Federal Court of Australia

JZGW v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1333

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| Review of: | *JZGW and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 4430 |
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| File number: | VID 784 of 2020 |
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| Judgment of: | **BROMBERG J** |
|  |  |
| Date of judgment: | 29 October 2021 |
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| Catchwords: | **MIGRATION** – mandatory cancellation of applicant’s visa under s 501(3A) of the *Migration Act 1958* (Cth) – decision of a delegate of the Minister under s 501CA(4) not to revoke the cancellation decision – decision of the Administrative Appeals Tribunal to affirm the delegate’s decision – whether the applicant’s representation that the consequences of deportation on his psychological health was “another reason” to revoke the cancellation of his visa was sufficiently articulated and significant to give rise to an obligation on the Tribunal to consider it – use of headings – the Tribunal failed to consider clearly expressed and significant representation |
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| Legislation: | *Migration Act 1958* (Cth) ss 499, 501, 501CA |
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| Cases cited: | *AXT19 v Minister for Home Affairs* [2020] FCAFC 32  *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89  *DQM18 v Minister for Home Affairs* (2020) 278 FCR 529  *EVK18 v Minister for Home Affairs* (2020) 274 FCR 598  *GBV18* *v Minister for Home Affairs* (2020) 274 FCR 202  *Guclukol v Minister for Home Affairs* [2020] FCAFC 148  *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628  *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1609  *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320  *Minister for Home Affairs v Omar* (2019) 272 FCR 589  *Minister for Immigration and Border Protection v DRP17* (2018) 267 FCR 492  *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 215  *MQGT v Minister for Home Affairs* [2020] FCA 520  *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1  *Navoto v Minister for Home Affairs* [2019] FCA 295  *Navoto v Minister for Home Affairs* [2019] FCAFC 135  *Nguyen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 985  *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152  *SZUTM v Minister for Immigration and Border Protection* (2016) 241 FCR 214  *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531  *Walker v Minister for Home Affairs* [2020] FCA 909 |
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| Date of hearing: | 16 April 2021 |
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| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice |

ORDERS

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|  | | VID 784 of 2020 |
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| BETWEEN: | JZGW  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: | BROMBERG J |
| DATE OF ORDER: | 29 October 2021 |

THE COURT ORDERS THAT:

1. The decision of the Administrative Appeals Tribunal made on 4 November 2020 in matter number 2020/5040 to affirm the decision of a delegate of the first respondent made on 7 December 2018 not to revoke the cancellation of the applicant’s visa (**decision**) is set aside.
2. The matter be remitted to the Administrative Appeals Tribunal for the Administrative Appeals Tribunal to review the decision according to law.
3. The First Respondent pay the applicant’s costs of the application.

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

REASONS FOR JUDGMENT

BROMBERG J:

1. The applicant seeks judicial review of a decision of the second respondent (**Tribunal**) made on 4 November 2020 to affirm the decision of a delegate of the first respondent (**Minister**) under s 501CA(4) of the *Migration Act 1958* (Cth) (**Act**) not to revoke the cancellation of his Class BC (Subclass 100) Spouse visa (**visa**).
2. In December 2018, the applicant’s visa was cancelled under s 501(3A) of the Act. The applicant was invited to and made representations that the decision be revoked. On 12 August 2020, a delegate of the Minister (**delegate**) decided not to revoke the cancellation of the applicant’s visa. On 20 August 2020, the applicant applied to the Tribunal for review of the decision of the delegate. On 4 November 2020, the Tribunal affirmed the decision of the delegate. The applicant now seeks judicial review of the Tribunal’s decision.

# Legal framework

1. The legal framework was not disputed by the parties. Under s 501CA(4) of the Act, the Minister may revoke a cancellation decision if the person makes representations responsive to the Minister’s invitation and the Minister is satisfied that the person passes the character test or there is “another reason” why the decision should be revoked.
2. In reviewing a decision made under s 501CA(4) of the Act, the Tribunal stands in the shoes of the Minister and is subject to the same statutory and common law constraints. Pursuant to s 499(2A) of the Act, the Tribunal is also obliged to comply with *Direction no. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (**Direction 79**) to the extent that it is lawful to do so.
3. The constraints flowing from s 501CA(4) of the Act and Direction 79 operate independently: *Nguyen v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 985 at [27] (Mortimer J). Thus the Tribunal may fail to perform its statutory task where it complies with Direction 79 but does not consider a representation made by the applicant as to “another reason” why the cancellation decision should be revoked.
4. The Tribunal is obliged under s 501CA(4) of the Act to give active intellectual consideration to significant and clearly made representations as to “another reason” for revoking the cancellation decision. If the representations meet this criterion, they “are a mandatory relevant consideration as a whole”: *Minister for Home Affairs v Buadromo* (2018) 267 FCR 320 at [41] (Besanko, Barker and Bromwich JJ). Furthermore, where a decision may have devastating consequences on an individual, the “obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people”: *Minister for Home Affairs v* ***Omar*** (2019) 272 FCR 589 at [37] (Allsop CJ, Bromberg, Robertson, Griffiths And Perry JJ); *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628 at [3] (Allsop CJ, with whom Markovic and Steward JJ agreed).
5. The state of satisfaction required under s 501CA(4)(b)(ii) of Act cannot be achieved lawfully without consideration of the representations made by the applicant: ***DQM18*** *v Minister for Home Affairs* (2020) 278 FCR 529 at[23] (Bromberg and Mortimer JJ). Accordingly, a failure to deal with a substantial and clearly articulated representation as to “another reason” why a cancellation decision should be revoked will, subject to materiality, sound in jurisdictional error: ***Viane*** *v Minister for Immigration and Border Protection* (2018) 263 FCR 531at [25]-[30] (Rangiah J); *Minister for Immigration and Border Protection v DRP17* (2018) 267 FCR 492 at [47] (Jagot, Rangiah and Banks-Smith JJ); ***Navoto*** *v Minister for Home Affairs* [2019] FCAFC 135 at [85] (Middleton, Moshinsky and Anderson JJ).
6. In carrying out its review, the Tribunal applied Part C of Direction 79 which addresses applications seeking the revocation pursuant to s 501CA(4) of the Act of a visa application. Part C includes paras 14(1) and 14.5 which are of some significance to the issue that arises for determination. Para 14(1) provides that “[i]n deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant”. Paragraph 14.5 of the Direction 79 establishes that the “other considerations” include:

**14.5 Extent of impediments if removed**

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

a) The non-citizen’s age and health;

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

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

1. Paragraphs 14(1) and 14.5, read together, essentially require the Tribunal to consider the impediments that a person may face in establishing themselves and maintaining basic living standards if removed to their country of origin. In doing so the Tribunal must take into account the matters referred to at para 14.5(1)(a)-(c), which for present purposes include the applicant’s “health”.

# The issue before the Court

1. The applicant relied on two grounds. The second was not pressed. The only ground pressed was whether the Tribunal failed to have regard to a representation made by the applicant as to another reason why the cancellation of his visa should be revoked. In the course of oral argument the second ground crystallised to a single issue, namely, whether the applicant had made a representation to the Tribunal that the devastating consequences of deportation on his psychological state was “another reason” to revoke the cancellation of his visa. Subject to the reservation discussed at [62]-[64] below, the Minister accepted that, if the applicant had made such a representation, it had not been dealt with by the Tribunal. Accordingly, the principal matter for determination before this Court is whether the applicant made the aforementioned representation.
2. It is convenient to identify the nature of the contest between the applicant and the Minister as to whether a representation was made that removal of the applicant from Australia would have an adverse psychological impact upon him. It is not contested that the applicant contended from the outset, that is, from the time he first responded to the Minister’s invitation to make representations seeking the revocation of the cancellation of his visa, that removal would have an adverse impact upon his psychological well-being. The fundamental issue between the parties is whether that representation should have been objectively understood as raising “another reason” for revocation, namely, that removal would impose a psychological impediment upon the applicant, or, alternatively, whether the representation was made merely to support a different reason for revocation relied upon by the applicant for revocation, namely, that removal and relocation to Vietnam would impose a financial impediment upon him.
3. The applicant contended that, relevantly, he claimed that there were two additional reasons in favour of revocation. *First*, removal from Australia would impose a psychological impediment upon him manifesting in depression and anxiety caused mainly by his separation from his children and, *second*, a severe financial impediment would be imposed upon him by reason of his relocation to Vietnam. The Minister contended that the applicant only raised the financial impediment as “another reason” relying on his psychological ill‑health solely for the purpose of supporting his asserted incapacity to establish himself and maintain a basic living standard in Vietnam.
4. The applicant substantially relied on the terms of the representation made by him to identify those two separate subjects or reasons in support of the revocation raised by him. The Minister substantially relied on the heading under which the representation was made as identifying the single subject (financial impediment) dealt with by that representation.
5. The representation or representations in question were, as I will explain, made and re-made by the applicant under the heading “Extent of impediments if removed”. That heading is in the same terms as the heading of para 14.5 of Direction 79. The Minister submitted that, in that context, properly construed, the references made to the applicant’s psychological condition as an impediment were put for the sole purpose of addressing the financial impediment dealt with by para 14.5 of Direction 79, namely, the potential financial impact of relocation to Vietnam.
6. The Tribunal’s reasons do not identify that the applicant raised a claim that a reason for revocation was that removal would impose a psychological impediment upon him. As stated already, it is not in contest that, if raised, that claim was not dealt with by the Tribunal. The question for determination, to which I now turn, is whether the claim or representation was raised or sufficiently raised to have obliged the Tribunal to consider it.
7. For the reasons that follow, I have determined that the applicant did raise the adverse psychological impact upon him of his removal from Australia as a stand-alone reason for revocation. That claim should have been considered by the Tribunal but was not.

# Authorities

1. Before considering the material before the Tribunal, it is appropriate to set out the relevant authorities in some detail. As stated above, a representation must be clearly expressed and significant for it to give rise to an obligation on the Tribunal to consider it: *GBV18* *v Minister for Home Affairs* (2020) 274 FCR 202 at [31(e)] (Flick, Griffiths and Moshinsky JJ). Whether a representation meets that bar is a question of fact: ***MQGT*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 215 at [20] (Jagot, Kerr and Anastassiou JJ).
2. That obligation, however, does not require the Tribunal to address every piece of evidence before it and every matter raised on the material: *Navoto* at [88] (Middleton, Moshinsky and Anderson JJ). The need to make a specific finding turns on the nature and content of the representation: *Omar* at [39]. As noted above, in the present case the Minister accepts that if the aforementioned representation was made the Tribunal failed to consider it.
3. The Tribunal is not obliged to consider a representation that was not put to it. Nevertheless, it must be accepted that the Tribunal is not “only required to deal with claims expressly articulated by the applicant”: ***NABE*** *v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 at [60] (Black CJ, French and Selway JJ). A representation may arise solely on the material or information before the Tribunal: *NABE* at [60]. The decision in *NABE* and some of the cases referred to below occurred in a different statutory context to the Tribunal’s task of reviewing a decision made under s 501CA(4). Nevertheless, I consider that these authorities are relevant to the matter at hand. Furthermore, it has been accepted that under s 501CA(4) if “what is overlooked [by the Tribunal] is better characterised as “information” (or “material”, or “evidence”), rather than an “argument”, there may be jurisdictional error where the “information” is sufficiently important, such that the error is serious enough to be described as jurisdictional”: *Viane* at [30] (Rangiah J, with Reeves J agreeing at [3]); *MQGT v Minister for Home Affairs* [2020] FCA 520at [14] (Reeves J).
4. A finding that a decision-maker has failed to consider a matter raised on the materials is not lightly made. The representation must “emerge clearly from the materials before the Tribunal”: *NABE* at [68] (Black CJ, French and Selway JJ). Further, it has been accepted that a claim raised on the materials must be based on “established facts”: ***AYY17*** *v Minister for Immigration and Border Protection* [2018] FCAFC 89 at [18] (Collier, Mckerracher and Banks-Smith JJ); *SZUTM v Minister for Immigration and Border Protection* (2016) 241 FCR 214 at [37]-[38] (Markovic J).
5. Representations arising on the materials assume heightened significance where the applicant was unrepresented. However, the presence of legal representation is not determinative of the inquiry, which should take into account all the circumstances of an individual case: *Navoto* at [103] (Middleton, Moshinsky and Anderson JJ); *Kasupene v Minister for Immigration and Citizenship* [2008] FCA 1609 at [19]-[21] (Flick J). Attention should be directed, however, to how an applicant’s claims have been advanced over a time, as the assessment cannot be performed in a vacuum: *AYY17* at [18] (Collier, Mckerracher and Banks-Smith JJ).
6. Before proceeding to consider the materials before the Tribunal, it should be observed that significant care is required when undertaking the inquiry as to whether a representation was made with sufficient clarity that it compels consideration by the Tribunal, lest a court fall into impermissible merit review. To that end, the Full Court said in *AXT19 v Minister for Home Affairs* [2020] FCAFC 32 at [56]:

Considerable caution needs to be exercised in resolving an argument that a claim has been made in sufficiently clear terms that it should in turn be considered by the Tribunal. The greater the degree of clarity in which a claim has been made and advanced for consideration, the greater may be the need for the Tribunal to consider the claim in clear terms. Conversely, the more obscure and less certain a claim is said to have been made, the less may be the need for the Tribunal to consider the claim. The need for caution arises lest a reviewing Court is propelled from its sole task of undertaking judicial review and into the murky waters of impermissible merits review. The task of a court undertaking judicial review is not to elevate a statement that may have been made in passing by a claimant into a clearly articulated claim in need of resolution. For a Court undertaking judicial review to engage in such a process has all the dangers of the Court resolving a different factual case to the one advanced to the Tribunal and thereby trespassing into merits – and not judicial – review.

1. In *DQM18* at [27], Mortimer J and I applied the observations of the Full Court. To similar effect, the Full Court said in *EVK18 v Minister for Home Affairs* (2020) 274 FCR 598 at [14] (Flick, Griffiths and Moshinsky JJ) (citations omitted):

The balance that is sought to be struck is to recognise that a “representation” which has been made pursuant to s 501CA(3) may contain a myriad of different claims and assertions and should not be dissected for the purpose of forensically and opportunistically subsequently seizing upon a failure to address a particular “statement” that may be found within a representation as exposing legal error, whilst at the same time recognising that a “representation” may not be drafted with the skill of an experienced legal practitioner.

1. Finally, there is a valuable observation made by Allsop CJ in *Navoto v Minister for Home Affairs* [2019] FCA 295 at [47] (endorsed on appeal in *Navoto* at [86]) which warns against an over reliance on textual taxonomical precision and resonates with the critical issue I need to grapple with. After surveying the authorities, his Honour said this (emphasis added):

… it can be taken that a failure to consider or take into account matters of sufficient importance in the representations may amount to jurisdictional error either because it cannot be said that the required state of satisfaction has been reached in accordance with the section in all the circumstances, or because not to take such an important matter into account reflects a failure to take into account all the representations. *One should be cautious about over reliance on textual taxonomical precision in this area.* There will be jurisdictional error if material important in the representations has not been taken into account so as to make the purported exercise of the power not one that can be seen or characterised as being based on, or having taken into account, the representations as a whole. An evaluation of this will be context and circumstance specific. Textual formulae are of little assistance.

# Consideration

1. On 3 June 2020, the applicant completed a personal circumstances form for the purpose of advancing his request for the cancellation of his visa to be revoked. The form was provided to the delegate and was also before the Tribunal. Under the heading “Impediments to return” question 12 of the form asked the applicant whether he had any diagnosed medical or psychological conditions. The applicant responded “yes” and requested that regard be had to the submission to the delegate dated 5 May 2020 (particularly at [71]-[81]), the attachments to the submission, and the observations of clinical psychologists Mr Watson-Munro and Mr Bernard Healy.
2. The applicant was then asked to provide details about any treatment that he was undertaking which he would like “the decision-maker to take into account”. The applicant responded that he “suffers from depression and sleep disturbance but does not receive medication or ongoing treatment for this in prison”.
3. Question 13 of the personal circumstances form asked the applicant under the heading “Return to your country of citizenship” whether he had any concerns or fears about what would happen to him if he were to return to Vietnam. The applicant again asked that the submission dated 5 May 2020 be considered, and said that his “concerns relate primarily to not being abel [sic] to see his children again and the significant emotional *and* financial difficulties he would face in Vietnam” (emphasis added). In response to question 14, which asked the applicant to provide any other information he would like the decision-maker to consider, the applicant again referred to the submission of 5 May 2020 as a whole.
4. I accept the contention of the applicant that, although these questions may have been drafted with the requirements of paras 14.1 and 14.5 of Direction 79 in mind, there was no express indication to that effect on the face of the document.
5. The submission dated 5 May 2020, referred to above (the **May submission**), was put to the delegate in support of the applicant’s request that the cancellation decision be revoked. At [71]-[81], the applicant made a submission to the delegate under the heading “Extent of impediments if removed”. The first part of that submission at [71]-[74] was in the following terms:

71. The significant psychological impediments that [the applicant] will face if removed to Vietnam also weigh heavily in favour of revocation. As Mr Watson-Munro notes at page 5 of his report:

It is apparent from his earlier history in Vietnam that he was already highly vulnerable in terms of symptoms of depression, anxiety, low self-esteem and insecurity. In this regard, he described considerable domestic violence within his home as a child and adolescent. This correlated well with his statement dated 3 May 2019, particularly from paragraphs 5 onwards.

72. Mr Watson-Munro conducted psychometric assessment, which confirmed that [the applicant] is experiencing a moderate and recurring Depressive Disorder (296.32) according to DSM-5 criteria and acknowledged suicidal ideation, noting at page 7 that:

This clearly speaks to the intensity of his depression in the present and his sense of despair regarding the future. In passing, this will be significantly aggravated if he is deported, particularly in the context of his concerns for his children.

73. Mr Watson-Munro concludes at page 12 of this report that:

[The applicant] will be significantly destabilised if he is required to return to Vietnam. I say this advisedly on the basis of him losing contact with his children and the strong likelihood that he would not be able to see them again. As noted, this dynamic fed into his earlier childhood experiences of familial discord and violence. Arising from this, [the applicant] will inevitably experience a sense of profound loss and failure should he be deported. In this context, there will be a significant recrudescence and escalation in his overall symptomatology.

74. Mr Watson-Munro’s comments are consistent with the “real concern” expressed by Clinical Psychologist Bernard Healy in respect of [the applicant’s] depression and emotional lability following his conviction, and suggest that his experience of removal from Australia is likely to be highly traumatic for him.

1. The applicant contended that these paragraphs could not be read in any manner other than advancing the propositions that the applicant currently suffers psychological conditions and that those conditions will be aggravated if he is deported. I accept that characterisation. Read as a whole and putting to one side contextual considerations to which I will return, the representation here made is that, in circumstances where the applicant is psychologically ill including because of a depressive disorder, removal from Australia is likely to be highly traumatic for him particularly because removal will involve separation from his daughters. These are the “significant psychological impediments” that are asserted to “weigh heavily in favour of revocation”. The textual content of paras [71] to [74] read without reference to the heading and the remainder of this section of the submission is unambiguous. A ‘psychological impediment’ is clearly raised as a reason in favour of revocation.
2. However, whether any ambiguity is raised must be answered not merely by reference to the text of the paras [71]-[74] but also by reference to context. Context is provided by the remainder of the section amongst other considerations. Paragraphs [75]-[81] stated (emphasis added and citations omitted):

[75] It should *also* be borne in mind that cancellation will likely result in severe financial hardship for [the applicant]. He is currently 44 years old, and unlikely to be released from prison until he is almost 46. The Pension & Development Network notes that:

Currently the state pension scheme in Vietnam, which is called ‘social insurance’, is administered solely by the Government’s Social Insurance Agency (SIA). This is a scheme that is compulsory in the state sector and compulsory in the non-state sector with the exception of small businesses that commonly choose to ignore this requirement. It is a standard pension scheme whereby a small fixed percentage of the worker’s salary is paid to the SIA on a monthly basis. Upon reaching retirement age the worker is able to receive the money that they have contributed in either a lump sum, or if they have contributed for over 20 years then they can choose to receive a pension for life.

[76] It is highly unlikely, given his age, that [the applicant] will be able to contribute to a pension fund for 20 years prior to retirement, meaning that any social benefits he receives in old age are likely to be limited by his level of contributions. Those contributions will in turn be limited by his capacity to find paid work after a 25-year absence from Vietnam, and his return in the aftermath of a global economic downturn caused by the COVID-19 epidemic.

[77] This is particularly concerning in light of Mr Healy’s observation at page 7 of his 5 July 2014 report regarding [the applicant’s] possible cognitive deficit:

Specific testing revealed an estimated IQ in the borderline to below average range, where 82% - 95% of people his age would do better. Powers for delayed recall were reduced and one could not discount the presence of higher-level cerebral impairment, possibly congenital in origin, but perhaps due in part to injuries sustained in a road accident in 1994.

[78] Moreover, the Pension & Development Network goes on to note that:

The vast majority of older people in Vietnam are cared for by their families, whether they receive a pension or not. The state pensions are insufficient to live from and so the additional support of the family is required. Older people without pensions that are extremely poor can get assistance under other government programs, though these programs are not well resourced.

[79] [The applicant’s] unhappy family life growing up is described consistently in his own statement and the reports of two psychologists, suggesting that family support upon his immediate return is likely to be problematic at best.

[80] His children will clearly remain in Australia, and he will return to Vietnam as a single man with evident difficulties relating to other people (see, for example, page 6 of Mr Healy’s 5 July 2014 report).

[81] The prospect of family support in his old age therefore appears to be remote, and his circumstances – compared to those of the general population – will most likely be characterised by serious financial, *as well as* emotional, hardship into old age.

1. It is clear that these paragraphs are addressing an asserted financial hardship upon the applicant of relocation to Vietnam as a reason for revocation. Two matters are raised in support. The second is a lack of familial support in Vietnam. The first is that on his retirement from the workforce in Vietnam, the applicant will not access an aged-pension which will sustain his basic needs. That is said to be likely for a number of reasons including because the rate paid for an aged-pension will be based upon the number of years of contributions made by the applicant to the relevant pension fund. In that respect, the applicant’s remaining working life, his capacity to work and his capacity to find work was relied upon and said to be limited. There is a reference made to the applicant’s health in the context of his capacity to work. However, reliance is only placed on the applicant’s “possible cognitive deficit”. Notably, the applicant’s depressive disorder (dealt with at [71]-[74]) is not referred to or relied upon.
2. The content of [75]-[81] when compared with that of [71]-[74] readily conveys an understanding that, although each part is addressing what may broadly be characterised as an asserted impediment to the applicant’s removal from Australia, each is addressing a different impediment. Paragraphs [75]-[81] are addressing psychological harm arising from the applicant’s removal from Australia and his consequent separation from his daughters. Paragraphs [75]‑[81] are addressing the difficulties which the applicant will likely experience upon his relocation and residence in Vietnam.
3. That a separate subject is addressed by each part of this section of the submission is underscored by the opening line of [75] which states that “[i]t should *also* be borne in mind that cancellation will likely result in severe financial hardship” (emphasis added). The use of the adverb ‘also’ is redolent of this section of the submission dealing with two subject matters rather than one. It readily conveys to the reader the author’s intent to move from one subject to a new and additional subject. The same may be seen at [81] of the submission where the section on impediments concludes that the applicant’s circumstances will most likely be “characterised by serious financial, *as well as* emotional, hardship into old age” (emphasis added). That conjunctive language, which serves to identify reliance upon two categories of hardship, is also used in a list of reasons for revocation provided by way of summary at [15] of the May submission. In an obvious reference to that part of the submission which later appears under the heading “Extent of impediments of removed”, the submission said (emphasis added):

The significant hardship that he would face if removed to Vietnam, in particular arising from his permanent separation from his children *and* likely financial circumstances.

1. I accept, however, that some ambiguity arises because of the heading used to introduce the section of the submission in question. The words “Extent of impediments if removed” are general and when used as a heading do not of themselves suggest that what follows will be specific to a particular category of impediment such as a financial impediment of the kind dealt with by para 14.5 of the Direction. However, to the trained eye, namely, a person such as a delegate of the Minister or a member of the Tribunal familiar with Direction 79, the words are recognisable as those in the heading to para 14.5 of that Direction. Furthermore, such a person would likely observe from other headings used by the May submission that the submission has been framed by reference to Part C of Direction 79. That is underscored by express references made at [14] of the May submission to Direction 79 and the Direction’s function of setting out considerations that the decision-maker must have regard to. It is further emphasised by the guidance given by the May submission at [16] that “[e]ach of the relevant primary and other considerations [in Direction 79] are, if relevant, dealt with in the order that they appear in the Direction”.
2. For those reasons, a person familiar with Direction 79 would objectively understand that the heading “Extent of impediments if removed” is heralding a section intended to address the content of para 14.5 of Direction 79. However, once a reader familiar with para 14.5 reads the text under the heading, it will likely be apparent to the reader that the content of the section travels beyond the impediment which circumscribes the scope of para 14.5.
3. There are then two possibilities available for resolving the inconsistency between heading and content. *First*, it might be thought that the author intended to raise the psychological impediment as a reason for revocation but has used an inappropriate heading. *Second*, it might be thought that the psychological impediment was raised merely in support of the financial impediment dealt with directly in paragraphs [75] to [81]. Either approach would resolve the inconsistency between heading and content, but the first, that the author misunderstood the scope of para 14.5 and used an inappropriate heading under which to raise the psychological impediment as “another reason”, is to my mind the more obvious inference that a reasonable reader would make.
4. My reasons for that conclusion have been largely canvassed already. The language utilised casts the psychological impediment as being of itself an impediment (i.e. a “reason”) “which weigh[s] heavily in favour of revocation” (at [71]). There is no suggestion that the psychological impediment (the reoccurrence or aggravation of the depressive disorder) is agitated simply in support of the separately identified “financial hardship” impediment at [75]. Indeed, when the submission at [77] directly dealt with the relevance of the applicant’s health to the financial hardship, no reference at all was made to the applicant’s psychological ailment. Further and tellingly in my view, the context reveals that two distinct subjects are being addressed including because the conjunctive language at [75], [81] and [15] point to reliance being made upon a plurality of impediments.
5. I appreciate that the reader will have recognised that the submission was made by a lawyer and presumably by someone with some familiarity with Direction 79. That fact does tend against an inference drawn by the reader that a misunderstanding of the scope of para 14.5 led to the use of an inappropriate heading. However, I think the reasonable reader would have appreciated that even a lawyer may have judged the scope of the paragraph by reference to its heading rather than its content and that, moreover, a mistake of that kind is a more explicable basis for the inconsistency than the notion that a lawyer intending to exclusively raise financial hardship as the sole impediment relied upon would have drafted this section in the terms in which it was. That conclusion is also supported by the fact that the heading to para 14.5 is itself misleading as to the scope of that paragraph.
6. There is, as I perceive it, an over reliance on textual taxonomical precision in the Minister’s approach of the kind that Allsop CJ warned against in *Navoto v Minister for Home Affairs* [2019] FCA 295.
7. By the time the application for revocation came to be determined by the Tribunal, there were other contextual considerations available from the material before the Tribunal which served to support the conclusion I have reached that a sufficiently clear representation of a psychological impediment was raised and relied upon by the applicant.
8. There was a substantial body of evidence put by the applicant which directly addressed the psychological impediment including expert evidence, some of which expressly opined that by reason of the applicant’s separation from his children, the applicant’s depressive disorder “will be significantly aggravated if he is deported”.
9. In support of the May submission, the applicant relied on the reports of Mr Bernard Healy, a clinical psychologist, which were provided to the Department. In his report dated 5 July 2014, Mr Healy reached the following conclusions in respect of the applicant’s health, including that the applicant suffers from “significant depression, elements of anxiety and a mild paranoid trend” (emphasis added):

His health was sound to the age of 16, when he contracted pleural pneumonia, resulting in a legacy of weakness in the chest. Since the age of 18 he has suffered severe headaches and insomnia. In 1994 in a road accident he sustained a back injury. For many years he has experienced joint pain, he believes from arthritis. In 1998 he injured a finger at work … and still has trouble flexing and grasping with the hand.

…Specific testing revealed an estimated IQ in the borderline to below average range, where 82% - 95% of people his age would do better. Powers for delayed recall were reduced and one could not discount the presence of higher level cerebral impairment, possibly congenital in origin, but perhaps due in part to injuries sustained in a road accident in 1994. *Personality testing was indicative of significant depression, elements of anxiety and a mild paranoid trend. He expressed suicidal ideation*, but was reminded of his responsibilities for his two very young daughters …

1. In a supplementary report dated 24 June 2015, Mr Healy reached the following further conclusions following additional consultation and review (emphasis added):

… He presented similarly to the way he did previously, although on this occasion he was more labile emotionally, stressed and depressed over his predicament (a Jury found him ‘guilty’ of trafficking in a large commercial quantity of cannabis) and concern for the wellbeing of his two daughters, now aged 9 and 6, about the state of his own health (with weight loss, gastric upset to the point where he was no longer able to tolerate prescribed anti-depressant medication, marked frequency of urination, and problems with arthritis).

… *I reiterate real concern about his depression*, resulting in weight loss, emotional lability and isolation in prison (compared with others), compounded by his significant physical health problems. Certainly prison experience for him is far more onerous than that normally experienced by others.

1. The applicant also relied on reports of Mr Tim Watson-Munro, a forensic psychologist, in support of his application for revocation. The applicant expressly referred to the findings of Mr Watson-Munro’s report dated 23 August 2019 in the May submission. Relevantly, in the report dated 23 August 2019 Mr Watson-Munro found that the applicant was a “depressed and anxious man” with “a complex developmental and clinical history with longstanding symptoms of depression, anxiety and diminished self-esteem”. Mr Watson-Munro found that, inter alia, his symptoms had been “compounded” by “his general fears of deportation”.
2. Under the heading “Psychometric assessment”, Mr Watson-Munro reached the following conclusions (emphasis added):

[The applicant] was administered the Beck Depression Inventory a self reporting questionnaire which canvases [sic] psychological and physiological symptoms of depression and anxiety experienced by the respondent over the past fortnight.

He is currently experiencing a *moderate and recurring Depressive Disorder* (296.32) according to DSM-5 criteria …

He endorsed statements referable to symptoms of sadness and pessimism “I am so sad or unhappy that I can’t stand it … I feel more discouraged about my future than I used to be.” *He also acknowledged suicidal ideation.* *This clearly speaks to the intensity of his depression in the present and his sense of despair regarding the future. In passing, this will be significantly aggravated if he is deported, particularly in the context of his concerns for his children*. He alluded to a grandparent evidently suiciding at the age of 53. He concedes substantially diminished appetite claiming that he initially lost 12 kilograms, which has now been regained. He nonetheless stated that he has no appetite at all.

[The applicant] equally so suffers sleep disturbance with early morning wakening.

1. Elsewhere Mr Watson-Munro found that the applicant had “a complex and fairly traumatic clinical and developmental history”, suffered “significant psychological symptoms arising from his exposure to a protracted history of domestic violence during his formative years” and that his “significant symptoms of depression and anxiety … have been further compounded in more recent years by an absence of contact with his children aged 13 and 11”.
2. In response to a specific request to opine on the “likely impact on [the applicant’s] wellbeing should he be returned to Vietnam, having particular regard to the fact that his two children will remain in Australia”, Mr Watson-Munro stated (emphasis added):

[The applicant] will be *significant*[*ly*] *destabilised if he is required to return to Vietnam*. I say this advisedly on the basis of him losing contact with his children and the strong likelihood that he would not be able to see them again. As noted, this dynamic fed into his earlier childhood experiences of familial discord and violence. Arising from this, *[the applicant] will inevitably experience a sense of profound loss and failure should he be deported. In this context, there will be a significant recrudescence and escalation in his overall symptomatology*.

1. A supplementary report dated 29 September 2020 was only before the Tribunal. After further consultation, Mr Watson-Munro was specifically instructed to opine on the impact of deportation on the applicant’s well-being, having regard to particular matters. Mr Watson-Munro concluded that it was “clear that deportation will have a devastating impact upon [the applicant]”. In support of this conclusion, Mr Watson-Munro referred to, inter alia, the possibility of “having a meaningful relationship [being] dramatically curtailed if he is deported”, the likelihood of receiving treatment being minimal if he is returned to the Vietnam, and the risk of a “recrudescence of his psychological problems”.
2. In cross-examination before the Tribunal, Mr Watson-Munro confirmed that his opinion had not changed from that expressed in the two reports. Mr Watson-Munro also stated that being returned to Vietnam would be clearly “detrimental to his psychological wellbeing”, was weighing heavily upon him, and would have “big impact upon his emotional equilibrium”.
3. Significantly, when the delegate summarised the May submission in the reasons given by the delegate, each of the psychological impediment and the financial impediment was listed as a separate basis for the revocation request. The delegate stated:

I consider that the revocation request and any supporting submissions made by or on behalf of [the applicant] can reasonably be summarised as follows:

…

* He has a *‘sense of despair regarding the future’* and *‘this will be significantly aggravated if he is deported, particularly in the context of his concern for his children’* and his removal from Australia *‘is likely to be highly traumatic for him’*.
* If he is removed to Vietnam he has *‘remote prospects’* of family support, will be without his children and his life will *‘most likely be characterised by serious financial, as well as emotional hardship into old age’*.

1. The section of the delegate’s reasons in which those two considerations were addressed was headed “Extent of impediments if removed to home country”. The heading is also an apparent reference to the heading in para 14.5 of Direction 79. The first paragraph of that section in which the delegate says that he had regard to impediments faced by the applicant in establishing himself and maintaining basic living standards in his home country was obviously addressing the content of that paragraph.
2. However, in the paragraph which immediately followed, the delegate said “I note Mr Bayly's submission that if [the applicant] is removed to Vietnam he has ‘remote prospects’ of family support, will be without his children and his life will ‘most likely be characterised by serious financial, as well as emotional hardship into old age’”. The delegate’s use of “as well as” picked the conjunctive language in the May submission, demonstrating the distinction between the submission as to the emotional hardship of deportation and the submission as to the financial hardship of deportation.
3. At [71] of the decision, the delegate dealt with that submission as to emotional hardship in greater depth:

I have considered Mr Bayly's submission that Mr Watson-Munro's found that [the applicant] ‘*is experiencing a moderate and recurring depressive disorder'* and *‘acknowledged suicidal ideation*’ and that [the applicant] has a ‘*sense of despair regarding the future*’ and ‘*this will be significantly aggravated if he is deported, particularly in the context of his concern for his children*’. Mr Watson-Munro concludes that [the applicant] ‘*will be significantly destabilised if he is required to return to Vietnam*’, particularly if he loses contact with his children and is not able to see them again, which would lead to a reoccurrence and ‘*escalation in his overall symptomatology*’. Mr Bayly also states that Mr Watson-Munro's comments are consistent with a clinical psychologist's concerns (in a report prepared for the Court in 2014) regarding [the applicant’s] ‘*depression and emotional liability*’, which suggests that [the applicant’s] removal from Australia ‘*is likely to be highly traumatic for him*’.

1. The delegate then turned to consider the “severe financial hardship” that the applicant may face if he were returned to Vietnam. Later (at [75]) the delegate returned to considering the difficulties the applicant will face if returned to Vietnam “primarily due to the separation from his children”. The delegate concluded (at [76]) that the applicant would be able to relocate to Vietnam “without significant impediments”.
2. The fact that the delegate identified the separate psychological impediment representation assumes significance in this case. During the course of argument, attention was directed to ***SZBEL*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 as authority for the proposition that the findings of the delegate at first instance may frame the approach of the Tribunal on review: see at [35] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon J). I accept that *SZBEL* concerned procedural fairness and arose in a different statutory context. Nevertheless, it is axiomatic that a review of a decision of a delegate will be framed by the issues in contest before the delegate which remain in contest before the Tribunal. That the delegate’s reasons identified a particular claim as being in contest would ordinarily contribute to the Tribunal’s understanding of the claims made by the applicant as they arise on the material before the Tribunal.
3. Here, the Tribunal should have been further assisted in its understanding that the psychological impediment claim had been made and was being pressed. The Applicant’s Statement of Facts, Issues and Contentions before the Tribunal restated the claim but also emphasised its primary status *vis a vis* the claim of financial hardship. Under the heading “Extent of impediments if removed” the applicant submitted that it was not contended that the applicant would be destitute if he were returned to Vietnam. The applicant conceded that he had family in Vietnam, although noting that his traumatic childhood would pose difficulties for him.
4. Instead the applicant emphasised that the “overwhelming impediment” for him was the separation from his children and the consequent impact on his mental health (emphasis added):

76. The *overwhelming* impediment for the Applicant will be the separation from his children and [t]he inability to resume the parenting role in their lives that he once had.

77. To that end, the opinion of Tim Watson-Munro is that “[if the Applicant] is required to return to Vietnam, the likelihood of him receiving treatment and support will be minimal and in this context, there may be *a recrudescence of his psychological problems*.”

78. He described *the likely effect on the Applicant as “devastating”*.

79. This consideration weight [sic] in favour of revocation.

1. Once it is appreciated, as it must be, that on the materials before the Tribunal the “overwhelming” concern of the applicant about the ‘extent of impediments if removed’ was emotional, it follows that a reasonable understanding of what the applicant was claiming could not be reduced to the largely economic focus of para 14.5 of Direction 79.
2. The contention about the consequences on the applicant’s mental health of his deportation had been repeated at each stage of the claim and were supported at all times by probative expert material to that effect. Aspects of the expert opinions directly considered the consequences of deportation on the applicant’s mental health and can readily be appreciated as having been sought by the applicant for the purpose of substantiating a submission to that effect. The applicant had clearly sought to establish that his mental health was a pivotal fact underlying his application for the revocation of the decision to cancel his visa. The relevance of that fact to the application was that deportation would have devastating consequences on his already fragile state. The Court engages in no exercise of reconstruction in identifying that matter. It was not a fact buried in the documents before the Tribunal. It was, to adopt the language of the applicant, the “overwhelming impediment” that he would face if he were to return to Vietnam. It was sufficiently explicable in the submissions to the Tribunal and overwhelmingly supported by the material before the Tribunal.
3. Whilst the headings supported the Minister’s case, reliance on headings was, as discussed, undermined by the fact that the overwhelmingly emotional nature of the applicant’s claims could not be reduced to the terms of para 14.5 of Direction 79. That demonstrates that it was sufficiently clear that the applicant’s mental health was not put for the sole purpose of responding to para 14.5 of Direction 79. Once that is accepted, the submissions and material, taken together and read as whole, demonstrate that the psychological impediment was a key and essential thread in the representations put to the delegate, and subsequently to the Tribunal, as to “another reason” to revoke the cancellation decision. In those circumstances the Tribunal was obliged to deal with the representation but it failed to do so.

# Was the claim sufficiently significant?

1. During oral argument the Minister contended that, if a claim were made, it may not have been necessary for the Tribunal to address it because it was not objectively significant or pivotal. In support of that proposition the Minister referred to the observations of the Full Court in ***Guclukol*** *v Minister for Home Affairs* [2020] FCAFC 148 at [49]-[51] (Katzmann, O'Callaghan and Derrington JJ). The Minister suggested by reference to ***Walker*** *v Minister for Home Affairs* [2020] FCA 909 at [39]-[40] (Bromwich J) that the requirement that a claim be significant or pivotal was essentially a requirement that the claim have sufficient merit to warrant consideration by the Tribunal.
2. I understand the discussion of “significance” in *Guclukol* and *Walker* to go to the manner in which the representation was advanced by the applicant before the Tribunal, not the merits of the claim itself. Accordingly, a representation may be regarded as insignificant if it were advanced merely by way of a passing comment or an unsubstantiated assertion or by some other means indicative of its lack of significance to the applicant’s case.
3. The conclusions above demonstrate that the representation in question was not insignificant to the applicant’s case. It was a key and essential thread of the representations advanced at each stage of the application. It was supported by an abundance of expert material that responded directly to the content of that representation. It could not be said that the representation was insignificant in the requisite sense. If I am mistaken about the import of *Guclukol* and *Walker*, I would nevertheless conclude that the representation was significant. The representation was clearly meritorious in the sense that it advanced cogent arguments based on probative expert material.

# Disposition

1. For the reasons stated the applicant has established that by failing to consider a clear and significant claim raised by him, the Tribunal’s decision is affected by jurisdictional error. No issue about the materiality of that error was raised or is apparent. I will make the orders sought by the applicant.

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| I certify that the preceding sixty-five (65) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromberg. |

Associate:

Dated: 29 October 2021