FEDERAL COURT OF AUSTRALIA

Chiagozie v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 139

File number(s):	NSD 812 of 2021
Judgment of:	**COLLIER J**
Date of judgment:	1 March 2023
Catchwords:	**MIGRATION** – review of migration decision – Direction No. 90 – visa refusal and cancellation under s501 *Migration Act 1958* (Cth) – revocation of mandatory cancellation of visa under s501CA - whether Administrative Appeals Tribunal denied procedural fairness – whether constructive failure to exercise jurisdiction – if decision of Tribunal illogical or irrational
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352 *DFTD v Minister for Home Affairs* [2020] FCA 859 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 197 ALR 389 *Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1000 *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 *Minister for Immigration and Ethnic Affairs v Baker* [1997] FCR 187 *R v Chiagozie* [2018] NSWDC 298 *Taulahi v Minister for Immigration and Border Protection* (2018) 357 ALR 467 *Taulahi v Minister for Immigration and Border Protection* (2018) 357 ALR 467; [2018] FCAFC 22
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights

Number of paragraphs:	68
Date of hearing:	1 February 2022
Counsel for the Applicant:	Dr Jason Donnelly
Solicitor for the Applicant:	Mr Ziaullah Zarifi of Zarifi Lawyers
Counsel for the First Respondent:	Mr Bora Kaplan
Solicitor for the First Respondent:	Karwan Eskerie of Sparke Helmore

ORDERS

NSD 812 of 2021

BETWEEN:	**FABIAN CHIAGOZIE** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **COLLIER J**

DATE OF ORDER: **1 MARCH 2023**

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to Minister for Immigration, Citizenship and Multicultural Affairs.
2. The originating application for review of a migration decision filed on 2 December 2021 be dismissed.
3. The applicant pay the costs of the first respondent, such costs to be taxed if not otherwise agreed.

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

REASONS FOR JUDGMENT

COLLIER J:

1 Before the Court is an application for review of a migration decision made by the Administrative Appeals Tribunal (**Tribunal)** on 8 July 2021. By that decision, the Tribunal affirmed the decision of the first respondent, made on 13 April 2021, not to revoke the mandatory cancellation of the applicant's visa under s 501CA (4)(b)(ii) of the *Migration Act 1958* (Cth) (**Migration Act).**

2 The applicant relies on the following grounds of review, contained in his amended originating application filed on 2 December 2021, in support of his application:

> **Ground 1: The decision of the second respondent (Tribunal) was illogical and/or irrational.**
>
> 1. The Tribunal found that the applicant's assault of a woman who was four months pregnant must weigh against him for clauses 8.1.1(1)(a)(ii) and 8.2 of Direction 90 (**assault on partner finding**).
> 2. The assault on partner finding was not based on logically probative material. In making this finding, the Tribunal otherwise adopted reasoning that was illogical and/or irrational:
>
> a. The evidence relied upon by the Tribunal to make the assault on partner finding went no higher than reliance upon prejudicial hearsay material.
>
> b. The Tribunal reasoned that the alleged victim was not called and subject to cross-examination by the first respondent (Minister). However, logically and rationally, the applicant should have had the right to cross-examine the alleged victim (consistent with legal authority).
>
> c. The allegations concerning the assault on partner finding were the subject of a contemporaneous police investigation that led to no charges against the applicant.
>
> d. There was evidence before the Tribunal that the alleged victim had serious mental health issues and was intoxicated at the time of the alleged assault. The Tribunal did not consider whether those facts impacted the probative nature of the impugned evidence adduced to NSW police.
>
> e. The evidence showed that the alleged victim had no visible injuries (despite the allegation that the applicant violently punched the alleged victim to the right side of the face).
>
> f. At [227], the Tribunal gave the alleged victim's written statement no weight because, inter alia, the alleged victim suffered mental illness and was not called to give evidence before the Tribunal. Having reasoned in that fashion, it was illogical and/or irrational for the Tribunal to accept the alleged victim's complaint reflected in the summons material (see [220] and [225]); since the matters the Tribunal took into account in rejecting the alleged victim's written statement to the Tribunal also applied to the

evidence that formed the basis of the summons material.

g. At [228], the Tribunal held that the applicant agreed that he had participated in planning about addressing domestic violence. However, the Tribunal did not rationally address the applicant's oral evidence that his participation was not on the basis that he was an offender of domestic violence; the evidence was to the contrary.

h. The Tribunal failed to lawfully consider and apply established legal principles relevant to forming a state of satisfaction that a non-citizen had engaged in criminal conduct for which they have not been charged.

i. The Tribunal's illogical and/or irrational reasoning was material. It infected the Tribunal's attribution of weight to four primary considerations.

Ground 2: The Tribunal denied the applicant procedural fairness.

1. A failure to respond to a substantial, clearly articulated argument was at least to fail to accord the applicant natural justice.

2. The applicant advanced claims that there was a real prospect that he would be subject to indefinite detention or otherwise subject to immigration detention for an indeterminate period on account of applying for a protection visa in the event of a non-revocation decision.

3. First, the Tribunal failed to lawfully consider the prolonged indefinite detention claim as a non-exhaustive other consideration that could potentially be held in the applicant's favour.

4. Secondly, at [318]-[319], the Tribunal appears to have acted on a misapprehension that the applicant's indefinite detention claim was not capable of amounting to another reason for revocation of the mandatory cancellation decision under s 501CA(4)(b)(ii) of the Migration Act 1958 (Cth) (the Act). The Tribunal reasoned that as indefinite detention was lawful, the prospect of a non-citizen being the subject of indefinite detention was not capable of amounting to another reason under s 501CA(4)(b)(ii) of the Act.

5. The Tribunal's reasoning demonstrated that it either acted on a misunderstanding of the applicable law or misunderstood the applicant's impugned claims, such as to have the consequence that the Tribunal failed to lawfully resolve the applicant's indefinite detention claims.

6. The pleaded error was material, involving, as it did, significant human consequences for a non-citizen.

Ground 3: There was a constructive failure to exercise jurisdiction by the Tribunal.

1. The applicant advanced a substantial, clearly articulated claim that he would be the subject of serious harm, persecution, and death if returned to Nigeria on account of his Christian faith (the risk of harm Christian claim).

2. The Tribunal failed to lawfully resolve the applicant's risk of harm Christian claim:

    a. The Tribunal failed to undertake an active intellectual process in considering material evidence adduced by the applicant in

support of the risk of harm Christian claim.

b. The Tribunal acted on a misunderstanding of the correct law (i.e. concerning s 36(3) of the Act), which had the effect that the Tribunal did not lawfully resolve the applicant's risk of harm Christian claim.

c. The Tribunal's attempt to find, in the alternative, that any error was not material cannot be lawfully sustained. Before the Tribunal could attribute whatever weight to the impugned consideration it saw fit, the Tribunal had to understand the gravamen of the risk of harm Christian claim (which it failed to show in this case).

d. The Tribunal's error was material, involving, as it did, significant human consequences for a non-citizen.

Ground 4: There was a constructive failure to exercise jurisdiction by the Tribunal.

3. Under cl 8.3(4)(d) of the Direction, the Tribunal was required to consider the effect that any separation from the non-citizen would have on the child. The Tribunal failed to lawfully address this mandatory consideration when considering the primary consideration of the best interests of minor children in Australia (see [241]-[257]).

4. The error was material. There was direct evidence before the Tribunal relevant to cl 8.3(4)(d). Lawful compliance could have led the Tribunal to give greater weight to the primary consideration of the best interests of minor children in Australia, which could realistically have led to a different result. The error involved the Tribunal failing to lawfully consider the best interests of four minor children in Australia.

(emphasis in original)

BACKGROUND

3 The applicant is a Nigerian citizen born in 1974. He has resided in Australia since August 2009.

4 On 6 June 2019, the applicant's Class BS Subclass 801 Partner visa (**visa**) was mandatorily cancelled under s 501(3A) of the Migration Act (**mandatory cancellation decision**). This cancellation occurred following the conviction of the applicant on 29 May 2018 of the offence of "import/export commercial quantity of border controlled drugs or plants". The applicant was consequently sentenced to a term of imprisonment of nine years and nine months. As a result of this conviction and sentence, the applicant no longer satisfied the character test set out in s 501(6)(a) of the Migration Act.

5 On 10 June 2019 the applicant made representations to the first respondent for the purpose of seeking the revocation of the mandatory cancellation decision. On 13 April 2021, a delegate of

the first respondent refused to revoke the mandatory cancellation decision (**non-revocation decision**).

6 On 21 April 2021, the applicant commenced proceedings in the Tribunal seeking review of the non-revocation decision. On 8 July 2021, the Tribunal affirmed the non-revocation decision.

7 The applicant sought review of the Tribunal's decision in this Court.

DECISION OF THE TRIBUNAL

8 The reasons of the Tribunal were lengthy and detailed.

9 At [14] the Tribunal noted that there were two issues before it, namely:

- whether the applicant passed the character test; or
- whether there was another reason why the decision to cancel the applicant's visa should be revoked.

10 The Tribunal noted that the applicant had conceded that he did not pass the character test as prescribed by s 501(6)(a) of the Migration Act, and that the mandatory cancellation decision was properly made under s 501(3A) of the Migration Act. The sole remaining question before the Tribunal was whether there was another reason for the revocation of the mandatory cancellation decision.

11 At [22] the Tribunal noted that it was bound by s 499(2A) of the Migration Act to comply with any directions made under the Act, specifically in this case *Direction No. 90 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (**Direction**). The Tribunal referred to para 8 of the Direction, which sets out the following primary considerations in making a decision under ss 501(1), 501(2), or 501CA(4):

(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.

12 The Tribunal also referred to other considerations which must be taken into account. They are set out in a non-exhaustive list in para 9 of the Direction, being:

(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; and

(ii) impact on Australian business interests.

13 At [45] *et seq* the Tribunal set out documentary evidence before it, including an Australian Criminal Intelligence Commissioner Check Results Report dated 22 March 2019, the sentencing remarks of Neilson DCJ in *R v Chiagozie* [2018] NSWDC 298, and the Conviction, Sentence and Appeals Report dated 6 June 2019. The Tribunal also noted the documents provided by the applicant.

14 At [51] the Tribunal noted that the applicant denied having physically assaulted his former partner, and said that he had never been charged with any domestic violence offences. The Tribunal accepted the terms of an interim Apprehended Domestic Violence Order on a "without admissions basis" to avoid legal expenses and the financial and emotional pressure on his family unit.

15 The Tribunal referred to submissions of the applicant concerning risks of harm he believed he would face in Nigeria. The Tribunal referred to evidence of witnesses for the applicant in respect of their relationships with him, and his relationship with his children. These witnesses included the applicant's former partner, who deposed that the applicant was a good father and that his children needed the applicant in their lives.

16 The Tribunal noted evidence of the applicant visiting Nigeria in September 2015 and February 2016.

17 The Tribunal referred to comments of the sentencing Judge in relation to importations of drugs, and rejected a submission by the applicant's counsel that the system of operation of drug importation was "primitive".

18 The Tribunal referred to evidence of the applicant given at the hearing, including his evidence concerning alleged domestic violence, a Provisional Apprehended Violence Order (**AVO**) to which he consented, and information about the applicant's family in Nigeria. The Tribunal also referred to evidence given in the Tribunal by witnesses called by the applicant.

19 The Tribunal summarised in detail the submissions of both Counsel before it.

20 In relation to primary consideration 1 concerning the interests of the Australian community, the Tribunal found in summary :

- Counsel for the applicant conceded before the Tribunal that the applicant's offending was very serious. At [184] the Tribunal said:

> Having regard for the far-reaching implications of proliferating prohibited drugs into the wider Australian community, the potential for great harm, not only to individual users, but to the broader Australian community, and the increased burden placed on the law enforcement and criminal justice system, and the nation's health facilities the Tribunal views the nature and seriousness of the Applicant's offending as extremely serious.

- The applicant's assault of a woman who was four months pregnant must weigh against him for the purposes of para 8.1.1(1)(a)(ii) and para 8.2 of the Direction: [191].
- The nature of the harm to individuals or the Australian community (should the applicant engage in further criminal or other serious conduct) could include further untruthful statements or documents being produced by him to government authorities, violent assaults of potential future partners, and further serious criminal importation and distribution of illicit substances: [195]. A concession that further similar reoffending could cause serious physical, psychological and financial harm to members of the Australian community was made by the applicant: [196].
- The applicant's evidence before the Tribunal, namely that there was a low risk of him reoffending, had its roots in the applicant's own statements, which the Tribunal considered were not credible.
- The applicant was not a credible witness, and the Tribunal gave no weight to his claims of remorse or rehabilitation.
- The Tribunal considered that there was a real risk of the applicant reoffending: [202]. Regardless whether the prospect of the applicant reoffending was low or material, the Tribunal considered that the harm which would be caused if his past conduct was repeated was so serious that *any* risk that it could be repeated was unacceptable: [203].
- It followed that this primary consideration weighed very heavily against revocation of the mandatory cancellation decision.

21 In relation to primary consideration 2 concerning family violence committed by a non-citizen, the Tribunal found in summary :

- There was no evidence that the applicant had been convicted of an offence involving family violence: [216]. However the Tribunal noted para 8.2(2)(b) of the Direction which relevantly provided:

> …there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.

- The Tribunal noted submissions by Counsel for the applicant and evidence in the applicant's statement.
- At [221] the Tribunal noted summonsed material referring to an incident where the applicant was said to have pushed and punched his pregnant former partner.
- At [225]-[226] the Tribunal referred to a Department of Family and Community Services report, and noted the agreement of the applicant that he had participated in planning about addressing domestic violence.
- At [227] the Tribunal noted that although the applicant's former partner provided a statement in support of the applicant remaining in Australia, at no point in her statement did she comment upon or retract the statements she is reported to have made to police concerning his alleged domestic violence towards her.
- At [228] the Tribunal concluded that it was more probable than not that the applicant did in fact exert violent force on his ex-partner.
- At [234] the Tribunal said there was insufficient evidence before the Tribunal to allow it to form a view as to the cumulative effect of the repeated acts of family violence.
- The Tribunal was not satisfied that the applicant had accepted responsibility for his family violence conduct.
- The Tribunal concluded that a consideration of para 8.2 of the Direction weighed very heavily against revocation of the mandatory cancellation decision.

22 In relation to primary consideration 3 concerning the best interests of minor children in Australia, the Tribunal found in summary :

- The applicant was the father of three minor children in Australia, and step-father to one minor child.
- At [245] the Tribunal observed that whilst it could not be said that there was no existing relationship between the applicant and the children, the applicant had been substantially

removed from their lives, and only had limited meaningful contact with them, after mid-May 2016.

- At [246] the Tribunal noted the submission that the applicant had reasonable prospects of having his biological children returned to his care if released into the Australian community, but said the evidentiary basis of this submission was unclear.
- At [247] the Tribunal said there was little prospect of the applicant playing any role in his step-daughter's future life given that she lived with her own biological father.
- At [254] the Tribunal accepted that if the applicant returned to Nigeria he would encounter significant difficulties maintaining contact with his biological children.
- At [256] the Tribunal considered it appropriate to give some limited weight in favour of revocation to this consideration.

23 In relation to primary consideration 4 concerning the expectations of the Australian community, the Tribunal observed:

> 260. This Applicant has sought to deceive border officers, and has committed multiple serious breaches of Australia's criminal law, with far-reaching consequences. In addition, he has subjected a pregnant, mentally ill woman to family violence. It was submitted by Dr Donnelly that the deemed community expectation is that this primary consideration would weigh against the revocation of the mandatory cancellation decision. He further submitted that the adverse ascription of weight to this primary consideration should be slightly reduced because the Applicant has resided in Australia since 2009 (i.e. about 11 years), and (relying on *FYBR v Minister for Home Affairs* (2019) 374 ALR 601) that the Australian community would afford the Applicant a higher level of tolerance. The Tribunal rejects this submission because it very much doubts that the Australian community would in fact afford the Applicant a higher level of tolerance having regard to the multiple deceptions the Applicant has perpetrated in order to come to and remain in Australia, and the fact that he has spent well over half of his time in Australia either in prison or immigration detention, and the only evidence before this Tribunal that he has engaged in lawful employment was the work that he did whilst he was in prison for his criminal offending.
>
> 261. The Tribunal considers that the expectations of the Australian community weigh very heavily against this Applicant.

24 In relation to international non-refoulement obligations, the Tribunal referred to the applicant's claimed fear of persecution as a Christian in Nigeria. It also referred to Decree 33 of the Nigerian Drug Act, however observed at [274] that it would be a rare event for the applicant to be prosecuted as he claimed to fear. The Tribunal at [277] reiterated its view that the applicant was not a credible witness, and that the Tribunal gave no weight to his evidence. At [281] the

Tribunal accepted, based on the DFAT report, that the security situation across Nigeria was unstable and fluid. The Tribunal gave paragraph 9.1 of the Direction neutral weight.

25 At [295] the Tribunal concluded that it was highly unlikely that the applicant would be granted a protection visa in Australia.

26 At [298] the Tribunal accepted that the health and social welfare support systems in Nigeria were very limited, however did not consider that the applicant would be worse off there than any other Nigerian citizen. At [299] the Tribunal accepted that the applicant would suffer significant emotional hardship if he were removed to Nigeria. At [304] the Tribunal did not consider that the applicant's claimed employment prospects presented a significant impediment to his return, or another reason to revoke the mandatory cancellation decision. However the Tribunal also referred to the international circumstances concerning COVID-19. It concluded at [306] that it was appropriate to give some weight in the applicant's favour in respect of the impact of COVID-19.

27 At [314] the Tribunal gave some slight weight in favour of the applicant to the strength, nature and duration of the applicant's ties to Australia.

28 At [316]-[318] the Tribunal considered the issue of indefinite detention as follows:

> 316. The Applicant raised concerns at what he claimed was the prospect of being detained indefinitely in immigration detention should he have an adverse outcome in this Tribunal. However, the Tribunal does not consider that this concern raises another reason in favour of his application.
>
> 317. The majority in the recent High Court case of *Commonwealth of Australia v AJL20* [2021] HCA 21 (23 June 2021) makes clear at [4 – 5] that detention under s 189 (1) is lawful and required to continue until one of the eventualities provided for in s 196 (1) occurs; and that in such circumstances habeas corpus is not an available remedy, and that the lawfulness of detention was not conditional on the actual achievement of removal of the unlawful non-citizen as soon as reasonably practicable by the Executive, and that an order mandating compliance by the Executive with the duty imposed by s 198 was the appropriate remedy for non-compliance with s 198.
>
> 318. In the event that the Executive is dilatory in returning the Applicant to his country of origin, his remedy is to seek a writ of mandamus, and the prospect of his indefinite detention is therefore not another reason to revoke the cancellation of his visa, and is given neutral weight.

29 The Tribunal concluded as follows:

> 321. In considering whether there is another reason to exercise the discretion afforded by section 501CA(4) of the Act to revoke the mandatory visa cancellation decision, the Tribunal finds as follows:

- Primary Consideration 1 weighs very heavily in favour of non-revocation;
- Primary Consideration 2 weighs very heavily in favour of non-revocation;
- Primary Consideration 3 is given limited weight in favour of revocation;
- Primary Consideration 4 weighs very heavily in favour of non-revocation; and
- To the extent that Other Considerations and Primary Consideration 3 weigh in favour of revoking the mandatory visa cancellation decision, they cannot, even when combined outweigh Primary Considerations 1, 2 and 4.

322. The Tribunal is now required to weigh all of the Considerations in accordance with the Direction.

323. Application of the Direction therefore favours the non-revocation of the cancellation of the Applicant's visa.

324. Consequently, the Tribunal cannot exercise the discretion to revoke the cancellation of the Applicant's visa.

SUBMISSIONS

Applicant's submissions

30 In relation to ground 1, the applicant submitted, in summary, as follows:

- The Tribunal's findings at [191], [220], [228], and [232] referable to the applicant's assault of his former partner were referable to details contained in a Commissioner of Police of New South Wales summons document (**COPS document**). These findings were not logically made :
  - Without prosecution and conviction for an offence, the finding that criminal conduct has occurred cannot be made on slight material: *Minister for Immigration and Ethnic Affairs v Baker* [1997] FCR 187 at [194].
  - The COPS document constitutes "slight material" in this sense, and was nothing more than prejudicial hearsay evidence;
  - The Tribunal did not proceed with caution before relying upon the COPS document;
  - There was evidence before the Tribunal that the applicant's former partner had mental health issues and was intoxicated at the time of the alleged assault, which was not considered;

- The applicant was not subsequently charged with assault;
- Given that the Tribunal gave the applicant's former partner's written statement in the Tribunal proceedings no weight, it was not logical for the Tribunal to then accept her complaint to NSW Police and officers of the Department of Family and Community Services (**DFCS**) (at [220] and [225] respectively);
- While accepting that the applicant had participated in "planning about addressing domestic violence", the Tribunal failed to acknowledge that the applicant's participation in this activity was not "on the basis that he was an offender of domestic violence; the evidence was to the contrary";
- The Tribunal was incorrect to consider the DFCS report was authoritative and independent, given that it did no more than record "… allegations of domestic violence from a third party";

- The Tribunal's finding referable to the applicant's assault of his ex-partner was material; and
- If the Tribunal had not made such a finding, it could have given less weight to the adverse primary considerations, more weight to the positive primary consideration related to the best interests of minor children in Australia and could realistically have come to a different result when undertaking the ultimate balancing exercise at [320]-[323].

31 In relation to ground 2, the applicant submitted, in summary, as follows:

- The Tribunal failed to respond to two claims advanced by the applicant namely:
  - There was a real prospect that the applicant would be detained indefinitely if it was found that he was owed protection obligations under the Migration Act (**claim 1**); or
  - The applicant would be detained for an indeterminate period if he applied for a protection visa (**claim 2**);
- The Tribunal failed to demonstrate an understanding of these claims.

32 In relation to ground 3, the applicant submitted, in summary, as follows:

- The Tribunal failed to adequately address the applicant's claim that, in the event he were deported to Nigeria, he would be subject to harm or death as a result of his Christian faith;
- Engagement with this ground could have resulted in the Tribunal reaching a different conclusion;
- On the basis that the Tribunal's use of the term "alternative views" was ambiguous and vague, the Tribunal's reasoning at [290] was not sustainable.

33 In relation to ground 4, the applicant submitted, in summary, that the Tribunal failed to constructively exercise its jurisdiction by not addressing the impact, owing to separation, that the applicant's deportation would have on his children.

Submissions of the Minister

34 In relation to ground 1, the Minister submitted, in summary, as follows:

- The applicant's argument that the Minister could not be satisfied of the existence of criminal conduct unless the non-citizen had been convicted of an offence was misconceived, because :
    - A finding to the effect that the applicant had assaulted his former partner was plainly open to the Tribunal to reach: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 255 CLR 352* at [33] per French CJ, Hayne, Kiefel, Bell and Keane JJ;
    - Similar findings may be made on the basis of allegations or acquittals: *Taulahi v Minister for Immigration and Border Protection* (2018) 357 ALR 467; [2018] FCAFC 22 at [31] per Robertson J (North J and Besanko J agreeing); *Katoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1000 at [30];
    - The present case was analogous to *Taulahi*. The COPS document and the Risk of Significant Harm Report dated 8 June 2017, constituted probative material. Both documents referenced allegations that the applicant had assaulted his former partner;
    - In the context of the applicant's involvement in "planning about addressing domestic violence", it was implicit in the Tribunal's findings at CB 647-649

[228] and [236]-[237] that it was not persuaded by the applicant's explanation for why he had made plans to address domestic violence.

35 In relation to ground 2, the Minister submitted, in summary, as follows:

- Claims 1 and 2 made by the application rose no higher than speculation, in that they might eventuate and were not factors required to be taken into account;
- The Tribunal was under no obligation to respond directly to claims 1 and 2 given that they were lacking in substance, not based on established facts and based on premises that were ultimately rejected by the Tribunal.

36 In relation to ground 3, the Minister submitted, in summary, as follows:

- The Tribunal made findings in relation to the applicant's non-refoulement claim, and rejected his claim to fear harm in Nigeria based on its assessment of his credibility and the weight of evidence. In doing so the Tribunal referred to the DFAT report, and also considered that a claim not previously made by the applicant (referable to his alleged Jewish ancestry) was a spontaneous invention.
- The better inference to draw from the Tribunal's reasons was not that the Tribunal ignored material supporting the applicant's claim of risk of harm as a Christian, but that it preferred the DFAT report to country information on which the applicant relied.
- Even if the Tribunal erred, it would not go to jurisdiction given that the applicant was not owed non-refoulement obligations because he could seek the protection of a third country.
- There was nothing ambiguous or vague about the Tribunal's language.

37 In relation to ground 4, the Minister submitted, in summary, as follows :

- Although the Minister did not specifically refer to cl 8.3(4)(d) of Direction No. 90 in relation to the best interests of the applicant's children, it is evident from its findings at [245]-[250] that it considered that the relationship of the minor children with the applicant was neither meaningful nor one of long-standing, and that there was "significant uncertainty" as to whether he would likely be able to play a positive parental role in their lives in the future.
- In any event the impact of separation was considered at [313] in addressing the strength, nature and duration of the applicant's ties to Australia.

CONSIDERATION

Ground 1

38 The applicant was not convicted of any offence in respect of domestic violence allegedly perpetrated by him against his then partner. However, the Tribunal accepted on the evidence before it that the applicant had in fact acted in a violent manner toward his former partner, and took that into consideration.

39 As a general proposition, the Tribunal was entitled to make that factual finding notwithstanding the absence of a conviction. In this regard I note *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, where the High Court observed at [33]:

> More generally, and contrary to the "normal expectation" stated by the Full Court, **it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action**. The decisions of this Court in *Attorney-General (Cth) v Alinta Ltd* and *Albarran v Companies Auditors and Liquidators Disciplinary Board* accept so much. **There is no reason to suppose that a Commonwealth public housing authority might lack the capacity to terminate a lease on the ground of the tenant's use of the premises for an unlawful purpose notwithstanding that the tenant has not been convicted of an offence arising out of that unlawful use**.
>
> (emphasis added, footnotes omitted)

40 In a similar context involving allegations of engaging in criminal activity, in *Taulahi* Robertson J stated (with North and Besanko JJ concurring) at [26]-[29]:

> In my opinion, the Minister was engaged in an evaluative exercise in the course of deciding how to exercise his discretion in s 501(3), having already formed the view that he reasonably suspected that the applicant did not pass the character test and that he was satisfied that the cancellation of the visa was in the national interest.
>
> The Minister's **decision-making was administrative, even if it involved a finding of behaviour which could found criminal proceedings**: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7; 255 CLR 352 at [33] per French CJ, Hayne, Kiefel, Bell and Keane JJ and [63] per Gageler J. Unlike *Today FM*, **the question of the commission of an offence is not the express statutory subject matter or jurisdictional fact where the issue is the exercise of the s 501(3) discretion**.
>
> The Minister took into account the response from the ACIC to the Department of Immigration and Border Protection's request for information regarding why Ms Mill sought AVOs against the applicant.
>
> **Contrary to the submissions of the applicant, that material was plainly relevant to the Minister's exercise of his discretion. As I have said, the Minister was engaged in an administrative process. He was not determining guilt or innocence and was not otherwise involved in the criminal justice process**. It follows that the

principle in *Woolmington* is not presently relevant.

(emphasis added)

41 His Honour went on to observe, at [31] and [34]:

> In my opinion, **it was open to the Minister to conclude that the events set out in the ACIC's report had occurred even where there were no criminal charges or criminal convictions**. Put differently, there was material before the Minister on which he could base the conclusions that he reached at [45] and the no evidence ground of judicial review has not been made out: see *Australian Postal Corporation v D'Rozario* [2014] FCAFC 89; 222 FCR 303 at [15] per Besanko J, [47]-[48] per Jessup J and [118] per Bromberg J.
>
> …
>
> I accept, of course, that an error in fact-finding may constitute a jurisdictional error: *Gill v Minister for Immigration and Border* [2017] FCAFC 51; 250 FCR 309, b**ut in the present case I find no error in fact-finding on the part of the Minister has been established**.
>
> (emphasis added)

42 In deciding whether a conclusion reached is illogical or irrational, Crennan and Bell JJ stated in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [135]:

> …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.** None of these applied here…
>
> (emphasis added)

43 Plainly there was evidence before the Tribunal, set out at [215]-[232], which could support its findings concerning the claimed domestic violence on the part of the applicant towards his then partner. This included evidence of the applicant himself, evidence of the former partner, various summonsed material, a Department of Family and Community Services report, the existence at some point of an AVO against the applicant, and the applicant's concession that he had engaged in family violence programs.

44 I am satisfied that the Tribunal's findings concerning the applicant and claims of family violence perpetrated by him were open to the Tribunal on the evidence before it. This is notwithstanding the absence of a formal conviction of the applicant under the criminal law in respect of such claims. The authorities are clear that the Tribunal can make its own findings in respect of evidence before it concerning such matters, and not be reliant on a formal conviction.

45 I also consider that the applicant, in this ground of review, is inviting the Court to revisit the facts before the Tribunal, and come to a factual conclusion other than that reached by the Tribunal, which is improper.

46 In such circumstances, it was reasonable for the findings of the Tribunal to be taken into consideration by the Tribunal in weighing the issues before it.

47 Ground 1 is unsubstantiated.

Ground 2

48 In *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 197 ALR 389, Gummow and Callinan JJ held at [24] that "[t]o fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord [the appellant] natural justice."

49 Noting that the applicant claims that the Tribunal failed to respond to two claims advanced by him – namely that there was a real prospect he would be detained indefinitely if he was owed protection obligations under the Migration Act or he would be detained for an indeterminate period if he applied for a protection visa – I agree with the submission of the Minister that such claims rose no higher than speculation.

50 As Snaden J observed in *DFTD v Minister for Home Affairs* [2020] FCA 859 at [42]:

> The **mere *possibility* of prolonged immigration detention is not a circumstance of which the subject matter, scope and/or purpose of the legislative scheme require, by implication, that a decision maker take account when exercising (or not exercising) the power conferred by s 501CA(4) of the Act**.
>
> In this case, prolonged immigration detention—leaving aside the uncertainty inherent in that phrase—is not a prospect that arises as a statutory or legal consequence of the Tribunal's Decision. Even if it were, it is not, on the strength of [*Minister for Immigration and Border Protection v Le* [(2016) 244 FCR 56], a consequence to which the subject matter, scope and/or purpose of the Act required, by implication, that the Tribunal give consideration before making its decision under s 501CA(4) of the Act. The prospect of prolonged detention, if it exists at all, exists contingently upon circumstances unrelated to the Tribunal's Decision.
>
> … [T]here is no warrant for supposing that the subject matter, scope or purpose of the relevant statutory provisions require, by implication, that the exercise or non-exercise of power under s 501CA(4) of the Act be conditioned, in this case, upon consideration of [Australia's non-refoulement] obligations. …
>
> Howsoever a "solution" manifests in any given case, there is always a period following the non-exercise of the power conferred by s 501CA(4) of the Act during which the non-citizen will remain subject to immigration detention. Where (as occurs frequently) review or appeal rights are engaged, that period can be more than trivial. There is

> nothing about the subject matter, scope or purpose of the relevant legislative provisions that, by implication, conditions the non-exercise of the power conferred by s 501CA(4) of the Act upon prior consideration of the likelihood that a former visa holder will be detained for a lengthy period whilst those processes play out. It is not apparent to me why the subject matter scope or purpose of the provisions should be thought to condition, by implication, the non-exercise of the power upon prior consideration of that prospect (lengthy detention) inasmuch as it might arise in any other way …
>
> The prospect of the applicant's being subjected to prolonged immigration detention was not a consideration of which the subject matter, scope or purpose of the Act (or the relevant parts of it) required that the Tribunal take account before declining to exercise its power under s 501CA(4) of the Act. The Tribunal's failure to take that prospect into account en route to the making of its decision does not qualify as jurisdictional error.

51 On the case presented to the Tribunal:

- The applicant put no evidence to the Tribunal concerning claims he proposed to advance in the course of any application for a protection visa; and
- There was no evidence of any impediment to the applicant's removal to Nigeria which could result in his detention being prolonged.

52 Plainly, the prospect of the applicant being detained at all whilst applying for a protection visa was simply speculative. There was no reason for the Tribunal to engage with such speculation. I am not satisfied that the applicant was denied procedural fairness in circumstances where the Tribunal declined to engage with a possible future application by the applicant for protection.

53 The comments of the Tribunal at [317]-[318] concerning prolonged detention of the applicant must clearly be read against the background of the findings by the Tribunal that

- the applicant was not a person to whom non-refoulement obligations were owed, and
- the applicant was not (in the Tribunal's view) a person who would be granted a protection visa on the basis of the evidence before the Tribunal.

54 Ground 2 is not substantiated.

Ground 3

55 In ground 3 the applicant claimed that the Tribunal failed to actively engage with the risk of harm to the applicant, as a Christian, returning to Nigeria.

56 At [263]-[291] of its reasons the Tribunal referred to the applicant's representations about risk of harm. In particular at [265]-[267] the Tribunal said:

> 265. It has been submitted on behalf of the Applicant that he will face

> discrimination, persecution, and other hardships in Nigeria in consequence of his Christian faith. The Applicant claims that during his last visit to Nigeria he was attacked by Boko Haram members whilst in Lagos. It was submitted that there is insufficient State protection to protect him against facing the same or similar injuries in the future at the hands of Boko Haram.
>
> 266. Aside from the threat posed by Boko Haram, it was declared by the Applicant that he would face double jeopardy in consequence of the prospect of being charged and punished in Nigeria under Decree 33 of the Nigerian Drug Act, section 22 (2)…
>
> 267. The claims made by the Applicant were put either as non-refoulement claims, and in the alternative, the harm and hardship falling outside a non-refoulement context were said to provide "another reason" to set aside the mandatory cancellation decision.

57 The Tribunal then referred to the applicant's evidence and submissions, its view of the applicant's credibility, and the DFAT Report concerning the security situation across Nigeria.

58 I am not satisfied that the Tribunal's extensive and detailed consideration constituted a failure on the part of the Tribunal to actively engage with the applicant's claims of risk of serious harm, persecution and/or death were he to return to Nigeria.

59 In any event, at [290] the Tribunal found that, had it reached the alternative views in respect of non-refoulement or "another reason" in this respect, it would nevertheless have found that the risk to the Australian community posed by the applicant outweighed the competing considerations. I reject the submission of the applicant that this conclusion was unsustainable, in circumstances where the Tribunal had before it all relevant material, and plainly analysed that material in detail.

60 Ground 3 is not substantiated.

Ground 4

61 In ground 4 the applicant claimed that the Tribunal failed to address a mandatory consideration, namely the effect that any separation from the applicant would have on minor children in Australia pursuant to cl 8.3(4)(d) of the Direction. This paragraph provides:

> 4. In considering the best interests to the child, the following factors must be considered where relevant:
>
> …
>
> (d) the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;

62 The applicant submitted that the general tenor of evidence demonstrated that his removal from Australia would have the likely effect of causing emotional, financial and practical hardship to his children in Australia, however the Tribunal failed to consider that evidence. The applicant also noted that the Tribunal specifically addressed cl 8.3(4)(c) and cl 8.3(4)(e) of the Direction, but apparently overlooked cl 8.3(4)(d).

63 The reasons of the Tribunal ought not be read with an eye finely attuned to the perception of error: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at [30]. In this case the Tribunal specifically found that the relationship of the applicant with his Australian children was not meaningful nor of long-standing, that he had been substantially removed from their lives and, in the case of his biological children, he had had only limited meaningful contact from the time they were babies or toddlers ([245]). In such circumstances, at [256] the Tribunal considered it appropriate to give only limited weight in favour of revocation of the mandatory cancellation decision to the best interests of minor children. In my view the discussion by the Tribunal of the interests of the applicant's minor children at [241]-[256] encompassed the relationship between the applicant and his children and, by inference, the effect of his separation on them following his removal from Australia.

64 In any event, and notwithstanding the absence of evidence concerning the effect of the applicant's removal from Australia on his children, I note that at [313] the Tribunal was prepared to accept that the applicant's biological children and step-child were likely to face emotional and psychological pain if he were removed to Nigeria. The Tribunal accordingly gave the consideration of the applicant's ties to Australia some slight weight in favour of the applicant.

65 It cannot be said that the Tribunal has failed to consider the effect of separation of the applicant from his minor Australian children.

66 Ground 4 is not substantiated.

CONCLUSION

67 The applicant's grounds of review are not substantiated. It is appropriate to dismiss the application.

68 Costs follow the event.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Collier.

Associate:

Dated: 1 March 2023