# FEDERAL COURT OF AUSTRALIA

## QYFM v Minister for Immigration, Citizenship and Multicultural Affairs (No 2) [2023] FCAFC 195

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| Appeal from: | *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810 |
| File number(s): | VID 584 of 2023 |
| Judgment of: | **KATZMANN, O'CALLAGHAN AND MCEVOY JJ** |
| Date of judgment: | 12 December 2023 |
| Catchwords: | **PRACTICE AND PROCEDURE** – where High Court of Australia allowed appeal and remitted matter to be heard and determined by a differently constituted Full Court – where grounds contended before primary judge and first Full Court abandoned and appellant sought leave to raise six new appeal grounds, whether leave to amend notice of appeal should be granted – application for leave to amend notice of appeal dismissed – appeal dismissed<br><br>**MIGRATION** – where appellant's visa cancelled under s 501(3A) of *Migration Act 1958* (Cth) (**Act**) and Administrative Appeals Tribunal affirmed decision of Minister's delegate, finding there was no reason to revoke cancellation decision – where appellant contended that Tribunal erroneously found that s 501CA(4)(b)(ii) of the Act was conditioned by an exercise of discretion, erroneously considered it was bound to comply with Direction No. 79, and erroneously applied "test" in *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 – where appellant also contended that Tribunal denied him procedural fairness on four different bases – whether any merit in proposed new appeal grounds |
| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 62A<br>*Migration Act 1958* (Cth) ss 499, 501, 501CA<br>*Direction No. 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*<br>*Direction No. 90 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* |

Cases cited:

*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593

*Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315

*BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456

*BQL15 v Minister for Immigration and Border Protection* [2018] FCAFC 104

*Coal and Allied Operations v Australian Industrial Relations Commission* (2000) 203 CLR 194

*Commissioner for the Australian Capital Territory Revenue v Alphaone* (1994) 49 FCR 576

*Garland v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 144

*Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461

*JVGD v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1253

*Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1

*Pewhairangi v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1322

*Pihama v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2023] FCA 678

*Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 96 ALJR 497

*Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480

*QYFM and Minister for Home Affairs* [2019] AATA 717

*QYFM and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 2161

*QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810

*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] HCA 15; (2023) 97 ALJR 419

*Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187

*VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588

*Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531

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| Division: | General Division |
| Registry: | Victoria |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
| Number of paragraphs: | 107 |
| Date of hearing: | 20 November 2023 |
| Counsel for the Appellant: | Dr J Donnelly with Mr A Schonell |
| Solicitor for the Appellant: | Zarifi Lawyers |
| Counsel for the First Respondent: | Mr A Solomon-Bridge with Ms M Jackson |
| Solicitor for the First Respondent: | Clayton Utz |

# ORDERS

**VID 584 of 2023**

| | |
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| **BETWEEN:** | **QYFM**<br>Appellant |
| **AND:** | **MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS**<br>First Respondent |
| | **ADMINISTRATIVE APPEALS TRIBUNAL**<br>Second Respondent |
| **ORDER MADE BY:** | **KATZMANN, O'CALLAGHAN AND MCEVOY JJ** |
| **DATE OF ORDER:** | **12 DECEMBER 2023** |

**THE COURT ORDERS THAT:**

1. The application for leave to amend the notice of appeal be dismissed.

2. The appeal be dismissed.

3. The appellant pay the first respondent's costs.

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

# REASONS FOR JUDGMENT

## THE COURT

### Introduction

1 This proceeding has a long history.

2 On 17 May 2023, the High Court allowed an appeal by the appellant from a judgment of the Full Court in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 287 FCR 328, which had dismissed his appeal from the primary judge on an application for judicial review of a decision of the Administrative Appeals **Tribunal**, on the ground that one member of the Full Court should have recused himself for apprehended bias. See *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 15; (2023) 97 ALJR 419.

3 Having allowed the appeal, and set aside the Full Court's orders, the High Court "remit[ted] the matter to the Federal Court of Australia to be heard and determined by a differently constituted Full Court".

4 The Minister accepted, and we agree, that what was remitted was the whole of the controversy, viz the correctness of the primary judge's reasons (being *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1810).

5 In the Full Court as originally constituted, the appellant relied on two grounds of alleged jurisdictional error on the part of the Tribunal not raised before the primary judge. On the remittal, he jettisoned reliance on both those grounds, and instead sought leave to proceed on an amended notice of appeal raising six entirely new grounds. Leave was also sought to rely on the transcript of the hearing before the Tribunal which was not before the Full Court or the primary judge. The Minister opposed the application for leave to rely on the new grounds but did not oppose the application to rely on the transcript of the Tribunal hearing.

6 Where grounds of appeal raise points not raised at first instance, leave is required and leave will not be granted unless it is expedient in the interests of justice to do so: *VUAX v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 238 FCR 588 at 598 [46] (Kiefel, Weinberg and Stone JJ). In the absence of an adequate explanation for the failure to take the point and where the point appears to be of doubtful merit, leave should generally be refused: *VUAX* at 498-99 [48]. Here, the points the appellant agitated were not raised before

the primary judge, where he was unrepresented, or before the original Full Court, although he was then represented by Dr Donnelly of counsel, who also represented him on the remittal. No explanation for the failure to take the points previously was proffered by way of evidence or in the written submissions. That is unsatisfactory. Nevertheless, the Minister's opposition to leave was based only on the absence of merit and an explanation was proffered by counsel during argument in response to a direct question from the Court. In the circumstances, we will only consider the leave application by reference to the merits of the new grounds. It follows that, unless those grounds are of doubtful merit, we would grant leave.

**The facts**

7 The appellant is a citizen of Burkina Faso. He arrived in Australia in 1997, and after unsuccessfully applying for a protection visa, left Australia in 2001. He returned in December 2011.

8 He was granted a Class BC Subclass 100 (Partner) visa, based upon his marriage to an Australian citizen.

9 In 2013, he was convicted of importing a marketable quantity of cocaine. He did so in circumstances where he used his innocent mother-in-law as a "drug mule". He was given a ten-year prison sentence, with a non-parole period of seven years.

10 On 8 November 2017, the appellant's visa was cancelled by the Minister's delegate acting under s 501(3A) of the *Migration Act 1958* (Cth) on the basis that he failed the character test and had been sentenced to a term of imprisonment exceeding 12 months.

11 He then made representations seeking revocation of the cancellation decision.

12 On 4 February 2019, the appellant was notified that another delegate of the respondent had decided not to revoke the visa cancellation, pursuant to s 501CA(4) of the Act. On 15 February 2019, the appellant asked the Administrative Appeals Tribunal to review the non-revocation decision.

13 On 16 April 2019, the Tribunal affirmed the non-revocation decision. See *QYFM and Minister for Home Affairs* [2019] AATA 717.

14 The appellant sought judicial review in this court and in February 2020, the court ordered that the Tribunal's decision be set aside.

15 That gave rise to a second Tribunal hearing.

16 On 9 July 2020, the Tribunal again affirmed the delegate's decision not to revoke the visa cancellation. See *QYFM and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 2161.

17 At the first Tribunal hearing the applicant was assisted by a French interpreter. At the second Tribunal hearing he had no interpreter. At the outset of the second Tribunal hearing he informed the Tribunal that he had no need for one, confirming what he had said at a telephone directions hearing, namely, that he only spoke English and no longer spoke his native language (Mooré) or French.

**The Tribunal's reasons**

18 Because of the nature and scope of the proposed grounds of appeal, it is necessary to set out at length the relevant reasons of the Tribunal.

19 Under the heading "Legislative Framework", the Tribunal said the following:

> 22. Section 25(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) ("AATA") and s 500(1)(ba) of the Act are the sources of the Tribunal's jurisdiction to review decisions under s 501CA.
>
> 23. Section 501(3A) of the Act, read in conjunction with ss 501(6) and 501(7), obliges the Minister to cancel a person's visa if the Minister is satisfied that the person does not pass the character test and is serving a full-time sentence of imprisonment.
>
> 24. The 'character test' is defined in s 501(6) of the Act and refers to a range of character matters that the Minister or their delegate may have regard to in deciding whether to revoke a mandatory visa cancellation under s 501(3A). Section 501(6)(a) of the Act provides:
>
> (6) For the purposes of this section, a person does not pass the character test if:
>
> (a) the person has a substantial criminal record (as defined by subsection (7)); or …
>
> 25. Section 501(7) of the Act sets out six sets of circumstances in which a person is taken to have a substantial criminal record for the purposes of the character test, including if the person has been sentenced to a term of imprisonment of 12 months or more (s 501(7)(c)).
>
> 26. Under s 501CA(3) of the Act, the Minister is obliged, as soon as practicable after deciding to cancel a visa, to give notice of the decision to the person and to invite them to make representations about revoking the original cancellation decision. Provisions relating to the form and process of those representations are found in reg 2.52 of the Migration Regulations 1994 (Cth).

27. Section 501CA(4) of the Act provides a discretion that the Minister may revoke the original decision, if the person whose visa has been cancelled makes representations in accordance with the invitation, and the Minister is satisfied that the person passes the character test, or that there is another reason why the original decision should be revoked.

20 The Tribunal correctly proceeded on the basis that it was bound to apply *Direction No. 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* (**Direction 79**), as follows:

28. The Minister is empowered by s 499(1) of the Act to give written directions to a person or body having functions or powers under the Act, provided the directions are about the performance of those functions or the exercise of those powers. The Minister has done so in the form of Direction No. 79 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA ("the Direction"). Section 499(2A) mandates that the Tribunal must comply with the Direction.

29. The purpose of the Direction is to guide decision-makers in performing functions or exercising powers under ss 501 and 501CA of the Act.

30. By way of general guidance, cl 6.2 of the Direction provides that:

    (1) The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non- citizens. The principles below are of critical importance in furthering that objective and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable.

    (2) ….

    (3) The principles provide a framework within which decision-makers should approach their task of deciding whether to … revoke a mandatory cancellation under section 501CA.

31. The principles referred to in the Preamble of the Direction are reproduced below and constitute a framework within which decision-makers apply the considerations in Parts A, B, or C of the Direction:

    ***6.3 Principles***

    *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*

    *(2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia*

*or elsewhere.*

*(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against women or children or vulnerable members of the community such as the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*

*(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.*

*(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.*

*(6) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.*

*(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.*

32. Clause 7(1)(b) of the Direction provides that in cases relating to the mandatory cancellation of a visa, a decision-maker '*…must take into account the considerations in Part C …'*. The following primary considerations at cl 13(2) of the Direction must be applied to determine whether to revoke a mandatory visa cancellation:

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

*(b) The best interests of minor children in Australia; and*

*(c) Expectations of the Australian community.*

33. Clause 14(1) of the Direction requires that other considerations to be taken into account include but are not limited to:

*(a) International non-refoulement obligations;*

*(b) Strength, nature and duration of ties;*

*(c) Impact on Australian business interests;*

*(d) Impact on victims;*

*(e) Extent of impediments if removed.*

34. Clause 8(2) of the Direction states that in applying the primary and other considerations, information and evidence from independent and authoritative sources should be given appropriate weight.

35. Clause 8(3) of the Direction states that '*Both primary and other considerations may weigh in favour of, or against, refusal, cancellation of the visa, or whether or not to revoke a mandatory cancellation of a visa*.'

36. Clause 8(4) states that '*Primary considerations should generally be given greater weight than the other considerations*.'

37. Clause 8(5) states that '*One or more primary considerations may outweigh other primary considerations*.' However, as held in *Jagroop v Minister for Immigration and Border Protection and Another* [(2016)] 241 FCR 461 at [57] and [78], in relation to previous ministerial directions:

> *[57] … the weighing process in each case is in substance left, as it must be, to the individual decision-maker exercising the power under s 501…*
>
> *…*
>
> *[78] … Ultimately…each decision-maker must return to the probative material and evidence in an individual case: it is not the content of the Direction which determines the outcome of the exercise of the s 501 discretion, but rather its application by a particular decision-maker to the evidence and material in an individual case.*

21 The Tribunal then turned to the "issue to be resolved", as follows:

39. It remains to be determined under s 501CA(4)(b)(ii) of the Act if there is 'another reason' why the mandatory visa cancellation should be revoked. The task of identifying 'another reason' was elaborated upon by the Full Court of the Australian Federal Court in *Viane v Minister for Immigration and Border Protection* [2018] 162 ALD 13 per Colvin J at [64]:

> *There is no statutory power to revoke under s 501CA(4)(b)(ii) unless the Minister is satisfied that there is a reason, other than a conclusion that the person concerned passes the character test, which means that the original decision 'should be' revoked. It is not enough that there is a matter that might be considered or may be said to be objectively relevant. It must be a reason that carries sufficient weight or significance to satisfy the Minister entrusted with the responsibility to consider whether to revoke the visa cancellation that the decision should be revoked. Only a reason of that character enlivens the statutory power to revoke. It is the absence of such a reason that will result in a decision not to revoke a visa cancellation.*

22 The Tribunal proceeded to refer to evidence given by the appellant about his medical history and health. Relevantly, it stated:

**Medical Evidence**

…

45. The Tribunal has had regard for a medical report by a forensic physician dated 27 March 2015, which was submitted by [the appellant's] support person and refers to an assault against [the appellant] in prison. The report also refers to [the appellant] undergoing back surgery in November 2014 while imprisoned, consisting of a L4/5 laminectomy and right discectomy to repair a herniated disk, the potential origins of which were considered by the report author.

…

**[The appellant's evidence]**

…

***Physical and mental health issues***

…

71. [The appellant] referred to being beaten up by other inmates while imprisoned in Australia, claiming his 'back was broken in two places.' He said that he strictly abided by the sentencing judge's instructions not to commit any further crimes and 'didn't retaliate' when attacked by other prisoners. [The appellant] said he was not currently taking any medications for physical or mental health issues and was fit and able to return to full-time work if released.

23 The Tribunal later recorded the appellant's evidence about other aspects of his mental health, including as follows:

192. … In his statement [the appellant] also referred to past diagnoses of depression and PTSD, and '*experiencing symptoms to this current day*' arising from traumatic experiences in Burkina Faso. In his oral evidence, [the appellant] referred to past mental health issues, claimed he had short-term memory problems, and that his back was '*broken in two places*' as the result of a prison assault. Later in his oral evidence, [the appellant] stated he has no currently diagnosed conditions, took no prescribed medications, and there was no medical reason why he could not immediately return to remunerative work if released. There is no current independent expert corroboration for any of the medical or psychological conditions [the appellant] refers to.

24 Having recorded the evidence before it, briefly recited the appellant's criminal history, and referred to relevant sentencing remarks and medical evidence about trauma, the Tribunal turned to consider the appellant's evidence.

25 The Tribunal noted (at [46]) that "[g]iven his self-represented status and the likely course of questioning, the Tribunal reminded [the appellant] at the outset of the hearing and on other occasions, that he had a right to silence and against self-incrimination, which he said he understood" and that he "exercised those rights during the hearing". The Tribunal also added that it "[drew] no adverse inference from the occasions that he did so".

26 It is convenient at this point to interrupt the recital of the Tribunal's reasons and set out how and in what respects the Tribunal reminded the appellant of his right to remain silent and of the privilege against self-incrimination. The transcript of the first day of the two-day hearing relevantly records the following two warnings given by the Tribunal in the context of the appellant being asked questions about his drug importation offending:

> MS LIANG [legal representative for the Minister]: Okay, thank you.
>
> You were living with your mother-in-law, is that right?---Yes.
>
> Now … as you know you were convicted of your offence that occurred in May and June of 2012, you don't dispute that, do you?---No. No.
>
> Now … do you also accept that you came back in December 2011 and then you invited your mother-in-law on a trip, in around May 2012, do you agree with that?---Yes.
>
> Now … before you invited your mother-in-law on the trip, when did you start planning the drug importation offence?
>
> SENIOR MEMBER: Just before you answer that … as a self-represented applicant I think it's important that I emphasise to you that some things you've admitted to in the court, and you've been convicted for, but you must - I must tell you that you do have the right to silence and a right against self-incrimination. So **if you are asked about any questions that do not relate to your convictions you do have a right to silence and a right against self-incrimination, do you understand that?**
>
> WITNESS: Yes.
>
> SENIOR MEMBER: The tribunal will make no negative inference from you choosing to exercise that right, do you understand that?
>
> WITNESS: Yes.
>
> …
>
> MS LIANG: … when did you go to Footscray Uni?---It was right after I come to - Footscray Tech, or Footscray Uni? It's couple of months – I think it's one month or two months after I arrived in Australia, I was studying logistics.
>
> So because you arrived in December 2011, are you saying that very early 2012 you started to study at university in Melbourne?---Yes.
>
> Then is it correct then you became friends with some people?---Yes.
>
> And did they invite you to be involved in the drug importation?---It's not friend, friend, it's uni colleagues, you just talk to people at uni. Your Honour, do I have to go too deeply to those questions?
>
> SENIOR MEMBER: … I have given you your rights here, that you have a right to silence. You can choose not to respond to questions that you think may tend to incriminate you. So if you think that you are being asked something that is outside of the parameters of your conviction, that might constitute a crime or might tend to implicate you in a crime, you can choose not to answer, okay? But that's a matter for you. Only you know, in detail, what it was that you pleaded to, in detail, at court, what you were convicted of. If you think it's outside of that, then feel free to say, "I wish to exercise my right to silence", or "I wish to exercise my rights, on the basis that it may

tend to incriminate me", and not to answer, okay?

WITNESS: Yes.

…

(Emphasis added.)

27 The appellant was given another warning during the second day of the hearing. This further warning was given by the Tribunal in the context of the tender by the appellant of a purported letter of recommendation by a former employer, whom we shall refer to as "WS", which purported to extol the appellant's virtues as an employee between July 2011 and December 2012. The relevant part of the transcript records the following exchange between the Tribunal and the appellant:

SENIOR MEMBER: Okay. Now I notice also in the materials that you've submitted … there are some statements from people, I assume they're your friends, [including WS]. Now all of these are dated in March 2019, so these are long-term friends, are they … ?

WITNESS: Yes, these are long-term friends.

SENIOR MEMBER: All right. Can I turn first to the director – the letter from someone called [WS], Director of United Wholesalers Proprietary Limited and the letter is dated 2 March 2019. And is [WS], is that a man or a woman?

WITNESS: I think it's a man but this company is - - -

…

WITNESS: Yes, it's a man

SENIOR MEMBER: It's a man. So you think it's a man, or you know it's a man?

WITNESS: No, it's a man.

SENIOR MEMBER: It's a man, all right.

WITNESS: Yes.

SENIOR MEMBER: All right. And how do you know [WS]?

WITNESS: I know him from a long way back, so [WS] is a long way back.

SENIOR MEMBER: Okay. And what do you mean a long way back, is that a friendship or did you work for him or how do you know each other?

WITNESS: It's a friend – he's a friend.

SENIOR MEMBER: Oh he's a friend?

WITNESS: Yes.

SENIOR MEMBER: So have you worked for [WS]?

WITNESS: No.

WITNESS: No, I have not worked for him (indistinct).

SENIOR MEMBER: All right. Well why does [WS] then say in his letter, he was with us from July 2011 to December 2012 and his high work ethic and leadership potential was realised, resulting in [the appellant] being quickly promoted to warehouse supervisor, if you haven't worked for him, how can it be that he said these things?

WITNESS: I think I must ask him what do they call it? I must ask him some character reference and that's what he was referring to so (indistinct) people to – (indistinct) people as, you know, helping them – yes, you know, as a friendship helping and that's why I think he might have meant it that way. But I have no word for it.

…

SENIOR MEMBER: So has [WS] provided false information to the tribunal, saying that you had worked for him?

WITNESS: It could be so - - -

SENIOR MEMBER: But … you provided these letters to the tribunal in support of your case, why have you provided something that's false?

WITNESS: So as you know so I am just providing I am just reading this to the best of my knowledge, as you know, I don't have my representative helping me out to fill those forms.

SENIOR MEMBER: But this has nothing to do with anyone representing him, you said you have known [WS] for a long time, you've known him from way back, he's a friend, if he's your friend and you've known him for a long time, then surely you must be satisfied that what he's written in this letter is correct, otherwise why would you give it to the tribunal?

WITNESS: So I leave it to your own expression on that but that's why I (indistinct) tell you, so there's nothing that I can add onto it.

SENIOR MEMBER: All right. Well let's – now [WS] has provided his phone number, when is the last time you spoke to him?

WITNESS: This is more than – mor than 18 months ago or something like that.

SENIOR MEMBER: 18 months ago.

WITNESS: Approximately.

28 At this point the Tribunal indicated that it would telephone WS later that day during the hearing to "see what he's got to say about his statement because it appears there has been a false statement submitted to the Tribunal on your evidence and I think it's only proper that I inquire as to the correctness or otherwise, of this statement" (T131.26-31). Later that day, the Tribunal did telephone WS and the transcript records, in essence, his evidence that he had never known the appellant (T161.38-162.32). The Tribunal then asked whether the appellant had "any questions at all of the witness". The appellant replied: "No". Having been told that, the Tribunal then warned the appellant as follows:

> SENIOR MEMBER: … I have some serious doubts … that you have provided statements that are true and accurate. I have some concerns that you have provided a statement … to the tribunal, that is fraudulent, because the person claims they don't know you and that that is a serious offence under the Administrative Appeals Tribunal Act. Now, I just remind you again … before you say anything, that you do have a right to silence and you do have a right not to answer any questions that you believe may incriminate you. But in fairness, I must say that I now have serious concerns about the evidence that you have provided to the tribunal. Do you understand that?
>
> [THE APPELLANT]: Yes. So, you say I have right to be silent?
>
> SENIOR MEMBER: You do have a right to be silent ...

29 We return to the Tribunal's consideration of the appellant's evidence. At [103] and [104], it expressed significant concerns about his credibility, including as follows:

> [The appellant] conceded that key features of his previous evidence are false, incomplete or otherwise deficient, but frequently engaged in blame-shifting, including by repeatedly blaming his former lawyer for fabricating evidence without his knowledge, or unnamed fellow prisoners for filling in documents without his instructions, which he did not check before submitting. [The appellant] often dissembled and obfuscated when responding to questions contradicting his claims, including in respect of past claims he maintained for years.
>
> The Tribunal considers [the appellant] is an unsatisfactory witness and revisionist historian. Key aspects of his evidence are false, inconsistent, exaggerated, implausible or incomplete. This conclusion is not made lightly and arises not from objectively minor matters of fact or [the appellant's] demeanour, but on substantial evidentiary aspects. …

30 The Tribunal then set out 18 separate examples in support of the finding that the appellant was not a credible witness. We will not burden these reasons by reciting them (they run for more than five pages). The Tribunal continued (at [30]):

> Such was the inconsistent and unreliable nature of key aspects of [the appellant's] evidence, that the Tribunal has decided to treat all his evidence with caution. Only claims that are specifically corroborated by other reliable evidence will be given weight.

31 The Tribunal structured its reasons with reference to the matters set out in Direction 79.

32 It turned first to the primary considerations in Direction 79. Having concluded that the appellant's offending was objectively serious; that the "real and unacceptable risk [the appellant] will reoffend if released … weighs very substantially against revocation"; and having dealt with the best interests of the appellant's (essentially estranged) children, the Tribunal turned to the next primary consideration, being the expectations of the Australian community, relevantly as follows:

> 144. Clause 13.3 of the Direction states:

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the mandatory visa cancellation of such a person. Non-revocation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not hold a visa. Decision-makers should have due regard to the Government's views in this respect.*

145. In *FYBR v Minister for Home Affairs* [2019] FCAFC 185 ("***FYBR***"), the Full Court of the Australian Federal Court dealt with the construction and application cl 11.3(1) (*Expectations of the Australian community*). Although this case refers to a different part of a previous Direction and relates to visa refusal, the clause is in identical wording as cl 13.3 of the current Direction. The majority in *FYBR* held that this primary consideration is a 'deeming' provision with normative principles, ascribing to the community an expectation aligning with that of the executive government. As Stewart J held at [104], '*it is not the decision-maker who makes an assessment of community values on behalf of the community*'. His Honour summarised the community's expectations at [101] and [103]:

> *101. Understood in this way, community expectations are simply, and informally, expressed as follows: "If you break the law that will be held against you, the more serious the breach the more it will be held against you, and it may even be decisive.*
>
> *...*
>
> *103. ...In a particularly egregious case, the weight to be afforded the community expectations would be such that a refusal might be thought to be inevitable, and at the other end of the spectrum a refusal might be thought to be unlikely...*

146. The reasoning in *FYBR* establishes that the '*deemed community expectation*' will in most cases call for cancellation, but that '*the question of whether it is appropriate to act in accordance with the deemed community expectation is in all cases left for the decision- maker to determine'*. The Direction helps inform the weight a decision-maker attributes. For example, cl 6.3(3) of the Direction states that non-citizens who commit serious crimes, including '*of a violent…nature, and particularly against women or children…should generally*' expect to forfeit the privilege of staying in Australia. That being said, use of terms like '*should generally*' convey discretion and judgements turn on the specific circumstances of each case (cl 6.1(3)). The reasoning in *FYBR* also reflects the potential inherent in cl 8(3) of the Direction, that: '*Both primary and other considerations may weigh in favour of, or against...*' Moreover, it reinforces the flexibility in cl 8(4) that requires the government's assessment of community expectations to be '*generally…given greater weight than the other considerations*', which '*contemplates a case in which the decision- maker considers it appropriate not to afford the expectation of the Australian community more weight than favourable countervailing factors…*'

147. The Tribunal notes the High Court has handed down a decision in respect of an application for special leave to appeal against *FYBR*. In refusing the application, the High Court held at [301]-[303], that '*there is no reason to*

*doubt the correctness of the decision of the majority of the Full Court of the Federal Court.*'

…

***Tribunal findings: Expectations of the Australian community***

150. The deemed community expectation in this case is that the mandatory cancellation decision should not be revoked. That follows from the very serious nature of [the appellant's] offending, use of his mother-in-law as an unwitting drug mule, relatively recent acceptance of guilt, presentation of bogus evidence at the current hearing, and significant unexplained inconsistencies in his evidence over time. This primary consideration weighs very substantially in favour of non-revocation.

33 The Tribunal then dealt with the "other considerations" in Direction 79, including international non-refoulement obligations (concluding they were not enlivened) as follows:

***Tribunal Findings: International non-refoulement obligations***

…

172. [The appellant's] evidence does not raise a legitimate fear of persecution in Burkina Faso for reasons of race, religion, nationality, or membership of a particular social group. …

173. [The appellant] also raised generalised fears of harm arising from instability in Burkina Faso, caused by an increase in indiscriminate acts of terror and attacks on civilian targets since approximately 2016. It is not clear from his evidence where he would settle if repatriated. [The appellant] was born in the capital, Ouagadougou, where his mother currently lives. Institutional structures and services, as they are in Burkina Faso, appear most developed in or immediately adjacent to the capital. Many of the targets identified in the media reports provided by [the appellant] appear linked to places where western tourists congregate, or tit-for-tat reprisals between Muslim and Christian groups, or government-related activity, particularly in the north of the country. There is no evidence to suggest that [the appellant], as a Muslim man with family living in the capital, would be required to live in areas attracting a 'do not travel' rating recommendation in the DFAT report he tendered, which, in any event, is more relevant to Australian citizens contemplating travel to Burkina Faso, rather than returning citizens like [the appellant]. That is not to diminish the risks confronting the general population in Burkina Faso, just that they are general risks confronting the population generally and not [the appellant] specifically.

…

175. The Tribunal concludes that 'International non-refoulement obligations' are not enlivened in this matter and carry no weight either for or against revoking the mandatory cancellation of [the appellant's] visa.

34 Under that same rubric, the Tribunal recorded at [153] that the appellant "lodged a bundle of material with the Tribunal, which he referred to in the hearing in support of claims that Australia's non-refoulement claims were enlivened by the specific circumstances of his case".

35 That material included Wikipedia entries, newspaper articles, travel advice for Burkina Faso, unemployment statistics, and the like.

36 The Tribunal then recorded in some detail the appellant's claim which it said at [155] "encompass a fear of general violence and 'unrest' in Burkina Faso, and he referred on several occasions to media reports about recent attacks … [and] a deteriorating security situation since approximately 2016, predominately in northern Burkina Faso".

37 Next, the Tribunal relevantly turned to consideration of the "extent of impediments if removed" and at [193] of its reasons recorded the following evidence from the appellant:

> 193. When asked about any concerns or fears arising from possible repatriation to Burkina Faso, [the appellant] stated in his 2017 PCF: '*I haven't been there for years. I have no contacts or prospects*.' In his March 2019 statement, he framed his concerns around an absence of familial and government support, given his siblings '*left Burkina Faso a long time ago to find life elsewhere around the world*.' At the present hearing, however, his evidence is that his mother and siblings live in Burkina Faso, but he is unable to rely on them for any support. He also claimed he could no longer speak his two native languages, except for '*a little broken French…just a few words here and there*'.

38 It then made the following findings under that rubric, relevantly at follows:

> 196. The Tribunal finds that:
>
> …
>
> (f) The unpredictable nature of life in Burkina Faso, as disclosed by its history and recent development, is likely to result in considerable challenges for [the appellant] in re- establishing himself. The Tribunal accepts Burkina Faso is a poor country. But with a relatively low unemployment rate of approximately 6.4%, and with the English language skills and course qualifications gained by [the appellant] in Australia, there is nothing to suggest he could not competitively apply for work. [The appellant] relies on these new qualifications as underlying his claims about realistic prospects of work in Australia. There is no evidence they could not similarly assist him to find work in Burkina Faso or a third country. If he needed it, there is no evidence [the appellant] would not have access to whatever social supports are available to other citizens in Burkina Faso. That is likely to be far below what is available to him in Australia. There is also no evidence he could not choose to live elsewhere overseas as he did between 2001 and 2011.
>
> 197. Putting all the evidence in the balance, repatriation to Burkina Faso nevertheless poses considerable challenges for [the appellant] in re-establishing himself and being able to provide for his daily needs. This consideration weighs substantially in favour of revocation.

39 The Tribunal also dealt with the strength, nature and duration of ties (concluding "on balance that this consideration weighs slightly, at best, in favour of revocation") and the impact on victims (of which there was no evidence).

40 Under the heading "Other Considerations", the Tribunal said (at [198]):

> No additional considerations were advanced by the parties and I have not identified any additional '*other considerations*' relevant to the specific circumstances of [the appellant's] application, as provided for at cl 14(1) of the Direction.

41 The Tribunal concluded relevantly:

> 200. For the reasons adduced earlier, key aspects of [the appellant's] evidence are either false, inconsistent, exaggerated, implausible or incomplete. He frequently attempted to blame evidentiary deficiencies on others. [The appellant's] current claims often rested on bare assertion, including when he presented a new narrative for the circumstances of his departure from Burkina Faso, and dispensed with the family massacre narrative he consistently maintained between 1997 and 2000. He implausibly asked the Tribunal to believe that the family massacre narrative and having to desert his wife and two children in Burkina Faso, were invented by his lawyers or arose from language issues, mistranslation, or his '*mental health*' (sic). He now attributes his trauma to a 'capture and torture' narrative similarly containing unexplained inconsistencies.
>
> 201. It is of significant concern that [the appellant] provided false evidence in the form of Exhibit A15. The Tribunal also has serious concerns about the circumstances in which Exhibit A16 was procured. The totality of the evidence is such that [the appellant's] claims cannot be relied upon unless corroborated by other persuasive evidence.
>
> 202. The Tribunal found [the appellant's] claims about remorse and rehabilitation to be unpersuasive, particularly in circumstances where he denied guilt throughout a jury trial, Court of Appeal process and for years thereafter. His relatively recent acceptance of guilt and efforts to reconcile with Australian family members, correlates with his current application and came across as self-serving. The prolonged denial of his offending gives rise to concerns about the extent to which he will deny and obfuscate in support of his own interests.
>
> 203. The Tribunal found [the appellant's] reliance on a continuing close relationship with his wife, mother-in-law, and children, and that family reunion was immediately in prospect upon his release, to be unpersuasive, uncorroborated and self-serving. On the best reading of the available evidence, his reunion claims are aspirational.
>
> 204. [The appellant's] criminal conduct is objectively very serious and had the potential to cause serious harm to Australian victims. That includes his mother-in-law who was potentially exposed to the death penalty if intercepted while carrying drugs overseas. There is no independent evidence to corroborate [the appellant's] claims that he is fully rehabilitated, notwithstanding the impressive list of certificates he provided. These have undoubtedly added to [the appellant's] skillset and may assist him with future employment. When the totality of the evidence is considered, the Tribunal considers there is a real

and unacceptable risk [the appellant's] will reoffend if released, particularly if he sees a future '*short-cut*' for financial gain, or experiences financial stress, or is unable to secure reliable work.

205. While the Tribunal can accept the love [the appellant's] expresses for his children is genuine, he has not performed a parental role for most of their young lives. The available evidence suggests he has been estranged from his children and other family members for approximately seven years. On his own evidence, [the appellant] has physically seen his children once since 2012. Based admittedly on the purely speculative basis that [the appellant's] three younger children may want a closer relationship with him in the future, the Tribunal finds it is in their best interests for the mandatory cancellation decision to be revoked.

206. The deemed community expectation in this case is that the mandatory cancellation of [the appellant's] visa should not be revoked. That follows from the very serious nature of his offending, relatively recent acceptance of guilt, presentation of bogus evidence, and significant inconsistencies in his evidence over time.

207. As for the other considerations in this matter, [the appellant's] non-refoulement claims have changed substantially over time. On the information he presented at the present hearing, his claims are unpersuasive. It is noted, however, that an appeal against the refusal of his 2019 Protection Visa application is yet to be heard, at which he has a further opportunity to present any additional claims or information.

208. [The appellant's] generalised fears of harm centre on instability in Burkina Faso resulting from an increase in indiscriminate acts of terror and attacks on civilian targets since approximately 2016. Those risks confront the broader population in Burkina Faso and not [the appellant] specifically. There is no persuasive evidence on which to reliably conclude that [the appellant] would not have the same rights or opportunities as any other citizen in Burkina Faso. Moreover, with a mother and three siblings currently living in Burkina Faso, there is no persuasive evidence he would be isolated or could not rely on some family support if repatriated. The concerns he expresses about being able to provide for his daily subsistence, are again risks faced by the population generally and not by [the appellant] personally.

209. [The appellant] has lived in Australia for a relatively short period of time and his serious offending occurred within months of arrival in Australia in December 2011. There is a dearth of reliable information about any positive contribution he has made, with many of his claims unsupported or exaggerated. On the totality of the evidence, [the appellant's] ties to the Australian community through family and social links are relatively weak.

210. [The appellant's] claims about past medical or psychological conditions are unsupported by recent expert evidence. During his oral evidence he stated that he has no currently diagnosed conditions, took no prescribed medications, and there is no medical reason preventing his return to work. The concerns he expressed about possible repatriation to Burkina Faso have changed over time from practical concerns about unfamiliarity, no family, lack of contacts, and poor work prospects. Now he claims his mother and siblings live in Burkina Faso, but he cannot rely on them for any support, cannot speak his first languages, and fears being identified and persecuted as a result of past activism. For the reasons expressed earlier, these claims were unpersuasive

and exaggerated. [The appellant] has demonstrated an ability to adapt to multiple cultures and international environments after leaving Burkina Faso as an adult. On his own evidence he has lived in South Africa, Australia, Indonesia, Nigeria, Papua New Guinea, and the Middle East. Moreover, the Tribunal does not accept that [the appellant's] family in Australia is in any way dependant on his contribution or shares his aspiration for immediate family reunion. There is no persuasive evidence that his family in Australia would be 'devastated' by his repatriation as he claims. The unpredictable nature of life in Burkina Faso, however, is likely to result in considerable challenges for [the appellant] if repatriated.

211. Having weighed all relevant considerations individually and cumulatively, the Tribunal finds there is not another reason why the decision to cancel [the appellant's] visa should be revoked. That is because the primary considerations '*Protection of the Australian community*' and '*Expectations of the Australian community*' weigh very substantially against revocation. These considerably outweigh the primary consideration '*Best interests of minor children*' and '*Strength, nature and duration of ties*,' each weighing slightly in favour of revocation, and '*Extent of Impediments if removed*,' which weighs substantially in favour of revocation.

**The reasons of the primary judge**

42 It is unnecessary to refer to his Honour's reasons, because none of the grounds of review contended before him are pursued on this appeal. Indeed, the appellant's counsel did not even mention his findings or reasons.

**The proposed further amended notice of appeal**

43 As we have already observed, in his proposed further amended notice of appeal, the appellant seeks to raise six new grounds of appeal, being six allegations of jurisdictional error by the Tribunal. We set it out in full (without alteration):

**1. The Tribunal acted on a misunderstanding of the law.**

a. First, the Tribunal found that s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth) (the **Act**) was conditioned by an exercise of discretion ([27], [37], [110(a)], [126], [146]). That was wrong: *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125 [17], [19]-[20], [26], [51] (***Au***).

b. Second, the Tribunal found that it was bound to comply with Direction 79 ([28]-[29]). That itself reveals error. Direction 79 incorrectly mandated that the statutory task in s 501CA(4)(b)(ii) of the Act is conditioned by an exercise of discretion: cls 5, 6.1(3), 7 and 13. Section 501CA(4)(b)(ii) of the Act does not involve an exercise of discretion: *Au* [17], [19]-[20], [26], [51].

c. Third, the first respondent (the **Minister**) also led the Tribunal to fall into error by contending that s 501CA(4)(b)(ii) of the Act was conditioned by an exercise of discretion: A230[1], A233[13], A241[37], A243[47].

d. Fourth, the Tribunal's error was material: *Au* [51]-[52].

**2. The Tribunal acted on a misunderstanding of the law.**

a. The Tribunal concluded that the expression 'another reason' in s 501CA(4)(b)(ii) of the Act required a reason that carried 'sufficient weight or significance' ([39]). The Tribunal applied the reasoning of Colvin J in *Viane v Minister for Immigration and Border Protection* [2018] 162 ALD 13 at [64] (the ***Viane test***).

b. The adoption of the Viane test was wrong and should be departed from. Section 501CA(4)(b)(ii) does not contain words that 'another reason' be one of 'sufficient weight or significance'. The necessity for there to be a reason that carries 'sufficient weight or significance' to invoke s 501CA(4)(b)(ii) of the Act is not supported by recent High Court of Australia jurisprudence: *Plaintiff M1-2021 v Minister for Home Affairs* [2022] HCA 17; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41.

c. The error was material.

**3. The Tribunal denied the appellant procedural fairness.**

a. The Tribunal may deny an unrepresented party procedural fairness in circumstances where it fails to advise the party of the right to invoke the privilege against self-crimination: *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480 [37]. The Tribunal contravened this principle.

b. First, the Tribunal concluded that the appellant provided false or misleading evidence in the form of Exhibit A15 and oral evidence about having known the witness 'from a long way back' and still considered him a friend ([104](a)]. In relation to this evidence, the Tribunal failed to advise the appellant of the right to invoke the privilege against self-crimination: T129[35]-[45], 130[40]-[47], 131[0]-[25].

c. The Tribunal only directed the appellant as to the privilege against self-crimination much later on the second day of the trial, long after the impugned evidence had been given: T164[5]-[25].

d. Second, the Tribunal concluded that the appellant may have breached s 62A of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**) by providing false or misleading evidence to the Tribunal. The Tribunal did not expressly put the appellant on notice as to a potential breach of s 62A of the AAT Act: T164[8]-[15]. The appellant was a self-represented litigant: T81[28].

e. Third, the error was material: *Nathanson v Minister for Home Affairs* (2022) 96 ALJR 737 [35], [39].

**4. The Tribunal denied the appellant procedural fairness.**

a. A failure to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord the appellant natural justice. The Tribunal breached this principle in this case.

b. First, in support of the appellant's rehabilitation claims, the appellant contended (the **prison assault claim**):

- he had been through enormous suffering in prison (T77[10]-[22]);
- was beaten in prison, where his back was broken in two places at L4 and L5 (T77[10]-[22]);
- during the attack he did not retaliate or respond (T77[10]-[22]);
- he is still suffering from the pain of the operation as a result of the assault (T77[20]-[25]);
- he was suffering from all the injuries from the assault until now (T77[30]);
- he had been attending a psychiatrist for anxiety and depression (T125[44]-[48]); and
- since coming to prison, after being violently assaulted, how could he even think of committing future criminal offences (T198).

c. Second, the Tribunal failed to respond to the appellant's prison assault claim in the context of the appellant's rehabilitation contentions ([130]-[131]). The appellant's prison assault claim was advanced as an important contention in his case (T198).

d. Third, the Tribunal's error was material: *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 34 [26].

**5. The Tribunal denied the appellant procedural fairness.**

a. First, the Tribunal found that the appellant's mother-in-law was a vulnerable member of the Australian community by virtue of the trust she reposed in him for the purposes of cl 13.1.1(1)(c) of Direction 79 ([111](b)] (the **adverse conclusion**).

b. Second, the adverse conclusion would not obviously be open on the known material. The appellant was not given notice of the adverse conclusion. Therefore, he did not have an opportunity to address it. The failure was a denial of procedural fairness: *Pihama v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 678 [12] (***Pihama***).

c. Third, the adverse conclusion was not put to the appellant during the impugned Tribunal proceedings. In the Minister's Statement of Facts, Issues and Contentions before the Tribunal, the Minister did not expressly raise the application of cl 13.1.1(1)(c) of Direction 79. It is also highly relevant that the appellant appeared on his own behalf before the Tribunal: *Pihama* [12].

d. Fourth, the Tribunal's error was material: *Nathanson* [33]; *Pihama* [13].

**6. The Tribunal denied the appellant procedural fairness.**

a. A failure to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord the appellant natural justice. The Tribunal breached this principle in this case.

b. First, before the Tribunal, the appellant contended as follows (the **risk of harm claims**):

- Burkina Faso is in political unrest: T62[45]-[47].
- People are killed in Burkina Faso: T63[0]-[5].
- The material before the Tribunal demonstrates that the Australian government advises people not go travel to Burkina Faso T63[0]-[5], [35]- [40].
- Half a million people have been displaced in Burkina Faso because of insecurity: T63[30]-[40].
- There is still hostility going on in Burkina Faso: T64[15]-[16], 114[33].

c. Second, the Tribunal failed to lawfully respond to the risk of harm claim (independent of international non-refoulement obligations) as another reason to revoke the mandatory cancellation decision under s 501CA(4)(b)(ii) of the Act: [175]. The Tribunal made no findings as to what weight, if any, it placed on the appellant's risk of harm claims outside international non-refoulement obligations ([173], [175], [198], [208]).

d. Third, the error was material.

44 We consider each proposed ground in turn.

**Proposed ground 1**

45 The first proposed ground is that the Tribunal acted on a misunderstanding of the law by finding that s 501CA(4)(b)(ii) "was conditioned by an exercise of discretion".

46 As Katzmann J observed in *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 187 at 191 [3], while s 501CA(4) provides that the Minister "may" revoke the original decision to cancel a visa if satisfied that the non-citizen passes the character test or there is another reason to do so, the weight of the authorities is to the effect that the Minister does not have a discretion to determine whether or not to revoke the original decision if satisfied of either matter. Rather, it confers a power to do so which must be exercised if so satisfied.

47 The appellant relied on ***Au*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315 (Perry, Derrington and O'Sullivan J). That was a

case where the Tribunal was found to have erred in applying s 501CA(4), because it did not seek to ascertain whether the subjective jurisdictional fact, being the satisfaction of the matters in s 501CA(4)(b)(ii), existed but wrongly perceived that the exercise of power was the discretion to revoke the cancellation decision.

48 In the present case, however, the Tribunal committed no such error. It did not misunderstand s 501CA(4)(b)(ii) of the Act. It did not find that this provision was "conditioned by an exercise of discretion" as the appellant alleged.

49 All the appellant did was to point to four instances where the Tribunal invoked the word "discretion" to describe the process it adopted in applying s 501CA(4)(b)(ii), and examining each of the Direction 79 considerations. But as the Minister's counsel submitted, none of those references to the word bespeaks error.

50 The first reference to "discretion" appears at [27] of the Tribunal's reasons where it stated that:

> Section 501CA(4) of the Act provides a discretion that the Minister may revoke the original decision, if the person whose visa has been cancelled makes representations in accordance with the invitation, and the Minister is satisfied that the person passes the character test, or that there is another reason why the original decision should be revoked.

51 The second appears in the quotation from the joint judgment of Kenny and Mortimer JJ in *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461 at 477-78 [78] (appearing at [37] of the Tribunal's reasons): see para [20] above, which was a reference to "the exercise of the s 501 discretion".

52 The third and fourth appear in [110] and [126] of the Tribunal's reasons in the context of references to the Minister's submissions about the weight to be given to certain mandatory considerations. The Minister apparently contended that the seriousness of the appellant's offending, the nature of harm to individuals and the Australian community should the appellant reoffend and the risk of him reoffending all weighed heavily in favour of the Tribunal exercising its discretion not to revoke the visa cancellation.

53 Dr Donnelly, who appeared for the appellant on this occasion with Mr Schonnell, conceded in oral argument that whether or not the Tribunal misunderstood the statutory task depends on the purpose to which the Tribunal ultimately put those remarks. Yet he was unable satisfactorily to explain how any of the three instances of the use of the word "discretion" led the Tribunal to a misunderstanding of the nature of the power conferred by s 501CA(4).

54 In the case of the second instance, appearing in the quotation from the joint judgment in *Jagroop* at 477-78 [78], the appellant did not dispute that, in carrying out the statutory task of deciding whether it was satisfied that there was another reason to revoke a mandatory cancellation decision, the Tribunal is required to apply Direction 79 to the evidence and material in an individual case. That was precisely what the Tribunal did. In this respect a decision maker bound by a Ministerial direction like Direction 79 has the same obligation irrespective of whether the power is conferred by s 501, as it was in *Jagroop*, or s 501CA(4), as it was in the present case.

55 The first, third and fourth references in the Tribunal's reasons to "discretion" are no different from the High Court's references in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 96 ALJR 497 at 507-8 [20], [22] and [23] (Kiefel CJ, Keane, Gordon and Steward JJ) to s 501CA(4) as a "discretionary" power. In *BCR16 v Minister for Immigration and Border Protection* (2017) 248 FCR 456 at 462 [22], Bromberg and Mortimer JJ also described s 501CA(4) as a "discretionary power to revoke the cancellation", adding that "in practical terms, the real discretionary considerations subsist in the terms of s 501CA(4)(b)(iii)".

56 In *Au* itself at 324-25 [33]-[34], Derrington J said that in exercising the power in s 501CA(4)(b)(ii), "[t]he formation of the state of mind [of satisfaction as to the existence of another reason] might be regarded as the exercise of a discretion "in a sense" or "in a broad sense", citing ***Coal and Allied*** *Operations v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 205 [20] (Gleeson CJ, Gaudron and Hayne JJ). In the preceding paragraph in *Coal and Allied*, their Honours observed that:

> "Discretion" is a notion that signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result". Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made …

57 A decision as to whether one is satisfied that there is another reason to revoke a decision to cancel a visa is a decision of this nature.

58 Here, having satisfied itself that the appellant did not pass the character test, the Tribunal identified the remaining issue as whether there was "another reason why the cancellation of the mandatory visa cancellation should be revoked" (at [39]) and addressed the various considerations in the Direction through that lens. At [199] the Tribunal explained that, in determining whether there was another reason, it applied the considerations in Pt C of the Direction to the specific circumstances of the case. It did not find that there was another reason

and purport to exercise a discretion to decline to revoke the cancellation decision. Rather, as is apparent from its conclusions at [211], it was not satisfied that there was another reason and affirmed the delegate's decision for that reason:

> Having weighed all relevant considerations individually and cumulatively, the Tribunal finds there is not another reason why the decision to cancel [the appellant's] visa should be revoked. That is because the primary considerations 'Protection of the Australian community' and 'Expectations of the Australian community' weigh very substantially against revocation. These considerably outweigh the primary consideration 'Best interests of minor children' and 'Strength, nature and duration of ties,' each weighing slightly in favour of revocation, and 'Extent of Impediments if removed,' which weighs substantially in favour of revocation.

59 As Markovic J observed in *Pewhairangi v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1322 at [41]:

> Of itself the references by the Tribunal in its reasons to "exercising the discretion" is not sufficient to conclude that the Tribunal did not understand its statutory task. Rather, the question to be resolved is whether, as was the case in *Au*, the Tribunal asked itself the wrong question in considering [the appellant's] application or, put another way, whether it addressed itself to the condition required to enliven the power in s 501CA(4) of the Act, namely the condition in s 501CA(4)(b)(ii).

60 The appellant also submitted that the Tribunal's statement (at [28]) that it was bound to comply with Direction 79 was something that "itself reveals error". It was not explained how that could be so in circumstances where s 499(2A) of the Act provides that a person or body like the Tribunal "must comply" with such a direction. See s 499(2A) of the Act; *BQL15 v Minister for Immigration and Border Protection* [2018] FCAFC 104 at [9] (Collier, Flick and Perry JJ).

61 There is thus no merit in proposed ground 1.

**Proposed ground 2**

62 The second proposed ground is that the Tribunal erred in applying the reasoning of Colvin J in *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 at 545-46 [64], which the Tribunal referred to at [39]. In that passage, Colvin J said:

> There is no statutory power to revoke under s 501CA(4)(b)(ii) unless the Minister is satisfied that there is a reason, other than a conclusion that the person concerned passes the character test, which means that the original decision "should be" revoked. It is not enough that there is a matter that might be considered or may be said to be objectively relevant. It must be a reason that carries sufficient weight or significance to satisfy the Minister entrusted with the responsibility to consider whether to revoke the visa cancellation that the decision should be revoked. Only a reason of that character enlivens the statutory power to revoke. It is the absence of such a reason that will result in a decision not to revoke a visa cancellation.

63 There is nothing erroneous in those observations. On the contrary, they are, with respect, clearly correct.

64 As Jackson J said in *JVGD v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1253 at [59]-[64] in response to the identical argument put in this appeal:

> 59 The applicant refers to the Tribunal's reliance on *Viane 2018* to say that s 501CA(4)(b)(ii) of the Migration Act is only invoked if there is a 'reason that carries sufficient weight or significance' … The applicant says that the Tribunal made a material error by acting on a misunderstanding of the law in this context.
>
> 60 The applicant submits that that use of the terms 'sufficient weight' or 'significance' places an 'unnecessary gloss' on the statutory language. The applicant further says that what constitutes 'another reason' is a matter for the decision maker and parliament has not prescribed reasons which might justify revocation (or not) of a cancellation decision. The applicant says that, while deciding whether or not that other reason exists might be the product of fact-finding, predictions about the future, or characterisations of past offending, it is neither desirable nor possible to formulate rules about how the Minister may or may not be satisfied about a reason for revocation.
>
> 61 There is no merit in this ground. The paragraph from *Viane* 2018 which the applicant impugns is in the decision of Colvin J, with whom Reeves J generally agreed (at [3]). The Full Court's reasoning in this case has not been disapproved or overruled by the High Court or another Full Court. It is binding on me as a single judge. It is not for me to decide whether the particular passage states an unnecessary gloss on the statutory requirement.
>
> 62 The applicant submits that the passage is in conflict with recent decisions of the High Court. His submissions list 10 propositions said to be established by those decisions that are asserted to be inconsistent with Viane 2018 at [64]. But, with respect, they are not. It is not necessary to list all 10. It is enough to give three examples:
>
> (a) 'the power of revocation is broad and wide': *Applicant S270/2019 v Minister for Immigration and Border Protection* [2020] HCA 32 at [36]; *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 at [22];
>
> (b) 'deciding whether or not to be satisfied that "another reason" exists 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': *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; (2021) 274 CLR 398 at [14]; and
>
> (c) 'the Tribunal's task under s 501CA(4) is evaluative': *Nathanson* at [71].
>
> 63 Nothing in *Viane 2018* at [64] is inconsistent with any of this. All it says is that, where s 501CA(4)(b)(ii) relevantly requires that the Minister be satisfied 'that there is another reason why the original decision should be revoked', it is not enough that the reason is one that might be relevant to that question. It must be a reason substantial enough to mean that the cancellation 'should be'

revoked.

64 The passage has not been relevantly overruled, disapproved or overtaken by subsequent or higher authority. The Tribunal did not fall into error in relying on it.

65 It is sufficient for us to say that we agree entirely with Jackson J.

66 There is thus no merit in proposed ground 2.

**Proposed ground 3**

67 Nor is there merit in proposed ground 3.

68 The allegation here is that the appellant was denied procedural fairness because the Tribunal failed to advise him of his right to invoke the privilege against self-incrimination before questioning him on an aspect of his evidence, relying on the decision in *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1480.

69 In that case, Allsop CJ explained at [36] and [37]:

> The privilege against self-incrimination is a fundamental common law right … It is not merely a rule of evidence available in judicial proceedings but is available generally, even in a non-curial context, as the foundation of an entitlement not to answer a question … The Tribunal is not bound by the rules of evidence, but this does not allow a Tribunal to require a witness to answer questions which exposes her or him to self-incrimination. The privilege against self-incrimination has also been recognised in statute, most particularly in ss 62(3) and 62(4) of the *Administrative Appeals Tribunal Act 1975* (Cth). Also, s 371(2)(c) of the Act provides that it is an offence for a witness to fail to answer a question of the Tribunal for the purposes of a review under Pt 5 of the Act. Section 371(3), however, provides an exception to this offence where "answering the question might tend to incriminate the person".
>
> The Tribunal may deny an unrepresented party procedural fairness if its questioning strays into matters about which the unrepresented party could invoke the privilege against self-incrimination without warning the person: *Kohli v Minister for Immigration and Border Protection* [2018] FCA 540; 74 AAR 433 per Flick J at [33]–[34], citing *SZHWY v Minister for Immigration and Citizenship* [2007] FCAFC 64; 159 FCR 1 at [74]–[77], [112] and [160]–[169] where the Full Court found that the Tribunal may deny an unrepresented party procedural fairness in circumstances where it fails to advise the party of the right to invoke client professional privilege … In *Kohli*, Flick J concluded that the Tribunal failed to advise the appellant of his right to invoke the privilege in respect of questioning about whether he had been driving unlawfully and his involvement in a possible theft. Nevertheless, his Honour held that the failure by the Tribunal occasioned the appellant no practical injustice because he was under no continuing risk of being charged with any unlawful driving offence relating to the events described in the cross-examination, and he denied any wrongdoing in respect of the theft. The evidence going to either or both of the matters also assumed little relevance in the ultimate reasoning and conclusion of the Tribunal. On that basis, Flick J at [39] dismissed the appeal ground, finding that the appellant (who was "well-educated (albeit unrepresented)") was not deprived of any meaningful

> opportunity to be heard by reason of any failure to advise him as to his rights against self-incrimination …

70 Proposed ground 3 is directed to what occurred on the second day of the hearing, set out at paras [27]-[28] above. The appellant contended that he was denied procedural fairness because he had not been specifically warned by the Tribunal at the start of its questioning of the appellant about the letter of reference from WS that the proffering of a false document, in this case the purported letter of reference, constituted an offence under s 62A of the *Administrative Appeals Tribunal Act 1975* (Cth). That section provides as follows:

> **62A False or misleading evidence**
>
> A person commits an offence if:
>
> (a) the person appears as a witness before the Tribunal; and
>
> (b) the person gives evidence; and
>
> (c) the person does so knowing that the evidence is false or misleading.
>
> Penalty: Imprisonment for 12 months or 60 penalty units, or both.

71 Whatever doubts the Tribunal may have had about the appellant's credibility from the point at which it expressed some uncertainty about whether WS was a man or a woman, it was not until WS confirmed in his evidence that he did not know the appellant that any occasion arose to give a warning.

72 The Minister submitted that the warnings given by the Tribunal on the first day of the hearing, in the context of the appellant's drug importation offending, were "expressed in general terms" and that the appellant said that he understood the nature of those general warnings, and that those warnings were, in any event, sufficient to afford the appellant procedural fairness.

73 There may be some considerable merit in that submission, but in circumstances where there is nothing in the appellant's point about the third warning, it is unnecessary to decide whether the former warnings were sufficient.

**Proposed ground 4**

74 The fourth proposed ground concerns a so-called "prison assault claim" in 2014 (during the second year of the appellant's incarceration), which is said to have been a matter material to the appellant's claim that he had been "rehabilitated" and which the Tribunal overlooked.

75 The extracts from the transcript of the hearing before the Tribunal in the proposed notice of appeal accurately record the appellant's evidence about an assault in prison.

76 The only mention that the appellant made of the assault in his closing submission, and the only part of it relied on to support proposed ground 4, was as follows:

> After I come to prison all this will have happened to me, I have collapsed, I have had people attach (sic, attack) me, beating up, and break my back in two different places, how – how can I even be thinking of committing any other offence.

77 In *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at 604-5 [47], the Full Court (French, Sackville and Hely JJ) observed:

> The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.

78 Here, as the Minister submitted, the Tribunal did not overlook the evidence of the assault. It was aware of the evidence and it had regard to it when it assessed the question of the appellant's mental health. It had regard to a medical report by a forensic physician and specifically noted the reference in it to an assault in prison and the details of the appellant's back surgery (at [45]); and it summarised the appellant's evidence about the assault in the context of his physical and mental health, including his evidence that "he strictly abided by the sentencing judge's instructions not to commit any further crimes and '*didn't retaliate*' when attacked by other prisoners" (at [71], emphasis in original). See too at [192].

79 It is true that the Tribunal did not expressly state that it had regard to what the appellant said about the assault in the context of his claimed rehabilitation. The fact that it was not mentioned in that context, however, does not mean that the Tribunal overlooked the argument. It is readily apparent that the Tribunal gave no weight to the appellant's claim that he "couldn't ever be thinking of committing any other offence" because he had been attacked in prison. The Tribunal made it clear that it did not accept his claim to be rehabilitated, including because he had proffered false evidence long after the time of the assault. As the Tribunal put it at [105]:

> Such was the inconsistent and unreliable nature of key aspects of [the appellant's]

> evidence, that the Tribunal has decided to treat all his evidence with caution. Only claims that are specifically corroborated by other reliable evidence will be given weight.

80 No challenge was made to this aspect of the Tribunal's reasoning.

81 Further, as the Minister submitted:

> … the Tribunal's impression was that the appellant had, since the assault in 2014, engaged in criminal deception of the Tribunal by the provision of a fabricated work reference ([104(a)]). That was a matter which told against the appellant's assertions of complete rehabilitation and was probative of the propensity of the appellant to reoffend in a similar manner to his past offending. These were matters that were specifically linked by the Tribunal at [128] (in the context of his previous offending having been explained as the product of taking a "*short-cut*": "*[The appellant] continues to take 'short cuts' with the truth, as evidenced by the false or questionable references he tendered at the hearing. The Tribunal was left with the impression that [the appellant] will continue to engage in misleading or deceptive conduct where he perceives a personal benefit*"), [129] ("*Someone who is fully rehabilitated would not present a bogus work reference*"), and [131] ("*[The appellant] is not 'fully rehabilitated' as he claims, given … the submission of a false work reference*").

82 Plainly, the Tribunal was entitled to give no weight to the appellant's claim that he would not reoffend because he had been assaulted in prison.

83 It follows that there is no jurisdictional error in the Tribunal not specifically addressing the so-called "prison assault claim" in the context of his claimed rehabilitation. And there is thus no merit in proposed ground 4.

**Proposed ground 5**

84 The Tribunal found (at [111(b)]) that the appellant's mother-in-law was a vulnerable member of the Australian community and placed weight on this in the course of considering the nature and seriousness of the offending. By proposed ground 5, the appellant alleged that he was denied procedural fairness because he was not put on notice that the Tribunal would do so.

85 This allegation is also devoid of merit.

86 Paragraph 13.1.1(1)(c) of Direction 79 relevantly stated:

> (1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to factors including:
>
> …
>
> c) The principle that crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government

> representatives or officials due to the position they hold, or in the performance of their duties, are serious.

87 There is no denial of procedural fairness where there is no practical injustice (see, for example, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 13-14 [37] (Gleeson CJ)), and there was no practical injustice here.

88 The appellant relied on *Pihama v Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs* [2023] FCA 678, in which Colvin J accepted as "properly made" the Minister's concession that it was a denial of procedural fairness to fail to give notice of a conclusion that road users were to be viewed as vulnerable members of the community for the purposes of para 8.1.1(b)(ii) of *Direction No. 90 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**) (at [12]).

89 Contrary to the appellant's submission, the reasoning in that case is not apposite here. It is evident that the reason Colvin J considered the concession to have been appropriate was that the adverse conclusion was one "which would not obviously be open on the known material", a matter also conceded by the Minister in that case (at [12]).

90 In *Commissioner for the Australian Capital Territory Revenue v Alphaone* (1994) 49 FCR 576 at 591-92, Northrop, Miles and French JJ said:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. **The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material**. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.
>
> (Emphasis added.)

91 Here, the finding that appellant's mother-in-law was a vulnerable member of the Australian community was obvious on the known material, and it is inconceivable that it would have taken the appellant by surprise.

92 In his Statement of Facts, Issues and Contentions provided to the Tribunal, the Minister stated that, based on the circumstances of his criminal offending, the appellant's conduct should be viewed as "particularly serious" and because of his exploitation of his mother-in-law, his conduct should be viewed "very seriously". It was apparent, the Minister argued, that "the [appellant] had arranged, with intention and forethought, to use an innocent person, his mother-in-law, to be his mule and to unknowingly carry the drugs across each border (Dubai and Australia)" with "little regard for the consequences" of his actions, including for his hapless mother-in-law. In oral argument the Minister contended that his crime was "exploitive". Those arguments picked up on remarks to like effect by the County Court judge who sentenced him for his role in the drug importation and to which the Tribunal referred in its summary of the Minister's submissions at [110] of its reasons.

93 The appellant volunteered to the Tribunal that he had used his mother-in-law as an "innocent person" to import drugs. The Tribunal asked him whether he thought she had trusted him, and that he took advantage of, and abused that trust, and the appellant agreed. The appellant admitted he put her life at risk for his own financial gain. It was not suggested that the questioning of the appellant about these matters involved any denial of procedural fairness.

94 Furthermore, as the Minister pointed out, the previously constituted Tribunal had identified the mother-in-law as a vulnerable member of the community for the purposes of Direction 79. In those circumstances, as the Minister put it, the instant Tribunal's finding was hardly unexpected.

95 It is impossible to imagine how the Tribunal's conclusion that the offending was very serious could have been any different. All the evidence pointed inexorably to that conclusion.

96 As a model litigant, the Minister drew our attention to the recent decision of the Full Court in *Garland v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 144.

97 Mr Garland had been convicted of assault occasioning bodily harm and sentenced to five years' imprisonment. In assessing the question whether there was "another reason" to revoke his visa cancellation, the Tribunal had taken the view that his victim, who had been struck on the head three times with a metal bar, was "vulnerable" within the meaning of Direction 90 because Mr Garland was "much larger than the victim". Justices Stewart and Hespe held at [53] that "the physical characteristics of the perpetrator relative to the victim are not what require the victim to be recognised as a vulnerable member of the community".

98 The appellant submitted that *Garland* "suggest[s]" that the appellant's mother-in-law is "not the kind of person that falls within the spectrum of a vulnerable member of a community". But this tentative complaint does not fall within proposed ground 5 and no application was made to expand that ground to raise it.

99 In any case, we would make the following observations about *Garland*.

100 First, the Tribunal's finding in that case was a finding that the *mere* difference in the physical characteristics of the perpetrator and the victim was sufficient to render the (smaller) victim "vulnerable" within the meaning of Direction 90. Justices Stewart and Hespe were, with respect, obviously correct to find that that difference alone was insufficient to constitute vulnerability within the meaning of Direction 90.

101 Secondly, counsel for Mr Garland conceded that the finding was immaterial in the circumstances of the case. So what the Full Court said was *obiter* in any event.

102 Thirdly, it is important to bear in mind, as Stewart and Hespe JJ recognised, that "a focus of concern in the Direction" is on identified vulnerable groups, "which include women, children, the elderly and the disabled, and on crimes against vulnerable people".

103 In the present case, the finding by the Tribunal that the appellant's mother-in-law was vulnerable within the meaning of Direction 79 had nothing to do with her "physical characteristics" and was not just reasonably open to it, but was plainly right.

**Proposed ground 6**

104 The appellant's counsel submitted that "yet again" the Tribunal had "breached" the principle that it was obliged to respond to a substantial, clearly articulated argument relying upon established facts, because it did not squarely address, and is taken to have overlooked, the appellant's generalised "risk of harm" claims, namely that: Burkina Faso is in political unrest; people are killed there; the Australian government advises people not go travel to Burkina Faso; half a million people have been displaced in Burkina Faso because of insecurity; and there is still ongoing hostility in Burkina Faso.

105 The appellant submitted that, had the Tribunal lawfully considered the appellant's generalised risk of harm claims, the appellant's case could have been more persuasive when it came to balancing the considerations which favoured revocation against those which favoured non-revocation in order to reach the ultimate decision.

106 It is apparent from a close reading of the transcript that, as the Minister submitted, the appellant's claim to fear harm in Burkina Faso was raised solely in the context of its consideration of Australia's non-refoulement obligations. In those circumstances, it could not be said that the appellant had raised "a substantial, clearly articulated argument" that he would be exposed to harm regardless of whether he was owed protection obligations. In any event, having regard to the opinions expressed by the Tribunal at [196] that "[t]he unpredictable nature of life in Burkina Faso, as disclosed by its history and recent development, is likely to result in considerable challenges for [the appellant] in establishing himself", repeated in substance at [197] (in the context of considering the extent of impediments he might face if removed to his country of nationality) and also at [210], we are not persuaded that the Tribunal did not take into account the potentially perilous conditions in Burkina Faso independent of the appellant's claims to be entitled to protection.

**Disposition**

107 As each of the proposed grounds is without merit, the application for leave to amend the notice of appeal will be refused and the appeal dismissed, with costs.

I certify that the preceding one hundred and seven (107) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Katzmann, O'Callaghan and McEvoy.

Associate:

Dated: 12 December 2023