# FEDERAL COURT OF AUSTRALIA

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

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| File number(s): | QUD 358 of 2021 |
| Judgment of: | **SC DERRINGTON J** |
| Date of judgment: | 18 March 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 – whether drug addiction ought to have been considered a health issue in the Tribunal's mandatory consideration of extent of impediments pursuant to Direction 90 s 9(1)(b) – whether jurisdictional error made by Tribunal – whether decision of Tribunal was illogical and/or irrational – whether procedural fairness was denied |
| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 43(2B)<br>*Migration Act 1958* (Cth) ss 476A, 499, 501, 501CA |
| Cases cited: | *AWT15 v Minister for Immigration and Border Protection* [2017] FCA 512<br>*AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503<br>*BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94; 277 FCR 420<br>*Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352<br>*CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496<br>*Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203<br>*Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628<br>*LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039<br>*Matthews v Minister for Home Affairs* [2020] FCAFC 146<br>*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 |

*Minister for Home Affairs v Buadromo* [2018] FCAFC 51; 267 FCR 320

*Minister for Home Affairs v Omar* [2019] FCAFC 188; 272 FCR 589

*Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158

*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1

*Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516; 69 AAR 210

*Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332

*Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164

*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611

*Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; 212 FCR 99

*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259

*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17

*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1

*Pallas v Minister for Home Affairs* [2019] FCAFC 149

*Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 258 CLR 173

*Tickner v Chapman* [1995] FCA 1726; 57 FCR 451

*Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 263 FCR 531

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| Division: | General Division |
| Registry: | Queensland |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
| Number of paragraphs: | 76 |
| Date of hearing: | 18 March 2022 |
| Counsel for the Applicant: | Dr Jason Donnelly |
| Solicitor for the Applicant: | Zarifi Lawyers |
| Counsel for the First | |

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| Respondent: | Jonathan Kay Hoyle |
| Solicitor for the First Respondent: | Australian Government Solicitor |

# ORDERS

**QUD 358 of 2021**

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| **BETWEEN:** | **EK**<br>Applicant |
| **AND:** | **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**<br>First Respondent |
| | **ADMINISTRATIVE APPEALS TRIBUNAL**<br>Second Respondent |

**ORDER MADE BY:** **SC DERRINGTON J**

**DATE OF ORDER:** **18 MARCH 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 EK is a citizen of Lebanon who arrived in Australia at the age of 15 on 1 December 1999. Since that time, he has held a succession of Class BB, Subclass 155 Five Year Resident Return Visas. EK'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 numerous offences, including drug trafficking, for which he was sentenced to a five-year term of imprisonment.

2 EK made representations on 5 May 2020 seeking revocation of the cancellation decision pursuant to s 501CA(4) of the *Migration Act*. On 14 July 2021, a delegate of the Minister decided not to revoke the cancellation decision. The Administrative Appeals **Tribunal** affirmed that decision on 6 October 2021 and published reasons for its decision (**Tribunal's reasons**).

3 EK now seeks judicial review of that decision pursuant to s 476A of the *Migration Ac*t on the following grounds:

1. There was a constructive failure to exercise jurisdiction by the second respondent.
2. The decision of the second respondent was illogical and/or irrational.
3. The Tribunal denied the applicant procedural fairness.

4 Fundamentally, the application concerns the construction of 'Direction No. 90 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA' (**Direction 90**) in circumstances where drug 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.

5 The Tribunal accepted that EK had a serious drug addiction (Tribunal's reasons at [103]) which had been conceded by EK to go 'hand in hand' with his very serious criminal conduct (Tribunal's reasons at [108]). The critical question now raised is whether EK drug addiction ought to have been considered as a health issue in the context of the Tribunal's mandatory consideration of the extent of impediments EK may face if he were to be removed from

Australia to Lebanon, even though no representation had been made that he suffered from any other health issue.

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

**Legislative provisions**

7 Section 501(3A) of the *Migration Act* provides that the Minister must cancel a visa that has been granted to a person if:

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

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

9 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.

10 The Preamble to Direction 90 is in paragraph 5 of Part 1. Paragraph 5.1 sets out the objectives of Direction 90 which, relevantly, include:

> (4) The purpose of this Direction is to guide decision-makers in performing functions or exercising powers under section 501 and 501CA of the Act. Under section 499(2A) of the Act, such decision-makers must comply with a direction made under section 499.

11 Paragraph 5.2 of Direction 90 provides as follows:

> **5.2 Principles**
>
> The principles below provide the framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under section 501, or whether to revoke a mandatory cancellation under s 501CA. The factors (**to the extent relevant in the particular case**) that must be considered in making a decision under s 501 or section 501CA of the Act are identified in Part 2.
>
> (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.
>
> (2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.
>
> (3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engage in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.
>
> (4) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding limited stay visas, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.
>
> (5) Decision-makers **must take into account the primary and other considerations relevant** to the individual case. In some circumstance, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mention in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.
>
> (emphasis added)

12 Part 2 is concerned with exercising the discretion. Section 6 of Direction 90 stipulates that, informed by the principles in paragraph 5.2, a decision-maker **must take into account** the

considerations identified in sections 8 and 9, **where relevant to the decision** (emphasis added).

13 Section 7(1) stipulates that, in applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight. Section 7(2) provides that primary considerations should generally be given greater weight than the other considerations, and section 7(3) provides that one or more primary considerations may outweigh other primary considerations.

14 Section 8 of Direction 90 provides:

> **8. Primary considerations**
>
> In making a decision under s 501(1), 501(2) or 501CA(4), the following are primary considerations:
>
> (1) protection of the Australian community from criminal or other serious conduct;
>
> (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.

15 The 'other considerations' which are required to be taken into account, where relevant, are specified in section 9:

> **9. Other considerations**
>
> (1) In making a decision under section 501(1), 501(2) or 501CA(4), other considerations must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):
>
> a) international non-refoulement obligations;
>
> b) extent of impediments if removed;
>
> c) impact on victims;
>
> d) links to the Australian community, including:
>
> i) strength, nature and duration of ties to Australia;
>
> ii) impact on Australian business interests.

16 Relevantly for present purposes, s 9.2 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.

**Relevant legal principles**

17 There was no dispute between the parties as to the relevant applicable principles.

18 First, the burden lies on EK to demonstrate jurisdictional error: *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 258 CLR 173 at [24] per French CJ, Bell, Keane, and Gordon JJ.

19 Secondly, the representations made by EK pursuant to the invitation in s 501CA(3) must be considered by the Minister and, therefore, by the Tribunal on review standing in the Minister's shoes. As such, they are a mandatory relevant consideration: *Minister for Home Affairs v* ***Buadromo*** [2018] FCAFC 151; 267 FCR 320 at [41]. Importantly however, as explained by the Court, 'they are a mandatory relevant consideration as a whole and not as to the individual statements contained in the representations': see also, *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 263 FCR 531 at [69]; *Minister for Home Affairs v* ***Omar*** [2019] FCAFC 188; 272 FCR 589 at [34(g)].

20 Thirdly, where a discretion is unconfined by the terms of the statute, a court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he or she is bound to do so is found in the subject matter, scope and purpose of the Act: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 39-40; *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 at [56] per Robertson J; *Buadromo* at [41].

21 Fourthly, the Tribunal is only required to consider claims made by an applicant where they are either:

1. the subject of substantial clearly articulated argument, relying on established facts; or
2. clearly emerge from the materials: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; 144 FCR 1 at [55]

and [68] per Black CJ, French and Selway JJ; ***AWT15*** *v Minister for Immigration and Border Protection* [2017] FCA 512 at [67] per Barker J; *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503 at [18] per Collier, McKerracher and Banks-Smith JJ.

22 Fifthly, the Tribunal is bound by Direction 90. It was required to have regard to the Primary Considerations and the Other Considerations identified in that Direction and so those considerations were also relevant considerations in a jurisdictional sense.

23 Sixthly, the Tribunal is required to give active intellectual or meaningful consideration to a 'substantial, clearly articulated representation': *Tickner v Chapman* [1995] FCA 1726; 57 FCR 451; *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [44]; *Omar* at [35]-[36].

24 The force and effect of Direction 90 made under s 499(1) of the *Migration Act*, albeit concerning one of its predecessors, Direction 65, was explained by the Full Court in *Matthews v Minister for Home Affairs* [2020] FCAFC 146. The Court said, at [45]:

> …it is important to emphasise that the express purpose of Direction 65 is "*to* ***guide*** *decision-makers performing functions or exercising powers under section 501 of the Act*" (para 6.1(4), Direction 65; emphasis added). It remains the task of the Tribunal to determine what is and is not relevant in the circumstances of the individual case. Thus, as Perram J held by analogy in ***SZTMD*** [*v Minister for Immigration and Border Protection* [2015] FCA 150; (2015) 150 ALD 34] (in a passage also approved in [Minister for Home Affairs v] *HSKJ* [[2018] FCAFC 217; (2018) 266 FCR 591] at [44]):
>
> > 20. Although the applicant did not directly raise the issue, I would indicate that I accept Mr Hume's submission that it was for the Tribunal to form an opinion as to what was relevant under cll 2 and 3 [of Ministerial Direction 56 made under s 499 of the Act] and what was not. The usual way of reading provisions such as these clauses is that they are construed as requiring the formation by the decision-maker of an opinion on the standard (here, relevance) imposed; that is to say, they are not generally construed as requiring the existence of a jurisdictional fact: see, for example, *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456 at 466-468 (FC). Consequently, there is no occasion to consider whether this Court is of the opinion that there were relevant parts of the guidelines or country information. It is the Tribunal's views on relevance which matter, not those of this Court.

25 Seventhly, the Tribunal is, pursuant to s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth), obliged where giving reasons in writing for its decision to include its findings on

material questions of fact and a reference to the evidence or other material on which those findings were based.

26 It must also be recalled that, on judicial review, the reasons of a decision maker should not be scrutinised minutely with an eye keenly attuned to the perception of error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at [30].

**Ground One**

27 EK's contention that the Tribunal constructively failed to exercise jurisdiction is particularised as follows:

> (a) In the context of considering the primary consideration of the protection of the Australian community, the second respondent found the applicant had a serious and sustained drug addiction problem:
>
> i. the applicant has been a heavy drug user for most of the last 16 years ([5])
>
> ii. the applicant had no concrete arrangements regarding post-release treatment or rehabilitation for his addiction ([61])
>
> iii. the applicant has a serious drug addiction problem ([103])
>
> iv. there is nothing in the applicant's history to suggest that he has the capacity to remain drug-free ([108])
>
> v. there is nothing in his history to inspire confidence that the applicant can escape from the drug-taking habits of almost his entire adult life ([108])
>
> vi. to believe that the applicant can stay away from the drug scene if released into the community would be a triumph of hope over experience ([108])
>
> vii. as the applicant presents a significant risk of returning to substance abuse, he is a significant risk of reoffending ([109).
>
> (b) In the context of considering the other consideration of the extent of impediments if removed from Australia, the second respondent was mandatorily required to consider the applicant's health under paragraph 9.2(1)(a) of Direction 90.
>
> (c) The second respondent failed to consider the applicant's serious health issues related to drug addiction and the necessity for drug rehabilitation.
>
> (d) When considering paragraph 9.2(1)(a) of Direction 90 (i.e. the applicant's age and health), the second respondent merely found that:
>
> i. the applicant is 37 years of age and apparently in good health ([133]).
>
> (e) The second respondent was content to hold the applicant's health issues

concerning unresolved serious drug addiction against him when considering the protection of the Australian community primary consideration, but those health issues were forgotten when it came to considering the other consideration of the extent of impediments if removed: *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 [27].

(f) Moreover, regardless of what the applicant claimed, 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: *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89 [26]. The applicant repeats the particulars in paragraph [1](e) above.

(g) The second respondent's non-compliance was material. Lawful compliance could realistically have led the second respondent to attribute greater weight to the other consideration of the extent of impediments if removed. Subsequently, when the second respondent came to undertake the ultimate balancing exercise at [149]-[155], a different conclusion could have been reached in the broad exercise of discretion.

28 The gravamen of EK's challenge to the Tribunal's decision is that it failed to consider a mandatory consideration relevant to the extent of impediments EK may face if removed to Lebanon, that being his health.

29 It must be borne in mind that section 9.2(1) of Direction 90 directs a decision maker to take into account the non-citizen's health, amongst other matters, in considering the extent of impediments likely to be faced *in establishing themselves and maintaining basic living standards* (in the context of what is generally available to other citizens of that country) (emphasis added).

30 In its consideration of the matters specified in s 9(1)(b), the Tribunal said:

133. The Applicant is 37 years of age and apparently in good health.

134. There is no doubt that if the Applicant were to be returned to live in Lebanon, he would experience significant language and cultural issues. He has not lived in Lebanon since he was a child. The primary language in Lebanon is Arabic, although English is widely spoken. The Applicant claims that his command of Arabic is now quite limited. It is interesting to note that in South Australia Police records up to and including 19 November 2010, the Applicant's primary language is stated to be "Arabic". From 17 January 2011 police reports indicate that the Applicant's primary language is "English". This would suggest that up until the beginning of 2011, the Applicant considered himself to be primarily a speaker of Arabic. I accept that it would take the Applicant some time to become entirely comfortable in an environment where Arabic was the main spoken language. This difficulty would, however, diminish over time.

135. Lebanese society is very different from Australian society with many quite different cultural and religious groups within the country. This would no

> doubt require some adjustment on the Applicant's part. It is also the case that economic and social conditions in Lebanon are poor, particularly of recent times. The Applicant would find it difficult to get employment or to access health or other services comparable to those available in Australia. According to XX, there are few supports to help people with drug problems and drugs are easily obtained in Lebanon.
>
> 136. The Applicant does have relatives in Lebanon including his father, various aunts, uncles and cousins. It is unclear what level of support he could expect to receive from his relatives, and the social, medical, and other economic support available to him there would be less than is available to him in Australia. He would be reliant on financial support from his mother, at least initially. XX stated that while she would not want to be put in a position where she has to financially support him, she would no doubt do as [sic] it if he was in need.
>
> 137. This Other Consideration (b) weighs in favour of revocation.

31 EK contends that, in the face of the Tribunal's several findings about his serious and sustained drug habit, the Tribunal was mandatorily required to consider that habit as a health issue when considering section 9(1)(b), whether or not EK 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.

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

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

33 Of course, *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 (*LRMM* 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]).

34 The principles relevant to determining whether a claim 'clearly emerges' from the material were summarised by Barker J in *AWT15* 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].
>
> (d) to clearly emerge from the materials, the claim must be based on 'established facts': *SZUTM v Minister for Immigration and Border Protection* (2016) 241 FCR 214. 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.

35 As to the material that was before the Tribunal, the following observations can be made. First, in his personal circumstances form dated 4 May 2021, EK left '**Section 12, Impediments to Return, Health Information**', blank. The attached statement acknowledged that his 'main problem is my drug addiction' when addressing his risk of re-offending. He spoke of his mother and brother's health difficulties but did not identify either his drug addiction or any other condition as a health difficulty. He asserted that there are no drug rehabilitation places in Lebanon.

36 Secondly, EK representations pursuant to s 501CA(3) were prepared by his legal representatives. In those representations, it was submitted in relation to s 9.2(1) of Direction 90 that 'this matter is relevant to the Applicant's mental health and ability to rehabilitate,

particularly in circumstances where he fled Lebanon as a child with his mother and siblings.' It was submitted further that:

> … there would be an absolute lack of social, medical or economic support available to the Applicant were they to be returned to Lebanon, which could damage the Applicant's mental health and rehabilitation efforts to an extent that it would diminish any prospects to remain drug-free.

37 In considering the extent of impediments if removed to Lebanon, the Delegate stated:

> Age and health
>
> 76. EK is aged 37 and has identified that he is a recovering drug addict.
>
> …
>
> Social, medical and/or economic support available in Lebanon
>
> …
>
> 86. I note that publicly available country information indicates that the Lebanese health system is highly diverse, including a mix of public and private payers and providers. Health financing is mobilised from a range of sources, including general government revenues, social security contributions and the private sector. The Ministry of Public Health also provides assistance to those who do not have health coverage.
>
> 87. I also note that publicly available country information indicates that several non- governmental organisations are actively addressing issues related to substance abuse disorders through a variety of interventions such as prevention, rehabilitation, abstinence and harm reduction, and rehabilitation services are offered in residential settings or in outpatient clinics.
>
> …
>
> 89. I find that EK will have access to health services, treatment and welfare services in Lebanon, although the standard and ease of access may not be of the same high standard and as widely available as those services are to EK in Australia. EK may also suffer disadvantage if their medical records and history are not available to them or their health service provider in their home country.

38 Thirdly, in his Statement of Facts, Issues and Contentions (**SFIC**) to the Tribunal, also prepared by his legal representatives, EK repeated the submission he had made to the Delegate, albeit noting that the submissions as to his susceptibility to relapse should he be returned to Lebanon should not infect the assessment of his risk to the Australian community. No other health condition was raised by EK.

39 Fourthly, also before the Tribunal was EK Parole Assessment Report dated 23 June 2020. That report noted EK's drug use, his completion of a Relapse Prevention Plan, and his completion of three short substance intervention courses between November 2018 and

October 2019. It noted also that EK had provided a clear drug test on 14 August 2019. In relation to his Mental Health & Wellbeing, that report said:

> Prison Mental Health Service has advised that the prisoner is not currently an open client nor are they awaiting intake or assessment. The prisoner has not been subject to formal observations while in custody or named in any self-harm incidents.
>
> The IRNA records a disclosure by the prisoner that he was seeing a psychologist approximately 6 years ago, and was diagnosed with a mental health condition. It further records that he was prescribe psychoactive medication which he took for four years before ceasing it. In the parole interview, the prisoner confirmed that he had seen a psychologist for "minor depression" and has taken and [sic] antidepressant medication called Lexapro "off and on". The prisoner denied experiencing self-harming or suicidal ideation. He reported that his mental health was currently stable.
>
> The sentencing remarks dated 6 April 2020 state 'I note that you had a disrupted childhood and are said to have been exposed to domestic abuse. You moved to Australia with your mother. Your mother was a single mother with three boys…(You) have mild anxiety and depression, and also an unverified heart condition…'

40 In the present case, not only did EK make no specific representation about any health issue, on a fair reading of the material, none could be said to 'clearly emerge' in the same manner as found by Logan J in *LRMM*. The only medical report referred to in the materials, and by the Tribunal (Tribunal's reasons at [14]-[15]), was that of psychologist Dr Cayley whose report was dated 22 December 2010 and which appears to have been prepared in respect of EK's sentencing before the District Court of South Australia on 9 March 2011. Nothing more recent was in evidence.

41 There was no evidence that EK reported any other health issues during the periods in which was drug free when incarcerated or for the period of approximately 18 months following his participation in a rehabilitation program at Byron Bay (Tribunal's reasons at [108]).

42 As at June 2020, no current medical issues were raised with the Parole Board and indeed it appears that not only was EK's mental health stable but that he was also drug free.

43 In light of this material, the Tribunal cannot be criticised for concluding that EK was 'apparently in good health'. Given the extensive references to EK's drug addiction throughout the Tribunal's reasons, it cannot realistically be supposed that the Tribunal 'overlooked' that addiction in concluding generally that he was 'apparently in good health'.

44 His state of health is only one factor the Tribunal was required to take into account when considering the impediments EK would face if removed from Australia.

45 As is apparent from the Tribunal's reasons, the Tribunal accepted that EK has been able to remain drug free while he has been incarcerated. His apparent inability to remain drug free when not incarcerated was a matter the Tribunal took into account in assessing his risk of offending. The Tribunal brought the risk of EK's return to substance abuse – his likely descent back into addiction – to account when considering the social, medical and/or economic support that would be available to him in Lebanon.

46 The Tribunal confronted the presence, or lack of, drug addiction rehabilitation programs in Lebanon, apparently accepting the evidence given by EK's mother that there were 'few supports to help people with drug problems and drugs are easily available in Lebanon' (Tribunal's reasons at [135]). This was consistent with the submissions made by EK's legal representatives both before the Delegate and before the Tribunal. Notably, the Tribunal's finding differed from that of the Delegate who had been persuaded that a range of rehabilitation options would be available to EK in Lebanon. In this context it is tolerably clear not only that the Tribunal conducted a proper review but also that the Tribunal subsumed EK's drug addiction within its overall consideration of the impediments he might face if removed.

47 As has already been observed, the Tribunal found that the extent of the impediments that may be faced by EK should he be removed from Australia weighed in his favour, that is, in favour of revoking the decision to cancel his visa. Ultimately, as EK has framed the terms of Ground One, the complaint is primarily one as to the allocation of the weight placed by the Tribunal on this factor. EK submits that had issues concerning his unresolved drug addiction been considered expressly as health issues, greater weight may have been attributed to the 'other consideration' of the extent of impediments if removed. It is for the Tribunal, not the Court, to determine what is and is not relevant in the circumstances of the individual case (*Matthews v Minister for Home Affairs* [2020] FCAFC 146 at [45]), and the weighing of the various factors a Tribunal is required to consider is also a matter for the Tribunal, not the Court: *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164 at [33]; *Pallas v Minister for Home Affairs* [2019] FCAFC 149 at [44].

48 EK has not established any jurisdictional error on the part of the Tribunal.

49 Even if such an error were established, contrary to the submission put by EK, that error would not be material. Whether the decision made could have been different – had EK's drug

addiction been considered expressly as a health issue within the meaning of paragraph 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 at [38]. The High Court went on to explain, at [39]:

> Bearing the overall onus of 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)

50 It will be recalled that paragraph 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 [150]-[153]) that Primary Consideration 1, the protection of the Australian community, weighed 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 moderately 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 paragraph 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 [148]).

51 Nevertheless, the Tribunal held that 'Having regard to all the Primary Considerations and Other Considerations, the application of the Direction favours the Tribunal not exercising the discretion to revoke the cancellation of the visa' (Tribunal's reasons at [154]).

52 In relation to Primary Consideration 1, the Tribunal stated:

> [103] The Applicant has committed multiple offences of escalating seriousness since 2005. He had admitted engaging in family violence. The Applicant has a serious drug addiction problem. He has shown himself to be both willing and able to engage in commercial drug trafficking. He has a fascination with firearms and has been convicted of firearms offences. So far, there is no evidence of him using firearms. It is clear from the findings of XXX in the Supreme Court of Queensland on 6 April 2020, that the Applicant's "fascination with guns" is more than academic and in fact extends to the use of a firearm to "protect his business". When it is noted that his first firearms conviction in 2012 involved a handgun, it is perhaps only good fortune that

has thus far prevented the Applicant using a firearm in circumstances where a person may have been seriously injured or killed. Any reoffending by the Applicant would be very serious, particularly if weapons were involved.

[104] The Applicant has a history of being found in possession of weapons dating back to 2010:

(a) On 30 October 2010, he was found to be in possession of nunchakus.

(b) On 23 April 2011, he was found to be in possession of a tomahawk.

(c) On 9 August 2011, he was found to be in possession of a Glock 9 mm pistol and a Vostock Margolin rifle.

(d) On 23 December 2015, he was found to be in possession of a baseball bat.

(e) On 30 July 2018, he was found with a loaded handgun stuck to the underside of the driver's seat in his car.

[105] The nature of harm that might be done to the community if the Applicant were to reoffend is extremely serious. It may not only include commercial trafficking in drugs, but also possibly the use of firearms or other weapons either for the purposes of "self-protection" or possibly even for the purposes of intimidation of drug debtors.

…

[108] The Applicant has been a serial offender, committing offences of greater and greater magnitude since 2005. Despite his attempts to rehabilitate himself since 2005, there is nothing in his history to suggest that he has the determination or the capacity to remain drug free. The only times that he has been drug-free since 2005 have been when he was incarcerated, or for a period of approximately 18 months after his participation in the Byron Bay rehabilitation program. On every occasion, he has returned to drug use and the magnitude of his involvement in drug trafficking has increased. He has engaged in drug trafficking when on bail. As he himself has conceded, drug use and offending go hand in hand in his case. There is nothing in his history to inspire confidence that the Applicant can escape from the drug taking habits of almost his entire adult life. He has no concrete arrangements to be supported in the community if the cancellation of his visa were to be revoked. To believe that he can stay away from the drug scene if released into the community, would be a triumph of hope over experience. In the past, even bail and parole supervision have not deterred him from offending and using drugs.

[109] The Applicant presents a significant risk of returning to substance abuse, and therefore, a significant risk of reoffending.

53 In relation to Primary Consideration 4, the Tribunal stated:

[127] … in assessing the weight attributable to Primary Consideration 4, it is necessary to have regard to the following matters:

(a) The Applicant has been involved in multiple offences since 2005 (see Annexure B).

(b) The severity of his offending has escalated. He has twice been sentenced to imprisonment for periods in excess of 12 months because of the seriousness of his offending.

(c) The Applicant has been involved in family violence, though he has no convictions for it. His offending includes commercial trafficking in drugs and firearms offences, both of which must be regarded as extremely serious.

54 In light of the ultimate finding by the Tribunal, and in light of the positive finding already made in relation to the extent of likely impediments should EK 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 EK, his drug addiction was expressly considered under paragraph 9.2(1)(a) of Direction 90.

55 Ground One cannot succeed.

**Ground Two**

56 EK's contention that the Tribunals decision was illogical and/or irrational is particularised as follows:

(a) When considering the primary consideration of the protection of the Australian community, the second respondent reasoned that the applicant required treatment and rehabilitation for his drug addiction problems ([61]), the applicant's history suggested he did not have the capacity to remain drug-free ([108]), the applicant *has* a serious drug addiction problem, and the applicant presented a significant risk of returning to substance abuse ([109]).

(b) In strong contrast to the findings extracted at 2(a) above, when the second respondent addressed the applicant's health in the context of the other consideration of the extent of impediments if removed from Australia, the second respondent oddly found that the applicant was 'apparently in good health' ([133]).

(c) It is illogical or irrational to find that a non-citizen has a serious drug addiction problem, but otherwise, reason that the person is apparently in good health (without *qualifying* the latter finding by reference to the former finding).

(d) The second respondent's findings extracted at (2)(b) above concerning the applicant's health cannot be lawfully reconciled with the decision-maker's findings extracted at (2)(a) above.

57 As was said by Crennan and Bell JJ in *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [135], the question that needs to be asked in determining whether a decision was legally unreasonable is whether:

[On] the probative evidence before the Tribunal, a logical or rational decision maker

could have come to the same conclusion as the Tribunal. Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.

58 Before considering the various particulars said to rise to the level of legal unreasonableness, it is helpful to recall the observations by Allsop CJ on this topic in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1:

> [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].
>
> …
>
> [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.
>
> [13] The relationship between the conclusion or outcome and the reasoning process revealed by reasons to reach it is one that should not be rigidly set. Reasons may fail to disclose an evident and intelligible justification or may

> not be sufficient to outweigh the inference that the decision is so unjust as to be (in the context of the statutory source of the power) beyond a lawful exercise of the power.

59 The Chief Justice emphasised, at [8], that the role of this Court in conducting judicial review of the Minister's decision is supervisory and cannot involve substituting the Court's view as to how a discretion should be exercised for that of an administrative decision-maker, including in particular substituting its view of what is reasonable for that of the Minister: see also *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [66]; *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158 at [59].

60 Similar observations were made by the Full Court in ***CQG15*** *v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496 at [60], referring to the decision of Wigney J in *Minister for Immigration and Border Protection v* ***SZUXN*** [2016] FCA 516; 69 AAR 210 at [52], and by the Full Court in ***BHL19*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94; 277 FCR 420 at [327].

61 The issue therefore is whether the arguments advanced in support of the particulars of this ground of review go beyond a challenge to the merits of the evaluative exercise carried out by the Tribunal, so as to substantiate a finding of legal unreasonableness: *BHL19* at [330]. For a decision to be vitiated for jurisdictional error based on illogical or irrational findings of fact or reasoning, 'extreme' illogicality or irrationality must be shown, 'measured against the standard that it is not enough for the question of fact to be one on which reasonable minds may come to different conclusions': *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; 212 FCR 99 at [148]; *SZUXN* at [52]; *CQG15* at [60].

62 In evaluating the decision of the Tribunal to determine whether it is sufficiently lacking rational foundation, or an evident or intelligible justification or in being plainly unjust, arbitrary, capricious, or lacking common sense, it is necessary to evaluate the decision as a whole. EK identifies illogicality or irrationality in the Tribunal's conclusion that a person with a serious drug addiction is apparently in good health, without qualifying the latter finding by reference to the former finding.

63 In context, however, such a criticism is unjustified. As is apparent from the whole of the Tribunal's reasons, the Tribunal had EK's drug addiction front of mind and made findings

including that he had a 'serious drug addiction' (Tribunal's reasons at [103]); that there is nothing in his history to inspire confidence that the Applicant can escape from the drug-taking habits of almost his entire adult life (Tribunal's reasons at [108]); and that as the 'Applicant presents a significant risk of returning to substance abuse, … [he is at] significant risk of reoffending' (Tribunal's reasons at [109]).

64 Evidently conscious of the extent of EK's addiction, the Tribunal nevertheless also took into consideration that 'There is nothing in his history to suggest that he has the determination or the capacity to remain drug free' (Tribunal's reasons at [108]). The Tribunal also had before it the remarks of the sentencing judge, Brown J, in the Supreme Court of Queensland on 6 April 2020:

> Given the charges for which you are now being sentenced it is hard to see that you have not decided that you want to be a career criminal rather than doing something about your life.

65 As has already been observed in respect of Ground One, there was no evidence before the Tribunal that EK reported any other health issues during the periods in which he was drug free.

66 Whilst a measure of clarity may have been achieved had the Tribunal phrased paragraph [133] of its reasons in words that acknowledged that EK was, apart from his drug addiction, in apparently good health, the finding of the Tribunal is neither so illogical nor irrational that no reasonable decision maker could have made the same finding on the same evidence.

67 Even if EK could sustain his contention that the Tribunal's conclusion that he was 'in apparent good health' was illogical and/or unreasonable, for the reasons already articulated in relation to Ground One, any such error would not be material.

68 Ground Two must be dismissed.

**Ground Three**

69 By Ground Three, EK contends that the Tribunal denied the applicant procedural fairness by failing to respond to a substantial, clearly articulated argument, being the reduced risk of reoffending because of EK's rehabilitation efforts, and in failing to intellectually engage 'with the courses rehabilitation claim'.

70 In his SFIC, EK submitted that he had a low risk of reoffending and listed what was described as his 'significant rehabilitation efforts' which included: attending the Byron Bay Treatment Program and the following supported living program; completing the Artius Options Recovery from Substances abuse course on 1 November 2018 and again on 31 May 2019; completing the Kairos Inside Short course from 13-17 May 2019; completing the Lives Lived Well DO IT Program on 17 October 2019; undertaking the Men's Group and Life Skills programs; recently completing various online rehabilitation courses including Drug and Alcohol Abuse 101, Depression Management, and Stress Management whilst in immigration detention.

71 In reviewing the Minister's decision on its merits, the Tribunal stands in the shoes of the Minister. In carrying out its statutory task, the Tribunal is required to give 'meaningful consideration' (by engaging in an 'active intellectual process') to any significant and clearly expressed relevant representations made by the Applicant: *Omar* at [34], [36]-[37]; *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [46].

72 The Tribunal set out at some length the attempts EK had made to rehabilitate himself. This included reference to 'various self-improvement courses' (Tribunal's reason's at [3]); assurances to sentencing judges in 2011 and 2012 in respect of detox programmes (which were not completed) or counselling (Tribunal's reason's at [17], [27]); reference to counselling in 2014 with Drug and Alcohol Services South Australia and Offenders Aid and Rehabilitation Services of South Australia, which did not prevent EK's continued drug use (Tribunal's reason's at [38]); his participation in the residential programme in Byron Bay from May to July 2016 at the cost to his mother of $30,000 but which resulted in his relapsing into drug use after 18 months (Tribunal's reason's at [42]-[43]); in the context of noting that EK had made no concrete arrangements regarding post-release treatment or rehabilitation for his addiction, noting that he 'has completed various relevant courses during his period of incarceration' (Tribunal's reason's at [61]). Plainly, the Tribunal was referring to the variety of courses that had been identified by EK. The failure to specifically name each and every course is not an error.

73 The Tribunal found that none of EK's efforts to rehabilitate himself, right up to the point of his most recent offending in 2019, have succeeded (Tribunal's reasons at [108]). This, however, does not lead to the conclusion that the Tribunal did not undertake the 'obligation

of real consideration of the circumstances of the people affected': *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628 at [3]. To the contrary, the Tribunal has drawn inferences from the past conduct of EK after having completed various courses and rehabilitation programmes, to predict the likelihood of EK's engaging in further criminal conduct. That is a matter within the decisional freedom of the Tribunal.

74 No error is shown in the Tribunal's approach.

75 Ground Three must also be dismissed.

**Disposition**

76 For these reasons, the application must be dismissed with costs.

I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice SC Derrington.

Associate:

Dated: 18 March 2022