FEDERAL COURT OF AUSTRALIA

Masi-Haini v Minister for Home Affairs [2022] FCA 1326

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| File number(s): |  |
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| Judgment of: | **GOODMAN J** |
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| Date of judgment: | 8 November 2022 |
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| Catchwords: | **MIGRATION** – application for judicial review of Minister’s decision not to revoke cancellation of the applicant’s visa – whether decision was legally unreasonable – whether the Minister failed to engage appropriately with representations made by the applicant – application dismissed  |
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| Legislation: | *Migration Act 1958* (Cth), ss 501, 501CA*Crimes Act 1900* (NSW), s 61 |
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| Cases cited: | *Assistant Minister for Immigration and Border Protection v Splendido* [2019] FCAFC 132; (2019) 271 FCR 595*Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; (2022) 289 FCR 21*Hillis v Minister for Home Affairs* [2021] FCA 892*Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516; (2016) 69 AAR 210*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EGZ17* [2022] FCAFC 12; (2022) 289 FCR 164*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; (2021) 395 ALR 403*Muggeridge v Minister for Immigration and Broder Protection* [2017] FCAFC 200; (2017) 255 FCR 81*MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 95 ALJR 441*Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 96 ALJR 497*Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) 258 CLR 173*R v Burstow; R v Ireland* [1988]1 AC 147*Taulahi v Minister for Immigration and Border Protection* [2018] FCAFC 22; (2018) 357 ALR 467 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 84 |
|  |  |
| Date of hearing: | 28 April 2022 |
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| Counsel for the Applicant: | Ms T Baw |
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| Solicitor for the Applicant: | Lewis & Bollard |
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| Counsel for the Respondent: | Ms R Francois |
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| Solicitor for the Respondent: | Sparke Helmore |

ORDERS

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|  | NSD 1338 of 2021 |
|   |
| BETWEEN: | VILI MASI-HAINIApplicant |
| AND: | MINISTER FOR HOME AFFAIRSRespondent |

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| order made by: | GOODMAN J |
| DATE OF ORDER: | 8 november 2022 |

THE COURT ORDERS THAT:

1. The application is dismissed.

2. The applicant is to pay the respondent’s costs, as agreed or taxed.

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

REASONS FOR JUDGMENT

GOODMAN J

# INTRODUCTION

1 The applicant is a citizen of New Zealand who was granted a Special Category (Class TY) (subclass 444) **visa**. On 23 September 2015, he was convicted by the District Court of New South Wales of several offences and sentenced to terms of imprisonment of six and eight years.

2 As the applicant was sentenced to a term of imprisonment of 12 months or more, s 501(3A)(a)(i), 6(a) and 7(c) of the *Migration* ***Act*** *1958* (Cth) required the respondent **Minister** to cancel his visa and on 8 March 2016, the Minister did so (**cancellation decision**).

3 Section 501CA(3) of the Act required the Minister to notify the applicant of the cancellation decision and to invite him to make representations to the Minister about the revocation of that decision. The Minister invited the applicant to make such representations, and the applicant did so.

4 Section 501CA(4) then provided the Minister with a discretion to revoke the cancellation decision, with such discretion being enlivened upon the Minister being satisfied, relevantly for present purposes, that there was “another reason” for revocation of the cancellation decision.

5 On 12 November 2021, the Minister made a decision (**Decision**, or **D**) not to revoke the cancellation decision. The applicant seeks judicial review of the Decision.

6 The Court’s task on this application is to determine, by reference to the grounds of review advanced by the applicant, whether the Decision was made within the authority conferred by the statute (here, s 501CA(4)) upon the decision-maker (here, the Minister): *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 95 ALJR 441 at 452 [29] to [30] (Kiefel CJ, Gageler, Keane and Gleeson JJ); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EGZ17* [2022] FCAFC 12; (2022) 289 FCR 164 at 171 [27] (Beach, Thawley and Cheeseman JJ).

7 The applicant contends that the Minister’s decision was not made within the authority conferred upon her by the Act, on two broad bases. The *first* is that the Minister made findings that were legally unreasonable, for reasons including an absence of probative evidence and the use of illogical or irrational reasoning. The *second* is that the Minister *“failed to engage in any active intellectual process in respect of parts of the evidence and submissions”*. Each of the bases advanced by the applicant requires analysis of the Minister’s decision. The approach to be taken in such analysis was explained by Brennan CJ, Toohey, McHugh and Gummow JJ in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272:

… It was said that a court should not be “concerned with looseness in the language ... nor with unhappy phrasing” of the reasons of an administrative decision-maker (36). The Court continued: “The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error.’’

These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed. In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision. This has been made clear many times in this Court. For example, it was said by Brennan J in *Attorney-General (NSW) v Quin*:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

(footnotes omitted)

8 To similar effect, see *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; (2015) 258 CLR 173 at 195 to 196 [59] to [60] (French CJ, Bell, Keane and Gordon JJ).

# THE MINISTER’S DECISION

9 Thus, it is convenient to consider the Decision first. The Decision addressed the question: was the Minister satisfied of the existence of another reason why the cancellation decision should be revoked? The Minister noted that in considering this question she had had regard to ***Direction*** *No 90, Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under s 501CA*, despite not being bound to do so (at D[11]). The Minister’s reasoning addressed the relevant considerations set out in the Direction. The Minister’s decision was structured in the following manner (enumeration has been added for ease of understanding):

1. First primary consideration: protection of the Australian community

1.1 Nature and seriousness of the conduct

1.2 Risk to the Australian community

1.2.1 The nature of the harm to individuals or the Australian community should the applicant engage in further criminal or other serious conduct

1.2.2 The risk of further criminal or other serious conduct

1.2.2.1 Factors contributing to past conduct

*1.2.2.2 Remorse and rehabilitation*

*1.2.2.3 OMCG affiliation*

1.2.2.4 Recent adverse conduct

1.2.3 Conclusion as to the risk to the Australian community

*2. Second primary consideration: Whether the conduct engaged in constituted family violence*

*2.1 Whether family violence had occurred*

*2.2 The seriousness of family violence that occurred*

*2.2.1 Frequency of* [the applicant’s] *conduct and any trend of increasing seriousness*

*2.2.2 Cumulative effects of any repeated acts of family violence*

*2.2.3 Rehabilitation achieved since last known act of family violence*

*2.2.4 Any re-offending after formal warning*

3. Third primary consideration: the best interests of minor children in Australia

*4. Fourth primary consideration: expectations of the Australian community*

5. Other considerations

6. Conclusions

10 The applicant’s challenge to the Decision is focussed upon the components of the Decision which are *italicised* above. The Minister’s reasoning is summarised below, by reference to the structure described in the previous paragraph.

## 1. First primary consideration: protection of the Australian community

11 The Minister commenced with the first primary consideration: the protection of the Australian community. After noting the effect of cl 8.1 of the Direction that decision-makers should have particular regard to the principle that *“entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, such as Australia’s law enforcement framework, and will not cause or threaten harm to individuals or the Australian community”* (at D[13]), the Minister turned to consider the matters referred to in cl 8.2 of the Direction – the nature and seriousness of the applicant’s conduct to date; and the risk to the Australian community should the applicant commit further offences or engage in other serious conduct.

### 1.1 Nature and Seriousness of Conduct

12 Under the heading *“Nature and Seriousness of the Conduct”*, the Minister stated (at D[15]):

As explained in the Direction, family violence is viewed very seriously by the Australian Government and the Australian community, while other acts of violence are also viewed very seriously. As detailed below [the applicant] has received convictions for offences which fall into both categories.

13 The Minister then noted that:

(1) between 2007 and 2 December 2008 the applicant appeared in Court four times and was convicted of affray, three driving while suspended offences and two other matters, but was only fined and placed on bonds (at D[16]);

(2) the applicant’s first sentence of imprisonment was received on 15 December 2008 in the District Court of New South Wales, when he was convicted of robberyand sentenced to 18 months imprisonment, suspended upon entry into a good behaviour bond (at D[17]). The Minister noted that the sentencing remarks of Judge Sides revealed that:

(a) the applicant and his cousin approached a 13 year old boy and demanded his mobile telephone;

(b) the victim was small in stature compared to the two offenders and while the applicant did not use actual (physical) violence, he had used his size to intimidate the victim;

(c) the Court considered the offending to be just below the mid-range of objective seriousness (at D[17]);

(3) between 2009 and 2014, the applicant was convicted of two further driving while suspended offences, as well as common assault (DV) and affray (at D[18]). The Minister noted (at D[18]) that:

(a) the applicant did not receive any custodial sentences for these matters;

(b) no sentencing remarks were available;

(c) when Police attended the incident which led to the domestic violence conviction, the victim, the then partner of the applicant, initially agreed to provide a statement (though she later declined to so so); and

(d) a Police **Statement of Facts** details what the victim originally told Police.

14 The Minister then set out (at D[19]) some detail from the Statements of Facts:

According to that statement, on 21 August 2011 an argument broke out between [the applicant] and his partner about [the applicant’s] wish to take the couple’s then four month old daughter to church when his partner did not want him to. During the course of the argument [the applicant] grabbed the victim’s leg and dragged her out of bed, while she kicked him in an attempt to break his grip. After the victim stood up, [the applicant] stood over her, grabbed her around the throat with one hand and pushed her back onto the bed. The victim reportedly felt pain, had trouble breathing and feared for her safety. [The applicant] also slapped her on either side of her face, demanding that she look at him. Later the same day, the victim found [the applicant] going through her mobile phone and he began questioning her about what she was doing while he was at church. He continued to yell at her and struck her to the back of the neck with an open hand, causing her pain. The argument continued and [the applicant] was reported to have kicked the victim. When the victim attempted to take the couple’s daughter, who was being held by [the applicant], he said *‘don’t touch her or I’ll knock you out’.* Fearing for her safety, the victim locked herself in the bathroom and again called the police. [The applicant] later grabbed the victim by the shoulder and jaw as he yelled at her.

(emphasis in original)

15 The Minister noted that the applicant disputed the information contained in the Statement of Facts, saying that he recalled having a verbal argument about taking his daughter to church but at no time did he assault his then partner, and he had no recollection of being arrested on the charges or going to Court (at D[20]). The Minister then stated:

I acknowledge that [the applicant] was only convicted of a single offence of assault, however I see no reason to doubt that the Police Statement of Facts provides a reasonably accurate account of what the victim told police initially, and I intend to rely on that account, bearing in mind that [the applicant] was actually convicted of a domestic violence assault offence, despite his assertion now that he did not commit any violence.

16 The Minister then turned to the offences that had led to the applicant’s convictions on 23 September 2015. She described those convictions and the underlying offences in the following way (at D[21] to D[23]):

21. [The applicant] was convicted of *Assault with intent to rob, while armed with an offensive weapon with wounding,* for which he was sentenced to eight years imprisonment, and two counts of *Robbery while armed with dangerous weapon,* for which he was sentenced to six years imprisonment on each count. [The applicant] admitted guilt to a further count of *Robbery while armed with dangerous weapon* which was taken into account on a Form 1.

22. The Judge detailed the circumstances of this offending in sentencing, noting that all four offences took place on 24 February 2014 and were carried out in much the same way. On each occasion [the applicant] went into a brothel armed with a firearm and used the weapon to threaten his victims and take money. The Judge was of the view that [the applicant’s] intention in each robbery was the same, to obtain cash, but noted that the amounts taken were relatively small. During two of the offences, [the applicant] pointed the firearm at a victim’s head and during another offence he punched a victim to the side of his face, causing a split underneath his eye and bruising. The split require suturing, though the Judge noted that the injury could be described as superficial.

23. The Judge considered that the victims in the targeted premises, being sex workers and other staff at brothels, clearly fell into the category of vulnerable individuals and the experience was no doubt terrifying for them. His Honour remarked that each offence was an example of very serious criminal conduct and noted that at the time of the offending [the applicant] was subject to a good behaviour bond.

(emphasis in original)

17 The Minister then made the following findings (at D[24] to [25]):

24. I find that the sentences [the applicant] received are a further indication of the seriousness of the offending. Dispositions involving incarceration of the offender are the last resort in the sentencing hierarchy and I have considered that the three sentences of court viewed the offending as very serious. With some accumulation, the effective total sentence resulting from the above offending was 10 years imprisonment, with an effective non-parole period of six years. This is clearly a very substantial term, as are the separate sentences for each offence, and reflect the very serious nature of the offending.

25. The above information shows that [the applicant’s] offending has been recurrent since 2007 and involves multiple convictions for violent offences, including one in the nature of family violence and others which are very serious examples of armed robbery and an associated offence, resulting in substantial terms of imprisonment. I consider this offending to be very serious.

### 1.2 Risk to the Australian Community

18 Under the heading *“Risk to the Australian Community”*, the Minister then considered:

(1) the nature of the harm to individuals or the Australian community should the applicant engage in further criminal or other serious conduct; and

(2) the risk of further criminal or other serious conduct, taking into account the likelihood of the applicant’s re-offending (at D[26]).

19 These are addressed, in turn, below.

#### 1.2.1 The nature of the harm to individuals or the Australian community should the applicant engage in further criminal or other serious conduct

20 The Minister noted that in view of the applicant’s offending history, she considered that any future offending of a similar nature would have the potential to cause physical and/or psychological injury and financial harm to members of the Australian community, as it had done in the past (at D[27]).

#### 1.2.2 The risk of further criminal or other serious conduct

21 The Minister undertook her assessment of the risk of further criminal or other serious conduct by reference to four considerations.

##### *1.2.2.1 Factors contributing to past conduct*

22 The *first* consideration was factors that may assist to explain the applicant’s past conduct. In this regard the Minister:

(1) considered the applicant’s submission that he grew up in a rough household with a strict father and was overwhelmed with a *“sense of neglect”* and so he sought a sense of freedom and belonging, but unfortunately found that with *“the wrong crowd”,* namely the Comancheros **OMCG** (at D[29]);

(2) noted that when sentencing the applicant in 2008, Judge Sides had remarked that the applicant had had the benefit of an *“uneventful and supportive upbringing”* (at D[30]);

(3) stated that she had taken into account the applicant’s submission that in the time leading up to his most recent offending he was experiencing major financial stress while trying to raise a family with no stable job (at D[31]);

(4) noted evidence accepted by Judge Conlon when sentencing the applicant in 2015 that: the applicant had been contracted by the OMCG to carry out a major roofing job and paid $28,000 to purchase materials for this purpose; the applicant had lent some of that money to his father but was unable to get the money back; the applicant had been given a deadline to complete the job or otherwise he would be shot; and that as a result he carried out the robberies to get the money he needed. The Minister also noted that Judge Conlon accepted that this threat was the motivation for the applicant to commit the robberies (at D[32]); and

(5) noted that a psychologist’s report before Judge Conlon found that due to the *“significant emotional duress”* that the applicant had been under from the threats made against him, *“his impaired judgement was further reduced”* (at D[33]).

##### *1.2.2.2 Remorse and rehabilitation*

23 The *second* consideration was the applicant’s *“remorse and rehabilitation”*. In this regard, the Minister:

(1)noted the applicant’s submission that he was very remorseful for his offending, regretted his actions deeply, and accepted that his criminal conduct had caused significant harm to members of the Australian community and humiliation for his family (at D[34]);

(2)noted that in a report before Judge Conlon for the purposes of sentencing the applicant in 2015, a consultant forensic psychologist had opined that the applicant would be open to therapeutic intervention, which should include cognitive behavioural therapy focused on systematic desensitisation for his anxiety, supportive psychotherapy, social skills and work on his depression; and that with continuing support, supervision and treatment the applicant’s prognosis would improve (at D[35]);

(3) noted that Judge Conlon had considered that the applicant had reasonable prospects of rehabilitation (at D[35]);

(4) stated that she had had regard to certificates submitted by the applicant evidencing his completion of courses in Decision Making Skills, Anger Management, Depression Management, Team Building, Listening Skills and Stress Management (at D[36]);

(5) accepted that the applicant had made significant efforts towards rehabilitation while in prison. In this regard, the Minister recorded that she was aware that the applicant had completed vocational courses including horticulture, construction, sports management and coaching, forklift driving and the operation of a chainsaw, and that the applicant had submitted that the completion of those courses would assist him to earn an honest living upon his release (at D[37]);

(6) noted that the information available to her did not indicate that the applicant had made firm arrangements for the type of therapy discussed in the psychologist’s report (at D[37]);

(7) recorded that she had taken into account that the applicant had been of good behaviour while in prison and had made a positive contribution through his involvement in the Young Adult Offender Program, and the Prevention of Alcohol Related Crime program, (at D[38]);

(8) accepted, based on submissions from the applicant and his family, that the applicant found his time in prison and his separation from his children very difficult and that this experience had strengthened the applicant’s resolve to refrain from further offending (at D[39]); and

(9) then made the following findings at D[40] to [41]:

40. I have regard to submissions from various friends and family members and accept that [the applicant] will have a support network in the community. I note that [the applicant] refers to a ‘split’ between his parents and himself prior to his offending. While I accept there may have been some difficulties in the relationship, I consider that the loan he gave to his father from the money paid to him for a major roofing job indicates that the relationship was intact in the lead up to the offending.

41. However I note that both sentencing remarks and [the applicant’s] own submissions make it clear that he had a supportive family, was an active member of his church community, had a good employment history and was strongly committed to his children throughout most of the period in which he continued to offend quite regularly and even when he was first sent to prison. I therefore consider that all the support he had and the other supposedly protective factors did not in fact prevent him committing serious offences in the past. Accordingly, I do not see why the same factors would necessarily do so in the future.

##### *1.2.2.3 OMCG affiliation*

24 The *third* consideration was the applicant’s affiliation with the OMCG. In this regard, the Minister stated (at D[42] to [45]):

42. I note in his submissions that the applicant confirms that he joined the Motorcycle Club seeking a sense of acceptance and belonging during a difficult period in his life. Evidence before the court in 2015 outlines that the applicant told a community corrections officer that he had joined the club about two and a half years prior to the offences before the court (which occurred in February 2014), I therefore deduce that he had been a member of the club since late 2011.

43. I note from an Australian Criminal Intelligence Commission (ACIC) fact sheet, dated 12 April 2019, that organised crime groups *‘pose a high threat to the Australian way of life’* and *‘engineer much of Australia’s serious crime’.* The facts sheet also states that outlaw motorcycle gangs are one of the most high profile manifestations of organised crime and *‘continue to engage in high impact violence, including the use of firearms’*.

44. While there is nothing indicate that [the applicant] took part in any criminal activity as part of the Comancheros OMCG, I find [the applicant’s] statement that *“joining this club was the apex of my decline as a moral member of society”* is evidence that he knew of the gang’s outlaw status and involvement in criminal activity when he joined. I consider that his decision to join such an organisation, renowned for violence and identified by law enforcement as a criminal threat, to be of concern.

45. While I acknowledge [the applicant] reports he ceased to be a member of the Comancheros OMCG, his past membership causes me to retain concerns about his prospects of maintaining a law abiding lifestyle in the future.

(emphasis in original)

##### *1.2.2.4 Recent adverse conduct*

25 The *fourth* consideration was described as *“recent adverse conduct”*. In this regard, the Minister:

(1) noted that in 2014 the applicant had been convicted of possessing a mobile phone in custody and sentenced to three months imprisonment, and the applicant’s submission that he had learnt his lesson and since that incident he had not been charged with any other offences while in custody (at D[46] to [47]); and

(2) recorded that she was aware that there had been two incidents of concern recorded during the applicant’s time in immigration detention; noted the submissions made by the applicant concerning those incidents; acknowledged that the applicant had not been proven to have engaged in criminal activity in those incidents and had provided an explanation of each one; found that the applicant’s explanations did not entirely resolve all the details of the incidents; stated that she did not see why the information the applicant had given in explanation of his actions was not reflected in a systems report; and expressed particular concern about the applicant’s further involvement in violence, which had been a recurring feature of his criminal history (at D[48] to [50]).

#### 1.2.3 Conclusion on risk to the Australian community

26 After considering the four matters described above, the Minister then expressed the following conclusions (at D[51] to [53]):

51. I have found that [the applicant’s] conduct is very serious. I have further found that violent crimes, especially those involving the use of a weapon, have the potential to cause physical and/or psychological injury or financial harm to members of the Australian community.

52. While I consider that the applicant has engaged positively with rehabilitation programs in prison and has made positive contributions as a role model in the Young Adult Offenders program and the Prevention of Alcohol Related Crime program, I cannot rule out the possibility that he will reoffend.

53. On balance, I consider there to be a reduced, albeit ongoing, likelihood that [the applicant] will reoffend. Nevertheless, I considered that, should [the applicant] engage in similar conduct again it may result in psychological and/or physical harm or financial harm to members of the community. I have given this weight against revocation.

## 2. Second primary consideration: whether the conduct engaged in constituted family violence

27 The Minister then turned to consider the second primary consideration: whether the conduct engaged in constituted family violence. In doing so, she considered: (1) whether family violence had occurred; and (2) the seriousness of such family violence.

### 2.1 Whether family violence had occurred

28 As part of her consideration of whether family violence had occurred, the Minister noted that the Direction states that the Australian Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia (at D[54]).

29 The Minister then noted that:

(1) for the purposes of the Direction, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family, or causes the family member to be fearful (at D[55]);

(2) of particular relevance was that the Direction indicated that assaultis an example of behaviour that may constitute family violence, where it has the effect described above on a family member (at D[56]);

(3) the applicant had been convicted on 31 January 2013 in the Local Court of New South Wales of common assault (DV) (at D[56]);

(4) the circumstances of the applicant’s offending were described in the Statement of Facts (at D[57]);

(5) the applicant had disputed the information in the Statement of Facts, saying that he recalled having a verbal argument about taking his daughter to church but at no time did he assault his then partner, and he had no recollection of being arrested on the charges or going to court (at D[57]); and

(6) the charge of common assaultin New South Wales is defined as an assault not occasioning actual bodily harm in s 61 of the *Crimes Act 1900* (NSW); and that assault was defined by the court in *R v Burstow; R v Ireland* [1988]1 AC 147 as any act by which a person causes another to apprehend immediate and unlawful violence (at D[58]).

30 The Minister then stated (at D[59]):

I acknowledge that [the applicant’s] conviction for *Common Assault (DV)* is not evidence that he has engaged in violence that has caused actual bodily harm however I consider that it is evidence that he has engaged in conduct which caused his then partner to be fearful and that this conduct constitutes ‘family violence’ as defined in the Direction.

(emphasis in original)

### 2.2 Seriousness of family violence that occurred

31 The Minister then considered the gravity of the family violence that had occurred (at D[60] to [70]):

60. Having determined that [the applicant’s] conduct, as set out above, constituted family violence, I have considered the seriousness of that conduct, noting that, as explained in the Direction, the Government’s concerns in relation to family violence are proportionate to the seriousness of the relevant conduct.

61. In assessing the seriousness of the family violence engaged in by the applicant, I have considered the following relevant factors.

*(a) frequency of [the applicant’s] conduct and any trend of increasing seriousness*

62. As there is only a single conviction for an offence involving family violence I do not consider that there has been any frequency or trend of increasing seriousness in [the applicant’s] family violence offending.

*(b) cumulative effect of any repeated acts of family violence*

63. I am aware that [the applicant’s] then partner, now estranged, was the victim of his family violence offending.

64. As detailed above I do not consider there has been repeated acts of family violence. I also note that [the applicant] and the victim married in October 2011, some months after the date of the offending and that [the applicant’s] wife gave evidence in support of her husband in Court in 2015.

*(c) rehabilitation achieved since last known act of family violence*

65. [The applicant] has completed a range of self-improvement programs since his incarceration, including Anger Management, which I consider likely to address some of the drivers of his family violence offending.

66. I have also considered that [the applicant’s] last known act of family violence occurred in 2011 and a considerable period of time has since passed.

67. [The applicant] has denied assaulting his wife. He submits there was a verbal argument on that day but that he never physically assaulted her. As detailed above the Court clearly found that his conduct had at very least caused her to apprehend immediate violence. Having demonstrated no insight into the impact of his behaviour on his victim, I consider that this may have limited the impact of any rehabilitation he may have achieved since his act of family violence.

*(d) Any reoffending after formal warning*

68. Although there is no information before me to indicate that the applicant has been warned by the Department or by a court or any law enforcement or other authority about the consequences of further acts of family violence, I do not consider the absence of a warning to be in [the applicant’s] favour.

Conclusion on seriousness of family violence that occurred

69. Having considered the above information, I find that [the applicant’s] family violence offending, while not toward upper end of the range of such offending, must still be considered very serious.

70. I have attributed this consideration weight against revocation of the cancellation of [the applicant’s] visa.

(emphasis in original)

## 3. Third primary consideration: the best interests of minor children in Australia

32 The Minister then considered the third primary consideration: the best interests of minor children in Australia, and specifically the best interests of the applicant’s two children and his nieces (at D[71] to [83]). At D[82] and [83] the Minister concluded that it was in the best interests of:

(1) the applicant’s children that she revoke the cancellation decision. The Minister noted that she had *“given this significant weight in favour of revocation”*; and

(2) the applicant’s nieces that she revoke the cancellation decision. However, as the applicant did not play a caring role for his nieces and they would continue to be cared for by their parents, this consideration was of *“only limited weight”*.

## 4. Fourth primary consideration: expectations of the Australian community

33 The Minister then considered the fourth primary consideration: the expectations of the Australian community. She observed that the Direction explained that the Australian community expects non-citizens to obey Australian laws while in Australia and that where a non-citizen has engaged in serious conduct in breach of this expectation (or where there is an unacceptable risk that they may do so) the Australian community expects the Government to not allow such a non-citizen to enter or remain in Australia (at D[84]). The Minister then recorded (at D[85] to [86]):

85. As also stated in the Direction, non-revocation of the mandatory cancellation of a visa may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not continue to hold a visa. In particular, the Direction states that the Australian community expects that the Australian Government can and should cancel a visa if the holder raises serious character concerns through certain kinds of conduct. Relevantly in the case of the applicant, those specified kinds of conduct include family violence and crimes against women. Noting that [the applicant] has engaged in conduct of that nature, I find that he raises serious character concerns and the community expectation described above applies in this case.

86. As explained in the Direction, the Government’s view is that the above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

## 5. Other considerations and conclusions

34 After addressing the *“other considerations”* specified by the Direction (at D[87] to [105]) the Minister expressed the following conclusions (at D[106] to [114]):

106. I considered whether there is another reason why the decision to cancel [the applicant’s] visa should be revoked, despite the applicant not satisfying me that he passes the character test.

107. I have found that the best interests of [the applicant’s] minor children, as a primary consideration, weigh significantly in favour of revocation of the cancellation of [the applicant’s] visa.

108. In addition, I have found that the strength and nature of his ties to Australia also weigh in favour of revocation of his visa.

109. However I have also given significant weight to very serious of the crimes (sic) he has committed, in particular his most recent armed robbery and assault convictions, which were of a violent nature, and find that the applicant should expect to forfeit the right to remain in Australia.

110. Furthermore I have considered that non-citizens who have engaged in acts of family violence raise serious character concerns such that the Australian community would expect they should not continue to hold a visa.

111. I give this primary consideration significant weight against revocation of the visa cancellation.

112. Noting that the applicant has lived in Australia for most of his life from a young age, I have taken into account that Australia may afford a higher level of tolerance of criminal conduct in relation to him than it would otherwise. However, I am cognisant that where significant harm could be inflicted on the Australian community, even strong countervailing considerations may be insufficient to revoke the decision to cancel the applicant’s visa.

113. On balance, I find that the factors that weigh against revocation of [the applicant’s] visa outweigh the factors in favour of revocation. Therefore, I am not satisfied that there is another reason why the decision to cancel [the applicant’s] Class TY 444 Special Category (temporary) visa should be revoked, as required by s501CA(4)(b)(ii) of the Act.

**Decision**

114. Since I am not satisfied that the applicant passes the character test, nor am I satisfied that there is another reason why the cancellation decision should be revoked, my power under s501CA(4) to revoke the cancellation decision is not enlivened and [the applicant’s] visa remains cancelled.

# APPLICATION FOR JUDICIAL REVIEW

35 Against that background, I turn now to consider the applicant’s grounds of review below in the order of the parts of the Decision which they challenge.

## Remorse and rehabilitation (1.2.2.2)

36 This ground concerns part of the Minister’s consideration of the applicant’s remorse and rehabilitation. As noted above, the applicant’s remorse and rehabilitation was one of the four factors that the Minister took into account in assessing the risk of further criminal or other serious conduct by the applicant. That, in turn, was part of the Minister’s consideration of the risk to the Australian community presented by the applicant, which in turn was part of the first primary consideration: protection of the Australian community. The paragraphs of the Decision relevant to this ground are set out below:

31. I have taken into account [the applicant’s] submission that in the time leading up to his most recent offending he was experiencing major financial stress while trying to raise a family with no stable job.

…

40. I have regard to submissions from various friends and family members and accept that [the applicant] will have a support network in the community. I note that [the applicant] refers to a ‘split’ between his parents and himself prior to his offending. While I accept there may have been some difficulties in the relationship, I consider that the loan he gave to his father from the money paid to him for a major roofing job indicates that the relationship was intact in the lead up to the offending.

41. However I note that both sentencing remarks and [the applicant’s] own submissions make it clear that he had a supportive family, was an active member of his church community, had a good employment history and was strongly committed to his children throughout most of the period in which he continued to offend quite regularly and even when he was first sent to prison. I therefore consider that all the support he had and the other supposedly protective factors did not in fact prevent him committing serious offences in the past. Accordingly, I do not see why the same factors would necessarily do so in the future.

37 The applicant’s ground for review is reproduced below:

2. The Minister erred by failing to engage in any active intellectual process in respect to parts of the evidence and submissions which led to misunderstandings and/or misinterpretations of the evidence and to conclusions unsupported by the evidence.

**Particulars**

…

ii. The Minister found that [the applicant] had supportive and protective factors such as good employment, a supportive family and commitment to his children when he committed the offences: D[41]. However, that was contrary to [the applicant’s] evidence. He said that he had no stable job, had a major a financial issue, the stress of raising a family and the split of his parents and him, during the time leading up to committing the offences for which he was imprisoned.

38 The applicant’s submissions focus upon the finding in D[41] that the applicant had a supportive family, was an active member of his church community, had a good employment history and was strongly committed to his children throughout most of the period in which he continued to offend quite regularly and even when he was first sent to prison.

39 The applicant submits that there is an inconsistency between this finding and the statement in D[31] that the Minister had taken into account the applicant’s submission that in the time leading up to his most recent offending he was experiencing major financial stress while trying to raise a family with no stable job. I do not accept this submission. It is not apparent to me that there is an inconsistency – read fairly, D[41] deals with the applicant having supportive and protective factors in place at the time of each of his offences, whilst D[31] deals with a stressor which the applicant relied upon to explain his most recent offending. Further, read fairly, D[31] records a submission made by the applicant and D[41] records a finding made by the Minister in which, to the extent of any inconsistency, she did not accept the submission made. I note also that in D[41], the Minister referred to both sentencing remarks (which I take to mean those made in 2008 by Judge Sides and in 2015 by Judge Conlon) and the applicant’s own submissions as providing a basis for the finding in D[41].

40 The applicant next submits that the finding in D[41] was contrary to the evidence before the Minister. In this regard, the evidence relied upon by the applicant is his representation to the Minister (which the Minister acknowledged at D[31]), together with the remarks of Judge Conlon in 2015 that the applicant had been a self-employed roof plumber since 2009 and that the applicant had advised the officer who prepared the pre-sentence report that he had experienced considerable financial problems owing to a downturn in business opportunities brought about by significant competition in his field of employment.

41 The weight to be given to the representations made by the applicant and which the Minister took into account is a matter for the Minister alone and the Minister is not required to make particular findings of fact:***Plaintiff M1****/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 96 ALJR 497 at 508 [24]. The applicant’s submission that the finding in D[41] was contrary to the evidence impermissibly invites merits review. I note that the applicant has not contended that there was *no* evidence for the finding in D[41].

42 It is common ground that the Minister’s note in D[40] that the applicant had referred to a ‘split’ between his parents and himself *prior to* his offending was an error and that the applicant’s reference was to such a split occurring *after* he was sent to prison. The applicant suggests that this is reflective of a pattern of the Minister in failing to give an active intellectual engagement to the applicant’s representations. I disagree. Whilst it is an error, it is not reflective of such a pattern and as noted above, reasons for decisions are not to be read with an eye keenly attuned to the perception of error. The applicant did not submit that this error was material and it does not appear to me to be material.

## OMCG affiliation (1.2.2.3)

43 These grounds concern the applicant’s past association with the OMCG, which is another of the four factors taken into account by the Minister in assessing the risk of further criminal or serious conduct by the applicant. As noted above, the Minister’s reasoning was relevantly:

42. I note in his submissions that the applicant confirms that he joined the Comancheros Motorcycle Club seeking a sense of acceptance and belonging during a difficult period in his life. Evidence before the court in 2015 outlines that the applicant told a community corrections officer that he had joined the club about two and a half years prior to the offences before the court (which occurred in February 2014), I therefore deduce that he had been a member of the club since late 2011.

43. I note from an Australian Criminal Intelligence Commission (ACIC) fact sheet, dated 12 April 2019, that organised crime groups ‘pose a high threat to the Australian way of life’ and ‘engineer much of Australia’s serious crime’. The facts sheet also states that outlaw motorcycle gangs are one of the most high profile manifestations of organised crime and ‘continue to engage in high impact violence, including the use of firearms’.

44. While there is nothing indicate that [the applicant] took part in any criminal activity as part of the Comancheros OMCG, **I find [the applicant’s] statement that “joining this club was the apex of my decline as a moral member of society” is evidence that he knew of the gang’s outlaw status and involvement in criminal activity when he joined**. **I consider that his decision to join such an organisation, renowned for violence and identified by law enforcement as a criminal threat, to be of concern**.

45. While I acknowledge [the applicant] reports he ceased to be a member of the Comancheros OMCG, **his past membership causes me to retain concerns about his prospects of maintaining a law abiding lifestyle in the future**.

(emphasis added)

44 The applicant’s grounds for review are reproduced below:

2. The Minister erred by failing to engage in any active intellectual process in respect to parts of the evidence and submissions which led to misunderstandings and/or misinterpretations of the evidence and to conclusions unsupported by the evidence.

**Particulars**

i. The Minister found that [the applicant] knew of the bikie gang’s outlaw status and involvement in criminal activity when he joined, which was a cause for concern: D[44]. However, that was contrary to [the applicant’s] evidence. He said that he joined because he was having stresses in his life and was looking for acceptance and belonging. It was not until coming to prison that he realised he made a very selfish and bad mistake.

…

3. The Minister erred by making material findings in the absence of probative evidence, or engaged in illogical or irrational reasoning, or the findings were legally unreasonableness.

**Particulars**

i. The Minister found that although [the applicant] had ceased to be a member of the Comancheros Outlaw Motor Cycle Gang (OMCG), “his past membership causes me to retain concerns about his prospects of maintaining a law abiding lifestyle in the future” D[45].

ii. The Minister did not reject any of [the applicant’s] evidence that he has had no association with OMCG for the past 8 years, and he made it clear he does not intend on rejoining them again. The Minister also acknowledged that *“there is nothing to indicate that [the applicant] took part in any criminal activity as part of the Comancheros OMCG”*: D[44].

iii. The mere fact of [the applicant’s] past membership provided no probative basis for finding that he might not be law abiding in the future. Also the vagueness of that conclusion amounts to nothing more than speculation by the Minister.

iv. In respect to the risk to the community, the Minister found that *“I cannot rule out the possibility he will reoffend”* (D[52]) and *“[o]n balance, I consider there to be a reduced, albeit ongoing, likelihood that [the applicant] will reoffend”* (D[53]).

45 The applicant submitted that there was no evidentiary or other basis for the finding, at D[44], that the applicant knew of the OMCG’s outlaw status when he joined it.

46 In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41; (2021) 395 ALR 403 at 408 [17], the High Court (Keane, Gordon, Edelman, Steward and Gleeson JJ) explained:

If the Minister exercises the power conferred by s 501CA(4) and in giving reasons makes a finding of fact, the Minister must do so based on some evidence or other supporting material, rather than no evidence or no material, unless the finding is made in accordance with the Minister’s personal or specialised knowledge or by reference to that which is commonly known. By “no evidence” this has traditionally meant “not a skerrick of evidence”.

47 I accept the applicant’s submission that there was no evidentiary or other basis for the finding that the applicant knew of the OMCG’s outlaw status when he joined it. The evidence cited by the Minister in D[44] for that finding was the representation made by the applicant that *“joining this club was the apex of my decline as a moral member of society”*. That evidence forms part of the following representation made by the applicant:

According to criteria 2, stated that my visa may be cancelled and that I would fail the “Character Test” should I have an association with an individual, group or organisation which is suspected of being involved in criminal conduct. Before coming to prison and in the time leading to committing the offence, I was not in a very pleasant place in my life. I had a major financial issue and stresses of raising a family with no stable job. This lead to me suffering a sense of neglect and separation from my family which not only impacted me but my family as well. Going through this tough time in my life, I naturally sought a sense of acceptance and belonging and so I joined the Commanchero (sic) Bike Club where I found what I thought I was seeking. It was until (sic) coming to prison when I realised the decision I made was a very selfish and bad mistake that I have done to hurt and harm the family that I loved. And that I was looking for was with my family and kids and that **joining this club was the apex of my decline as a moral member of society** and as a father to my children. My prison record could support my claim of non-association with these people as not once in the past 6 years in prison I received any visits or contact from any of these people and I’m happy to say that I am free of any association with them any longer.

(emphasis added)

48 There is no evidentiary basis in this representation for the finding that the applicant knew of the OMCG’s outlaw status when he joined it. Indeed, it is clear from the representation that the realisation that *“joining this club was the apex of my decline as a moral member of society”* occurred when he went to prison. As noted above, the Minister found that the applicant joined the OMCG in 2011, and that he was imprisoned in July 2015.

49 The Minister submitted that based on all of the evidence before the Minister including: (1) evidence referred to by Judge Conlon in 2015 that members of the applicant’s extended family were part of the OMCG; (2) evidence referred to by Judge Conlon of an intercepted telephone call which was recorded in April 2014 and which may have suggested that the applicant had been engaged in criminal activities on behalf of the OMCG at that time; and (3) the absence of a denial from the applicant of knowledge of the OMCG’s *“notorious reputation for criminal activity”*, it was open to the Minister to infer that the applicant knew of the OMCG’s outlaw status when he joined it.

50 I do not accept that submission. As to (1), Judge Conlon noted that the applicant’s then wife’s evidence was that: *“she was of the opinion that some of his family members who are associated with an outlaw motorcycle club have contributed to his attitude and unacceptable behaviour”* and that the applicant had said that: *“his cousins were also members of the motorcycle club and he had joined them about two and a half years before the offences”*. This evidence does not address the applicant’s knowledge at the time he joined the OMCG and the Minister’s submission impermissibly assumes that the applicant gained knowledge of the OMCG’s outlaw status from his cousins before he joined it. As to (2), the intercepted telephone call occurred in 2014, three years after the applicant joined the OMCG in 2011 and does not provide evidence of the applicant’s state of mind when he joined. As to (3), the absence of a denial is not evidence of the applicant’s state of mind as at 2011.

51 The Minister (appropriately) did not contend that the finding was justified by the Minister’s personal or specialised knowledge, or that the finding was justified on the basis that such information concerning the OMCG was notorious.

52 Thus, I am satisfied that the finding that the applicant knew of the OMCG’s outlaw status when he joined it (and thus the Minister’s concern that he had done so) did not have an evidentiary or other basis. The Minister erred in making such a finding.

53 The applicant also submitted that the Minister failed to adequately engage with the applicant’s representations that he had not been a member of the OMCG for a number of years, that he regretted having joined it and that his life has moved on from that point. The applicant also submitted that if the Minister had engaged adequately with these representations, she may have come to a different conclusion on assessing the risk to the community presented by the applicant.

54 The Minister recorded at D[45] her acknowledgement that the applicant had reported that he had ceased to be a member of the OMCG but noted that his past membership was a cause for concern about his prospects of maintaining a law-abiding lifestyle in the future. Otherwise, the Decision does not suggest any engagement with the representations made which are referred to in the previous paragraph. Further, mere past membership of an OMCG does not provide a rational basis for a concern as to future offending: see *Assistant Minister for Immigration and Border Protection v Splendido* [2019] FCAFC 132; (2019) 271 FCR 595 at 619 [77] to [78] (Mortimer J; Moshinsky J agreeing); *Hillis v Minister for Home Affairs* [2021] FCA 892 at [79] to [81] (Wigney J); ***Muggeridge*** *v Minister for Immigration and Broder Protection* [2017] FCAFC 200; (2017) 255 FCR 81 at 93 [50] to [51] (Charlesworth J; Flick and Perry JJ agreeing). Thus, I am satisfied that there are logical errors in the Minister’s reasoning.

55 However, it does not follow that these errors are jurisdictional. Whether an error is jurisdictional will depend upon the nature of the error considered in the context of the decision as a whole. In *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; (2022) 289 FCR 21 at 27 to 28 [33] to [35] the Full Court (Allsop CJ, Besanko and O’Callaghan JJ) explained that:

33     The characterisation of a decision (or a state of satisfaction) as legally unreasonable because of illogicality or irrationality is not easily made: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at 551 [11], 564 [52], and 586 [135]; *Minister for Home Affairs v DUA16* [2020] HCA 46; 385 ALR 212 at 220 [26];*SZMDS* 240 CLR at 647–650 [130]–[135]; *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496 at 517–518 [60]; and *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20*[2021] FCAFC 195; 395 ALR 57 at 88 [142]

34 The task in assessing illogicality is not an exercise in logical dialectic. “Not every lapse of logic will give rise to jurisdictional error. A Court should be slow, although not unwilling, to interfere in an appropriate case”: *SZDMS* 240 CLR at 648 [130]. It is the ascertainment, through understanding the approach of the decision-maker and characterising the reasoning process, of whether the decision (or state of satisfaction) is so lacking a rational or logical foundation that the decision (or relevant state of satisfaction) was one that no rational or logical decision-maker could reach, such that it was not a decision (or state of satisfaction) contemplated by the provision in question. Some lack of logic present in reasoning may only explain why a mistake of fact had been made which can be seen to be an error made within jurisdiction. As the Chief Justice said in *Stretton* at [11], the evaluation of whether a decision was made within lawful boundaries is not definitional, but one of characterisation and whether the decision was sufficiently lacking in rational foundation, having regard to the terms, scope and purpose of the statutory source of power, that it cannot be said to be within the range of possible lawful outcomes.

35 Ultimately, the question is whether the satisfaction of the relevant state of affairs or matter was irrational, illogical or not based on findings or inferences of fact supported by logical grounds: *Minister for Immigration and Multicultural & Indigenous Affairs v SGLB*[2004] HCA 32; 207 ALR 12 at 20 –21 [38]; *Re Minister for Immigration &Multicultural Affairs; Ex Parte Applicant S20/200*2 [2003] HCA 30; 198 ALR 59 at 71 [52] and 98 [173], such that it cannot be said to be possible for the conclusion to be made or the satisfaction reached logically or rationally on the available material. It will then satisfy the characterisation of unjust, arbitrary or capricious.

56 In the present case, the impugned findings formed part of the Minister’s consideration of the *“OMCG affiliation”*, which was one of four factors considered as part of her assessment of the risk of further criminal or other serious conduct by the applicant, the other three factors being *“factors contributing to past conduct”*, *“remorse and rehabilitation”* and *“recent adverse conduct”*. The conclusion reached after considering all four factors was that the Minister formed the views that she *“cannot rule out the possibility that he will reoffend”* (at D[52]) and that *“on balance I consider there to be a reduced, albeit ongoing, likelihood that* [the applicant] *will reoffend”* (D[53]). Those findings were open to the Minister based upon her other findings, including that:

(1) the psychological assessment report provided to Judge Conlon (and which formed the basis of his Honour’s satisfaction that the applicant had reasonable prospects of rehabilitation) stated that the applicant required treatment that should involve cognitive behaviour therapy with a specified focus; but the information before the Minister did not indicate that the applicant had made firm arrangements for the type of therapy discussed in that report (at D[35] and [37]);

(2) the applicant had committed serious offences previously, despite having supposedly protective factors in place such as a supportive family, his activity in his church community, good employment history and his commitment to his children (D[41]); and

(3) the applicant’s involvement in violence was recurrent (at D[25]), which the Minister noted was a matter of particular concern (at D[50]).

57 Further, the Minister’s ultimate conclusion that she was not satisfied that there was another reason why the cancellation decision should be revoked (at D[114]) was open to her based upon all of the primary and other considerations. In this regard, it is noteworthy that the Minister’s expression of her conclusions at D[106] to [113] indicates that she gave significant weight to the gravity of crimes that the applicant had committed and that he had engaged in acts of family violence (at D[109] and [110]). The impugned findings have no prominence in the Minister’s weighing up of the competing considerations.

58 Thus, the impugned findings cannot be considered in any way critical, or central, to the conclusion reached by the Minister that she was not satisfied that there was another reason to revoke the cancellation decision. As Wigney J explained in *Minister for Immigration and Border Protection v SZUXN* [2016] FCA 516; (2016) 69 AAR 210 at 221 [55], in a passage cited with approval by Charlesworth J (Flick and Perry JJ agreeing) in *Muggeridge* at [35(6)]:

… allegations of illogical or irrational reasoning or findings of fact must be considered against the framework of the inquiry being whether or not there has been jurisdictional error on the part of the Tribunal: *SZRKT* at [148]. The overarching question is whether the Tribunal’s decision was affected by jurisdictional error: *SZRKT* at [151]. Even if an aspect of reasoning, or a particular factual finding, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result: *Minister for Immigration and Citizenship v SZOCT* (2010) 189 FCR 577; 274 ALR 487; 119 ALD 90; [2010] FCAFC 159 at [83]–[84] (Nicholas J); *SZNKO v Minister for Immigration and Citizenship* (2013) 140 ALD 78; [2013] FCA 123 at [113]. Where the impugned finding is but one of a number of findings that independently may have led to the Tribunal’s ultimate conclusion, jurisdictional error will generally not be made out: *SZRLQ v Minister for Immigration and Citizenship* (2013) 135 ALD 276; [2013] FCA 566 at [66]; *SZWCO* at [64]–[67].

## Family violence (2)

59 These grounds concern the second primary consideration: whether the conduct engaged in constituted family violence. The paragraphs of the Decision relevant to this ground are set out below:

20. I acknowledge that [the applicant] was only convicted of a single offence of assault, however I see no reason to doubt that the Police Statement of Facts provides a reasonably accurate account of what the victim told police initially, and I intend to rely on that account, bearing in mind that [the applicant] was actually convicted of a domestic violence assault offence, despite his assertion now that he did not commit any violence.

…

67. [The applicant] has denied assaulting his wife. He submits there was a verbal argument on that day but that he never physically assaulted her. As detailed above the Court clearly found that his conduct had at very least caused her to apprehend immediate violence. Having demonstrated no insight into the impact of his behaviour on his victim, I consider that this may have limited the impact of any rehabilitation he may have achieved since his act of family violence.

…

69. Having considered the above information, I find that [the applicant’s] family violence offending, while not toward upper end of the range of such offending, must still be considered very serious.

…

85. As also stated in the Direction, non-revocation of the mandatory cancellation of a visa may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not continue to hold a visa. In particular, the Direction states that the Australian community expects that the Australian Government can and should cancel a visa if the holder raises serious character concerns through certain kinds of conduct. Relevantly in the case of the applicant, those specified kinds of conduct include family violence and crimes against women. Noting that [the applicant] has engaged in conduct of that nature, I find that he raises serious character concerns and the community expectation described above applies in this case.

…

110. Furthermore I have considered that non-citizens who have engaged in acts of family violence raise serious character concerns such that the Australian community would expect they should not continue to hold a visa.

60 The applicant’s grounds for review are reproduced below:

1. The Minister erred in making the following findings that were legally unreasonable:

i. that [the applicant’s] family violence offending *“must still be considered very serious”* D[69], however the evidence supports the reverse conclusion; and

ii. that the Australian community would expect that non-citizens who have engaged in acts of family violence would expect they should not continue to hold a visa D[110], is a generalised conclusion without regard to any of the specific circumstances of [the applicant].

**Particulars**

i. The Minister acknowledged that a conviction for common assault is not evidence that [the applicant] engaged in any physical violence that caused bodily harm. This is consistent with [the applicant’s] evidence that he did not engage in any physical assault against his partner, rather they had an argument about him taking their daughter to church.

ii. In assessing the seriousness of the family violence, the Minister found: no evidence of any frequency or trend of increasing seriousness as it was only one conviction; no repeated offending; [the applicant] undertook a number of programs that would be likely to address some of the drivers of the offence; no reoffending after a formal warning because there was only one offence; and his family violence offending was ***“not*** *toward [the] upper end of the range of offending”:* D[69] (emphasis added).

iii. [the applicant] was never arrested on that day, and there is no evidence he was removed from the family home or the presence of his partner by the police; he did not even realise he had been charged for domestic violence until days later.

iv. The Minister’s wholesale conclusion on community expectations failed to refer to any risk of re-offending of [the applicant], failed to reconcile it to the contrary evidence, failed to refer to the personal circumstances of [the applicant] which may bear upon any reoffending and is inconsistent with the process of weighing up the relevant considerations.

2. The Minister erred by failing to engage in any active intellectual process in respect to parts of the evidence and submissions which led to misunderstandings and/or misinterpretations of the evidence and to conclusions unsupported by the evidence.

**Particulars**

…

iii. The Minister found that as [the applicant] demonstrated no insight into his act of family violence that it limited any rehabilitation: D[67]. However, that conclusion is inconsistent with the evidence discussed at Particulars i to iii of Ground 1, and the other evidence of: their marriage one month after the incident; his wife’s support in Court; he was never arrested, charged or convicted for any family violence offending again for the next 4 years (up to his imprisonment for robberies); and there was no basis for the Minister to entirely rely on the Police Statement of Facts (D[20]) when they were **not** Agreed Facts and in the absence of any sentencing remarks of the Magistrate.

61 By these grounds, the applicant contends that two findings were legally unreasonable.

### Finding that the applicant’s family violence “must still be considered very serious”

62 The first is the finding in D[69]:

Having considered the above information, I find that [the applicant’s] family violence offending, while not toward upper end of the range of such offending, must still be considered very serious.

63 The applicant submitted that *“the evidence supports the reverse conclusion*”. This contention again invites the Court, impermissibly, to engage in merits review by weighing the competing evidence. I note, again, that the applicant has not suggested that there was *no* evidentiary or other basis for the finding.

64 The applicant next submitted that the Minister’s finding was supported by the Statement of Facts and the Minister should not have had regard to the Statement of Facts because:

(1) the Statement of Facts did not reflect the offence of which the applicant was charged and convicted, in that the offence did not involve physical violence;

(2) the Statement of Facts had not been properly tested and the implication that it could act as a substitute for sentencing remarks of a magistrate was unreasonable when regard is had to the offence in respect of which what the applicant was actually convicted; and

(3) the applicant was not arrested on the day of the incident, no warrant or apprehended domestic violence order was issued and he was allowed to continue to live and stay at the family home.

65 I see no error in the Minister taking into account the Statement of Facts. Clause 8.1.1(1)(a)(iii) of the Direction provides that decision-makers must have regard to acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed. It is also clear from cl 8.2(2) of the Direction that a charge or a conviction is not necessary and that the family violence consideration arises where there is information or evidence from an independent and authoritative source that the non-citizen has been involved in the perpetration of family violence and the non-citizen has been afforded procedural fairness. Clearly, the Statement of Facts was an independent and authoritative source and provided a contemporaneous account of what the applicant’s then wife initially told police in relation to the incident.

66 Thus, the nature of the offence of which the applicant was charged or convicted does not limit the matters that may be taken into account in considering whether there has been family violence. It was open to the Minister to have regard to the Statement of Facts and the weight to be given to it was a matter for the Minister.

67 There are some parallels between this case and the decision of the Full Court in *Taulahi v Minister for Immigration and Border Protection* [2018] FCAFC 22; (2018) 357 ALR 467 in which Robertson J (with whom North and Besanko JJ agreed) found no error in the Minister taking into account a report of the Australian Criminal Intelligence Commission concerning apprehended domestic violence orders and the (untested) allegations which led to those orders in circumstances where there had been no criminal charges or conviction.

68 It also does not follow from the events subsequent to the taking of the Statement of Facts (such as the absence of an arrest, warrant or apprehended domestic violence order; the time taken to try the charge; the circumstances of the trial or its outcome) that the Statement of Facts could not be taken into account.

69 Thus, there was no error in the Minister having regard to the Statement of Facts.

70 The applicant next submitted that the Minister’s finding at D[20]:

…I see no reason to doubt that the Police Statement of Facts provides a reasonably accurate account of what the victim told police initially, and I intend to rely on that account, bearing in mind that [the applicant] was actually convicted of a domestic violence assault offence, despite his assertion now that he did not commit any violence.

lacked an intelligible justification, was inconsistent with the charge laid and inconsistent with the Minister’s later finding at D[59], that:

I acknowledge that [the applicant’s] conviction for Common Assault (DV) is not evidence that he has engaged in violence that has caused actual bodily harm however I consider that it is evidence that he has engaged in conduct which caused his then partner to be fearful and that this conduct constitutes ‘family violence’ as defined in the Direction.

71 I do not read the Minister’s statement at D[20] that she would bear in mind *“that the applicant was convicted of a domestic violence assault offence, despite his assertion now that he did not commit any violence”*, as a statement that she found the applicant to have been convicted of an offence involving physical bodily harm. So much is clear from the Minister’s analysis that the offence did not require physical bodily harm at D[58] to [59]. Whilst it may be possible to parse this sentence in D[20] in a way which suggests that the Minister formed the view that the applicant had been convicted of an offence involving physical bodily harm which he was now denying, such an interpretation is not available when the Decision is read as a whole and with a mind not finely attuned to the perception of error.

72 The applicant next submitted that the Minister’s finding that the domestic violence offence was *“very serious”*, was legally unreasonable in circumstances where the Minister found that three of the four factors described in cl 8.2(3) of the Direction (being the factors numbered 2.2.1 to 2.2.4 at [9] above) pointed to a low degree of seriousness and that the finding was incongruous with the evidence. I do not accept this submission. The weight to be given to particular factors was a matter for the Minister. The process is qualitative, rather than quantitative. It would be equally impermissible to consider the issue by reference to the number of paragraphs in the Decision devoted to those factors favourable to the applicant as against the number of such paragraphs unfavourable to the applicant.

73 Thus, I am not satisfied that the Minister’s finding at D[69] was attended by legal unreasonableness.

74 Further, the Minister expressly found that the applicant’s family violence offending was not toward the upper end of the range (at D[69]). The finding that the offending was nevertheless very serious was open to the Minister on the materials before her, including the guidance in the cl 8.1.1(1)(a)(iii) of the Direction that acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed are viewed *“very seriously”* by the Australian Government and the Australian community (at D[15]).

75 The applicant also submitted that the Minister failed to undertake an active intellectual engagement with the following factors: (1) the offending was more than 10 years prior to the Decision; (2) the applicant and the victim married shortly after; (3) there was no other incident of family violence; (4) his wife supported him at his last sentencing hearing; and (5) that in court the applicant’s wife gave evidence that *“he had been a good father to their children and she would continue to support him”.* However, it is clear that the Minister took into account that:

(1) the offending was more than 10 years prior to the Decision – at D[66] she stated: *“I have also considered that* [the applicant’s] *last known act of family violence occurred in 2011 and a considerable period of time has since passed”*;

(2) the applicant and the victim married shortly after – at D[64] she stated: *“I also note that* [the applicant] *and the victim married in October 2011, some months after the date of the offending”*;

(3) there was no other incident of family violence. At D[64] she stated: *“As detailed above I do not consider that there has been repeated acts of family violence”*;

(4) the applicant’s wife supported him at his last sentencing hearing. At D[64] she stated: *“I also note that* [the applicant’s] *wife gave evidence in support of her husband in Court in 2015”*; and

(5) the applicant’s wife’s evidence that *“he had been a good father to their children and she would continue to support him”*, which is part of the evidence referred to in (4).

76 The applicant’s submission that the Minister failed to undertake an active intellectual engagement with these factors does not descend into detail as to why the level of engagement with the above factors was insufficient. The submission does not address the nature, form and content of the representations made to the Minister and why those matters required a greater level of engagement with the above factors than was undertaken: see *Plaintiff M1* at 508 to 509 [25]. I do not accept the submission that the Minister failed to adequately address the five factors identified above.

### The finding that the Australian community would expect that non-citizens who have engaged in acts of family violence would expect they should not continue to hold a visa

77 The applicant also contends that the following finding at D[110]:

Furthermore I have considered that non-citizens who have engaged in acts of family violence raise serious character concerns such that the Australian community would expect they should not continue to hold a visa.

was legally unreasonable. The applicant submitted that the Minister made unreasonable wholesale conclusions in respect to the community expectations in respect to family violence offending, which failed to engage with the personal circumstances of the applicant’s conduct. This submission is focussed upon the Minister’s finding at D[85]:

As also stated in the Direction, non-revocation of the mandatory cancellation of a visa may be appropriate **simply because** the nature of the character concerns or offences is such that the Australian community would expect that the person should not continue to hold a visa. In particular, the Direction states that the Australian community expects that the Australian Government can and should cancel a visa if the holder raises serious character concerns through certain kinds of conduct. Relevantly in the case of the applicant, those specified kinds of conduct include family violence and crimes against women. Noting that [the applicant] has engaged in conduct of that nature, I find that he raises serious character concerns and the community expectation described above applies in this case.

(emphasis added)

78 The applicant submitted that D[85], and in particular the emphasised words above, is an oversimplification of Direction 90 which does not take into account the degree of seriousness and any re-offending (cl 8.2(3)) or that the Australian Government’s concerns are proportionate to the gravity of the family violence offending (cl 8.2); and that on this interpretation any family violence offending, no matter how trivial, would justify the non-revocation of a cancellation decision.

79 I do not read D[85] in this way. Its effect is simply that it *“may be appropriate”* in a particular case to not revoke a cancellation decision because of the nature of the character concerns or offences; not that this is a sufficient basis in the present case. Nor do I read it as a statement that any family violence offending, no matter how trivial, would justify the non-revocation of a cancellation decision. It is also clear, reading the Decision as a whole, that the Minister took into account the particular circumstances of the applicant’s conduct.

80 The applicant also submitted that on a proper interpretation of cll 5.2(5) and 8.4(3) of the Direction, the community’s expectations of non-revocation only apply if physical harm is caused by the family violence. Those clauses provide:

**5.2 Principles**

…

(5) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.

and

**8.4 Expectations of the Australian Community**

…

(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.

81 I do not accept this submission. Clause 8.4(2)(a) specifically refers to acts of family violence as an example of conduct which may attract the expectation of the Australian community that a person who has engaged in such conduct should not enter or remain in Australia; and, as the Minister noted at D[55], *“family violence”* is defined in cl 4(1) in terms which are not restricted to physical violence, namely:

***family violence***means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:

a) an assault; or

b) a sexual assault or other sexually abusive behaviour; or

c) stalking; or

d) repeated derogatory taunts; or

e) intentionally damaging or destroying property; or

f) intentionally causing death or injury to an animal; or

g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or

h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or

i) preventing the family member from making or keeping connections with his or her family, friends or culture; or

j) unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.

82 In this context, cl 8(3) is to be read as a statement of emphasis that the risk is not confined to physical harm. Similarly, the final sentence of cl 5.2(5).

83 Thus, I am not satisfied that legal unreasonableness attended the finding at D[110].

# CONCLUSION

84 For the reasons set out above, the application should be dismissed with costs. I will make orders accordingly.

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| --- |
| I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman. |

Associate:

Dated: 8 November 2022