him to become addicted to drugs and offend' (Tribunal's reasons at [117]).

22 Thirdly, the Tribunal also expressed 'serious concern' about the lack of any supporting evidence that Mr Ibrahim had undertaken, or was undertaking any drug rehabilitation courses in prison or detention (Tribunal's reasons at [118]). The Tribunal also observed that Mr Ibrahim appeared to have no plan to seek assistance if released and regards himself as having recovered from his drug addiction. The Tribunal observed that if he is again exposed to stressors leading to his prior drug use and offending, his capacity to remain drug free could be put at risk (Tribunal's reasons at [122]). The Tribunal nevertheless accepted that Mr Ibrahim 'had a period of remaining drug free in prison and detention' which was 'consistent with evidence that he tested negative for drugs several times in prison' (Tribunal's reasons at [124]).

23 Fourthly, Mr Ibrahim points to the Parole Assessment notes referred to by the Tribunal, which record that Mr Ibrahim 'presents with deficits in its [sic] emotional regulation skills and requires relapse prevention counselling' (Tribunal's reasons at [128]) as evidence of his current state of health, which the Tribunal 'forgot' to deal with. A similar submission is made with respect to the Tribunal's finding (Tribunal's reasons at [133]) that:

> …the tribunal accepts overall that the applicant presents a low risk of reoffending. However, given his lack of demonstrated commitment to drug rehabilitation or counselling to assist with managing the stresses which, on his evidence caused his drug use and offending, continued minimisation of his responsibility for the Criminal

> Damage Offence, and the uncertainty regarding his living and work arrangements on release, the Tribunal does not consider the likelihood to be very low. Nor could it be said that there is no likelihood of reoffending in the Applicant's circumstances. That is to say, there is no evidence to suggest that the Applicant's risk is something less than a low risk.

24 More generally, it was submitted that a review of the totality of the material before the Tribunal, including a psychologist's report tendered to the sentencing judge, the Pre-Sentence Report, a Risk Management System Prison Reception Intake Assessment, a Treatment Assessment Report prepared in 2021, and a police report that Mr Ibrahim's extended family had attended a health centre for advice on his drug use, supports a finding that the Tribunal failed to consider his unresolved drug addiction and mental health issues.

25 In particular, Mr Ibrahim pointed to the fact that, during his immigration detention, the drug suboxone had been discovered in his incoming mail, as evidence that was before the Tribunal which suggested he had not abstained from drugs even whilst detained. However, before the Tribunal, Mr Ibrahim had denied any knowledge of the drug and he was not charged with respect to the incident. The Tribunal drew no adverse inference from that matter (Tribunal's reasons at [124]).

26 It is said further that as recently as his time in immigration detention, Mr Ibrahim had claimed that he was 'currently completing a Drug and Alcohol course' and that he was 'attending psychologist appointments'. The difficulty with this submission is that the Tribunal found that Mr Ibrahim had not undertaken any such course or program for self-regulation (Tribunal's reasons at [121]).

27 What emerges from the Tribunal's reasons read 'fairly and not in an unduly critical manner' and 'in light of the content of the statutory obligation pursuant to which it was prepared' (BVD17 v Minister for Immigration and Border Protection [2019] HCA 34; 268 CLR 29 at [38]) is that the Tribunal did not find that Mr Ibrahim's drug use nor his inability to self-regulate his emotions were presently matters affecting his health. The Tribunal found that his drug use, and subsequent offending, was caused by his inability to manage the stresses in his life (Tribunal's reasons at [133]) and, on that basis, expressed on several occasions its serious concerns that Mr Ibrahim had taken no steps to address how he might better manage his emotions and avoid falling back into drug use.

28 Mr Ibrahim made no representation that he had any existing issue with, or concern about, his health that would cause him any impediment if removed from Australia. Nevertheless, the

Tribunal considered the historical medical issues that had been raised before the Tribunal, being the suggested heart attacks and stroke whilst in prison or detention (albeit there were no records of any such medical events) (Tribunal's reasons at [218]) and found that Mr Ibrahim had no existing physical or mental health issues (Tribunal's reasons at [219]). The Tribunal considered the country information relevant to Lebanon's health outcomes and found that there was no information available to it to suggest that Mr Ibrahim would be impeded in establishing himself and maintaining basic living standards in Lebanon, in the context of what is generally available to other Lebanese citizens.

29 In these circumstances, no inference can be drawn that the Tribunal failed to engage in an active intellectual process, as was required of it, when considering Mr Ibrahim's health for the purposes of paragraph 9.2(1)(a) of Direction 90: Carrascalao v Minister for Immigratio*n and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [36]-[46]. Having engaged in the required active intellectual process, it formed the view that Mr Ibrahim's health was not an impediment he might face to establishing himself and maintaining basic living standards, in the context of what is generally available to other citizens of Lebanon.

Did the claim clearly emerge on the materials?

30 Similarly, no claim that Mr Ibrahim's health was such that it may be an impediment to his establishing himself and maintaining basic living standards in Lebanon, in the context of what is generally available to other Lebanese citizens, clearly emerged from the materials: NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) [2004] FCAFC 263; 144 FCR 1 at [55] and [68] per Black CJ, French and Selway JJ; AWT15 v Minister for Immigration and Border Protection [2017] FCA 512 at [67] per Barker J; AYY17 at [18] per Collier, McKerracher and Banks-Smith JJ.

31 The principles relevant to determining whether a claim 'clearly emerges' from the material were summarised by Barker J in *AWT15* at [67]-[68] and endorsed by the Full Court in *AYY17* at [18]:

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

(b) the fact that a claim **might** be seen to arise on the 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 for determining whether an unarticulated claim has been "squarely raised" or "clearly emerges" from the materials ä 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.

32 It is accepted that the circumstances of *AYYI*7, being concerned with what claims a decision-maker is required to consider in the context of an application for a protection visa, are different from the context of s 501CA. It may therefore be doubted whether the principles in AYY17 are readily applicable in the context of a case involving an application for revocation of the mandatory cancellation of a visa on character grounds, see for example Jones v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 285 at [57]-[58]. In the former case, a 'claim' can be identified by reference to a body of facts which, if accepted, would establish that a person has a right to protection under s 36 of the Migration Act. In the context of s 501CA, by contrast, the power is only enlivened by an applicant making representations in response to an invitation to do so. Thus, the obligation on a decision-maker is to consider representations which are 'clearly expressed and significant': Ali v Minister for Home Affairs [2020] FCAFC 109; 278 FCR 627 at [78(c)] per Collier, Reeves and Derrington JJ. Acceptance of the facts underpinning such a representation does not mean, however, that such acceptance is dispositive of the case. That remains a matter for the decision-maker in the exercise of the broad evaluative task. Further, representations are advanced as the very reason why a visa cancellation should be revoked in the particular circumstances of the applicant. It is difficult to understand how, in that context, an unarticulated representation is one that can readily be categorised as one that clearly emerges from the materials.

33 However, in Hong v Minister for Immigration and Border Protection [2019] FCAFC 55; 269 FCR 47 at [66], Bromwich and Wheelahan JJ (Logan J dissenting) accepted that much of the guidance summarised in AYY17 draws on cases concerning applications for protection visas where claims in support of asylum or claims in support of complementary protection may arise. Nevertheless, in the context of a matter concerning s 501CA, their Honours said, at [69]-[70]:

> We do not consider that the primary judge's reference to the guidance in *AYY17* in formulating his conclusions at [36]-[42], which we have summarised at [40]-[43] above, involved any error. At the heart of the guidance in *AYY17* is the idea that the Tribunal is only required to consider matters that are raised by argument, or which clearly emerge from the materials. That is equally so in relation to matters advanced in proceedings before the Tribunal involving reviews of decisions under s 501CA(4) of the Act, where the section contemplates that the former visa-holder may advance matters by way of representation directed to why the power of revocation should be exercised.
>
> In the circumstances of this case, and without more, it was not enough for a claim to be advanced before the Tribunal, so as to require it to be considered as part of its irreducible jurisdictional task, for the appellant to rely upon two sentences in the original personal circumstances form accompanying the appellant's visa cancellation revocation request…

34 An application for special leave in Hong was refused by the High Court: Hong v Minister for Immigration and Border Protection [2019] HCATrans 230.

35 In Raibevu v Minister for Home Affairs [2020] FCAFC 35 per Perram, Markovic and Charlesworth JJ, the Full Court referred to the observations of Bromwich and Wheelahan JJ in *Hong* and said, at [88]:

> For present purposes, the requirement to properly apprehend and consider each "claim" may be assumed to condition the personal exercise by the Minister of the power conferred by s 501CA(4). On that assumption, it would be necessary to consider the issues that were either expressly articulated or otherwise clearly raised on the evidentiary materials, having particular regard to the reasons Mr Raibevu had advanced as to why the cancellation decision should be revoked.

36 It is unnecessary to conclude definitively whether the principles *AYY17* do extend to cases involving an application for revocation of the mandatory cancellation of a visa on character grounds where the express representations of an applicant will not necessarily be dispositive but rather raise matters which might weigh in the exercise of a discretion. If they do not apply, the Tribunal cannot be criticised for failing to consider a matter that was not the subject of a clearly articulated representation by Mr Ibrahim: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 73 ALD 321 at [24] per Gummow and Callinan JJ.

37 However, on the assumption that they apply equally to decisions under 501 and 501CA, the Tribunal has not failed to consider a claim that clearly emerged from its findings or on the materials before the Tribunal. There were no established facts that Mr Ibrahim's present state of health was other than as he himself told the Tribunal, being that he had no current health conditions. The materials before the Tribunal did not establish the facts that Mr Ibrahim had an ongoing drug addiction or psychological condition. At their highest, the materials established that Mr Ibrahim had stresses in his life, caused by the need to support his wife and children, which stresses had in the past caused him to be unable to self-regulate his emotions and to use drugs.

38 Further, the materials before the Tribunal established that Lebanese health outcomes compare favourably with other countries in the region and with middle-income countries and that there was nothing to suggest that a person such as Mr Ibrahim, who was in generally good health, would be impeded in establishing himself and maintaining basic living standards. Moreover, there was nothing in the material before the Tribunal to suggest that a person who might be susceptible to relapsing into drug use on account of social stressors would be impeded in establishing himself and maintaining basic living standards, in the context of what is generally available to other citizens of Lebanon.

39 No independent claim clearly emerged from the Tribunal's findings nor the material before it.

Was any alleged error material?

40 In light of the findings above, it is strictly unnecessary to consider whether the alleged error by the Tribunal was material.

41 Mr Ibrahim submitted that the alleged error of the Tribunal in failing to consider his 'health' was material in the sense that, but for the error, there was a realistic possibility that the decision could have been different. Whether the decision that was in fact made could have been different had Mr Ibrahim's 'health' been considered, 'falls to be determined as a matter of reasonable conjecture within the parameters set by the historical facts that have been determined on the balance of probabilities': MZAPC v Minister for Immigration and Border Protection [2021] HCA 17 at [38]. The High Court went on to explain, at [39]:

> Bearing the overall onus of proving jurisdictional error, the plaintiff in an application for judicial review must bear the onus of proving on the balance of probabilities all the historical facts necessary to sustain the requisite reasonable conjecture. The burden of the plaintiff is not to prove on the balance of probabilities that a different decision *would* have been made…the burden of the plaintiff is to prove on the balance of

> probabilities the historical facts necessary to **enable the court to be satisfied of the realistic possibility** that a different decision *could* have been made…
>
> (footnotes deleted; emphasis added)

42 As has already been explained, at their highest, the historical facts establish that Mr Ibrahim might be susceptible to relapsing into drug use is he is unable to self-regulate his emotions and is once again exposed to the stress factors to which he has been susceptible in the past. Such a possibility is highly speculative. In considering the impediments Mr Ibrahim may face on his return, although the Tribunal found that they weighed in Mr Ibrahim's favour, it found that none of them was 'insurmountable' (Tribunal's reasons at [252]). Even if Mr Ibrahim could prove on the balance of probabilities that he might relapse into drug use, contrary to his express assertions to the contrary, there was no evidence at all as to whether that circumstance would pose an impediment, let alone an insurmountable impediment, to his establishing himself and maintaining basic living standards. On the contrary, the evidence established that the particular stress factors which led to Mr Ibrahim's drug use would be somewhat ameliorated if he returned to Lebanon. He would no longer have the primary responsibility for his children and wife (noting that he is now separated from his wife), and his wife's family would provide ongoing financial and emotional support to his wife and children (Tribunal's reasons at [238]).

43 In light of the parameters set by the facts which have been determined by the Tribunal, it is difficult to see that there is a realistic possibility that a different decision could have been made if the Tribunal had considered whether Mr Ibrahim may relapse into methylamphetamine use on his return to Lebanon which would constitute an impediment to his establishing himself and maintaining basic living standards.

Disposition

44 It follows that no jurisdictional error has been established and the application must be dismissed.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice SC Derrington.

Associate: 

Dated: 29 April 2022