FEDERAL COURT OF AUSTRALIA

Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 730

Review of:	*Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4680
File number(s):	QUD 20 of 2022
Judgment of:	**SC DERRINGTON J**
Date of judgment:	24 June 2022
Catchwords:	**MIGRATION** – application to review decision of Administrative Appeals Tribunal – original decision by delegate of Minister not to revoke mandatory cancellation of visa under s 501CA of the *Migration Act 1958* (Cth) – whether alcohol use and/or dependency ought to have been considered a health issue in the Tribunal's mandatory consideration of impediments pursuant to s 9(1)(b) of Direction 90 – whether the Tribunal constructively failed to exercise jurisdiction – whether procedural fairness was denied
Legislation:	*Acts Interpretation Act 1901* (Cth) s 25D *Administrative Appeals Tribunal Act 1975* (Cth) s 43(2B) *Migration Act 1958* (Cth) ss 476A, 499, 501, 501CA
Cases cited:	*AWT15 v Minister for Immigration and Border Protection* [2017] FCA 512 *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 *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 1842 *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 69; 248 FCR 416 *DKN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 97; 285 FCR 1 *DNQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 72; 275 FCR 517

	El Khoueiry v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 247 *GXXS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 468 *Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 450 *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1609; 49 AAR 77 *Khazaal v Attorney-General* [2020] FCA 448 *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; 267 FCR 320 *Minister for Home Affairs v HSKJ* [2018] FCAFC 217; 266 FCR 591 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590 *MZXLB v Minister for Immigration and Citizenship* [2007] FCA 1588 *PGDX v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1235 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 *SZSLA v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 944 *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45; 241 FCR 214
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	63
Date of hearing:	1 June 2022
Counsel for the Applicant:	Ms L De Ferrari SC with Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the Respondents:	Mr B McGlade
Solicitor for the Respondents:	Clayton Utz

ORDERS

QUD 20 of 2022

BETWEEN:	**JOHN MANEBONA** 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: **24 JUNE 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 Mr Manebona is a citizen of Solomon Islands who first arrived in Australia at the age of 14 on 11 September 2001. He returned to Solomon Islands about a year later, on 29 August 2002 before returning to Australia on 9 January 2007 at the age of 20. He has lived in Australia since that time.

2 Mr Manebona's visa was mandatorily cancelled by a delegate of the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs pursuant to s 501(3A) of the ***Migration Act*** *1958* (Cth) following his conviction for several offences of domestic violence, for which he was sentenced to a total term of 4.75 years imprisonment, each sentence to be served concurrently and suspended after three months of imprisonment.

3 Mr Manebona made representations on 28 February 2021 seeking revocation of the cancellation decision pursuant to s 501CA(4) of the *Migration Act*. On 29 September 2021, a delegate of the Minister decided not to revoke the cancellation decision. The Administrative Appeals **Tribunal** affirmed that decision on 17 December 2021 and published reasons for its decision (**Tribunal's reasons**).

4 Mr Manebona seeks judicial review of that decision pursuant to s 476A of the *Migration Act* on the following grounds:

(1) There was a constructive failure to exercise jurisdiction by the Tribunal.

(2) The Tribunal denied the applicant procedural fairness.

5 Fundamentally, the first ground of the application concerns the construction of "Direction No. 90 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA" (**Direction 90**) in circumstances where alcohol use and/or dependency is at the root of the relevant offending but is not the subject of a separately articulated claim in relation to the non-citizen's health.

6 The Tribunal accepted, inter alia, that there was insufficient evidence before it to find that there is a real prospect that Mr Manebona is able to manage his alcohol consumption (Tribunal's reasons at [166]), which had been conceded by Mr Manebona to be a cause of his aggression (Tribunal's reasons at [76]). The critical question now raised is whether the risk of

Mr Manebona's being unable to manage his alcohol consumption ought to have been considered as a matter relevant to his "health" in the context of the Tribunal's mandatory consideration of the extent of impediments Mr Manebona may face if he were to be removed from Australia to Solomon Islands, even though no representation had been made that he suffered from any health issue.

7 As to the second ground of the application, the gravamen of the complaint is that the Tribunal is said to have made an adverse finding in relation to the evidence of Mr Manebona's former partner when such a finding would not obviously be open on the known material. Consequently, it is contended that Mr Manebona was denied procedural fairness.

8 For the reasons that follow, the appeal must be dismissed.

Legislative provisions

9 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.

10 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 para (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 Manebona did not pass the character test in s 501(1) of the *Migration Act*, because of the operation of para (6)(a), on the basis of para (7)(c).

11 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.

12 Section 499(1) of the *Migration Act* provides that the Minister may give written directions to a person or body having functions or powers under the *Migration Act* if the directions are about the exercise of those functions or powers. Such directions have been made from time to

time pursuant to s 499(1) for those decision-makers who are tasked with making a decision under ss 501 or 501CA of the *Migration Act*, being a decision in relation to visa refusal and cancellation or revocation of a mandatory cancellation of a visa. The most recent iteration, and that which applies to the present case, is Direction 90 which came into force on 15 April 2021.

13 The Preamble to Direction 90 is in para 5 of Part 1, which includes the objectives of Direction 90.

14 Part 2 of Direction 90 is concerned with exercising the discretion. Section 6 of Direction 90 stipulates that, informed by the principles in para 5.2, a decision-maker **must take into account** the considerations identified in ss 8 and 9, **where relevant to the decision** (emphasis added).

15 Specifically, s 9(1)(b) of Direction 90 provides that the "extent of 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 ss 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.

16 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 impediments if removed" is given to decision-makers in s 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;
>
> (b) whether there are substantial language or cultural barriers; and

(c) any social, medical and/or economic support available to them in that country.

Ground One

17 Mr Manebona 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].

18 As has already been observed, 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 per Mason J.

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

19 The Tribunal dealt with the extent of the impediments Mr Manebona may face if removed from Australia at [204]-[209] of its Reasons:

> 204. The Applicant is a 35-year-old man, and he does not contend, and there is no medical evidence that he suffers any health issues.
>
> 205. There do not appear to be any significant language or cultural barriers to his return to the Solomon Islands, as he has lived a substantial part of his life there.
>
> 206. The Solomon Islands is of course a developing country, and social, medical and economic support would, to the extent that they are available, would be just as available to him in establishing himself and maintaining basic living standards as they are to other citizens of that country.
>
> 207. The Tribunal accepts that the Applicant has a poor relationship with his father, and may face adversity in the context of an ignominious return to the Solomon Islands. On the other hand, he has numerous relatives on his mother's side who can offer him personal and social, but not financial support.
>
> 208. The Tribunal accepts that the Applicant will face challenges returning to his home country.
>
> 209. This Other Consideration weighs in favour of revocation of the mandatory cancellation of the Applicant's visa.

20 The gravamen of Mr Manebona's challenge to the Tribunal's decision is that it failed to consider a mandatory consideration relevant to the extent of impediments Mr Manebona may face if removed to Solomon Islands, that being his health. Further, Mr Manebona submitted that the Tribunal was bound to comply with s 25D of the *Acts Interpretation Act 1901* (Cth)

(***AIA***) and that, in failing to set out its findings on material questions of fact and refer to the evidence or other material on which those findings were based, being findings as to whether or not Mr Manebona's alcohol use constituted a matter relevant to his health, the Tribunal failed to so comply. The extent to which s 25D of the *AIA* added to the similar obligation imposed on the Tribunal by s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth) was not addressed.

21 Mr Manebona 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 s 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.

22 As I observed both in *Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 450 at [15] and in *El Khoueiry v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 247 at [33] (see also ***GXXS*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 468 at [95]-[97]), *LRMM* concerned a different set of circumstances from those in the present proceedings. In *LRMM*, there was evidence before the Tribunal that the applicant had been diagnosed with a specific medical condition, namely alcohol dependency disorder (at [14]). The Tribunal made no reference to that diagnosis but appears to have considered another condition that had been diagnosed by the applicant's psychologist (*LRMM* at [26]). Although the Court found that "the Tribunal was obliged, under the heading health, to acknowledge and then address the ramifications of the [diagnosed] alcohol dependency disorder" (*LRMM* at [29]), it does not follow that a similar obligation fell upon the Tribunal in relation to Mr Manebona's alcohol use when considering his health.

23 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] HCA 34; 268 CLR 29 at [38]. Thus, Mr Manebona bears the onus of establishing, on the balance of probabilities, that the relevant

element of the potential impediments was not considered. He must 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] FCAFC 107; 252 FCR 352 at [48].

24 The evidence relating to Mr Manebona's health was addressed as follows:

(1) The Tribunal referred to Mr Manebona's Personal Circumstances Form dated 28 March 2021 (Tribunal's reasons at [30]-[38]). It noted that in the Form, Mr Manebona stated he had no diagnosed medical or psychological conditions and was not currently being treated by any doctor or health professional (Tribunal's reasons at [38]).

Mr Manebona had also stated in the Form that he was not taking any medication.

(2) The Tribunal referred to the International Health and Medical Services records, including Mr Manebona's health induction assessment upon his detention dated 8 March 2021, which the Tribunal observed disclosed no alcohol or drug use and made no health recommendations and listed him as "a fit and healthy young man" (Tribunal's reasons at [64]). As observed by the Tribunal, those documents record variously that Mr Manebona reported "Social alcohol use, did not elaborate, does not sound significant amounts" (Tribunal's reasons at [64]) and "denied past Hx [history] of Drug and Alcohol" (Tribunal's reasons at [65]).

In none of the records of appointments with medical staff up to November 2021 was any diagnosis recorded, nor were any drugs prescribed. There was no indication that Mr Manebona was suffering symptoms of alcohol withdrawal.

25 Having referred to this evidence, it cannot be realistically contended that the Tribunal did not take into account Mr Manebona's "health" in considering the extent of any impediments he may face in establishing himself and maintaining basis living standards in Solomon Islands. The Tribunal cannot be criticised for its finding that "there is no medical evidence that he suffers any health issues" (Tribunal's reasons at [204]). Indeed, the medical evidence before the Tribunal was to the contrary. Further, Mr Manebona positively disavowed any diagnosed medical or psychological conditions and any current treatment in respect of his health.

26 Consequently, there was no logical reason for the Tribunal to consider whether and what medical support he was going to need in Solomon Islands when directing its attention to s

9.2(1) of Direction 90, the Tribunal having concluded, at least implicitly, that he would need none. As was observed by Derrington J in *GXXS* at [56], it is axiomatic that in order for an applicant to raise the issue mentioned in s 9.2 for consideration, he or she must point to more than the existence of a medical condition. It is also necessary that the condition is of such a nature that it may impede the applicant in establishing him or herself or in maintaining a basic standard of living. Mr Manebona made no such representation. In his Personal Circumstances Form dated 28 March 2021, Mr Manebona indicated that he had no concerns or fears about what would happen to him if he were to return to Solomon Islands. He identified the problems he would face on return as: "I leave my Mum, sister, brother, my children behind in Australia is very hard, painful and have nothing left is big problem for me I have nothing in Solomon Island". There was nothing in the evidence before the Tribunal that raised the prospect of Mr Manebona's alcohol use impeding him in establishing himself or maintaining a basic standard of living. He had encountered no such difficulties in Australia where he had maintained steady employment without any apparent recourse to medical support for his alcohol use.

27 The issue now advanced by Mr Manebona was omitted from the range of other issues which he 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. Mr Manebona has not discharged his onus of establishing there was evidence on which this Court could conclude that the Tribunal failed to consider the potential impediments to his return to Solomon Islands. No inference can be drawn that the Tribunal failed to lawfully consider Mr Manebona's health in the context of considering the impediments to Mr Manebona's return to Solomon Islands for the purposes of s 9.2(1)(a) of Direction 90: *Carrascalao* at [36]-[46].

Did the claim nevertheless "clearly emerge" on the materials?

28 Mr Manebona contends that, in the face of the Tribunal's several findings about his alcohol issues, the Tribunal was mandatorily required to consider those matter as a health issue when considering s 9(1)(b), whether or not Mr Manebona raised that matter himself, because it was in the nature of an unarticulated claim that "clearly emerged" on the material before it in the context of the Tribunal's consideration of the primary consideration of the protection of the Australian community.

29 The principles relevant to determining whether a claim "clearly emerges" from the material were summarised by Barker J in *AWT15 v Minister for Immigration and Border Protection* [2017] FCA 512 at [67]-[68]:

> (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) while there is no precise standard for determining whether an unarticulated claim has been "squarely raised", (*MZXLB v Minister for Immigration and Citizenship* [2007] FCA 1588 at [14] (Finkelstein J)) a court will be more willing to draw the line in favour of an unrepresented party: *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1609; 49 AAR 77 at [21] (Flick J);
>
> (d) to clearly emerge from the materials, the claim must be based on 'established facts': *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45; 241 FCR 214. In that case, 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 principles set out in *Dranichnikov.*
>
> (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.

30 Mr Manebona's submitted the claim that he had a "serious problems with alcohol" emerged in the following way:

(1) The Tribunal noted the applicant's evidence that he was willing to do more to avoid future abuse of alcohol (Tribunal's reasons at [35]);

(2) The Tribunal noted that the applicant completed drug and alcohol rehabilitation programs (Tribunal's reasons at [48], [55], [77]-[78]);

(3) The Tribunal noted the applicant's evidence that he had been drinking before he went to prison (Tribunal's reasons at [74], [76]-[77]);

(4) The Tribunal noted the applicant's evidence that he engaged in family violence when under the influence of alcohol (Tribunal's reasons at [75], [76]);

(5) The Tribunal noted that the applicant continued drinking after he had completed a drug and alcohol rehabilitation program (Tribunal's reasons at [77], [164]);

(6) The Tribunal noted the submission of the first respondent, to the effect that the applicant had not undertaken any specific program post imprisonment that was aimed specifically towards alcohol consumption (Tribunal's reasons at [101]);

(7) The Tribunal noted the remarks on sentence of a Court to the effect that the applicant has a high dependency on alcohol which he abuses daily (Tribunal's reasons at [123]); and

(8) The Tribunal concluded that it was not satisfied that the applicant would be able to manage his alcohol consumption in the future (Tribunal's reasons at [166], [169]).

31 Mr Manebona submitted further that the following findings by the Tribunal added to the emergence of the alleged issue,

(9) The Tribunal concluded that the applicant does not appear to have had behavioural issues when he was not intoxicated (Tribunal's reasons at [174]); and

(10) The Tribunal found that the applicant had not adequately addressed his alcohol issues, which appear to be the root of his problem and a major contributing factor to his domestic violence offending (Tribunal's reasons at [177]).

32 Mr Manebona submitted that notwithstanding the Tribunal's consideration of these various matters, the Tribunal failed to consider that Mr Manebona's health issues related to "unresolved and sustained alcohol abuse problems". The question is whether a claim to "unresolved and sustained alcohol abuse problems" was based on established facts.

33 Whilst the Tribunal had accepted that Mr Manebona's alcohol use was a major contributing factor to his offending, and that there was insufficient evidence before the Tribunal to find that there is a real prospect of Mr Manebona's being able to manage his alcohol consumption, those findings to do not amount to one that he has "unresolved and sustained alcohol abuse problems".

34 While it may be accepted that Mr Manebona consumed alcohol, there was no evidence before the Tribunal to suggest that he had a "sustained alcohol abuse problem". Mr Manebona gave evidence regarding the "Early Recovery Substance Abuse Program" which he attended

between October and December 2019. He said he continued drinking after he had completed the program until a week before he went to prison in December 2020. Although he had been encouraged to stay away from alcohol, there had been no discussion about whether he should cease drinking. Mr Manebona gave evidence that he "drank twice a month" before he was imprisoned (Tribunal's reasons at [77]). It does not appear that this evidence was challenged.

35 It should also be observed that the remarks on sentence to the effect that "the applicant has a dependency to alcohol which he abuses daily" (Tribunal's reasons at [123]) were made in a bail affidavit that was before the sentencing Magistrate in 2019. They were not findings made by the Court.

36 The evidence clearly disclosed that Mr Manebona's use of alcohol played a part in his offending. There was, however, little or no evidence as to the nature and degree of Mr Manebona's present consumption of alcohol or his dependence on it. By the time of the Tribunal's decision in December 2021, he had evidently been alcohol free since 9 December 2020 when he was incarcerated and subsequently detained.

37 There was no evidence from any witness that Mr Manebona had a sustained alcohol abuse problem. It simply was not an established fact.

38 Consequently, where all that was relied upon by Mr Manebona was evidence of an alleged health condition – serious problems with alcohol – no issue under s 9.2 could have emerged for consideration. First, the suggestion that Mr Manebona suffered from "serious problems with alcohol" or any reasonably identifiable alcohol related disease did not emerge on any "established facts" whether as found by the Tribunal or otherwise. What did emerge was that Mr Manebona had a serious problem with offending when he used alcohol. Secondly, even if it could be said that Mr Manebona had some relevant alcohol related health issue, there was no evidence of any of the other matters in s 9.2 from which it might be raised. In short, Mr Manebona had not contended that his alleged problems with alcohol would impede him in establishing or maintaining basic living standards in Solomon Islands, in the context of what is generally available to other citizens of that country.

39 Mr Manebona has not established that there was a constructive failure to exercise jurisdiction by the Tribunal.

Materiality

40 Even if such an error were established, contrary to the submission put by Mr Manebona, that error would not be material. Whether the decision made could have been different – had Mr Manebona's alleged serious problems with alcohol been considered expressly as a health issue within the meaning of s 9.2 of Direction 90 – "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; 390 ALR 590 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…
>
> (emphasis added)

41 Where it is improbable that the result could have been different, the "realistic possibility" threshold is not satisfied: *DNQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 72; 275 FCR 517 at [60]. The materiality of an error is assessed by the reconstruction of a counterfactual question considered in light of the totality of the evidence, and the question is one of fact which the Court must resolve by whatever inferences are available on the evidence: *MZAPC* at [38].

42 It will be recalled that s 7(2) of Direction 90 provides that "Primary considerations should generally be given greater weight than the other considerations". The Tribunal found (Tribunal's reasons at [224]) that Primary Consideration 1, the protection of the Australian community, weighed very heavily against revocation, Primary Consideration 2, whether the conduct engaged in constituted family violence, weighed against revocation, Primary Consideration 3, the best interests of minor children, weighed in favour of revocation, and Primary Consideration 4, the expectations of the Australian community, weighed against revocation. In terms of the "other considerations" specified in s 9 of Direction 90, the Tribunal found that the extent of impediments if removed and the links to the Australian community both weighed in favour of revocation (Tribunal's reasons at [209] and [219]) but that even when combined, they could not outweigh Primary Considerations 1, 2 and 4 (Tribunal's reasons at [224]).

43 As submitted by the Minister, in light of the strong findings made against Mr Manebona by the Tribunal, and in light of the positive finding already made in relation to the extent of likely impediments should Mr Manebona be removed from Australia, it is difficult to see that there is a realistic possibility that a different decision could have been made if, as contended by Mr Manebona, his alleged serious problems with alcohol were expressly considered under s 9.2(1)(a) of Direction 90.

44 Ground One cannot succeed.

Ground Two

45 In considering the impact on members of the Australian community including victims, as it was required to do pursuant to s 9.3(1) of Direction 90, the Tribunal said:

> 211. The only relevance before the Tribunal comes from the victim of the Applicant's most serious offending, W, who gave evidence before the Tribunal that although her relationship with the Applicant is finished, she has a good relationship with his mother and sister, and was going to his mother's home that evening to attend the Applicant's brother's birthday. She gave positive evidence regarding the Applicant particularly as to his role as a father, a good person, and an important role model, and requested for the sake of mainly of her elder daughter, that the Applicant be allowed to remain in Australia.
>
> 212. The Tribunal is concerned that W's evidence has been to some degree compromised by the closeness of her relationship with the Applicant's mother, sister and brother and tailored in consequence. The Tribunal gives W's evidence little weight in regard to this consideration.
>
> 213. There is no broader evidence regarding the impact on the wider Australian community.
>
> 214. In the absence of other relevant evidence, the Tribunal gives this Other Consideration neutral weight.

46 Mr Manebona contends, relying on *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [29], that the Tribunal should have advised it was minded to draw an adverse conclusion that would not obviously be open on the known material and, as such, he was denied procedural fairness.

47 The first matter to consider is the proper construction of s 9.3(1) which provides:

> Decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.

48 The section 501 or 501CA decision with which this paragraph is concerned is, relevantly in this case, the decision under s 501CA(4)(b)(ii) as to whether the discretion to revoke the cancellation of Mr Manebona's visa was enlivened by the Tribunal's satisfaction that there was "another reason" why the original decision should be revoked.

49 The previous iteration of s 9.3(1) was cl 14.4(1) of Direction 79. That Direction dealt separately with decisions to cancel a visa under s 501(2) (Part A), decisions to refuse a visa under s 501(1) (Part B), and decisions to revoke a mandatory cancellation of a visa under s 501CA (Part C). Clause 14.4(1) of Part C provided:

> Impact of a decision *not* to revoke on members of the Australian community, including victims of the non-citizen's criminal behaviour…
>
> (emphasis added)

50 As was observed by Colvin J ***CGX20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 1842 at [12], cl 14.4(1) appeared to "invite a focus upon the consequences for victims if the person was removed from Australia". His Honour found there was an "obvious error in the formulation of cl 14.4" (at [19]) and the impact on victims could only be considered in circumstances where the person concerned was allowed to stay in Australia (at [12]). His Honour said:

> 18. However, in the case of a cancellation under s 501(3A), Direction 79 requires the decision-maker to consider the impact of a decision *not to revoke* (thereby framing the inquiry by reference to what would be the case if the person was removed from Australia because the cancellation of the visa was not revoked). If the direction required there to be a focus on what would be the case if the visa cancellation was not revoked then it would be a most awkward way of directing attention to the adverse consequences for victims and their family members if the person was allowed to remain in Australia.
>
> 19. Therefore, in my view the Tribunal was correct to approach the task on the basis that there was an obvious error in the formulation of cl 14.4 of Direction 79. In all likelihood it was caused by the negative character of an application under s 501CA(4) in which the applicant seeks to revoke the visa cancellation.
>
> 20. For those reasons, cl 14.4 should be read in the manner expressed by the Tribunal and there was no error in approaching the present case in that way. What might be described as negative consequences for family members who were also victims of the offending if the person was not allowed to remain in Australia were matters to be considered under other aspects of Direction 79.

51 The decision was affirmed on appeal in *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 69; 248 FCR 416. Importantly, at [21] and [23], the Full Court drew attention to the analogous provisions in cl 10.4 (the impact

on victims of a decision not to cancel a visa) and cl 12.3 (the impact on victims of a decision to grant a visa) which contraindicated a literal construction of cl 14.4.

52 In ***DKN20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 97; 285 FCR 1, the appellant submitted that the Tribunal failed to take into consideration a letter of support as evidence of the impact of the non-revocation decision on Ms J, who was a victim of one of the appellant's offences. Ms J had urged that the appellant not be deported because of the effect it would have on their daughter (at [23]). It was argued that the Tribunal had not contemplated the possibility that this evidence could be favourable to the appellant and was not addressed anywhere in its reasons. It was submitted further that cl 14.4 should have been construed in a way that did not foreclose the possibility that evidence of a victim may be supportive of an application to revoke a mandatory cancellation of a visa and it should not be assumed that such evidence could only weigh against the making of that decision (at [25]).

53 The Full Court, at [37], adopted Colvin J's reasoning and held that there was no scope for the Tribunal to consider the impact on the offender's partner as a victim under cl 14.4.

54 Nevertheless, the Tribunal had considered the impact of its decision on Ms J as a family member under the heading "Best interests of minor children". The Full Court held, at [42]:

> This was appropriate as her statements in the letter of support concerning her desire to co-parent and to preserve the relationship between the Appellant and his daughter were plainly relevant to a consideration of the best interests of her and the Appellant's daughter. It is clear that the Tribunal had turned its mind to Ms J, and the impact of removing the Appellant from Australia, when deciding whether or not to revoke the cancellation decision, though it had not done so by express reference to cl 14.4.

55 Direction 90, which was promulgated on 8 March 2021, collapses the considerations relevant to the three types of decisions (to cancel, to grant, and to revoke mandatory cancellation) into one consolidated Direction. In so doing, the apparent anomaly in cl 14.4 of Direction 79 does not arise under Direction 90 and it is unnecessary to resolve any alleged inconsistency between the decision in *DKN20* and that of Kerr J in *PGDX v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1235. It is clear from the recasting of cl 14.4 by s 9.3(1) of Direction 90 that it is the impact on a victim *of the perpetrator remaining in Australia* which is the matter to be considered, where relevant.

56 In the present case, no evidence of the impact on W as a victim of the family violence committed by Mr Manebona was raised as a relevant issue. The Tribunal found as much

(Tribunal's reasons at [214]). None of the evidence recited by the Tribunal at [211] raised the issue. Whether or not W wished to give evidence as to the impact on her as a victim was a matter for W alone. She was not compelled to give any such evidence. The fact that the Tribunal might have expected her to give such evidence is irrelevant. It was therefore strictly unnecessary for the Tribunal consider the impact on W as a victim and it did not do so in any real sense. Consequently, it gave the Consideration "neutral weight" (Tribunal's reasons at [214]).

57 In light of the absence of any evidence of the impact on W as a victim, the concerns expressed by the Tribunal at [212] as to whether W's evidence has been "compromised" or "tailored" must be construed as no more than that – concerns that there was no evidence given by W about the impact on her as a victim of the family violence. The Tribunal's concerns cannot be construed as an adverse finding of W's credibility in relation to the evidence that she did adduce.

58 The Tribunal recorded the evidence given by W in her statutory declaration to the effect that she did not want her daughters missing out on their father, nor him to miss out on his daughters, and that she believed he was a very good person and role model and father figure for the girls. She also observed that it was "painful to witness" her daughters missing their father (Tribunal's reasons at [40]). In her oral testimony, W said that although the relationship with Mr Manebona was definitely over, "she felt they could both be civil, and she is willing to share the children with him and his family. He is a good father, and she believes he is a good person. They just cannot get along" (Tribunal's reasons at [99]). The Tribunal referred to this evidence again when considering the best interests of the children and accepted W's evidence that Mr Manebona might play a positive role in his daughters' lives and that both daughters would be heavily impacted by his deportation (Tribunal's reasons at [185], [190]). These findings were consistent with W's oral testimony, that the reason she supports Mr Manebona's remaining in Australia is, "it's not just financial support … it's more for their mental health too, because my daughter asks me if she can see her dad or talk to her dad every night for over a year now". The Tribunal found that the best interests of the children weighed in favour of the revocation of Mr Manebona's visa (Tribunal's reasons at [191]).

59 In circumstances where there was no material expressly put to the Tribunal, relating to the impact on W as a victim, and where the Tribunal was neither required to, nor did, make any

finding in relation to the issue, it cannot be concluded the Tribunal's expression of its concerns about the absence of such evidence from W meant that Mr Manebona was denied procedural fairness.

60 Without objection, Mr Manebona read the affidavit of W sworn on 26 May 2022. W deposed to what she would have said had she been put on notice that the Tribunal considered her evidence "compromised" or "tailored". Nothing in her affidavit deposed to any impact on her as a victim of family violence. The impact of Mr Manebona's deportation on W was described in the context of her losing a co-parent and the effect of his absence on her as a single mother and having to endure the significant emotional impact on her daughters of their father's absence. As has already been explained, s 9.3(1) is not apposite to these impacts – the impact on victims is only to be considered in circumstances where the offender is to be permitted to remain in Australia (*CGX20* at [18]-[20]; *DKN20* at [36]). The Tribunal had placed weight on these matters when considering the best interests of the children.

61 Consequently, any procedural unfairness that may have occurred has not resulted in material error, nor any practical injustice: *Khazaal v Attorney-General* [2020] FCA 448 at [59]; *SZSLA v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 944 at [23].

62 Ground Two cannot be sustained.

Disposition

63 For these reasons, the application must be dismissed.

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice SC Derrington.

Associate:

Dated: 24 June 2022