Federal Court of Australia

Kwatra v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCAFC 194

|  |  |
| --- | --- |
| Appeal from: | *Kwatra v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 680 |
|  |  |
| File number: | VID 396 of 2022 |
|  |  |
| Judgment of: | **MARKOVIC, CHEESEMAN AND HESPE JJ** |
|  |  |
| Date of judgment: | 8 December 2022 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from decision of the **Federal Court** of Australia – where primary judge dismissed application for judicial review of Administrative Appeals **Tribunal** decision not to revoke visa cancellation under s 501CA(4) of the *Migration Act 1958* (Cth) – whether the primary judge erred in failing to find that Tribunal erred in failing to consider the extent of the impediments that the appellant’s health would cause him if returned to India – whether primary judge erred in failing to find that the Tribunal erred in failing to consider how Australia’s non-refoulement obligations may be engaged where no non-refoulement claim was advanced by the applicant before the Tribunal – Held: appeal dismissed with costs |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) s 501CA(4)(b)(ii)  *Direction No. 90 - Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* |
|  |  |
| Cases cited: | *Afu v Minister for Home Affairs* [2018] FCA 1311  *Allesch v Maunz* [2000] HCA 40; 203 CLR 172  *Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 172; 287 FCR 294  *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424  *CSV15 v Minister for Immigration and Border Protection* [2018] FCA 699  *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; 289 FCR 21  *FJP17 v Minister for Home Affairs* [2019] FCA 256  *HRZN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 133  *Kwatra v* *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 58  *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421  *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541  *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590  *Nathanson v Minister for Home Affairs* [2022] HCA 26; 403 ALR 398  *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417  *Re Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507  *Sharma v Minister for Immigration and Border Protection* [2017] FCAFC 227; 256 FCR 1  *Swift v SAS Trustee Corporation* [2010] NSWCA 182  *SZDCD v Minister for Immigration and Border Protection* [2019] FCA 326  *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | Victoria |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 54 |
|  |  |
| Date of hearing: | 28 November 2022 |
|  |  |
| Counsel for the Appellant: | Mr A Krohn |
|  |  |
| Solicitor for the Appellant: | Carina Ford Immigration Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr C E A Hibbard |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs. |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 396 of 2022 |
|  | | |
| BETWEEN: | SANJAY KWATRA  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MUTLICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

|  |  |
| --- | --- |
| order made by: | MARKOVIC, CHEESEMAN AND HESPE JJ |
| DATE OF ORDER: | 8 December 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the first respondent to be assessed on a lump sum basis, if not agreed.
3. The name of the first respondent be amended to “Minister for Immigration, Citizenship and Multicultural Affairs”.

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

REASONS FOR JUDGMENT

THE COURT:

# Introduction

1. The appellant, Mr Sanjay Kwatra, a citizen of India, appeals from the judgment of the Federal Court of Australia: *Kwatra v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 680 (**PJ**), dismissing an application for judicial review of a decision made by the second respondent, the Administrative Appeals **Tribunal** on 2 September 2021: *Kwatra and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 3147 (2 September 2021) (**T**). The Tribunal affirmed a decision made by a **delegate** of the first respondent, the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs under s 501CA(4) of the *Migration* ***Act*** *1958* (Cth) not to revoke the mandatory cancellation of the appellant’s Class BB Subclass 155 Five Year Resident (Permanent) **visa**.
2. The appellant advances two grounds of appeal, which are substantially identical to the grounds of review considered, and dismissed, by the primary judge.
3. For the reasons below, the appeal is dismissed.

# FACTUAL BACKGROUND

1. The factual background was not in issue and was summarised by the primary judge as follows:

1 The applicant, Sanjay Kwatra, is a 57-year-old Indian national who first arrived in Australia in 1996 at the age of 32. He has an extensive criminal record. His offending commenced shortly after he arrived in Australia. Much of his offending was of a similar character. He was sentenced to imprisonment on several occasions, his two most recent sentences being imposed firstly in January 2019, when he was convicted of making vexatious calls to an emergency service, breaching bail conditions and contravening a community corrections order, and secondly in March 2019, when he was convicted of making false and vexatious calls to an emergency service and failing to comply with a sentencing order. For the second of these he was sentenced to 18 months in prison.

2 Mr Kwatra’s visa was cancelled on 6 June 2019 under s 501(3A) of the [Act] on the basis that a delegate of the [Minister] was satisfied that he did not pass the character test under s 501(6)(a) of the Act.

# PROCEDURAL HISTORY

1. When his visa was mandatorily cancelled, Mr Kwatra made representations under s 501CA of the Act that the cancellation of the visa should be revoked, but on 11 May 2020, the delegate decided not to revoke the cancellation of the visa. Mr Kwatra applied to the Tribunal. He represented himself before the Tribunal. On 3 August 2020, in its first decision, the Tribunal affirmed the decision of the delegate: *Re Sanjay Kwatra and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 2633.
2. Mr Kwatra applied to this Court for judicial review of the Tribunal’s decision. Mr Kwatra was legally represented on that application. On 4 February 2021, a judge of this Court set aside that decision, and remitted the matter to the Tribunal to be determined according to law: *Kwatra v* *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 58 (***Kwatra (No 1)***).
3. In the proceedings remitted to the Tribunal, Mr Kwatra again represented himself. On 2 September 2021, the Tribunal, differently constituted, decided that there was not another reason under s 501CA(4)(b)(ii) of the Act to revoke the cancellation of the visa, and again affirmed the decision of the delegate: T [3].
4. Mr Kwatra applied to this Court for judicial review of the Tribunal’s decision. Mr Kwatra was legally represented at the review application. On 15 June 2022, Mr Kwatra’s application was dismissed with costs: PJ [9]. The present appeal is in respect of that judgment.

# GROUNDS OF APPEAL

1. Mr Kwatra raises two grounds of appeal:

**Grounds of appeal**

1 The Federal Court at first instance erred in not finding that the Second Respondent (“the Tribunal”) fell into jurisdictional error in that it failed to consider relevant considerations.

**Particulars**

(a) The Tribunal failed to consider with an actual intellectual engagement the material, submissions and questions relating to the physical and mental health of the Applicant, and the extent of the impediments that his health would cause him on return to India, including the risks to his life.

(b) Further or in the alternative to Particular (a) to this Ground, the Tribunal failed to consider with an actual intellectual engagement the material, submissions and questions relating to the physical and mental health of the Applicant, and the question of how Australia’s non-refoulement obligations may be engaged as a result.

2 The Federal Court at first instance erred in not finding that the Tribunal fell into jurisdictional error in that it was legally unreasonable.

**Particulars**

(a) The Tribunal reasonably and correctly found “that *Extent of impediments if removed* assumes the weight of a primary consideration.” (Decision [118]-[119])

(b) In all the circumstances of the case, including:

i. the Tribunal’s finding set out in Particular (a) of this Ground,

ii. the length of time the Applicant was a resident in Australia,

iii. his specific criminal history and the causes of it,

iv. the material relating to his mental and physical health,

v. the support he would have if he remained in Australia,

vi. his absence of support if he returned to India,

vii. the situation of the Covid-19 virus in India and its likely effect on the Applicant, and

viii. any of Australia’s non-refoulement obligations

it was unreasonable for the Tribunal to conclude that the cumulative result of all the factors relating to *Extent of impediments if removed* were not sufficient to be another reason to revoke the cancellation of his visa under s 501CA(4)(b)(ii) of the *Migration Act 1958*.

1. The grounds raised on this appeal are substantially identical to the grounds on which Mr Kwatra relied in his amended application for review before the primary judge (set out at PJ [8]).

# CONSIDERATION

## Appeal by rehearing – the correction of error

1. The appeal is brought under s 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth) and is by way of rehearing: *Re Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] HCA 17; 205 CLR 507 at [75] (Gleeson CJ and Gummow J); and *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [29] to [30]. The exercise of appellate jurisdiction under s 24(1) is concerned with the correction of error: *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 at [20] to [25]. It is therefore necessary to show error, legal or factual, in the primary decision: *Allesch v Maunz* [2000] HCA 40; 203 CLR 172 at [23] (Gaudron, McHugh, Gummow and Hayne JJ); *Sharma v Minister for Immigration and Border Protection* [2017] FCAFC 227; 256 FCR 1 at [26].

## Ground 1: Failure to take into account relevant considerations

1. By his first ground, Mr Kwatra contends that the primary judge erred in failing to find jurisdictional error on the part of the Tribunal by reason of the alleged failure of the Tribunal to consider relevant considerations.

### Applicable principles

1. The applicable principles in relation to judicial review of a decision under s 501CA(4) of the Act are well-established and were not in issue on this appeal. They were set out by the Full Court in *Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 172; 287 FCR 294 at [27] (authorities in the *chaussure* omitted):

27 Considered within the statutory context, the Minister’s statutory power conferred by s 501CA(4) has been determined to have the following characteristics:

(1) If representations are made to the Minister, a statutory obligation arises on the part of the Minister to form a state of satisfaction as to whether the person passes the character test or there is ‘another reason’ why the original decision should be revoked.

(2) The state of satisfaction must be formed by reference to the representations such that a failure to consider the representations as a whole would be a failure to consider a mandatory relevant consideration.

(3) The individual matters raised in the representations are not each mandatory relevant considerations and therefore do not need to be brought to account in the making of the decision such that they must form part of the considerations that give rise to the required state of satisfaction.

(4) However, a state of satisfaction that is formed without considering a substantial or significant and clearly expressed claim made in the representations that there is a particular reason why the visa cancellation decision should be revoked is not a state of satisfaction of the kind required by the statute.

(5) Further, there must be a real and genuine consideration of each such substantial or significant and clearly expressed claim.

(6) If the state of satisfaction is formed that there is ‘another reason’ why the original decision cancelling the visa should be revoked then the Minister must revoke the cancellation.

1. That summary must be read in light of the High Court’s decision in ***Plaintiff M1****/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417, where the majority cautioned against using labels similar to those which inform this appeal — “proper, genuine and realistic consideration” and “active intellectual process”. The majority emphasised the risk in doing so was to introduce a de facto gateway to merits review. The following extract from the majority’s decision (at [22] to [27]), cited by the primary judge at PJ [53], is significant in the context of the present appeal (emphasis and footnotes omitted):

22 Section 501CA(4) of the Migration Act confers a wide discretionary power on a decision-maker to revoke a decision to cancel a visa held by a non-citizen if satisfied that there is “another reason” why that decision should be revoked. The statutory scheme for determining whether the decision-maker is satisfied that there is “another reason” for revoking a cancellation decision commences with a former visa holder making representations. In determining whether they are satisfied that there is “another reason” for revoking a cancellation decision, the decision-maker undertakes the assessment by reference to the case made by the former visa holder by their representations.

23 It is, however, improbable that Parliament intended for that broad discretionary power to be restricted or confined by requiring the decision-maker to treat every statement within representations made by a former visa holder as a mandatory relevant consideration. But the decision-maker cannot ignore the representations. The question remains how the representations are to be considered.

24 Consistently with well-established authority in different statutory contexts, there can be no doubt that a decision-maker must read, identify, understand and evaluate the representations. Adopting and adapting what Kiefel J (as her Honour then was) said in *Tickner v Chapman*, the decision-maker must have regard to what is said in the representations, bring their mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker. And the decision-maker is not obliged “to make actual findings of fact as an adjudication of all material claims” made by a former visa holder.

25 It is also well-established that the requisite level of engagement by the decision-maker with the representations must occur within the bounds of rationality and reasonableness. What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.

26 Labels like “active intellectual process” and “proper, genuine and realistic consideration” must be understood in their proper context. These formulas have the danger of creating “a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any [decision‑maker’s] decision can be scrutinised”. That is not the correct approach. As Mason J stated in *Minister for Aboriginal Affairs v Peko‑Wallsend Ltd*, “[t]he limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind”. The court does not substitute its decision for that of an administrative decision-maker.

27 None of the preceding analysis detracts from, or is inconsistent with, established principle that, for example, if review of a decision‑maker’s reasons discloses that the decision‑maker ignored, overlooked or misunderstood relevant facts or materials or a substantial and clearly articulated argument; misunderstood the applicable law; or misunderstood the case being made by the former visa holder, that may give rise to jurisdictional error.

1. The observations in *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [45] highlight the risk of slipping into impermissible merits review (Basten JA and Allsop P, as his Honour, the Chief Justice, then was, agreeing):

The language of “proper, genuine and realistic consideration” was introduced into administrative law in *Khan v Minister for Immigration, Local Government and Ethic Affairs* (1987) 14 ALD 291 and *Broussard v Minister for Immigration and Ethnic Affairs* (1987) 21 FCR 472 at 483 (Gummow J). That which had to be properly considered was “the merits of the case”. Taken out of context and without understanding their original provenance, these epithets are apt to encourage a slide into impermissible merit review: *Kindimindi Investments Pty Ltd v Lane Cove Council* [2006] NSWCA 23; 143 LGERA 277 at [79]. If it is demonstrated in a particular case that an administrative decision-maker has failed to address a claim properly made, or has failed to identify the statutory power under which the claim should properly be disposed of, there will be a constructive failure to exercise jurisdiction. Relief will be available accordingly. Thus, “to fail to respond to a substantial, clearly articulated argument relying on established facts was at least to fail to accord [the appellant] natural justice”: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 77 ALJR 1088 at [24] (Gummow and Callinan JJ, Hayne J agreeing) and [86]-[88] Kirby J), applied by this Court in *Spanos v Lazaris* [2008] NSWCA 74 at [19], in my judgment, Beazley and Bell JJA agreeing. Where a decision-maker does address the claim, by reference to the correct power, asking whether he or she did so “properly” or “genuinely”, or “realistically” may be taken, inappropriately, as an invitation to assess the correctness of the result, rather than the legality of the process.

1. Even if the Tribunal does not consider a representation, the applicant on judicial review bears the onus of satisfying the Court that the failure to consider that representation was material to the Tribunal’s decision: ***MZAPC*** *v Minister for Immigration and Border Protection* [2021] HCA 17; 390 ALR 590 at [2], [39], [60] (Kiefel CJ, Gageler, Keane and Gleeson JJ); ***Nathanson*** *v Minister for Home Affairs* [2022] HCA 26; 403 ALR 398 at [1] (Kiefel CJ, Keane and Gleeson JJ).

### Particulars of error

1. Mr Kwatra does not point to any error of principle on the part of the primary judge. Instead, Mr Kwatra advances submissions which contend that the primary judge made two overlapping errors in applying the well-established principles to his analysis of the Tribunal’s decision. The errors are identified by reference to the two particulars given in support of ground 1.
2. The first particularises an alleged failure on the part of the Tribunal to engage, in the requisite legal sense, with the material, submissions and questions raised in relation to Mr Kwatra’s physical and mental health, and the extent of the impediments that his health would cause him on return to India, including a risk to his life.
3. The second, which is expressed to be further or in the alternative, particularises an alleged failure to consider with an “actual” intellectual engagement the material, submissions and questions relating to Mr Kwatra’s physical and mental health, and the question of how Australia’s non-refoulement obligations may be engaged as a result.

### Particular (a) – extent of impediments caused by Mr Kwatra’s health

1. The primary judge recorded Mr Kwatra’s submissions on this issue at [33]:

Mr Kwatra contends that, on a fair reading, the reasons for the findings on his health being an impediment if removed are very limited. He submits that the Tribunal did not consider his ability to pay for or get treatment, and did not grapple with an actual intellectual engagement with the disabling effect of extensive comorbidities, and what they meant for a destitute man, once destructively alcoholic, returning to India without family, support or work after almost 30 years. In oral submissions, Mr Kwatra amplified this point by reference to submissions that he had made to the Tribunal to the effect that [he] would not survive in India if he were required to return there and that if required to do so it would be a death sentence.

1. Mr Kwatra’s submissions on appeal were substantially to the same effect.
2. The primary judge’s reasons for dismissing this aspect of the review application were as follows (at [34] to [38]):

34 Having regard to the extensive and careful reasons delivered by the Tribunal, I am not satisfied that this aspect of ground 1 is made out. As I have noted above, the Tribunal considered and weighed up both positive and negative factors relevant to Mr Kwatra’s return to India. It noted at [115] concerns about his ability to re-establish himself in India, which included his reliance on social security since 2008, the potential problem for his prospects of finding work if he did not remain abstinent from alcohol, his age, his criminal record, his lengthy period of time being out of the Indian job market, the uncertainty of whether he could be supported by his cousins and the absence of any evidence that he could draw on support from any friends in India, and the fact that he had no savings.

35 In relation to his health, the Tribunal conducted an extensive review of Mr Kwatra’s claims in relation to his conditions and accepted that he had experienced longstanding depression and anxiety and takes medications for several medical conditions. With the exception of what it considered to be some overstated evidence about his back problems, alleged macular degeneration and a claimed diagnosis for PTSD, the Tribunal otherwise accepted Mr Kwatra’s claims as to the severity of his conditions. In this regard the Tribunal accepted at [115] that the Indian health system “has experienced severe challenges because of COVID-19, which may adversely impact [his] ability to source the treatments he requires”. The Tribunal also accepted that the COVID-19 pandemic had adversely affected the Indian economy and that it may cause severe respiratory and other symptoms or death in some patients and, at [117], that with his comorbidities Mr Kwatra is likely to be more susceptible to contracting COVID-19 or infections like Black Fungus, with adverse health consequences.

36 Furthermore, the Tribunal accepted that if Mr Kwatra relapses into alcohol abuse, his health is likely to deteriorate.

37 Taking Mr Kwatra’s health condition into account, the Tribunal found at [119] that even if he did remain abstinent from alcohol, Mr Kwatra would be confronted by “considerable impediments in re-establishing himself and maintaining basic living standards” and found that this consideration [weighed] “very substantially” in favour of revocation, even going so far as deciding to treat it as a primary consideration. Furthermore, I do not accept that the Tribunal failed to consider claims advanced by Mr Kwatra to the effect that he may die destitute if returned to India, whether by reason of catching COVID-19 or as a result of the impediments that he would face. The tenor of all of Mr Kwatra’s claims as to impediments that he would face was that his health would suffer such that he could not support himself or his health requirements if he is returned to India. It is apparent from the findings of the Tribunal that, having considered the positive and negative factors, the balance weighed strongly, in this aspect of its decision, in favour of revocation.

38 Having regard to this process of reasoning, in my view it cannot be said that the Tribunal failed to give adequate consideration to the matters alleged in particular (a) of ground 1. Having regard to this conclusion it is not necessary for me to consider the question of materiality, although I note that, having regard to the weight given by the Tribunal to the impediments factor, it is difficult to see how there could be a realistic prospect that, had the matters to which Mr Kwatra refers been given more detailed consideration, that could have led to any further weight being placed upon it within the principles set out in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 at [45] (Bell, Gageler and Keane JJ).

1. On appeal, Mr Kwatra advanced a selective reading of the primary judge’s findings as follows:

“… the Tribunal conducted an extensive review of Mr Kwatra’s claims in relation to his conditions and accepted that he had experienced longstanding depression and anxiety and takes medications for several medical conditions. …. the Tribunal otherwise accepted Mr Kwatra’s claims as to the severity of his conditions. Having regard to this process of reasoning, in my view it cannot be said that the Tribunal failed to give adequate consideration to the matters alleged in particular (a) of ground 1.”

1. In reliance on this selective reading of the primary judge’s reasons, Mr Kwatra submitted that the primary judge found that “the Tribunal rehearsed some evidence and points submitted by the Appellant relating to his physical and mental health of the Appellant, but failed to consider as required the practical extent of the impediments or harm his health would cause him on return to India, including how far he may be at risk of dying”. Mr Kwatra submitted that, on a fair reading of the Tribunal’s reasons, the primary judge erred in not finding that the Tribunal’s findings of health being an impediment were inadequate in three respects:
2. First, the Tribunal did not consider in the requisite legal sense, Mr Kwatra’s inability to pay for or access treatment if returned to India.
3. Second, the Tribunal did not grapple with the “disabling effect of [his] extensive ‘comorbidities’ and what they meant for a destitute man, once destructively alcoholic, returning to India without family, support or work after almost 30 years”.
4. Third, and most significantly, the Tribunal did not grapple with the risk of Mr Kwatra dying if returned to India.
5. Mr Kwatra has not demonstrated error on the part of the primary judge in making the findings at PJ [34] to [38]. Mr Kwatra’s submissions are predicated on a misstatement of the breadth of the primary judge’s findings, which were amply supported by a careful analysis of the Tribunal’s reasons. The primary judge correctly found that the Tribunal’s reasons were extensive and careful, were based on an extensive review of the materials, and involved a detailed and careful consideration of the extent of the impediments that Mr Kwatra would likely face on return to India consequential to his physical and mental health, including as to the risk to his life, in accordance with the way in which Mr Kwatra put his claim. The Tribunal described Mr Kwatra’s health issues in some detail at T [34] to [42], summarised Mr Kwatra’s claims in respect of his various conditions at T [112] and recorded its findings at T [114] to [119], about the “extent of impediments if returned”.
6. Mr Kwatra’s submission that the primary judge erred in failing to find that the Tribunal did not consider Mr Kwatra’s ability to pay for or access treatment if returned to India must be rejected. The Tribunal referred in its reasons to Mr Kwatra’s statements that “even if [healthcare is] available, it costs a fortune” (T [35]) and that the absence of Government-funded assistance like Medicare, telehealth and disability payments would “render him destitute and unable to maintain basic living standards, constituting a ‘death sentence’” (T [106]). At T [115(d)], the Tribunal noted that Mr Kwatra stated “he has no meaningful savings”. The Tribunal’s conclusion at T [119], that the appellant would “likely … be confronted by considerable impediments in re-establishing himself and maintaining basic living standards”, was clearly informed by the Tribunal’s assessment of the appellant’s ability to pay for or access treatment.
7. Mr Kwatra’s submission that the primary judge erred in failing to find that the Tribunal did not grapple with the “disabling effect of [Mr Kwatra’s] extensive ‘comorbidities’” must also be rejected. The Tribunal accepted that Mr Kwatra had “experienced longstanding depression, anxiety and takes medications for several medical conditions”: T [116], though found that some of Mr Kwatra’s health-related claims were overstated. Read fairly and in context, it is clear that the Tribunal otherwise accepted the veracity of Mr Kwatra’s claims in relation to his “comorbidities”. The Tribunal accepted that, as a result of his comorbidities, Mr Kwatra was more susceptible to contracting COVID-19 or infections like Black Fungus, and as a result he “may be more severely impacted” if he contracted COVID-19: T [117]. Taken together, these matters informed the Tribunal’s finding that, even if Mr Kwatra did not relapse into alcohol abuse, it was “likely he will be confronted by considerable impediments in re-establishing himself and maintaining basic living standards”: T [119].
8. Mr Kwatra’s submission that the primary judge erred in failing to find that the Tribunal did not grapple with the “risk of [the appellant] dying” must too be rejected. Before the Tribunal, Mr Kwatra claimed to fear that there was a real possibility that he would die if he returned to India and contracted COVID-19 and that there he feared his “existing health conditions and the difficulties [he would] face in maintaining even basic living standards puts [him] at particular risk of serious illness or death from COVID-19 or black fungus”. The Tribunal acknowledged Mr Kwatra’s submission that to return him to India would constitute a death sentence and would place him at particular risk of serious illness or death: T [106] and [107]. Read fairly, the Tribunal considered and dealt with these representations: T [107] and [117]. The Tribunal’s consideration of Mr Kwatra’s representations concerning his risk of dying were subsumed into the conclusory finding made at T [119].
9. The submissions advanced by Mr Kwatra in support of particular (a) of ground 1 were, in substance, an attempt to re-run the same arguments that the primary judge rejected. As demonstrated by the primary judge, the Tribunal’s reasons reveal the process of review required of it, as articulated by the High Court in *Plaintiff M1*. The Tribunal considered Mr Kwatra’s representations, sifted them, weighed them against the whole of the material before it, and reached conclusions about those representations. The primary judge was correct to conclude that the Tribunal engaged with Mr Kwatra’s representations to the requisite legal standard.
10. For completeness, we note that the Tribunal concluded that its consideration of the extent of the impediments that Mr Kwatra would face if removed weighed “very substantially in favour of revocation” and found that in the specific context of Mr Kwatra’s circumstances, this consideration assumed the weight of a primary consideration: T [119]. The Tribunal nonetheless concluded that this consideration was outweighed by other considerations that weighed heavily against revocation. Having regard to this aspect of the Tribunal’s reasons, even if Mr Kwatra had established error in relation to this ground, we are satisfied that any such error would not have been material. Materiality is established if the error deprived the appellant of a realistic possibility of a different outcome: *Nathanson* at [1] citing *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 264 CLR 421 at 445 [45]; and *MZAPC* at 592, 610. Mr Kwatra bore the onus of demonstrating that the denial of procedural fairness was material in this sense. Given the extent to which the Tribunal appears to have considered “extent of impediments if removed” in Mr Kwatra’s favour, Mr Kwatra would have failed to discharge his onus to establish that the error for which he contends deprived him of a realistic possibility of a different outcome.

### Particular (b) – Australia’s non-refoulement obligations engaged by Mr Kwatra’s health

1. By particular (b) of ground 1, Mr Kwatra asserts that the primary judge erred in failing to find that the Tribunal failed to consider whether his claims about the risk of harm as a result of his mental and physical health issues engaged Australia’s non-refoulement obligations.
2. In order to address this part of the appeal, it is necessary to first provide some additional context. The first Tribunal decision in relation to Mr Kwatra’s visa cancellation was set aside on judicial review by a judge of this Court on the basis that the Tribunal had failed to address a claim that Mr Kwatra would be at risk of harm in India because of the COVID-19 pandemic: *Kwatra* *(No 1)* at [40]. In considering whether the failure to consider the claim of risk of harm was material, the primary judge described the claim as “concerning Australia’s non‑refoulement obligations”: *Kwatra* *(No 1)* at [46]. The decision in *Kwatra (No 1)* was not appealed.
3. Following the decision in *Kwatra (No 1)*, the High Court handed down its decision in *Plaintiff M1* in which the High Court clarified the approach to be adopted by decision‑makers exercising the discretionary power under s 501CA to non-refoulment claims, in the following terms (at [28] to [30]):

***Decision-makers’ approach to non-refoulement***

28 Where the representations do *not* include, or the circumstances do not suggest, a non-refoulement claim, there is nothing in the text of s 501CA, or its subject matter, scope and purpose, that requires the Minister to take account of any non-refoulement obligations when deciding whether to revoke the cancellation of any visa that is not a protection visa.

29 Where the representations *do* include, or the circumstances do suggest, a non‑refoulement claim by reference to unenacted international non‑refoulement obligations, that claim may be considered by the decision‑maker under s 501CA(4). But those obligations cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error-they are not part of Australia’s domestic law.

30 Where representations *do* include, or the circumstances *do* suggest, a claim of non-refoulement *under domestic law*, again the claim may be considered by the decision-maker under s 501CA(4)60, but one available outcome for the decision-maker is to defer assessment of whether the former visa holder is owed those non-refoulement obligations on the basis that it is open to the former visa holder to apply for a protection visa.

1. The decision in *Kwatra (No 1)* must be read in light of *Plaintiff M1.*
2. As noted above, following the decision in *Kwatra (No 1)*, Mr Kwatra’s application was considered afresh by the Tribunal, differently constituted. At the second Tribunal hearing, at which Mr Kwatra was again self-represented, the senior member explained that ***Direction No. 90*** *- Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* enabled the Tribunal to take into account “international non-refoulement obligations” and as a separate consideration, “impediments if removed”. Notwithstanding this, Mr Kwatra did not, in his written or oral submissions, advance a claim based on Australia’s non-refoulement obligations. Instead, at the second Tribunal hearing, Mr Kwatra framed his claim to focus on the extent of the impediments he would face if returned.
3. Against this background, the Tribunal recorded in its reasons at T [101] to [102]:

**Tribunal Consideration: International non-refoulement obligations**

101 The Applicant did not advance non-refoulement claims at the first hearing of this matter or during the present hearing. His claims instead focussed on impediments to re-establishing himself in India, including finding work, accessing healthcare, sourcing practical and emotional support, and avoiding COVID-19.

**Tribunal findings: International non-refoulement obligations**

102 Clause 9.1 of the Direction is not enlivened and carries neutral weight. The Applicant’s claims about impediments to removal are considered next.

1. On this appeal, Mr Kwatra did not contend that he had made representations of a non‑refoulement claim to the Tribunal. Rather, Mr Kwatra’s submission on this appeal was that “because the very basis of the remittal by the Court to the Tribunal was that the Tribunal as first constituted had not considered a non-refoulement claim, it must follow that the circumstances did suggest a non-refoulement claim”.
2. The primary judge addressed Mr Kwatra’s submission on this aspect at PJ [46] to [58]. The primary judge concluded that the Tribunal found that the representations made by Mr Kwatra did not include, and the circumstances did not suggest that Mr Kwatra was seeking to make a non-refoulement claim: PJ [54]. At PJ [48] to [51], the primary judge observed that:

48 On judicial review, a decision of the Tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant (or an applicant’s lawyers) at a later stage[:] *S395 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; 216 CLR 473 at [1] (Gleeson CJ, in dissent, but citing *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* [2003] HCA 1; 211 CLR 441 at [31] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

49 Even making due allowance for the fact that Mr Kwatra was self-represented, it is apparent that he chose to present his case to the Tribunal on bases other than in reliance on cl 9.1(1). First, the express basis for the remittal to the Tribunal was that the earlier decision had not taken into account an apparent claim arising from non-refoulement obligations: at [46] of *Kwatra* [*(No 1)*]. It was plainly a matter of which Mr Kwatra must have been aware. Secondly, Mr Kwatra was found by the Tribunal to be an intelligent man who was fluent in English. He had filed written submissions signed by himself upon which he relied before the Tribunal on both occasions. Thirdly, the Tribunal explained to him during the course of the hearing that it could take into account international non-refoulement obligations. However, the Tribunal considered that Mr Kwatra instead elected to advance his case, not by reference to any non-refoulement obligations, but rather by reference to the extent of impediments that he would face upon his return, under cl 9.2 of the Direction.

50 In those circumstances, the fact that he was self-represented cannot obscure the fact that Mr Kwatra elected to advance his case on a basis that is different to the basis now advanced in this Court.

51 It was against this background that the Tribunal determined that the cl 9.1 was “not enlivened”.

1. At PJ [53], the primary judge cited extensively from the majority’s decision in *Plaintiff M1* (see [14] above), concluding that Mr Kwatra did not advance a non-refoulement claim, and the circumstances did not suggest that one was available.
2. At PJ [55], the primary judge concluded that the non-refoulement obligations enacted under Australia’s domestic law did not extend to obligations concerning the risk of harm Mr Kwatra was now seeking to rely upon (emphasis added):

Furthermore, the non-refoulement obligation that Mr Kwatra now seeks to invoke is harm arising under the International Covenant on Civil and Political Rights as risking his “inherent right to life” (Article 6.1), “cruel, inhuman or degrading treatment or punishment” (Article 7.1) and the “right to … security of person” (Article 9.1). Clause 9.1(1) of the Direction concludes that, “in considering non-refoulement obligations where relevant, decision-makers should follow the tests enunciated in the Act”. *The definition of “non-refoulement obligations” in s 5 of the Act does not extend to include these obligations in the sense of the harm Mr Kwatra submits he would face.* The direction in cl 9.1(1) requires that “in considering non-refoulement obligations where relevant, decision-makers should follow the tests enunciated in the Act”. In the context of s 36(2A) of the Act and protection visa refusals, the definitions of “cruel or inhuman treatment or punishment” and “degrading treatment or punishment” incorporate the element of actual subjective intent: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [26]-[27] (Kiefel CJ, Nettle and Gordon JJ). In the context of protection visas, a general lack of healthcare services in a country to which an applicant is to be returned does not amount to intentional infliction of harm, as required for “cruel, inhuman or degrading treatment or punishment”: see, for example, *FJP17 v Minister for Home Affairs* [2019] FCA 256 at [33] (Banks-Smith J). Similarly, removal to a country with inadequate medical treatments and the prospect of dying of a health condition was not, without more, something that would “arbitrarily deprive [the applicant] of life” as in Article 6 of the Covenant: see, for example, *SZDCD v Minister for Immigration and Border Protection* [2019] FCA 326 at [48] (Gleeson J). Furthermore, *SZTAL* has been applied in the context of s 501CA(4): see *Afu v Minister for Home Affairs* [2018] FCA 1311, in which the claimant raised his inability to access the medical help that he needed in Tonga because Tonga did not have the same health system as Australia, at [58]-[62] (Bromwich J).

1. No error has been demonstrated in relation to primary judge’s conclusions relating to these matters.
2. First, the primary judge was correct to conclude that the representations before the Tribunal on remittal did not include, and the circumstances did not suggest, a non-refoulement claim. The primary judge’s conclusion is supported by the decision of the Full Court in ***HRZN*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 133, a decision handed down after the primary judgment was delivered. As the High Court held in *Plaintiff M1* at [28], the Tribunal was not obliged to consider whether Australia’s non‑refoulement obligations were engaged.
3. Second, the risk of harm identified by Mr Kwatra — being the risk to Mr Kwatra’s health upon his return to India — is not the type of risk of harm which gives rise to a non-refoulement obligation as enacted in domestic law. As the High Court explained in *Plaintiff M1* (at [18]), Australia’s non-refoulement obligations, to the extent enacted as domestic law, are addressed in the Act in provisions concerning the grant of protection visas, being a class of visa created specifically to allow decision-makers to grant visas to persons who cannot be removed from Australia consistently, but not co-extensively, with Australia’s non-refoulement obligations under international law. Under the Act, non-refoulement obligations (in the form of protection visas) are relevantly owed to a person who is a refugee (under s 36(2)(a)) or who meets the complementary protection criterion (under s 36(2)(aa)), subject to the “ineligibility criteria” in s 36(1C) and (2C). Unenacted international non-refoulement obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error: *Plaintiff M1* at [20].
4. In his written submissions, Mr Kwatra framed his non-refoulement claim as follows:

It is further respectfully submitted that the Court at first instance erred (at [55]) in not finding that the definition of non-refoulement in section 5 of the Act did not extend to the matters listed in the Direction given under the Act, including obligations under the *International Covenant on Civil and Political Rights* at 9.1(1) of the Direction. Apart from the general and obvious risk of harm engaging non-refoulement obligations, even to his life by destitution and disease if he returned to India in the time of Covid-19, this harm engaged specific obligations under the *International Covenant on Civil and Political Rights*, as risking his “inherent right to life” (Article 6.1), “cruel, inhuman or degrading treatment or punishment” (Article 7.1), and “the right to security of person” (Article 9.1).

1. In oral submissions, Mr Kwatra submitted that ss 36(2)(a) and 36(2)(aa) were not an exhaustive and complete codification of Australia’s non-refoulement obligations, particularly where non‑refoulement obligations are a matter raised in the mandatory directions by the Minister under s 499 of the Act. Mr Kwatra relied upon the definition of the “non-refoulement obligations” in s 5 of the Act, which is in the following terms:

***“non-refoulement obligations”***includes, but is not limited to:

(a) non-refoulement obligations that may arise because Australia is a party to:

(i) the Refugees Convention; or

(ii) the Covenant; or

(iii) the Convention Against Torture; and

(b) any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a).

1. Mr Kwatra noted that the definition commences in the *chapeau* with the phrase “includes, but is not limited to” and it was thus not an exhaustive definition. It was submitted that the definition could extend to the obligations on which he sought to rely by reason of the International Covenant on Civil and Political Rights (**ICCPR**).
2. Mr Kwatra’s reliance upon the definition of non-refoulement obligations in s 5 of the Act is misplaced. The requirement in cl 9.1 of *Direction No. 90* is that “in considering non‑refoulement obligations where relevant, decision-makers should follow the tests enunciated in the Act”. The “non-refoulement obligations” definition is only used in s 197C of the Act. That section addresses the relevance of Australia’s non-refoulement obligations to removal of unlawful non-citizens under s 198 of the Act. Section 197C(1) provides (emphasis added):

(1) For the purposes of section 198 [removal from Australia of unlawful non‑citizens], it is *irrelevant* whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

Neither the definition in s 5 nor s 197C of the Act satisfy the description of being “tests enunciated in the Act”. These provisions are not relevant in the present context.

1. In oral submissions, Mr Kwatra submitted that the risk of harm if he returned to India in the time of COVID-19 engaged specific obligations under the ICCPR, being his “inherent right to life” (Article 6.1) and protection against “cruel, inhuman or degrading treatment or punishment” (Article 7.1). In oral submissions, he did not press his claim based on “the right to security of person” (Article 9.1). It is sufficient to note that, based on its text, the article has no application in the present case (protecting, as it does, against arbitrary arrest or detention).
2. To the extent that Australia has enacted into domestic law obligations of non-refoulement by reason of being a party to the ICCPR, those obligations are reflected in s 36(2A) of the Act. We accept the Minister’s submissions, that Mr Kwatra’s claims to invoke obligations of non‑refoulement based on the following grounds cannot be sustained:
3. ***Deprivation of life*** – Section 36(2A)(a) requires Mr Kwatra to establish that he would be arbitrarily deprived of his life. The prospect of limited access to health treatment, even where it may result in the loss of life, is not arbitrary conduct: *SZDCD v Minister for Immigration and Border Protection* [2019] FCA 326 at [48]; and *CSV15 v Minister for Immigration and Border Protection* [2018] FCA 699 at [34].
4. ***Cruel or inhuman treatment or punishment*** – Section 36(2A)(d) requires Mr Kwatra to establish that he would be subjected to cruel or inhuman treatment or punishment. This requires Mr Kwatra to identify “actual subjective intent” to inflict cruel, inhuman or degrading treatment or punishment: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [26] to [27], definitions of “cruel or inhuman treatment or punishment” and “degrading treatment or punishment” in s 5 of the Act. A lack of available medical treatment does not constitute the intentional infliction of harm: *Afu v Minister for Home Affairs* [2018] FCA 1311 at [61] to [62]. There was nothing before the Tribunal to support a finding that Mr Kwatra would be subject to acts or conduct or mistreatment involving actual subjective intent.
5. For these reasons, ground 1 must be dismissed. Mr Kwatra has not established error on the part of the primary judge.

## Ground 2 - legal unreasonableness

1. In this case, the Tribunal was required to determine whether under s 501CA(4) there was “another reason” why the decision to cancel Mr Kwatra’s visa should be revoked. The Tribunal was required to reach a decision or state of satisfaction. That necessarily involved a broad and evaluative task. As the Full Court recognised in ***Djokovic*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3; 289 FCR 21 at [33], the characterisation of a decision (or a state of satisfaction) as legally unreasonable because of illogicality or irrationality is not easily made.
2. As the Minister submitted, Mr Kwatra was inviting the Court to conduct an “outcome focused” review of first, the Tribunal’s conclusion, and secondly, the primary judge’s conclusion (especially at PJ [62] to [64]), without specifying a particular error in reasoning. Such an approach is impermissible: *Djokovic* at [34].
3. Mr Kwatra did not establish that the decision was outside the scope of the statutory authority conferred on the Tribunal and has not demonstrated that the primary judge erred in concluding that the Tribunal’s decision was not legally unreasonable. Ground 2 must be dismissed.

# CONCLUSION

1. For the reasons given, the appeal will be dismissed. Mr Kwatra will be ordered to pay the Minister’s costs, to be assessed on a lump sum basis, if not agreed.

|  |
| --- |
| I certify that the preceding fifty-four (54) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Markovic, Cheeseman and Hespe. |

Associate:

Dated: 8 December 2022