FEDERAL COURT OF AUSTRALIA

Prasad v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 791

Review of:	*Prasad v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 3438
File number:	NSD 1335 of 2023
Judgment of:	**SHARIFF J**
Date of judgment:	19 July 2024
Catchwords:	**MIGRATION** – application for judicial review of decision of the Administrative Appeals Tribunal to affirm decision of delegate of the Minister not to revoke cancellation of the applicant's visa under 501CA(4) of the *Migration Act 1958* (Cth) – whether Tribunal acted on a misunderstanding of law by failing to take into account applicant's personal circumstances when attributing weight to primary consideration of expectations of the Australian community – whether Tribunal denied applicant procedural fairness by failing to consider argument relying on *CKL21 v Minister for Home Affairs* [2022] FCAFC 70; (2022) 293 FCR 634 – whether Tribunal denied applicant procedural fairness by failing to advise or inform applicant and witnesses of proposed adverse credibility findings – whether Tribunal failed to give proper, genuine and realistic consideration to representations made by applicant regarding rehabilitation and risk of reoffending – whether Tribunal ignored, overlooked or misunderstood evidence adduced by witness – no errors established – application dismissed with costs
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) *Migration Act 1958* (Cth) ss 499(2A), 500(1)(ba), 500(6H), 500(6J), 500(6L)(c), 501(3A), 501(6), 501CA, 501CA(4), 501CA(4)(b)(ii) *Direction No 79 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*

Cases cited:

Ali v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 559

BJI20 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1632

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

CKL21 v Minister for Home Affairs [2022] FCAFC 70; (2022) 293 FCR 634

Comcare v Lilley [2013] FCAFC 121; (2013) 216 FCR 214

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd (1994) 49 FCR 576

Dranichnikov v Minister for Immigration and Multicultural and Indigenous Affairs [2003] HCA 26; (2003) 77 ALJR 1088

Dunasemant v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 13; (2022) 292 FCR 155

FYBR v Minister for Home Affairs [2019] FCAFC 185; (2019) 272 FCR 454

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

Hala v Minister for Justice [2015] FCAFC 13; (2015) 145 ALD 552

Ismail v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 2; (2024) 98 ALJR 196

Lidono Pty Ltd v Commissioner of Taxation (Cth) [2002] FCA 174; (2002) 191 ALR 328

Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCAFC 116; (2023) 298 FCR 516

Minister for Home Affairs v Smith [2019] FCAFC 137

Minister for Immigration and Border Protection v SZSWB [2014] FCAFC 106

Minister for Immigration and Citizenship v SZGUR [2011] HCA 1; (2011) 241 CLR 594

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v DOM19 [2022] FCAFC 21; (2022) 289 FCR 499

Nathanson v Minister for Home Affairs [2022] HCA 26; (2022) 276 CLR 80

Puafisi v Minister for Immigration and Citizenship [2008] FCAFC 39

QHRY v Minister for Immigration, Citizenship, Migrant

	Services and Multicultural Affairs [2021] FCA 827 *Rana v Military Rehabilitation and Compensation Commission* [2005] FCA 6 *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 *SZUTM v Minister for Immigration and Border Protection* [2016] FCA 45; (2016) 241 FCR 214 *Uelese v Minister for Immigration & Border Protection* [2015] HCA 15; (2015) 256 CLR 203
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	91
Date of last submission/s:	26 May 2024
Date of hearing:	3 May 2024
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr B D Kaplan
Solicitor for the First Respondent:	Sparke Helmore Lawyers

ORDERS

NSD 1335 of 223

BETWEEN:	**ASHLEY NAND PRASAD** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**SHARIFF J**
DATE OF ORDER:	**19 JULY 2024**

THE COURT ORDERS THAT:

1. The application be dismissed.

2. The applicant pay the first respondent'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

SHARIFF J:

A. INTRODUCTION

1 The applicant was born in 1971 and is a citizen of Fiji. He permanently relocated to Australia in 1997 at the age of 26 on a Permanent Resident Class AY Subclass 104 Preferential Family visa.

2 On 20 October 2022, the applicant's visa was cancelled by a delegate of the first respondent (the **Minister**) under s 501(3A) of the *Migration Act 1958* (Cth) (the **Act**). This decision (the **Cancellation Decision**) was made on the basis that the applicant had been sentenced to a period of imprisonment of three years in August 2022.

3 The applicant sought revocation of the Cancellation Decision pursuant to the statutory process outlined in s 501CA(4) of the Act. On 17 July 2023, a delegate of the Minister decided not to revoke the cancellation decision (the **Non-Revocation Decision**).

4 The applicant then sought review of the Non-Revocation Decision in the Administrative Appeals Tribunal (the **Tribunal**) under s 500(1)(ba) of the Act. The hearing of that application took place over two days on 28 and 29 September 2023. The applicant was legally represented at the hearing and filed a statement of facts, issues and contentions (**ASFIC**). The Minister was also legally represented at the hearing and also filed a statement of facts, issues and contentions (**MSFIC**). Written and oral evidence was given by the applicant and others, including his mother and sister, in support of his claims.

5 By orders made on 9 October 2023, and for the reasons published on 25 October 2023, the Tribunal affirmed the Non-Revocation Decision: see *Prasad v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 3438 (**AAT**).

6 The Tribunal determined that the applicant did not pass the "character test" defined in s 501(6) of the Act given his substantial criminal record, and that the sole issue before it was whether there was "another reason" to revoke the Cancellation Decision under s 501CA(4)(b)(ii) of the Act: at AAT [7]. The Tribunal noted that it was bound by *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 99**): at AAT [9]. Ultimately, the Tribunal determined that the "primary considerations" as to the protection of the Australian community, family violence and

expectations of the Australian community outweighed the countervailing primary and "other" considerations which weighed in the applicant's favour: at AAT [305]. The Tribunal concluded that the application of Direction 99 favoured non-revocation of the Cancellation Decision and affirmed the Non-Revocation Decision: at AAT [305]-[306].

7 By an application to this Court, the applicant sought judicial review of the Tribunal's decision. The applicant relied on five grounds of review, which can be briefly stated as follows:

(a) **Ground 1**: that the Tribunal acted on a clear misunderstanding of the law by failing to take into account the applicant's personal circumstances when deciding what weight to attribute to the expectations of the Australian community primary consideration (**Primary Consideration 5**);

(b) **Ground 2**: that the Tribunal denied the applicant procedural fairness by failing to respond to a substantial, clearly articulated argument based on the Full Court decision in ***CKL21*** *v Minister for Home Affairs* [2022] FCAFC 70; (2022) 293 FCR 634, when assessing the applicant's future risk of harm under the protection of the Australian community primary consideration (**Primary Consideration 1**) and coming to the conclusion that the applicant's commitment and ability to refrain from reoffending had "not been tested in the wider community": at AAT [121];

(c) **Ground 3**: that the Tribunal denied the applicant procedural fairness by failing to identify an issue that was critical to its decision and advise him of an adverse conclusion which was not obviously known to be open to the applicant on the material before the Tribunal —namely, an adverse credibility finding in relation to the applicant's mother and sister (who had given evidence at the Tribunal hearing);

(d) **Ground 4**: that the Tribunal failed to give proper, genuine and realistic consideration to a number of the applicant's representations in finding that the applicant had done "several courses aimed at addressing family violence" (at AAT [186]), that the applicant had "made very limited efforts to rehabilitate" (at AAT [234]) and that there was "no evidence that [the applicant] is suffering any particular difficulty" in immigration detention (at AAT [240]); and

(e) **Ground 5**: that the Tribunal constructively failed to exercise jurisdiction in that it ignored, overlooked or misunderstood evidence adduced by the applicant's sister regarding her awareness of the applicant's drug use.

8 For the reasons which follow, the application for judicial review should be dismissed.

B. GROUND 1

B.1 Overview

9 By Ground 1, the applicant contended that the Tribunal misunderstood the law by erroneously assuming and reasoning that the applicant's personal circumstances had no bearing on the weight to be given to Primary Consideration 5. The part of the Tribunal's reasons which is relevant to this ground is at AAT [235]-[237], where the Tribunal stated:

> **The Applicant contended that the Tribunal should take into account his personal circumstances, such as the rehabilitation he has engaged in and the length of time he has lived in Australia, and that these matters should offset the adverse attribution of weight to this Primary Consideration.** Two single Judge decisions were relied upon, being *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 396 and *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559.
>
> **If the Applicant contends that the sorts of personal matters mentioned should reduce the weight allocated to this Primary Consideration, I do not accept that. These matters are not relevant to the expectations of the Australian community**, and that much is clear from paragraph 8.4 of the Direction [sic] and the Full Federal Court's decision in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 [In particular see Charlesworth J at [53] and [74]]. **They can be taken into account, and are capable of attracting weight in the Applicant's favour, separately to this Primary Consideration. In that way, they are capable of off-setting the weight of this Primary Consideration in the final weighing exercise**, consistent with what Beach J said in *Kelly* (followed in *Ali*) when his Honour referred to matters personal to an Applicant affecting the *relative* weight given to this Primary Consideration.
>
> This Primary Consideration weighs very heavily against revocation of the cancellation of the Applicant's visa, and it would even in the absence of any risk of re-offending.
>
> (Emphasis added; footnotes inserted in square brackets).

10 The applicant submitted that numerous decisions establish that the personal circumstances of a non-citizen may counterbalance the negative weight attributed to Primary Consideration 5. In this regard, the applicant relied on ***Dunasemant*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 13; (2022) 292 FCR 155 at [58]-[61]; ***QHRY*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 827 at [44] and [47]; and ***Ali*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559 at [73] and [86]-[87]. The applicant contended that *Dunasemant*, being a decision of the Full Court of this Court, is binding authority, and supports the conclusion that an applicant's personal circumstances are relevant to an assessment of Primary Consideration 5.

11 The applicant submitted that the Tribunal's failure to offset the adverse attribution of weight to Primary Consideration 5 on account of the applicant's personal circumstances involved a

misunderstanding of the law, and that this alleged error was material. He submitted that, had the Tribunal acted on a correct understanding of the law, it *could have* given less weight to Primary Consideration 5, which *could have* made a difference when the Tribunal came to undertake the ultimate balancing exercise in answering the question whether there was "another reason" why the Cancellation Decision should have been revoked: citing *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 276 CLR 80 at [47], *Dunasemant* at [60] and *QHRY* at [47]-[48].

12 The Minister submitted that the Tribunal's approach to Primary Consideration 5 coheres with the recent judgment of the High Court in ***Ismail*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2; (2024) 98 ALJR 196. The Minister contended that the same arguments made by the applicant in this case were made and rejected in *Ismail*, in which it was held that paragraph 8.4 of *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**) (which was in the same terms as paragraph 8.5 of Direction 99), did *not* require regard to be had to an individual's personal circumstances, either in applying the primary consideration of the expectations of the Australian community, or in deciding what weight should be placed on that consideration.

13 In reply submissions and in argument before me, the applicant cavilled with the Minister's contention that the same argument that is made in this case was made in *Ismail*. The applicant submitted that, in *Ismail*, the complaint was that the delegate had failed to have regard to a *mandatory consideration*, being the applicant's personal circumstances, when weighing the expectations of the Australian community: citing *Ismail* at [47]. Here, however, the applicant submitted that his complaint is that the Tribunal *acted on a misunderstanding of the law*, which is a different species of error. The applicant contended that nothing in *Ismail* held that a decision-maker is *prohibited* from having regard to a non-citizen's individual circumstances when assessing the attribution of weight to Primary Consideration 5: citing *Ismail* at [49]-[52]. It was contended that in *Ismail*, the applicant had not expressly advanced a claim that the adverse attribution of weight to the primary consideration of the expectations of the Australian community should be offset by reason of individual circumstances, whereas that was an express contention in the present case which the applicant claimed was supported by the Full Court's decision in *Dunasemant*. The applicant contended that *Dunasemant* remains good law and was not overruled by, or even addressed in, *Ismail*.

B.2 Consideration

14 I do not accept the applicant's contentions. To explain why, it is necessary to start with the text of Primary Consideration 5. It is set out at paragraph 8.5 of Direction 99 and provides, relevantly, as follows:

> **8.5 Expectations of the Australian Community**
>
> (1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.
>
> (2) In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:
>
> a) acts of family violence; or
>
> …
>
> c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature…
>
> (3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.
>
> (4) **This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.**
>
> (Emphasis added).

15 It will be evident from paragraph 8.5(4) of Direction 99 that decision-makers, including the Tribunal, are required to assess the expectations of the Australian community as a whole, without assessing the community's expectations "in the particular case". The Tribunal was required to comply with paragraph 8.5(4) and a failure to do so may have amounted to jurisdictional error: see s 499(2A) of the Act and *BQL15 v Minister for Immigration and Border Protection* [2018] FCAFC 104 at [9].

16 In *Ismail*, the High Court considered Direction 90, the predecessor to Direction 99, which dealt with the "expectations of the Australian community" at paragraph 8.4. Relevantly, the content of 8.4(4) of Direction 90 was identical to 8.5(4) of Direction 99. It was contended on behalf of the plaintiff in *Ismail* that the relevant delegate had misapplied paragraph 8.4 of Direction 90 as the "delegate was required to consider those expectations in light of the plaintiff's personal circumstances and did not do so": [47]. The plaintiff contended that "the expectations of the Australian community would have been affected by knowledge of the plaintiff's personal circumstances" and, as a result, the "delegate was required to, but did not, weigh those personal circumstances in deciding what ultimate weight to give to the expectations of the Australian community". The High Court rejected this argument, stating at [51]-[52]:

> Further, **para 8.4 does not stipulate that, in assessing what weight is to be given to the expectations of the Australian community, the decision-maker must attribute to that hypothesised community knowledge of the personal circumstances of the applicant for the visa as known to the delegate. To the contrary, para 8.4(4) stipulates that the decision-maker is to proceed on the basis of the Australian Government's views as set out in para 8.4 "without independently assessing the community's expectations in the particular case".**
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> **Paragraph 8.4(4) is to be understood as directing the decision-maker not to attempt to infer what the expectations of the Australian community would be "in the particular case" (that is, with the knowledge of the delegate about the applicant's personal circumstances), but to proceed on the basis that the views of the Australian Government set out in para 8.4(1)-(3) are the relevant norm described as the expectations of the Australian community. That norm, as applicable by reference to the terms of para 8(1)-(3), is <u>then to be weighed with other relevant matters</u> as required by paras 6 and 7 of Direction 90.** The delegate's reasoning accords with these requirements.
>
> (Emphasis and additional emphasis added).

17 In my view, the same position applies here. As was the case with paragraph 8.4(4) of Direction 90, here, paragraph 8.5(4) of Direction 99 required the relevant decision-maker—in this case, the Tribunal standing in the shoes of the delegate—not to infer the expectations of the Australian community "in the particular case", which necessarily excludes consideration of the applicant's personal circumstances. This is distinct to whether Primary Consideration 5 should be given more or less relative weight as against other considerations, including the applicant's personal circumstances, in the overall balance: e.g., see *Ismail* at [52]; *FYBR v Minister for Home Affairs* [2019] FCAFC 185; (2019) 272 FCR 454 at [74]-[77] (Charlesworth J).

18 I do not regard the Full Court's decision in *Dunasemant* as leading to a different result in this case, as contended for by the applicant. At the hearing before me, both the applicant and the Minister made submissions as to how *Dunasemant* should be understood. The applicant

submitted that the error found to be material by the Full Court in *Dunasemant* was that the Tribunal had failed to consider the appellant's personal circumstances in determining the *absolute weight* to be given to the primary consideration of expectations of the Australian community and another consideration. The Minister contended that the better interpretation of the decision is that the Full Court found that the Tribunal fell into error by overlooking the personal circumstances of the appellant in determining the *relative* weight that *could be* placed on the primary consideration of the expectations of the Australian community, rather than the *absolute* weight to be placed on that consideration. The Minister further contended that, if the applicant's reading of *Dunasemant* is correct, it is inconsistent with the High Court's decision in *Ismail* and should be taken to have been impliedly overruled.

19 I do not consider it necessary to resolve the issue the parties raised as to their competing views on the reasoning in *Dunasemant*. That is because the Full Court in *Dunasemant* was dealing with *Direction No 79 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 79**), which was in materially different terms to Directions 90 and 99. Relevantly, paragraph 13(2)(c) of Direction 79 identified the expectations of the Australian community as a primary consideration in respect of "revocation requests" and set out that consideration at paragraph 13.3(1) as follows:

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

20 As will be evident, Direction 79 did not contain the equivalent of paragraphs 8.4(4) of Direction 90 and 8.5(4) of Direction 99. There was nothing within the text of paragraph 13.3 of Direction 79 that directed the relevant decision-maker not to take into account a visa applicant's personal circumstances in an assessment of the primary consideration as to the expectations of the Australian community. It follows that the Full Court's decision in *Dunasemant* was decided in respect of a differently worded Direction and is not instructive as to the outcome in the present case.

21 I do not consider that the Tribunal erred in not having regard to the applicant's personal circumstances when making its assessment as to Primary Consideration 5. Accordingly, Ground 1 fails.

C. GROUND 2

C.1 Overview

22 This ground raises the question of whether the Tribunal failed to respond to a substantial, clearly articulated argument raised by the applicant before the Tribunal based on the Full Court decision in *CKL21*.

23 The applicant contended that he had raised an argument before the Tribunal based on *CKL21*, that: (1) it is a logical fallacy to conclude that a fact has been proved because it has not been disproved; (2) a finding that a non-citizen's conduct has not been tested in the community does not establish that the non-citizen is at risk of reoffending; and (3) such a finding is not a positive predictor of a non-citizen's future behaviour. Specifically, in the proceedings before the Tribunal, the applicant made the following submissions at [75]-[77] of the ASFIC in the context of discussing factors going to the applicant's likelihood of reoffending in the future:

> 75. ***Fourth***, the delegate reasoned as follows:
>
> > [The applicant's] rehabilitation journey is very recent, having completed his courses over a period of January 2023 to May 2023, and while I acknowledge that he has been drug-free while in detention, this is yet to be tested in the community where he will have unfettered access to drugs via his usual channels of access and possible unsocial influences.
>
> 76. There are difficulties with this reasoning of the delegate. The applicant's rehabilitation postdates May 2023. The delegate fails to appreciate that drugs are easily accessible in both prison and immigration detention. The applicant is surrounded by criminals in prison and immigration detention daily. The applicant has ceased all contact with antisocial peers.
>
> 77. As to the impugned reasoning that the applicant's rehabilitation has not been tested in the community, the Tribunal would note the reasoning of the Full Court in *CKL21 v Minister for Home Affairs* [2022] FCAFC 70 at [79]:
>
> > [79] It is a logical fallacy to conclude that a fact has been proved because it has not been disproved… So too, and as observed by Mortimer J in *Splendido* (at [95]) and by Colvin J in *Logan* (at [24]), a finding that the appellant's conduct has not been tested in the community does not establish that the appellant is a risk of reoffending. It is a negative finding about what is not known or established (because the appellant has not been living in the community), rather than a positive predictor of the appellant's future behaviour.

24 Further, in oral submissions before the Tribunal, Counsel for the applicant made the following submissions (at T162.4-35):

> In terms of rehabilitation, I won't take the tribunal through it, but I can respectfully say that in my professional submission – that the applicant's rehabilitation is remarkable, compared to many non-citizens who come before the tribunal. He has said that he has grown and matured. He has undertaken substantial rehabilitation to change and

> transform. Of course, there's his evidence of two and a half years of remission from drugs. He has done online courses. He has done face-to-face courses – SMART Recovery, for example. He has seen the mental health nurse in detention. He has done telephone counselling. And he has tried to take steps to engage in rehabilitation into the community without a definitive date, yet. And those have been done both in prison and in immigration detention. And that – he has really tried to take – make use of his time in prison and detention, and not just sit around and waste his time, so that he has made a conscious effort. He said, 'I want to give myself the best chance,' while accepting candidly that he still does have a long journey of rehabilitation, and that it's not something that has ended, by any stretch of imagination.
>
> He also said – and it's an important piece of evidence, I think, in the context of rehabilitation – that 'I've been offered drugs, many times, in these environments,' but he hasn't touched it. And that should be to his credit, because, of course, someone who has had a serious drug abuse problem, which this unfortunate man has had – keeping in mind that it is a health issue – that he hasn't taken drugs. So, obviously, the rehabilitation is assisting.
>
> And one might say, well, it hasn't been tested in the community. But it has been tested in an environment where, on his own evidence, there are significant stresses. He's away from his family, from the small amount of friends he says that he has that don't engage in drugs. And, of course, it's the longest period of time he hasn't been in the community in Australia, so the (indistinct) also not (indistinct words) people in the prison detention environment. And he reminded us, in his evidence, that he hasn't had any contraventions in prison detention.

25 The applicant submitted that, when assessing Primary Consideration 1, the Tribunal did not lawfully consider the applicant's claims made in reliance upon *CKL21* and wrongfully concluded that the applicant's commitment and ability to refrain from reoffending had "not been tested in the wider community": AAT [121]. The applicant drew attention to the part of the Tribunal's reasons at AAT [121], where the Tribunal stated:

> The change the Applicant would need to make to refrain from offending would be a tremendous one given his entrenched antisocial attitudes and behaviours prior to his incarceration. Staying off drugs and avoiding negative peers are not the only changes required, and he has only achieved those in custody. It does not necessarily follow that he would continue that in the wider community where he will not be in such a controlled, heavily monitored environment, i.e. where he can enjoy the drug-associated lifestyle that he enjoyed before. Further, he obviously has not had opportunities to commit driving offences in custody and the opportunity to assault females is extremely limited as, while there are some female staff members in the detention centre, there is also heavy surveillance. **The Applicant's commitment and ability to refrain from that type of offending has not been tested in the wider community.** What he has established so far, to his credit, is a record of good behaviour in custody and proactive engagement in rehabilitative activities.
>
> (Emphasis added).

26 The applicant submitted that this passage demonstrates that the Tribunal had not considered his claim. It was contended that the Tribunal was required to read, identify, understand and evaluate his representations, and that the natural and appropriate inference to be drawn is that

the Tribunal overlooked the *CKL21* claim when considering the applicant's future risk of harm. The applicant further contended that this error was material, in that it infected the Tribunal's assessment of Primary Consideration 1 and the ultimate weighing exercise.

27 In response, the Minister submitted that an administrative decision-maker such as the Tribunal is required to respond to a "substantial, clearly articulated argument *relying on established facts*" (emphasis added): citing ***Dranichnikov*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 at [24] (Gummow and Callinan JJ) and [95] (Hayne J). The Minister submitted that the "established facts" of a claim are its factual predicates (citing *Minister for Immigration and Border Protection v* ***SZSWB*** [2014] FCAFC 106 at [5] (Gordon, Robertson and Griffiths JJ); and ***SZUTM*** *v Minister for Immigration and Border Protection* [2016] FCA 45; (2016) 241 FCR 214 at [38], [45]) and that, where the factual bases for a claim have not been embraced by a decision-maker, that claim will not have been based on "established facts": citing ***GXXS*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 468 at [48]; and ***BJI20*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1632 at [68].

C.2 Consideration

28 I do not accept Ground 2. It proceeds on a narrow reading of the Tribunal's extensive reasons. It is true, as the applicant submitted, that the Tribunal did not refer to *CKL21* in its reasons and, in particular, did not specifically address the logical fallacy to which the Full Court adverted in *CKL21* at [79]. However, it does not follow that the Tribunal reasoned in a way that was inconsistent with the decision in *CKL21* or disregarded the logical fallacy to which the Full Court adverted at [79].

29 As set out above at [23] in the extracted passage from the ASFIC, the Full Court in *CKL21* at [79] stated that the fact that a person's conduct has not been tested in the community "does not establish that the appellant is at risk of reoffending" and that such a finding is one about that which is not known and not a "positive predictor" of a person's "future behaviour". In the present case, the Tribunal's reasons and conclusions as to the applicant's steps toward rehabilitation and risk of reoffending were based on a range of considerations, and the Tribunal did not seek to determine these matters solely on the basis that they had not been tested in the community.

30 It is necessary to have regard to the Tribunal's reasons as to the applicant's rehabilitation and risk of reoffending. At AAT [114], the Tribunal identified that it "must have regard to" the

following relevant factors (set out at paragraph 8.1.2(2) of Direction 99) on a "cumulative basis":

> (a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and
>
> (b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non- citizen re-offending; and evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence.

31 Thereafter, at AAT [115]-[118] the Tribunal set out the nature of the applicant's offending and the harm occasioned by that offending (where applicable). At AAT [119], the Tribunal observed that:

> The Applicant was adamant that he has reformed. Other witnesses, such as his sister, gave evidence along those lines. In the past the Applicant has engaged with rehabilitation providers while expressing an intention to rehabilitate, and friends have assured courts that he is committed to reforming, but he has gone on to re-offend. The Applicant has also expressed a determination to assist his mother before, but not done so, and continued to use drugs and offend.

32 The Tribunal then noted that the applicant claimed that he never wished to be incarcerated and had expressed a renewed commitment to Christianity: AAT [120]. The Tribunal then stated at AAT [121] that:

> The change the Applicant would need to make to refrain from offending would be a tremendous one given his entrenched antisocial attitudes and behaviours prior to his incarceration. Staying off drugs and avoiding negative peers are not the only changes required, and he has only achieved those in custody. **It does not necessarily follow that he would continue that in the wider community where he will not be in such a controlled, heavily monitored environment, i.e. where he can enjoy the drug-associated lifestyle that he enjoyed before. Further, he obviously has not had opportunities to commit driving offences in custody and the opportunity to assault females is extremely limited as, while there are some female staff members in the detention centre, there is also heavy surveillance. <u>The Applicant's commitment and ability to refrain from that type of offending has not been tested in the wider community</u>**. What he has established so far, to his credit, is a record of good behaviour in custody and proactive engagement in rehabilitative activities.
>
> (Emphasis and additional emphasis added).

33 It will be apparent from the above passage that the Tribunal observed or made a finding that the applicant's commitment and ability to refrain from reoffending and rehabilitate had not been tested in the wider community. Had the Tribunal proceeded to make a finding from the absence of such evidence that the applicant was at risk of reoffending, the Tribunal would not only have disregarded the argument that the applicant had raised before the Tribunal relying upon *CKL21*, but the Tribunal's reasoning would also have involved the logical fallacy

identified in *CKL21*. However, the Tribunal did not make a positive finding that the absence of evidence as to the applicant's commitment being tested in the community meant that he was at risk of reoffending or not being rehabilitated, or was a positive predictor of these matters. That is because the Tribunal, having made the observations it did at AAT [121], proceeded to evaluate the applicant's steps toward rehabilitation and the risk of reoffending by reference to other evidence before the Tribunal and, especially, a risk assessment that had been prepared by a clinical psychologist. The Tribunal reasoned as follows at AAT [122]-[126]:

> I have the benefit of a recent risk assessment that was conducted by Mr Matt Visser, clinical psychologist, dated 24 May 2023. He interviewed the Applicant on 5 May 2023 via teleconference. He also spoke separately with the Applicant's uncle, Dr Suresh Prasad.
>
> Before addressing that report, I note that I accept the following matters. The Applicant has not used drugs since he entered custody in May 2021, which was some two years and four months ago. While he previously did not see his drug use as problematic or arising from a dependence, he now says he had a mental (but not physical) dependence on methamphetamine, and he attributes his offending to a combination of drug use, bad influences and toxic relationships. He does not believe he was ever dependent on cannabis.
>
> I accept that, while the Applicant has been in custody, he has cut ties with all his negative peers, i.e. disconnected on Facebook. I accept that he has solid, feasible plans to go into a residential rehabilitation facility for three to six months if he is returned to the Australian community, and his GP has agreed to help him arrange ongoing counselling. He has proactively made enquiries with various rehabilitation services. Further, the Beenleigh Baptist Church has offered the support of its ministry "Restore Support Group" which provides pastoral care, housing, employment, and professional care to those recently released from prison.
>
> The Applicant has a credible offer of full-time employment with a supportive employer, which he intends to accept. That employer has known him for ten months and was impressed by his motivation and capacity to undertake rehabilitation and self-help courses to function as a better citizen. The Applicant has expressed a strong desire to provide practical assistance to his mother who is 83 years old and somewhat dependent on his sister for assistance. I accept that his uncle is a law-abiding person who is genuinely concerned with his well-being and is willing to offer support and guidance. The Applicant wants to establish whether Ms N's child is his biological son and go through mediation so he can be a part of his life. This is a motivating factor for him to stay in Australia and out of gaol but it also carries potential to cause stress and frustration given the unhealthy relationship the Applicant had with Ms N and the DVO in place.
>
> Prior to his interview with Mr Visser, the Applicant had done at least 30 rehabilitative courses, mostly online, and he had engaged in some counselling. The subject matter of the courses and counselling covered areas such as abuse, violence against women and girls, family violence, drugs, anger management, cognitive behaviour intervention, behaviour management, stress management and conflict resolution. There were also modules in a broad category of self-help such as building self-esteem and goal setting. In the hearing the Applicant gave examples of what he had learned which included that drugs destroy lives, how to identify triggers, how to control triggers, how to cope moving ahead without using drugs, how to control anger, how to change patterns of

> thinking and behaviour, recognising and identifying stress and reactions to stress, making informed decisions based on all the factors and the impact a decision will have on other people, and calming down techniques.

34 Having addressed these matters, the Tribunal then turned to examine at length and in exhaustive detail the risk assessment prepared by Mr Visser, the clinical psychologist, and the opinions expressed by him, as is apparent from AAT [127]-[164]. The Tribunal also examined the evidence given by the applicant's mother and sister, and his paternal uncle, Dr Prasad: AAT [165]-[174]. The Tribunal also permitted the applicant to re-open his case to respond to evidence that had been given about his "temper": AAT [175]. The Tribunal then reasoned as follows at AAT [176]-[177]:

> **The Applicant has also repeatedly failed to recognise the risk he poses to the community**. Shortly after his parole was revoked, he asked the parole board to re-instate it even though only days before, he had attacked Ms K in breach of a DVO, he had sent nasty messages to Ms N in breach of a DVO and nothing had substantially changed in his circumstances or his respective relationships with each woman. Specifically, while he had not taken drugs for a few days, he still believed Ms N was pregnant with his child and in a relationship with someone else. Some months later, he later applied for bail having done only very limited rehabilitative activity. In October 2022, he told the department "I strongly believe the risk to be negligible or no risk" and "There is just no chance of the likelihood or even the slightest possibility that I will engage in further criminal activity." However, seven months later, in May 2023, Mr Visser assessed a moderate to high risk. Four months after that, the Applicant maintained in the hearing of this matter that the risk of re-offending was "non-existent" because of what he had been through in prison and detention, and he said that in legal terms this is referred to as "low risk". **When asked about this statement, given Mr Visser's assessment, the Applicant conceded that there was a possibility of further drug offences** but he maintained that:
>
> > "due to taking considerable course work and taking steps to rehabilitate myself that has changed drastically. I'm not the person that I was over two and a half years ago".
>
> Despite the courses and counselling the Applicant has done, **he does not seem to have achieved much in the way of insight into his behaviour or preparedness to hold himself fully accountable for his offending. All the supports that the Applicant has arranged in the community will not do any good unless he chooses to meaningfully engage with them. Even if he does, <u>according to Mr Visser the risk of re-offending would be moderate. Considering all of the evidence, I see no reason to doubt the accuracy and currency of Mr Visser's risk assessment. I accept that there is presently a high risk of re-offending which would become a moderate risk if the Applicant engages in the recommended rehabilitative treatment</u>. Given the harm from further violent offending of the kind he has previously perpetrated, even a moderate risk is an unacceptable risk**. A moderate or high risk of further traffic offences of the kind he has previously committed is also a serious concern.
>
> (Emphasis and additional emphasis added).

35 It is evident that the Tribunal's conclusions as to the applicant's steps toward rehabilitation and risk of reoffending were informed by a number of matters, including the applicant's evidence, the evidence of other witnesses and the risk assessment prepared by Mr Visser. The Tribunal did not reason to its conclusions about the applicant's prospects of rehabilitation or risk of reoffending on the basis of the absence of evidence about these matters having been tested in the community. In my view, the Tribunal did not engage in the logical fallacy identified in *CKL21* at [79].

36 In light of the above, whilst the Tribunal did not specifically refer to the applicant's argument relying upon *CKL21*, as the Minister submitted, it was not necessary for the Tribunal to do so because the Tribunal did not proceed to reason in a way that was inconsistent with *CKL21*. As the Minister further submitted, the Tribunal was required to address a "substantial, clearly articulated argument relying upon established facts" where the "factual predicates" are accepted by the Tribunal, but where such predicates are not embraced by a decision-maker, that claim will not have been based on "established facts": *SZSWB* at [5]; *SZUTM* at [38] and [45]; *GXXS* at [48]; *BJI20* at [68].

37 The Minister's submissions should be accepted. As noted above, the contention that was advanced on the applicant's behalf was that the Tribunal should not adopt the reasoning of the delegate that the applicant's rehabilitation and risk of reoffending had not been tested in the community. For the reasons set out above, whilst the Tribunal made an observation or finding that the applicant's steps toward rehabilitation had not been tested in the community, the Tribunal did not conclude that the applicant was at risk of reoffending because of that fact. Nor did the Tribunal reason that the absence of such evidence was a positive predictor as to the applicant's risk of reoffending. Rather, the Tribunal proceeded to reach a conclusion about both the applicant's prospects of rehabilitation and risk of reoffending by reference to other matters. By reasoning in this way, the Tribunal embraced the point made on the applicant's behalf. In that context, it is of no moment that the Tribunal made no specific reference to the applicant's argument relying upon *CKL21*.

38 For these reasons, Ground 2 fails.

D. GROUND 3

D.1 Overview

39 This ground raises the question of whether the Tribunal denied the applicant procedural fairness in respect of a finding it made about the credibility of the evidence given by the applicant's mother and sister. The part of the Tribunal's reasons which is relevant to this ground is AAT [169]-[170], where the Tribunal stated:

> The Applicant's mother and sister said they were unaware of the Applicant [sic] drug use and offending until very recently when a copy of his criminal history was provided for the purpose of this application. His mother described herself as "*amazed*" and "*just stunned*". His sister was asked if she knew the details of the more recent assaults, and she said "*I know the details that Dr Donnelly sent me, what he sent me, yes*".
>
> This evidence does not sit comfortably with the evidence in the District Court sentencing remarks that the Applicant's mother and sister were in court when the Applicant was sentenced for his attack on Ms K and the threatening messages he sent to Ms N. The irresistible inference is that they were in court, not by coincidence, but because the Applicant was being sentenced. The learned Judge described the offending. They each have a good command of English. I find it extremely unlikely that they were unaware of what he was being sentenced for in August 2022. **Therefore I find that they were not completely honest in their evidence, which undermines the credibility of their evidence in general.**
>
> (Emphasis added).

40 Also relevant are the passages from AAT [292]-[297] and [301]-[303], under the heading "Procedural fairness", where the Tribunal stated:

> 292. I formed the opinion that the Applicant's mother and sister were not completely honest about their knowledge of the Applicant's offending, and that their behaviour indicated that they were not seriously concerned that he could commit suicide here or in Fiji.
>
> 293. On 6 October 2023, the Tribunal sent an email to the Applicant (copied to the Respondent) attaching extracts of the transcript of the evidence given by the Applicant's mother and sister, and invited the Applicant to submit further evidence from those witnesses addressing these issues. The email included:
>
> > *"The current state of the evidence may lead the Tribunal to make adverse findings about the credibility of the Applicant's mother and/or sister due to the above apparent anomalies in their evidence. Further, the Tribunal may infer that the Applicant's mother, sister or both were told by the Applicant to tell the Tribunal that he was suicidal at the prospect of being returned to Fiji to enhance his prospects of getting his visa back."*
>
> 294. That afternoon, the Applicant's counsel stated that the Applicant was prohibited from putting forward further evidence by s500(6J) of the Act. He further submitted that
>
> > *"even if it be accepted that the Applicant's mother and sister were present in Court on the relevant occasion, it does not necessarily follow that they were present in Court for the entirety of the sentencing proceedings. Nor does it*

> *necessarily follow that the Applicant's sister and mother followed all that was said in the sentencing proceedings…The fact that the Applicant's sister and mother were present at the Applicant's sentencing hearing does not mean that their presence at those proceedings meant that they received full knowledge of the Applicant's criminal history, including the full nature and sentences the Applicant had received."*

295. The Applicant's mother and sister were never asked if they had full knowledge of his criminal history including the sentences he received. High level knowledge was never in issue. The issue was their denial of any knowledge prior to these proceedings.

296. The Applicant's counsel construed the quoted passage from the Tribunal's email as an *"Allegation of Perverting the Course of Justice / Breach of Administrative Appeals Tribunal Act 1975 (Cth)"* and that the *"the Applicant, the Applicant's mother and sister have conspired to give false and misleading evidence before the Tribunal".*

297. On the morning of 9 October 2023, the Respondent emailed the Tribunal advising that the Minister did not contend that the Applicant, his mother and his sister had conspired to each mention the Applicant's alleged risk of suicide. The Tribunal therefore proceeded to determine the application on the basis that there was no such arrangement. The Respondent reiterated the submission made in the hearing that the evidence did not demonstrate any risk of suicide, and specifically pointed to the lack of medical evidence.

…

301. The Applicant's submissions that were provided on 6 October 2023 included:

> *"As a matter of procedural fairness, before the Tribunal could make adverse findings in relation to the impugned issues raised, the allegations would need to be put to the Applicant, the Applicant's mother and the Applicant's sister…The Applicant is also concerned that these issues have been raised, in effect, at the 11th hour by the Tribunal. They were not, of course, raised during the trial by either the Tribunal or the Minister. These raise serious procedural fairness concerns for the Applicant."*

302. During the hearing, in the interests of procedural fairness, the Tribunal recounted evidence that a witness had given that was inconsistent with evidence the Applicant had given, and gave the Applicant an opportunity to address the inconsistency. His counsel expressed doubts about the Tribunal's recollection of the evidence, which underlined the importance of having an accurate record of the oral evidence. **The hearing concluded on Friday 29 September 2023. The 206 page transcript of proceedings was received by the Tribunal on the afternoon of Wednesday 4 October 2023. The Tribunal raised these matters with the parties on the morning of Friday 6 October 2023. The Tribunal was required to decide the application before midnight on Monday 9 October 2023.**

303. With respect to the Applicant's complaint that matters were not put to the witnesses during the hearing, it is not reasonable to expect the Respondent, or the Tribunal for that matter, to alert the Applicant to every weakness in his case. That is especially so in circumstances where there was a great deal of evidence from the Applicant and his witnesses, no real-time record of it, and the Applicant was well positioned to address the relevant weakness in issue had he wanted to. The District Court sentencing remarks were provided to the Applicant last year with an invitation to comment on them. He did comment in a document dated 22 December 2022. The sentencing remarks were also contained in the "G-Documents" that were served on him several weeks before the hearing. The Applicant secured legal representation in

> April 2023. **He and his counsel were obviously present in the Tribunal hearing when his mother and sister each said they did not know about any of his offending until a copy of his criminal record was provided in the context of these proceedings. There was ample opportunity for the Applicant to address the apparent inconsistency between their evidence and the evidence of a District Court judge in re-examination. The invitation from the Tribunal following the hearing was made over and above the requirements of procedural fairness.**
>
> (Emphasis added; footnotes omitted).

41 The applicant submitted that procedural fairness required the substance of the adverse conclusion drawn by the Tribunal in the final sentence of AAT [170] to have been put to the applicant's mother and sister at the hearing, which it was not. In support of this submission, the applicant drew attention to the following contextual matters:

(a) neither before nor during the hearing did the Tribunal or the Minister put to the applicant's mother and sister the alleged inconsistency in their evidence;

(b) neither before nor during the hearing did the Tribunal or the Minister raise the adverse conclusion with the applicant;

(c) on Friday 6 October 2023, the Tribunal alerted the applicant's legal representative to the proposed adverse conclusion and invited a response;

(d) this afforded the applicant just over one business day to respond to the Tribunal, as the last day the Tribunal could make a decision in the matter was Monday 9 October 2023 (given the effect of s 500(6L)(c) of the Act).

42 The applicant further submitted that the invitation made by the Tribunal referred to in [41](c) above did not cure the Tribunal's breach of procedural fairness obligations, as by the time of that invitation the hearing had concluded. In this regard, the applicant drew attention to s 500(6J) of the Act, which provides that, in an application for review of a non-revocation decision under s 501CA(4):

> … the Tribunal must not have regard to any document submitted in support of the person's case unless a copy of the document was given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review. However, this does not apply to documents given to the person or Tribunal under subsection 501G(2) or subsection (6F) of this section.

43 The applicant submitted that the effect of s 500(6J) was that the applicant was not permitted to adduce further written evidence in support of the applicant's case, and further, that the Tribunal's request for additional evidence after the hearing conflicted with the requirements of the section.

44 Alternatively, the applicant contended that the delayed notification by the Tribunal of the proposed adverse conclusion and the request for further information afforded the applicant insufficient time to adequately respond and amounted to a breach of procedural fairness.

45 Finally, the applicant submitted that this breach was material, in that there will generally be a realistic possibility that the decision-making process could have resulted in a different outcome where a party was denied an opportunity to present evidence or make submissions on an issue that required consideration.

46 In response to this ground, the Minister submitted that while the Tribunal is required to afford procedural fairness to the parties to a review under s 501CA of the Act, the content of procedural fairness will depend on the statutory framework within which the decision-maker exercises power and the facts and circumstances of the particular case: citing ***SZBEL*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152 at [26] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). The Minister acknowledged that the hearing rule requires a decision-maker "to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made" and to "advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material": citing *Commissioner for Australian Capital Territory Revenue v* ***Alphaone*** *Pty Ltd* (1994) 49 FCR 576 at 592 (Northrop, Miles and French JJ); and *Manebona v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 116; (2023) 298 FCR 516 at [149] (Logan, Rangiah and Goodman JJ).

47 The Minister contended, however, that the natural justice hearing rule does not require the decision-maker to "expose his or her thought processes or provisional views for comment before making the decision", or to give a person affected by an exercise of power "the chance to comment on every nuance of what the decision-maker is considering": citing *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 at [9] (French CJ and Kiefel J); and *Hala v Minister for Justice* [2015] FCAFC 13; (2015) 145 ALD 552 at [66] (Dowsett, Tracey and Katzmann JJ). The Minister submitted that the Tribunal's adverse credibility finding at AAT [170] was but a natural evaluation of the evidence before the Tribunal, including the sentencing judge's remarks and the oral evidence given by his mother and sister, which was known to the applicant and in respect of which he had an opportunity to comment. The Minister submitted that natural justice did not require the Tribunal to identify

the inconsistency in the evidence or to disclose to the applicant in terms that it was proposing to find that his mother and sister had not been truthful in their evidence.

48 In support of this contention, the Minister relied on the principles enunciated by Gyles J in ***Lidono*** *Pty Ltd v Commissioner of Taxation (Cth)* [2002] FCA 174; (2002) 191 ALR 328 at [20], where his Honour stated:

> In my opinion, a tribunal, in assessing and reconciling material before it, is not bound to accept or reject any piece of evidence in whole, and it is often the case that a view of the facts is found which does not accord with the evidence or submissions by either side. In my opinion, that is what occurred here. **Provided that such a view is properly open on the evidence, and does not involve the use of any fresh undisclosed material or undisclosed head of liability or defence, in my view, the Tribunal is not bound to call the parties back and warn of that possibility.**
>
> (Emphasis added).

49 The Minister also drew attention to the decision of Finn J in *Rana v Military Rehabilitation and Compensation Commission* [2005] FCA 6 at [69], where his Honour, referring to *Lidono* with approval, held that the Tribunal "was not obliged to reveal to [the applicant] at the hearing its reasoning based on its views of his credibility, provided its conclusion was not arrived at in reliance upon any undisclosed fact or matter of which [he] was unaware". The Minister submitted that the views of Gyles J in *Lidono* in relation to arriving at a conclusion of credibility have been endorsed by Full Courts of this Court, including in *Puafisi v Minister for Immigration and Citizenship* [2008] FCAFC 39 at [24] (Black CJ, Lindgren and Sackville JJ) and *Comcare v Lilley* [2013] FCAFC 121; (2013) 216 FCR 214 at [111] (Kerr, Farrell and Mortimer JJ).

50 On the assumption that procedural fairness *did* require the Tribunal to inform the applicant or the witnesses that it was proposing to make adverse credibility findings against them and to seek further comment from them, the Minister further submitted that the applicant was not denied a reasonable opportunity to respond to the Tribunal's concerns. The Minister advanced two arguments in this regard.

51 *First*, the Minister submitted that procedural fairness required the applicant to be given "a reasonable opportunity to present [his] case", and what is a reasonable opportunity depends upon "the whole of the circumstances, including the nature of the jurisdiction exercised and the statutory provisions governing its exercise": citing *Manebona* at [147]. In this regard, the Minister emphasised the deeming provision in s 500(6L) which required the Tribunal to act

with urgency and which constrained the Tribunal's procedural fairness obligations in the circumstances of the case.

52 *Second*, the Minister submitted that the applicant's reliance on s 500(6J) is misplaced. The Minister contended that the provision of a statement addressing the inconsistencies identified by the Tribunal would not have contravened s 500(6J). That is because s 500(6J) is not directed to information which an applicant may wish to give in answer to a matter raised by the Tribunal *of its own initiative*, even if that information supports their case; rather, it applies only in respect of information provided by an applicant as part of their case-in-chief: citing ***Uelese** v Minister for Immigration & Border Protection* [2015] HCA 15; (2015) 256 CLR 203 at [5], [44], [53], [72] (French CJ, Kiefel, Bell and Keane JJ), [97]-[99], [101], [104] (Nettle J); and *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v **DOM19*** [2022] FCAFC 21; (2022) 289 FCR 499 at [17], [23](d)-(e) (Mortimer, Halley and O'Sullivan JJ).

53 The Minister also noted that the two-day rule in s 500(6H) would not apply, as that provision restricts the receipt of "witness testimony – oral testimony in chief": citing *DOM19* at [21]. The Minister relied on *DOM19* at [17], where the Full Court held that s 500(6H) "should not be construed to restrict the flexibility of the Tribunal to ensure procedural fairness to the parties to a review beyond what is required by its terms" (relying in turn on *Uelese*). The Minister contended that that is precisely what the Tribunal sought to do in this case, and that its request for the applicant to provide a further response by 9 October 2023 was not unreasonable in circumstances where:

(a) that was the last day on which a decision on the review had to be made;

(b) the hearing had concluded only seven days earlier;

(c) the transcript of the hearing (which ran to over 200 pages) was received by the Tribunal in the afternoon on Wednesday 4 October 2023;

(d) there was a considerable amount of evidence and submissions which the Tribunal was required to consider; and

(e) the issue raised by the Tribunal was a discrete one.

54 Finally, the Minister submitted that any denial of procedural fairness as alleged by the applicant would not have been material. In this regard, the Minister contended that the Tribunal's conclusions on Primary Consideration 1 turned almost entirely on an assessment of other evidence and, insofar as its conclusions on that primary consideration turned in part on the

finding made at AAT [170], it made no difference to the result given the Tribunal's conclusion at AAT [305] that "[e]ven if there was not a material risk of further offending, Primary Consideration 1 would weigh very heavily against the Applicant…". Further, the Minister contended that the applicant failed to explain how, had the finding at AAT [170] not been made, the outcome of the review could have been different, and that an examination of the Tribunal's reasons reveals that that finding did not affect its conclusions on any other considerations.

D.2 Consideration

55 By Ground 3, the applicant contended that the Tribunal denied him procedural fairness in respect of the findings that the Tribunal made that were adverse to the credibility of aspects of the evidence given by his mother and sister. Relevantly, the material finding in this regard related to the evidence given by the applicant's mother and sister that they were unaware of the applicant's criminal offending until more recently when a copy of his criminal history was provided to them for the purposes of the hearing before the Tribunal: AAT [196]. The Tribunal found that the applicant's mother and sister were not "completely honest" in their evidence in relation to this matter in circumstances where the Tribunal found that both of them had been present in the District Court when the applicant had been sentenced in August 2022 and where the learned sentencing judge in the District Court had described the applicant's previous offending as part of the sentencing remarks: AAT [170].

56 There was another matter in respect of which the Tribunal had concerns about the evidence given by the applicant's mother and sister relating to whether they had conspired with each other to give evidence to the Tribunal about the applicant's alleged risk of suicide, but ultimately the Tribunal did not make any finding in this regard: AAT [292]-[303].

57 The applicant's contentions before me were, in essence, that the Tribunal was bound to raise with and put to the applicant, and each of the applicant's mother and sister, the alleged inconsistencies in the evidence given by the applicant's mother and sister and the prospect of adverse findings being made in this regard. I do not accept this contention.

58 Although it may be accepted that the Tribunal was bound to identify to the applicant any issue critical to its decision, such an obligation was limited to adverse conclusions which would not be "open on the known material": see *SZBEL* at [29]; and *Alphaone* at 592. The obligation to afford procedural fairness did not require the Tribunal to provide a "running commentary" as

to its reasons or reasoning: *SZBEL* at [48]; *Minister for Home Affairs v Smith* [2019] FCAFC 137 at [17]. In *SZBEL*, the High Court stated at [48]:

> Secondly, as Lord Diplock said in *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry*:
>
> > the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.
>
> Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.

59 The Tribunal had before it the sentencing remarks of Judge Everson of the District Court of Queensland dated 25 August 2022 in respect of the sentences imposed on the applicant for multiple domestic violence and other offences. Those sentencing remarks (at page 3, lines 44-45) recorded that the applicant's mother and sister were present in Court at the time of the applicant's sentencing. The sentencing remarks also record the following (at page 3, lines 4-9):

> Unfortunately, you also developed a drug habit of using methamphetamine. This is reflected in your 15-page criminal history, which is exhibit 1 before me. However, your criminal history also contains disturbing entries for violence against women and in recent times, from 2 February 2020, six entries for contravention of domestic violence orders. You therefore have a lengthy and relevant criminal history and you are not a youthful offender by any means.

60 During the applicant's mother's evidence before the Tribunal, she gave the following evidence in response to questions asked by the Tribunal member:

> It sounds like from what you've said that you didn't know really what Ashley was doing, the offences he was doing and the lifestyle that he was leading, and you still don't really know much about it now. Is that right?---Yes, is – that's very true, yes, yes.
>
> …
>
> You've said in your statement that 'Ashley is not a bad person but he made some very bad choices and drugs and the wrong company led to his demise.' That sounds like you do know a bit about what he was doing. What's brought you to that conclusion that I just read out?---Yes, yes. Now because I got – no, only now, only now. Because my daughter, I think Dr Donnelly sent her all the – all that, but she didn't tell me everything. She only said, 'Mum, he was in drugs, he was in drugs, that's why he's like this.' I said, 'Don't tell me any more because I don't want to know. I can't take it, I can't take any more. Don't let me know anything else, so' - - -

61 It is evident from this exchange that the Tribunal member was seeking to ascertain whether the applicant's mother did or did not know much about the applicant's criminal offending, and, ultimately, her response was that she came to know about some of that information as part of the proceedings before the Tribunal. The applicant's sister gave the following evidence before the Tribunal during cross-examination:

> Thank you. First question I have is it sounds like that you and your family were very shocked when you first learned of your brother's criminal history?---M'mm.
>
> Is it fair to say that you only learnt about the extent of his criminal history during these tribunal proceedings?---Yes and no. Dr Donnelly did send me my brother's criminal history, so I have skimmed through it. It's very long and detailed, but I understand what's happened and what he's done. So I've been aware of it since – yes, since this tribunal hearing period from Dr Donnelly.

62 The position therefore was that there was evidence before the Tribunal that the applicant's mother and sister were present in the District Court when the sentencing judge observed and remarked upon the applicant's "lengthy and relevant criminal history". The Tribunal also had evidence that the applicant's mother and sister were unaware of that criminal history until more recently as part of the proceedings before the Tribunal. Both the applicant's mother and sister were asked questions about their prior knowledge of the applicant's criminal history and its extent. The Tribunal, having heard evidence from the applicant's mother and sister, concluded that they had a "good command of English" and, as a result, concluded that it was "extremely unlikely" that they were unaware of the applicant's prior criminal offending in circumstances where they were both present in Court at the time the applicant was sentenced: AAT [170]. In short, the Tribunal engaged in an exercise of evaluating the evidence before it and made a decision not to accept it in this respect. The acceptance or rejection of that evidence was a matter for the Tribunal and was part of its process of reasoning.

63 In the circumstances, it is my view that the Tribunal was not required to expose to the applicant, or the applicant's mother or sister, that the Tribunal would not be accepting their evidence that they had only learned about the applicant's prior criminal history in recent times. Whether the Tribunal would accept or reject their evidence in this regard was a matter that was obvious on the known material.

64 In any event, following the conclusion of the Tribunal hearing, the Tribunal wrote to the applicant's representatives identifying that, on the current state of the evidence, the Tribunal may make "adverse findings about the credibility" of the evidence given by the applicant's mother and sister: AAT at [293]. On the afternoon of that same day, the applicant's Counsel

responded by stating that the applicant was prohibited from putting forward further evidence by reason of s 500(6J) of the Act, but nevertheless made a submission that, although the applicant's mother and sister were present in the District Court when the applicant was sentenced in August 2022, it did not follow that they were present in Court for the entirety of the sentencing proceedings and, even if they were, it did not follow that they thereby had full knowledge of the applicant's criminal history, including the full nature of the sentences he had received: AAT [294]. Thus, it followed that, even if the Tribunal was bound to have raised with the applicant the prospect that it might make adverse findings in relation to the evidence given by the applicant's mother and sister, an opportunity was given to the applicant to respond to that matter. This opportunity was taken up by the provision of a response by the applicant's Counsel.

65 The question as to whether the Tribunal could afford procedural fairness by inviting further comment after the conclusion of the Tribunal hearing does not need to be decided in view of the conclusions I have reached that the Tribunal did not deny the applicant procedural fairness. In any event and for completeness, I do not regard s 500(6J) of the Act as having prevented the Tribunal from affording the applicant an opportunity to comment on particular matters or giving the applicant an opportunity to provide further materials following the conclusion of the Tribunal hearing. As the Minister submitted, s 500(6J) does not apply to information which is sought from the applicant by the Tribunal of its own initiative, and, instead, it applies only in respect of information provided by the applicant in support of his case in chief: see *Uelese* at [5], [44] (French CJ, Kiefel, Bell and Keane JJ) and [97]-[104] (Nettle J). The Minister further submitted that s 500(6H) did not preclude such steps as it operated in respect of witness testimony or oral testimony in chief given by the applicant: see *DOM19* at [21]. In my view, the Minister's submissions should be accepted. As the Full Court held in *DOM19* at [17], s 500(6H) should not be construed to restrict the flexibility of the Tribunal to ensure procedural fairness to the parties to review beyond what is required by its terms. Nor do these provisions of the Act affect or operate inconsistently with the Tribunal's obligations under the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**) to afford procedural fairness to the applicant including, where necessary, to adjourn proceedings: *DOM19* at [32]. In my view, ss 500(6H) and (6J) do not restrict the operation of the AAT Act in respect of the obligations imposed on the Tribunal to ensure that every party to a proceeding is given a reasonable opportunity to present their case, to adjourn proceedings, or to require any party to

provide further information in relation to a proceeding: *Uelese* at [57], [70], [77] (French CJ, Kiefel , Bell and Keane JJ); and *DOM19* at [17] and [32].

66 It may be accepted that, here, to the extent that the Tribunal sought to give the applicant an opportunity to comment, it was, in practical terms, a short period of time. The Tribunal wrote to the applicant's representatives at 11.48am on Friday 6 October 2023 and invited a response by 8.00am on Monday 9 October 2023. Although in the ordinary course, the period of time afforded for a response may be regarded as extremely short, that period has to be considered in light of the statutory framework within which the Tribunal was obliged to make a decision and, as the Tribunal observed, the availability of a transcript and its review.

67 It follows that Ground 3 fails.

E. GROUND 4

E.1 Overview

68 This ground raises the question of whether the Tribunal failed to give proper, genuine and realistic consideration to various representations made by the applicant, by reference to a number of conclusions drawn by the Tribunal in its reasons.

69 The **first impugned conclusion** is at AAT [186], where the Tribunal found that the applicant had done "several courses aimed at addressing family violence". The **second impugned conclusion** is at AAT [234], where the Tribunal found that the applicant had "made very limited efforts to rehabilitate". The **third impugned conclusion** is at AAT [240], where the Tribunal, writing in the context of the applicant's time in immigration detention, found that there was "no evidence that [the applicant] is suffering any particular difficulty".

70 In relation to the first impugned conclusion, the applicant submitted that the word "several" means "more than two but not many". The applicant submitted that in fact, the applicant had undertaken at least 20 courses related to family violence (see ASFIC at [61]), which is inconsistent with the conclusion drawn at AAT [186]. The applicant contended that this demonstrated that the Tribunal did not give active intellectual consideration to the applicant's rehabilitation.

71 In relation to the second impugned conclusion, the applicant submitted that the finding suggests that, after consideration, the Tribunal determined that the applicant had put forth minimal or insufficient effort towards rehabilitation. The applicant contended that this finding is

inconsistent with the fact that the applicant had completed about 50 rehabilitation programs (see ASFIC at [61]-[70]), and indicates that the Tribunal did not give active intellectual consideration to the applicant's "significant level of commitment to rehabilitation".

72 In relation to the third impugned conclusion, the applicant submitted that the finding is inconsistent with the evidence presented, which indicated that the applicant's mood was negatively affected by being in detention, a diagnosis of Major Depressive Disorder was made during his time in detention, and the applicant himself contended that his time in detention represented a significant deprivation of personal liberty. Again, the applicant submitted that the Tribunal's conclusion is contrary to the evidence and shows that it failed to lawfully read, identify, understand and evaluate the applicant's representations.

73 Finally, the applicant contended that these errors were material. The applicant submitted that:

(a) the first impugned conclusion adversely influenced the Tribunal's evaluation of two primary considerations: the protection of the Australian community and issues pertaining to family violence;

(b) the second impugned conclusion adversely affected the Tribunal's consideration of the expectations of the Australian community;

(c) the third impugned conclusion had a significant impact on the Tribunal's interpretation of the legal ramifications of its decision; and

(d) collectively, the impugned conclusions compromised the Tribunal's attribution of weight to the primary considerations and its overall weighing in the balance.

74 In relation to the first impugned conclusion, the Minister contended that the applicant's focus on the word "several" ignores the context in which the Tribunal made the finding. The Minister submitted that the Tribunal was "well aware that the applicant had undertaken at least 30 rehabilitative courses, some of which concerned family violence", pointing to the Tribunal's finding at AAT [126] that:

> Prior to his interview with Mr Visser, the Applicant had done at least 30 rehabilitative courses, mostly online, and he had engaged in some counselling. The subject matter of the courses and counselling covered areas such as abuse, violence against women and girls, family violence, drugs, anger management, cognitive behaviour intervention, behaviour management, stress management and conflict resolution. There were also modules in a broad category of self-help such as building self-esteem and goal setting…

75 In relation to the second impugned conclusion, the Minister again submitted that the statement that the applicant had "made very limited efforts to rehabilitate" had to be read in context. The Minister contended that that finding was made in a passage of the Tribunal's reasons in which it was dealing with the applicant's history of offending and re-offending and the absence of or minimal efforts toward rehabilitation in *that* time. The Minister submitted that the Tribunal acknowledged the steps toward rehabilitation that the applicant had most recently taken while in custody elsewhere in its reasons: citing AAT [121], [124]-[126], [131], [153] and [177].

76 In relation to the third impugned conclusion, the Minister contended that the applicant's complaint overlooks the Tribunal's finding (also at AAT [240]) that there was no evidence that he was "not adequately cared for" in detention and that he had "access to the medical care he needs and to psychological counselling". The Minister submitted that the Tribunal's concern was with any difficulties experienced by the applicant that could *not* be addressed in detention. The Minister submitted that the Tribunal was aware of, and took into account, the applicant's medical needs: citing AAT [132], [241], [263], [266]-[277] and [284]-[285].

E.2 Consideration

77 In my view, the applicant's contentions involve a narrow reading of the entirety of the Tribunal's reasons which must be read as a whole and fairly without an eye keenly attuned to the perception of error: see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-272.

78 As to the first impugned conclusion, the Tribunal's statement that the applicant had undertaken "several courses aimed at addressing family violence" (AAT [186]) has to be read fairly and together with the fact that the Tribunal examined the applicant's evidence as to the steps he had taken toward rehabilitation in an extensive way including in relation to those steps he had taken in custody and elsewhere: see AAT [121], [124]-[126], [131], [153] and [177]. In my view, as the Minister submitted, the Tribunal's findings that the applicant had undertaken "several courses" must be read in light of the findings it made elsewhere recognising that the applicant had undertaken extensive courses: e.g., see AAT [126].

79 In relation to the second impugned conclusion, I accept the Minister's submission that the Tribunal's finding that the applicant had "made very limited efforts to rehabilitate" has to be read in context in that, in the relevant part of the Tribunal's reasons in which this finding was made, the Tribunal was making an observation as to the limited efforts as to rehabilitation that the applicant had made *at the time* that he had *engaged in the offending* and reoffending.

80 In relation to the third impugned conclusion, the Minister's submissions must again be accepted. It is not correct that the Tribunal made a general finding that the applicant was not suffering any particular difficulty. Rather, the Tribunal's finding was that, in light of the access to medical care and psychological counselling that he had received, there was no evidence that the applicant had not been "adequately cared for" in detention: see AAT [240]. As the Minister submitted, the Tribunal's concern was that there were no difficulties that the applicant had confronted that had not been addressed in detention.

81 The applicant's contentions proceed on a narrow reading of the Tribunal's reasons, which I do not accept. For these reasons, Ground 4 fails.

F. GROUND 5

F.1 Overview

82 This ground raises the question of whether the Tribunal overlooked or misunderstood evidence adduced by the applicant's sister regarding her awareness of the applicant's drug use.

83 The part of the Tribunal's reasons which is relevant to this ground is AAT [169] where the Tribunal stated:

> The Applicant's mother and sister said they were unaware of the Applicant [sic] drug use and offending until very recently when a copy of his criminal history was provided for the purpose of this application…

84 The applicant submitted that the finding at AAT [169] conflicts with an explicit statement made by the applicant's sister in examination before the Tribunal in which she acknowledged longstanding awareness of the applicant's marijuana use (at T132.22-26):

> All I knew – and I knew this for years, that he had been smoking marijuana. And many times, you know, I've had a go at him and said, 'You've got to stop doing that. You can't take drugs like that'. That's the extent of it that I knew over these years.

85 The applicant submitted that the discrepancy between the Tribunal's finding and the applicant's sister's testimony suggested that the Tribunal failed to lawfully consider the evidence on a disputed topic. The applicant contended that that error was material in that it infected the Tribunal's analysis of the applicant's sister's evidence and her potential to be a prosocial factor in the applicant's life moving forward (at AAT [173]), which was a matter going to the applicant's prospects of reoffending.

86 The Minister contended that this ground proceeded on a misunderstanding of the Tribunal's reasons. The Minister submitted that, insofar as the Tribunal was referring to the knowledge of

the applicant's sister, its statement at AAT [169] concerned her lack of knowledge of his "offending", rather than of his drug use. The Minister contended that this coheres with the statement in the final sentence of AAT [169], that the applicant's sister "was asked if she knew the details of the more recent assaults, and she said 'I know the details that Dr Donnelly sent me, what he sent me, yes'"; and the finding at AAT [170] that it was "extremely unlikely that [the applicant's sister and mother] were unaware of what he was being sentenced for in August 2022".

87 Alternatively, the Minister submitted that the statement in AAT [169] could be read as directed to the applicant's sister's knowledge of the *full extent* of his drug use. The Minister pointed to evidence given by the sister at the hearing that she was unaware of his use of methamphetamines and that he had been able to hide his drug use and criminal issues from her: T133.5-17. The Minister submitted that that evidence was reflected in the finding at AAT [173] that "for many years [the applicant's sister] did not know about his drug using lifestyle and offending". The Minister contended that on this reading, there was no inconsistency between the Tribunal's findings and the evidence.

F.2 Consideration

88 By this ground, the applicant contended that the Tribunal overlooked or misunderstood the evidence given by the applicant's sister regarding her awareness of the applicant's drug use. I do not agree.

89 In my view, read fairly, the Tribunal's reasons disclose that it was concerned about evidence given by the applicant's mother and sister that they were unaware of the applicant's drug use *and* offending until recently when a copy of his criminal history was provided. The concern that the Tribunal was identifying was that the applicant's sister was giving evidence that she had only recently learned about the applicant's drug use and offending in circumstances where she had been present at the time the applicant was sentenced in the District Court. The finding made by the Tribunal at AAT [169] was not inconsistent with the evidence given by the applicant's sister that she had limited knowledge of the applicant's drug use in the past. As the Minister pointed out, the Tribunal accepted at AAT [173] that the applicant's sister did not know for many years about the applicant's drug use and lifestyle. The Tribunal's concern as expressed at AAT [169] was with her evidence that she had only become aware of the applicant's drug use *and* offending as part of the proceedings before the Tribunal. I discern no inconsistency.

90 I do not accept that the Tribunal misunderstood the evidence or that the Tribunal engaged in any error, let alone jurisdictional error. Accordingly, Ground 5 fails.

G. DISPOSITION

91 For the foregoing reasons, the application should be dismissed. The applicant should pay the Minister's costs as agreed or assessed.

I certify that the preceding ninety-one (91) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Shariff.

Associate:

Dated: 19 July 2024