FEDERAL COURT OF AUSTRALIA

RPQB v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1419

Review of:	*RPQB and Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 3192
File number:	VID 641 of 2022
Judgment of:	**ROFE J**
Date of judgment:	17 November 2023
Catchwords:	**MIGRATION** – decision of the Administrative Appeals **Tribunal** affirming decision of the Minister not to revoke mandatory cancellation of visa under s 501(3A) of the *Migration Act 1958* (Cth) – whether decision of the Tribunal affected by jurisdictional error – whether the Tribunal misunderstood the evaluative task under s 501CA(4)(b)(ii) as requiring the exercise of discretion – whether Tribunal failed to consider health and age of the applicant – where application alleges Tribunal's approach was legally unreasonable – Tribunal not required to consider claims not raised before it – application dismissed
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595 *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315 *BKTS v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 729 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 *DTR21 v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1237 *GXXS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 468 *Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 450 *King v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 152

	LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1039 *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023)] FCAFC 116 *Minister for Home Affairs v Omar* (2019) 272 FCR 589 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 *Nathanson v Minister for Home Affairs* (2022) 403 ALR 398 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 409 ALR 65 *Tsvetnenko v United States of America* (2019) 269 FCR 225 *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112
Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	113
Date of last submission/s:	27 September 2023
Date of hearing:	11 October 2023
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Human Rights for All
Counsel for the First Respondent:	Mr A F Solomon-Bridge
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

VID 641 of 2022

BETWEEN:	**RPQB** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
ORDER MADE BY:	**ROFE J**
DATE OF ORDER:	**17 NOVEMBER 2023**

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the first respondent's costs of the application, to be assessed by a Registrar if not agreed.

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

REASONS FOR JUDGMENT

ROFE J:

1. INTRODUCTION

1 The applicant is a 25 year old national of the Federal Republic of Somalia. He arrived in Australia in June 2011 on a Class XB Subclass 200 Refugee (permanent) **visa**.

2 The applicant has a lengthy criminal history commencing from 15 October 2014 which comprises of multiple sentences of imprisonment for domestic violence and other violence related offences.

3 On 28 February 2019, the applicant's visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth).

4 The applicant seeks judicial review of the Administrative Appeals **Tribunal**'s decision made on 3 October 2022 to affirm the decision of a delegate of the first respondent (the **Minister**) to refuse to revoke the cancellation of the applicant's visa per s 501CA(4) of the Act.

5 For the reasons that follow, the application is dismissed.

2. LEGISLATION

6 I adopt the principles of the relevant legislative framework that I set out at [4]–[15] in ***DTR21*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1237:

> [4] This application concerns the exercise of discretion under s 501CA of the Act, and in particular the application of Ministerial Direction No. 90 (**Direction 90**) in undertaking that exercise.
>
> [5] Section 501 of the Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that they pass the character test: s 501(1).
>
> [6] Section 501(3A) provides that the Minister must cancel a person's visa if the Minister is satisfied that the person does not pass the character test because the person has a "substantial criminal record". A person has a "substantial criminal record" if they have been sentenced to a term of imprisonment of 12 months or more.
>
> [7] Section 501CA provides that if the Minister has cancelled the person's visa under s 501(3A), the Minister must notify the person and invite the person to make representations to the Minister about the revocation of the visa cancellation: s 501CA(3).
>
> [8] If that person makes representations, the Minister may revoke the original decision if the Minister is satisfied that the person passes the character test (as defined by s 501) or that there is "another reason" why the original decision should

be revoked: s 501CA(4)(b).

[9] The Act provides that the Minister may give written directions to a person or body having functions or powers under the Act: s 499. That person or body must comply with those directions.

[10] Direction 90 was made on 8 March 2021, for the purpose of guiding decision-makers in performing functions or exercising powers under ss 501 and 501CA of the Act. Specifically, Pt 2 of Direction 90 directs decision-makers on exercising their discretion to refuse a visa under s 501CA(4).

[11] Clause 5 of Direction 90 sets out principles which are said to provide the framework within which decision-makers should approach their task of deciding whether to revoke a mandatory cancellation under s 501CA. These principles include at cl 5.2(5):

> Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing consideration may be insufficient to justify not … revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.

[12] Clause 6 of Direction 90 provides that, informed by the principles in cl 5.2, a decision-maker must take into account all of the relevant considerations identified in cll 8 and 9. The considerations in cl 8 are "primary considerations", while those in cl 9 are "other considerations". Clause 7 states that primary considerations are generally to be given greater weight than the other considerations, and that one or more primary considerations may outweigh other primary considerations.

[13] The four "primary considerations" identified in cl 8 are:

> (a) protection of the Australian community (8.1);
>
> (b) family violence committed by the non-citizen (8.2);
>
> (c) best interests of minor children in Australia affected by the decision (8.3); and
>
> (d) expectations of the Australian community (8.4).

[14] Further directions are provided in relation to each of the four primary considerations. Relevantly to this application, cll 8.1, 8.2 and 8.4 provide as follows:

> 8.1 Protection of the Australian Community
>
> …
>
> 8.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct
>
> …
>
> (2) In assessing the risk that may be posed by the non-citizen to the

Australian community, decision-makers must have regard to, cumulatively:

a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

i) information and evidence on the risk of the non-citizen re-offending; and

ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

…

8.2 Family violence committed by the non-citizen

…

(3) In considering the seriousness of the family violence engaged in by the noncitizen, the following factors must be considered where relevant:

a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;

b) the cumulative effect of repeated acts of family violence;

c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:

i) the extent to which the person accepts responsibility for their family violence related conduct;

ii) the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);

…

8.4 Expectations of the Australian Community

(1) The Australian community expects non-citizens to obey Australian laws whilst in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.

(2) In addition, … non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the

> Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind;
>
> (a) acts of family violence; or …
>
> (3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.
>
> [15] The "other considerations" in cl 9 which must be taken into account where relevant are:
>
> (a) international non-refoulement obligations (9.1);
>
> (b) the extent of impediments if removed from Australia (9.2);
>
> (c) the impact on victims (9.3); and
>
> (d) links to the Australian community, including the strength, nature and duration of ties to Australia, and the impact on Australian business interests (9.4).

7 As I observed in *DTR21* at [67], Direction 90 makes clear that the Australian Government considers family violence to be a serious issue to be taken into account in any consideration of whether to revoke a mandatory cancellation pursuant to s 501CA. This reflects the attitude of the Australian community towards family violence. Not only is family violence committed by the non-citizen a stand-alone primary consideration (cl 8.2), each of the other three primary considerations expressly refers to family violence as a relevant factor to be considered (see cll 8.1.1(1)(a)(iii), 8.3(4)(g) and 8.4(2)(a)).

3. BACKGROUND

8 The Tribunal set out the applicant's criminal history at [22]–[29]. The Tribunal noted that the applicant's criminal history commenced in 2014. On 28 July 2015, the applicant was convicted of 12 charges including contraventions of domestic violence orders, assault occasioning bodily harm, driving unlicenced, fraud and stealing. A 12 month prison sentence was imposed. At [23], the Tribunal noted that the sentencing Magistrate described the breach of the domestic violence order as "serious" and the assault as "particularly violent".

9 On the applicant's birthdate as accepted by the Tribunal (1 November 1997), the applicant was a minor at the time he committed his crimes in 2014 and 2015, but by reason of confusion as to his birthdate, he was sentenced for them as an adult.

10 On 8 October 2015, the applicant's visa was cancelled under s 501(3A) leading to the applicant being placed in detention. This decision was later revoked by the delegate of the

Minister on 20 September 2016 with the following warning given to the applicant: "this decision does not mean that your case cannot be reconsidered again on character grounds in the event of further criminal offending by you".

11 After this time, the applicant went onto further offend on the following occasions:

(a) On 23 March 2016, the applicant was convicted on a guilty plea of numerous charges including a breach of a probation order, going armed so as to cause fear, wilful damage, contravention of domestic violence order and stealing. At [25], with respect to the domestic violence, the Tribunal noted the Magistrate's comment that it was a serious way that the applicant had behaved to his girlfriend and that "you did not treat her well". A sentence of six months imprisonment was imposed.

(b) On 29 August 2018, the applicant was convicted in the Brisbane District Court of assault occasioning bodily harm, a domestic violence offence, and was sentenced to a term of 18 months imprisonment. The offending was committed on 30 April 2017 against the applicant's wife who was 21 years of age and pregnant at the time.

(c) On 10 December 2018, the applicant was convicted in the Brisbane Magistrates Court of stealing, assaulting or obstructing a police officer, contravention of domestic violence order (aggravated offence) and a wilful damage domestic violence offence. He was sentenced to nine months imprisonment.

(d) On 19 March 2019, in the District Court of Queensland, the applicant was convicted of assault occasioning bodily harm and sentenced to 12 months imprisonment. The offence occurred on 4 November 2017, which took place only one month after the applicant was released from prison after committing the domestic violence on 30 April 2017.

12 By 30 April 2017, the applicant was no longer a minor. At [26], the Tribunal noted that the domestic violence offending was committed against the applicant's wife who was 21 years of age and pregnant at the time. The Tribunal set out the circumstances of the offending as described by the sentencing judge:

> the offences arose in the context of what started off as a verbal argument … She tried to leave the house. You told her to go to the living room. You approached her and punched her to the face. She also at that time felt some pain to her stomach and obviously felt a movement, as she described it, in her left eye. Count 4 arose in the context of – the common assault that followed was that you slapped her to the face and spat in her face. You told her to go to the bedroom, and she was apologising to you. And, ultimately, not long after another verbal exchange, she packed up and

> ultimately left.
>
> Police and ambulance arrived. They noticed, amongst other things, severe swelling and bruising to the left side of her face as well as bruising to her arms.

13 The procedural history of this proceeding is extensive and was described by the applicant as "tortured". This is the third Tribunal decision in relation to the decision to cancel the applicant's visa.

14 On 1 March 2019, the delegate of the Minister notified the applicant of the cancellation of his visa. On 6 March 2019, the applicant made representations seeking revocation of the mandatory cancellation decision.

15 The mandatory cancellation of the visa may be revoked by the delegate, or by the Tribunal for the purposes of review, if the decision maker is satisfied that:

(a) the applicant passes the character test; or

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

16 On 7 August 2020, a delegate for the Minister made a decision to refuse to revoke the cancellation.

17 On 12 August 2020, the applicant lodged an application for review of the delegate's decision with the Tribunal.

18 On 6 November 2020, the Tribunal constituted by Senior Member Tavoularis published reasons affirming the delegate's non-revocation decision (**First Tribunal decision**).

19 On 26 November 2020, the applicant commenced an application in this Court for review of the First Tribunal decision.

20 On 27 April 2021, Mortimer J (as her Honour then was) made orders by consent setting aside the First Tribunal decision and remitting the matter back to the Tribunal for determination in accordance with the law, noting that the Minister accepted that the decision had failed to consider the applicant's contradicting or qualifying evidence in relation to a physical altercation in prison.

21 On remitter, the Tribunal constituted by Senior Member Morris (**Second Tribunal decision**) again affirmed the delegate's non-revocation decision on 13 October 2021.

22 On 26 October 2021, the applicant commenced an application for review in this Court of the Second Tribunal Decision.

23 On 19 May 2022, Mortimer J (as her Honour then was) made orders by consent quashing the Second Tribunal decision and remitting the matter to be determined according to law, noting that the Minister accepted that the decision had failed to consider the applicant's claim that he would face harm by reason of his accent, hairstyle and perceived wealth if returned to Somalia.

24 This matter was then remitted to the Tribunal for the third time for determination. On 3 October 2022, the Tribunal constituted by Deputy President Britten-Jones affirmed the decision made on 6 August 2020 to not revoke the mandatory cancellation decision dated 1 March 2019 (**Third Tribunal decision**).

25 On 27 October 2022, the applicant commenced the current application for review of the Third Tribunal Decision.

4. BACKGROUND OF THE MATTER

26 The Tribunal noted that the applicant was born in Somalia in 1997. When the applicant was two years old, he fled with his mother, stepfather and older brother to a refugee camp in Eritrea. It was further noted that the applicant does not have or maintain any ties with his biological father and considers his stepfather to be his father.

27 The applicant spent approximately 11 to 12 years living in a refugee camp in Eritrea where life was extremely difficult for the applicant, resulting in him being exposed to both violence and trauma.

28 The applicant arrived in Australia with his mother and stepfather in June 2011 as a refugee and has remained in Australia since then.

29 The applicant's older brother migrated to Australia in 2017 after leaving the refugee camp earlier in an attempt to support the family. The applicant's older brother is married and has five Australian children.

30 The Tribunal acknowledged that the applicant has no meaningful connection to Somalia having left the country as an infant. The only relatives the applicant understands live in Somalia is his elderly aunt, with whom the applicant does not have contact, and presumably his biological father, with whom the applicant has never had a relationship or contact.

31 The applicant's mother and stepfather separated after coming to Australia due to domestic violence. The applicant maintains a close relationship with his elderly mother who has been experiencing health issues and intends to care for her upon his release.

32 The applicant has a five year old son who was born in Australia. The applicant's mother and son's biological mother, who is the applicant's former wife, have primarily taken care of the child. Since 2022, the biological mother has assumed primary responsibility for caring for the son.

33 As noted above, the Tribunal set out the applicant's criminal history, which included domestic violence offences. The applicant has been in prison or detention since 24 September 2018.

34 The Tribunal determined that the applicant did not pass the character test prescribed under s 501(6)(a) as he had been sentenced to a term of imprisonment of 12 months or more. As such, the Tribunal concluded that the applicant could not rely on s 501CA(4)(b)(i) of the Act. The Tribunal determined the only issue was whether there was "another reason" to revoke the cancellation decision pursuant to s 501CA(4)(b)(i), having regard to the principles and considerations in Direction 90. The Tribunal recognised that pursuant to s 499(2A) of the Act, it must comply with a direction made under s 499, in this case, Direction 90.

35 The background facts established by the Tribunal are not challenged on appeal. The applicant's criminal history is not challenged either, except the applicant draws attention to the fact that at the time of the offences in 2014 and 2015, he was a minor, but was sentenced as an adult.

5. GROUNDS OF REVIEW

36 By way of an amended originating application dated 3 July 2023, the applicant relied on the following four grounds of review:

(a) The Tribunal acted on a misunderstanding of the law;

(b) The Tribunal failed to complete the exercise of its jurisdiction by not appreciating the applicant's age at the time of sentencing for his criminal conduct;

(c) The Tribunal failed to complete the exercise of its jurisdiction by not considering the applicant's alcohol dependence disorder for the purposes of para 9.2(1)(a) of Direction 90; and

(d) The Tribunal's decision was legally unreasonable, illogical, or irrational.

5.1 Ground 1

37 The applicant contends that the Tribunal incorrectly interpreted the statutory power under s 501CA(4)(b)(ii) of the Act as discretionary, citing in support the following paragraphs of the Tribunal's reasons:

(a) At [55], the Tribunal said that "in the weighing up exercise by which I evaluate whether to exercise **my discretion**…"; and

(b) At [96], the Tribunal concluded that it was "required to carry out the evaluative exercise of weighing up the factors to determine whether to **exercise the discretion** to revoke the cancellation decision".

(Emphasis added.)

38 Further, the applicant draws attention to the heading to immediately preceding [96] of the Tribunal's reasons which states: "Conclusion as to whether to exercise the **discretion** to revoke the cancellation of the visa" (Emphasis added.).

39 The applicant submits that the Tribunal's statement, that it was bound by Direction 90, was also problematic because Direction 90 incorrectly refers to the "exercise of discretion" in the context of decisions made under s 501CA(4)(b)(ii) of the Act. The applicant gives as an example the heading to Pt 2 of Direction 90, which reads: "Exercising the discretion".

40 The applicant submits that given the findings at [55] and [96], there is no question that the Tribunal proceeded on the basis that s 501CA(4)(b)(ii) of the Act involved an exercise of discretion. The applicant submits that the Tribunal therefore failed to address the correct question because the power under s 501CA(4)(b)(ii)does not involve the exercise of a discretion.

41 The applicant relies on the following observations of Derrington and Perry JJ in *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315 (***Au FC***) at [52]:

> Here, the correct question was not addressed. It should have been whether the

> delegate's decision that the power under s 501CA(4) was not enlivened because they were not satisfied of the existence of another reason for cancellation, was the correct or preferable one. As mentioned, the Tribunal asked itself a different question. Therefore, in the application of the materiality principles the question is whether, if the Tribunal addressed the correct question, there was a realistic possibility of a different outcome. The answer must, of course, be in the affirmative. That is, the Tribunal would not have determined that the correct or preferable decision was that the discretion should be exercised not to revoke the cancellation decision. How it would have answered the entirely different question of whether there was "another reason for revocation" is impossible to ascertain. It follows that the failure to address the correct question was an error that, had it not occurred, meant that there was a realistic probability of a different outcome.

42 The applicant further drew attention to the comments of O'Sullivan J in *Au FC* at [167]–[169]:

> [167] The authorities are clear that it is not for this Court or for the primary judge to substitute its decision on the merits for that of the Tribunal. However, the evaluative process undertaken by the Tribunal in s 501CA(4)(b)(ii) demands a unique outcome. That outcome is not to be reached by approaching the matters to be considered against the background of, and with a view to, reaching a conclusion in the exercise of a discretion.
>
> [168] With respect to the primary judge, the Tribunal did not engage in the deliberative process of evaluation required of it by s 501CA(4)(b)(ii), so as to arrive at a unique conclusion. Instead, as the High Court noted in *Coal and Allied Operations Pty Ltd,* the Tribunal necessarily engaged in that exercise with some latitude as to the decision to be made.
>
> [169] That difference in the approach to the task at hand is fundamental. Had the Tribunal approached its task having asked itself the correct question, there is a realistic possibility of a different outcome on the appellant's request for revocation of his visa cancellation. Under those circumstances it cannot be said that the error of law by the Tribunal was not material.

43 The applicant also relies on the following observation at [41] in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 (per Gleeson CJ, Gaudron, Gummow and Hayne JJ):

> Thus, although the Minister's satisfaction (or, in the case of the Tribunal, its satisfaction) is still required, s 65(1) imposes an obligation to grant a visa, as distinct from conferring a power involving the exercise of a discretion. The satisfaction that is required is a component of the condition precedent to the discharge of that obligation.

44 The applicant maintains that the error in incorrectly identifying the type of power contained under s 501CA(4)(b)(ii) of the Act was material.

45 The applicant, during oral submissions, made reference to Ministerial Direction No. 99 (**Direction 99**), asserting that the fact that this later direction has removed all references to the word "discretion" supports its case in relation to Direction 90.

46 The Minister accepted that the power prescribed under s 501CA(4)(b)(ii) is an evaluative one. Nevertheless, the Minister contends that in assessing whether the Minister is satisfied "that there is another reason why the original decision [to cancel] should be revoked", the "Minister has a degree of 'decisional freedom' as to what constitutes such a reason": *Minister for Home Affairs v Omar* (2019) 272 FCR 589 at [34](h) (per Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ).

47 Thus, the Minister submits that Direction 90, (the validity of which is not challenged in this proceeding and therefore which must be complied with by the decision-maker (see s 499(2A) of the Act)), identifies a number of different considerations which may pull in different ways in a particular case. In advancing this argument, the Minister drew the Court's attention to [15] of *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v* ***Viane*** (2021) 274 CLR 398 where Keane, Gordon, Edelman, Steward and Gleeson JJ said the power in s 501CA:

> may involve matters of judgment, especially when weighing factors for and against revocation. The breadth of the power conferred by s 501CA of the Act renders it impossible, nor is it desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation.

48 The Minister submits that, pursuant to *Viane*, the nature of the evaluative task is a broad one.

49 The Minister contends that the Tribunal approached its task with a correct understanding of the evaluative function which it was to perform and drew attention to the following sections of the Tribunal's Reasons, to support that contention:

(a) Having identified that the applicant did not pass the character test and therefore did not satisfy s 501CA(4)(b)(i) of the Act, the Tribunal said at [9]–[10]:

> Section 501CA(4)(b)(ii) requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision to assess if there is "another reason" why the cancellation decision should be revoked. This assessment is made by reference to the representations made by the applicant which I am required to read, identify, understand and evaluate. **Deciding whether or not to be satisfied that "another reason" exists is an evaluative exercise and might be the product of necessary fact finding, or the product of making predictions about the future, or it might be about assessments or characterisation of an applicant's past offending**.
>
> …
>
> the only issue for the Tribunal is whether there is "another reason" to revoke the cancellation decision having regard to the principles and considerations in Direction 90.
>
> (Emphasis added.)

(b) After considering the matters in the Direction, the Tribunal also said this at [58]:

> In deciding whether there is "another reason" to revoke the cancellation of the applicant's visa, I must also take into account the other considerations listed in Direction 90, but these are not exhaustive.

(c) And in expressing its ultimate conclusion, the Tribunal concluded at [99], "I am not satisfied that there is 'another reason' to set aside the cancellation decision".

50 The Minister submits that the applicant has disregarded the Tribunal's reasoning outlined above and, instead, focusses on the three mentions of the word "discretion" in support of the contention that somehow the Tribunal had gone on to disregard the evaluative approach required.

51 The Minister submits that the Tribunal's reasons are, of course, to be read as a whole and without an eye keenly attuned to the perception of error. The Minister submits that the three mentions of "discretion" do not lead to the inference that the Tribunal fundamentally misunderstood the evaluative task with which it was charged under s 501CA(4)(b)(ii).

52 The Minister submits that the applicant's complaint about the Tribunal having followed the Direction is not well understood. The Minister submits that the Tribunal did not explicitly identify any parts of the Direction that referred to a "discretion", but rather applied the evaluative approach which the Direction otherwise prescribed.

53 In addressing the applicant's submission regarding the changed wording of Direction 99, counsel for the Minister submitted that the Court should not infer any infirmity in an earlier direction simply because a later direction happens to use different terms. There is no principle of statutory or administrative admission in this context.

5.1.1 Consideration

54 I accept that the Tribunal has used the word "discretion" on the occasions noted by the applicant above. However, I consider that it is clear from a consideration of the Tribunal's reasons as a whole that the Tribunal did not misunderstand or misapprehend the nature of its task. In considering and weighing up the various considerations specified by the Direction, the Tribunal undertook an evaluative exercise. This is confirmed by the Tribunal's statement at [9], set out above, in relation to the task before it.

55 The Tribunal went on to carry out the evaluative task of individually considering and balancing each of the prescribed considerations. Ultimately, the Tribunal found at [97] that,

while there were "not insignificant" countervailing considerations (including the best interests of the applicant's son, the impact on the applicant's mother, and the very real prospect of indefinite detention), they were outweighed by the primary considerations of family violence and the protection and expectations of the Australian community. The Tribunal specifically recited at [98] that it had reached its conclusions having applied the relevant decision-making principles in para 5.2 of the Direction, which it had set out at [12] of its reasons.

56 Unlike the present matter, the Tribunal in *Au FC* suffered from a grave misapprehension of the nature of the task before it. As Derrington J observed at [42]–[43] in *Au FC*, "the Tribunal did not address the correct question in any way", and "[i]n no way did it address the question of whether it was satisfied there was another reason why the cancellation decision should be revoked". The present Tribunal appreciated that the task of determining whether it was satisfied that there was another reason to revoke the cancellation decision, involved an evaluation of the various considerations prescribed by the Direction.

57 The Tribunal's reasons are, of course, to be read as a whole and without an eye keenly attuned to the perception of error. Three uses of the word "discretion", when read in the context of the Tribunal's reasons as a whole, do not lead to the conclusion that the Tribunal fundamentally misunderstood the evaluative task with which it was charged under s 501CA(4)(b)(ii). Accordingly, I do not consider that the Tribunal acted on a misunderstanding of the law, and therefore the applicant has failed to establish the first ground of review.

5.2 Ground 2

58 The applicant submits that the Tribunal was bound to consider the relevant considerations in Direction 90, including the applicant's age for the purposes of para 9.2(1)(a) of the Direction.

59 The applicant argues that the lack of references to the applicant's age in the Tribunal's Reasons, and in particular, in the consideration of the extent of impediments if removed ([85]–[88]) leads to the natural and appropriate inference that the Tribunal overlooked the necessity to consider the applicant's age for the purposes of para 9.2(1)(a) of Direction 90. The applicant submits that the Tribunal's error is material.

60 The applicant refers to [92] of the Tribunal's (under another section titled "Links to the Australian community") which states that "[t]he applicant has lived in Australia for about 11 of his 27 years".

61 The Minister submits that the applicant, who was represented by experienced migration solicitors before the Tribunal, does not point to any representation (express or implied) by the applicant that his age was relevant in any way to the extent of any impediments he might face if removed (which is the concern of para 9.2(1)(a) of the Direction).

62 I do not consider that the Tribunal failed to complete the exercise of its jurisdiction by virtue of the discrepancies in the applicant's age. It is clear the Tribunal had understood the applicant to have been born in 1997, as set out at [16] of its reasons.

63 At [86], the Tribunal noted that the applicant would face language difficulties and had no real family or support networks in Somalia, having left with his immediate family when he was about two years old. The applicant was unable to point to any change in the extent or nature of the impediments that he would experienced if removed to Somalia that would arise if the age of the applicant had been overstated by the Tribunal as three years older than he was.

64 It has been previously observed by Mortimer J (as her Honour then was), that an argument about a failure to consider a matter specified in a Ministerial direction under s 499, but about which no "real material or argument [had been] put by the applicant" to the decision-maker, is an argument "without any foundation": *Williams v Minister for Immigration and Border Protection* (2014) 226 FCR 112 at [119]. See also *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 116 at [95] (per Logan, Rangiah and Goodman JJ). That is the case here.

65 Accordingly, the applicant has failed to establish the second ground of review.

5.3 Ground 3

66 The applicant contends that the Tribunal was bound to consider the applicant's health, in particular, the applicant's alcohol dependence disorder, for the purposes of para 9.2(1)(a) of Direction 90. The applicant submits that the Tribunal failed to comply with this mandatory consideration when it failed to consider the applicant's alcohol dependence disorder.

67 The applicant submits that he was diagnosed with alcohol dependence disorder by an expert, citing the report of Dr Nina Zimmerman dated 7 October 2020 in which the psychiatrist

provided a "diagnosis of alcohol dependence currently in remission in the context of detention".

68 The applicant further notes that there is no reference to the applicant's health diagnosis of alcohol dependence when considering the extent of impediments if removed at [85]–[88] or non-refoulment obligations at [59]–[76]. The applicant submits that the natural and appropriate inference is that the Tribunal overlooked the necessity to consider the applicant's alcohol dependence health condition for the purposes of these considerations.

69 The applicant maintains that this error was material and advances that had the Tribunal considered the issue of the applicant's alcohol dependence disorder, it may have attributed greater weight to the consideration, leading to a different balancing of the competing considerations in reaching a potentially different conclusion about revocation.

70 The applicant submits, for completeness, that the Minister cannot contend that the applicant's alcohol dependence disorder was no longer an issue before the Tribunal as it had considered the applicant's alcohol dependence disorder when considering the primary consideration of the protection of the Australian community.

71 In advancing this ground of review, the applicant relies on the following comments of Logan J in ***LRMM*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039 at [27]:

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

72 The Minister submits that the Tribunal, after a lengthy discussion of Australia's non-refoulement obligations at [59]–[76], and the prospect of indefinite detention at [77]–[84], then turned to canvass the extent of impediments that the applicant may face if removed. It found at [86] that:

(a) the applicant "would face significant impediments if returned to Somalia because of those matters set out above in relation to risk of harm and non-refoulement obligations";

(b) he would face "language difficulties";

(c) he has "no real family or other support networks" in Somalia;

(d) accepting the opinion of the consultant psychologist, Mr Mackinnon, "the applicant's reactive depression and anxiety would probably worsen into a clinically significant condition for which there would be no adequate medical treatment available";

(e) the applicant's "post-traumatic stress disorder he used to suffer would likely be triggered again if returned";

(f) the applicant "would not be able to access the medical or counselling services he requires"; and

(g) the applicant "would have great difficulty establishing himself and maintaining basic living standards".

73 The Minister maintains that whilst the Tribunal found the above factors weighed in favour of the revocation of the cancellation decision at [88], the Tribunal considered that other considerations in favour of not revoking the cancellation outweighed these factors (at [97]).

74 The Minister submits that the evidence before the Tribunal established that the applicant's alcohol dependency was a past dependency, not a subsisting dependency. In addressing the diagnosis of alcohol dependency the psychiatrist, Dr Zimmerman, observed in her earlier report that the applicant's alcohol dependency was "currently in remission". Dr Zimmerman's later report stated that "he is no longer dependent on alcohol" and accepted that the longer a person, who previously suffered from alcohol dependency disorder, abstains from alcohol, the more likely they are to stay abstinent.

75 The Minister also notes that the applicant's evidence was that he "has not used alcohol since approximately September 2018" and has "no intention to drink again", having attended programs in 2016, 2017 and 2018. Further, in his submissions, the applicant relied on his "prolonged abstinence from alcohol".

76 The Minister submits that no express claim was made before the Tribunal that the applicant's past alcohol dependence was a relevant health issue under Direction 90. Rather, the applicant's past alcohol dependence, together with his abstinence since 2018, was presented before the Tribunal as a relevant matter to his risk of recidivism if released into the Australian community.

77 The Minister also rejects the proposition that there was any implied claim arising from the materials before the Tribunal based on the applicant's past alcohol dependency. On the hypothesis that he might return to Somalia, the applicant's evidence was also to the effect that

alcohol is not allowed in Somalia and, in that context, his concern was only that Somalian extremists would find out he "*used* to drink alcohol" (Emphasis added.). Thus, the applicant's representations with respect to his health for the purposes of para 9.2(1)(a) were consistently limited to his ability to access mental health services on return to Somalia.

78 The Minister submits that the Tribunal was not obliged to consider the applicant's past alcohol dependency in the context of impediments he may face if returned to Somalia as no such claim (either clearly articulated or clearly arising on the materials) was made.

79 The Minister submits that all of the material which the applicant's previous representatives marshalled and put before the Tribunal was directed to the threat of persecution for having drunk alcohol in Australia and being perceived as a westerner in Somalia. The Minister submits that this was all presented in a historical context and this claim was fairly dealt with at [73] of the Tribunal's reasons.

80 The Minister submits that *LRMM* does not assist the applicant as the applicant has not pointed to any particular evidence before the Tribunal which was relevant to the applicant's relapsing, after more than five years of abstinence, if removed to Somalia (where the evidence was to the effect that alcohol was not allowed).

5.3.1 Consideration

81 The applicant's prior consumption of alcohol was raised in two contexts before the Tribunal. First, in submissions made to persuade the Tribunal that there was minimal risk of recidivism if the applicant should be released into the community, the applicant consistently submitted that he had stopped drinking alcohol and had no intention of drinking alcohol again in order to establish that he was an acceptable risk.

82 Second, the applicant's prior alcohol consumption (not any alcohol dependence disorder) was raised before the Tribunal in the context of non-refoulment obligations in relation to his concern that he was at risk of violence and persecution from the Al-Shabaab Islamic terrorist organisation on return to Somalia, in part because of his prior consumption of alcohol in Australia.

83 The evidence before the Tribunal was that the applicant had not drunk alcohol since 2018, the applicant's alcohol dependence was past, or at the very least in remission, and that alcohol was not permitted in Somalia. Unlike *LRMM,* there was no evidence before the Tribunal which indicated that the applicant was likely to, or facing the possibility of, relapsing..

84 In circumstances where the applicant made no express reference to his past alcohol dependence disorder, and it did not clearly arise on the materials relied on by the applicant, the Tribunal was not obliged to consider it.

85 Accordingly, I do not consider that the Tribunal erred by failing to consider the applicant's past alcohol dependence disorder as a relevant health condition, for the purposes of para 9.2(1)(a) of Direction 90. The applicant has failed to establish the third ground of review.

5.4 Ground 4

86 The fourth ground advanced by the applicant is that the Tribunal's decision was legally unreasonable, illogical, or irrational. Ultimately, the applicant submits there are five propositions which, when taken together, reach the level of legal unreasonableness:

(a) The issue of the applicant's age (being born in 1997 not 1995);

(b) The applicant's age not being a contentious issue;

(c) The Tribunal's reliance on sentencing remarks, made where the applicant was sentenced as an adult, when he was still a minor;

(d) The applicant's rehabilitation was not tested outside detention in the community and

(e) The Tribunal's misunderstanding of its task as being the exercise of a discretion rather than an evaluative task.

87 The applicant submits that the question of legal unreasonableness is highly fact-focussed: *BKTS v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 729 at [48] (per Moshinsky, O'Bryan and Cheeseman JJ).

88 The Tribunal accepted that the applicant was born in 1997 and described that fact as being uncontentious. However, the Tribunal referred at [97] to the applicant being aged 27, not 24 as he would have been at the time of the decision if born in 1997. This is the source of the Tribunal's alleged illogicality.

89 In relation to this ground, the applicant says that the applicant's age is relevant to the Tribunal's assessment of the nature and seriousness of the applicant's offending for the purposes of para 8.1.1(1) of Direction 90. As set out above, the Tribunal referred to the remarks on sentence of various sentencing judges (at [23] and [32]). The applicant submits that the various judges who sentenced the applicant as an adult did not realise the applicant was a child in relation to all criminality up until 17 November 2015.

90 The applicant submits that the Tribunal therefore should have approached the various remarks on sentence of the criminal offending with great caution. The applicant maintains that his age at the time of the relevant criminal offending was a highly relevant matter on sentence and therefore the Tribunal's reliance upon the flawed factual basis upon which the applicant was variously sentenced over the years has infected the Tribunal's reasoning process.

91 When addressing the issue of the applicant's age at the time of his convictions, counsel for the applicant argued that the outcome of the charge was irrelevant. Counsel submitted that the Tribunal should have viewed the applicant as a minor at the time of offending and sentenced as an adult. As such, the applicant was not afforded the protection often provided to minors in the criminal justice system.

92 The applicant submits that the Tribunal's consideration of the primary consideration of the protection of the Australian community was legally flawed as the applicant, through no fault of his own, had no opportunity to demonstrate his rehabilitation outside of detention in any practical sense. The applicant relied on the decision of Mortimer J (as her Honour was then) in *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595 at [95] that the lack of opportunity to demonstrate rehabilitation in the community does not in itself provide a basis for a positive finding that the applicant is likely to reoffend.

93 The applicant also seeks to rely on Grounds 1 and 2 for the purpose of Ground 4, namely that the Tribunal erroneously approached the statutory question from the perspective of the exercise of a discretion. For the reasons outlined above, the applicant has failed to make out Grounds 1 and 2 and, accordingly, I reject those arguments as far as they relate to Ground 4.

94 The final point on which the applicant relied in advancing this ground is that no separate threshold of materiality applies for the purposes of Ground 4. In advancing this point, the applicant draws attention to [76] of ***Nathanson*** *v Minister for Home Affairs* (2022) 403 ALR 398 in which Gageler J (as his Honour was then) said the following:

> A majority in *MZAPC* acknowledged that there are certain categories of error which necessarily result in "a decision exceeding the limits of decision-making authority without any additional threshold [of materiality] needing to be met" by an applicant. One such category is where the error is so egregious that it will be jurisdictional regardless of the effect the error may have had on the conclusion of the decision-maker. A serious denial of procedural fairness involving a denial of an opportunity to be heard in relation to an important issue in the context of an evaluative decision (as occurred in this case) falls into that category. Put in different terms, "the quality or severity of the error", as a matter of logic and common sense, necessarily gives rise

> to the conclusion that it does not matter whether the "decision could realistically have been different had [the] error not occurred". Here, the "gravity of the consequence of the decision", together with "[h]uman experience and plain common sense", compel the inference that Mr Nathanson would, if fairly put on notice of the issue, have addressed it and said all that he could have about the domestic violence incidents in the context of the primary consideration of the protection of the Australian community.
>
> (Citations omitted.)

95 The Minister submits that the Tribunal accepted the applicant's 1997 birth year which had been asserted by the applicant in his own statement of facts, issues and contentions dated 15 August 2022, and it may be accepted that the Tribunal proceeded on that basis. Further, the Tribunal's observation that the applicant had committed domestic violence against his partners since he "was about 17 years old", which was referable to his offending since 2014 (see at [22], [45]), implied a birth year of 1997, not 1995.

96 Whether the Tribunal's reference at [97] to the applicant being 27 was a typographical error, or a miscalculation, the Minister submits that nothing concerning the nature and seriousness of the applicant's offending turned on whether the applicant was approximately 24 or 27. Further, as the Full Court has stated, "[a]n inconsistency in reasons does not necessarily and of itself demonstrate an illogical finding of fact or any other error of law": ***QYFM*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328 at [28] (per McKerracher, Griffiths and Bromwich JJ) (overturned on unrelated grounds in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 409 ALR 65 (per Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ)).

97 In addressing the reliance on sentencing judges' remarks, the Minister submits that the applicant does not suggest that the Tribunal was entitled to somehow go behind the applicant's prior sentencing findings, only that it should have approached the remarks on sentence with "great caution". The Minister maintains that it is not explained how approaching the sentencing remarks with that caution could conceivably have led the Tribunal to find differently as to the applicant's criminal history and the warnings he had been given,.

98 In addressing the alleged error in observing that the applicant's rehabilitation had not been tested outside detention, the Minister observes that it is a matter of fact that the applicant "has not been tested in the community since he undertook the very limited rehabilitative courses in

August 2020". The Minister submits that the Tribunal's observation was relevant to engaging with Dr Zimmerman's report which had stated as a positive fact that the applicant was able to identify areas where he would benefit from support. It was relevant to assessing the applicant's risk to the community that those identified further areas for rehabilitation were still "not adequately addressed". The Tribunal found that there was a "real, albeit low, risk of further offending" at [42] and this finding cannot have been unreasonable (or contain any error material) in that context.

99 In relation to materiality, the Minister relies on the following observation of Kiefel CJ, Gageler, Keane and Gleeson JJ at [33] of ***MZAPC*** *v Minister for Immigration and Border Protection* (2021) 273 CLR 506:

> The threshold of materiality was not expressed to be additionally required to be met for every breach of every condition of a conferral of statutory decision-making authority to result in a decision-maker having exceeded the limits of the authority conferred by statute in the absence of an affirmative indication of a legislative intention to the contrary. There are conditions routinely implied into conferrals of statutory decision-making authority by common law principles of interpretation which, of their nature, incorporate an element of materiality, non-compliance with which will result in a decision exceeding the limits of decision-making authority without any additional threshold needing to be met. The standard condition that a decision-maker be free from actual or apprehended bias is one example. The standard condition that *the ultimate decision that is made lie within the bounds of reasonableness* is another.
>
> (Emphasis added.) (Citations omitted.)

100 In oral submissions, counsel for the Minister submitted that when it comes to outcome unreasonableness, the High Court has said that no separate criterion of materiality applies. If the only legally reasonable outcome was that the applicant has his visa cancellation revoked, there could not be any sensible argument that unreasonableness was not material to the decision.

101 The Minister submits that it is apparent that the applicant does not (and sensibly could not) allege outcome unreasonableness. That is, he does not contend that the only decision reasonably available on the material was for the revocation of the applicant's visa cancellation. Therefore, the Minister maintains that the applicant must demonstrate materiality in relation to the unreasonableness of the particulars errors in the Tribunal's reasons of which he complains.

102 The Minister drew attention to Full Court's comments in ***Tsvetnenko*** *v United States of America* (2019) 269 FCR 225 at [94]–[96] (per Besanko, Banks-Smith and Colvin JJ):

> [94] However, in the case of a claim that the decision was unreasonable by reason of the character of the reasoning advanced to support the decision, it will be necessary to consider whether the decision was "materially affected by unreasonableness": *SZVFW* at [55] (Gageler J). This reflects the need to consider whether the decision (not simply the reasoning) was unreasonable in the requisite sense, namely because the decision was unreasonable (when evaluated by considering the result or the reasoning process supporting the decision). An immaterial respect in which the reasoning is "without any evident or intelligible justification" does not make the decision unreasonable in a jurisdictional sense. In such an instance, the decision as a whole still conforms to the implied standard of reasonableness.
>
> [95] As was made clear in *SZVFW*, a question as to whether an administrative decision is unreasonable in a jurisdictional sense is a legal one which though evaluative in character is capable of only one correct answer: at [18] (Kiefel CJ), [54]-[56] (Gageler J), [87], [116]-[117] (Nettle and Gordon JJ) and [154]-[155] (Edelman J).
>
> [96] Having regard to the nature of the review ground, it is illogical to speak of the extent of non-compliance with an implied obligation to make a decision that is reasonable. It is not possible to conceive of an instance in which it might be demonstrated that the decision itself is unreasonable, but not in a material way. Rather, in a case where unreasonableness is sought to be demonstrated by reference to the reasons given by the decision-maker the application of the requirement for materiality involves a consideration as part of evaluating whether the decision is unreasonable as to whether any illogicality or other defect in the reasoning was material to the decision.

103 The Tribunal accepted the applicant's birthdate as 1997 as the first background fact at [16]. The applicant was unable to show how the Tribunal's misstatement as to the applicant's age as 27 (rather than 24) in the context of his links to the Australian community, had relevantly affected the Tribunal's considerations. Indeed, it might be thought that an additional three years of links with the Australian community might be beneficial to the applicant for the purposes of the Tribunal's consideration of that issue. A minor inconsistency in recording the applicant's age in the Tribunal's reasons, that cannot be shown to have any bearing on the Tribunal's considerations, does not demonstrate an illogical finding of fact or any other error of law: *QYFM* at [28] (per McKerracher, Griffiths and Bromwich JJ).

104 As to the Tribunal' reference to the sentencing remarks, the applicant does not suggest that the Tribunal was entitled somehow to go behind the applicant's prior sentencing findings, only that it should have approached the remarks on sentence with "great caution". It is not explained how approaching the sentencing remarks with that caution could conceivably have led the Tribunal to find differently as to the applicant's criminal history and the warnings he had been given, than as it did in [23] and [32] of its reasons

105 The Tribunal did not place "blind reliance" on the sentencing remarks. It referred to the sentencing remarks of various sentencing judges for the descriptions of the violence committed by the applicant, in the context of considering the nature and seriousness of the applicant's conduct, and in particular whether it involved domestic violence. The Tribunal was not considering the applicant's sentencing history, rather the acts committed by the applicant which led to the sentences. The descriptions of the violent acts are unaffected by whether the applicant was a minor or an adult when committing the acts. For example, at [23], the Tribunal referred to a Magistrate's description of an assault as being "particularly violent". The flawed factual basis on which the applicant was sentenced prior to 2016 did not infect the Tribunal's considerations.

106 In its consideration of the likelihood of further criminal or other serious conduct by the applicant, the Tribunal made reference to Dr Zimmerman's July 2021 report and her positive statement that the applicant was able to identify areas where he would benefit from support in the future, one area of which was relationship counselling. The Tribunal accepted that as a positive factor in favour of the applicant, but noted that it remained the case that the applicant had not adequately addressed the areas in which he had said that he would benefit from support as at the date of the decision. Ultimately, the Tribunal stated at [42]:

> Since the applicant was about 17 years old he has committed physical violence against each of the three women with whom he had a relationship over a four year period. He also committed domestic violence towards his mother. The violence did not come to an end until he was incarcerated. He has not been tested in the community since he undertook the very limited rehabilitative courses in August 2020. To release him into the community without adequate rehabilitation would put the Australian community at risk of further harm. There is a real, albeit low, risk of further offending which I consider to be unacceptable.

107 The Tribunal was concerned as to the applicant's history of domestic violence in relation to four women (including his mother); violence which did not stop until he was incarcerated. The Tribunal's concern reflects the Australian Government's consideration of family violence as a serious issue as expressed in Direction 90.

108 As submitted by the Minister, the Tribunal's conclusion at [42] accorded with the psychologist, Mr Mackinnon's, opinion that there was only a low chance of the applicant reoffending in any serious manner, and also what the applicant had himself contended that there was a low risk of his re-offending. I do not consider that the Tribunal's conclusion in accordance with the applicant's contention to be unreasonable.

109 Notwithstanding, I have had high regard to the applicant's criminal offending from 2014 to 2018, being an extensive record spanning over four years. I further note that the applicant's offending only ceased once the applicant was either incarcerated or being held in detention. The nature and frequency of the offending increased over the years, demonstrating a concerning pattern.

110 The Tribunal, in considering the applicant's pattern of offending, came to the conclusion at [42] that "[t]here is a real, albeit low, risk of further offending which [it] considers to be unacceptable". The Tribunal accepted that the risk of offending was low and acknowledged that the applicant had taken part in "very limited rehabilitative courses in August 2020" . The protection of the Australian community is a serious factor and any assessment of this factor should not be taken lightly. The nature of the applicant's offending in the past was serious and violent. The Tribunal did not err in considering that a low level of risk would subsist if the applicant was released back into the community.

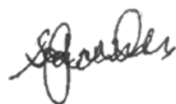
111 Finally, I reject the applicant's submission that the totality of errors made by the Tribunal bespeaks a process of reasoning that was legally unreasonable. None of the alleged errors have been established, aside from the misstatement of the applicant's age at [92], and that error has not been shown to be material.

112 Accordingly, the applicant has failed to establish the fourth ground of review.

6. CONCLUSION

113 I find that the applicant has not established any of the grounds he relies on and, as such, the application should be dismissed.

I certify that the preceding one hundred and thirteen (113) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rofe.

Associate: 

Dated: 17 November 2023