KQHR AND THE CONSIDERATION OF PSYCHOLOGICAL EVIDENCE IN VISA DECISION-MAKING

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I INTRODUCTION

Visa decision-making is one of the most prolific expressions of administrative law in Australia's legal system. Certainly, it is one of the most litigated. In recent years, this litigation has extended to visa cancellation. Following the passage of new mandatory cancellation provisions with the Migration Amendment (Character and General Visa Cancellation) Bill 2014, the number of visa cancellations on character grounds grew exponentially.

Visa cancellations are a contested legal question in Australia for a wide range of reasons. Long-term non-citizens can find themselves facing an even more uncertain future even after serving custodial sentences. But of particular concern is where visa cancellation is based on the weighing of psychological evidence.

In a recent Federal Court of Australia decision, *KQHR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* ('*KQHR*'),[1] McEvoy J quashed an Administrative Appeals Tribunal ('AAT') affirmation of a delegate decision not to revoke the mandatory cancellation of KQHR's Transitional (Permanent) visa. The decision to quash turned on the consideration of competing psychological evidence and went against a previous judicial trend to err away from reviewing the substance of such reports. The decision provides possible insight into the distinction between adequate engagement with the content of evidentiary materials in judicial review, and impermissible merits review.

II CASE SUMMARY

A Background

KQHR, an Iranian citizen, arrived in Australia with his family from Iran in 1967 as a 13-year-old. In 1994, he was granted a Class BF Transitional

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1 *KQHR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1205 ('*KQHR*').

(Permanent) visa. KQHR's criminal history spans more than 40 years, but for the purposes of his visa cancellation, KQHR was convicted in 2013 of armed robbery, aggravated burglary and false imprisonment for which he received concurrent sentences of imprisonment for five years and six months, three years, and two years on appeal.[2] In March 2017, KQHR's visa was cancelled by operation of sections 501(6)(a) and 501(7)(c) of the *Migration Act 1958* (Cth) ('the Act'), on the basis that the delegate was satisfied that he did not pass the character test.[3] As part of a previous order to receive psychological assessment, KQHR requested in 2009 an assessment for an Acquired Brain Injury ('ABI'). Subsequent psychological assessments in 2017 and 2020 made diagnoses of Post-Traumatic Stress Disorder ('PTSD') and Major Depressive Disorder on the basis of childhood sexual abuse and heroin dependence, as well as a probable acquired brain injury.[4] A separate 'screening' assessment in November 2019, conducted over videolink and ceased at KQHR's request, found '[n]o evidence of mental illness'.[5]

KQHR requested revocation of the cancellation decision. In December 2017 a different delegate of the Minister decided not to revoke the visa cancellation under section 501CA.

The applicant sought review of the non-revocation decision by the AAT. Deputy President Forgie affirmed the delegate's decision. KQHR applied to the Federal Court for review of the Tribunal's decision. On 13 May 2019 the Federal Court quashed the Tribunal's decision for jurisdictional error and remitted the matter for fresh consideration by the Tribunal. On 8 April 2021, the differently constituted Tribunal again affirmed the decision.

KQHR again applied to the Federal Court for review on the grounds that, while he did not pass the character test by reason of sections 501(6)(a) and 501(7)(c), there was 'another reason why the original decision [cancelling his visa] should be revoked', provided for by section 501CA(4)(b)(ii) of the Act.[6] The Tribunal had found that, given the competing diagnoses, it could not be satisfied that the applicant had a mental illness.[7] KQHR argued that the Tribunal's finding was irrational and without evidence. He also argued that the Tribunal failed to properly consider the evidence of his acquired brain injury and claimed risk of the death penalty if he returned to Iran. Though not relevant for these proceedings, KQHR also argued that he was either denied procedural fairness or that the Tribunal acted unreasonably because the Tribunal member determined the matter by reference to a written transcript of a previous hearing before a different member, without listening to the audio of that hearing.[8]

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2 *KQHR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 795, [134] ('*KQHR AAT Decision*').
3 *KQHR* (n 1) [2].
4 *KQHR AAT Decision* (n 2) [35], [55].
5 *KQHR* (n 1) [154].
6 Ibid [4].
7 Ibid [155].
8 Ibid [9].

B The Federal Court Judgment

The Court held that the Tribunal's finding regarding KQHR's lack of mental illness was irrational, as the evidence relied upon for this finding did not constitute a formal diagnosis and could not be rationally viewed as a basis to discount other, more substantial reports diagnosing mental illness ('Ground 1').[9] The Court further found the Tribunal's consideration of KQHR's health conditions was at a level of generality such that it could not be said to have fairly considered his acquired brain injury ('Ground 2'),[10] a critical part of his case for revocation. The Court remitted the matter to the Tribunal for reconsideration and so did not consider the remaining grounds.

C Reasoning

In a 32-paragraph decision that would be notable for its brevity alone, in *KQHR* McEvoy J considered in detail the content and nature of the evidence weighed by the decision-maker. Though it is well established that it is generally for the delegate to determine the appropriate weighting given to the factors under consideration (per *Peko-Wallsend*),[11] the Court's decision in *KQHR* reflects the reasoning in decisions like *Khadgi*[12] and *DZADQ*[13] that a delegate's failure to give appropriate regard to a factor they are bound to have regard to, where that factor is of material importance to the case, may support the inference that the delegate did not regard that factor at all.

In *KQHR*, the Tribunal was faced with three separate psychological reports: a detailed expert report from a psychologist covering the 'specifics of the applicant's impairment and the nature of the difficulties he would face in Iran as a result of that impairment'; two 2017 reports of a clinical neuropsychologist stating 'the applicant presented with many of the clinical features of both PTSD and persistent depressive disorder'; and finally a note in the reports of International Health and Medical Services ('IHMS'), the health contractors in immigration detention, noting the applicant had been subject to a 'Mental Health Screening' by videoconference in 2019 and that the applicant was '[r]eluctant to engage', '[e]nded interview prematurely' and was '[d]ismissive', and there was '[n]o evidence of mental illness'.[14] As McEvoy J outlined:

> The Tribunal characterised that final sentence in the IHMS note as a formal diagnosis that the applicant did not suffer from any mental illness, using it to discount the detailed expert evidence in the reports of Mr Cummins and Ms Anderson of the applicant's mental illness. In effect, and as the applicant submits, the Tribunal treated the short IHMS note from Dr Spencer on the one hand, and the diagnosis and detailed evidence of Mr Cummins and the reports of Ms Anderson which were consistent with Mr Cummins' evidence on the other, as if they were equivalent and cancelled each other out. Referring to the 'competing opinions'

9 Ibid [18].
10 Ibid [29].
11 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 37 (Mason J).
12 *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248.
13 *DZADQ v Minister for Immigration and Border Protection* [2014] FCA 754.
14 *KQHR* (n 1) [13]; *KQHR AAT Decision* (n 2) [154].

about the applicant's mental health, the Tribunal concluded at [155]: "Given the competing diagnoses, the Tribunal is not positively satisfied that KQHR has a mental illness."[15]

III ANALYSIS

A Previous Decisions

Medical, psychological and mental health evidence is not a new phenomenon in visa decision-making, particularly with regard to refugee assessments and any type of cancellation matter. Consequently, a recent dataset published by the Kaldor Centre Data Lab assists in identifying other cases where such evidence was considered.[16] While the full methodology is outlined in their paper,[17] the complete dataset contains details of 6,756 judicial review decisions of refugee matters between 1 January 2013 and 11 March 2021, and provides a readily searchable dataset on which to draw. A search of catchwords in this dataset identified 11 matters where medical or psychological evidence formed an element of the grounds for review.[18] Including both visa grant and cancellation decisions, these cases demonstrate the range and depth of various judicial deliberations where psychological evidence was a material consideration.

Notably, only a minority of these matters address the substance of psychological reports and the weighing of such evidence; most related specifically to whether the Tribunal adequately considered psychological evidence of the applicant's competence to participate in a hearing, such that procedural fairness has been extended, while others considered the impact of psychological evidence on the applicant's credibility. With regard to competence to appear, only one of the decisions, *MZAQB*,[19] resulted in a jurisdictional error. No decision contemplating the impact of credibility was set aside by the court.

However, some decisions do provide insights specifically on the weighing of psychological evidence. In *ARK16*,[20] for example, the applicant submitted that injuries received in a car bombing contributed to his inconsistent presentation of

15 *KQHR* (n 1) [14].

16 'Kaldor Centre Data Lab', *Andrew & Renata Kaldor Centre for International Refugee Law* (Web Page) <https://www.kaldorcentre.unsw.edu.au/kaldor-centre-data-lab>.

17 Daniel Ghezelbash, Kevyan Dorostkar and Shannon Walsh, 'A Data Driven Approach to Evaluating and Improving Judicial Decision-Making: Statistical Analysis of the Judicial Review of Refugee Cases in Australia' (2022) 45(3) *University of New South Wales Law Journal* 1085 <https://doi.org/10.53637/TCNQ8226>.

18 *AFD16 v Minister for Immigration and Border Protection* [2020] FCA 964 ('*AFD16*'); *AIG15 v Minister for Immigration and Border Protection* [2016] FCCA 891; *AJY16 v Minister for Immigration and Border Protection* [2017] FCCA 565; *ARK16 v Minister for Immigration and Border Protection* [2016] FCCA 1422 ('*ARK16*'); *BMU15 v Minister for Immigration and Border Protection* [2015] FCCA 3253; *BZAGM v Minister for Immigration and Border Protection* [2016] FCCA 1231; *FMV17 v Minister for Immigration and Border Protection* [2019] FCCA 186 ('*FMV17*'); *FRD17 v Minister for Immigration and Border Protection* [2018] FCCA 1366 ('*FRD17*'); *MZAQB v Minister for Immigration and Border Protection* [2017] FCCA 161 ('*MZAQB*'); *SZSLC v Minister for Immigration and Border Protection* [2013] FCCA 1905; *SZUAS v Minister for Immigration and Border Protection* [2019] FCCA 1953.

19 *MZAQB* (n 18).

20 *ARK16* (n 18).

evidence during the Tribunal hearing. The Tribunal had found that while the evidence indicated the applicant had been injured in a car bomb explosion, and that the applicant had memory difficulties which 'may' have been caused by that explosion, the applicant was able to give clear evidence on other occasions:[21]

> The Tribunal's assessment of the applicant, as indicated elsewhere in these reasons, is that he had difficulty on occasions in engaging with the Tribunal's questions on certain issues and that he appeared to need time to "process" questions before being able to respond. His evidence to the Tribunal was often characterised by vague responses … The applicant appeared to have difficulties, on occasions, in remembering details or in discussing claims in any detail.[22]

On appeal, the Federal Circuit Court held 'the Tribunal expressly referred to the alleged injuries … in its reasons, as well as referring to the submissions advanced on behalf of the applicant, including the submissions advanced after the hearing'.[23]

The Court went on to note that 'the applicant's submissions are, in substance, a repetition of the applicant's claims, and an impermissible invitation to the Court to engage in a merits review. This Court does not have power to make fresh findings of fact in relation to the applicant's claims and evidence'.[24]

A similar case, *FRD17*,[25] considered whether the Immigration Assessment Authority appropriately considered the applicant's psychological and cognitive conditions under the complimentary protection criterion. The Court found:

> The findings by the Authority in relation to the applicant's psychological and cognitive ability, identified in paragraphs 30 and 31 of the Authority's reasons, clearly reflect the Authority taking into account those conditions and concluding that the applicant would not be denied or unable to access medical treatment or services in Afghanistan. That was a finding that the Authority was entitled to make on the material before the Authority and was not unreasonable or illogical. On a fair reading, that is a finding which the Authority took into account in its adverse finding in respect of complementary protection.[26]

The court concluded '[t]here was no failure by the Authority to consider the applicant's psychological and cognitive ability'.[27]

In *FMV17*,[28] the applicant alleged the Tribunal did not consider all relevant material, including medical evidence, in determining whether a risk to the good order of the Australian community existed, instead focusing only on the applicant's conduct. Riley J held:

> I do not accept that the Tribunal only considered the applicant's conduct in determining that there was a risk. The Tribunal set out in its reasons for decision all the medical and other evidence that the applicant said it should have considered.

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21 *1413546 (Refugee)* [2015] AATA 3567, [56].
22 Ibid.
23 *ARK16* (n 18) [23].
24 Ibid [24].
25 *FRD17* (n 18).
26 Ibid [33].
27 Ibid [34].
28 *FMV17* (n 18).

> There is no reason to doubt that the Tribunal took it into account in assessing the risk.[29]

Conversely, in the more recent *AFD16*,[30] on appeal to the Federal Court, Perry J held that the Tribunal had 'failed comprehensively to engage in a meaningful consideration of the psychiatric evidence … despite ostensibly accepting [the] medical opinions'.[31] This is reflective of the finding in *KQHR* that genuine consideration must go beyond a level of generality to be considered to be fairly considered.

The court in *AFD16* found the AAT had accepted the psychiatric opinions in full, but:

> Despite this, there was no recognition by the AAT of the seriousness of Mr [AFD]'s illness and the complexity of his symptoms in its assessment of his credibility including Mr [AFD]'s inability to concentrate, psychotic symptomology, and persistent paranoid ideation. Yet plainly these were matters of such significance to an assessment of Mr [AFD]'s credibility that if they were taken into account, it would have been expected that the Tribunal would have referred to them before finding that the appellants were not entirely truthful and that elements of their claims were fabricated … Those are extremely serious findings of deliberate dishonesty.[32]

IV CONCLUDING OBSERVATIONS

The decisions above, though limited, appear to indicate that courts are reluctant to consider the content and substance of medical or psychological reports, and the value and treatment given to those documents, instead focussing on whether the decision under review broadly identified that the decision-maker had taken the matter into account.

Consequently, the decision in *KQHR* arguably has broader implications for the role of medical and psychological evidence in visa decision-making, and indeed, for other forms of evidence in administrative decision-making more broadly. The reasoning indicates that in some circumstances the weighting applied to evidence, though somewhat discretionary to the decision-maker, remains subject to legal checks and balances for reasonableness.

This reinforces but also refines the long-held jurisprudence that applications for review on the basis of unreasonableness, illogicality, or irrationality must usually be so egregious as to warrant judicial intervention, and such intervention in anything less than those outliers risks erring into impermissible merits review. While this may be appropriate for some types of documentary evidence in the judicial review of administrative decisions, the sweeping significance of medical and psychological reports in the consideration of visa decisions (in this case a cancellation revocation, but consider also the credibility assessment and fitness to

29 Ibid [53].
30 *AFD16* (n 18).
31 Ibid [4].
32 Ibid [75].

be interviewed of protection applicants) suggest that greater deliberation with the substance of such reports would be warranted.

Indeed, if we follow administrative law precedents like *NAJT*[33] to their logical conclusion, the surface level assessments of psychological or medical evidence by previous judicial decisions could fall foul of reasonableness tests wherein the weighing of evidence requires genuine consideration and intellectual engagement rather than simple overt reference to the document's existence before the decision-maker.[34]

Further, this must be considered in light of the recent High Court decision of *MZAPC*,[35] which offered guidance on the continuing importance of materiality in establishing jurisdictional error. Significantly, Edelman J's dissenting judgment (although not on this point) from the slender majority in *MZAPC* stated that:

> Subject to any express statutory provision to the contrary, some errors or failures to comply with statutory conditions will always involve a material breach irrespective of whether the result might have been inevitable. One type of statutory condition that will always involve material non-compliance is a duty to make the ultimate decision within the bounds of legal reasonableness. A decision that is legally unreasonable will, by definition, involve an error that is not trivial or harmless.[36]

Contextualising this finding in *MZAPC* in the circumstances of *KQHR*, it is not relevant in judicial review that the non-revocation decision could have been reached in the absence of proper consideration of the medical evidence. A failure to fully, or even adequately, engage with and consider evidence before the decision-maker, can be sufficient to establish jurisdictional error and practical injustice requiring the remedy of rehearing.

33 *NAJT v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 147 FCR 51.

34 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 244 [111] (Kirby J).

35 *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506 ('*MZAPC*').

36 Ibid 572 [181] (Edelman J) (citations omitted).