Federal Court of Australia

QJYD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 962

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| Review from: | *QJYD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1 |
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| File number: |  |
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| Judgment of: | **MCKERRACHER J** |
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| Date of judgment: | 16 August 2021 |
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| Catchwords: | **MIGRATION** – judicial review of a decision of the Administrative Appeals Tribunal affirming the delegate’s decision not to revoke a cancellation decision – whether the Tribunal’s state of satisfaction that there was not ‘another reason’ to revoke the cancellation decision was vitiated by the its misunderstanding of certain evidence concerning the likelihood of reoffending – where Tribunal’s purported misunderstanding demonstrated by new material adduced that was not before the Tribunal  **MIGRATION** – whether the non-exercise of the Tribunal’s discretion to obtain further information in relation to certain evidence was legally unreasonable – whether the Tribunal failed to make an obvious inquiry regarding a critical fact that was readily ascertainable |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) ss 33(1)(c), 43(2B)  *Migration Act 1958* (Cth) ss 473DC, 476A, 499, 499(1), 499(2A), 501(3A), 501CA(3)(b), 501CA(4), 501CA(4)(a), 501CA(4)(b), 501CA(4)(b)(i), 501CA(4)(b)(ii) |
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| Cases cited: | *Ali v Minister for Home Affairs* [2020] FCAFC 109; (2020) 278 FCR 627  *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* [1949] HCA 26; (1949) 78 CLR 353  *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34; (2019) 268 CLR 29  *EAT17 v Minister for Home Affairs* [2021] FCA 68  *EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681; (2019) 272 FCR 409  *Guclukol v Minister for Home Affairs* [2020] FCAFC 148  *Kaur v Minister for Immigration and Border Protection* [2017] FCAFC 184; (2017) 256 FCR 235  *Matthews v Minister for Home Affairs* [2020] FCAFC 146  *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; (2018) 267 FCR 320  *Minister for Immigration and Border Protection v CRY16* [2017] FCAFC 210; (2017) 253 FCR 475  *Minister for Immigration and Border Protection v Maioha* [2018] FCAFC 216; (2018) 267 FCR 643  *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; (2013) 230 FCR 431  *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332  *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39;(2009) 83 ALJR 1123  *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] HCA 6: (1996) 185 CLR 259  *Navoto v Minister for Home Affairs* [2019] FCAFC 135  *PQSM v Minister for Home Affairs*  [2020] FCAFC 125; (2020) 279 FCR 175  *Taualii v Minister for Home Affairs* [2019] FCA 2013  *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 |
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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: | 56 |
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| Date of hearing: | 9 June 2021 |
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| Counsel for the Applicant: | Mr JF Gormly |
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| Solicitor for the Applicant: | Labour Pains Legal |
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| Counsel for the First Respondent: | Mr M Hosking |
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| Solicitor for the First Respondent: | Sparke Helmore |
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| Solicitor for the Second Respondent: | The Second Respondent did not appear |

ORDERS

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|  | | WAD 17 of 2021 |
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| BETWEEN: | QJYD  Applicant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | MCKERRACHER J |
| DATE OF ORDER: | 16 AUGUST 2021 |

THE COURT ORDERS THAT:

1. The application be dismissed.
2. The applicant pay the costs of the first respondent, 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

MCKERRACHER J:

1. The applicant seeks judicial review of a decision of the Administrative Appeals **Tribunal** made on 6 January 2021: *QJYD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 1. In that decision the Tribunal affirmed a decision of a **delegate** of the first respondent, the **Minister**, under s 501CA(4) of the *Migration* ***Act*** *1958* (Cth) not to revoke the mandatory cancellation of the applicant’s visa.
2. The applicant relies, with leave having been granted, on a further amended originating application filed on 18 May 2021 in which the Tribunal’s decision is challenged on two grounds which are, in summary form, that:
3. the Tribunal ‘misunderstood and so failed to consider’ evidence before it concerning an assessment screening tool referred to as ‘The Risk of Reoffending – Prison Version (RoR-PV)’ (**screening tool**), such that the state of satisfaction that the Tribunal was required to reach as to whether or not there was ‘another reason’ to revoke the cancellation under s 501CA(4)(b)(ii) of the Act was vitiated; and
4. secondly, that the Tribunal acted unreasonably by failing to consider exercising its discretion under s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**) to acquire new information to inform itself about the screening tool.
5. For the reasons that follow and despite careful argument for the applicant, the application must be dismissed.

# BACKGROUND

1. The applicant is a citizen of New Zealand, who was born in 1988 and arrived in Australia in November 1998 at the age of 10. He now has an extensive criminal record, dating back to January 2007 when he was 18 years old. The offences for which the applicant was convicted, and the sentences he received, are set out in detail in the Tribunal’s decision (at [3]-[9]).
2. A shorter synopsis is the following:
3. he was convicted of 22 offences between January 2007 and April 2012;
4. in January 2013, the then Department of Immigration and Citizenship sent the applicant a formal counselling letter, warning him that further criminal convictions could result in the cancellation of his visa;
5. between February 2014 and September 2015, the applicant committed a further 55 offences;
6. in August 2016, the applicant’s visa was cancelled under s 501(3A) of the Act;
7. in September 2016, the delegate decided under s 501CA(4) of the Act to revoke the cancellation of the applicant’s visa, but warned that further criminal offending could lead to the visa being cancelled again; and
8. between October 2017 and August 2019, the applicant committed a further 25 offences.
9. In February 2020, the applicant was sentenced to cumulative terms of imprisonment of 18 months and 16 months for two counts of ‘possession of a prohibited drug with intent to sell or supply (methylamphetamine)’.
10. In April of that year, the applicant’s visa was cancelled again pursuant to s 501(3A) of the Act and he was invited to make representations about the revocation of the decision. He made representations in response, but the delegate on this occasion decided not to revoke the cancellation of the visa and the applicant applied to the Tribunal for review of that decision.
11. The applicant attended a hearing before the Tribunal on 22 and 23 December 2020 and was represented by a lawyer. On 6 January 2021, the Tribunal decided to affirm the delegate’s decision in reasons of considerable length and detail.
12. The applicant did concede to the delegate and the Tribunal for the purpose of their consideration of s 501CA(4)(b)(i) that he did not pass the character test as defined by s 501 of the Act. This meant that in order for the Tribunal’s power under s 501CA(4) to revoke the cancellation to be enlivened, it needed to be satisfied under s 501CA(4)(b)(ii) that there was ‘another reason’ why the cancellation should be revoked.

# THE TRIBUNAL’S DECISION

1. In considering whether it was satisfied that there existed ‘another reason’ to revoke the cancellation decision, the Tribunal was required to comply with Ministerial **Direction No. 79**: s499(2A) of the Act. A failure to comply with a direction under s 499 is capable of being a jurisdictional error: *PQSM v Minister for Home Affairs* [2020] FCAFC 125; (2020) 279 FCR 175 per Bank-Smith J and Jackson JJ (at [90]). In complying with Direction No. 79, the Tribunal was required to have regard to the three primary considerations expressed in para 13(2). Only the first of those primary considerations, ‘Protection of the Australian community from criminal or other serious conduct’, is relevant to the grounds of review.
2. The first primary consideration requires the Tribunal, *inter alia*, to assess cumulatively both the nature of the harm to individuals or the community if the applicant were to reoffend and the likelihood of the applicant engaging in further criminal or serious conduct. In considering the likelihood of reoffending, the Tribunal must take into account ‘available information and evidence on the risk of the [applicant] re-offending’.
3. By his grounds of review, the applicant alleges that the Tribunal misunderstood, and failed to further inform itself, about a particular piece of evidence which was clearly relevant to its assessment of the likelihood of the applicant reoffending. That piece of evidence was the screening tool. Evidence of the screening tool’s application to the applicant appeared in two documents that were before the Tribunal, being a ‘**Treatment Assessment Report**’ and an ‘**Individual Management Plan**’. In the first of these documents, reference was made to the screening tool as follows:

**3 General Offending**

**ROR-PV Total Score**

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| --- | --- |
| **Score** | **11** |

The Risk of Reoffending – Prison Version (RoR-PV) assessment screening tool was administered. [The applicant] scored 11 as such is a low risk of general reoffending. In accordance with the current pilot process, he will not be further assess or criminogenic programs.

1. Similarly, the second document refers to the screening tool as follows:

**Rehabilitation and Re-Integration**

**1.9 Main intervention needs**

Education and Vocational Training

**Comments**:

A risk of Reoffending – Prison Version (ROR-PV) assessment was administered by an Acacia Treatment Assessor. [The applicant] is not recommended for criminogenic programs at this time due to low risk of reoffending.

1. The Tribunal addressed these references to the screening tool at [112] of its decision in a passage that is the focus of the applicant’s grounds of review:

At the commencement of his sentence on 13 February 2020, the Applicant was assessed by prison treatment assessors as “*a low risk of general reoffending*” and so he was not assessed for criminogenic programs (R2/548-549). Similarly, an individual management plan for the Applicant dated 21 May 2020, prepared for his sentence starting on 8 June 2019, also assessed the Applicant as “*not recommended for criminogenic programs at this time due to a low risk of general reoffending*” (G68/238). **Given the Applicant’s history of offending, incarceration and his significant history of drug use, it is difficult for the Tribunal to accept the assessment of prison treatment assessors that the Applicant was a “*low risk*” of reoffending. In this regard, the Tribunal notes that no reasons were given as to how and why that assessment was reached (G68/238).** In contrast, in 2016 the Applicant was denied parole, with one of the denial reasons given by the Prisoners’ Review Board being his “*extensive criminal history which suggests a high risk of reoffending*” (R2/492).

(Emphasis added.)

1. Prior to making this assessment, the Tribunal observed (at [97]) that the applicant had a lengthy criminal history comprising approximately 100 offences over a 12 year period which occupied almost all of his adult life. It noted that the applicant was seemingly undeterred by a written warning about visa cancellation and that, after having his visa reinstated in 2016 and being released from prison, the applicant proceeded to reoffend within two months and was back in prison within four months. Similarly, the Tribunal raised its concerns (at [102]) about the applicant’s expressions of remorse, observing that similar representations had been made when his visa was reinstated in 2016 yet the applicant had continued to offend.
2. After its observations about the screening tool, the Tribunal proceeded to set out at length the evidence of a consultant psychologist who had undertaken a telephone assessment of the applicant. The psychologist considered that overall the applicant was a low risk of recidivism (at [121]) and that this risk related primarily to relapse into drug dependency and potential contact with a negative peer group. However, the Tribunal also recorded (at [123]-[130]) a series of exchanges during cross-examination in which it became apparent that the psychologist had not been made aware of certain events in the applicant’s past, including the fact that his visa had already once been reinstated in 2016. This led to the psychologist to qualify his initial assessment, accepting (at [128]) that those factors increased the risk of recidivism.
3. The Tribunal made its overall assessment of the likelihood of reoffending as follows (at [132]):

Considering the evidence discussed above regarding the likelihood of the Applicant reoffending, **the Tribunal is of the opinion that the Applicant’s likelihood of re-offending is somewhat higher than in the “*low*”range.** The Tribunal regards the risk as more appropriately categorised as falling within the moderate range of offences. **However, even if the risk were “*low*”, given the nature of the harm caused to the community by drug related offending and driving offences of the nature committed by the Applicant, any likelihood of either type of offending being repeated is unacceptable (see paragraph 6.3.4 of Direction No 79).**

(Emphasis added.)

1. In the last sentence of the above passage the Tribunal cites para 6.3.4 of Direction No. 79 which is in the following terms:

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

1. After considering each of the other factors required by Direction No. 79, the Tribunal concluded that it was not satisfied that there was another reason to revoke the cancellation of the applicant’s visa (at [230]-[238]):

230. In relation to the first primary consideration, the Tribunal has found that:

(a) the nature and seriousness of the Applicant’s offending conduct weighs very strongly against the revocation of the Cancellation Decision (paragraphs 13.1 and 13.1.1 of Direction No 79); and

(b) the risk to the Australian community should the Applicant commit further offences weighs very strongly against the revocation of the Cancellation Decision (paragraphs 13.1 and 13.1.2 of Direction No 79).

231. Overall, with respect to the first primary consideration, the Tribunal has concluded that the protection of the Australian community (paragraphs 13.1, 13.1.1 and 13.1.2 of Direction No 79), weighs very strongly against the revocation of the Cancellation Decision.

232. With respect to the second primary consideration, being the best interests of minor children (paragraph 13.2 of Direction No 79), the Tribunal has found that the best interests of the Applicant’s: eight-year-old daughter weighed strongly; 15 month-old daughter weighed strongly; eight-year-old stepdaughter weighed moderately; five-year-old stepson weighed moderately; and 16-year-old brother weighed slightly in favour of the revocation of the Cancellation Decision.

233. The Tribunal has found that the third primary consideration, being the expectations of the Australian community (paragraph 13.3 of Direction No 79) would be that the Cancellation Decision should not be revoked. The Tribunal must now determine the weight to be applied to this consideration.

…

237. After balancing the relevant primary and other considerations, the Tribunal concludes that the expectations of the Australian community would nevertheless weigh very strongly against the revocation of the Cancellation Decision. As articulated in paragraph 13.3(1) of Direction No 79, the Australian community expects non-citizens to obey Australian laws while in Australia. The Applicant has, however, shown a consistent disregard for the law by committing approximately 100 offences, sometimes repeatedly. He has been undeterred by prison sentences, a warning in 2013, and the previous cancellation of his Visa, and the reinstatement of his Visa in 2016 with a similar warning. The Tribunal is of the opinion that, even when balanced against the primary and other considerations that weigh in favour of the Applicant (including the best interests of minor children) the very strong view of the Australian community would be that the Applicant should not hold a Visa.

238. The Tribunal finds that the primary considerations of the protection of the Australian community and the expectations of the Australian community outweigh the best interests of the relevant children and the other considerations which weigh in favour of the Applicant.

# THE APPLICANT’S ARGUMENTS

1. By ground 1 of the application for review, the applicant contends that the state of satisfaction reached by the Tribunal under s 501CA(4)(b)(ii) that there was not another reason to revoke the cancellation decision was vitiated by its misunderstanding of the screening tool in its assessment of the likelihood of reoffending in circumstances where:
2. the state of satisfaction was a subjective jurisdictional fact, it being a condition for the exercise of the power to revoke in s 501CA(4);
3. section 499(2A) of the Act bound the Tribunal to comply with Direction No. 79 as the Direction was made under s 499(1) of the Act;
4. paragraph 8(2) of Direction No. 79 required the Tribunal to give appropriate weight to information and evidence from independent and authoritative sources;
5. the applicant had made representations under s 501CA(4)(a) that he would not reoffend in the future;
6. in considering the likelihood of the applicant engaging in further criminal or serious conduct pursuant to para 13.1.2(1)(a) of Direction No. 79 the Tribunal (at [112]) found that no reasons were given for the assessment of the applicant as presenting a low risk of general reoffending referred to in a Treatment Assessment Report and an Individual Management Plan made within the **Department of Justice** of the Government of Western Australia. It therefore did not accept the assessment of a low risk of general reoffending;
7. the Individual Management Plan was before the Tribunal as part of representations made by the applicant under s 501CA(4)(a). The Treatment Assessment Report was before the Tribunal as part of the Minister’s case, having been summonsed from the Department of Justice; and
8. in so finding, the Tribunal misunderstood and so failed to consider the evidence before it that the assessment of low risk of reoffending was the outcome of the administration in relation to the applicant of the assessment screening tool identified in material before the Tribunal as ‘The Risk of Reoffending – Prison Version (RoR-PV)’ in which the applicant achieved a particular score by which he was designated ‘a low risk of general reoffending’.
9. The applicant stresses that ground 1 is not that the Tribunal failed to take into account the screening tool’s assessment at all, but rather, that it did not understand the nature and function of the instrument by which the assessment was made. Because of that misunderstanding, the Tribunal could not properly evaluate the screening tool’s low risk assessment to achieve the satisfaction required by the Tribunal, one way or another, by s 501CA(4)(b)(ii).
10. In reference to the fact that prison treatment assessors gave no reasons as to how and why the assessment was reached, it is said that those criticisms show that the Tribunal did not understand the actuarial or statistical nature of the screening tool. Nor did the Tribunal know of the purpose or reliability of the screening tool in predicting reoffending, or its validation for use with prisoners. Instead, it is argued that the Tribunal treated the assessment as an expression of the assessor’s own opinion, possibly unreasoned, and possibly not subject to any criteria. That misunderstanding, it is said, undermines and frustrates the proper formation of the subjective state of satisfaction, one way or another, required of the Tribunal under s 501CA(4)(b)(ii) to enliven the power to revoke.
11. By affidavit evidence filed in support of the application, the applicant points to the widespread use of the screening tool in correctional facilities and the fact that the tool is purely statistical in that it produces a risk score based on six objective factors which include the offender’s age, gender, highest educational qualification and past criminal history. The applicant, in particular, relies upon an asserted error by the Tribunal in concluding that the assessor applying the screening tool failed to explain the reasoning behind the conclusion that the applicant was a low risk of reoffending. That approach to the screening tool demonstrated that the Tribunal was of the view that this screening tool was some form of subjective assessment, rather than a purely objective statistical examination of the applicant’s circumstances. The applicant argues that a correct understanding of the screening tool was rendered crucial by the applicant’s representations including the Individual Assessment Report, in relation to the primary consideration of the protection of the Australian community that he would not reoffend.
12. The applicant relies upon the observation of Dixon J in ***Avon Downs*** *Pty Ltd v Commissioner of Taxation (Cth)* [1949] HCA 26; (1949) 78 CLR 353 that a state of mind required by a statute might be vitiated if the repository of power ‘… excludes from consideration some factor which should affect his determination’. Also making up the *Avon Downs* ‘relevant factor’ is the terms of s 499(2A) of the Act which requires decision-makers to comply with directions the Minister makes under s 499, including Direction No. 79. In that regard, para 8(1) of Direction 79 requires decision-makers to take into account the primary and other considerations relevant to the individual case. Paragraph 8(2) specifically requires decision-makers to give ‘appropriate weight’ to information and evidence from ‘independent and authoritative sources’, which the applicant says in this instance must include the Treatment Assessment Report and the Individual Management Plan produced by the Department of Justice. Accordingly, the treatment by the Tribunal of this issue as to the screening tool assessment of a low risk of reoffending is said to be erroneous.
13. The applicant says this approach to the construction of s 501CA(4) in line with *Avon Downs* principles was recently approved by two Full Courts in ***Ali*** *v Minister for Home Affairs* [2020] FCAFC 109; (2020) 278 FCR 627 (at [39]-[44]) and ***Guclukol*** *v Minister for Home Affairs* [2020] FCAFC 148 (at [16]). These two cases are addressed further below.
14. The applicant argues that the Tribunal’s misapprehension about the screening tool is a result of its failure to consider all the information about the screening tool that it had before it in the Treatment Assessment Report and Individual Management Plan, and other information which it could have obtained for itself (the latter point being the subject of ground 3). The applicant adopts what was said by the Full Court in *Minister for Immigration and Border Protection v MZYTS* [2013] FCAFC 114; (2013) 230 FCR 431, a case concerning the Minister’s satisfaction of the existence of criteria for a protection visa. There, the Full Court (Kenny, Griffiths and Mortimer JJ) said (at [46]):

Although in one sense this might be described as a “failure to consider” most recent country information, or a failure to consider a claim about increased risk of persecution on return to Zimbabwe, in our opinion the error is, fundamentally, a failure to form the state of satisfaction (one way or the other) required for the purposes of the review in respect of the criterion in s 36(2)(a). Judicial review of the formation, by an inferior tribunal, of the state of satisfaction required by the empowering provision may be, as the High Court pointed out in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (***Kirk***) (at [64]) best described as a “functional exercise” (citing Jaffe, 1957). Affixing a pre-existing label or meta-description to what a decision-maker did in purported exercise of a statutory power, for example “a failure to consider”, may assist the analysis, although it may also provide a distraction. To the extent Robertson J made similar observations in *SZRKT* at [98] and [111], we respectfully agree.

(Emphasis in the original.)

1. There is no debate in this application that the Tribunal did have regard to both the Individual Management Plan and the Treatment Assessment Report, and took into account in making its decision that the applicant had been assessed by prison treatment assessors as being a ‘low risk’ of reoffending. The focus is on the statement that *‘no reasons were given as to how and why that assessment was reached’*.
2. The applicant also stresses that the *Avon Downs* error is not avoided by the Tribunal’s finding (at [132]) that ‘*any* likelihood’ of drug related or driving offending of the nature committed by the applicant is unacceptable. The applicant says the Tribunal expressly imported its misunderstanding of the screening tool as conveyed by the Tribunal’s use of inverted commas around ‘low’. In this way the misunderstanding of the screening tool is said to infect the Tribunal’s consideration at [132] as well.
3. In the alternative, the applicant contends under ground 3 (ground 2 is no longer pressed) that the Tribunal’s failure to consider exercising its discretion under s 33(1)(c) of the AAT Act to obtain further information about the screening tool assessment was legally unreasonable and lacked any evident intelligible justification.
4. Section 33(1)(c) of the AAT Act provides as follows:

**33 Procedure of Tribunal**

(1) In a proceeding before the Tribunal:

…

(c) 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. Reliance is placed on the decision in *Minister for Immigration and Border Protection v* ***CRY16*** [2017] FCAFC 210; (2017) 253 FCR 475, where the Full Court held that a statutory decision-maker will commit jurisdictional error not only when the exercise of a discretion is legally unreasonable, but also when it is legally unreasonable not to consider exercising the discretion at all such that it is disabled from performing its review function.
2. The applicants says there is no evidence to suggest that the Tribunal exercised, or even considered exercising its power in s 33(1)(c) of the AAT Act to obtain further information about the screening tool. This, in circumstances where the Tribunal was required to consider the applicant’s representation that he would not reoffend and where it conceded that no reasons had been given for the prison assessors’ low risk assessment using the screening tool. The applicant’s argument that the Tribunal should have sought further information on the screening tool, and indeed that it was unreasonable for it not to do so, is said to be strengthened by the requirement that the Tribunal comply with para 8(2) of Direction No. 79 which requires ‘appropriate weight’ to be given to evidence from ‘independent and authoritative sources’.

# CONSIDERATION

## Ground 1 – Vitiation of a state of satisfaction by a misunderstanding of evidence

1. It may be accepted, as the applicant contends, that the requirement under s 501CA(4)(b)(ii) of the Act that the Minister (or the Tribunal in the Minister’s stead) be satisfied that there is another reason to revoke the cancellation decision is a precondition to the valid exercise of the power to so revoke contained in the chapeau of s 501CA(4). Similarly, that power is also conditioned upon the existence of the matters prescribed by s 501CA(4)(a), that the applicant make representations in accordance with the invitation that the Minister is required to give under s 501CA(3). It is not controversial that this requirement was satisfied.
2. Both the requirements of s 501CA(4)(a) and s 501CA(4)(b)(ii) are jurisdictional facts, the existence of which, are necessary preconditions to the valid exercise of the power to revoke a cancellation decision. As the Full Court (Collier, Reeves and Derrington JJ) in *Ali* explained (at [40]-[42]):

40 The jurisdictional fact in subs (4)(a) is something which might be objectively ascertained (an objective jurisdictional fact). In this case the Minister made the observation that the appellant had made representations about the revocation of the original decision. That was not something of which he was required to be satisfied. It was merely an event which needed to occur and its existence or otherwise would always be open to full merits review.

41 **The matters in subs (4)(b)(i) and (ii) are subjective jurisdictional facts. The question for a court on review is not whether they existed, but whether the Minister was satisfied that either existed. By his reasons the Assistant Minister recorded that he was not satisfied that the appellant passed the character test and, nor was he satisfied that there was “another reason why the original decision should be revoked”. The consequence was that the power in the chapeau, which was conditioned on the satisfaction of the jurisdictional facts in subs (a) and (b), was not enlivened.**

42 The shielding of jurisdictional facts from curial review by interposing a subjective deliberation on a matter is a long established legislative drafting technique: *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385 at 403, acknowledged by Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 (*Eshetu*) at [130], and repeated by his Honour with McHugh J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 (*S20/2002*) at [54]. **Although the existence of a subjective state of mind is not beyond review by the Court, the grounds upon which it may be “reviewed” are limited. An early identification of those grounds was undertaken by Dixon J in *Avon Downs*** *Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 (*Avon Downs*) at 360. Those grounds have been added to and refined over the years: *MacCormick v Federal Commissioner of Taxation* (1945) 71 CLR 283; *Buck v Bavone* (1976) 135 CLR 110 at 118-119 *per* Gibbs J; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992 at [38] *per* Gummow and Hayne JJ; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (*SZMDS*); *EHF17 v Minister for Immigration and Border Protection* (2019) 272 FCR 409. Despite that elaboration in the later cases, the principles on which subjective jurisdictional facts may be reviewed are nevertheless generally referred to as “*Avon Downs* principles”. **That being said, where the state of mind on which the operation or exercise of a provision or power is conditioned is vitiated by an *Avon Downs* error, any subsequent purported exercise of power will necessarily be affected** **by jurisdictional error: *S20/2002* at [59].**

(Emphasis added.)

1. The applicant also relied on *Guclukol*, where the Full Court (Katzmann, O’Callaghan and Derrington JJ) said (at [16]):

Before considering that submission, it is convenient to briefly consider the functional operation of s 501CA(4), despite the absence of any substantive submissions being provided to the Court on this issue. In *Ali v Minister for Home Affairs* [2020] FCAFC 109 (***Ali***), the Full Court assayed at [39] – [44] the recent authorities and concluded that the discretionary power in the chapeau to s 501CA(4) was conditioned upon the existence of two subjective jurisdictional facts, the second being the Minister’s satisfaction “that there is another reason why the original decision should be revoked”. **It follows that, where the Court is called upon to ascertain whether a vitiating error has occurred in the course of reaching the required state of mind, the principles relating to subjective jurisdictional fact review, sometimes referred to as “*Avon Downs* principles”, are initially applicable. It may be that, once a vitiating error in the formation of the state of mind is identified, the subsequent purported exercise of power will involve a jurisdictional error due to the non-existence of the circumstance on which the power was conditioned.** See generally, Derrington R, “*Migrating Towards a Principled Approach to Reviewing Jurisdictional Facts*” (2020) 27 AJ Admin L 70.

(Emphasis added.)

1. It may be accepted from these two passages that the Court’s task on review of the decision-maker’s satisfaction under s 501CA(4)(b)(ii) of the Act is to consider whether the existence or not of that subjective jurisdictional fact has been vitiated by an error of the kind described by Dixon J in *Avon Downs* (at 360) and in line with the principles enunciated in the subsequent decisions identified in *Ali* (at [42]).
2. It must also be observed that the above quoted passage from *Guclukol*, and an earlier paragraph from *Ali* (at [39]) suggest that the existence of the jurisdictional facts prescribed by s 501CA(4)(a) and s 501CA(4)(b)(ii) (or (i)) enliven the *discretionary* power of the Minister to revoke a cancellation decision contained in the chapeau of s 501CA(4). To the extent that these decisions appear to suggest that the Minister retains some residual discretion to exercise or not exercise the power to revoke the cancellation decision, after satisfaction of the preconditions contained in s 501CA(4)(a) and s 501CA(4)(b), there is also substantial authority for the contrary view: see for instance Katzmann J’s reasons (at [2]-[7] and the authorities cited therein) in ***Tohi*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125; cf Derrington J’s reasons in *Tohi* (at [35]-[38]) and [50]-[51]). It is unnecessary to decide this point in the present case and neither party advanced submissions as to the proper construction of s 501CA(4) as a whole. It suffices for present purposes to accept simply that the existence or not of a jurisdictional fact rendered subjective by the requirement that a decision-maker reach a state of satisfaction will be vitiated by error if the decision-maker commits an *Avon Downs* error.
3. The applicant’s contention is that the Tribunal’s misunderstanding of the underlying statistical basis of the screening tool, and its apparent view that the attribution of a ‘low risk’ of reoffending to the applicant was the subjective view of prison assessors, vitiated its satisfaction that there was not another reason to revoke the cancellation decision. The Minister’s submissions in response to this ground were directed primarily to demonstrating that the Tribunal had clearly given active intellectual consideration to the representations as to reoffending generally and indeed specifically in relation to the screening tool. It is not disputed that it is generally unnecessary for the Tribunal to refer to every piece of evidence or contention advanced by an applicant but must consider significant and clearly articulated representations as a whole: *Minister for Home Affairs v Buadromo* [2018] FCAFC 151; (2018) 267 FCR 320 per Besanko, Barker and Bromwich JJ (at [48]-[49]); *Navoto v Minister for Home Affairs* [2019] FCAFC 135 per Middleton, Moshinsky and Anderson JJ (at [88]) and *Matthews v Minister for Home Affairs* [2020] FCAFC 146 per Middleton, Perry and O’Bryan JJ (at [29]). However recourse to these principles fails to address the actual contention advanced by the applicant. It is not contended that the Tribunal failed to directly consider a representation or did not actively engage with a representation, rather it is contended that the consideration which the Tribunal did give to the screening tool proceeded on a misunderstanding with the consequence that the state of satisfaction was vitiated.
4. The fundamental difficulty with the argument advanced by the applicant under ground 1 however, is that it has not been demonstrated how a misunderstanding of the true nature of a piece of evidence, which could not have been ascertained on the material before it, could amount to an *Avon Downs* error. As Derrington J observed in his Honour’s comprehensive review of jurisdictional fact review in *EHF17 v Minister for Immigration and Border Protection* [2019] FCA 1681; (2019) 272 FCR 409 (at [67], [69]-[70] and [76]):

67 Secondly, **the various states of mind on which powers are frequently conditioned are concerned with matters which contain inherent value judgments or are dependent upon conclusions about the existence or otherwise of matters which require an assessment of the available material. Necessarily, evaluative judgments are matters on which reasonable minds might differ and may include a not insignificant subjective element**: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353 (*Avon Downs*) at 360. In this way the legislature implicitly recognises that there is no absolute conclusion or state of mind which might be reached in every case. Indeed, usually a range of views might be held, and the power is enlivened if the repository reaches that state of mind on which it is conditioned.

…

69 Fourthly, the danger of an abuse of the court’s power of review of administrative action by the frivolous pursuit of unmeritorious proceedings makes it more desirable in the interests of justice and the legal process that the permissible grounds for subjective jurisdictional fact review should be reasonably limited by clear definition and not be left open to a wide range of unfortunate arguments claiming invalidity.

70 Thus, in conformity with the manner in which the legislature has granted power, any review by the Court, as to the existence of a subjective jurisdictional fact must be limited to determining whether the state of mind actually reached is one within the range which the legislature intended to be formed as a pre-requisite to the exercise of power. **If there are errors in the process by which a state of mind is reached, such as by considering extraneous or irrelevant considerations or by excluding relevant considerations, the state of mind will not be that which the legislature impliedly requires. Similarly, if, in reaching the state of mind, the repository of power has asked themselves the wrong question as a consequence of a mistake of law, the state of mind is not that on which the exercise of power is conditioned. It might also be noted that the Parliament implicitly intends the requisite state of mind should be one which has been formed logically and rationally upon findings of fact which are logically formed upon probative evidence.** Further, even if it cannot be detected that an error occurred in the application of law or consideration of the correct matters, if the conclusion is one which is wholly unreasonable, it can, nevertheless, be inferred that one of the identified error has occurred…

…

76 The precise content of the grounds of irrationality, illogicality or illogical fact finding in reaching or not reaching the required state of satisfaction remains unclear. In *S20/2002*, Gleeson CJ observed at [9] that to describe a process of reasoning as leading to an illogical conclusion might mean no more than saying that on the same material the reviewer would have reached a different conclusion. **The existence of a mere faulty inference of fact will not be sufficient, but, if it can be said that the true and only reasonable conclusion contradicts the one reached, then it may be shown to involve legal error**. In that case, McHugh and Gummow JJ were prepared to accept at [37] that the jurisdictional fact did exist because the Tribunal’s lack of satisfaction of the protection visa criteria was not illogical or irrational. Their Honours did not specify the scope of the illogicality or irrationality grounds or the ground concerned with evidential deficiency. However, they did refer with some approval to the decision in *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Company Pty Ltd* (1953) 88 CLR 100 (*Melbourne Stevedoring*) at 119 to the effect that the absence of any foundation in fact is a sufficient ground for vitiating any alleged state of mind which is said to arise from it. **Similarly, it was seemingly accepted that inadequacy of material, whilst not in itself sufficient to ground prohibition, may be a circumstance which supports the inference that the repository of power applied the wrong test or was not, in reality, satisfied of the particular matters.**

(Emphasis added.)

1. It does not necessarily follow, in my view, as the applicant contends, that the Tribunal’s reasons at [112] suggest it was under the impression that there was some subjective evaluation involved in the screening tool assessment. In saying that ‘no reasons were given as to how and why that assessment was reached’, the Tribunal was correctly referring to an absence of information of any kind. It was an absence of information that would have enabled the Tribunal to determine how much weight to place on the assessment made by the prison assessors because the assessment under the screening tool of being at ‘low risk’ says nothing about the information provided to the assessors to undertake the assessment or the matters that were relevant to the application of the screening tool or the way in which the screening tool converted those matters into a score responding to a low risk of reoffending.
2. Although it is true that the Tribunal did not specially identify the screening tool that the prison assessors deployed and did not specifically note the applicant’s score of 11 which warranted, under the screening tool, the assessment of a low risk of reoffending, no part of the Tribunal’s reasons at [112] displays any irrational or illogical reasoning or findings unsupported by the material before it. A decision-maker’s reasons should not be construed minutely and finely with an eye keenly attuned to the perception of error: *Minister for Immigration and Ethnic Affairs v Wu Shan* *Liang* [1996] HCA 6: (1996) 185 CLR 259 (at 271-272). Nor can it be said that the material considered by the Tribunal on the question of the risk of reoffending was inadequate. As the subsequent paragraphs of its decision make clear, a substantial amount of other material was considered by the Tribunal, including the extensive evidence of a consultant psychologist.
3. Nor can it be said that the Tribunal completely disregarded the screening tool from its consideration. Rather, it simply expressed concern about the lack of available evidence to substantiate the conclusion that prison assessors reached in applying the screening tool to the applicant and gave it less weight as a result. When considered in this light, ground 1 is an attempt to allege error on the part of the Tribunal by the amount of weight it gave to a piece of evidence in circumstances where the only indication that greater weight should have potentially been given was found in further evidence adduced for the first time in this Court. That is not a permissible course to take in the review of a decision-maker’s state of satisfaction.
4. Subject to the requirement that it not make findings which are irrational, illogical, unreasonable or unsupported by evidence, it is a matter for the Tribunal to assess and interpret the material before it and to make findings on the basis of that material. While the applicant is at pains to point out that the case is not one of failure to consider the material, but rather, a failure to understand it, that is simply another way of saying that the Tribunal may have arrived at a different conclusion if it had a clear understanding of the particular evidence. It was for the applicant to present the evidence and the case he sought to make to the Tribunal. It is not apparent that the applicant made the issues which are the subject of the additional evidence sought to be adduced on this review, clear to the Tribunal (i.e. the nature of the screening tool and how it is applied and used). In this case, it is clear the Tribunal did engage in detailed consideration of the primary consideration of the protection of the Australian community, as it was required to do and did so over 90 paragraphs of its decision. Clearly it gave careful and detailed consideration to the likelihood of the applicant engaging in further criminal conduct.
5. Further, the Tribunal’s conclusion (at [132]) that any likelihood of reoffending would be unacceptable is not shown to be erroneous, nor could any misunderstanding of the screening tool have influenced the Tribunal’s separate consideration of the nature and seriousness of any potential harm, if the applicant did reoffend. As no error in the Tribunal’s treatment of the screening tool has been demonstrated, it is unnecessary to consider this argument any further.

## Ground 3 (ground 2 being abandoned) – failure to obtain further information

1. This ground turns on the discretionary power that the Tribunal has to inform itself of any matter, in such manner as it thinks appropriate pursuant to s 33(1)(c) of the AAT Act. The basis of this ground is a reasonableness ground in that, in the absence of clear words to the contrary, a statutory discretion has to be exercised reasonably: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (at [26], [29], [63], [88] and [94]).
2. There is no doubt that the Tribunal has power to get information that it considers to be relevant to a proceeding and it must not act in a way that is legally unreasonable in choosing whether or not to exercise that power. But once again, the starting point is that it is for the applicant to put before the Tribunal, by way of evidence and submission, that which he or she wishes the Tribunal to take into account and to satisfy the Tribunal that there is ‘another reason’ why cancellation of a visa should be revoked: see *Minister for Immigration and Border Protection v Maioha* [2018] FCAFC 216; (2018) 267 FCR 643 per Rares and Robertson JJ (at [48]) and Flick J (at [70]) and ***Taualii*** *v Minister for Home Affairs* [2019] FCA 2013 per Anderson J (at [100]). There is no duty on the part of the Tribunal to ask for further representations from the applicant or to make inquiries into the representations made or to consider making such inquiries. Given those statements of principle, the challenge of demonstrating legal unreasonableness is, in this case, difficult. There are cases in which a failure to exercise a power in the nature of, or similar to, the power in s 33(1)(c) of the AAT Act may be legally unreasonable, but it has been noted that such cases will be extremely limited.
3. One such case was *CRY16* in which the Full Court held that the failure of the Immigration Assessment **Authority** to exercise its discretion under s 473DC of the Act to receive further information from the applicant about potential relocation to Beirut was legally unreasonable. Importantly though in that case, the Authority rejected the applicant’s claim on an altogether different basis from the delegate such that the applicant had not previously been on notice that the issue of relocation could be determinative of the case. As the Full Court said (at [69]-[70] and [82]):

69 Next, it is appropriate to record that, although much argument was addressed to the nature of the Authority’s discretion in Subdiv C, including s 473DC, there is no doubt that the Authority had *power* to get any documents or information which were not before the Minister and which the Authority considered may be relevant. Put differently, that the Authority has a discretion rather than a duty to get those documents or information does not provide an answer to whether or not the Authority acted reasonably as explained in *Li*. We do not accept the submission on behalf of the Minister that the only relevant question is whether Pt 7AA *required* the Authority to give such notice to a referred applicant.

70 Neither do we accept the Minister’s submission that if there was no duty imposed on the Authority to consider the exercise of a discretionary power, the principles of legal unreasonableness could only have application in cases where the Authority had given consideration to exercising the power, and decided to exercise it in a manner adverse to an affected party. In our opinion, that proposition is too broad.

…

82 Our conclusion is that it was **legally unreasonable, in the circumstances, not to consider getting documents or information from the respondent**. The legislature is to be taken to intend that the Authority’s statutory power in s 473DC will be exercised reasonably. The failure to consider the exercise of that discretionary power lacks an evident and intelligible justification in circumstances where the Authority knew that it did not have, but the respondent was likely to have, information on his particular circumstances and the impact upon him of relocation to Beirut. **The Authority did not have that information because the question of relocation, either at all or to Beirut, was not explored, or the subject of findings, by the delegate.** The Authority’s failure to consider the exercise of that discretionary power meant that it disabled itself from considering what was reasonable, in the sense of “practicable”, in terms of relocation. In our opinion, as a consequence, the review by the Authority under s 473CC miscarried for jurisdictional error.

(Emphasis added.)

1. The applicant says, and it may be accepted, that there was no evidence to suggest the Tribunal exercised or even considered exercising its power under s 33(1)(c) of the AAT Act to obtain further information about the screening tool. However, the mere absence of any reference to the exercise or consideration of the exercise of a discretion is not sufficient to ground an inference that the Tribunal failed to consider the exercise of the discretion or indeed that such failure was unreasonable: *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34; (2019) 268 CLR 29 (at [16] and [40]). The Tribunal is under no general obligation to consider the exercise of a procedural power such as that under s 33(1)(c): *Minister for Immigration and Citizenship v* ***SZGUR*** [2011] HCA 1; (2011) 241 CLR 594 per French CJ and Kiefel J (at [22] and [41]) and *Taualii* per Anderson J (at [96]-[100]). There is also no obligation on the part of the Minister to point to evidence to show that the Tribunal considered exercising a procedural power: see *SZGUR* per French CJ and Kiefel J(at [30]-[35]).
2. Although I have previously noted the apparent incongruence in the requirement that a decision-maker must exercise a statutory discretion reasonably, while not being required to give reasons for the exercise *or non-exercise* of that discretion (see *EAT17 v Minister for Home Affairs* [2021] FCA 68 (at [60])), there is no basis to doubt the propositions drawn from the above authorities and I am bound to apply them.
3. In *Minister for Immigration and Citizenship v SZIAI* [2009] HCA 39;(2009) 83 ALJR 1123 per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ (at [20] and [25]), the High Court left open the possibility that a ‘a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review’. Assuming without deciding that such a possibility could apply in the context of decisions under s 501CA(4) of the Act, it remains the case that the circumstances in which the failure by an administrative decision-maker to make an inquiry may constitute jurisdictional error are rare and exceptional.
4. The applicant contends that in this case, the Tribunal’s obligation to consider the applicant’s representations and the requirement that it give appropriate weight to evidence from authoritative sources (para 8(2) of Direction No. 79), combined with the relevance of the screening tool to the consideration of the likelihood of reoffending, demonstrate the unreasonableness of failing to make its own inquiries where it conceded (at [112]) that the material before it did not disclose the reasoning behind the screening tool assessment.
5. However, as noted by the Full Court in ***Kaur*** *v Minister for Immigration and Border Protection* [2017] FCAFC 184; (2017) 256 FCR 235 per Dowsett, Pagone and Burley JJ (at [33]), the fact that it may have been reasonable to make an inquiry does not mean that the lack of consideration of whether such an inquiry should be made would be legally unreasonable or amount to jurisdictional error: *Kaur* (at [33] and the authorities cited therein).
6. There is no indication that at any time the applicant requested the Tribunal to exercise the power to obtain further information about the screening tool. In this case, the Tribunal would not have been under any duty to gather further information about the screening tool or to consider doing so. Nothing in the circumstances of this case supports the applicant’s contention that the absence of a decision to obtain further information about the screening tool or to consider doing so lacked an ‘evident and intelligible justification’ for not getting further information in circumstances where it was not asked to do so. This is particularly so because the nature of the screening tool was not a matter of critical significance to the Tribunal’s review. As has been made clear above, the Tribunal considered a substantial body of material beyond the screening tool, including from independent and authoritative sources, in its assessment of the likelihood of reoffending.

# MATERIALITY

1. The errors contended for the applicant have not been made out, but in the alternative, assuming for present purposes that they were, it has not been shown that each of the errors was material in the sense that if the Tribunal had not made one or both of the errors, it could realistically have made a different decision on the review. Each of the grounds pertains to the question of the Tribunal’s assessment of the likelihood of the applicant reoffending and the lack of weight given by the Tribunal to the outcome of the screening tool assessment. But the content of [132] of the Tribunal’s decision set out above makes it clear that, even if the Tribunal had made either of the errors contended for by the applicant, neither error could have resulted in a successful outcome, even if the Tribunal had concluded that the risk of the applicant reoffending was ‘low’, as opposed to being ‘somewhat higher than the “low” range’ which was the actual finding.
2. The Tribunal made quite clear that a more favourable assessment of reoffending could not realistically have resulted in the Tribunal reaching a different state of satisfaction under s 501CA(4)(b)(ii) to the one that it did. This was due to its finding that the nature of the harm caused to the community by drug related offences and driving offences committed by the applicant was sufficiently serious that any likelihood of either type of offending being repeated was held to be unacceptable. Such a conclusion was clearly open (see para 6.3.4 of Direction No. 79).

# CONCLUSION

1. For these reasons, the application must be dismissed with costs.

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| I certify that the preceding fifty-six (56) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice McKerracher. |

Associate:

Dated: 16 August 2021