FEDERAL COURT OF AUSTRALIA

X v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1567

File number:	NSD 648 of 2020
Judgment of:	**MARKOVIC J**
Date of judgment:	14 December 2021
Catchwords:	**MIGRATION** – application for review of a decision of the Administrative Appeals Tribunal affirming decision of delegate of first respondent not to revoke a decision to cancel applicant's Class WA Subclass Bridging A visa – whether Tribunal made findings for which there was no evidence – where Tribunal found that applicant would have access to "welfare services" in W – whether Tribunal's decision was legally unreasonable – where Tribunal found that applicant would face a lack of social, medical and economic support in W – application dismissed
Legislation:	*Migration Act 1958* (Cth) ss 501, 501CA)
Cases cited:	*BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 *Minister for Immigration v Stretton* (2016) 237 FCR 1 *Muggeridge v Minister for Immigration and Border Protection* (2017) 255 FCR 81 *Schmidt v Minister for Immigration and Border Protection* [2018] FCA 1162; (2018) 162 ALD 495 *Zheng v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2021] FCA 1509
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	65
Date of hearing:	24 May 2021
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Scott Calnan, Lawyer
Counsel for the Respondents:	Mr B D Kaplan
Solicitor for the	Sparke Helmore Lawyers

Respondents:

ORDERS

NSD 648 of 2020

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

ORDER MADE BY: **MARKOVIC J**

DATE OF ORDER: **14 DECEMBER 2021**

THE COURT ORDERS THAT:

1. The application be dismissed.

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

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

REASONS FOR JUDGMENT

MARKOVIC J:

1 The applicant, X, seeks judicial review of a decision of the Administrative Appeals **Tribunal** made on 12 May 2020. The Tribunal had affirmed a decision of a delegate of the first respondent (**Minister**) made on 17 February 2020 not to revoke a decision made on 6 November 2017 to cancel Mr X's Class WA Subclass Bridging A **visa** pursuant to s 501(3A) of the *Migration Act 1958* (Cth) (**Act**).

BACKGROUND

2 Mr X is a citizen of X. He arrived in Australia in June 2014.

3 On 29 September 2017, Mr X was convicted in the District Court of New South Wales of two counts of sexual intercourse without consent and one count of assault with an act of indecency, for which he was sentenced to terms of imprisonment of five years, two years and three months respectively.

4 As noted at [0] above, on 6 November 2017, while he was serving a sentence of imprisonment on a full-time basis, Mr X's visa was cancelled under s 501(3A) of the Act because he did not pass the character test (**Cancellation Decision**).

5 On 16 November 2017, Mr X made a request for revocation of the Cancellation Decision. On 18 February 2020, Mr X was notified that a delegate of the Minister had determined pursuant to s 501CA(4) of the Act not to revoke that decision (**Revocation Decision**).

6 On 24 February 2020, Mr X sought review by the Tribunal of the Revocation Decision.

7 On 12 May 2020, the Tribunal affirmed the Revocation Decision.

THE TRIBUNAL'S DECISION

8 It was common ground between the parties that Mr X did not pass the character test because he had a "substantial criminal record" within the meaning of s 501(7)(c) of the Act and that he was serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the state of New South Wales. Accordingly, the sole issue before the Tribunal was whether there was another reason why the Cancellation Decision should be revoked, having regard to "Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA" (**Direction 79**).

9 The Tribunal set out the objective expressed in Direction 79 of regulating, in the national interest, the coming into, and presence in, Australia of non-citizens. It went on to outline the guiding principles set out in cll 6.2, 6.3, 7 and 8 of Direction 79 and, with those principles in mind, turned to consider the primary and other considerations set out in Pt C of Direction 79.

10 In relation to the primary considerations, the Tribunal found that the protection of the Australian community from criminal or other serious conduct and the expectations of the Australian community weighed against revocation of the Cancellation Decision, while the best interests of minor children in Australia affected by the Cancellation Decision weighed in favour of revocation but should be given limited weight.

11 In relation to the non-exhaustive list of other considerations set out in Direction 79, the Tribunal found that Mr X was not owed international non-refoulement obligations, the strength, nature and duration of Mr X ties with Australia weighed heavily in favour of revocation of the Cancellation Decision, there was no evidence of any impact on Australian business interests or impact on victims, and the extent of impediments if removed from Australia weighed in favour of the revocation of the Cancellation Decision.

12 The Tribunal's consideration of the last factor, the extent of impediments if removed from Australia, is central to Mr X's application.

13 At [181] of its decision record the Tribunal set out cl 14.5(1) of the Direction 79 which provides:

> 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;
>
> b) Whether there are substantial language or cultural barriers; and
>
> c) Any social, medical and/or economic support available to them in that country.

14 At [182]-[187] the Tribunal reasoned as follows in relation to this factor:

> [182] Having regard to sub-paragraphs 14.5(1)(a) and (c) of the Direction, the Applicant is currently aged 31 years. He has been diagnosed with a depressive illness and a sleep disorder and is currently taking prescribed medication. The DFAT report indicates that mental health services in W are limited, but they are available. The Applicant will have access to health services, treatment and welfare services in W, although the standard and ease

of access may not be of the same high standard and as widely available as those services are to him in Australia. The Applicant may also suffer disadvantage if his medical records and history are not made available to his healthcare providers in W.

[183] Having regard to sub-paragraph 14.5(1)(b), the Applicant resided in W until the age of 19 years when he departed to study in Malaysia. The Tribunal finds that he would not face any significant linguistic or cultural barriers upon his return to W. Both his parents and one of his brothers still reside in W, and the Applicant has acknowledged that he has extensive family and network connections in W.

[184] The Applicant claims he will face financial difficulties in W due to its low employment rate and him not having relevant skills to establish himself. The evidence before the Tribunal is that the Applicant holds a Bachelor of Business Studies and has completed a number of course and programs in gaol, and he holds certificates in welding and digital media and technology. In addition, he is an experienced tiler and has run a number of businesses in Australia and Malaysia. The Applicant also has the support of his family in W. His family members are educated and established, and should be able to provide him with assistance while he finds work in W. The Applicant does not come from a rural area and would have the benefit of his family and social network for emotional and practical support.

[185] The Tribunal finds that despite the support of his family in W, the Applicant will face practical, financial and emotional hardship upon return, due to his separation from his wife and stepson, lack of social, medical and economic support and his expressed fear of harm on return. The Applicant's hardship will be exacerbated by the negative impacts that relocating to W would have on his wife and stepson, should they choose to move there if his visa remains cancelled and he must return to W.

[186] The Tribunal finds that the Applicant's familiarity and extensive family and community ties with W are such that he will not face significant impediments in re-establishing himself if he returns. However, he will suffer considerable emotional hardship as a consequence of the separation from his wife and stepson, particularly if they are unable to relocate to W to live with him.

[187] Having considered the factors in paragraph 14.5(1) of the Direction, the Tribunal finds that this consideration weighs in favour of the revocation of the Mandatory Visa Cancellation Decision.

(Footnotes omitted.)

15 The Tribunal weighed the relevant competing considerations and noted that two primary considerations weighed against revocation while one primary consideration and one other relevant consideration weighed in favour of revocation. The Tribunal concluded that it was not satisfied that there existed "another reason" why the Cancellation Decision should be revoked and accordingly affirmed the Revocation Decision.

LEGISLATIVE FRAMEWORK

16 Section 501 of the Act governs the cancellation of a visa.

17 Section 501(3A) of the Act provides for mandatory cancellation of a visa in certain circumstances. That section provides:

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

18 Section 501(6)(a) of the Act relevantly provides that, for the purposes of s 501 of the Act, a person does not pass the character test if the person has a substantial criminal record. Section 501(7) of the Act provides that a person has a "substantial criminal record" if, among other things, that person has been sentenced to a term of imprisonment of 12 months or more.

19 Section 501CA of the Act applies if the Minister makes a decision, referred to as "the original decision", under s 501(3A) to cancel a visa that has been granted to a person. Section 501CA(4) of the Act confers a discretion upon the Minister to revoke a cancellation decision made under s 501(3A) and provides:

> The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked.

GROUNDS OF REVIEW

20 In his amended originating application, filed on 4 May 2021, Mr X raised the following two grounds:

> 1. **The second respondent (Tribunal) made findings for which there was no evidence.**

(a) The Tribunal concluded that the applicant will have access to welfare services in W (**welfare finding**).

(b) There was no probative evidence before the Tribunal capable of supporting the welfare finding.

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

(a) The applicant repeats Ground 1 above.

(b) The Tribunal concluded that the applicant will have access to health services, treatment and welfare services in W.

(c) In contrast to (a) above, the Tribunal elsewhere concluded that the applicant will have a lack of social, medical and economic support in W.

(Emphasis in original.)

21 I address each ground in turn.

GROUND 1

22 By ground 1 of his amended application Mr X contends that there was no evidence to support the Tribunal's findings at [182] of its decision record that "he will have access to … welfare services in W, although the standard and ease of access may not be of the same high standard and as widely available as those services are to him in Australia", referred to as the **welfare finding**.

Applicant's submissions

23 Mr X observed that the Minister's power to revoke an original decision to cancel a visa is enlivened if, and only if, relevantly, the Minister is satisfied that there is another reason why the original decision should be revoked. He submitted that, properly construed, the power is subject to the implied condition that the Minister's state of satisfaction, or non-satisfaction, be formed based on factual findings that are open to being made on the evidentiary materials, referring to *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 278 FCR 386 at [47]. Mr X submitted that the Tribunal failed to comply with that condition and thus failed to comply with a condition affecting the exercise of the power.

24 Mr X submitted that the Tribunal's reference to "welfare services" encompasses at least matters concerning social security and the availability of free or assisted healthcare, referring

to a finding to that effect made in relation to the phrase "government welfare services" in ***Schmidt*** *v Minister for Immigration and Border Protection* [2018] FCA 1162; (2018) 162 ALD 49.

25 Mr X submitted that there is no question that the welfare finding was a critical step in the Tribunal's ultimate conclusion because:

(1) following Direction 79 the Tribunal was bound to consider whether he would have access to any social, medical and/or economic support available in W;

(2) in purporting to comply with that mandatory consideration the Tribunal found that he would have access to welfare services in W. Mr X said that given the nature of the welfare finding it was a matter that did not count in his favour. That is, the effect of such a finding would tend to limit the extent of impediments if removed from Australia since he would purportedly have welfare access in W;

(3) the Tribunal ultimately concluded that the other consideration, extent of impediments if removed from Australia, weighed in favour of revoking the mandatory cancellation decision; and

(4) in essence, the Tribunal's welfare finding inevitably affected the ascription of weight the Tribunal gave to the other consideration related to extent of impediments if removed from Australia and, had the welfare finding not been made, the Tribunal may have given this other consideration greater weight in his favour on the premise that there was no evidence that he would have access to welfare provision in W.

26 Mr Xsubmitted that s 501CA(4) of the Act is not to be interpreted as denying legal force and effect to every decision made in breach of the condition at [23] above but that the Act is "ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance" and that ordinarily the threshold of materiality would not be met "in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which the decision was made" referring to *Hossain v Minster for Immigration and Border Protection* (2018) 264 CLR 123 at [29]-[30].

27 Mr X submitted that in the context of s 501CA(4) of the Act an error in the performance of the Minister's fact finding function may amount to jurisdictional error if the finding affects a critical step in the Minister's ultimate conclusion as to whether or not there is "another

reason" to revoke the original decision. He contended that, given that he could not pass the character test, the Tribunal's task was to form a state of satisfaction or non-satisfaction as to whether there existed another reason to revoke the Cancellation Decision and that the task was an evaluative one in two respects in that the Minister was required: first, to decide questions of fact that arose on the materials; and secondly, to assess the relative weight to be ascribed to the countervailing considerations.

28 Mr X contended that the ascription of weight to each consideration necessarily depended on the factual circumstances as determined by the decision maker and that, in the given statutory context, an error in a finding of fact could affect the weight given by the Tribunal to the particular consideration in question.

29 Mr X submitted that ultimately the Tribunal concluded that it was not satisfied that there is another reason why the Cancellation Decision should be revoked and thus the decision to refuse to revoke the Cancellation Decision was affirmed. Mr X observed that decision was no doubt made examining the factors for and against revoking the Cancellation Decision and submitted that, had the impugned welfare finding not been made, the other considerations related to the "extent of impediments if removed from Australia" may have been given more weight in favour of the applicant. In turn, following an assessment and evaluation of the factors for and against revoking the cancellation, the Tribunal may have found that the mandatory cancellation decision should be revoked.

30 The Minister submitted that the expression "welfare services" is not to be understood as a reference to the payment of social security or state benefits but rather to services for the wellbeing of W nationals. He submitted that not only is that understanding consistent with the ordinary meaning of the word welfare but it accords with the context within which the expression was used by the Tribunal. The Minister submitted, by reference to the findings at [182] of the Tribunal's decision record, that the Tribunal was plainly concerned with the topic of availability of services relating to Mr X's health and wellbeing and that its reference to "welfare services" was not mere surplusage as the Tribunal may have had in mind the (limited) availability of social workers, psychologists and/or occupational therapists in W.

31 The Minister submitted that the balance of the Tribunal's reasons on the extent of impediments Mr X may face if removed from Australia also supported his construction of [182] of the Tribunal's decision record. The Minister contended that at [184] the Tribunal referred to, and at [185] accepted, Mr X's claim that he will face financial difficulties in W

but that it made no reference to welfare services in either paragraph. He said that, reading the Tribunal's reasons fairly, the only inference to be drawn from the absence of any reference to "welfare services" at [184]-[185] is that the Tribunal was not concerned at [182] with the payment of social security or state benefits.

32 The balance of the Minister's submission proceeded on the basis that the above submissions concerning the Tribunals decision were not accepted.

33 The Minister submitted that, in any event, there was evidence to support the Tribunal's finding at [182] that Mr X will have access to health services, treatment and welfare services in W, referring to the Department of Foreign Affairs and Trade's (**DFAT**) report which indicated that medical and other services were accessible to W but that those services were either inadequate or that most W were unable to afford them. The Minister contended that a no evidence ground cannot survive even a skerrick of evidence and that, in this case, the country information was sufficient to support the impugned finding.

34 The Minister further submitted that, in the context of a review of a "migration decision", a no evidence ground can only be deployed in respect of a jurisdictional fact and that s 501CA(4)(b)(ii) of the Act does not require a decision maker to make a finding as to whether or not there are "welfare services" in a former visa holder's country of origin. That is, the particular fact for which Mr X contended there was no evidence is not a jurisdictional fact.

Consideration

35 The relevant principles in relation to a "no evidence" ground of judicial review were recently summarised by Cheeseman J in *Zheng v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2021] FCA 1509. Relevantly, at [24]-[26] her Honour said:

> [24] The Tribunal's statement of reasons must be read fairly in the context in which they were delivered and not with an eye keenly attuned to the detection of error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259, 272 and 291 (Brennan, McHugh, Toohey, Gummow JJ) citing *Collector of Customs v Pozzolanic* [1993] FCA 456; (1993) 43 FCR 280 at 286 – 287
>
> [25] To succeed on the "no evidence" ground, Mr Zheng must demonstrate an absence of any supporting material or rational or probative basis for the Minister's decision: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 282 (Brennan CJ, Toohey, McHugh and Gummow JJ); *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628 at [44] - [46] (Allsop CJ, Markovic and

> Steward JJ). As Wheelahan J recently observed, the high threshold that an applicant must establish before a decision will be held to be beyond power on the ground of an absence of evidence or probative material protects against the court sliding into merits review: *Renton v Minister for Home Affairs* [2021] FCA 931 at [28].
>
> [26] In *Guclukol v Minister for Home Affairs* [2020] FCAFC 148, the Full Court addressed a "no evidence" challenge to the formation the state of satisfaction required by s 501CA(4)(b)(ii) of the Act in the following terms (at [22]):
>
> > … The real question was whether a finding of fact made by the Minister for the purposes of the formation of the state of mind on which the power was conditioned was supportable. That question is answered by the principles found in the several decisions of the High Court to which reference has been made, which indicates the relevant inquiry is whether the finding of fact was not supported by some probative material or could not be supported on logical grounds. The requirement that the material averred in support of a finding be "probative" emphasises its quality in proving, supporting or establishing a finding of fact. A skerrick of material may support the existence of a fact in the sense that it is consistent with it, but it might not be positively supportive of its existence.

36 The first question to address concerns the construction of the Tribunal's reasons and what it meant when it referred, at [182] of its decision record, to "welfare services".

37 Mr X relied on *Schmidt* as supporting his interpretation of the phrase "welfare services". In that case the **Assistant Minister** for Immigration and Border Protection made a decision under s 501CA(4) of the Act not revoke a decision to cancel Mr Schmidt's visa. Among other things, Mr Schmidt, who was a citizen of the United States of America, contended that the Assistant Minister's decision was vitiated by jurisdictional error because he made findings for which there was no evidence. At [12] Burley J set out the Assistant Minister's reasons insofar as he considered the impediments Mr Schmidt would face if removed from Australia including that:

> **…** Furthermore the United States has a government welfare system that offers a level of support broadly comparable to that available in Australia. I find that any practical hardship faced by Mr Schmidt in re-establishing himself in the United States of America would not be so great as to prevent him in maintaining basic living standards.

Mr Schmidt contended that there was no evidentiary foundation in the material before the decision maker for that finding.

38 At [26] Burley J found that:

> The Minister's reference to a "government welfare system" encompasses at least

> matters concerning social security, such as unemployment benefits, and the availability of free or assisted health care. These are two matters that are of significance to the consideration of the position of Mr Schmidt.

39 Mr X submitted that, by analogy, the expression "welfare services" used by the Tribunal at [182] is co-extensive with the expression "government welfare system" referred to in *Schmidt* at [26]. Mr X also relied on a series of decisions by the Tribunal in which he contended the Tribunal considered welfare services to include social security benefits.

40 In understanding what the Tribunal meant when it referred to "welfare services" it is important to consider the statement in context. In *BVD17 v Minister for Immigration and Border Protection* (2019) 93 ALJR 1091 at [38] the plurality of the High Court of Australia (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) relevantly observed that:

> … To the extent that the factual basis for a claim to relief is sought to be founded on an inference to be drawn from a decision-maker's statement of reasons, the appropriateness of drawing the inference falls to be evaluated having regard to two settled principles. One is that such a statement of reasons must be read fairly and not in an unduly critical manner. The other is that it must be read in light of the content of the statutory obligation pursuant to which it was prepared.
>
> (Footnotes omitted.)

41 Commencing at [181] the Tribunal addressed cl 14.5(1) of Direction 79. At [182] it turned expressly to consider cl 14.5(1)(a) and (c) (see [14] above) which concern consideration of an applicant's age and health and any social, medical and/or economic support available to the applicant in the relevant country. It is apparent, based on a fair reading of [182], that the Tribunal was there concerned with Mr X's age and health and the medical support he would receive. It referred to evidence of the availability of limited mental health services in W before concluding that Mr X would have access to health services, treatment and welfare services.

42 The Minister said that the Tribunal was there referring to "welfare services" as services for the wellbeing of W nationals, noting that such a meaning accorded with the natural meaning of the word "welfare" and the context within which the Tribunal used the expression.

43 As to the former, while "welfare" is defined in the *Oxford English Dictionary* (online edition) to mean "the state or condition of doing or being well; wellbeing, prosperity, success; the health, happiness, and fortunes of a person or group" and similarly by the *Macquarie Dictionary* (Online edition) as "the state of faring well; wellbeing: one's welfare; the physical or moral welfare of society", the expression used by Tribunal is "welfare services". That

term is defined in the *Oxford English Dictionary* (online edition) to mean "provided by the state for those in need" or "provided with welfare benefits by the state". That is the term "welfare services" has as its meaning the provision of a benefit or a service to a person.

44 As to the latter it is necessary to have regard to the balance of the Tribunal's consideration of cl 14.5(1) of Direction 79: at [183] the Tribunal considered cl 14.5(1)(b) of the Direction 79, substantial language and cultural barriers; at [184] the Tribunal addressed a submission by Mr X that he would face financial difficulties on his return; at [185] the Tribunal found that despite his family's support in W, Mr X would face "practical, financial and emotional hardship upon his return, due to … lack of social, medical and economic support and his expressed fear of harm on return"; at [186] the Tribunal found that Mr X would not face significant impediments in re-establishing himself on return to W given his extensive family and community ties but that he would suffer considerable emotional hardship due to his separation from his wife and stepson; and at [187] the Tribunal concluded that this consideration, i.e. extent of impediments if removed from Australia, weighed in favour of revocation of the Cancellation Decision.

45 When this part of the Tribunal's reasons are considered as a whole it is apparent, as the Minister submitted, that at [182] of its decision record the Tribunal was concerned only with Mr X's health and services available to him in that regard and at [184] and, in part, at [185] of its decision record the Tribunal was concerned with Mr X's financial circumstances and economic support available to him. That being so, while the Tribunal's use of the term "welfare services" may have been somewhat inapt it was, in my opinion, referrable to services to be provided relating to Mr X's health.

46 That reading of the relevant part of the Tribunal's reasons is sufficient to dispose of this ground. However, for completeness I note two matters.

47 First, while somewhat trite to observe, every decision will differ. In that regard the facts before the Tribunal in this case and its findings can be distinguished from the relevant finding considered by the Court in *Schmidt*. For the same reason I am not assisted by the approach taken in the various Tribunal decisions, including to the extent they were decisions by the same Tribunal member.

48 Secondly, given the context in which I have found that the Tribunal used the term "welfare services" in its decision, I am satisfied that there was evidence before the Tribunal to support

its finding. In particular the DFAT country information report for W dated 9 March 2018 included under the headings "Health" and "Mental Health" respectively the following:

> 2.16 W have poor access to health care and poor health outcomes, particularly outside major urban centres. W spent USD94 per person on health care in 2016 and demand for public health care significantly exceeds supply. Medical and health services are the responsibility of all levels of government. Access to and availability of quality medical services are inadequate, with most W unable to afford health care.

And:

> 2.20 The World Health Organisation (WHO) reports significant gaps in mental health services in W. There are fewer than 150 psychiatrists in the country and few neurologists. The government reports approximately five psychiatric nurses per 100,000 population and very few clinical psychologists, social workers, neuro-physiotherapists, and occupational therapists. Psychotropic drugs are rarely available and health information systems do not incorporate mental and neurological health measures.

49 Given my conclusions above, it is not necessary to determine whether any fact finding error of the kind contended for by Mr X is jurisdictional in nature.

GROUND 2

50 By this ground Mr X contends that the Tribunal's decision was legally unreasonable, illogical and/or irrational because it made findings at [182] and [185] of its decision record which are irreconcilable.

Applicant's submissions

51 Mr X submitted that the welfare finding was material to the ultimate conclusion reached by the Tribunal because it involved a significant matter involving his human consequences. Mr X observed that the Tribunal concluded at [182] of its decision record that he "will have access to health services, treatment and welfare services in W, although the standard and ease of access may not be of the same high standard and as widely available as those services are to him in Australia" and submitted that thus the Tribunal found that he would have access to health services and provision of welfare in W.

52 Mr X contended that, in contrast, the Tribunal elsewhere concluded that he would face practical, financial and emotional hardship on return to W "due to … lack of social, medical and economic support" (at [185] of its decision record). He submitted that the Tribunal's finding here appears to be that he would not have access to medical and economic support, despite concluding to the contrary at [182] of its decision record.

53 Mr X submitted that the use of the word "lack" is defined as "the fact that something is not available" or "does not exist at all". He contended that thus the Tribunal's reasoning process, when addressing the other consideration of the extent of impediments if removed from Australia, demonstrates extreme illogicality or irrationality. Mr X submitted that the Tribunal concluded that he would have access to health services and the provision of welfare in W and subsequently reasoned that there was a lack of such services in that country. He said, considered in that context, the two separate findings cannot be reconciled.

54 Mr X submitted that the Tribunal's impugned illogical reasoning was material to the ultimate conclusion in that it directly impacted its assessment of the other consideration concerning the "extent of impediments if removed from Australia". He contended that, had the impugned reasoning not been adopted, the Tribunal may have come to a different conclusion as to the ascription of weight for this consideration.

Consideration

55 In *Muggeridge v Minister for Immigration and Border Protection* (2017) 255 FCR 81, a Full Court of this Court (Flick, Perry and Charlesworth JJ) considered whether the decision made by the Minister in that case to cancel Mr Muggeridge's visa under s 501(2) of the Act was legally unreasonable. At [35] the Full Court summarised the applicable principles as follows:

> The alleged error is one affecting the process of reasoning adopted by the Minister in the exercise of a discretionary power. It is well settled that a discretionary power conferred by a statute is to be construed as subject to the condition that it be exercised reasonably. The principles to be applied are considered at length in the various judgments in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (*Li*) and in the decisions of the Full Court of this Court in *Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158 and *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 (*Stretton*). They may be briefly summarised as follows:
>
> (1) the power conferred under s 501(2) of the Act is implicitly confined by the subject matter, scope and purpose of the legislation: *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J);
>
> (2) as Allsop CJ explained in *Stretton* (at [11]), the task of reviewing a decision for legal unreasonableness is not definitional, but one of characterisation:
>
> > … the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range

of possible lawful outcomes as an exercise of that power. …

(3) the Court is to look to the reasons given for the decision to understand why the power was exercised as it was: *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437 (*Singh*);

(4) as the Full Court explained in *Singh*, the process of review of legal unreasonableness "will inevitably be fact dependent". The Court continued (at [48]):

> … That is not to diminish the importance of the supervising court maintaining an approach which does not involve the substitution of its own judgment for that of the decision-maker. Rather, it is to recognise that any analysis which involves concepts such as "intelligible justification" must involve scrutiny of the factual circumstances in which the power comes to be exercised.

(5) in a different review context, Deane J spoke of the requirement that a statutory tribunal act rationally and reasonably: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 367-368. His Honour's explanation of the content of that obligation applies equally to the Minister in the exercise of the power conferred by s 501(2) of the Act (at 367):

> When the process of decision-making need not be and is not disclosed, there will be a discernible breach of such a duty if a decision of fact is unsupported by probative material. When the process of decision-making is disclosed, there will be a discernible breach of the duty if findings of fact upon which a decision is based are unsupported by probative material and if inferences of fact upon which such a decision is based cannot reasonably be drawn from such findings of fact.

(6) nevertheless, as Wigney J said (with respect correctly) in *Minister for Immigration and Border Protection v SZUXN* (2016) 69 AAR 210 (at [55]):

> … allegations of illogical or irrational reasoning or findings of fact must be considered against the framework of the inquiry being whether or not there has been jurisdictional error on the part of the Tribunal: *SZRKT* at 137 [148]. The overarching question is whether the Tribunal's decision was affected by jurisdictional error: *SZRKT* at [151]. 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: *Minister for Immigration and Citizenship v SZOCT* (2010) 189 FCR 577 at [83]-[84] (Nicholas J); *SZNKO v Minister for Immigration and Citizenship* (2013) 140 ALD 78 at [113]. 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: *SZRLQ v Minister for Immigration and Citizenship* (2013) 135 ALD 276 at [66]; *SZWCO* at [64]-[67].

56 In *Minister for Immigration v Stretton* (2016) 237 FCR 1 at [4] and [6]-[12] Allsop CJ said:

> [4] In *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, the High Court made clear that legal reasonableness or an absence of legal unreasonableness was an essential element in the lawfulness of decision-

making; Parliament is taken to intend that statutory power will be exercised reasonably: see *Li* at [26] and [29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88] (Gageler J).

…

[6] Each of the judgments in *Li* sought to give *explanatory* content to the concept of legal unreasonableness. As was discussed in *Minister for Immigration and Border Protection v Singh* (2014) 231 FCR 437, the judgments in *Li* identified two different contexts in which the concept of legal unreasonableness was employed: a conclusion after the identification of jurisdictional error for a recognised species of error, and an "outcome-focused" conclusion without any specific jurisdictional error being identified: *Singh* at [44].

[7] It is in relation to the second context, the "outcome-focused" application of the concept, that precise definition, beyond explanation of the operative notion and of the legal technique by which to make the assessment, becomes productive of complexity and confusion. There is "an area of decisional freedom" of the decision-maker, within which minds might differ. The width and boundaries of that freedom are framed by the nature and character of the decision, the terms of the relevant statute operating in the factual and legal context of the decision, and the attendant principles and values of the common law, in particular, of reasonableness. The boundaries can be expressed by the descriptions and explanatory phrases of the kind set out in [5] above.

[8] The content of the concept of legal unreasonableness is derived in significant part from the necessarily limited task of judicial review. The concept does not provide a vehicle for the Court to remake the decision according to its view as to reasonableness (by implication thereby finding a contrary view unreasonable). Parliament has conferred the power on the decision-maker. The Court's function is a supervisory one as to legality: see *Li* at [30], [66] and [105].

[9] The conclusion that a decision is legally unreasonable by reference to the outcome, whether or not there are reasons therefor, is assisted by reference to expressions taken from cases such as those mentioned in [5] above. Any criticism that these explanations are circular and vague is to be met by attending to the terms, scope and policy of the statute and the values drawn from the statute and the common law that fall to be considered in assessing the decision. The terms, scope and policy of the statute and the fundamental values that attend the proper exercise of power — a rejection of unfairness, of unreasonableness and of arbitrariness; equality; and the humanity and dignity of the individual — will inform the conclusion, necessarily to a degree evaluative, as to whether the decision bespeaks an exercise of power beyond its source.

[10] This concept of legal unreasonableness is not amenable to minute and rigidly-defined categorisation or a precise textual formulary. For instance, in argument, the submission was put that [76] of *Li* in the judgment of Hayne, Kiefel and Bell JJ contained two (different) "tests": (1) if upon the facts the result is unreasonable or plainly unjust and (2) if the decision lacks an evident and intelligible justification. The submission reflected the dangers of overly emphasising the words of judicial decisions concerning the nature of abuse of power, and of unnecessary and inappropriate categorisation. The

plurality's discussion of unreasonableness at [63]-[76] in *Li* should be read as a whole — as a discussion of the sources and lineage of the concept: [64]-[65], of the limits of the concept of reasonableness given the supervisory role of the courts: [66], of the fundamental necessity to look to the scope and purpose of the statute conferring the power to find its limits: [67], of the various ways the concept has been *described*: [68]-[71], of the relationship between unreasonableness derived from specific error and unreasonableness from illogical or irrational reasoning: [72], of the place of proportionality or disproportion in the evaluation: [73]-[74] (as to which see also French CJ at [30] and see also *McCloy v New South Wales* (2015) 89 ALJR 857; 325 ALR 15 at [3] (French CJ, Kiefel, Bell and Keane JJ)), of the guidance capable of being obtained from recognising the close analogy between judicial review of administrative action and appellate review of judicial discretion: [75]-[76].

[11] The boundaries of power may be difficult to define. The evaluation of whether a decision was made within those boundaries is conducted by reference to the relevant statute, its terms, scope and purpose, such of the values to which I have referred as are relevant and any other values explicit or implicit in the statute. The weight and relevance of any relevant values will be approached by reference to the statutory source of the power in question. The task is not definitional, but one of characterisation: the decision is to be evaluated, and a conclusion reached as to whether it has the character of being unreasonable, in sufficiently lacking rational foundation, or an evident or intelligible justification, or in being plainly unjust, arbitrary, capricious, or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power, such that it cannot be said to be within the range of possible lawful outcomes as an exercise of that power. The descriptions of the lack of quality used above are not exhaustive or definitional, they are explanations or explications of legal unreasonableness, of going beyond the source of power.

[12] Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.

57 The resolution of this ground requires first a consideration of what the Tribunal found at [185] of its decision record. There the Tribunal said:

> The Tribunal finds that despite the support of his family in W, the Applicant will face practical, financial and emotional hardship upon return, due to his separation from his wife and stepson, **lack of social, medical and economic support** and his expressed fear of harm on return. The Applicant's hardship will be exacerbated by the negative impacts that relocating to W would have on his wife and stepson, should they choose to move there if his visa remains cancelled and he must return to W.
>
> (Emphasis added.)

58 This ground concerns the words emphasised above, namely the Tribunal's finding that "despite the support of his family" Mr X "will face …. lack of social, medical and economic support". Mr X contended the word "lack" means "no". That is, the relevant finding by the Tribunal at [185] is that he would have *no* social, medical and economic support.

59 There was disagreement between the parties about the meaning of "lack" in this context. The *Shorter Oxford English Dictionary* defines "lack" to mean "a shortage or absence" of "something desirable or necessary". The *Macquarie Dictionary* defines "lack" to mean "deficiency or absence of something requisite, desirable, or customary". It follows that "lack" can mean either a deficiency or absence. In order to understand how the Tribunal used the word "lack" in making its finding at [185], regard must be had to the context in which it made that finding.

60 At [182] the Tribunal found that, while they are limited, Mr X will have access to mental health services in W and that he will have access to health services and treatment although the standard and ease of access may not be of the same standard as in Australia. At [183] of its decision record the Tribunal considered whether Mr X would face any language or cultural barriers upon return to W as required by cl 14.5(1)(b) of the Direction 79 and at [184] the Tribunal considered Mr X's former employment, his skills and the support that could be provided by his family as required by cl 14.5(1)(c) of Direction 79. Those findings necessarily provide context for the findings at [185].

61 That being so, it is clear that when the Tribunal said that there would be a "lack of social, medical and social support" it used the word "lack" in the sense of a deficiency rather than an absence or, as Mr X submitted, that there would be no such support. Given the anterior finding at [182], that is the way in which the Tribunal's finding ought to be interpreted. The findings at [182] and [185] of the Tribunal's decision record can be reconciled.

62 On the assumption that the Minster's submission that "lack of" meant shortage, Mr X also submitted that there was no evidence to support the finding at [185] of the Tribunal's decision record that he would have a shortage of access to economic support in W. I reject that submission. First, the finding of lack of economic support, is a finding in favour of Mr X. Thus, even if the Tribunal made an error, it is not one about which Mr X can complain. Such an error would not be material. Secondly, Mr X gave evidence and made submissions to the Tribunal about the financial difficulties he would face if returned to W. So much is evident from [184] of the Tribunal's decision record. To that end, there was

evidence before the Tribunal in relation to Mr X's financial circumstances and the hardship he would face. By way of example, in his personal statement, originally provided to the delegate under cover of a letter from his solicitor, Mr X said that if he is returned to W he "will not be able to find work due to the economic crisis" and that he has "no savings".

63 For those reasons Mr X's contention that the Tribunal's finding at [185] was legally unreasonable or illogical is not made out and ground 2 must fail.

CONCLUSION

64 It follows that Mr X's application should be dismissed. As Mr X has been unsuccessful he should pay the Minister's costs as agreed or taxed.

65 I will make orders accordingly.

I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Markovic.

Associate:

Dated: 14 December 2021