FEDERAL COURT OF AUSTRALIA

Belmont v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 667

Review of:	*Belmont v Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2023] AATA 1285
File number(s):	NSD 543 of 2023
Judgment of:	**HORAN J**
Date of judgment:	21 June 2024
Catchwords:	**MIGRATION** – mandatory cancellation of visa on character grounds under s 501(3A) of the *Migration Act 1958* (Cth) – power to revoke cancellation if satisfied that there is another reason why the original decision should be revoked – where evidence before Administrative Appeals Tribunal that applicant had severe substance abuse issues requiring medical treatment – whether claim clearly arose that applicant may face impediments due to health if removed to New Zealand – whether Tribunal failed to have regard to a relevant consideration under para 9.2(1)(a) of *Direction No. 99: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* – whether Tribunal erred by treating s 501CA(4)(b)(ii) as involving an exercise of discretion – whether Tribunal erred by treating para 8.1.1(1)(c) of the Direction as precluding it from having regard to applicant's custodial sentences in considering the nature and seriousness of criminal conduct – held that Tribunal failed to address impediments that the applicant may face as a result of his health if removed from Australia to his home country – application allowed
Legislation:	*Migration Act 1958* (Cth) ss 501(3A), 501CA
Cases cited:	*Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315 *CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 318 *Demir v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 870 *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 293 FCR 509 *Doves v Minister for Immigration, Citizenship, Migrant*

Services and Multicultural Affairs [2022] FCAFC 134

El Khoueiry v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCAFC 136

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

GXXS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 468

Holloway v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCA 1126; 179 ALD 217

Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 450

Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2023) 300 FCR 67

JSMJ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1466

LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12; 98 ALJR 610

LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1039

Lucas v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1653

Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2023) 298 FCR 516

Nkani v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1410

Nkani v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCAFC 70

Okoh v Minister for Immigration, Citizenship and Multicultural Affairs (2023) 297 FCR 63

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

Plaintiff M1/2021 v Minister for Home Affairs (2022) 275 CLR 582

QYFM v Minister for Immigration, Citizenship and Multicultural Affairs (No 2) (2023) 301 FCR 422

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

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

Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights

Number of paragraphs:	118
Date of hearing:	30 October 2023
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr G Johnson
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Solicitor for the Second Respondent:	The Second Respondent filed a submitting notice

ORDERS

NSD 543 of 2023

BETWEEN:	**JOHN RUDOLF DANSEL BELMONT** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY: **HORAN J**

DATE OF ORDER: **21 JUNE 2024**

THE COURT ORDERS THAT:

1. A writ of certiorari issue from the Court directed to the second respondent, quashing the second respondent's decision made on 22 May 2023.
2. A writ of mandamus issue directed to the second respondent, requiring the second respondent to reconsider and determine the applicant's application for review according to law.
3. The first respondent pay the applicant's costs as agreed or assessed.

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

REASONS FOR JUDGMENT

HORAN J:

1 The applicant is a citizen of New Zealand who was born on 15 July 1977, and was formerly the holder of a Class TY Subclass 444 Special Category (Temporary) visa (**Special Category visa**). His most recent arrival in Australia was in January 2019, although he had previously entered and left Australia on numerous occasions between January 1998 and December 2003, and from May 2011.

2 On 23 September 2021, the applicant was convicted in the Magistrates Court of Queensland of three counts of "Contravention of domestic violence order (aggravated offence)" and one count of breaching a probation order. The applicant was sentenced to 12 months' imprisonment for each count of his domestic violence order contravention offences and three months' imprisonment for his offence of breaching of a probation order .

3 On 9 November 2021, while he was serving a full-time sentence of imprisonment in a custodial institution, the applicant's Special Category visa was cancelled by the first respondent (the **Minister**) under s 501(3A) of the ***Migration Act*** *1958* (Cth).

4 On 27 February 2023, after the applicant had made written representations to the Minister requesting the revocation of the cancellation decision, a delegate of the Minister decided under s 501CA(4) of the Migration Act not to revoke the original decision.

5 The applicant applied to the second respondent (the **Tribunal**) for review of the non-revocation decision. On 22 May 2023, following a hearing at which the applicant and his father gave oral evidence, the Tribunal (constituted by two Senior Members) decided to affirm the delegate's decision not to revoke the cancellation of the applicant's Special Category visa. In reaching its decision, the Tribunal applied the written direction given by the Minister under s 499 of the Migration Act, "Direction No. 99: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA" (the **Direction**).

6 Pursuant to s 476A of the Migration Act, the applicant seeks judicial review of the Tribunal's decision on two grounds.

(a) First, the applicant alleges that the Tribunal "failed to complete the exercise of its jurisdiction", on the basis that it was required by para 9.2(1)(a) of the Direction to consider the applicant's health issues relating to alcohol abuse and drug addiction in the

context of its consideration of the extent of any impediments that the applicant may face if removed from Australia to New Zealand, and that it failed to do so.

(b) Secondly, the applicant alleges that the Tribunal "acted on a misunderstanding of the law", either by proceeding on an erroneous understanding that the matter of which it was required to be satisfied under s 501CA(4)(b) of the Migration Act (namely, that there was "another reason why the original decision should be revoked") involved an exercise of discretion, or by erroneously concluding that it was precluded by para 8.1.1(1)(c) of the Direction from taking into account the applicant's sentences for various offences involving crimes of a violent nature against women and acts of family violence.

7 For the reasons set out below, the first ground is upheld. In circumstances where the Tribunal accepted on the evidence that the applicant was suffering from a medical or psychological condition in relation to substance abuse and addiction that required clinical treatment and supervision, the Tribunal failed to take into account that health-related issue when considering the extent of any impediments that the applicant may face in establishing himself and maintaining basic living standards in New Zealand for the purposes of para 9.2(1)(a) of the Direction. I consider that this error was material to the Tribunal's decision. Accordingly, the Tribunal's decision should be set aside, and the matter should be remitted to the Tribunal for redetermination.

LEGISLATIVE FRAMEWORK

8 Section 501(3A) of the Migration Act provides:

> The Minister must cancel a visa that has been granted to a person if:
>
> (a) the Minister is satisfied that the person does not pass the character test because of the operation of:
>
> (i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or
>
> (ii) paragraph (6)(e) (sexually based offences involving a child); and
>
> (b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

9 Section 501(6)(a) provides that a person does not pass the character test if the person has a substantial criminal record, as defined by subsection (7). Relevantly, s 501(7)(c) provides that

a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

10 Section 501CA applies if the Minister makes a decision (referred to as the **original decision**) under s 501(3A) to cancel a visa that has been granted to that person. Section 501CA relevantly provides:

> (3) As soon as practicable after making the original decision, the Minister must:
>
> (a) give the person, in the way that the Minister considers appropriate in the circumstances:
>
> (i) a written notice that sets out the original decision; and
>
> (ii) particulars of the relevant information; and
>
> (b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.
>
> (4) The Minister may revoke the original decision if:
>
> (a) the person makes representations in accordance with the invitation; and
>
> (b) the Minister is satisfied:
>
> (i) that the person passes the character test (as defined by section 501); or
>
> (ii) that there is another reason why the original decision should be revoked.

11 Section 499(1) of the Migration Act provides that the Minister may give written directions to a person or body about the performance of functions or the exercise of powers under the Act. The person or body is required to comply with such a direction: s 499(2A).

12 The Direction was made by the Minister on 23 January 2023, and commenced operation on 3 March 2023. It revoked the previous written direction given under s 499 of the Migration Act ("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"), which was in force at the time that the original decision was made not to revoke the cancellation of the applicant's Special Category visa. Direction No. 99 was in force at the time of the Tribunal's decision to affirm the non-revocation decision.

13 Paragraph 5.1 of the Direction addresses the statutory objectives of the Migration Act, including the powers to refuse or cancel a visa on character grounds. Paragraph 5.1(4) states that the purpose of the Direction "is to guide decision-makers in performing functions or

exercising powers under section 501 and 501CA of the [Migration] Act", noting that decision-makers are required by s 499(2A) to comply with the direction. Paragraph 5.2 sets out a number of principles that "provide the framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under section 501, or whether to revoke a mandatory cancellation under section 501CA", and states that "[t]he factors (to the extent relevant in the particular case) that must be considered in making a decision under section 501 or section 501CA of the [Migration] Act are identified in Part 2" of the Direction.

14 Under the Direction, a decision-maker is required to take into account the primary and other considerations identified in ss 8 and 9 of the Direction, where those considerations are relevant to the decision and the individual case: see paras 5.1(6) and 6. Primary considerations should generally be given greater weight than the other considerations: para 7(2). One or more primary considerations may outweigh other primary considerations: para 7(3).

15 The primary considerations are identified in para 8 of the Direction as follows:

> (1) protection of the Australian community from criminal or other serious conduct;
>
> (2) whether the conduct engaged in constituted family violence;
>
> (3) the strength, nature and duration of ties to Australia;
>
> (4) the best interests of minor children in Australia;
>
> (5) expectations of the Australian community.

16 Relevantly to the present case, in relation to the first primary consideration, para 8.1(2) requires decision-makers to give consideration to the nature and seriousness of the non-citizen's conduct to date, and the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct. In relation to the nature and seriousness of the conduct, para 8.1.1 relevantly provides:

> **8.1.1 The nature and seriousness of the conduct**
>
> (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 the following:
>
> a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:
>
> i. violent and/or sexual crimes;
>
> ii. crimes of a violent nature against women or children,

regardless of the sentence imposed;

iii. acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

i. causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

ii. 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;

iii. any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));

iv. where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;

c) with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;

...

(Emphasis added.)

17 Paragraph 9(1) of the Direction sets out other considerations that must be taken into account where relevant, including but not limited to:

a) legal consequences of the decision;

b) extent of impediments if removed;

c) impact on victims;

d) impact on Australian business interests

18 Paragraph 9.2 deals with the extent of impediments if removed:

9.2 Extent of impediments if removed

(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into

account:

a) the non-citizen's age and health;

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

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

(Emphasis added.)

THE TRIBUNAL'S DECISION

19 As mentioned above, the Tribunal affirmed the delegate's decision not to revoke the cancellation of the applicant's Special Category visa, and provided written reasons for its decision on 22 May 2023 (**Reasons**).

20 Towards the commencement of the Reasons (at [8]), the Tribunal identified the two issues for its determination in the following terms:

(a) whether the Applicant passes the character test; or

(b) whether there is another reason why the decision to cancel the Applicant's Visa should be revoked.

(Emphasis added.)

Each of those issues was reflected in a separate heading in the Reasons.

21 It was common ground before the Tribunal that the applicant did not pass the character test based on his "substantial criminal record", and the Tribunal made a finding to that effect: Reasons at [9].

22 The Tribunal commenced its analysis of the second issue, under the heading "Is there another reason for the revocation of the cancellation of the Applicant's Visa", with the following statement in relation to the application of the Direction (Reasons at [10]):

> **In considering whether there is another reason to exercise the discretion in s 501CA(4) of the Act**, the Tribunal is bound by s 499(2A) of the Act to comply with any directions made under the Act.
>
> (Emphasis added.)

23 The Tribunal proceeded to set out the principles in para 5.2 of the Direction which inform the application of the relevant considerations "[f]or the purposes of deciding whether or not to revoke the mandatory cancellation of a non-citizen's visa": Reasons at [11]. Each of the primary considerations and other considerations identified in ss 8 and 9 of the Direction were addressed under a discrete heading.

24 In relation to Primary Consideration 1 (protection of the Australian community), the Tribunal noted that the applicant had "compiled a relatively lengthy history of criminal offending in this country", comprising 21 offences that were dealt with in 13 "sentencing episodes" in the Magistrates Court of Western Australia and the Magistrates Court of Queensland from November 2015 to September 2021. The earlier offences included various public nuisances, minor drug possession offences, and riding a bicycle without lights and a helmet. Most of those convictions resulted in fines ranging from $5 up to $1,000. The applicant's more serious offending comprised his convictions in June 2020 for contraventions of a domestic violence order and convictions in September 2021 for breaches of a probation order and aggravated contraventions of a domestic violence order. It was in respect of the latter convictions that the applicant was sentenced to a term of imprisonment of 12 months, so as to trigger the mandatory cancellation of his visa under s 501(3A) of the Migration Act.

25 The Tribunal also referred to the applicant's history of traffic infringements from October 2020 to June 2021. These infringements had resulted in the imposition of 26 demerit points over an eight-month period, culminating in a conviction for unlicensed driving and a six-month suspension of his drivers' licence. The Tribunal stated that it was "of further concern" that the applicant's first traffic infringement during this period involved having a child over six months but less than four years of age travel unrestrained in a vehicle he was driving.

26 The Tribunal addressed the nature and seriousness of the applicant's conduct under para 8.1.1 of the Direction.

(a) Relevantly, for para 8.1.1(a) the Tribunal found that the applicant had convictions for multiple violent offences, in which "violence had been visited upon female victims in the context of family violence-type offending". Referring to the sentencing remarks in the Magistrates Court of Queensland in September 2021, the Tribunal found that the applicant's offending fell squarely within paras 8.1.1(a)(i), (ii) and (iii). Having regard to para 8.1.1 of the Direction, the Tribunal considered "the Applicant's domestically violent conduct against female victims to be very serious": Reasons at [21].

(b) In relation to para 8.1.1(b) of the Direction, the Tribunal noted that the applicant had not committed an offence falling within paras 8.1.1(b)(i), (iii) or (iv). The Tribunal had regard to the circumstances of an offence of obstructing a police officer of which the applicant had been convicted in October 2018, which the Tribunal characterised as "a direct challenge to the lawful authority of a police officer charged with responsibility

for public order and safety at a significant community event". These remarks appear to have been referable to para 8.1.1.(b)(ii) of the Direction, which is relevantly concerned with "crimes committed against … government representatives or officials due to the position they hold, or in the performance of their duties". The Tribunal found that the applicant's "reprehensible conduct towards those police officers must be viewed (at the very least) as serious": Reasons at [24].

(c) The Tribunal stated that, in applying para 8.1.1(1)(c) of the Direction, it was "precluded from taking into account sentences imposed on this Applicant" for any violent offending he may have committed against women, acts of family violence, or any sentence he received relating to conduct whereby he caused a person to enter into or to become a party to a forced marriage, referring to the crimes covered by subparas 8.1.1(a)(i), (a)(ii) and (b)(i) respectively. The Tribunal continued (Reasons at [26]-[28]):

> I am therefore precluded from taking [in]to account the custodial terms imposed on this Applicant in September 2021 (three months), and again in September 2021 (12 months) and again in June 2020 (65 days). These custodial terms – in terms of the Applicant's sequence of the commission of 21 offences – appear from offence 17 to offence 21. The previous 16 offences were almost exclusively punished by fines ranging from $5 to $1000.
>
> It is both difficult and unsafe to allocate any measure of quantifiable weight against the Applicant when one has regard to the exclusively non-custodial nature of the sentences imposed for this non-precluded offending. It suffices to say that while the sentences imposed on the Applicant for his precluded offending are significant, the sentences for the non-precluded offending are of a comparatively much milder level.
>
> The penalties imposed on the Applicant for his traffic offending should also be considered here. Of course, none of those offences involved the imposition of custodial time. That said, the sentences imposed over a barely eight month period of offending are significant insofar as traffic offending is concerned. This is because (1) the offending during that eight month period is remarkable for its consistency and repeated nature; and (2) it culminated in the cancellation of the Applicant's driving privileges for six months.

(d) The Tribunal was satisfied that, overall, para 8.1.1(1)(c) "militates in favour of a finding that the sentences imposed by the courts for [the applicant's] offending do point to the (at least) serious nature of his offending and, more likely, to its very serious nature": Reasons at [29].

(e) The Tribunal proceeded to consider each of the remaining subparagraphs of para 8.1.1, including the frequency of the applicant's offending, the trend of increasing seriousness in the applicant's criminal history, and the cumulative effects of the applicant's repeated

offending. The Tribunal considered that these factors supported a finding that the totality of the applicant's offending had been of a serious or very serious nature. The Tribunal also considered whether the applicant had provided false information in an incoming passenger card and whether the applicant had convictions for offending in New Zealand, but gave these factors only "moderate" or "slight" weight respectively in favour of a finding that the applicant's conduct had been of a serious nature.

(f) Accordingly, the Tribunal concluded that para 8.1.1(1) of the Direction lead to the conclusion that "the totality of the Applicant's unlawful conduct in this country does reach a threshold of being 'very serious'": Reasons at [44].

27 The Tribunal then turned to consider para 8.1.2 of the Direction in relation to the risk to the Australian community should the applicant commit further offences or engage in other serious conduct.

28 The first consideration under para 8.1.2(a) involved the nature of the harm to individuals or the Australian community from further criminal or other serious conduct. The Tribunal recognised that the recommission by the applicant of the offences involving public nuisance, drug possession or traffic infringements would not necessarily result in any significant level of harm beyond the consumption of "the community's policing and/or judicial sentencing resources". However, the position was "starkly different" in relation to the offences involving serious domestic violence, in respect of which the Tribunal found that "such conduct could very well result in physical, psychological and, quite conceivably, catastrophic harm to a victim": Reasons at [49].

29 The next consideration under para 8.1.2(b) was the likelihood of the applicant engaging in further criminal or other serious conduct of this nature. This included the applicant's written evidence which purported to explain "the circumstances in which his substance abuse issues became a very significant predispositive element behind his offending conduct": Reasons at [50]. The Tribunal referred to evidence that the applicant has engaged with the "Lives Lived Well" organisation, a drug and alcohol counselling support service in Queensland. In a report dated April 2022, a counsellor and case manager from that organisation said that the applicant had told her he had abstained from alcohol for over 18 months, and that he had demonstrated insight into his past patterns and the resulting negative impacts associated with alcohol use. The Tribunal referred to evidence that he had completed a number of courses during his time

in immigration detention, including in relation to family violence, depression, anger management, and drug and alcohol abuse.

30 In the course of his oral evidence at the Tribunal hearing, the applicant responded to questions regarding his substance abuse and risk of recidivism. The Tribunal found that the applicant readily accepted that his abuse of alcohol and illicit drugs had been the "primary causative factors behind his offending", and that there was "a pattern in his past offending history that saw him dealt with for offending as a result of substance abuse issues, being returned to the community and then returning to abusing substances, primarily alcohol": Reasons at [57]-[58]. The applicant reassured the Tribunal that, on his return to the community, he would be able to "self-regulate his consumption of alcohol so as to avoid a further relapse", referring to the courses that he had completed and his ongoing support network. He said that he would live with his parents in Perth and was confident that he would be able to find work in the mining industry in Western Australia.

31 The Tribunal then set out at [59] of its Reasons the following exchange from the hearing in relation to the applicant's rehabilitation from past addictions, noting that he had "agreed that this issue remained a work in progress for him":

> SENIOR MEMBER TAVOULARIS: Yes and you're in the process of overcoming your addictions, aren't you?
> THE APPLICANT: Yes. Yes.
> SENIOR MEMBER TAVOULARIS: It's still a work in progress for you?
> THE APPLICANT: Still a work in progress, that's right Member.
> SENIOR MEMBER TAVOULARIS: Still working at it. Not there yet?
> THE APPLICANT: Still working at it, not there yet.
> SENIOR MEMBER TAVOULARIS: You'd agree with that?
> THE APPLICANT: I'd agree with that 100 per cent.

32 In answering subsequent questions, the applicant rated his chances of not reverting to severe drug and alcohol use if things were to become difficult for him as a "seven to eight [out of ten] because there's still progress to work". He acknowledged that on previous occasions he had "just let it go", but stated that his parents were going to support him. He agreed "100 percent" that he had a problem with substance abuse, and that "his past difficulties with illicit drugs and alcohol have been severe enough such as to now give rise to a requirement that he be under the care of a suitably clinical expert": Reasons at [61].

33 The Tribunal accepted a risk assessment by the Department of Corrective Services that the applicant had a "low recidivist risk", on the conditional basis that this assessment was directed to the risk of further general offending and "was not indicative of his risk of violent offending".

The Department's risk assessment had acknowledged the applicant's "high intervention needs in the areas of employment, substance abuse, domestic violence (perpetrator) and domestic violence (victim)", which the Tribunal regarded as "consistent with the applicant's own evidence that his rehabilitation remained a work in progress and that, in his own words, he would return to the community on the basis of being 'seven out of 10' rehabilitated". The Tribunal noted this evidence was "concerning in circumstances where illicit drugs and/or alcohol will be more readily available to him than was the case in both prison and immigration detention": Reasons at [64].

34 In assessing the applicant's risk of recidivism, the Tribunal acknowledged that the applicant had "accepted that a predisposition to abuse either or both alcohol and methylamphetamine has been primarily causative of his past offending", and commended the applicant "for being forthright enough to now accept that his past difficulties with substance abuse have been of such a magnitude that management and control of that symptomatology should be in the hands of a suitably qualified clinical expert". However, the Tribunal found that "the significant difficulty for this Applicant is that this Tribunal cannot be certain that he will undertake and adhere to the required level of rehabilitative care and management for his substance abuse issues upon his return to the community". The Tribunal considered that the applicant's apparent willingness to engage in rehabilitative courses, while commendable, went "no further than the Applicant demonstrating a desire to undertake courses and to talk to others about his substance abuse issues" and was "not evidence of a demonstrated and ongoing pattern of rehabilitative care, management and control of the predispositive symptoms around substance abuse that have led to his very serious past offending". Although "at first blush" it appeared that the applicant had protective factors working in his favour, he had previously had the benefit of such protective elements but had nevertheless sought refuge in illicit drugs and alcohol "when things went awry for him". The Tribunal did not consider that the applicant's level of resilience would be all that different in the short to medium term future.

35 The Tribunal stated (Reasons at [66]):

> In terms of an actual finding about the level of his recidivist risk, it should be noted that he has a long history of persistent substance abuse allied to repeated offending. He has reoffended while supervisory and other intervention-based orders have been in place. While his capacity to be resilient towards life's difficulties may have marginally improved, it is difficult for this Tribunal to have confidence that such resilience can be successfully maintained in circumstances where the Applicant acknowledges an on-going difficulty with substance abuse and that his journey towards overcoming such issues is a significant distance away from completion. The nature, extent and sheer

> violence of his offending against women in a domestic context is conduct that, if repeated, would be so serious that any risk of its re-commission would be unacceptable to the Australian community.

36 Accordingly, the Tribunal found that Primary Consideration 1 "confers a *heavy* level of weight against revocation of the mandatory cancellation of the Applicant's Visa": Reasons at [70].

37 The Tribunal made the same finding in respect of the weight afforded to Primary Consideration 2 (family violence): Reasons at [93]. The Tribunal referred to the applicant's convictions in September 2021 for offences involving family violence, noting that "his offending involved repeated and aggravated breaches of previously imposed domestic violence orders" so as to satisfy para 8.2(2)(a) of the Direction. The Tribunal found that the applicant's conduct was threatening and violent behaviour that caused its victim, a member of the applicant's family, to be fearful. The family violence conduct was repeated, frequent and "of a consistently sustained level of high seriousness" from its outset in mid-2020. After having regard to the factors set out in para 8.2(3) of the Direction, the Tribunal found that the applicant's family violence conduct was of a very serious nature and that, while the applicant had accepted responsibility for that conduct and had come to realise and understand its impact, his efforts to address the causative factors behind his offending "remain a work in progress": Reasons at [92].

38 In relation to Primary Consideration 3 (the strength, nature and duration of ties to Australia), the Tribunal expressed a view "that the totality of the evidence points to a certain, but not determinative, level of weight in favour of a finding that this Tribunal should restore the Applicant's visa status to remain here": Reasons at [112]. In other words, this primary consideration appears to have been given some weight in favour of revocation of the cancellation decision, but was not regarded as determinative.

39 In reaching this conclusion, the Tribunal considered the impact on members of the applicant's immediate family residing in Australia, including his parents and a sister. The Tribunal also considered the applicant's ties with his three biological children, who are all Australian citizens, as well as other family members and social links in Australia. The Tribunal had regard to the length of time that the applicant had resided in the Australian community, whether or not he had spent his formative years in Australia, and whether he had positively contributed to the Australian community during his time here.

40 In respect of Primary Consideration 4 (the best interests of minor children in Australia), the Tribunal noted that the applicant has three biological children (who were aged five, three and

two years) and one child of a previous relationship of the applicant's former partner (who is also the biological mother to the applicant's three other children). The applicant's biological children were in foster care, and the Tribunal found that neither the applicant nor their biological mother had any parental role in their lives. While the applicant had some visitation rights to see his children, the Tribunal found that the applicant and his former partner were "some distance away from securing primary parental care for these three children". Further, the Tribunal found that the applicant had perpetrated family violence conduct in the presence of his children, and that "[g]iven the unresolved nature of the Applicant's difficulties with alcohol and/or illicit substance abuse and its capacity to be causative of very serious offending by him, we are not confident that the children are not at risk of being exposed to similar domestic violence perpetrated in their presence by the Applicant": Reasons at [128] (see para 8.4(4)(g) of the Direction).

41 Ultimately, having regard to the "cumulative best interests" of the children, the Tribunal found that Primary Consideration 4 was of "neutral weight" in the determination of the application.

42 The Tribunal concluded that Primary Consideration 5 (expectations of the Australian community) conferred a heavy level of weight against revocation of the cancellation decision given the very serious nature of the applicant's offending history, including acts of family violence against a woman and obstruction of a police officer: Reasons at [148]. While the Tribunal did not consider that there were any applicable factors that operated to lower the Australian community's tolerance of his criminal or other serious conduct, it also did not consider that the expectations of the Australian community were modified such that the community had a higher than usual tolerance of such conduct. The Tribunal was "of the view that the Applicant's very serious domestically violent conduct and the resulting harm from that conduct (thus far) has been of a sufficient magnitude such as to dispel any applicable countervailing considerations", and found that "the community expects that the Government can and should cancel his Visa".

43 The Tribunal addressed the "other considerations" listed in the Direction, to the extent that they were relevant.

44 In particular, the Tribunal assessed the extent of any impediments the applicant may face if removed from Australia, referring to para 9.2 of the Direction which requires the decision-makers to take into account, among other things, "the non-citizen's age and health" along with

"any social, medical and/or economic support available to that non-citizen" in their home country. The Tribunal said (Reasons at [151]-[152]):

> In his [Personal Circumstances Form], the Applicant was asked '*Do you have any diagnosed medical or psychological conditions?*' He ticked the 'Yes' box and refers to him as '*... going threw a hard time dealing with depression which im addressing now since ive been inside...*'.
>
> There is also reference to the Applicant previously having '*... suffered with rhythmic stutering [sic] which lowered his learning capacity over time*.' Apart from these symptoms, the Applicant appears to be in the prime of his life. It can be safely found that to whatever extent the Applicant may require treatment or assistance with these symptoms, he will, as a citizen of New Zealand, be able to access such support from New Zealand's public health care system which would not be starkly different to what would be available to him in Australia. We do not consider the Applicant's age and state of health are not factors constituting any impediments upon a removal to New Zealand.
>
> (Emphasis and errors in original.)

45 It may be noted that the final sentence in this extract contains a double negative that appears from its context to be a typographical error.

46 In its consideration of the applicant's age and health for the purposes of para 9.2(1)(a) of the Direction, the Tribunal did not expressly refer to the issues arising from his previous substance abuse and addiction.

47 The Tribunal went on to find, for the purposes of paras 9.2(1)(b) and (c) of the Direction, that the applicant will not face any significant or substantial language or cultural barriers on his return to New Zealand, that he is not "devoid of social support in New Zealand" (including from relatives), and that he "will be entitled to the same level of publicly available … health care as is available to other citizens of New Zealand": Reasons at [156].

48 Accordingly, the Tribunal concluded that "Other Consideration (b)" (the extent of impediments the applicant may face if removed from Australia) conferred "a slight but not determinative level of weight" in favour of the revocation of the cancellation decision.

49 In its conclusion, the Tribunal noted that there were "two alternate conditions precedent to the exercise of the discretion to revoke the mandatory cancellation of the Applicant's visa: either the Applicant must be found to pass the character test; or [w]e must be satisfied that there is another reason, pursuant to the Direction, to revoke the cancellation": Reasons at [161]. After summarising the weight given to each of the primary considerations, the Tribunal found that the combined weights of Primary Considerations 1, 2 and 5 respectively were sufficient to outweigh the combined weights allocated to Primary Consideration 3 and Other

Consideration (b). Accordingly, a "holistic view of the evidence" favoured affirming the non-revocation decision: Reasons at [163]-[164].

50 For those reasons, the Tribunal affirmed the decision not to revoke the cancellation of the applicant's Special Category visa.

CONSIDERATION

Ground one

51 This ground of review alleges that the Tribunal erred by failing to comply with para 9.2(1)(a) of the Direction in so far as that sub-paragraph required the Tribunal to take into account the applicant's "age and health" when considering the extent of any impediments that he may face in establishing himself and maintaining basic living standards if removed from Australia to New Zealand.

52 The applicant contends that there was evidence before the Tribunal that clearly raised his abuse of drugs and alcohol as issues affecting his health. He submitted that the Tribunal failed to refer to those health issues in the context of its consideration of the impediments that he may face if removed from Australia for the purposes of para 9.2(1)(a) of the Direction, and that the Tribunal's failure was a material error that could have affected the weight that it attributed to this consideration.

53 In support of this ground, the applicant submitted that it was apparent from the material and evidence before the Tribunal that he had ongoing health issues in relation to alcohol abuse and drug addiction that required medical treatment and supervision. This included the following evidence at the Tribunal hearing.

(a) In response to questions from the Tribunal, the applicant summarised his past involvement with alcohol and drugs. The applicant said that he had "tried nearly all of them but the main demon of them is actually drink and ice", and that his drinking "ended up being a lifelong obsession … from an early age". The applicant said that there were times when he was heavily using "ice", but that he had not done so for several years. He told the Tribunal: "yes I do have a drinking problem and I am a drug addict", but denied that he still had that problem and said that he had been "sober and clean" while he was in detention.

(b) The Tribunal asked the applicant a series of questions that focused on his "issues with substances". The applicant accepted that most, if not all, of his offending had occurred

while he had been affected by alcohol or drugs. The Tribunal asked the applicant what assurance he could give that he would not start abusing alcohol or drugs if he were to be released into the community. This led to the exchange in which the applicant agreed that he was in the process of overcoming his addictions, and that this remained a "work in progress".

(c) The Tribunal proceeded to explore with the applicant the nature of his substance abuse issues:

> SENIOR MEMBER TAVOULARIS: Okay. Final question. Once again I go back to your issues with drugs. More alcohol but drugs as well and let's collectively refer to those issues as substance issues. Substance abuse issues, right? I'm going to state the obvious. You've got a problem. Agree?
>
> MR BELMONT: Yes. I agree 100 per cent.
>
> SENIOR MEMBER TAVOULARIS: Okay and it is maybe both or one – **a psychological problem or a medical problem, a physical problem**. So it's a problem?
>
> MR BELMONT: Yes.
>
> SENIOR MEMBER TAVOULARIS: **And to fix those sorts of psych problems or health problem, medical physical problems you need an outside expert?**
>
> MR BELMONT: **Yes.**
>
> SENIOR MEMBER TAVOULARIS: **That's usually called obviously a medical doctor or a psychologist?**
>
> MR BELMONT: **Yes.**
>
> SENIOR MEMBER TAVOULARIS: Do you agree that the extent of your past difficulty with drugs and alcohol **really needs you to be under the care of that sort of clinical expert**?
>
> MR BELMONT: Yes and I did a psychologist report and I do have a doctor there and I've been working with this for 18 months since I've been in detention and it's what we've been working towards.
>
> SENIOR MEMBER TAVOULARIS: But you agree don't you?
>
> MR BELMONT: I do.
>
> SENIOR MEMBER TAVOULARIS: That your problems are severe enough?
>
> MR BELMONT: They are.
>
> SENIOR MEMBER TAVOULARIS: And **I'm not a doctor, but your problems with alcohol and substance abuse is severe enough or are severe enough to require a doctor for example to prescribe drugs to you to put you off going to alcohol, going to drugs, if there is such a drug, if there is such a medication that you could take. You need that, don't you surely?**
>
> MR BELMONT: **Yes, I do.**

(Emphasis added.)

54 As is apparent from the Reasons, the Tribunal appears to have explored these issues primarily in the context and for the purposes of its assessment of the likelihood of the applicant engaging in further criminal or other serious conduct. Thus, the Tribunal noted that the applicant had raised his substance abuse issues as a "very significant predispositive element behind his offending conduct": Reasons at [50], [57]. The Tribunal noted the applicant's concession that his recovery from alcohol and drug addiction was a "work in progress": Reasons at [59]-[60]. The Tribunal then relied on the applicant's concessions from the exchange set out above, namely that "those types of issues **require the intervention of an outside clinical expert**" and that "his past difficulties with illicit drugs and alcohol have been severe enough such as to now give rise to **a requirement that he be under the care of a suitably [sic] clinical expert**" (emphasis added): Reasons at [61].

55 Under the heading "Assessment of recidivist risk", the Tribunal relied on four factors as "being informative about the Applicant's current level of recidivist risk": Reasons at [62]. The first of those factors concerned the applicant's acceptance that "a predisposition to abuse either or both alcohol and methylamphetamine has been primarily causative of his past offending", in relation to which the Tribunal commended the applicant –

> … for being forthright enough to now accept that **his past difficulties with substance abuse have been of such a magnitude that management and control of that symptomatology should be in the hands of a suitably qualified clinical expert** who can (1) diagnose relevant predispositive symptoms; (2) suggest and implement a treatment plan such that; (3) the Applicant's prognostic outlook can be known with some measure of certainty.
>
> (Emphasis added.)

56 Nevertheless, the Tribunal had reservations about whether the applicant would "undertake and adhere to the required level of rehabilitative care and management for his substance abuse issues upon his return to the community": Reasons at [63].

57 The applicant's complaint is that, when the Tribunal came to consider "Other consideration (b)" in relation to the extent of any impediments that he may face if removed from Australia to New Zealand, it did not refer to or take into account his substance abuse issues or his need for medical treatment by a "suitably qualified clinical expert" to manage those issues. Instead, the Tribunal referred to the applicant's depression and his reduced learning capacity due to rhythmic stuttering, and found that "apart from these symptoms, the Applicant otherwise appears to be in the prime of his life": Reasons at [151]-[152]. The

applicant submitted that para 9.2(1)(a) of the Direction required the Tribunal to take into account his "age and health" when considering the extent of impediments that he may face in establishing himself and maintaining basic living standards in New Zealand, and that his difficulties with substance abuse were clearly raised on the evidence before the Tribunal as a medical problem involving his health.

58 The Minister submitted that the applicant did not make any representation to the Tribunal that his substance abuse issues would constitute or give rise to any impediments for him if removed from Australia, and that he did not raise those issues as being relevant to his health in the context of any such impediments in establishing himself and maintaining basic living standards in New Zealand.

59 The applicant completed a "Personal Circumstances Form" dated 21 April 2022, which contained a section on "Impediments to return" with the following questions on "health information":

> **Do you have any diagnosed medical or psychological conditions?** Yes ☑ No ☐
> If yes: provide details of the condition/s and explain what treatment you are receiving (for example, any prescription medication or counselling or other professional treatment). Provide evidence from a medical professional to support your claims.
>
> *as to my prison reports you can find and see my record and i'm going threw a hard time dealing with depression which i'm addressing now and since i've been inside, more information to come.*
>
> …
>
> **If you are currently being treated by any doctor/health professional/counsellor, provide details that you want the decision-maker to take into account. You may wish to provide a report regarding your treatment and progress**.
>
> yes on going support threw 100 Sugarmill Rd Pinkenba, detention more information to come
>
> (The address of the Brisbane Immigration Detention Centre is 100 Sugarmill Road, Pinkenba QLD.)

60 In the course of oral closing submissions by the Minister's legal representative at the hearing before the Tribunal, Senior Member Tavoularis foreshadowed the findings that ultimately appear in the Reasons at [152]:

> SENIOR MEMBER TAVOULARIS: The three subparagraphs in relation under consideration B. First, age and state of health. He's a man in his mid-40s, arguably in the prime of his life. There's no identifiable physical or mental health maladies confronting him. To the extent that there may be, they can be adequately dealt with in New Zealand, which has a broadly similar public health system as is available to him here.

61 These observations followed oral submissions made by the Minister's representative that the applicant's expressed fears about homelessness should not attract any great weight, in the light of his demonstrated ability to obtain and keep employment in Australia while he was on parole. The assertion by the Senior Member that the applicant did not confront any "identifiable physical or mental health maladies" is not easy to reconcile with the emphasis placed by the Tribunal earlier in the hearing on the applicant's "medical problems" requiring treatment by a clinical expert, which was ultimately reflected in findings made by the Tribunal. The Senior Member also stated that, in relation to medical support, the applicant would "have the benefit of those things that are available to other citizens of New Zealand" and that, to the extent that there were impediments arising from "the inevitable shock of … removal to a new country", that could not be dispositive in this matter. The Minister's representative expressed his agreement with the Tribunal's observations. The applicant did not address these issues in his oral reply submissions.

62 Accordingly, the Minister argued that the applicant did not disclose any health conditions in relation to his alcohol and drug addictions in his personal circumstances form, and did not make any claim before the Tribunal that those matters, or any ongoing need for treatment or assistance with his substance abuse issues, would have an adverse impact on his ability to establish himself and maintain basic living standards in New Zealand. In such circumstances, the Minister submitted that the Tribunal did not overlook or fail to deal with such issues when making findings about impediments arising from the applicant's age and health.

63 There are a number of recent decisions of this Court that have considered whether the Tribunal had failed to take into account an applicant's health in connection with substance abuse issues in the context of its consideration of the extent of impediments that he or she may face if removed from Australia. Those cases accept that there may be an obligation to address such matters if they are clearly articulated in the applicant's claims and representations or otherwise clearly arise on the materials before the Tribunal: see eg *Ibrahim v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 300 FCR 67 (***Ibrahim FC***) at [65], [68] (Logan, Rangiah and Markovic JJ).

64 In ***Holloway*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1126; 179 ALD 217, the applicant had made submissions before the Tribunal that he had an issue with addiction to drugs and claimed that it was reasonably foreseeable that he would relapse into serious drug misuse if he were to be removed to Canada. The Tribunal found that

there was a significant likelihood that Mr Holloway would relapse into drug use. However, in considering the impediments that Mr Holloway may face in his return to Canada, the Tribunal focused on his "present state of health" and thereby "excluded the possibility that [his] history of drug misuse and drug addiction may be brought to account in considering the extent of impediments that he might face in establishing himself and maintaining basic living standards if removed to Canada where he would not have family and social support": at [9]. Thus, the Tribunal found that it was not of the view that the applicant's "age and **present state of health** represent significant, or insurmountable impediments to his return and resettlement in Canada" (emphasis added).

65 In allowing the application and setting aside the Tribunal's decision, Colvin J held that the Tribunal had failed to give effect to para 9.2(1)(a) of Direction No 90 (which was in similar terms to the Direction in the present case) by adopting "an unduly narrow view of its meaning", so as "to confine the term 'health' to only include currently manifested health issues and difficulties": at [13], [14]. Justice Colvin relevantly said at [12]:

> Used in the phrase "age and health", the word health would ordinarily be understood to mean any aspect of a person's physical wellbeing and would include the overall state of a person's fitness and condition, including underlying health issues and ongoing effects of any past injury. Within ordinary parlance, a person's status as having a history of substance abuse, especially where there was evidence from which it may be concluded that there was a real risk of relapse into misuse of substances to such an extent that it would be an impediment to a person being able to establish and maintain basic living standards, is [an] aspect of that person's overall health.

66 His Honour held that Mr Holloway's propensity to relapse into substance abuse was an existing underlying condition that amounted to a "health-related issue", and that the Tribunal erred "in treating Mr Holloway as if his present state of health did not include his propensity to relapse into substance abuse (being a fact that it had found and acted upon elsewhere in its reasons)": at [14]-[15]. In reaching this conclusion, Colvin J rejected a submission advanced by the Minister that the effect of the Tribunal's reasoning was that there was no evidence of any recognised health condition "in the sense that there was no diagnosis of a mental health condition or other pathology that explained the history of drug use in a way that might be considered to form part of [Mr Holloway's] state of health".

67 The decision in *Holloway* is not on all fours with the present case, in so far as Mr Holloway had made an explicit submission to the Tribunal that his drug addiction and propensity to relapse was a health-related issue for the purposes of para 9.2(1)(a), and the error that was identified by Colvin J involved the Tribunal's misconstruction and misapplication of that

paragraph based on its acceptance of the factual foundation of Mr Holloway's submission. Nevertheless, the decision illustrates that a history of drug addiction and substance abuse is capable of raising issues about an applicant's health for the purposes of para 9.2(1)(a) that can be relevant to the impediments that may be faced by him or her if removed to another country. Justice Colvin (at [13]) rejected the approach that had been adopted by the Tribunal in that case, under which:

> … a person who presented with no issue or difficulty living in Australia (with available treatment and social support) but who had an underlying health condition that might be exacerbated if the person was removed to another country in a way that may be life threatening or physically debilitating would not be viewed as having an impediment. A person with a past history of mental illness, or a cancer diagnosis of remission or a medical condition of a kind where the person can maintain reasonable health provided they received regular pharmaceutical or other treatment are all examples of health conditions that would be excluded by the Tribunal's approach which only considers the current state of health of a person.

68 In ***LRMM*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039, Logan J held that the Tribunal had failed to take into account the applicant's health when making its decision to affirm the non-revocation of his visa. The evidence before the Tribunal included a report by a clinical psychologist that the applicant suffered from alcohol dependency disorder that was in "partial remission within a controlled environment": at [14]. As in the present case, the applicant's ability to remain sober in the wider community was considered by the Tribunal in the context of an assessment of his risk of reoffending. However, when dealing with the applicable paragraph of the Ministerial Direction dealing with impediments that the applicant may face if removed from Australia to his home country, the Tribunal referred only to a diagnosed adjustment disorder with the potential to develop into a major depressive disorder, and did not separately address the applicant's alcohol dependency disorder. Justice Logan concluded that the Tribunal had failed to take into account a relevant consideration of the applicant's health as specified in para 14.5 of the applicable Ministerial Direction, in circumstances where "the applicant, from the moment he sought revocation, made reference to his drinking, and **by the time of the hearing, that particular reference had matured into an expert diagnosis**": at [28] (emphasis added). His Honour stated (at [27]):

> Indeed, so important was the subject of the applicant's difficulties with alcohol to its reasoning process in respect of risk, it seems to me that the Tribunal on this occasion, and with all respect, has just forgotten that it was additionally necessary to advert to this health condition separately, as ministerially required, when addressing the requirements of [14.5]. Had the Tribunal addressed this subject, it may well have had to confront the discounting promoted in the reply submission on behalf of the applicant. It might also have had to confront the presence or otherwise of any medical facilities in Ethiopia to provide programs for rehabilitation or treatment of those with

> alcohol dependency disorder. A fair reading of the reference of the minister's specification of health in his direction is that, necessarily, that reference embraces alcohol dependency disorder.

69 In ***Ibrahim*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 450, on the other hand, SC Derrington J rejected a submission that the Tribunal failed to consider the applicant's drug addiction and mental health issues when considering the extent of any impediments he may face if removed from Australia to Lebanon. Her Honour noted (at [1]) that a similar issue had arisen in a series of recent proceedings, in each of which:

> … the gravamen of the complaint has been that a non-citizen's drug or alcohol use and/or dependency, which contributed to the relevant offending and which was considered relevant to the decision-maker's consideration of the non-citizen's risk of recidivism, was not identified by the decision-maker as an independent, albeit unarticulated, claim that 'clearly emerged' from the decision-maker's own findings and the material on which such findings were based, and which was therefore a mandatory consideration in relation to the extent of any impediments the non-citizen may face if removed from Australia to their home country.

70 On the facts in *Ibrahim*, the applicant did not represent to the Tribunal that there was any matter affecting his health which would be an impediment to establishing himself in Lebanon or that might hinder his maintenance of basic living standards, and positively disavowed any current health conditions: at [17]. Mr Ibrahim stated in his personal circumstances form that he had "completely stopped taking drugs" and had "overcome this habit". Nor did any claim clearly emerge on the materials before the Tribunal that Mr Ibrahim's health in connection with his drug use may be an impediment on his return to Lebanon. The Tribunal did not make any finding that Mr Ibrahim's drug use or his inability to self-regulate his emotions were matters affecting his health: see at [27]. The materials before the Tribunal did not establish that Mr Ibrahim had an ongoing drug addiction or psychological condition, and there was nothing to suggest that a person such as Mr Ibrahim, who was in generally good health, would be impeded in establishing himself and maintaining basic living standards in Lebanon: at [37]-[38].

71 The decision in *Ibrahim* at first instance was affirmed on appeal: see *Ibrahim FC*. The Full Court also drew attention to the absence of any finding by the Tribunal that Mr Ibrahim had an existing drug addiction, and the fact that Mr Ibrahim himself claimed that he had completely stopped taking drugs and had overcome his drug habit: at [59], [75]. In such circumstances, the Court did not consider that the materials before the Tribunal raised any claim of a drug addiction or risk of relapse as a health issue which might cause an impediment to Mr Ibrahim

in establishing himself and maintaining basic living standards if removed to Lebanon: see at [59], [74]-[76].

72 A similar ground of review was rejected by SC Derrington J in ***El Khoueiry*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 247, whose decision was upheld on appeal in *El Khoueiry v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCAFC 136 (Collier, Rangiah and Downes JJ) (***El Khoueiry FC***). While the Tribunal found that Mr El Khoueiry had a serious drug addiction that contributed to his criminal conduct, he had not made any specific representation nor presented any medical evidence that this was a health issue that would bear upon the impediments that he would face if removed to Lebanon: *El Khoueiry* at [40]-[43]; *El Khoueiry FC* at [46], [48]. Unlike in *LRRM*, there was no medical or other evidence that Mr El Khoueiry had a specific medical condition such as alcohol dependency disorder, or any other health issues that would result in impediments to his removal. Further, the Court found that the Tribunal had not overlooked Mr El Khoueiry's claim of drug addiction in the context of its consideration of the extent of any impediments that he may face if removed to Lebanon: *El Khoueiry* at [47]; *El Khoueiry FC* at [49].

73 This argument was also unsuccessfully raised by the applicant in ***GXXS*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 468. Justice Derrington concluded that the applicant in *GXXS* had not made any express representation or submission that he would suffer any impediments as a result of his unresolved alcohol dependency, and his Honour did not accept that any such claim had clearly emerged from the material before the Tribunal. There was sparse evidence as to the nature and degree of the applicant's present consumption of alcohol or his dependence on it and, in contrast to *LRRM*, the Tribunal had not made a finding that the applicant's past consumption of alcohol amounted to "anything approaching an 'alcohol dependency' of any sort": at [48]-[52]. Accepting that "a formal diagnosis of a medical condition" was not essential, Derrington J considered (at [95]) that "there must be, at least, evidence of some health-related issue which is of such significance that it might interfere with the applicant's capacity to establish themselves in their home country", and concluded that there was no such evidence in that case.

74 In any event, Derrington J expressed the view in *GXXS* that it was an error to construe the relevant paragraph of the Ministerial direction "as having the consequence that if some evidence emerges that an applicant has an adverse health condition, is of a certain age, is of a

particular culture, or speaks a particular language, the decision-maker is automatically required to undertake an inquiry into the other elements of the clause and then reach some conclusion about it": at [54], [93]. Even if the material raised a health-related issue relating to alcohol addiction, there must be evidence or material to suggest that he may face an impediment in establishing himself and maintaining basic living standards in his home country, including by reference to evidence demonstrating that "there is some qualitative difference between the circumstances in Australia and those in the applicant's home country": at [54]-[64].

75 In ***Manebona*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 298 FCR 516, the appellant argued that the Tribunal erred "by overlooking his health condition of alcohol dependency when it came to consider the extent of any impediments he may face if removed to the Solomon Islands, despite having found that he had such a condition (and used that condition against him) when considering risk to the community": at [103]. The Court (Logan, Rangiah and Goodman JJ) rejected the premise of this argument, concluding that the Tribunal had not found that the appellant had a condition of alcohol dependency: at [105], [109]-[110]. The Court also did not accept the appellant's alternative submission that the material before the Tribunal clearly raised an issue whether he had an alcohol dependency that might provide an impediment to establishing himself and maintaining basic living standards in the Solomon Islands: at [111]-[116]. While accepting the observations made by Colvin J in *Holloway* at [12] that a person's status as having a history of substance abuse may be an aspect of that person's overall health, the Court stated at [113]:

> That proposition may be accepted as generally true, but whether evidence of a history of substance abuse clearly raises an issue as to whether a person has a health condition and whether it may pose an impediment to their ability to establish and maintain basic living standards is very much a factual question which depends upon the content of the material before the decision-maker. The answer may turn on matters including any information about the nature and extent of the "substance abuse" problem, whether it presently exists and if not, the risk of relapse.

The appellant in *Manebona* was ultimately successful on a different ground that the Tribunal had denied him procedural fairness in the way in which it dealt with the evidence of his former partner, who was the victim of his past offending.

76 Shortly after the hearing in the present case, Markovic J dismissed a similar ground of review in ***Pewhairangi*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1322. Her Honour distinguished the decision in *LRRM*, and found that no claim had clearly emerged on the material before the Tribunal "to the effect that Mr Pewhairangi's drug, alcohol and gambling disorders and/or his depression and anxiety were health conditions to be

considered as an aspect of impediments to his removal": at [82]. There was no medical or other evidence that Mr Pewhairangi had any diagnosed medical condition, and he had not raised the alcohol and gambling issues as an impediment to his removal to New Zealand. This was despite there having been a "psychosocial assessment report" prepared for sentencing proceedings which discussed Mr Pewhairangi's drug and alcohol use and gambling addiction and expressed the view that he had an "alcohol use disorder and gambling disorder" as defined by DSM-5 (the *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition): see at [50(1)]. Nevertheless, Mr Pewhairangi had stated in his personal circumstances form that he did not have any medical or psychological conditions and, in contrast to *LRMM*, he had not subsequently qualified or changed this response by reference to any medical evidence. In so far as Mr Pewhairangi had claimed that being around members of his family in New Zealand who abused drugs and alcohol would not be the best environment for him and might cause him to relapse, the Tribunal had addressed that claim by noting the evidence regarding "some anti-social characteristics of his family in New Zealand" (at [72]).

77 The issue was considered by O'Bryan J in another decision handed down after the hearing in the present case, ***Nkani** v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1410. The Full Court recently dismissed an appeal from this decision: *Nkani v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 70 (Snaden, Downes and McEvoy JJ) (***Nkani FC***). The Tribunal made findings about Mr Nkani's history of drug and alcohol use in the context of its consideration of the protection of the Australian community and the risk of reoffending, but did not address whether he had a health issue associated with that drug and alcohol use that would be an impediment to establishing himself and maintaining basic living standards if he was removed from Australia to Zimbabwe. Mr Nkani had not made any representation to the effect that his use of drugs and alcohol would be an impediment to establishing himself and maintaining basic living standards if removed to Zimbabwe: *Nkani* at [63]. The Court did not consider that such a claim arose from the material before the Tribunal, and rejected the applicant's submission that "the issue of drug and alcohol addiction as a health issue requiring medication and treatment was 'very much in play' before the Tribunal": *Nkani* at [83]; *Nkani FC* at [39], [46]. Drawing a parallel with *Manebona*, the Full Court stated at [40]:

> … evidence or findings which reflect that the appellant misuses alcohol and drugs, has a propensity for poor behaviour or committing crimes while intoxicated and has required rehabilitative intervention does not compel a finding that the appellant has a

> dependency on alcohol amounting to a "health issue", let alone one that would impede his reintegration in Zimbabwe.

78 Notwithstanding the Tribunal's acceptance that Mr Nkani's use of alcohol and drugs was a factor in his offending and that he had made unsuccessful attempts at rehabilitation, the Tribunal "was unwilling to find, on the evidence before it, that Mr Nkani's use of drugs and alcohol gave rise to a health issue which needed to be addressed in the Tribunal's reasons": *Nkani* at [73]; *Nkani FC* at [41]-[44]. The Tribunal made express findings to the effect that "there was no medical diagnosis to support the proposition that Mr Nkani has a clinical diagnosis or dependency on alcohol as distinct from being what he describes as a 'binge drinker' who regularly got 'wasted', and the Tribunal cannot import into Mr Nkani's narrative a finding that he has a health issue which needs to be addressed in the Tribunal's findings": *Nkani* at [71(f)]. This was not taken to suggest that such a medical diagnosis was required in order to raise the issue: *Nkani* at [74], [81]. Nevertheless, in circumstances where "[o]ther evidence before the Tribunal indicated that the appellant's use or misuse of drugs and alcohol did not rise to the level of a 'health issue'" (*Nkani FC* at [41]-[44]), it explained why the Tribunal had not considered whether Mr Nkani's drug and alcohol use would give rise to an impediment if he were removed to Zimbabwe: *Nkani* at [82]; *Nkani FC* at [47]. This was "a logical consequence of its earlier finding that no 'health issue' of this kind existed, and thus no relevant health issue arose for consideration under paragraph 9.2(1)(a)": *Nkani FC* at [47].

79 In ***RPQB*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1419, Rofe J rejected an argument that the Tribunal erred by failing to consider the applicant's alcohol dependency disorder for the purposes of para 9.2(1)(a) of Direction 90. There was evidence before the Tribunal that the applicant had been diagnosed by a psychiatrist with "alcohol dependence currently in remission in the context of detention", although the psychiatrist had later expressed a view that he was no longer dependent on alcohol (at [74]). However, the applicant relied on his prolonged abstinence from alcohol and gave evidence that he had not used alcohol for some time and had "no intention to drink again" (at [75]). The applicant's prior consumption of alcohol was raised before the Tribunal in the context of the applicant's risk of recidivism and in the context of non-refoulement obligations. In relation to the former, the applicant submitted that he had stopped drinking alcohol and had no intention of drinking alcohol again. In relation to the latter, the applicant's claim was that he would be at risk of persecution for reasons of his past consumption of alcohol in Australia. There was no evidence to indicate that the applicant faced the possibility of relapsing into alcohol use or abuse (at

[83]). In such circumstances, Rofe J concluded that the Tribunal was not bound to consider the applicant's past alcohol dependence disorder as a relevant health condition for the purposes of para 9.2(1)(a) of Direction 90: at [84]-[85].

80 Arguments based on an alleged failure by the Tribunal to consider aspects of a non-citizen's health when considering the extent of impediments upon removal have also been rejected on the particular facts in *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 293 FCR 509 at [98]-[112] (Farrell, Moshinsky and Burley JJ), *Doves v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 134 at [30]-[50] (Nicholas, Thomas and Downes JJ) and *Okoh v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 297 FCR 63 at [48]-[67] (Thomas, O'Bryan and McElwaine JJ).

81 On the other hand, such an argument was upheld by Thawley J in *WCGD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1419; 180 ALD 355 at [44]-[48] and [52]-[64], in relation to a failure by the Tribunal to have regard to the applicant's depression in its consideration of the extent of impediments on removal for the purposes of an equivalent paragraph of the applicable Ministerial Direction, in circumstances where there was evidence that the applicant was suffering depression and had been prescribed anti-depressant medication, and that a consultant psychologist considered that the applicant "could benefit from remaining under the care of a medical practitioner to treat his depression and provide referrals (if needed)".

82 This survey of previous decisions illustrates that the question of whether or not the Tribunal failed to have regard to a mandatory relevant consideration under para 9.2(1)(a) of the Direction, or whether the Tribunal misunderstood or misinterpreted that paragraph, will ultimately turn on the facts of each case: see eg *Ibrahim* at [15]; *Manebona* at [113].

83 As has often been pointed out (see eg *Nkani* at [69]; *Manebona* at [95]), para 6 of the Direction requires the decision-maker to take into account the considerations identified in parasa 8 and 9 (the primary and other considerations) of the Direction "where relevant to the decision". There may be scope for the Tribunal to form a view that a specified consideration, or an aspect of a consideration, is not relevant to its decision on the facts of the individual case. Nevertheless, it is now settled that s 501CA(4) of the Migration Act requires the decision-maker to consider the representations made by the former visa holder, and that the obligation can encompass any claims that clearly arise on the materials before the decision-maker: see eg *Ibrahim FC* at [65],

referring to *CKT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 294 FCR 318 at [91] (Katzmann, Charlesworth and Burley JJ).

84 The central question in the present case is whether a claim was articulated by the applicant or clearly arose on the materials before the Tribunal to the effect that, for the purposes of para 9.2(1)(a) of the Direction, the applicant's drug and alcohol addictions were a health-related issue that would be relevant to the impediments that he may face in establishing himself and maintaining basic living standards if removed to New Zealand. If such a claim was articulated or clearly arose on the materials, the Court must consider whether the Tribunal failed to take the issue into account when considering the applicant's health as required by para 9.2(1)(a), and, if so, whether that failure was material to its decision.

85 In this regard, the question for this Court is not whether the applicant in fact suffers from a health issue that would present an impediment if removed to New Zealand. That is a question of fact within the province of the Tribunal. Rather, the question on judicial review is whether or not a claim was articulated by the applicant or clearly arose on the materials which required consideration by the Tribunal under para 9.2(1)(a) of the Direction. Upon such consideration, the Tribunal would make appropriate findings of fact about the nature and extent of any impediments within the meaning of para 9.2(1)(a) that the applicant may face if removed to New Zealand, and determine the weight to be given to this consideration in relation to the revocation decision.

86 Although previous cases in which similar issues have been addressed may provide guidance as an illustration of the application of principles to particular facts, care should be taken not to treat the outcomes of individual cases as establishing fixed categories that govern or control the case at hand: compare eg *CRS20 v Secretary, Department of Home Affairs* [2024] FCA 619 at [82] (Wheelahan J), and the discussion therein. Some cases might involve the Tribunal asking the wrong question by misconstruing the terms of para 9.2(1)(a) of the Direction: see eg *Holloway*. Other cases will involve an analysis of the material before the Tribunal to ascertain whether a health-related issue was clearly raised as a possible impediment that may be faced on removal, and a construction of the Tribunal's reasons to determine whether any such issue was taken into account. For such purposes, it is accepted that drug and alcohol addiction and other substance abuse issues are capable of being regarded as an aspect of a person's health within the meaning of para 9.2(1)(a): *Holloway* at [12]. Such health issues, including the risk of relapse into drug and alcohol abuse, are capable of presenting impediments

within the meaning of para 9.2(1)(a), that is, "impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country)".

87 In some cases, the presence or absence of a formal diagnosis that the applicant has a medical or psychological condition has been treated as significant in determining whether or not a health-related issue was clearly raised on the materials. However, the existence of a formal diagnosis is not essential in order for such a claim to arise for consideration under para 9.2(1)(a). On the other hand, there may be cases in which applicant seeks to disavow or rebut any drug or alcohol dependency in an effort to demonstrate rehabilitation and to address potential concerns about the risk to the Australian community, or where the Tribunal makes a finding that the applicant's drug or alcohol use in connection with prior offending does not amount to a health issue: see eg *Ibrahim*, *Manebona*, *Nkani* and *RPQB*. Or it may be sufficiently clear from the Tribunal's reasons that it did not fail to take into account an applicant's drug or alcohol addiction when considering the impediments that may be faced by the applicant if removed to his or her home country: see eg *El Khoueiry*.

88 In the present case, the salient aspects of the material before the Tribunal were as follows.

(a) The applicant did not disclose in his "Personal Circumstances Form" that he had any diagnosed medical or psychological condition in relation to his substance abuse. He referred only to his difficulties in "dealing with depression" (see [0] above).

(b) In the Tribunal proceedings, the Minister filed a statement of facts, issues and contentions (**SOFIC**) dated 20 April 2023. In addressing the risk to the Australian community, the Minister's SOFIC referred to the applicant's "alcohol misuse" as one of the factors that underpinned his offending. In the context of the extent of any impediments that the applicant may face if removed, the SOFIC stated that the applicant "appears to have diagnoses of depression and anxiety which result in panic attacks and has historically had a stutter", but did not otherwise refer to any issues concerning the applicant's health. The Minister contended that the applicant would have access to social, medical and economic support systems in New Zealand that were of an equivalent quality to those in Australia, "such that the applicant's health should not be a barrier to his return to New Zealand".

(c) The applicant, who was not legally represented before the Tribunal, provided a brief written submission in the form of a letter to the Tribunal dated 26 April 2023, in which he appealed to the Tribunal to grant him a visa to return to the Australian community. In this submission, the applicant emphasised his family and his rehabilitation efforts, but did not refer to his substance abuse issues.

(d) There was some material before the Tribunal in relation to the applicant's completion of counselling and courses for drug and alcohol abuse.

(e) In the course of the Tribunal hearing, Senior Member Tavoularis questioned the applicant intensively about his substance abuse, in the immediate context of an exploration of the causative factors behind his offending. The Senior Member extracted concessions from the applicant that he was still "in the process of overcoming [his] addictions, that he was "still working at it" and that he was "not there yet". This led to the exchange that is reproduced above at paragraph [0] above in which the Senior Member put to the applicant that he had a "psychological problem or a medical problem" with substance abuse, and that to fix such "psych" or "health" problems he would need to be under the care of a "clinical expert" such as "a medical doctor or a psychologist". The Senior Member put to the applicant that his substance abuse problems were "severe enough to require a doctor for example to prescribe drugs to you to put you off going to alcohol, going to drugs". The applicant readily accepted these propositions when they were put to him by the Senior Member.

(f) The Tribunal relied on this evidence in its Reasons to make findings that the applicant's substance abuse issues were such as to require "management and control" by a "suitably qualified clinical expert". The Tribunal contemplated that the clinical expert (which may be taken to mean a medical doctor or psychologist) would need to "diagnose relevant predispositive symptoms" and "suggest and implement a treatment plan", such "the Applicant's prognostic outlook can be known with some measure of certainty": Reasons at [61]-[62].

89 In these circumstances, I consider that a claim clearly emerged from or arose on the material and evidence before the Tribunal to the effect that the applicant was suffering from a health-related issue involving severe substance addiction which required ongoing medical treatment and supervision in order to address a potential risk of relapse into drug or alcohol abuse in the future. While there was no formal medical diagnosis before the Tribunal, the Tribunal clearly proceeded on the basis that the applicant was suffering from such a medical or psychological

problem or condition, and the applicant readily adopted that proposition in the course of his oral evidence.

90 It is true that the applicant did not advance an explicit claim or representation that his drug and alcohol addiction would give rise to any impediments in establishing himself or maintaining basic living standards in New Zealand. Nevertheless, the fact of his medical or psychological condition necessarily entailed a risk of relapse into substance abuse, particularly in the absence of appropriate clinical treatment and supervision, which might impact upon his ability to establish himself and to maintain basic living standards compared with other New Zealand citizens. The Tribunal was required by para 9.2(1)(a) of the Direction to take such matters into account in considering any impediments that the applicant might face if removed from Australia.

91 It is also true that the Tribunal made a finding (at [152]) that the applicant will "be able to access such support from New Zealand's public health care system which would not be starkly different to what would be available to him in Australia". However, this finding was expressly directed to the availability of treatment or assistance with the symptoms of rhythmic stuttering, and cannot be taken as having addressed the comparative availability of clinical treatment or supervision for the applicant's "severe" substance abuse issues.

92 Separately, in relation to para 9.2(1)(c) of the Direction, which requires the decision-maker to take into account "any social, medical and/or economic support" available to the applicant in his or her home country, the Tribunal found (at [155]) that the applicant would have access to "governmental assistance in the form of publicly available health care and/or social security or welfare benefits to assist with his re-settlement in New Zealand … to the same extent as is generally available to other citizens of that country", and (at [156]) that the applicant "will be entitled to the same level of publicly available … health care as is available to other citizens of New Zealand". Again, however, these findings were not directed to the availability of health care for substance abuse issues, and the Tribunal did not make any finding about the extent of such health care for New Zealand citizens or its comparability to the health care system in Australia.

93 Accordingly, I find that the Tribunal erred by failing to have regard to a mandatory relevant consideration under para 9.2(1)(a) of the Direction, namely whether the applicant may face impediments if removed to New Zealand as a consequence of his medical or psychological condition relating to substance abuse and addiction.

94 The Minister submitted that, if the Tribunal erred in its consideration of para 9.2(1)(a) of the Direction, any such error was not material to its decision. This submission was primarily based on the Tribunal's findings that the applicant would in any event be able to access support from the public health system in New Zealand and that such support would be comparable to what was available in Australia. As noted above, those particular findings were not addressed to the particular health issues raised by the applicant's substance abuse and addiction, and therefore do not demonstrate that there was no realistic possibility of a different outcome had the Tribunal properly considered those issues.

95 More generally, I am satisfied that the Tribunal's error was material to its decision. In ***LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*** [2024] HCA 12; 98 ALJR 610, the High Court recently considered whether a failure to comply with a Ministerial direction under s 499(2A) was material to an exercise of power conferred by s 501CA(4) of the Migration Act not to revoke a cancellation decision. The plurality (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ) emphasised at [15] that "a court called upon to determine whether the threshold [of materiality] has been met must be careful not to assume the function of the decision-maker" (compare Beech-Jones J at [49]). As the plurality stated at [29], "[a] reviewing court does not engage in a review of the merits of the decision, reconstruct a decision making process, rework the apparent basis upon which a decision has been made, or rewrite the reasons for decision". Accordingly, in the particular context of an exercise of power under s 501CA(4) involving the process of evaluation called for by the applicable Ministerial Direction, the court on judicial review cannot make "assumptions about how the Tribunal would have undertaken the weighing exercise" under the direction. The threshold of materiality is met if "there is a possibility, not fanciful or improbable, that the decision that was made in fact *could* have been different if the error had not occurred": at [36].

96 In circumstances where the Tribunal's failure to take into account the applicant's health-related issues under para 9.2(1)(a) might have affected the weight that it accorded to that consideration in deciding whether there was another reason to revoke the cancellation of the applicant's Special Category visa, I am satisfied that there was a realistic possibility that the Tribunal's evaluative conclusion could have been different if there had been no error. The Tribunal gave "other consideration (b)" under para 9.2 of the Direction "a slight but not determinative level of weight" in favour of the revocation of the cancellation decision. The possibility is not fanciful or remote that the Tribunal might have given a greater level of weight to this

consideration if it had taken into account the impediments that may be faced by the applicant in New Zealand as a consequence of his health-related issues in connection with substance abuse. In turn, notwithstanding the heavy weight against revocation that was given to several primary considerations, there is a realistic possibility that the Tribunal's "holistic view" and ultimate conclusion on the combined weights of the primary and other considerations could have been different.

97 For these reasons, I uphold ground 1.

Ground two

98 The second ground of review in the originating application alleges that the Tribunal acted on a misunderstanding of the law, and is expressed to have two distinct "strands".

(a) First, that the Tribunal erred in concluding that s 501CA(4) involved an exercise of discretion, rather than forming a state of satisfaction that there was another reason why the original cancellation decision should be revoked.

(b) Secondly, that the Tribunal erred in finding that para 8.1.1(1)(c) of the Direction precluded it from taking into account the sentences imposed upon the applicant for offences involving crimes of a violent nature against women and acts of family violence, when para 8.1.1(1)(c) merely directs the Tribunal as to what are mandatory considerations that it is bound to consider and therefore does not forbid or preclude it from taking into account all the criminal sentences imposed on the applicant.

The first strand

99 The first strand relies principally on the Full Court's decision in ***Au*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 315. In that case, a decision by the Tribunal to affirm a non-revocation decision under s 501CA(4) was set aside on the ground that the Tribunal had failed to address the correct question under s 501CA(4)(b)(ii), namely whether there was "another reason why the original decision should be revoked", and that this error was material to the Tribunal's decision. Instead, the Tribunal had perceived that the decision under review was the exercise of a discretion whether to revoke the cancellation decision, and had purported to "re-exercise" that discretion: see *Au* at [17]-[19] (Derrington J, with whom Perry J agreed), [100]-[104], [151]-[153] (O'Sullivan J). The Tribunal had repeatedly stated in its reasons that it was exercising a discretion whether to

revoke, and there was nothing in the Tribunal's reasons to suggest that it had understood the correct question to be determined under s 501CA(4)(b)(ii): *Au* at [22]-[23], [26] (Derrington J).

100 The Full Court in *Au* drew a distinction between, on the one hand, the formation of a state of mind as to whether there was another reason for revocation and, on the other hand, the exercise of a discretion whether to revoke a cancellation decision: *Au* at [29] (Derrington J), [154], [165] (O'Sullivan J). While accepting that the formation of a state of mind can be regarded as involving an exercise of discretion "in a broad sense", Derrington J considered that the former involved a different "mental process" and was "both functionally and legally, substantively different from exercising a general discretion": *Au* at [33]-[34], [36]. His Honour stated at [51]:

> The Tribunal member did not address the question of whether, on the material, there was "another reason for revocation". Instead, it asked itself whether, as a matter of discretion, the cancellation decision should be revoked. As identified previously those two considerations are functionally and substantively different. The former does not seek to determine whether the cancellation decision should be revoked, but only whether there is another reason for doing so.

101 Similarly, O'Sullivan J concluded at [167]:

> … the evaluative process undertaken by the Tribunal in s 501CA(4)(b)(ii) demands a unique outcome. That outcome is not to be reached by approaching the matters to be considered against the background of, and with a view to, reaching a conclusion in the exercise of a discretion.

102 His Honour held that the Tribunal had not engaged in "the deliberative process of evaluation required of it by s 504CA(4)(b)(ii), so as to arrive at a unique conclusion", but had instead "engaged in that exercise with some latitude as to the decision to be made": *Au* at [168].

103 In such circumstances, the Full Court held that the Tribunal's error was material to its decision, so as to amount to jurisdictional error, because there was a realistic possibility that the Tribunal might have reached a different outcome if it had addressed the correct question: *Au* at [52] (Derrington J), [169] (O'Sullivan J). It was "impossible to ascertain" how the Tribunal would have answered the "entirely different question" of whether there was another reason for revocation: *Au* at [52] (Derrington J).

104 The Tribunal's reasons in the present case can be distinguished from the factual situation in *Au*. In the latter case, it was clear that the Tribunal "did not address the correct question in any way" and "simply did not attempt to engage with the statutory task": *Au* at [42], [43] (Derrington J). In contrast to *Au*, which did not contain any reference at all to the statutory

conditions in s 501CA(4)(b) and did not reach any conclusion whether or not there was another reason to revoke the cancellation decision, the Tribunal's reasons in the present case indicate that the Tribunal was quite aware of the statutory conditions on the power conferred by s 501CA(4).

(a) The Tribunal reproduced the terms of s 501CA(4) at [6] of the Reasons. It also identified the issues by reference to the conditions in s 501CA(4)(b)(i) and (ii), and relevantly framed the issue of "whether there is another reason why the decision to cancel the Applicant's Visa should be revoked": Reasons at [8].

(b) The Tribunal's consideration of the Direction was prefaced by the heading "Is there another reason for the revocation of the cancellation of the Applicant's Visa".

(c) The Tribunal stated (at [10]) that it was bound to comply with Ministerial directions made under s 499 of the Act "in considering whether there is another reason to exercise the discretion in s 501CA(4) of the Act". Although this combined the concept of an exercise of discretion with the language of the statutory condition in s 501CA(4)(b)(ii), it cannot be read as having been intended to displace that statutory condition with a general discretion conferring latitude on the Tribunal as to the choice of decision to be made divorced from the conditions in s 501CA(4) or the requirements of the Direction.

(d) In its conclusion, the Tribunal noted that there were "two alternate conditions precedent to the exercise of the discretion to revoke the mandatory cancellation of the Applicant's visa", and relevantly stated that "[w]e must be satisfied that there is another reason, pursuant to the Direction, to revoke the cancellation". Again, the reference here to "the exercise of the discretion to revoke the mandatory cancellation" did not replace the issue whether there was another reason to revoke the cancellation. Putting to one side the question whether s 501CA(4) involves a residual discretion once the conditions of subparagraphs (b)(i) and (ii) are satisfied, it is clear that the Tribunal's decision rested entirely on whether or not it was satisfied there was another reason to revoke the cancellation decision: see Reasons at [162].

105 There are only two references in the Tribunal's reasons to the exercise of a discretion under s 501CA(4), and on each occasion this is in the immediate context of a reference to the statutory condition under s 501CA(4)(b)(ii). It is not necessarily inapt to refer to the concept of discretion in the context of the evaluative exercise required under s 501CA(4), including in the application of the Direction to the exercise of that power. It may be noted that the Direction is

equally applicable to the discretionary powers to refuse or cancel visas under s 501. Further, the power under s 501CA(4) has on occasion been described as a discretionary power, including in judgments of the High Court: see eg *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 at [16], [20], [22] (Kiefel CJ, Keane, Gordon and Steward JJ); *LPDT* at [33], [35] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ). Thus, the plurality in *LPDT* at [33] stated that "having identified the relevant mandatory considerations, **the exercise of the discretion under s 501CA(4)** required the Tribunal to engage in an evaluative assessment involving the weighing of those relevant mandatory considerations with other relevant considerations" (emphasis added).

106 In any event, it is not simply a matter of counting the number of times that the word "discretion" appears in the Tribunal's reasons. The issue is whether the Tribunal correctly understood its task on the review of the delegate's decision under s 501CA(4), and asked itself the correct statutory question: see eg *Pewhairangi* at [41]; *RPQB* at [54]. In my view, it is clear that the Tribunal did address the question whether there was another reason to revoke the cancellation for the purposes of s 501CA(4)(b)(ii), and it affirmed the delegate's decision on the basis that it was not satisfied that there was another reason to revoke the cancellation decision, having regard to the considerations set out in the Direction.

107 I note that attempts in subsequent cases to rely on the decision in *Au* to challenge decisions of the Tribunal in the exercise of the power under s 501CA(4) have generally failed on the basis that any references to "discretion" in the Tribunal's reasons did not indicate that the Tribunal had misunderstood its task: see *Pewhairangi* at [39]-[47]; *RPQB* at [37]-[57]; *JSMJ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1466 at [35]-[42] (Perry J); *Lucas v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1653 at [23]-[39] (Meagher J); *QYFM v Minister for Immigration, Citizenship and Multicultural Affairs (No 2)* (2023) 301 FCR 422 at [45]-[61] (Katzmann, O'Callaghan and McEvoy JJ).

108 Accordingly, I reject the first "strand" of ground 2.

The second strand

109 The applicant submits that the Tribunal erred by proceeding on the basis that it was "precluded" by para 8.1.1(1)(c) of the Direction from taking into account the custodial sentences imposed on the applicant in June 2020 and September 2021, being for crimes of a violent nature against women and acts of family violence. In the applicant's submission, while para 8.1.1(1)(c) directed the Tribunal as to the mandatory considerations that it was required to take into

account, there is nothing in either s 501CA(4) or para 8.1.1(1)(c) that precluded the Tribunal from taking into account all the criminal sentences imposed on the applicant. The applicant submits that this was a "critical misunderstanding of the law", which "infected the Tribunal's analysis of the primary consideration of the protection of the Australian community" and in turn infected the Tribunal's "holistic view" of the applicant's case.

110 Paragraph 8.1.1 of the Direction deals with the nature and seriousness of the non-citizen's criminal offending or other conduct, as a central aspect of the first primary consideration (protection of the Australian community): see para 8.1(2)(a) of the Direction.

(a) Under para 8.1.1(1), decision-makers must have regard to each of the matters set out in sub-paragraphs (a) to (h) "[i]n considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date".

(b) Paragraph 8.1.1(1)(a) sets out three types of crimes or conduct that are "viewed very seriously by the Australian Government and the Australian community". Paragraph 8.1.1(1)(b) sets out four types of crimes or conduct that are "considered by the Australian Government and the Australian community to be serious".

(c) Some of these types of crimes or conduct are either viewed very seriously or are considered to be serious "regardless of the sentence imposed" or "regardless of whether there is a conviction for an offence or a sentence imposed" – namely, crimes of a violent nature against women or children (para 8.1.1(1)(a)(ii)), acts of family violence (para 8.1.1(1)(a)(iii)), and causing a person to enter into or being party to a forced marriage (other than being a victim) (para 8.1.1(1)(b)(i)).

(d) Paragraph 8.1.1(1)(c) requires the decision-maker to have regard to "the sentence imposed by the courts for a crime or crimes". This subject to an exception in respect of the crimes or conduct mentioned in paras 8.1.1(1)(a)(ii), (a)(iii) and (b)(i) – in other words, the types of crimes or conduct that are treated as serious or very serious *regardless* of the sentence imposed.

111 The logic reflected in these paragraphs of the Direction is that certain types of crimes or conduct are treated of themselves as serious or very serious by reason of the nature of the crimes or conduct, *irrespective* of any sentence imposed by the courts. Accordingly, for those types or crimes or conduct, it is unnecessary or even redundant for the Tribunal to have regard to the sentence imposed in considering the nature and seriousness of the criminal offending or other conduct. Those kinds of crimes or conduct are necessarily regarded as serious or very serious,

and are taken into account as such under paras 8.1.1(1)(a) or (b). Other crimes, however, might be regarded as more or less serious by reference to the degree of severity of the sentence imposed – including some crimes of the types that are viewed very seriously (eg violent and/or sexual crimes within para 8.1.1(1)(a)(i)) or that are considered to be serious (eg crimes committed against vulnerable members of the community or against government representatives or officials within para 8.1.1(1)(b)(ii), crimes committed while in immigration detention or in relation to an escape from immigration detention within para 8.1.1(1)(b)(iv), etc).

112 The level of seriousness ascribed to acts of family violence is reflected in other aspects of the Direction. Thus, para 8.2 of the Direction specifically deals with family violence committed by the non-citizen as the second primary consideration in making a decision under s 501CA(4). Paragraph 8.2(3) sets out mandatory relevant factors that must be considered where relevant in considering the seriousness of any family violence engaged in by the non-citizen. While the sentence imposed for an offence involving family violence is not itself directly referred to in para 8.2(3), the decision-maker must have regard to matters such as the frequency of the conduct and any trend of increasing seriousness, the cumulative impact of repeated acts of family violence, and any rehabilitation achieved since the person's last known act of family violence. It is to be expected that these factors would involve consideration of the circumstances of the family violence conduct, which would ordinarily encompass any relevant sentencing remarks for any offences of which the person has been convicted. Similarly, under the fifth primary consideration (expectations of the Australian community), para 8.5(2)(a) of the Direction relevantly states that the Australian community expects that the Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct involving acts of family violence.

113 In the present case, the Tribunal appears to have faithfully followed the terms of para 8.1.1(1)(c) of the Direction. As the Minister submitted, the Tribunal's reasons can be regarded as articulating the effect of para 8.1.1(1)(c). The Tribunal stated that, *in applying that particular sub-paragraph*, it was precluded from taking into account sentences imposed on the applicant for crimes mentioned in paras 8.1.1(1)(a)(ii), (a)(iii) and (b)(i), and was therefore precluded from taking into account under para 8.1.1(1)(c) the applicant's sentences of imprisonment in June 2020 for contraventions of a domestic violence order and in September 2021 for breaches of a probation order and aggravated contraventions of a domestic violence

order: Reasons at [25]-[26]. However, it is equally clear that the Tribunal had regard to the applicant's convictions for those offences under para 8.1.1(1)(a): Reasons at [20]-[21].

114 In addressing para 8.1.1(1)(c), the Tribunal took into account the fines imposed for the applicant's other crimes, which it referred to as "non-precluded offending" to distinguish them from the crimes mentioned in para 8.1.1(1)(a)(ii), (a)(iii) and (b)(i). In relation to those other crimes, while the sentences were "of a comparatively milder level", the Tribunal was nevertheless satisfied that they pointed to "the (at least) serious nature of his offending and, more likely, to its very serious nature": Reasons at [29]. One might perhaps describe this as a rather ambitious finding, given that it related to sentences comprising fines of between $5 and $1,000 for a range of traffic infringements, minor drug possession charges, public nuisances and obstructing a police officer. Nevertheless, it is not the role of the Court to review the merits of the Tribunal's decision, and the applicant did not directly challenge this finding on legal grounds.

115 Contrary to the applicant's submissions, I do not consider that there was any legal error in the manner in which the Tribunal applied para 8.1.1(1)(c) of the Direction. The Tribunal did not disregard the applicant's criminal offending that was the subject of the convictions in June 2020 and September 2021, nor did it disregard entirely the sentences imposed for those offences in so far as they were relevant apart from para 8.1.1(1)(c). This is reflected, for example, in the Tribunal's consideration of para 8.1.1(1)(d), namely, "the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness", in the context of which the Tribunal dealt directly with the domestic violence offences in September 2021 and referred to the sentencing remarks in respect of those convictions: Reasons at [32]. The Tribunal also referred to those sentencing remarks in the context of the offending falling within para 8.1.1(1)(a): Reasons at [20]. More generally, the Tribunal took the "precluded offending" into account when considering the risk to the Australian community should the applicant commit further offences or engage in other serious conduct for the purposes of para 8.1.2 of the Direction (see Reasons at [48]-[49], [66]), when considering Primary Consideration 2 (family violence) (see Reasons at [71]-[93]), and when considering Primary Consideration 5 (expectations of the Australian community) (see Reasons at [139]).

116 Further, and in any event, it is unclear how the exclusion from para 8.1.1(1)(c) of the custodial sentences imposed on the applicant in June and September 2021 could realistically have made any difference to the Tribunal's finding that the sentences imposed pointed to the

characterisation of the applicant's offending as at least serious, and more likely very serious, nor how it could have changed the Tribunal's ultimate conclusion under para 8.1.1(1) that "the totality of the Applicant's unlawful conduct in this country does reach a threshold of being 'very serious'": Reasons at [44]. Accepting that the Tribunal is engaged in an evaluative exercise that involves an instinctive synthesis and weighing of a range of relevant factors (see *Demir v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 870 at [21]-[22] (Kennett J)), the inclusion of the custodial offences for the "precluded offending" under para 8.1.1(1)(c) would be incapable of ameliorating the findings made by the Tribunal based on the sentences imposed for other offences. In so far as the applicant seeks to argue that the length of custodial sentences could in fact be relied upon in mitigation of their seriousness, such an argument ignores the terms of paras 8.1.1(1)(a)(ii) and (iii) of the Direction.

117 Accordingly, the second "strand" of ground 2 is rejected.

CONCLUSION

118 Ground 1 of the application is upheld. Orders should be made to set aside the Tribunal's decision and require the Tribunal to redetermine the application for review according to law. The Minister should pay the applicant's costs.

I certify that the preceding one hundred and eighteen (118) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Horan.

Associate:

Dated: 21 June 2024