Federal Court of Australia

CRNL v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 1482

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| Review of: |  |
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| File number: |  |
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| Judgment of: | **JACKSON J** |
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| Date of judgment: | 19 December 2024 |
|  |  |
| Catchwords: | **MIGRATION** - judicial review of decision of Administrative Appeals Tribunal as to whether to revoke mandatory cancellation of visa - whether Tribunal mischaracterised or misconstrued its task by uncritically accepting the veracity of police reports - whether Tribunal denied procedural fairness by not notifying applicant how it would deal with the police reports - whether assessment of likelihood of further criminal or other serious conduct devoid of meaningful content - no jurisdictional error found - application dismissed |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 33*Migration Act 1958* (Cth) ss 499, 501, 501CA |
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| Cases cited: | *Aghbolagh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affair*s [2023] FCA 43*AUP21 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 442*Chen v Minister for Immigration and Border Protection* [2017] FCA 46*CRNL v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138*Jattan v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 866*Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326*RDYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 108*RDYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 254 |
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| Division: | General Division |
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| Registry: | Western Australia |
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| National Practice Area: |  |
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| Number of paragraphs: | 92 |
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| Date of last submissions: | 26 November 2024 (applicant)20 November 2024 (first respondent) |
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| Date of hearing: | 12 November 2024 |
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| Counsel for the Applicant: | Mr S Kikkert (pro bono) |
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| Counsel for the First Respondent: | Mr TM Lettenmaier |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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| Counsel for the Second Respondent: | The second respondent filed a submitting notice save as to costs |

ORDERS

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|  | WAD 85 of 2024 |
|   |
| BETWEEN: | CRNLApplicant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| order made by: | JACKSON J |
| DATE OF ORDER: | 19 DECEMBER 2024 |

THE COURT ORDERS THAT:

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

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

REASONS FOR JUDGMENT

JACKSON J:

1. The applicant is a citizen of New Zealand. In October 2020, a delegate of the first respondent (**Minister**) cancelled his Australian visa because the delegate determined that the applicant did not pass the character test, on the ground that he had a substantial criminal record (within the meaning of s 501(6)(a) of the *Migration Act 1958* (Cth)).
2. The applicant made representations as to why the cancellation of his visa should be revoked, but in 2021 a delegate of the Minister decided not to revoke it. The second respondent, the Administrative Appeals Tribunal, affirmed that decision, but the Full Court set that aside and remitted the matter to the Tribunal: *CRNL v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138. The applicant now seeks judicial review of a **second decision** of the Tribunal, which was made on the remitter from the Full Court.
3. The application is made on two grounds. The first impugns certain adverse factual findings made by the Tribunal, that particular conduct by the appellant was violent and threatening and that it comprised behaviour that caused its victims to be fearful. While the bases on which those findings were challenged in the originating application were numerous, in oral argument they were helpfully narrowed down to what I will call two limbs. The first limb is that the Tribunal misunderstood or mischaracterised its task, that being evidenced by the Tribunal's uncritical acceptance of the veracity of police reports which were before it. Instead, it was said, the Tribunal should have assessed the reports in the context of all the other available evidence and submissions so as to arrive at its own view as to their veracity or otherwise. The second limb of this ground is that, if the Tribunal intended to accept the reports uncritically, it should have put the applicant on notice of that intention, so that he had an opportunity to make submissions to persuade the Tribunal not to take that approach. This second limb thus resolves to a contention that in failing to put him on notice, the Tribunal denied him procedural fairness.
4. The second ground, added by an amendment sought (and not opposed) at the commencement of the hearing, was that the Tribunal fell into the kind of jurisdictional error that was found to have occurred in ***Jattan*** *v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 866 (Banks-Smith J). In that case, the Tribunal had made findings about the likelihood of Mr Jattan engaging in further criminal or other serious conduct which, in all the context, were held to be devoid of meaningful content. The applicant contends that the Tribunal has done something similar here and so has fallen into the same kind of jurisdictional error.
5. For the following reasons, the application will be dismissed.

## The second decision of the Tribunal

1. The Tribunal made the second decision on 20 March 2024.
2. When it made the second decision, the Tribunal was constituted by a member different to the one who had made the decision that the Full Court set aside. But in making the second decision, the Tribunal had regard to what was described as a remittal bundle containing all the material that had been before the first Tribunal. In addition to the remittal bundle, the second Tribunal had before it the transcript of the proceedings before the first Tribunal. Only the applicant gave oral evidence before the second Tribunal.
3. The remittal bundle included reports from the records of the South Australian and Western Australian Police Forces which had been obtained under summons. The reports concerned incidents that had come to the attention of the police but had not resulted in charges or convictions.
4. The second Tribunal noted that in July 2013 the applicant had been sentenced to 15 months' imprisonment for the offence of deprivation of liberty and set out further procedural history. It was plain that the applicant did not pass the character test for the purposes of s 501CA(4)(b)(i) of the *Migration Act*. So that provision did not furnish a ground to revoke the cancellation of the visa. Rather, the question before the Tribunal was whether there was 'another reason' to revoke the cancellation decision as contemplated by s 501CA(4)(b)(ii).
5. In making that decision, the Tribunal was conscious that under s 499(2A) of the *Migration Act* it was required to follow the relevant ministerial direction, which at the time was *Direction no. 99: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 99**). The Tribunal thus addressed the primary and other considerations that were mandatory under that direction, if relevant.
6. These included the protection of the Australian community and, under that heading, the nature and seriousness of the applicant's past conduct. After setting out the relevant parts of Direction 99, the Tribunal reviewed the applicant's history of offending. Since he had been convicted of numerous offences which included serious assaults on multiple domestic partners, and serious threats to them, the Tribunal concluded that the conduct was very serious. To the Tribunal's mind, consideration of sentences that had been imposed on the applicant also confirmed that finding. It is relevant to the second ground of review to note that the Tribunal did not at this point discuss the detail of any particular sentence imposed by a court, or of any assessment made by a court as to the risk of the applicant reoffending.
7. Several other matters the Tribunal was required to consider under Direction 99 also pointed to the conclusion that the applicant's conduct was very serious; they do not need to be described.
8. The Tribunal then went on to consider the nature of the harm to individuals or the Australian community should the applicant engage in further criminal or other serious conduct (see Direction 99 para 8.1.2(2)(a)). It concluded that, if repeated, the applicant's unlawful conduct would have the potential to occasion 'quite realistically, catastrophic harm to its victims' (Tribunal decision, para 48).

### The likelihood of reoffending or other serious conduct

1. The Tribunal then turned to discuss the likelihood of the applicant engaging in further criminal or other serious conduct (for which I will use the term 'reoffending' as a convenient shorthand) (Direction 99 para 8.1.2(2)(b)). This directly concerns the second ground of review. At paragraph 49 of its reasons, the Tribunal opened that discussion by saying (footnote removed):

During closing oral submissions, the Respondent's representative predicated any assessment of the Applicant's recidivist risk around one central question: 'The question is, really, "Is the risk so low that, a prospect of a future partner of the [the Applicant] being seriously injured or dying, is the risk so low that it is acceptable?"' For reasons apparent from the following evidentiary elements, that question must be answered in the negative.

1. The Tribunal then went on to consider material bearing on the likelihood of the applicant reoffending, from a variety of sources. It considered factors about the applicant's upbringing and background that the applicant himself identified as having resulted in his offending. The Tribunal also considered in some detail his evidence about the circumstances of his offending, and in general terms found that he denied having been violent, blamed his victims, and otherwise showed little or no true remorse. The Tribunal considered the applicant's conduct in prison, referring to an incident in 2013 and another in September 2020. It also noted that there had been no reported incidents in immigration detention, but said (para 61), 'His capacity to moderate his conduct in a domestic scenario and sustain a pattern of abstinence from substance abuse in the community remains to be tested.'
2. The Tribunal then reviewed whether the applicant had experienced any deterrent effect from the punishments he had received in the past. Relevantly to ground 2, the Tribunal's survey of the applicant's custodial history was given in broad overview, and so did not identify the particular time at which he had last been incarcerated.
3. The Tribunal then went on to consider potential factors that might militate against reoffending, such as relationships he had with his former partner and his children or stepchildren. The Tribunal did not place much store in those matters as protective factors.
4. The Tribunal also considered the applicant's 'abusive relationship with alcohol and illicit drugs' (para 67). In that regard it noted the remarks of the judge who sentenced the applicant for deprivation of liberty in July 2013 about the applicant's abuse of amphetamine, cannabis and alcohol.
5. The Tribunal then turned to what it called in a heading the 'absence of current and independent clinical evidence'. This part of its reasons is directly relevant to ground 2. The Tribunal said (para 69):

The Tribunal's task involving assessment of the Applicant's recidivist risk is made significantly more difficult and speculative in circumstances where there is no contemporaneous or current clinical opinion about the factors predisposing him to so very seriously offend.

1. The Tribunal went on to note some psychometric testing that had taken place before the sentencing in July 2013 and what it summarised as the sentencing judge's observations about the applicant's substance abuse, including that the applicant 'did not have any insight or acceptance about the extent to which those substances have played a part in his offending' (para 69). The Tribunal went on (para 70):

If (1) the Applicant has no realisation or understanding of the extent to which abuse of those substances have predisposed him to offend; and (2) if there is no current clinical analysis directed towards this question, how can this Tribunal now venture into the territory of definitively stating the level of recidivist risk he now represents? …

The Tribunal then quoted further remarks of the sentencing judge in 2013. The remarks quoted did not include any assessment of the risk that the applicant would reoffend.

1. The Tribunal then further discussed the lack of any expert clinical opinion on the risk of the applicant reoffending and described how, in its view, the 'situation did not improve during his oral evidence given in cross-examination' (para 72). It said (para 73):

The state of the Applicant's treatment for his mental health symptoms remains aspirational ('find a doctor') or the subject of self-treatment ('try and forget about it'). There is no clinical [sic] who has (1) identified the symptoms/diagnosed any condition(s) adversely impacting the Applicant's psychopathology; (2) defined a program of treatment to bring those symptoms under some form of remedial management and control; and (3) provided some kind of resulting prognosis about how such rehabilitative treatment now favourably speaks to the Applicant's level of recidivist risk.

1. The Tribunal then said the following:

***Findings about recidivist risk***

74. As mentioned earlier, this is the second ventilation of this application before this Tribunal. This has resulted in a bulky level of material. Despite that bulk, there is a relative dearth of independent and ultimately reliable evidence around recidivist risk. Having regard to the state of this bulky material (and the oral evidence given at both Tribunal hearings) I have arrived at the following conclusions about the Applicant's current recidivist risk:

* **capacity to identify causative factors:** the Applicant seems able to identify specific causative factors behind his offending. But he does not comprehend how those factors have predisposed him towards the commission of very serious offending;
* **remorse and acceptance of wrongdoing:** at least one judicial sentencing officer thought he displayed virtually no victim empathy and that he was no good at accepting responsibility for his offending. It must be said that the obfuscatory and self-serving tone of his evidence before the instant Hearing did little to dispel these impressions;
* **conduct while in prison:** while some of his conduct in prison has been more unruly than unlawful, this misconduct does betray an incapacity to manage his tendency for inconsequential thinking about the consequences of his actions. The consequences were benign in prison. They were clearly harmful and potentially catastrophic when committing his family violence conduct in the community;
* **no deterrent effect:** the Applicant's criminal history gives the clear impression of someone who has failed to heed any warning or take any lesson from the sentences imposed on him. I did not take from his evidence given before me any impression that he has now experienced any such deterrent effect;
* **the failure of protective factors to prevent offending:** the evidence contains reference to support networks of the Applicant in Australia that could now be said to be bulwarks against his risk of further offending. None of (1) the relationship with Ms C; (2) his step‑fatherly role for Avril and Child J; and (3) his role as a biological father to Child A prevented him from offending. The evidence does not suggest such factors will more effectively prevent him from offending in future;
* **unresolved and undefined substance abuse issues:** in my non‑clinical opinion, these issues have been front and centre - in a dispositive sense - in the Applicant's pattern of offending. There is a concerning historicity behind the Applicant's substance abuse issues stretching back some 20 years. While they remain unresolved or unaddressed, his recidivist risk remains uncertain and, ultimately, unknown;
* **the absence of current and independent expert clinical evidence:** the Applicant's symptom(s) and diagnosis(es) predisposing his offending conduct remain unknown and untreated. His prospects of sourcing and receiving such rehabilitative treatment are aspirational and otherwise to be self-determined.

**Assessment of recidivist risk**

75. I am hard-pressed to identify a single evidentiary factor on which a finding about the Applicant's current level of recidivist risk can be reliably made. The absence of clinical intervention and reporting is concerning. The Applicant talks about re-entering the community and assuming the respective responsibilities of remunerative employment and active parenting. These aspirationally expressed intentions are not supported by, or predicated on, supportive clinical opinion that past pre-dispositive factors behind his offending are now under satisfactory management and control.

76. In these circumstances, I consider it unsafe to venture any assessment of actual future risk. To the extent I am required to meet this requirement, I will say (and find) that this Applicant's current level of recidivist risk - in the event of a return to the Australian community - cannot be safely found to be any different to what it was at the time of his most recent removal from that community.

…

**Conclusion of Primary Consideration 1:**

78. With reference to the weight attributable to this Primary Consideration 1:

(a) I have found the nature and seriousness of the totality of the Applicant's conduct to date has been very serious;

(b) I have found that recommission of all or part of the Applicant's offending would have the potential for the occasioning of physical, psychological, measurably material and, quite realistically catastrophic harm to its victims;

(c) I have found the Applicant's current level of recidivist risk cannot now be safely found to be any different to what it was at the time of his most recent removal from the Australian community.

79. My analysis of the material leads me to a finding that this Primary Consideration 1 confers a very heavy level of weight towards this Tribunal affirming the Decision Under Review.

1. I interpret the Tribunal's roundabout way of expressing itself in paragraphs 76 and 78(c) as meaning that it thought that the level of risk of the applicant reoffending at the time of the second decision was the same as the level of risk at the time when the applicant was last removed from the Australian community. To the extent that the Tribunal did make a conclusory finding about the likelihood of the applicant reoffending, it appears to be in those paragraphs.
2. However, nowhere in its reasons for decision did the Tribunal say when the applicant was last removed from the Australian community, or what the level of recidivist risk was at that time. I have described every part of its reasons in which it could have approached those subjects, or did approach them, and at no point does it say anything that permits identification of what view it held (if any) as to the level of recidivist risk at the time of the applicant's most recent removal from the Australian community.
3. Nor, after paragraph 79, did the Tribunal shed any light on those matters. The Minister did not suggest otherwise in this Court. As will be seen, this ostensible absence of a referent for the Tribunal's conclusory finding was the subject of the second ground of review.

### The police reports

1. Given the nature of the applicant's criminal record, the second primary consideration, concerning family violence, was also relevant. It was under this heading that the Tribunal came to make the finding, based on police reports about incidents that did not lead to criminal convictions, which the applicant now impugns. Direction 99 relevantly provided at paragraph 8.2(2):

This consideration is relevant in circumstances where:

(a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or

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

1. After setting paragraph 8.2 out in full, the Tribunal noted that the applicant had both convictions for 'domestically violent conduct' and had 'perpetrated family violence conduct that has come to the attention of law enforcement authorities, but for which he was not charged or convicted' (para 81). After summarising the applicant's criminal convictions for family violence, the Tribunal said (footnotes removed):

82. With reference to his family violence conduct that was duly recorded as having been perpetrated but for which he was not charged and convicted, the material contains the following:

* on 12 June 2011, police were called following an argument between the Applicant and his then partner. After initially leaving the house, the Applicant returned and the argument between him and her resumed. When it resumed, it culminated in him punching her in the face causing bruising and swelling to her face. This incident was duly described in a report made by the South Australian Police Force, a copy of which appears in the material;
* on 20 February 2016, an ex-partner of the Applicant contacted the police and reported that over the last 48 hours he had become aggressive and very jealous towards her. She reported that during an argument between them on the previous day he put his forehead on hers and started shouting abusing things towards her. She also reported that when the Applicant left the scene of that earlier argument, he told her 'I have bullets, and I'm going to kill you.' This incident was duly described in a report made by the Western Australian Police Force, a copy of which appears in the material;
* on 13 October 2017, a neighbour of the Applicant and Ms C called the police upon hearing an argument between them. When the police arrived, Ms C told them that the argument occurred as a result of the Applicant [trying] to discipline one of her children but instead started yelling at the child and then kicking a heating appliance. Ms C also told police that following the Applicant turning his anger towards her, she ran out of the dwelling and into the backyard where she screamed for help and tried to jump over a bamboo fence. She failed in that attempt and the Applicant caught up with her, pulling her down off the fence and pinning her to the ground. This incident was duly described in a report made by the Western Australian Police Force, a copy of which appears in the material;
* on 23 December 2017, there was a further incident between the Applicant and Ms C. A member of the public noticed the Applicant expressing feelings of jealousy towards Ms C. Those expressions were sufficiently animated such as to lead to him physically grabbing Ms C, putting his arm around her neck, dropping her to the floor which resulted in … Avril and Child J to run out of the house and seek help. This member of the public was sufficiently concerned about this conduct to call police who duly arrived. This incident was described in a report made by the Western Australian Police Force, a copy of which appears in the material; and
* on 12 April 2018, the adult child of Ms C, Avril, contacted the police as a result of the Applicant's conduct towards her mother, Ms C. This conduct involved the Applicant grabbing Ms C, dragging her around the house and throwing drinking glasses at her. This incident was described in a report made by the Western Australian Police Force, a copy of which appears in the material.
1. The Tribunal's description of each of these five incidents was footnoted to a police report in the remittal bundle.
2. The Tribunal then framed the next steps in its reasoning as follows (at para 83):

Paragraph 8.2 of the Direction compels two initial inquiries: (1) it is necessary to ascertain who was a member of the Applicant's family? and (2) whether any of the Applicant's conduct against any such family member amounts to family violence for present purposes? I will address each question in turn.

1. After satisfying itself that the 'victims' (in the Tribunal's characterisation) of the applicant's conduct 'both convicted and reported but not convicted' were members of the applicant's family, as defined in the direction, the Tribunal turned to the next inquiry as follows (footnote removed):

**Did any of the Applicant's conduct constitute family violence?**

85. 'Family violence' is defined in the Direction. It is defined as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful'. This definition poses two separate questions:

* was the Applicant's conduct violent, threatening, or other behaviour that coerced or controlled a member of his family?
* was the Applicant's conduct violent, threatening, or other behaviour that caused a family member to be fearful?

86. It is abundantly clear from the various descriptions of the Applicant's conduct - both (1) convicted and (2) reported but not convicted - was without question violent, threatening and/or behaviour that sought to coerce or control each of the victims and members of his family. I have no hesitation in finding that his conduct in each of the incidents - both (1) convicted and (2) reported but not convicted - was violent, threatening and that it comprised behaviour that caused each of its victims to be fearful.

**Is the Applicant's conduct captured by paragraph 8.2 of the Direction?**

87. As mentioned earlier, this Applicant has perpetrated family violence conduct that has been the subject of actual convictions and which has been reported by police but not actually charged and convicted. With specific reference to paragraph 8.2(2)(a), the convictions of the Applicant for domestically violent conduct satisfy this provision. These convictions for family violence conduct do constitute family violence for the purposes of the Direction.

88. With reference to his family violence conduct that has been reported, but not charged or convicted, I will make a finding that such conduct satisfies the requirement of paragraph 8.2(2)(b) of the Direction. Each of the reports of this category of the Applicant's family violence conduct were made by suitably experienced attending police officers who, on any reasonable view, would have (or had) commensurate experience in the preparation of such reports. The authors of those reports can now be found to have been an independent and authoritative source for each report that was prepared. Therefore, for the purposes of paragraph 8.2(2)(b) of the Direction, the Applicant's reported but not convicted family violence conduct must be found to constitute family violence for the purposes of the Direction. I so find.

1. Then, under the heading 'Assessment of the seriousness of the Applicant's family violence', the Tribunal considered various aspects of the applicant's conduct as required by paragraph 8.2(3) of the direction. It did so by reference to both the criminal convictions and the other reported incidents, and concluded that the second primary consideration concerning family violence weighed very heavily in favour of affirming the delegate's decision. Of this discussion, only paragraph 91 specifically referred to incidents recounted in the police reports, as follows:

**Paragraph 8.2(3)(b)**: requires consideration of the cumulative effect of repeated acts of family violence. An obvious cumulative effect has been the physical and emotional trauma occasioned upon victims. Equally appalling is the undeniable reality that the Applicant's conduct has drawn infant children into its orbit. I have earlier described at least two instances where the now adult child Avril- who only turned 18 in April 2023 - felt sufficiently compelled to report the Applicant's conduct to the police and to seek their intervention. Avril was well under the age of 18 years when she made these reports to the police. Perhaps even more appalling was the Applicant's conduct resulting in his conviction on 30 April 2020 for common assault in circumstances of aggravation. The indicia of this conduct is particularly significant because it not only resulted in harm to Ms C, but also to the infant child in the vicinity whose capsule fell to the ground during the assault. The Applicant's family violence conduct has also been of such a nature as to cause a neighbour and another casual observer of his conduct to feel compelled to call police. These cumulative effects of the Applicant's family violence conduct causes this sub-paragraph to militate in favour of a finding that the Applicant's family violence conduct has been of a 'very serious' nature.

1. Along the same lines, when considering rehabilitation under paragraph 8.2(3)(c) the Tribunal referred to the impact of the applicant's behaviour on 'both the victims and other people it drew into its orbit such as children, a neighbour and a casual observer in a social context' (para 92).
2. At the conclusion of its consideration of family violence, the Tribunal found that it was very serious and that the consideration 'confers a very heavy level of weight' in favour affirming the delegate's decision (para 95).

### Other findings and conclusion

1. The Tribunal found that two other primary considerations, of ties to the Australian community and the best interests of minor children in Australia, each weighed moderately in favour of revoking the cancellation of the visa. It found that the fifth such consideration, the expectations of the Australian community, weighed heavily in favour of affirming the delegate's decision. It found that the other considerations required under the direction were either neutral or weighed moderately in favour of revocation. Its ultimate conclusion was that there was not another reason to revoke the cancellation of the applicant's visa.

## Ground 1 - argument and consideration

### The applicant's case

1. At the hearing, the applicant was given leave to rely on a further amended originating application. Ground 1 in that application is:

The Tribunal fell into jurisdictional error by relying on evidence to make an adverse finding against the appellant which was, in all of the circumstances of the case:

a) unreliable; and/or

b) inconclusive; and/or

c) unsafe.

Alternatively, the Tribunal denied the Applicant procedural fairness in the way that it dealt with this evidence.

1. The ground was followed by numerous particulars, but the refinement of the applicant's case in oral submissions means it is not necessary to set them out. As so refined, it was clear that the applicant was not, for example, contending that the second Tribunal fell into jurisdictional error by making findings that breached the condition implied into its statutory functions that they be performed within the bounds of reasonableness. His main submission was, rather, that the reports contained allegations only, but on the face of the Tribunal's reasons (especially paragraph 88, reproduced above) the Tribunal accepted the reports without grappling with why they did not lead to convictions.
2. Counsel for the applicant properly conceded that the police reports fulfilled the requirement in paragraph 8.2(2)(b) that they be information or evidence from an independent and authoritative source. Generally, police forces will meet that description. But he submitted that the Tribunal fell into error by simply accepting everything in the reports because they came from a source of that kind. The Tribunal should instead have treated the reports as containing allegations, and placed whatever weight was thought to be appropriate bearing that and all other relevant matters in mind.
3. Counsel gave as an example the fact that typically police reports recount things said by complainants or alleged victims that have not been tested. According to the applicant, the Tribunal fell into error by failing to recognise that the reports might be inaccurate, and thereby mischaracterised or misunderstood the nature of the statutory task as shaped by the particular requirements of Direction 99.
4. Framed in terms of procedural fairness, the ground appeared to be that the Tribunal failed to put the applicant on notice that it was proposing to deal with the police reports in that way, that is, to accept their veracity uncritically. Had it put him on notice of that, the applicant would have had an opportunity to try to persuade the Tribunal not to do so. That was in circumstances where the applicant's general denial of having perpetrated domestic violence meant that the veracity of the reports was in issue. While the Minister submitted that the applicant had accepted before the first Tribunal that he had engaged in some of the conduct described in the police reports, the broader context of at least some of those reports had been disputed, so the accuracy of at least some of them was in issue before the second Tribunal (the transcript of the first Tribunal hearing being in evidence before the second Tribunal).
5. In the hearing it was clarified, then, that the complaint about procedural fairness was not that the applicant was unaware that the police reports might be relied on. That complaint could hardly have been made: the Minister's Statement of Facts, Issues and Contentions put the police reports and their contents to the Tribunal in terms (before both the first Tribunal and the second Tribunal). It was, rather, that the way the second Tribunal was going to approach the reports - its uncritical acceptance of them once it was satisfied that they came from independent and authoritative sources - was not notified to the applicant.
6. It is also worth making clear that counsel for the applicant made no reference to the closing words of paragraph 8.2(2)(b) of Direction 99, which require that, when information from independent and authoritative sources concerning family violence is being considered, 'the non‑citizen being considered under section 501 or section 501CA has been afforded procedural fairness'. Ground 1 does not, therefore, raise any asserted failure to meet that requirement (as to which, see ***Aghbolagh*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affair*s [2023] FCA 43 at [46] (Burley J); and *AUP21 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 442 at [67]-[72] (Rofe J)).
7. For completeness, I note that some of the particulars in the originating application asserted that the police reports were 'contrary to known facts' and/or 'contained assertions that were contrary to the only reasonable inference'. But at no point did counsel for the applicant identify any facts or inferences that contradicted the reports. In light of the oral submissions described above, I take these particulars to have been abandoned. Counsel also explicitly abandoned a particular to the effect that the Tribunal should not have relied on the material at all because it was outside the bounds of s 33(1) of the *Administrative Appeals Tribunal Act 1975* (Cth).

### Consideration

1. I accept with a qualification what might be called the factual premise of the applicant's argument: namely, that on the face of its reasons, the Tribunal accepted the veracity of the accounts of the applicant's conduct that were to be found in the police reports, without looking into why they did not result in charges or convictions, or addressing any other matter that might have cast doubt on their veracity.
2. At paragraph 86, without further discussion, the Tribunal had 'no hesitation in finding' that the applicant's conduct in the police reports 'was violent, threatening and that it comprised behaviour that caused each of its victims to be fearful'. At paragraph 87 it said that the applicant had perpetrated family violence that had been reported by police but not actually charged and convicted. And at paragraph 88 it reasoned directly from its findings that the police reports were independent and authoritative sources to a conclusion that the applicant's 'reported but not convicted family violence conduct must be found to constitute family violence for the purposes of the Direction'. At the only other place where it considered the police reports, paragraph 91, the Tribunal relied on them without undertaking any assessment of whether they were to be accepted as true.
3. The qualification is that even though the Tribunal accepted the police reports uncritically, it does not follow that it misunderstood their nature, or overlooked the fact that they were reports of matters that had not been tested in court and subjected to the verdict of a judge or jury. To the contrary, the passages from the Tribunal's reasons set out above show that it appreciated that. At two points in paragraph 86 it drew the distinction between conduct that led to a conviction and conduct that did not, and characterised the material as containing 'descriptions' of conduct of both kinds (see [30] above). At paragraph 88 (also reproduced at [30]) the Tribunal drew the distinction again and showed that it was aware that the police reports had not resulted in charges or convictions. And when it came to assess the cumulative effect of the applicant's conduct at paragraph 91 (see [31] above), the Tribunal did so on the basis, not that the matters in the reports had been established beyond reasonable doubt, but that they had been sufficient to compel third persons to call the police. In my view, the Tribunal appreciated the difference between police reports containing unproven allegations and convictions in courts of law. To that extent, its reasons show no misapprehension of the nature of its statutory task.
4. In any event, I do not accept what might be called the legal premise of the applicant's argument: namely, that to accept the reports without looking into the truth of their contents was to misunderstand or mischaracterise that task. In this case, the Tribunal's freedom in the performance of its statutory task was circumscribed by the prescriptive requirements of Direction 99. The applicant made no submission that the direction itself transgressed the limits of s 501CA(4)(b) of the *Migration Act*. The Tribunal was explicitly and assiduously following the direction. The question, then, is whether in accepting the veracity of the police reports in the way that it did, the Tribunal acted in accordance with the requirements of the direction.
5. In my view, on the proper construction of Direction 99, it did. It is important to understand the stage in the reasoning process mandated by Direction 99 at which the Tribunal made the impugned findings. The primary consideration in question is 'whether the conduct engaged in constituted family violence' (para 8(2)). Paragraph 8.2 of the direction tells decision makers how they are to approach that consideration. It is convenient to set the paragraph out in full:

**8.2 Family violence committed by the non-citizen**

(1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).

(2) This consideration is relevant in circumstances where:

a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or

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

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

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

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

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

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

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

iii. efforts to address factors which contributed to their conduct; and

d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non- citizen's migration status, should the non-citizen engage in further acts of family violence.

1. Paragraph 8.2(1) emphasises the seriousness with which the Australian government views family violence, and says that its concerns in this regard are proportionate to the seriousness of the family violence, cross-referring to paragraph 8.2(3).
2. Paragraph 8.2(2) then, in terms, tells decision makers how they must determine whether family violence is a relevant consideration. Sub-paragraph (a) requires no elucidation for present purposes. Sub-paragraph (b) effectively requires decision makers to answer two questions in the affirmative: is there 'information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence', and has the non-citizen been 'afforded procedural fairness'?
3. Then sub-paragraph (3) directs decision makers as to the factors they must consider in 'considering the seriousness of the family violence engaged in by the non-citizen'. It is at that point that the decision maker is required to assess the seriousness of the family violence by reference to the various factors.
4. Understood in context, then, what paragraph 8.2(2) requires is a threshold inquiry into whether the primary consideration of family violence is a relevant one. It requires the decision maker to find that it is relevant, if the criterion in sub-paragraph (a) and/or the criteria in sub‑paragraph (b) are satisfied.
5. In my view this neither requires nor leaves room, at this point, for any consideration of the veracity of the materials relied on. That is evidently so in connection with sub-paragraph (a) concerning criminal convictions, and is also the case with sub-paragraph (b). In the latter provision, the drafters of the direction can be seen to have taken into account the possibility that evidence from other sources may well be less reliable than a guilty verdict in a court of law. They have addressed that by requiring that the sources available are independent and authoritative, and that procedural fairness has been afforded. Provided those criteria are satisfied, the Tribunal must determine that family violence is a relevant criterion, and move on to the various evaluations required by sub-paragraph (3).
6. In my respectful view, this understanding of paragraph 8.2 of Direction 99 is consistent with views expressed by Burley J in *Aghbolagh* at [35]-[36] (emphasis in original):

… When read as a whole, para 8.2(2) identifies the circumstances where the receipt by a decision maker of information in relation to the perpetration of family violence is to be considered *relevant*. In para 8.2(2)(a) this will arise upon a non-citizen being convicted of an offence, found guilty of an offence or having charges proven (however they are described) that 'involve' family violence. The definition of 'family violence' is broad and extends beyond physical assault to include derogatory taunts, destruction of property and includes acts that fall within the ambit of what might broadly be termed acts of coercive control: see definition at [8] above. Consideration of 'family violence' is also *relevant* to a decision maker where, under para 8.2(2)(b), there is information *or* evidence from independent and authoritative sources *indicating* that the non-citizen is or has been involved in the perpetration of family violence. Sub-paragraph (b) is self-evidently of broader scope than (a). At its widest, it identifies that the decision maker must take into account as a consideration not only evidence, but information indicating the non-citizen's perpetration of family violence. This is relevantly subject to the limitation that it is from 'independent and authoritative sources'.

However, para 8.2(2) does not establish a particular standard for fact finding. It presents the circumstances in which the consideration crosses the threshold of 'relevance' by reference to the identified information. The question of what may be considered to be an independent and authoritative source is left to the decision maker, being a question of evaluation having regard to the nature of the conduct and the circumstances of the particular case. This is a familiar task and is to be understood in the context of s 33(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**), which provides for the Tribunal to conduct a proceeding with as little formality and technicality as required by the case, noting that the Tribunal is not bound by the rules of evidence, but may inform itself on any matter in such manner as it thinks appropriate.

1. At [41] Burley J described the 'threshold of relevance' set by paragraph 8.2(2)(b) as 'low'.
2. The facts and the issues in *Aghbolagh* were different to the current case. The Tribunal in that case *had* engaged in a critical assessment of the relevant police reports, and the critical issue was whether they were from an independent and authoritative source. But Burley J's construction of paragraph 8.2 of Direction 99 is consistent with the one I have outlined.
3. It is clear from the excerpts of the Tribunal's decision set out above that it was following the path set by paragraph 8.2. It framed the inquiry in terms of each of sub-paragraphs (2)(a) and (2)(b): see [30] above. The reasoning that the applicant particularly criticised was explicitly directed to determining whether the applicant's conduct as described in the police reports met the definition of family violence in Direction 99, and (relevantly) whether it met the requirements of paragraph 8.2(2)(b): see [30] above. On determining that it did, the Tribunal concluded that the conduct reported in the police reports 'must be found to constitute family violence for the purposes of the Direction' (para 88). And this was in a section headed 'Is the Applicant's conduct captured by paragraph 8.2 of the Direction?'.
4. The Tribunal was thus assessing whether the threshold requirements for the primary consideration to arise were met. Counsel for the applicant's proper concession that the police reports here were independent and authoritative sources, and the lack of any submission that the Tribunal did not comply with the balance of para 8.2(2)(b), therefore dispose of ground 1. They confirm that the Tribunal complied with Direction 99. And since it did so, it did not engage in any departure from usual practice which needed to be notified to the applicant in order to afford procedural fairness: cf. *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40; (2015) 256 CLR 326 at [64]-[67] (Gageler and Gordon JJ).
5. Those conclusions are only reinforced by a concession counsel also made (with respect, inevitably) that the family violence consideration was relevant. To the extent that the applicant was criticising the lack of any express weighing of the veracity of the things said in the police reports, that is readily explicable by the presence of ample other material showing that domestic violence was indeed relevant. In those circumstances, the Tribunal did not need to expressly assess the weight to be put on each of the police reports.
6. And that is so in circumstances where, as I have said, the Tribunal displayed no misunderstanding of the difference between unproven police reports and criminal convictions. When it came to assess the seriousness of the family violence engaged in by the applicant in accordance with paragraph 8.2(3), the Tribunal showed an appreciation of the nature of the police reports, and only relied on them to a limited extent (see again para 88). While views may differ about whether the Tribunal should have approached the reports with more scepticism at that point, the assessment it conducted under paragraph 8.2(3) was not the object of the applicant's criticism. And even if it had been, that would have been a criticism of the merits of the decision rather than one going to jurisdictional error: cf. *Aghbolagh* at [43].
7. I do not uphold ground 1.

## Ground 2 - argument and consideration

### The applicant's case

1. Ground 2 is:

The Tribunal failed to comply with para 8.1.2(2)(b) of Direction 99, as at [Tribunal reasons] [74]-[76] and [78]-[79] it failed, in substance, to complete an assessment and evaluation of the risk to the Australian community based on the likelihood of the applicant engaging in further criminal or other serious conduct; and/or, alternatively, failed to properly take that factor into account.

1. The paragraph of Direction 99 to which the ground refers requires the Tribunal to have regard to:

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

i. information and evidence on the risk of the non-citizen reoffending; and

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

1. With minor changes to the paragraph references, ground 2 is the same as a ground that was accepted in *Jattan*. It will be necessary to consider that case shortly, but in overview, the Tribunal there had concluded that Mr Jattan represented 'an unresolved and otherwise unknown level of recidivist risk' and that his 'current level of recidivist risk is now no different to what it was at the time of his most recent removal from the Australian community': *Jattan* at [43]‑[44]. Justice Banks-Smith found that it was not possible to tell from the Tribunal's reasons what time it had in mind when it said that, and what level of risk it had in mind as at any such time. As a result, the Tribunal's conclusion was devoid of meaningful content, so that paragraph 8.1.2(2) of Direction 99 was not properly taken into account: see [72]-[73].
2. Essentially, the applicant submits that the same thing has happened here. He points to similarity between the wording of the conclusion that the Tribunal reached in *Jattan* and the wording of the equivalent conclusion reached here: see paras 76 and 78(b) of the Tribunal's reasons at [22] above. Counsel for the applicant submitted that in this case it is even less clear what the Tribunal had in mind, although he did not develop why. Counsel further submitted that in placing great weight on the overall consideration, the Tribunal failed in its task where it failed to specify the level of previous risk.

### The Minister's submissions

1. Relying on *RDYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 108 (***RDYQ* FC**), counsel for the Minister submits that the Tribunal was correct when, at paragraph 76 of its reasons, it indicated doubt as to whether it was required to assess the future risk of the applicant reoffending. The Minister submits that the Tribunal was not required to state a particular value or level of the risk of reoffending, just to have regard to that risk in its consideration of paragraph 8.1.2: see *RDYQ* FC at [13], [15].
2. In relation to whether the Tribunal's conclusion about the applicant's recidivist risk was devoid of meaningful content, the Minister submits that, contrary to the applicant's (undeveloped) submission, in this case it is clearer what the Tribunal had in mind than it was in *Jattan*. In this case the Tribunal referred to the applicant having been convicted and sentenced in November 2020, at several points in its reasons. Counsel for the Minister then took me to a Department of Justice record which was before the Tribunal. This shows that the applicant was received at Hakea Prison (a remand prison) on 19 August 2020, transferred to Acacia Prison on 26 November 2020, and apparently discharged into immigration detention on 1 March 2021. The Minister submits that this, together with the references to the applicant's conviction and sentencing in November 2020, leads to an inference that 19 August 2020 is the date the Tribunal had in mind as the time of the applicant's most recent removal from the Australian community. In that respect, he submits the history of Mr Jattan's removals from the Australian community was more convoluted than the applicant's history in this case.
3. The Minister makes submissions, not only about the time that the Tribunal had in mind, but also about the level of risk that it had in mind. He submits that this case is also distinguishable from *Jattan* in that respect. He relies on the Tribunal's statement at paragraph 49 of its reasons to the effect that the applicant's recidivist risk is not so low that the prospect of a future domestic partner being injured or killed is acceptable: see [14] above. According to the Minister, the Tribunal having framed the issue that way, its subsequent analysis and conclusion should be understood to be to the effect that the risk was unacceptable. Counsel for the Minister referred in particular to the Tribunal's statement in paragraph 74 of its reasons that while the applicant's substance abuse issues 'remain unresolved or unaddressed, his recidivist risk remains uncertain and ultimately unknown': see [22] above, second last bullet point. Counsel submitted that in the context of the statement at paragraph 49, this should be understood as the Tribunal indicating that it had assessed the risk of recidivism as unacceptable. In that respect too, the Minister submits, this case is distinguishable from *Jattan*. The Minister draws a comparison with ***Chen*** *v Minister for Immigration and Border Protection* [2017] FCA 46 in which, he says, the Court held that it was enough for the Tribunal to have identified that there was *a risk*.
4. The Minister therefore submits, in effect, that in this case the applicant has not discharged his onus of establishing that the Tribunal's conclusion as to the risk of reoffending was devoid of meaning, so as to indicate that it had not had regard to that risk as required by Direction 99.
5. Counsel for the applicant sought to undermine this by pointing to ambiguity about whether going into immigration detention was the time of the applicant's most recent removal from the community, rather than the time of his most recent imprisonment for criminal offences (or preceding remand). But on a fair reading of the Tribunal's reasons I do not consider that this ambiguity is real. As is often the case, the applicant went directly to immigration detention on his 'release' from prison, and spent no time in the community between the two places of detention. So it would be an unusual and strained reading of the Tribunal's reasons to understand it to be referring to the time of his immigration detention.

### Jattan and RDYQ FC

1. Both counsel proceeded on the basis that the principles to be applied to determine ground 2 are to be found in *Jattan* and *RDYQ* FC. I will therefore summarise the principles by reference to those cases.
2. In my respectful view, the analysis conducted in *Jattan* relevantly establishes the following:
3. Setting aside the effect of any direction under s 499 of the *Migration Act*, the risk of harm to the Australian community is a mandatory consideration for decision makers under s 501(2) (the main cases on that subject being about that provision), and so by parity of reasoning, it is a mandatory consideration for decision makers under s 501CA(4)(b). But it is not necessary for the decision maker to ascribe any particular characterisation to the quality of risk, or to quantify the risk. By the same token, merely referring to the existence of 'a risk' *may* not be enough: *Jattan* at [54]-[59] and cases cited there.
4. Where a statutory direction applies, the decision maker is not required to provide an estimate of the extent of the likelihood of re-offending, or to make an express finding concerning that likelihood. What is required, to use the particular terminology of Direction 99, is that the decision maker 'have regard', cumulatively with the other factors listed in paragraph 8.1.2(2), to 'the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account' the information and evidence described in paragraphs 8.1.2(2)(b)(i) and (ii): see *Jattan* at [60]-[66], relying in particular on Burley J's decision in *Chen* and on Wigney J's first instance decision in *RDYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 254. (There is no appreciable difference between the various prior iterations of Direction 99 in this regard: see *Jattan* at [60].)
5. Nevertheless, if the Tribunal's findings about the risk of reoffending are devoid of meaningful content, that may bespeak a failure to have regard to the likelihood as required by the direction: see *Jattan* at [73].
6. Generally, any plausible justification for the Tribunal's course of reasoning must be found in its published reasons. That is not to say that the reasons must be read as though they were self-contained. But it does mean that if the reasons do not disclose that the Tribunal had particular materials before it in mind, those materials cannot be enlisted to support the decision. To do so would be to speculate: see *Jattan* at [74]-[75].
7. It is necessary for the disposition of the present application to offer further comment on the third of these points. In my view, if the Tribunal's findings about the risk of reoffending are devoid of meaningful content, that may be jurisdictional error because if the Tribunal has not identified for itself what the likelihood is, it cannot be said to have had regard to that likelihood. There is nothing there that can be regarded.
8. To say this is not to be prescriptive about how the Tribunal must conceive of the likelihood, much less to mandate that it must express its conception in any particular way. But there is an irreducible minimum requirement that it at least have formed a view about the likelihood. Otherwise, it cannot be said to have had regard to it, as part of the overall requirement in Part 2 of Direction 99 to give appropriate weight to the various considerations: see para 7. Again, there would be nothing there to weigh.
9. The significance of *RDYQ* FC to the present analysis is that it is confirmation by a Full Court that the statutory direction does not require the Tribunal to make an express finding about the likelihood of the non-citizen reoffending. It reaffirms that the requirement is that the Tribunal 'have regard to' that consideration.
10. Before applying these principles to the present case, it is worth reaffirming also some matters that are axiomatic in cases such as the present. The inquiry is a fact intensive one that focusses on the Tribunal's reasons. They are to be read fairly and as a whole, in the context of the materials that were before the Tribunal, and without an eye keenly attuned to the detection of error. The onus of establishing error is on the applicant. Each case is different, and although comparing similarities in language between Tribunal decisions may be helpful, in the end the question is what the particular reasons in their particular context reveal about the reality of the consideration of relevant matters by the particular Tribunal. The requirement to read the reasons in the context of the materials before the Tribunal is not, however, a licence to use the materials to speculatively fill in gaps in the reasons.

### Consideration

1. Applying those principles to the case before me, I consider that the applicant has not established jurisdictional error on the part of the second Tribunal. *Jattan* is distinguishable.
2. As the Minister points out, at paragraph 49 the Tribunal commenced its consideration of the likelihood of the applicant reoffending by answering, in the negative, a question posed in the Minister's submissions to the Tribunal: is the risk of death or serious injury to a future domestic partner so low as to be acceptable?
3. In distinguishing between 'risk' and adverse consequences in the way assumed in the question, the Tribunal appears to be using 'risk' as a synonym for 'likelihood' or 'probability'. This is reinforced by the heading which immediately precedes that paragraph and reads 'The likelihood of the non-citizen engaging in further criminal or other serious conduct'. The Tribunal's firm negative answer to the question indicates that it had formed a view about the level of likelihood, based on the analysis that followed. To the extent that the view about likelihood was rolled up with a view about adverse consequences, it is to be recalled that paragraph 8.1.2(2) of Direction 99 requires those matters to be considered cumulatively.
4. That the Tribunal expressly justified its view by reference to the analysis that followed is important. That analysis is therefore to be read as supporting, in the Tribunal's mind, a finding that the risk was not so low as to be acceptable. Apparently open ended findings may be understood differently in that context.
5. The analysis that followed this introductory statement in the Tribunal's reasons included consideration of the evidence about a number of factors relevant to the likelihood of reoffending: the applicant's own evidence as to what caused his offending; whether he felt suitable remorse and understood and accepted the gravity of what he had done; his conduct while in prison; whether he had been deterred by the punishments he had received; certain protective factors; and the applicant's substance abuse. The Tribunal was not reluctant to express forthright views about these matters (mostly adverse to the applicant), suggesting that it was not withholding judgement about the likelihood of reoffending.
6. The problem that now calls for resolution arises in the next part of the reasons, where the Tribunal focusses on what it says is the lack of any 'contemporaneous or current clinical opinion about the factors predisposing him to so very seriously offend': para 69. While on its face this evinces uncertainty, the way it was framed suggests that the Tribunal considered that it was a problem for the applicant. For example, at paragraph 71 the Tribunal says (emphasis added):

… *the Applicant cannot point to* a current clinician who has examined him with particular emphasis on (1) his history of substance abuse; (2) psychopathological factors behind his apparent lack of consequential thinking; and (3) how and to what extent the abuse he reports having occurred earlier in his life now speaks to pre‑dispositive factors behind his very serious offending.

1. That impression is confirmed by paragraph 73, which is reproduced above at [21]. The tenor of the paragraph is that the applicant has not given any reason to think that when he is released, he will be able to avail himself of expert treatment or programs that will reduce the likelihood that he will reoffend.
2. At paragraph 74, which is reproduced above (at [22]), the Tribunal repeats its complaint that there is a dearth of independent and reliable material around recidivist risk. But it goes on to summarise the evidence it did have before it concerning that risk in a manner showing that it has been considered. And, again, it does so in a manner indicating that it has formed an unfavourable view of the applicant and of his prospects of rehabilitation. It is in the course of this summary where the Tribunal first uses the verbal formulation that the applicant's recidivist risk is 'unknown'. The context of that use is important and so that particular bullet point, and the one that follows it, are worth setting out again (italics added):
* **unresolved and undefined substance abuse issues**: in my non-clinical opinion, these issues have been front and centre - in a dispositive sense - in the Applicant's pattern of offending. There is a *concerning historicity* behind the Applicant's substance abuse issues stretching back some 20 years*. While they remain unresolved or unaddressed, his recidivist risk remains uncertain and, ultimately, unknown*;
* **the absence of current and independent expert clinical evidence:** the Applicant's symptom(s) and diagnosis(es) predisposing his offending conduct remain unknown and untreated. *His prospects of sourcing and receiving such rehabilitative treatment are aspirational and otherwise to be self-determined*.
1. A fair reading of this in light of the Tribunal's earlier statement in paragraph 49 analysed above, leads to the inference that the Tribunal is saying that in the context of all the other material it has analysed, the lack of any expert opinion means that the risk of reoffending is so high as to be unacceptable. That reading is reinforced by the Tribunal's references to 'a concerning historicity behind the Applicant's substance abuse issues' and how the prospects of rehabilitative treatment are 'aspirational'.
2. The Tribunal then, under the heading 'Assessment of recidivist risk', said that it was 'hard‑pressed' to identify a single evidentiary factor on which a finding of recidivist risk can be reliably made and that the 'absence of clinical intervention and reporting is concerning' (para 75). The applicant's intentions were said, pejoratively, to be 'aspirationally expressed' and not supported by clinical opinion. Again, all this indicated a negative view of the level of likelihood that the applicant will reoffend.
3. The Tribunal then put its ultimate finding in paragraph 76. It expressly eschewed 'any assessment of actual future risk'. In the context of what has gone before, this is not saying that the Tribunal has not reached a view about the likelihood of reoffending, only that it is not prepared to make a finding in terms of any particular level of likelihood. In then saying that the level of recidivist risk 'cannot be *safely* found to be any different' (emphasis added) to its level at the time of the applicant's most recent removal from the Australian community, the Tribunal is fairly to be understood to be saying that the likelihood of reoffending is so high as to be unacceptable. In light of *RDYQ* FC, that was sufficient for the Tribunal to comply with Direction 99.
4. As has been said, the context afforded by paragraph 49 of the Tribunal's reasons is important to this conclusion. The applicant sought to minimise that importance by submitting that the paragraph is ambiguous, since it does not state what period of time the Tribunal is referring to when it referred to his 'recidivist risk'. But there was no need for the Tribunal to do so in paragraph 49. For at that point, it was not speaking in terms of any historical level of risk, but in terms of the risk it was required to consider under Direction 99, that is, the risk should the applicant be released into the community in the future as a result of successfully obtaining revocation of the cancellation of his visa.
5. The applicant also submitted that paragraph 49 should be read as indicating that the Tribunal had proceeded to find that it could not make a safe conclusion about recidivist risk. But that is conspicuously not the view the Tribunal expresses in that paragraph. The confusion comes later in the decision but, for the reasons I have given, it does not lead to the conclusion that the Tribunal failed to make an assessment of the likelihood of reoffending that had meaningful content.
6. While each case depends on its particular combination of facts, it is helpful to consider the features that distinguish this case from *Jattan*. Principally, they arise because in this case, the Tribunal:
7. introduced the subject by making it clear that it had reached a view that the risk of reoffending was so high as to be unacceptable;
8. consistently framed its discussion of the evidence in terms that indicated that the applicant had not persuaded it that he did not present an unacceptable risk;
9. as analysed at [82] above, used the crucial formulation 'his recidivist risk remains uncertain and, ultimately, unknown' in a context which indicated that what it meant by that was that the risk was unacceptable, because the applicant had not addressed it satisfactorily;
10. did not say that the risk was uncertain and unknown in its overall conclusion about the level of recidivist risk (cf. *Jattan* at [43], Tribunal's reasons paras 75‑76); and
11. did ultimately say that it was expressing a view about *future* risk (it did not say anything like that in *Jattan*).
12. So while it is not possible to say what specific level of risk the Tribunal had in mind at the time of the applicant's 'most recent removal from the Australian community', when the reasons are read fairly as a whole, it is apparent that the Tribunal had formed the view that the likelihood of reoffending should the cancellation of the visa be revoked and the applicant be returned to the community was so high as to be unacceptable. It follows that, unlike in *Jattan*, the Tribunal's reasons manifest a view about the likelihood of reoffending which meant that it was able to meaningfully have regard to that likelihood as required by Direction 99. In that context, the Tribunal was not required to express that view in quantitative or qualitative terms.
13. There is no doubt that the Tribunal's reasons are badly expressed. As a result, there was a proper basis to put ground 2. But read in context of the rest of the decision, the offending passages in paragraphs 76 and 78(c) are surplusage. In the end, the applicant has not discharged his onus of persuading me that the Tribunal fell into jurisdictional error as contended in ground 2.

## Disposition

1. The application will be dismissed, with costs.

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| I certify that the preceding ninety-two (92) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jackson. |

Associate:

Dated: 19 December 2024