FEDERAL COURT OF AUSTRALIA

Doves v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 134

Appeal from:	*Doves v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1281
File number(s):	QUD 383 of 2021
Judgment of:	**NICHOLAS, THOMAS AND DOWNES JJ**
Date of judgment:	19 August 2022
Catchwords:	**MIGRATION** – unarticulated claim of health issues said to have emerged – where issues concerning alcohol and anger management were not claimed to be health issues before Tribunal – where no evidence adduced before Tribunal of any diagnosed medical condition or any link between these issues and the appellant's health – where no material before the Tribunal to suggest that the alleged health issues could be an impediment to removal – in absence of such evidence, no realistic possibility of a different decision being made – whether Tribunal able to take into account strength, duration and nature of ties outside Australia when considering strength, duration and nature of ties to Australia – finding that nature and strength of ties to family members in Australia can be affected by existence of family members outside Australia – as consideration of nature of family relationships outside Australia was entitled to be considered in any event, any error was not material **PRACTICE AND PROCEDURE –** application for leave to rely on grounds of appeal raising arguments not advanced at trial – whether expedient and in the interests of justice for leave to be given to raise grounds – where no explanation advanced as to why these grounds were not raised before the primary judge – where one ground could have been the subject of evidence adduced by the respondent before primary judge – where the grounds lacked merit – application dismissed
Legislation:	*Migration Act 1958* (Cth) ss 499(2A), 500(1)(ba), 501(3A), 501(6)(a), 501(7)(c), 501CA Direction No. 79 - Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa

	under s 501CA paras 8(1), 14, 14.2, 14.5
Cases cited:	*Ali v Minister for Home Affairs* [2018] FCA 1895 *AXT19 v Minister for Home Affairs* [2020] FCAFC 32 *AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503; [2018] FCAFC 89 *CVRZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 205 *Doves v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1281 *GXXS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 468 *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; [2021] HCA 17 *O'Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310 *VUAX v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 238 FCR 588; [2004] FCAFC 158 *Zheng v Cai* (2009) 239 CLR 446; [2009] HCA 52
Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	63
Date of hearing:	11 May 2022
Counsel for the Appellant:	Mr D Hooke SC w/ Dr J Donnelly
Solicitor for the Appellant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr P Knowles
Solicitor for the First Respondent:	Sparke Helmore Lawyers

Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

QUD 383 of 2021

BETWEEN:	**BEN DOVES** Appellant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
ORDER MADE BY:	**NICHOLAS, THOMAS AND DOWNES JJ**
DATE OF ORDER:	**19 AUGUST 2022**

THE COURT ORDERS THAT:

1. Leave to advance grounds 1 and 2 of the Notice of Appeal filed on 17 November 2021 is refused.
2. The appeal is dismissed.
3. The appellant pay the first respondent's costs of and incidental to the appeal.

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

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a decision of the Federal Court of Australia in *Doves v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1281.

2 The primary judge dismissed the appellant's amended application for judicial review of the decision of the second respondent (**Tribunal**) affirming a decision of a delegate of the first respondent (the **Minister**) not to revoke the cancellation of the appellant's Class BB Subclass 155 (five year Resident Return) **visa** under s 501CA(4) of the *Migration Act 1958* (Cth) (**the Act**).

3 By his Notice of Appeal, the appellant seeks:

(1) leave to raise two grounds of appeal, and that the appeal be allowed based on these grounds;

(2) that order 1 of the decision of the primary judge be set aside and, in its place, it be ordered that the decision of the Tribunal be quashed and the matter be remitted to the Tribunal;

(3) costs.

4 The application for leave, and the appeal, will be dismissed because:

(1) the appellant did not provide an adequate explanation as to why the grounds of appeal were not raised before the primary judge;

(2) the grounds of appeal have no merit;

(3) the first ground, had it been raised below, could have been the subject of evidence adduced by the Minister.

BACKGROUND

5 The appellant is a citizen of the Netherlands. He first arrived in Australia on 7 December 1999, at which time he was 32 years old.

6 The appellant has a lengthy criminal history, as summarised by the Tribunal:

> As previously mentioned, the material discloses that between January 2006 and February 2019, the Applicant came before the courts for sentencing on approximately 16 occasions and that he was convicted of some 24 offences broadly capable of

> categorisation as (1) offences against property; (2) offences against the person; (3) public nuisance; (4) failure to comply with a direction from lawful authority; (5) failure to comply with the requirements of a duly issued order compelling him to do/refrain from doing something; (6) drunk and disorderly conduct; and (7) driving/traffic offences.

7 The appellant's most recent offending occurred on 26 September 2018 on which date he committed the crimes of entering premises with intent to commit an indictable offence and wilful damage for which he was sentenced on 22 February 2019 to a concurrent sentence of 18 months imprisonment (with a parole release date at one-third of the way through the term) and a restitution order of $19,793.19.

8 On 24 July 2019, the appellant was given notice that his visa had been mandatorily cancelled under s 501(3A) of the Act on the basis that he did not pass the character test (**cancellation decision**).

9 On 16 August 2019, the appellant requested a revocation of the cancellation decision. On the same day, the appellant provided additional statements in support of his request for revocation.

10 On 6 December 2019, a delegate of the Minister decided pursuant to s 501CA(4) of the Act not to revoke the cancellation decision.

11 On 13 December 2019, the appellant applied to the Tribunal for review of the delegate's decision not to revoke the cancellation decision pursuant to s 500(1)(ba) of the Act.

12 The Tribunal heard the application on 24 February 2020. On 28 February 2020, the Tribunal affirmed the decision under review.

THE TRIBUNAL'S DECISION

13 Pursuant to s 501CA(4)(b) of the Act, the Tribunal determined that the issues on review were whether the applicant passed the character test and whether there is another reason why the decision to cancel the appellant's visa should be revoked.

14 In relation to the first issue, the Tribunal was satisfied that the appellant did not pass the character test due to the operation of ss 501(6)(a) and 501(7)(c) of the Act. The appellant, in his written material to the Tribunal, did not comment on his offending and did not make any reference to the character test.

15 In relation to the second issue, the Tribunal observed that it was bound by s 499(2A) of the Act to comply with **Direction No. 79 -** Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA.

16 Direction No. 79 provides guidance for decision-makers on how to exercise the discretion. The direction provides for three "primary considerations":

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

(2) Primary Consideration B – the best interests of minor children in Australia; and

(3) Primary Consideration C – expectations of the Australian Community.

17 Paragraph 8(1) of Direction No. 79 provides that decision-makers must take into account the primary and "other considerations" relevant to the individual case. The Other Considerations which must be taken into account are provided in a non-exhaustive list in paragraph 14 of the direction:

(1) international non-refoulement obligations;

(2) strength, nature and duration of ties;

(3) impact on Australian business interests;

(4) impact on victims; and

(5) extent of impediments if removed.

18 The Tribunal's reasons concluded at [170]:

> In considering whether there is another reason to exercise the discretion afforded by s 501CA(4) of the Act to revoke the mandatory visa cancellation decision, I have had regard to the considerations referred to in the Direction. I find as follows:
>
> - Primary Consideration A weighs very heavily in favour of non-revocation;
> - Primary Consideration C weighs heavily in favour of non-revocation;
> - Primary Consideration B weighs moderately in favour of revocation;
> - I have outlined the weight attributable to the Other Considerations. I do not consider that the totality of the weight attributable to all of the Other Considerations combined, even when conjoined with Primary Consideration B, outweigh the very significant combined and determinative weight I have attributed to Primary Considerations A and C; and
> - a holistic view of the considerations in the Direction therefore favours the non-revocation of the cancellation of the Applicant's visa.

THE PRIMARY JUDGE'S DECISION

19 The appellant brought an amended application for review of the Tribunal's decision and advanced seven particulars of his contention that the Tribunal had made a jurisdictional error. The primary judge dismissed the application, finding at [48] that the reasoning process of the Tribunal was "thoughtful, thorough and correct".

20 By this appeal, the appellant seeks leave to raise two grounds in this appeal that were not raised before the primary judge. The Minister opposes the application to raise fresh grounds on appeal.

RELEVANT PRINCIPLES

21 Leave to argue a ground of appeal not raised before the primary judge should only be granted if it is expedient in the interest of justice to do so: *O'Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310 at 319 per Mason J (as his Honour then was); ***VUAX** v Minister for Immigration & Multicultural & Indigenous Affairs* (2004) 238 FCR 588; [2004] FCAFC 158 at [46] (Kiefel J (as her Honour then was), Weinberg and Stone JJ); *CVRZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 205 at [19] (Kenny, Davies and Banks-Smith JJ).

22 In ***Khalil** v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 (Katzmann, Banks-Smith and Rofe JJ), the Full Court stated at [34]:

> The Court's power to grant leave must be exercised in the way that best promotes the overarching purpose of the civil practice and procedure provisions of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and Rules: FCA Act, s 37M. That purpose is the facilitation of "the just resolution of disputes… according to law" and "as quickly, inexpensively and efficiently as possible". It includes objectives such as the just determination of all proceedings before the Court; the efficient use of the Court's judicial resources; the efficient disposal of the Court's overall caseload; and the timeous disposal of all proceedings. Dealing with a point for the first time on appeal does not serve those objectives.

23 Relevant considerations on such an application include:

(1) whether there is an adequate explanation for the failure to raise the ground below: *VUAX* at [48]; *Khalil* at [37];

(2) the merits of the proposed ground: *VUAX* at [48];

(3) the "potential vindication of a just outcome" and the gravity of the consequences of the decision not to permit the ground to be advanced: *Khalil* at [36];

(4) any prejudice to the respondent if the new ground is allowed to be advanced: *VUAX* at [48]; *Khalil* at [36];

(5) whether the new ground raises a matter that could have been met by evidence: *Zheng v Cai* (2009) 239 CLR 446; [2009] HCA 52 at [16] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

THE GROUNDS OF APPEAL

24 The first ground of appeal states:

> **1. The learned primary judge erred in failing to find that the second respondent (Tribunal) failed to complete the exercise of its jurisdiction.**
>
> (a) Under paragraph 14.5(1) of Direction no. 79 (**Direction 79**), in considering the other consideration of the extent of impediments if removed, the Tribunal was required to take into account, *inter alia*, the appellant's health (the **health consideration**).
>
> (b) Independent of the mandatory health consideration, an unarticulated claim might "clearly emerge" before a decision-maker from their own findings and the material before them upon which the findings are reached.
>
> (c) The Tribunal failed to lawfully consider the mandatory health consideration under paragraph 14.5(1)(a) of Direction 79. The Tribunal merely noted the appellant's response in his Personal Circumstances Form (the **PCF**) that the appellant did not have any diagnosed medical or psychological conditions ([163]).
>
> (d) First, the evidence adduced by the appellant in the PCF (before the Department of Home Affairs) concerning his health had been superseded by oral evidence the appellant gave in the Tribunal hearing:
>
> - The appellant conceded that his criminality in Australia was largely due to unresolved issues with alcohol abuse ([32]).
> - The appellant outlined that if he were returned to the Australian community, he would seek proper treatment for his life-long issues with abusing alcohol ([79]).
> - The appellant conceded that he had a predisposition towards arbitrarily ceasing medication prescribed to him for the specific purpose of removing his craving for alcohol ([83]).
> - The appellant conceded that he was barely at the beginning of any such treatment process or regime of rehabilitation for his unresolved issues with alcohol ([83]-[84], [91]).
> - The appellant conceded he needed to submit to a strict regime of counselling and rehabilitation for his issues with alcohol and anger management ([91]).
>
> (e) Secondly, the Tribunal itself made clear findings that the appellant has

serious unresolved health issues concerning alcohol addiction and alcohol abuse:

- The appellant's consumption of alcohol to consistently excessive levels completely disorientates his moral compass such that almost anyone and anything is, to his mind, "fair game" ([75]).
- The appellant's conduct when intoxicated causes him an inability to delineate between the wrong and right way of acting ([75]).
- The appellant continues to allow his propensity to abuse alcohol to get the better of him ([77]).
- The first respondent (**Minister**) contended that there was no evidence of any rehabilitation undertaken by the appellant specifically targeting his alcohol problem ([80]). The Tribunal agreed with this contention of the Minister, adding that there was minimal evidence of any rehabilitation ([81]).
- The appellant had a predisposition and propensity to abuse alcohol ([87], [90], [133]).
- The appellant had not convinced the Tribunal that he had actively engaged with the rehabilitation process for his abuse alcohol problems ([91]) [sic]
- The appellant's unresolved serious alcohol problems fed into the Tribunal's risk assessment that the appellant posed a strong and convincing likelihood of re-offending ([93], [133]).
- The appellant's offending derives from unresolved issues with alcohol ([133]).
- The level and extent of the appellant's treatment for alcohol problems is not sufficient for the Tribunal to be able to properly ground a positive finding of the appellant's level of rehabilitation ([133]).

(f) Thirdly, given the Tribunal's clear findings that the appellant had unresolved health issues related to alcohol addiction and alcohol abuse, that was not a health issue that could be simply ignored (or forgotten) by the Tribunal when considering the mandatory health consideration in paragraph 14.5(1)(a) of Direction 79. Equally, the appellant's evidence before the Tribunal clearly outlined (and conceded) that he had serious unresolved health issues related to alcoholism that required rehabilitation and treatment.

(g) Finally, in summary, the Tribunal was content to hold the appellant's health issues concerning unresolved serious alcoholism against him when considering the protection of the Australian community primary consideration, but that health issue was entirely forgotten when it came to considering the other consideration of the extent of impediments if removed. The error was material.

25 The second ground of appeal states:

2. The learned primary judge erred in failing to find that the Tribunal acted on a misunderstanding of the applicable law.

(a) The Tribunal acted on a misunderstanding of the applicable law concerning the other consideration of strength, nature, and duration of ties to Australia under paragraph 14.2 of Direction 79.

(b) In considering this other consideration, the Tribunal reasoned that the appellant has a parent (his mother) and a brother in Holland ([153]). At [154], the Tribunal reasoned that it could be fairly said that if the appellant returned to Holland, he would be returning to a mother with whom he has maintained close contact during his time in Australia ([154]).

(c) The fact that the appellant would be returning to his mother in Holland is not relevant to paragraph 14.2 of Direction 79. The question of any emotional/practical support the appellant might receive from his mother in Holland is not relevant to the criteria in paragraph 14.2.

(d) The Tribunal's misconstruction of paragraph 14.2 (by reference to the support the appellant would receive from his mother in Holland) infected the Tribunal's attribution of weight to this other consideration. Had the Tribunal acted on a correct understanding of paragraph 14.2, the Tribunal could realistically have given greater weight to this other consideration. The error was material.

APPLICATION TO ADVANCE GROUNDS NOT RAISED BELOW

Whether adequate explanation for failure to raise grounds below

26 There was no evidence adduced which provided any explanation by the appellant for the failure to raise the grounds of appeal before the primary judge. This is significant especially in circumstances where the appellant was represented below. The fact that different solicitors and counsel acted for the appellant on the appeal is not sufficient justification to warrant the grounds being raised on appeal: *Khalil* at [35].

27 The appellant submitted that, as the grounds have merit, that would tell against an inference that the previous lawyers had made a forensic decision not to advance these grounds before the primary judge. However, even if the grounds have merit, this does not tell against another inference which is equally open, being that the previous lawyers, for whatever reason, decided not to advance these grounds, including because they did not agree that the grounds had any merit.

28 The appellant also submitted that the decision of ***LRMM*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 (Logan J) was handed down after the proceedings below and that this case had a direct bearing on the first ground of appeal. However, for the reasons explained below, the facts of *LRMM* differ in

significant respects to the facts of this case such that the decision is of no real assistance to the appellant in this appeal.

29 The lack of any explanation for the failure to advance these grounds of appeal before the primary judge tells against allowing them to be advanced in this appeal.

Merits of the grounds of appeal

Ground 1

30 The substance of the first ground of appeal is that the Tribunal failed to lawfully consider the appellant's health as mandatorily required by paragraph 14.5(1)(a) of Direction No. 79. That paragraph relevantly states:

> (1) 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;

31 In relation to the "extent of impediments if removed" consideration, and specifically, in relation to the appellant's "age and health", the Tribunal's reasons stated at [161]–[163] and [167]:

> 161. As a guide for exercising the discretion, paragraph 14.5(1) of the Direction directs a decision-maker to take into account any impediments that a non-citizen may face if removed to their country of origin and if required to re-establish themselves in that country. Relevant factors to be taken into account include:
>
> (a) the non-citizen's age and health;
>
> …
>
> 162. In his Personal Circumstances Form, the Applicant summarises his concerns about returning to Holland as follows:
>
> Yes, family here in Australia, my house, my business.
>
> …
>
> Yes, I have limited support, nothing for me back in my country! Everything I have is here.
>
> 163. The Applicant is a man of 52 years of age. In response to [a] question in his "Personal Circumstances Form" about "***Do you have any diagnosed medical or psychological conditions?****"* the Applicant ticked the "*No*" box. [Footnote 90 stated: see also Section 14.5(1)(a) of the Direction].
>
> …
>
> 167. I am thus of the view that this Other Consideration (e) is of neutral weight to the determination of this application.

32 That is, the materials before the Tribunal included a representation by the appellant that he did *not* have any diagnosed medical or psychological conditions, and this was taken into account by the Tribunal as reflected in its reasons.

33 In this appeal, the appellant's case was that he had a medical condition, namely his alcohol addiction, coupled with a psychological condition concerning anger management (which manifested as a result of his alcohol abuse). The appellant relied on these "health issues" as being an "unarticulated claim" which had clearly emerged before the Tribunal from its own findings and the material before it upon which the findings were reached.

34 The findings and material which the appellant submitted gave rise to this unarticulated claim were:

(1) the appellant's oral evidence which is particularised in the appellant's Notice of Appeal at paragraph 1(d). This was said by the appellant to have "superseded" the statement by the appellant in the Personal Circumstances Form (which was referred to in [163] of the Tribunal's reasons);

(2) the Tribunal's findings which are particularised in the appellant's Notice of Appeal at paragraph 1(e).

35 The appellant relied on the decision of *LRMM* as an analogous case which was said to be on "all fours" with the facts of this case. In relation to a similar ground of appeal which was advanced in that case, Logan J stated at [27]:

> Indeed, so important was the subject of the applicant's difficulties with alcohol to its reasoning process in respect of risk, it seems to me that the Tribunal on this occasion, and with all respect, has just forgotten that it was additionally necessary to advert to this health condition separately, as ministerially required, when addressing the requirements of [14.5].

36 However, the facts in *LRMM* differ from the facts in this case in important respects.

37 The Personal Circumstances Form submitted by the applicant in *LRMM* made reference to his problem with alcohol. The section about whether there is "any particular diagnosed medical condition" was left blank: [22] *LRMM*.

38 In this case and as already referred to above, the appellant ticked "no" on the Personal Circumstances Form when answering the question of whether he had any diagnosed medical or psychological conditions. He also answered "N/A" to a question asking for any detail of current treatment by any doctor/health professional/counsellor. The appellant never sought to

qualify or alter these representations before the Tribunal (including to suggest that they had been "superseded"). The point which the appellant now wishes to advance as being an unarticulated claim is therefore directly contrary to the articulated representations made by the appellant, which means it is more obscure and less obvious. In such a case, there is less need for the Tribunal to consider the claim: *AXT19 v Minister for Home Affairs* [2020] FCAFC 32 (Flick, Griffiths and Moshinsky JJ) at [56].

39 The applicant in *LRMM* obtained a report of a clinical psychologist who opined that, as a provisional diagnosis, the applicant suffered from alcohol dependency disorder: [14] *LRMM*. Although expressed to be provisional, the Tribunal accepted the psychologist's assessment of the applicant: [25] *LRMM*.

40 In this case, there was nothing in the material before the Tribunal, or in the Tribunal's findings, of any evidence that the appellant's historic "abuse" of alcohol or his issues with anger management amounted to a health condition. The appellant relies on his oral evidence before the Tribunal but never expressly framed his evidence as a "diagnosed medical condition" and nor was any expert evidence adduced which opined that the appellant's problems with alcohol and anger management could be classified as a health issue or that there was any link between these matters and the appellant's health.

41 The lack of such evidence was referred to by the Tribunal in its reasons. When assessing the weight attributable under Primary Consideration C, the Tribunal made the unchallenged finding at [133] that:

> there is no current, independent or expert evidence before the Tribunal providing analysis and commentary around (1) the Applicant's issues with alcohol, (2) his incapacity to regulate his anger and impulsivity, and (3) his incapacity to submit to lawful authority – such that this Tribunal could confidently make a finding that any such diagnosed/identified symptoms are under some kind of remedial management and control …

42 In summary, *LRMM* concerned a different set of circumstances than those which arose in this case (and is distinguished for that reason) because:

(1) the appellant made a positive assertion in the materials which were before the Tribunal regarding his lack of any diagnosed medical or psychological conditions, which articulated claim was not withdrawn or qualified, and which is inconsistent with the unarticulated claim which is now said to have emerged;

(2) the appellant did not frame his oral evidence in the Tribunal as being a diagnosed medical condition;

(3) the appellant did not adduce any evidence before the Tribunal regarding any diagnosed medical condition or health issue, including any diagnosed psychiatric condition. Nor did he adduce any evidence which showed that there was any link between these matters and the appellant's health;

(4) the Tribunal made express findings regarding the lack of current, independent expert evidence regarding the appellant's issues with alcohol and anger management (albeit under a different consideration under Direction No. 79), and those findings are not challenged.

43 For these reasons and contrary to the appellant's submissions, this is not a case where the Tribunal had "entirely forgotten" about the appellant's health issues when considering paragraph 14.5(1)(a) of Direction No. 79. That is because the appellant made no specific representation about his alcohol dependency or anger management as being a health issue.

44 Nor could it be said that the appellant's health issues were an unarticulated claim which had clearly emerged from the Tribunal's findings and the material before it.

45 That is because, in order to clearly emerge from the materials, an unarticulated claim must be based on "established facts": *AYY17 v Minister for Immigration and Border Protection* (2018) 261 FCR 503; [2018] FCAFC 89 (Collier, McKerracher and Banks-Smith JJ) at [18]. Having regard to the materials before the Tribunal, including the appellant's oral evidence, no health issue based on established facts could be said to have clearly emerged in this case. Further, having regard to the lack of evidence adduced by the appellant before the Tribunal, and the answers given by him on the Personal Circumstances Form, any such articulated claim was obscure and uncertain.

46 Further, even if the appellant's use of alcohol and his anger management could be described as health issues, there was no material before the Tribunal to suggest that these matters could possibly be relevant as an impediment to removal. In this case, it is neither obvious nor apparent that treatment options available in the Netherlands would be any less adequate than treatment in Australia so as to constitute an impediment to removal: see *GXXS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 468 (Derrington J) at [57] and [60]–[62].

47 As to this issue, relevant evidence could have been adduced in the Court below. The appellant submitted that, had the Tribunal properly considered the appellant's unresolved alcohol issues, "the Tribunal would need to confront the presence or otherwise of any medical facilities in Holland to provide programs for rehabilitation or treatment of those with such issues". On that basis, the issue now raised could have been the subject of evidence in the Court below. This provides a further reason not to permit the first ground to be argued on appeal.

48 The appellant bore the onus of demonstrating that any error was material: *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; [2019] HCA 3 at [45]–[46] (Bell, Gageler and Keane JJ). In *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441; [2021] HCA 17 (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ) the plurality, Kiefel CJ, Gageler, Keane and Gleeson JJ, observed at [39] that:

> … The burden of the plaintiff is not to prove on the balance of probabilities that a different decision *would* have been made had there been compliance with the condition that was breached. But 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 had there been compliance with that condition.
>
> (emphasis original)

49 In order to demonstrate that there was a realistic possibility of a different decision being made, there would need to be some basis to find that a Tribunal could conclude that the appellant required further treatment for his health issues, what that treatment was and that such treatment would not be available in the Netherlands so as to constitute an impediment to removal. There is no evidence on that question and no other basis upon which the Court could infer such a possibility. This means that the appellant has failed to satisfy the onus of demonstrating that any error was material in any event.

50 For these reasons, the first ground of appeal has no merit.

Ground 2

51 The substance of the second ground of appeal is that the Tribunal acted on a misunderstanding of the applicable law concerning the other consideration of "strength, nature and duration of ties to Australia" under paragraph 14.2 of Direction No. 79, which states:

> (1) … decision-makers must have regard to:
>
> …

> (b) The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of cancellation on the non-citizen's immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely).

52 The appellant expressly refers to [153]–[154] of the Tribunal's reasons in his Notice of Appeal which paragraphs state:

> It is clear that the Applicant's two children in Australia would be impacted by the Applicant's removal to Holland. As against that, the Applicant does have a parent (his mother) and a brother in Holland. The other point that emerged in the evidence was that, for the 20 years the Applicant has been in Australia, his parents visited him here on 22 occasions. The Applicant said:
>
> > I've been here for 20 years now in Australia and mum and dad have been coming over for 22 times, sometimes they come twice a year. They come three months at a time, so we spend a lot of time together …
>
> Therefore, it can be fairly said that if the Applicant returned to Holland, he would be returning to a mother with whom he has maintained close contact during his time in this country. At best, a moderate measure of weight is attributable to this Other Consideration (b) pursuant to paragraph 14.2(1)(b) of the Direction.

53 The thrust of the appellant's criticism is that questions of any emotional/practical support the appellant might receive from his mother in the Netherlands is not relevant to the criteria in paragraph 14.2. Instead, it was submitted that the consideration of the presence of the appellant's mother and brother in the Netherlands was clearly relevant to paragraph 14.5 in relation to "extent of impediments to return".

54 The appellant's case is that this misconstruction of paragraph 14.2 infected the Tribunal's attribution of weight; that is, the Tribunal appeared to offset or moderate the positive ascription of weight to this other consideration by reference to the appellant's relationship with his mother in the Netherlands. According to the appellant, this had the effect of "double-counting" as it was considered in an inappropriate position (paragraph 14.2) *and* also in the appropriate position (paragraph 14.5).

55 However, in assessing the "strength, nature and duration" of the appellant's family or social links to persons in Australia, the Tribunal was entitled to assess those matters "holistically and in context, and not just in isolation": *Ali v Minister for Home Affairs* [2018] FCA 1895 (Bromwich J) at [23].

56 The text of paragraph 14.2(1)(b) requires consideration of the "strength duration and nature of any family or social links". The "nature" of a person's ties to family members in Australia –

and the weight that should be afforded to that matter – can logically be affected by the existence of relationships with other family members who do not live in Australia. That is to say, one manner of considering the nature of a person's ties to Australia is to consider those ties by reference to the person's ties to other countries. Whilst the Tribunal does not necessarily have to reason in this manner, it is not prohibited from so reasoning.

57 In any event, even if the appellant's contention is correct, any error was not material. The Tribunal was entitled to consider the appellant's family relationships in the Netherlands in the course of considering other factors relevant under Direction No. 79. The appellant has not demonstrated that there is any realistic possibility that the Tribunal would have reached a different conclusion if it had considered the appellant's family relationships in the Netherlands under one aspect of the direction rather than another.

58 For these reasons, the second ground of appeal has no merit.

Other considerations

59 For the reasons already given, the first ground, had it been raised before the primary judge, could have been the subject of evidence adduced by the Minister. There is therefore inevitable prejudice to the Minister if the appellant is permitted to advance this ground of appeal.

60 This provides a further reason to refuse leave to advance the first ground of appeal.

61 We accept that the Tribunal's decision, and the primary judge's judgment upholding it, have serious consequences for the appellant who has resided in Australia for more than 20 years. However, we do not consider that the appellant's grounds of appeal, which raise arguments not advanced before the primary judge, have any merit and it would therefore be futile to permit him to rely on them.

CONCLUSION

62 Leave to advance grounds 1 and 2 of the Notice of Appeal filed on 17 November 2021 will be refused and the appeal will be dismissed.

63 The appellant will be ordered to pay the Minister's costs of and incidental to this appeal.

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Nicholas, Thomas and Downes.

Associate:

Dated: 19 August 2022