FEDERAL COURT OF AUSTRALIA

WCGD v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCA 1419

File number(s):	WAD 303 of 2020
Judgment of:	**THAWLEY J**
Date of judgment:	28 November 2022
Catchwords:	**MIGRATION** – mandatory revocation under s 501(3A) of the *Migration Act 1958* (Cth) – failure to take into account depression when considering "extent of impediments" for the purpose of paragraph 14.5(1) of Direction 79 – failure adequately to consider applicant's health under paragraph 14.5(1) of Direction 79 – application allowed
Legislation:	*Migration Act 1958* (Cth) ss 476A, 499, 501, 501CA
Cases cited:	*FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Mukiza* [2022] FCAFC 89 *Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417
Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	65
Date of hearing:	24 November 2022
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Ms C Taggart
Solicitor for the First Respondent:	Australian Government Solicitor

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

ORDERS

WAD 303 of 2020

BETWEEN:	**WCGD** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
ORDER MADE BY:	**THAWLEY J**
DATE OF ORDER:	**28 NOVEMBER 2022**

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to the Minister for Immigration, Citizenship and Multicultural Affairs.
2. There issue absolute in the first instance a writ of certiorari, directed to the second respondent, quashing its decision made on 12 November 2020.
3. There issue absolute in the first instance a writ of mandamus, directed to the second respondent, requiring it to determine the applicant's application for review according to law.
4. The first respondent pay the applicant's costs as agreed or assessed.

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

REASONS FOR JUDGMENT

THAWLEY J:

1 On 17 December 2020, the applicant filed an application under s 476A of the *Migration* ***Act*** *1958* (Cth) for judicial review of a decision of the Administrative Appeals **Tribunal** made on 12 November 2020.

2 The Tribunal affirmed a decision of a **delegate** of the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs not to revoke the decision to cancel the applicant's Class BC Subclass 100 (Spouse) visa.

BACKGROUND

3 The applicant is a citizen of the Solomon Islands. He arrived in Australia in October 2000 aged seven and was granted a Subclass 100 (Spouse) visa on 29 November 2001.

4 The applicant has a long history of criminal offending which is set out in the reasons of the Tribunal's decision at [38]-[88]. Relevantly, on 19 June 2019, the applicant was convicted of twelve offences in the Magistrates Court of Queensland. Three of those convictions were for terms of imprisonment of 12 months or more to be served concurrently.

5 On 16 September 2019, while the applicant was serving a term of imprisonment, the Minister mandatorily cancelled the applicant's visa pursuant to s 501(3A) of the Act.

6 Section 501CA(4) of the Act provides a discretion to the Minister to revoke a mandatory cancellation decision made under s 501(3A). Section 501CA (1), (3) and (4) provide:

> **501CA Cancellation of visa – revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)**
>
> (1) This section applies if the Minister makes a decision (the ***original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.
>
> …
>
> (3) As soon as practicable after making the original decision, the Minister must:
>
> (a) give the person, in the way that the Minister considers appropriate in the circumstances:
>
> (i) a written notice that sets out the original decision; and
>
> (ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

7 On 16 September 2019, the applicant received notification of the cancellation decision and was invited to make representations in support of any request to revoke the cancellation decision pursuant to s 501CA(3) of the Act.

8 On 23 September 2019, the applicant made representations in accordance with s 501CA(3), thus satisfying paragraph (a) of s 501CA(4). There was no issue before the delegate that the applicant did not pass the character test, meaning that subparagraph (b)(i) did not apply. Therefore, the central issue for the delegate was whether subparagraph (b)(ii) applied, namely whether the delegate was satisfied that there was "another reason" why the mandatory cancellation decision under s 501(3A) should be revoked.

9 In exercising powers and function under the Act, the delegate was bound to comply with *Ministerial* ***Direction 79*** *– Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation under s 501CA* made under s 499(1) of the Act: s 499(2A) of the Act.

10 Direction 79 relevantly provides at paragraph 7 under the heading "How to exercise the discretion":

(1) Informed by the principles in paragraph 6.3 above, a decision-maker:

a) must take into account the considerations in Part A or Part B, where relevant, in order to determine whether a non-citizen will forfeit the privilege of being granted, or of continuing to hold, a visa; or

b) must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked.

11 Part C of Direction 79 sets out the considerations for decision-makers when considering whether to revoke cancellation of a non-citizen's visa. Part C includes:

13. Primary considerations – revocation requests

(1) Under subsection 501(3A) of the Act, the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c)) or paragraph (6)(e)) and the non-citizen 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. A non-citizen who has had his or her visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case.

(2) In deciding whether to revoke the mandatory cancellation of a non-citizen's visa, the following are primary considerations:

a) Protection of the Australian community from criminal or other serious conduct;

b) The best interests of minor children in Australia;

c) Expectations of the Australian community …

14. Other considerations – revocation requests

(1) In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):

a) International non-refoulement obligations;

b) Strength, nature and duration of ties;

c) Impact on Australian business interests;

d) Impact on victims;

e) Extent of impediments if removed …

14.5 Extent of impediments if removed

(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;

b) Whether there are substantial language or cultural barriers; and

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

12 On 19 August 2020, the delegate decided not to revoke the cancellation of the applicant's visa under s 501CA(4) of the Act.

13 On 24 August 2020, the applicant lodged an application with the Tribunal seeking review of the delegate's decision not to revoke the cancellation of his visa. The applicant was represented before the Tribunal. Like the delegate, the Tribunal was bound to comply with Direction 79.

14 On 12 November 2020, the Tribunal affirmed the Minister's decision. Like the delegate, the Tribunal was not satisfied that there was "another reason" to revoke the cancellation of the visa.

15 On 17 December 2020, the applicant filed an originating application in this Court seeking an order that the decision of the Tribunal be quashed, relying on five grounds. On 30 April 2021, the applicant filed an amended originating application which abandoned the grounds of the application sought in the original originating application. On 18 March 2022, following a change in legal representatives, the applicant filed a further amended originating **application**. The application again abandoned the grounds which had previously been relied upon.

16 The applicant now relies on three grounds of judicial review. Each of the three grounds concern whether the Tribunal erred in its consideration of paragraph 14.5 of Direction 79, concerning the extent of impediments (if any) that the applicant would face if removed to the Solomon Islands.

THE TRIBUNAL'S REASONS

17 Given the focussed nature of the appeal, it is unnecessary to refer to the Tribunal's reasons in detail. Its reasons concerning paragraph 14.5 of Direction 79 are contained at [242] to [249]. The issues in the appeal revolve in particular around the first three of those paragraphs:

> [242] Paragraph 14.5 of the Direction directs decision-makers to take into account 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.
>
> [243] The Applicant has contended that:
>
> *"The Applicant maintains the position in relation to concerns for the Applicant's removal to the Solomon Islands, where it is unlikely that the Applicant will receive equal benefits in the instance of relocation on the basis that the Solomon Island does not share the same political,*

economic, social, technological, legal benefits that Australia holds. We maintain our submissions dated 29 September 2020 and 28 October 2020 that the Respondent failed to take into account that his immediate family reside in Australia and have no professional network to support the Applicant in the Solomon Islands. Additionally, the Applicant does not speak Pigeon (sic) English (or any other language), nor does he have a high understanding of the language, the Applicant has no professional support and has little prospects for employment in comparison to those available in Australia. Furthermore, the distant familial connections provide extremely limited contact with the Applicant. In fact, the Applicant is extremely unfamiliar with the culture of the Solomon Island's having relocated to Australia at a young age of seven years old."

[244] The Applicant is a 27 year old male of seemingly good health, with no diagnosed medical or psychological conditions identified by the Applicant in their Personal Circumstances Form. The Tribunal does acknowledge the diagnosis offered by Professor Freeman in respect to the Applicant being diagnosed with an Adjustment Disorder, Cannabis Use Disorder, and Methamphetamine Dependency Disorder, but with no recommended treatment (pharmacological or otherwise) referred to in his report.

[245] The Tribunal accepts that the Applicant may face some difficulties establishing himself in the Solomon Islands with respect to the many years the Applicant has been absent from the country where he first lived.

[246] The Tribunal agrees with the Respondent's contention that the Applicant would have to have some awareness of the language and culture (even if they are no longer proficient in the language). With respect to the Applicant's understanding of Pidgin English (spoken in the Solomon Islands), the Tribunal refers to the following exchange in cross-examination of the Applicant:

*"**Respondent**: I think you said before you can't speak Pidgin, is that right?*

***Applicant**: Yes.*

***Respondent**: Not at all?*

***Applicant**: I can understand it a little bit but I've lost the accent. Literally I can't – yes, maybe a few words, that's about it.*

***Respondent**: Is Pidgin English much different, do you know, to English that we're speaking in or is it similar?*

***Applicant**: Yes, it's – like, some words are similar but the pronunciation and everything, it's different. Yes, it's different. It's heaps – yes, it's definitely different."*

[247] The Tribunal did hear in evidence from the Applicant's family that the Applicant's maternal grandmother, as well as a paternal aunty and uncle reside in the Solomon Islands. The Tribunal acknowledges there may be an initial hardship in returning to the Solomon Islands whilst trying to adjust to their language and customs but this adjustment would be temporary and not insurmountable; whilst not being completely unfamiliar to the Applicant.

[248] The Tribunal has had regard to Professor Freeman's comments that the Applicant was unable to articulate any work opportunities, and refers to the Respondent's submission regarding the Solomon Islands' "*Youth@work*"

program which is a government program, "*… created in order to fill a critical gap in youth employment through the placement of young people into career pathways, with the objective of helping them access to paid employment or to start their own business*."

[249] In view of the reasons outlined by the Tribunal with respect to the extent of any impediments a non-citizen may face if removed from Australia to the Solomon Islands, it is the Tribunal's view that paragraph 14.5 of the Direction weighs slightly in favour of revocation, however the Tribunal is of the view that the weight of this factor does not outweigh the very heavy weight the Tribunal has found for both Primary Consideration A, and Primary Consideration C.

GROUND 1

18 By ground 1 of the application, the applicant contends that the Tribunal constructively failed to exercise its jurisdiction on the basis that it misunderstood the evidence of the consultant psychologist, Professor Freeman. Ground 1 was as follows:

> **1. There was a constructive failure to exercise jurisdiction.**
>
> a. A decision-maker can commit jurisdictional error by acting on a misunderstanding of evidence adduced: *Bristowe v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 12 [39].
>
> b. First, the Tribunal reasoned that there was no recommended treatment (pharmacological or otherwise) referred to in the expert report of Professor Freeman for the applicant's Adjustment Disorder, Cannabis Use Disorder, and Methamphetamine Dependency Disorder: CB501 [244].
>
> c. Secondly, the Tribunal acted on a material misunderstanding of the evidence adduced by Professor Freeman. In fact, Professor Freeman recommended treatment for the applicant's Methamphetamine Dependency Disorder: CB216 [11.3]. Professor recommended:
>
> - the applicant undertake treatment, support, and monitoring for his Methamphetamine Dependency Disorder
> - the applicant should engage in complementary community-based relapse prevention interventions eg, Drug ARM, ATODS, etc
> - the applicant should develop a secure support network, avoid past drug associates, and manage his mood.
>
> d. Thirdly, the error was material. Lawful compliance could realistically have led the Tribunal to attribute greater weight to the other consideration of the extent of impediments if removed from Australia. Subsequently, this consideration could have been more persuasive when it came to balancing the considerations which favoured revocation against those which favoured non-revocation in order to reach the ultimate decision: *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 [65].

19 In submissions concerning Ground 1, the applicant focussed on the Tribunal's statements at [244] that the applicant is "of seemingly good health" and that there was "no recommended treatment (pharmacological or otherwise) referred to in [Professor Freeman's] report".

20 Professor Freeman conducted an assessment of the applicant on 6 October 2020 at the request of the applicant's legal representatives and provided a report in relation to that assessment on 28 October 2020. Professor Freeman had been asked by the applicant's representatives to prepare a "psychological report regarding the impact that the refusal decision will have on [the applicant], his mental health, and anyone associated with him". He was asked to consider the following factors:

> 1. [The applicant's] personal circumstances;
> 2. [The applicant's] vulnerability at the time of his offence;
> 3. [The applicant's] attitude towards rehabilitation;
> 4. [The applicant's] likelihood of reoffending;
> 5. The effect of [the applicant's] mental health that impacted on the offending;
> 6. The effects a possible refusal of [the applicant's] visa application will have on him and anyone associated with him;
> 7. The strain that a possible refusal of [the applicant's] visa application will have on the relationship between [the applicant] and his partner residing in Australia; and
> 8. Any further matters deemed appropriate by you.

21 In relation to the applicant's medical conditions, under the heading "Psychological/Psychiatric History" Professor Freeman stated:

> [7.1] [The applicant] is prescribed anti-depressant medication (eg, Endep) and was previously also prescribed Avanza. He is also prescribed melatonin to assist with sleep disturbances eg, "*I can't sleep. My head runs in circles at night*."
>
> [7.2] He reported engaging in sporadic psychological consultations since being domiciled at the Yongah facility.

22 Under the heading "Clinical Assessment" Professor Freeman stated (footnotes omitted):

> ***Mental Status Examination***
>
> [8.1] There were no observable abnormalities on the majority of the MSE factors: mood and affect, memory, speech, cognition, thought patterns and level of consciousness. He did not appear to engage in any form of self-report bias, including impression management. Rather, he openly discussed his behaviour and his responses appeared genuine. Please note the assessment approach (via the telephone) negated some aspects of the MSE assessment eg, appearance.
>
> ***Clinical Assessment***
>
> [8.2] - Cannabis Use Disorder (partial remission in a controlled environment)
>
> - Methamphetamine Dependency Disorder (partial remission in a controlled environment)

- Adjustment Disorder (severe with anxious distress)

[8.3] [The applicant] has a history of substance abuse that is reflective of periodic Cannabis Use Disorder and Methamphetamine Dependency Disorder. The applicant accepted that his methamphetamine consumption has created the greatest level of psychosocial impairment in functioning (and directly led to his current incarceration). [The applicant] likely has a comorbid Adjustment Disorder that directly stems from the emotional stress associated with his current predicament eg, incarceration, separation from his children, concern about his visa status etc). More broadly, a review of his psychosocial functioning suggests he is vulnerable to react excessively to emotional stressors and/or experience periods of depression. Symptomatology includes: sleep disturbance, periods of marked distress/anxiety, episodes of depressed mood, feelings of helplessness/hopelessness, etc …

23 Under the heading "Clinical Summary, Risk Assessment and Concluding Remarks" Professor Freeman stated (footnotes omitted; emphasis added):

[11.1] [The applicant] is a 27 year old male who experienced an uneventful early childhood and relocated to Australia when aged 7. However, he immediately experienced reduced parental supervision and was reportedly exposed to his mother's alcoholism. He was influenced by a negative peer support group that resulted in multiple episodes of juvenile detention and fuelled his substance abuse. He accepts misusing a range of substances from a young age that culminated in periods of methamphetamine dependency (which most recently created impairments in psychosocial functioning). In regards to the latter, it is noteworthy that exposure (and affiliations) with deviant subgroups significantly enhances drug dependencies. In fact, it is one of the most reliable predictors of an individual's substance use. The only other marked aspect of his psychosocial functioning was engagement in an unstable relationship, which was fractured by infidelity and questions about the paternity of his young son. [The applicant] appears to have placed considerable weight in his parental responsibilities, and was likely psychologically ill equipped to respond to the corresponding emotional distress. More specifically, he accepts that such parental responsibilities were a protective factor in regards to him avoiding substance use, and he spiralled into methamphetamine dependency (and engaged in erratic behaviours) when he lost custody of his son.

[11.2] [The applicant]'s early offending history can be attributed to substance abuse and alignment with a negative peer support group. The applicant's most recent offences (2019) are best explained through his methamphetamine dependency and associated emotional distress (from lifestyle instability). That is, [the applicant] accepts engaging in a range of reckless behaviours when impaired with methamphetamines (and in fact, he cannot recall the origins of attending his family's residence). It is noteworthy that methamphetamine usage promotes maladaptive decision making and response inhibition and elevated risk taking propensities. The applicant was also experiencing elevated depressive symptomatology (at the time) that was a likely additional contributor, as individuals who suffer from depression are more vulnerable to engage in impaired decisions.

[11.3] The risk of recidivism relates primarily to him avoiding relapsing into substance abuse, avoiding alignment with a negative peer support group and securing lifestyle stability eg, avoiding high risk emotionally agitating situations. Encouragingly [the applicant] has a sufficient level of insight into

the extent of his substance abuse, recognises the link between his substance abuse and offending, and subsequently articulates a strong commitment to avoid relapse. **However, he will need to be vigilant of relapse for an extended period of time as methamphetamine dependency is usually chronic and requires lasting aftercare eg, treatment, support and monitoring. As a result, he should be encouraged to engage in complementary community-based relapse prevention interventions e.g., Drug ARM [Awareness Rehabilitation Management], ATODS [Alcohol, Tobacco and Other Drugs Service]**, etc. Additionally, his risk of relapse is likely linked to experiencing lifestyle instability (and associated emotional turmoil), and thus, he should be encouraged to develop a secure support network, avoid past drug associates and manage his mood. **In regards to the latter, he could benefit from remaining under the care of a medical practitioner to treat his depression and provide referrals (if needed).** Given that a sizeable proportion of his offending history directly relates to substance abuse, if he can achieve ongoing abstinence, then his risk of recidivism may prove to be less than calculated through the HCR-20 and VRAG.

[11.4] In summary and based on the writer's *Structured Professional Judgement* (SPJ9), [the applicant] presents as a male who was destabilised (during adolescence) by substance misuse and contact with a negative peer support group. He regained some level of lifestyle stability when he had primary custody of his young son, which dissipated when he lost the role and struggled with methamphetamine dependency.

[11.5] In regards to the cancellation [sic - revocation] of his visa cancellation, [the applicant] has no confirmed place of residence in the Solomon Islands. More specifically, the applicant's entire direct family reside in Australia and he has not been in contact with his extended family members (eg, cousins) for an extended period of time eg, "*I'd be homeless. I honestly don't know – I wouldn't even know how to survive there*." He could not articulate any work opportunities that is further reflective of him not residing in the Solomon Islands since 2000 (as a child) eg, "*I don't even know the lifestyle. I can't speak pigeon English.*" It is also likely that he will have limited contact with his children, as they reside in Australia (and are reportedly at risk of remaining in foster care for an extended period of time). In regards to the latter, he presents as particularly despondent and anxious about this possible outcome, and is eager to return to his parental responsibilities.

24 The applicant contended that the Tribunal misunderstood the evidence of Professor Freeman and that, at [11.3] of his report, he did in fact make recommendations as to future treatment, in particular for the applicant's methamphetamine dependency disorder.

25 The Minister, noting that [11.3] was directed to the risks of recidivism, submitted that Professor Freeman made no recommendations for future treatment. According to the Minister, the community based relapse prevention interventions and other steps "encouraged" by Professor Freeman were not "indicative of treatment in any sense". The Minister submitted that [11.3] of Professor Freeman's report and the Tribunal's statements at [244] need to be understood

also in the context of the cross-examination of Professor Freeman at [11.3]. The following evidence was given in cross-examination:

> That's all right. In paragraph 11.3 you said that he will need to be vigilant of relapse for an extended period of time as methamphetamine dependency is usually chronic and requires lasting after care; are you able to say generally how long someone needs to remain vigilant for seemingly to avoid relapse?---Look, that's a very different - (1) to be able to predict the likelihood of violence in the future with somebody is quite challenging; (2) to be able to determine how long somebody needs to be vigilant for is even more difficult but to err on the side of caution they need to be vigilant indefinitely. They need to be aware of high risk situations, high risk negative peer support group, yes, because historically methamphetamine dependency is a dependency which some people can relapse back into so it would need to be vigilant into the foreseeable future which I would imagine would, yes, an extended period of time. He certainly wouldn't want to be associating with this past drug support network or anything like that.
>
> Thank you. You've said that he should be encouraged to engage in community-based relapse prevention services such as DrugARM; is it the case that if he does not engage in a service like that his risk of relapse would increase?---That's a good question and it's a difficult question to answer conclusively. On the one hand does the applicant have an appropriate level of insight and self-awareness to development a relapse prevention plan where void using in the future? Probably.
>
> Would the relapse skills be solidified or strengthened if he did engage in some complimentary monitoring over a period of time? It couldn't certainly couldn't hurt. You know, I'm not suggesting that that needs to go on for years and years and years but particularly in a high risk where he's exposed to emotional stressors. You know, getting out of custody, getting your life back together, getting lifestyle stability. It might prove to be a protective factor if he went and spoke to somebody and reinforced his skills, yes.

Consideration

26 Paragraph 11.3 of Professor Freeman's report is primarily directed to the risk of recidivism. The risk of recidivism was related to relapse in drug use. Professor Freeman made reference to the applicant "need[ing] to be vigilant of relapse" of his methamphetamine dependency and stated that methamphetamine dependence is "usually chronic" and "requires lasting aftercare eg, treatment, support and monitoring". Professor Freeman was making at least two points in [11.3] of his report, only the first of which was the subject of cross-examination:

(1) First, the risks of recidivism and of relapse into methamphetamine dependency would be mitigated by engaging in community-based relapse prevention interventions, developing a secure support network, avoiding drug associates and the applicant managing his mood. These were apparently examples of things which fell within what Professor Freeman had referred to in [11.3] as "treatment, support and monitoring".

(2) Secondly, in regard to his mood, Professor Freeman stated that the applicant "could benefit from remaining under the care of a medical practitioner to treat his depression and provide referrals (if needed)".

27 Although not free from doubt, I read the Tribunal's comment at [244] that no treatment was recommended by Professor Freeman as indicating that Professor Freeman did not make any specific recommendation for medical treatment of the conditions he had identified at [8.2] as opposed to more generalised recommendations for management or "treatment, support and monitoring" of his methamphetamine dependency disorder. I do not infer that the Tribunal misunderstood what Professor Freeman had said, as opposed to overlooking or failing sufficiently to consider all of what Professor Freeman had said when directing itself to the requirements of paragraph 14.5 of Direction 79. For reasons given below in relation to Grounds 2 and 3, I infer from [244], read with the whole of the reasoning in relation to the "extent of impediments" from [242] to [249], that the Tribunal failed to take into account the applicant's depression and mental health and the more generalised recommendations made by Professor Freeman sufficiently to comply with paragraphs 14.1(e) and 14.5(1) of Direction 79. I note that, when addressing the applicant's risk of recidivism at [143], the Tribunal set out [11.3] of Professor Freeman's report.

28 The doubt referred to in the previous paragraphs arises because:

(a) Professor Freeman's recommendations about "complementary community-based relapse prevention interventions" might be referred to as "treatment" and appear to be encompassed in what Professor Freeman called "treatment, support and monitoring"; and

(b) Professor Freeman had:

- acknowledged at [7.1] that the applicant was prescribed anti-depressant medication;
- acknowledged at [11.3] that the applicant had depression;
- made no suggestion that the prescribing of anti-depressant medication was inappropriate; and
- considered that the applicant "could benefit from remaining under the care of a medical practitioner to treat his depression and provide referrals (if needed)."

29 Notwithstanding the doubt, on balance Ground 1 is not made out.

GROUND 2

30 By ground 2 of the application, the applicant contended that:

(a) the Tribunal did not have regard to the applicant's depression when considering the "extent of impediments" if the applicant were to be removed from Australia; and

(b) as a result, the Tribunal constructively failed to exercise its jurisdiction by failing lawfully to consider a mandatory consideration.

31 Ground 2 was:

> **2. There was a constructive failure to exercise jurisdiction.**
>
> a. By statutory force of s 499 of the *Migration Act 1958* (Cth), the Tribunal was mandatorily required to have regard to the applicant's health when considering the extent of impediments if removed from Australia consideration: Direction no 79, paragraph 14.5(1)(a) (see CB144).
>
> b. First, before the Tribunal:
>
> - The applicant expressly contended in his statement of facts, issues and contentions (the ASFIC) document that he has been affected by depression for which he has been prescribed antidepressants: CB162[28].
> - The applicant expressly contended in the ASFIC document that due the effects of depression, he has been unable to commit to rehabilitation programs: CB162[29].
> - In the referral letter to Professor Freeman, the applicant's legal representative noted that the applicant is reportedly suffering from depression for which he is prescribed antidepressants: CB196[14].
> - Professor Freeman noted that the applicant is 'prescribed anti-depressant medication (eg, Endep)': CB212[7.1].
> - Professor Freeman reported that the applicant is 'vulnerable to react excessively to emotional stressors and/or experience periods of depression'. The expert further opined the applicant had 'episodes of depressed mood, feelings of helplessness/hopelessness, etc': CB213[8.3].
> - Professor Freeman reported that the applicant has a history of 'experiencing elevated depressive symptomatology': CB216[11.2]. Professor Freeman opined that 'individuals who suffer from depression are more vulnerable to engage in impaired decisions': CB216[11.2].
> - Professor Freeman opined that the applicant could 'benefit from remaining under the care of a medical practitioner to treat his depression': CB216[11.3].
> - In the original decision, when considering the other consideration of the extent of impediments if removed from Australia, the delegate noted that the applicant stated he 'has 'spoken to someone' about his depression and mental health': CB55[69].

c. Secondly, the Tribunal failed to lawfully apply the mandatory consideration concerning the applicant's health for the purposes of paragraph 14.5(1)(a) of Direction no. 79. The Tribunal failed to consider the applicant's health issues concerning depression.

d. When considering the extent of impediments if removed other consideration at CB500-503[242]-[249], the Tribunal did not refer to the applicant's health issues of depression whatsoever. The natural and appropriate inference is that the Tribunal overlooked this health issues: cf *QHRY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 827 [38].

e. Thirdly, the error was material. The applicant repeats the particular pleaded at paragraph 1(d) above. Moreover, where the Tribunal has failed to lawfully apply the mandatory consideration of a non-citizen-s health for the purposes of paragraph 14.5(1)(a), one might apprehend that it would intrude not just on health but also upon ability to obtain work or otherwise settle in that country: *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 [32].

Consideration

32 In his "personal circumstances form", submitted with his request for revocation, the applicant was asked the following question:

> **12. IMPEDIMENTS TO RETURN**
>
> **HEALTH INFORMATION**
>
> **Do you have any diagnosed medical or psychological conditions? Yes ☐ No ☒**

33 As noted in the quote above, the applicant stated that he did not have any diagnosed medical or psychological conditions. This statement was made before the applicant had been assessed by Professor Freeman. Question 12 continued by providing a space to identify any medication and the condition for which such medication was prescribed. This material was left blank. The following question was also left blank:

> If you are currently being treated by any doctor/health professional/counsellor, provide details that you want the decision-maker to take into account. You may wish to provide a report regarding your treatment and progress.

34 There was other material before the Tribunal concerning the applicant's depression.

35 First, the applicant's statement, also submitted with his revocation request, referred to a part of his family situation, at least historically, "ruining my mental health".

36 Secondly, in the original decision, the delegate noted that the applicant stated he "has spoken to someone" about his depression and mental health. This comment is likely to have been from

the applicant's personal circumstances form in which he was asked the following question and gave the following answer:

> **10. CRIMINAL HISTORY AND RISK OF REOFFENDING**
>
> **…**
>
> **If you have completed any courses or programs that will help you to avoid further offending, provide details of these and attach evidence.**
>
> *I have not completed any courses because my time incarceration were not long enough to complete the course but I have spoken to someone about depression and mental health*

37 Thirdly, consistently with Professor Freeman's later report, the applicant's SFIC identified that the applicant had been affected "severely with anxiety, depression and sleeplessness" for which he was prescribed antidepressants and melatonin. The "Facts" part of the SFIC included:

> **Applicant's personal circumstances**
>
> …
>
> 27. The Applicant instructs that he was unable to commit to any rehabilitation programs due to the frequent transfer from one (1) prison to another. The Applicant was transferred from the Arthur Gorrie Correctional Centre to the Brisbane Correctional Centre to the Woodford Correctional Centre. Upon completion of the Applicant's sentence, he was transferred to the Brisbane Immigration Transit Accommodation Centre and then finally to the Yongah Hill Immigration Detention Centre.
>
> 28. Further, the Applicant has been affected severely with anxiety, depression and sleeplessness, for which he has been prescribed the following medications:
>
> a. Antidepressants; and
>
> b. Melatonin.
>
> 29. Due the effects of the Applicant's depression, he has been unable to committed to any rehabilitation programs at Yongah Hill Immigration Detention Centre.
>
> 30. However, the Applicant intends to attend professional help with his mental health wellbeing and attend rehabilitation programs.

38 The "Contentions" part of the SFIC included a series of contentions under the heading "Submissions in relation to principles of Direction 79" and included:

> 88. ***Extent of impediment if removed***
>
> a. If the Applicant's visa remains cancelled, he will have no ability to draw from any personal networks to assist him in the Solomon Islands compared to Australia, which is a significant social barrier. The Applicant will lose the benefit of his family he has received to date, which must be a significant consideration.
>
> b. The Applicant would not be able to maintain the benefit of

> employment in the Solomon Island with his qualifications (certificate III and IV in fitness) and the lack of professional network in Solomon Islands, which will necessarily affect his current financial circumstances, his family's financial circumstances, and his future employability. Therefore, there is a significant economical barrier to consider.

39 At least so far as the SFIC was concerned, it was not specifically contended that the applicant's depression was relevant as an "impediment" to the applicant's return to the Solomon Islands.

40 Fourthly, Professor Freeman's report referred to depression. It stated:

- the applicant is "prescribed anti-depressant medication (eg, Endep)";
- the applicant is "vulnerable to react excessively to emotional stressors and/or experience periods of depression" and that the applicant had "episodes of depressed mood, feelings of helplessness/hopelessness, etc";
- the applicant has a history of "experiencing elevated depressive symptomatology", "individuals who suffer from depression are more vulnerable to engage in impaired decisions" and that he could "benefit from remaining under the care of a medical practitioner to treat his depression".

41 Finally, Professor Freeman's report was served with a supplementary SFIC which included the following (emphasis added):

> **Submissions in relation to principles of Direction 79: *Exercising discretion***
>
> ***Primary Consideration 1 –*** *the protection of the Australian community from criminal or other serious conduct*
>
> …
>
> 16. In relation to paragraph 32 of the Respondent's submissions dated 19 October 2020, the Applicant submits as follows:
>
> i. Importantly, as highlighted in the Applicant's submissions dated 29 September 2020, the Applicant was significantly affected by mental health issues, which ultimately prevented him from meaningfully engaging in rehabilitative efforts.
>
> …
>
> ***Primary Consideration 3*** *– Expectations of the Australian community*
>
> 29. In reference to paragraphs 52 to 54 of the Respondent's submissions dated 19 October 2020, **the Applicant relies on the Applicant's submissions dated 29 September 2020 in relation to the extent of impediment if removed. It is further reiterated that the Applicant is suffering from mental illness and the effect of removal will have significant impact on his wellbeing generally**, especially in the absence of his beloved children, nephews and

nieces. The effect of removal will also sever any parent child relationship between the Applicant and his children.

30. In reference to Professor James Freeman psychologist report dated 28 October 2020 enclosed here with, the applicant has no confirm[ed] place of residence in the Solomon Islands and or direct family members now reside in Australia. Further, the Applicant has not been in contact with his extended family members in the Solomon Islands for an extended period of time. Professor James Freeman's psychologist report, the applicant had expressed during the assessment interview that should he be removed from Australia to the Solomon Islands, "[he would] be homeless. [he] honestly don't know – [he] wouldn't even know how to survive there". The applicant had not resided in the Solomon Islands since 2000 as a child and as such has no possible or realistic work opportunities in the Solomon Islands. Additionally, the Applicant expressed during the assessment interview that "[he does not] even know the lifestyle. [he] can't speak pigeon English". Importantly, Professor James Freeman observed that the applicant will have limited contact with his children, given that they currently reside in Australia and has no intention to relocate to the Solomon Islands, neither would that be in the best interest of the children.

42 Paragraphs 52 to 54 of the Minister's SFIC, to which the applicant's supplementary SFIC referred at [29] (set out above), were as follows:

52. Whilst the Minister acknowledges that the applicant may face some difficulty re-establishing himself in the Solomon Islands due to his residence in Australia, this would only present a short term hardship and would not preclude resettlement. It also appears that the applicant spent the first six years of his life there. Having grown up in the Solomon Islands, there are no language or cultural barriers for the applicant to overcome. The applicant has also declared that he has a grandparent living there (G20/108).

53. As a citizen of the Solomon Islands, the applicant would also have the same access to social, medical and economic support as other citizens. The Solomon Islands government is addressing youth unemployment, including through initiatives such as the Youth@Work programme which the Minister contends would assist the applicant in obtaining employment. This program assists the placement of young people into career pathways, with the objective of helping them access paid employment or to start their own business.9

54. The Minister contends there are limited impediments to the applicant being removed to the Solomon Islands.

43 The applicant submitted that: (a) in its reasons addressing impediments if removed from Australia, the Tribunal did not refer to the applicant's depression; and (b) it should be inferred that the Tribunal did not consider the applicant's depression when considering paragraph 14.5(1)(a) of Direction 79.

Consideration

44 Paragraph 14(1)(e) of Direction 79 requires that the "extent of impediments if removed" to be taken into account. The phrase "extent of impediments if removed" is given meaning by

paragraph 14.5(1), namely: 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 the other citizens of that country)". The combined operation of paragraphs 14(1)(e) and 14.5(1) is that:

(1) the matter in the chapeau to paragraph 14.5 – the "extent of impediments" if removed – is a mandatory consideration by reason of paragraph 14(1)(e);

(2) in forming a view about the "extent of impediments", it is mandatory to take into account each of the matters in sub-paragraphs (a) to (c) of paragraph 14.5(1), namely:

    (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.

45 The applicant's depression was expressly referred to in the supplementary SFIC as an issue raised in relation to paragraph 14.5(1) of Direction 79. Contrary to the submissions advanced for the Minister, it is not to the point that depression was not raised in connection with "extent of impediments" until after the Minister's SFIC had been filed. It was clearly raised in the applicant's supplementary SFIC such that it was an issue at the hearing.

46 The material before the Tribunal recorded that the applicant was suffering depression and was taking anti-depressant medication. Professor Freeman considered the applicant had depression which could benefit from remaining under the care of a medical practitioner who could provide referrals if necessary. Whilst the Tribunal set out the whole of [11.3] of Professor Freeman's report elsewhere in its judgment, I am satisfied that it did not consider the issues posed by the applicant's depression when considering paragraph 14.5(1) of Direction 79. The entirety of the Tribunal's reasons in relation to paragraph 14.5(1) is set out at [17] above. There was no mention of depression. There was no apparent consideration given to the applicant's depression or the fact that Professor Freeman had stated that the applicant "could benefit from remaining under the care of a medical practitioner to treat his depression and provide referrals (if needed)". I do not accept the Minister's submission that the Tribunal should be understood as having addressed depression by reason of its reference at [244] to Adjustment Disorder.

47 In circumstances where depression was specifically put forward as relevant to paragraph 14.5(1) of Direction 79, and there was cogent material supporting the submission, the Tribunal

was bound to consider the applicant's depression in its consideration of the issues raised by paragraph 14.5(1).

48 It cannot be accepted that the failure to consider the issue was immaterial to the outcome. Paragraph 14.5(1) was found by the Tribunal to weigh "slightly in favour of revocation". If the Tribunal had considered the issue of depression it may have attributed greater weight to the consideration. It is possible that this may have led to a different balancing of the competing considerations in reaching a conclusion about revocation – see, for example: *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 at [65].

GROUND 3

49 By ground 3 of the application, the applicant claims that the Tribunal failed to give "proper, genuine and realistic" consideration to the merits of his case when considering the extent of impediments he would face if removed to the Solomon Islands. Ground 3 of the application was:

> **3. The Tribunal failed to give, proper, genuine, and realistic consideration to the merits of the applicant's case.**
>
> (a) The Tribunal was mandatorily required to have regard to the extent of impediments the applicant would face if removed to his home country: paragraph 14.5(1) of Direction no. 79 (CB144).
>
> (b) First, the applicant repeats and adopts Grounds 1-2 for the purposes of this ground. When considering paragraph 14.5(1), the Tribunal failed to engage in an active intellectual process in relation to the expert recommendations for treatment concerning the applicant's health issues. Moreover, the Tribunal failed to consider the applicant's health issues in relation to depression at all.
>
> (c) Secondly, when considering paragraph 14.5(1), the Tribunal reasoned that the applicant was a '27 year old male of seemingly good health': CB501[244]. However, that finding seems to ignore the Tribunal's earlier findings when considering adverse primary considerations that were held against the applicant:
>
> - The applicant has significant substance abuse issues, which largely remain unresolved: CB465[110]; CB478[147].
> - The applicant has incomplete rehabilitation: CB472[131]; CB478[152]; CB491[208(l)].
> - The applicant has not undertaken formal rehabilitation to the extent that he has the capacity to abstain from illicit substances: CB478[149]; CB486[184].
> - There is no evidence that the applicant has subjected himself to formal counselling to an extent that he is now able to control [his] emotional regulation with regards to his emotions: CB478[150].

- The applicant has a very long history of illicit substance abuse: CB490[208(j)].

(d) When considering the extent of impediments consideration, the Tribunal seems to have forgotten its earlier findings that the applicant has significant unresolved substance abuse issues, has not currently shown the capacity to abstain from illicit substances and required formal counselling for emotional regulation purposes: cf, *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 [27]. All those matters were relevant to the applicant's health for the purposes of paragraph 14.5(1)(a).

(e) Thirdly, 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 and adopts paragraphs 2(c)-(d) above.

(f) Fourthly, the Tribunal was required by paragraph 14.5(1)(c) of Direction no 79 to have regard, inter alia, to any medical and economic support available to the non-citizen in their home country: CB144. The Tribunal failed to consider these aspects of the criterion in paragraph 14.5(1): CB500-503[242]-[249].

(g) There was no evidence before the Tribunal that the applicant would have access to medical and economic support in Solomon Islands to address his various health issues; cf, *Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503 [98]. Lawful compliance with paragraph 14.5(1)(c) could realistically have led the Tribunal to find that the applicant would have considerable impediments in addressing his various medical health issues: *Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503 [97].

50 The findings by the Tribunal to which the applicant refers in relation to Ground 3, apart from the applicant's depression, are as follows (emphasis added):

> **The Nature and Seriousness of the Applicant's Conduct to Date**
>
> …
>
> [110] Despite this, the Applicant has not taken an opportunity to moderate his conduct and address the factors predisposing him to violently offend, or to address his significant substance abuse issues, which largely remain unresolved on the evidence before the Tribunal, discussed later in these reasons …
>
> **The Nature of the Harm to Individuals or the Australian Community were the Applicant to Engage in Further Criminal or Other Serious Conduct**
>
> …
>
> [131] In regard to the Applicant's submissions that they have now been forgiven for offences which have occurred in a domestic setting as the victims (namely their step-father and mother) were ignorant to the Applicant's substance abuse, the Tribunal treats this argument with caution. The Tribunal is not persuaded that the Applicant's family fully appreciates the potential risk of harm from the Applicant, particularly in relation to the incomplete nature of his rehabilitation, and the unacceptable risk this poses to his recidivism …

The Likelihood of the Non-citizen Engaging in Further Criminal or Other Serious Conduct

…

[149] The Tribunal is not convinced, on the state of the evidence before it, the Applicant has undertaken formal rehabilitation to the extent he can now reliably demonstrate that his capacity to abstain from illicit substances is such that it renders him of being a lower risk of succumbing to these past addictions which have contributed to his offending. This is particularly so, given the Applicant has been diagnosed with Methamphetamine Dependency Disorder and Cannabis Use Disorder

[150] Likewise, there is no evidence before the Tribunal that the Applicant has subjected themselves to formal counselling to an extent that they are now able to control their emotional regulation with regards the emotions that cause them to violently offend…

[152] In circumstances where in Professor Freeman's own words, the Applicant, "…will need to be vigilant of relapse for an extended period of time as methamphetamine dependency is usually chronic and requires lasting aftercare", and in the absence of evidence that the Applicant has undergone formal rehabilitation for their predilections towards substance abuse such that there is a demonstrable form of remedial management and control in place to address these issues; the Tribunal views the likelihood of the Applicant engaging in further criminal or other serious conduct to be a strong and convincing likelihood.

Primary Consideration C – The Expectations of the Australian Community

Factual circumstances relevant to Primary Consideration C

…

[208] In assessing the weight attributable to Primary Consideration C, it is necessary to have regard to the following circumstances arising from the Applicant's circumstances:

…

(j) The Applicant's offending has been linked to a very long history of illicit substance abuse, and an incapacity to control a predisposition towards violent resolutions to situations he may be confronted with.

51 The applicant submitted that, given the applicant's unresolved health conditions, the Tribunal was required by paragraph 14.5(1) of Direction 79 to have regard to medical support available to the applicant in his home country and failed to consider this issue.

Consideration

52 The cautionary words of the High Court in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417 should be noted given the applicant's reference to "proper, genuine, and realistic" consideration (footnotes omitted):

[24] Consistently with well-established authority in different statutory contexts,

> there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations. Adopting and adapting what Kiefel J (as her Honour then was) said in *Tickner v Chapman* , the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker. And the decision-maker is not obliged "to make actual findings of fact as an adjudication of all material claims" made by a former visa holder.
>
> [25] It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement — the degree of effort needed by the decision-maker — will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.
>
> [26] Labels like "active intellectual process" and "proper, genuine and realistic consideration" must be understood in their proper context. These formulas have the danger of creating "a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision-maker's] decision can be scrutinised". That is not the correct approach. As Mason J stated in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, "[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind". The court does not substitute its decision for that of an administrative decision-maker.

53 With reference to Ground 3(g), it should be noted (as the applicant did) that the decision in *Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1503 was overturned in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Mukiza* [2022] FCAFC 89.

54 Paragraph 14.5(1)(a) of Direction 79 requires the Tribunal to take into account the applicant's "health" when considering the "extent of impediments" as described in the chapeau of the paragraph. Paragraph 14.5(1)(c) requires the Tribunal to take into account "[a]ny social, medical and/or economic support available" in the home country. The enquiry is not confined to assessing whether a medical professional has made specific recommendations as to treatment.

55 In the circumstances of this case, paragraph 14.5(1) required a consideration of the applicant's health and "[a]ny social, medical and/or economic support available to them in that country" when considering 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 the other citizens of that country".

56 The Tribunal:

- found that the applicant had "significant" substance abuse issues which "largely remain unresolved": [110];
- found that the applicant had not undertaken formal rehabilitation to the extent that he has the capacity to abstain from illicit substances: [149];
- found that the applicant had not had formal counselling to an extent that he is now able to control his emotional regulation: [150];
- accepted Professor Freeman's finding that methamphetamine dependency is "usually chronic and requires lasting aftercare" in the context of assessing the likelihood of the applicant engaging in further criminal or serious conduct: [152].

57 Professor Freeman had stated that the applicant "should be encouraged to engage in complementary community-based relapse prevention interventions eg, Drug ARM [Awareness Rehabilitation Management], ATODS [Alcohol, Tobacco and Other Drugs Service]".

58 The Tribunal stated at [244] that Professor Freeman had made no recommendations for treatment of the disorders he had diagnosed. I take the Tribunal to mean that he had made no specific treatment recommendations. Professor Freeman had made general recommendations for what he described as "lasting aftercare eg, treatment, support and monitoring" and specifically encouraged "complementary community-based relapse prevention interventions". These "community-based relapse prevention interventions" are appropriately described at least as "social … support" within paragraph 14.5(1)(c). They were not apparently considered in relation to the "extent of impediments".

59 As noted earlier, Professor Freeman considered that the applicant suffered depression and had stated that the applicant "could benefit from remaining under the care of a medical practitioner to treat his depression and provide referrals (if needed)". This is "medical … support" within paragraph 14.5(1)(c). This was not apparently considered in relation to the "extent of impediments".

60 Before the Tribunal, the Minister had submitted in his oral closing submissions:

> In terms of impediments of removal, the applicant is a young man in his twenties, with no significant medical conditions. Although Professor Freeman diagnosed the applicant with an adjustment disorder and cannabis use disorder, and methamphetamine dependency, there was no recommended treatment for any of these conditions, that would be unavailable in the Solomon Islands.

61 There was no specific evidence about what was or was not available in the Solomon Islands concerning treatment for depression or the other specific conditions diagnosed by Professor Freeman or the availability of the kinds of relapse prevention programs suggested by Professor Freeman.

62 I infer that the Tribunal did not take into account matters which it was required by paragraph 14.5(1)(c) to take into account in the circumstances. The circumstances included: (a) the applicant's reference to his depression; (b) the SFICs filed by the parties, in particular the applicant's supplementary SFIC which referenced his depression in the context of the "extent of impediments"; (c) those paragraphs of Professor Freeman's report set out at [21] to [23] above; and (d) the closing submissions. The Tribunal should have considered, but I infer failed sufficiently to consider, the applicant's "health" and "[a]ny social, medical and/or economic support available to them in" the Solomon Islands in considering 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 the other citizens of that country)".

63 The Tribunal's reasons at [242] to [249] indicate that it proceeded upon the basis that the applicant was essentially healthy, albeit with conditions diagnosed by Professor Freeman at [8.2] of his report, for which no specific treatment had been recommended. However, and by way of example only, the Tribunal had accepted that the applicant had methamphetamine dependency which required lasting aftercare: at [152]. The reasoning at [242] to [249], read in the context of the reasons as a whole, indicates that the Tribunal did not consider Professor Freeman's recommendations about relapse prevention programs and medical practitioner treatment for depression when considering the "extent of impediments".

64 The failure to take into account a mandatory consideration constitutes jurisdictional error, assuming it is material. So too does a failure to comply with a direction made under s 499 of the Act. For the reasons given in relation to Ground 2, the error was material.

CONCLUSION

65 The application must be allowed with costs. Writs of mandamus and certiorari should issue.

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

Associate:

Dated: 28 November 2022