

AUSTRALIA / JUDGMENT

McKinley v Repatriation Commission [2015] FCA 145

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FEDERAL COURT OF AUSTRALIA

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McKinley v Repatriation Commission [2015] FCA 145

Citation: McKinley v Repatriation Commission [2015] FCA 145

Appeal from: Re Jennifer McKinley and Repatriation Commission [2014] AATA 670

Parties: JENNIFER MCKINLEY v REPATRIATION COMMISSION

File number: VID 597 of 2014

Judge: PAGONE J

Date of judgment: 2 March 2015

Catchwords: ADMINISTRATIVE LAW – Appeal from Administrative Appeals Tribunal – claim for increased rate of pension payable under Veterans' Entitlements Act 1986 (Cth), s 24 – where applicant claimed to suffer post-traumatic stress disorder and alcohol dependence as war-caused injuries – whether Tribunal failed to afford applicant procedural fairness – whether Tribunal took into account an irrelevant consideration – whether decision affected by actual or apprehended bias – whether findings irrational, illogical or manifestly unreasonable – whether Tribunal failed to make independent inquiries – whether Tribunal failed to provide adequate reasons for its factual findings – whether Tribunal failed to apply the correct standard of proof in relation to factual findings.

Legislation: Veterans' Entitlements Act 1986 (Cth)

Administrative Appeals Tribunal Act 1975 (Cth) ss 39, 43(2B), 44(1)

Cases cited: Bushell v Repatriation Commission (1992) 175 CLR 408

Commissioner of Taxation v Glennan (1999) 90 FCR 538

Danagher v Child Support Registrar [2014] FCA 1408

Johnson v Johnson (2000) 201 CLR 488

Kowalski v Repatriation Commission [2011] FCAFC 43

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Minister for Immigration v Yusuf (2001) 206 CLR 323

Minister for Immigration and Citizenship v SZIAI (2009) 259 ALR 429

Minister for Immigration and Multicultural Affairs; Re Ex Parte Applicant S20/2002 [2003] 198 ALR 59

Muralidharan v Minister for Immigration and Ethnic Affairs (1996) 62 FCR 402

O'Sullivan v Repatriation Commission (2003) 128 FCR 590

Repatriation Commission v Bawden (2012) 206 FCR 296

Repatriation Commission v Deledio (1998) 83 FCR 82

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152

Date of hearing: 17 February 2015

Place: Melbourne

Division: GENERAL DIVISION

Category: Catchwords

Number of paragraphs: 25

Counsel for the Applicant: Mr D De Marchi of DeMarchi & Associates

Counsel for the Respondent: Ms C Dowsett

Solicitor for the Respondent: Australian Government Solicitor

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION VID 597 of 2014

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: JENNIFER MCKINLEY

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: PAGONE J

DATE OF ORDER: 2 MARCH 2015

WHERE MADE: MELBOURNE

THE COURT ORDERS

THAT:

1. The appeal be dismissed with costs.

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

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION VID 597 of 2014

ON APPEAL FROM THE ADMINISTRATIVE APPEALS TRIBUNAL

BETWEEN: JENNIFER MCKINLEY

Applicant

AND: REPATRIATION COMMISSION

Respondent

JUDGE: PAGONE J

DATE: 2 march 2015

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 Ms McKinley has appealed from a decision of the Administrative Appeals Tribunal which rejected her claim to have her post-traumatic stress disorder and her alcohol abuse accepted as having been "war-caused" for the purposes of the Veterans' Entitlements Act 1986 (Cth). The basis of her appeal, as set out in written submissions filed on her behalf, was that "the Tribunal committed a number of errors of law, all essentially arising out of its reliance on a Writeway report in preference of [sic] her evidence".

2 Ms McKinley served in the Australian Army in the period from 12 February 1986 to 12 October 2005 and rendered operational service as a Sergeant in East Timor from 10 October 1999 to 1 February 2000. Ms McKinley suffered injuries to her knee and ankle which were accepted as war-caused and receives compensation at 60% of the general rate for those injuries. Ms McKinley had previously been diagnosed with post-traumatic stress disorder following a motorcycle accident in 1997, in which she suffered injuries. Ms McKinley returned to work following that accident and completed an Indonesian language course prior to being posted to East Timor in October 1999. The basis of the present appeal is an application which Mr McKinley made for an increase in the rate of pension payable to her to the special rate of pension payable pursuant to s 24 of Veterans' Entitlements Act 1986 (Cth) in reliance upon her claim that her conditions of post-traumatic stress disorder and alcohol abuse were war-caused.

3 Ms McKinley's earlier claim for acceptance of post-traumatic stress disorder arising from the same period of her service in East Timor. That claim had been made on 25 February 2005 and had been rejected. A delegate of the Repatriation Commission decided that her condition was not related to her operational service in East Timor and that it was more properly diagnosed as generalised anxiety disorder. That decision was affirmed by the Veterans' Review Board on 22 September 2005 and its decision, in turn, was affirmed by the Tribunal on 3 May 2007. The evidence in the application to the Tribunal in that matter included a statement by Ms McKinley dated 17 October 2005 and a report by Writeway Research Service Pty Ltd dated 11 August 2006 ('the Writeway report') which was also part of the material before the Tribunal in the subsequent application by Ms McKinley which is the subject of this appeal.

4 On 30 November 2012, Ms McKinley made her present application to have her claimed conditions of post-traumatic stress disorder and alcohol abuse accepted as war-caused in order to have the rate of her pension increased to the special rate payable pursuant to s 24 of Veterans' Entitlements Act 1986 (Cth). On 3 December 2012, a delegate of the Repatriation Commission decided that the appropriate diagnosis of her condition was of generalised anxiety disorder and alcohol dependence, and found that neither condition was war-caused. That decision was affirmed by the Veterans' Review Board on 30 May 2013 and that decision, in turn, was affirmed by the Tribunal on 12 September 2014. It is from that decision of the Tribunal that Ms McKinley appeals to the Court under s 44(1) of the Administrative Appeals Tribunal Act 1975 (Cth).

5 Ms McKinley was legally represented by Mr De Marchi in the proceeding in the Tribunal and at the hearing of the appeal in this Court. The evidence before the Tribunal included the Writeway report and Ms McKinley's statement dated 17 October 2005 which, as mentioned, had been part of the material in the previous unsuccessful application to the Tribunal. Ms McKinley's statement had referred to 10 incidents which she claimed had occurred during her operational service. The Writeway report referred to those 10 incidents and responded to each of them. Ms McKinley's new evidence in the second Tribunal proceeding referred to six of the 10 incidents but not to the other four. The Tribunal recorded these matters in its reasons and ultimately concluded against Ms McKinley's application.

6 Ms McKinley's appeal to this Court challenged the Tribunal's use of the Writeway report by contending that the Tribunal had committed a number of errors of law. The first question of law was expressed as:

Did the Tribunal fail to afford the applicant procedural fairness because it did not give the applicant sufficient notice that it would place considerable reliance on the Writeway report in preference of [sic] the Applicant's evidence?

It was argued for Ms McKinley that she had been denied procedural fairness because the Tribunal had not given her sufficient notice that it would place considerable reliance on the Writeway report in preference to her evidence and that, consequently, she had not been given a reasonable opportunity to call for the author of the Writeway report to be cross-examined and for there to be further submissions pursuant to s 39 of the Administrative Appeals Tribunal Act 1975 (Cth) following cross-examination. In the written submissions filed on her behalf, the argument was expressed as being that the Tribunal should have indicated to Ms McKinley that "it intended to prefer the material in the Writeway report" to her evidence "given the contest of views that had emerged in evidence" between Ms McKinley and the Repatriation Commission.

7 It is clear, however, from the Tribunal's decision that Ms McKinley was afforded procedural fairness in relation to the Writeway report. The report had been included in the documents before the Tribunal and had been provided to her, and to her legal advisers, for the proceeding. It was clearly known to her legal representative that the Repatriation Commission was relying upon the Writeway report in answer to the claim made by Ms McKinley and was encouraging the Tribunal to accept material in the report in preference to her evidence. The Tribunal's reasons record at [8] that counsel for Ms McKinley had "conceded that the decision previously made" by the Tribunal "could not be ignored", and that "the contents of documents received into evidence in that review [could not] be disregarded". The submission which had been made for Ms McKinley was to distinguish that material in the knowledge that it had been relied upon and that it was actively before the Tribunal as the basis of a potentially adverse determination.

8 The Tribunal's statutory duty was to ensure that Ms McKinley was given a reasonable opportunity to inspect the documents which the Tribunal was to consider in reaching its decision: see *O'Sullivan v Repatriation Commission* (2003) 128 FCR 590, 603 [53]. In this case that opportunity was fully afforded, and Ms McKinley and her legal representative were on notice that

the respondent was urging the Tribunal to decide her application adversely by placing considerable weight on the Writeway report in preference to her evidence. The Tribunal was not required to give her "a running commentary upon what it thinks about the evidence that [was] given" nor, relevantly, to disclose to her what it was "minded to decide" so that she might have a further opportunity of criticising the Tribunal member's "mental processes" before reaching a final decision: see *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 166 [48]; *Danagher v Child Support Registrar* [2014] FCA 1408, [16]. Ms McKinley, and those representing her, knew of the report, they knew that it was being relied upon by the respondent in its case against Ms McKinley, and they could, if so advised, have sought to have the author of the report called for cross-examination. Indeed, a reason submitted on behalf of Ms McKinley in the appeal that was said to require the Tribunal to have indicated its preference (namely, as set out in the written submissions, "particularly given the contest of views that had emerged in evidence [emphasis added] between [Ms McKinley] and the Repatriation Commission") provides the answer to why Ms McKinley, through her legal representatives at the hearing, was in fact given sufficient notice that considerable reliance on the Writeway report was a matter actively engaged for the Tribunal's consideration and decision: the fact that a contest of views "had emerged" in the evidence (as submitted for Ms McKinley) indicates that Ms McKinley was on notice that the Tribunal would consider whether to base its decision on the contested material.

9 The second question of law relied upon for Ms McKinley was expressed as:

Did the Tribunal take into account an irrelevant consideration in assessing the reliability of the Writeway report, namely its impression of previously prepared Writeway reports?

The ground relied upon in relation to this question was based largely on the third last and second last sentences in paragraph [76] of the Tribunal's reasons. The paragraph stated:

I accept that there were many occasions when the applicant was anxious and subjectively felt concerned for her safety. However, her recollection and description of events is inconsistent with a significant body of documented historical material, much of which was contemporaneously produced. Neither the applicant nor her representative challenged any of that material in this review, nor was the Writeway author called to give evidence. His report was based on his research of the historical material. I have had many occasions in reviews of veterans' applications to read the reports of consultants engaged by the Writeway organisation. I was impressed by the quantity of documents and historical sources that were accessed in conducting the research. I also regard the report as balanced. [Emphasis added to identify the two sentences in question]

It was submitted for Ms McKinley that a fair reading of this paragraph indicated that the Tribunal's decision had taken into account an irrelevant consideration, namely, the Tribunal's personal view about other reports written by Writeway. The submission for Ms McKinley was that the Tribunal's reasons indicated that it was deciding against Ms McKinley because it "was impressed" by reports unconnected with Ms McKinley.

10 In considering this submission it may be useful to pay particular attention to the way in which the question of law, and the grounds relied upon, were expressed on behalf of Ms McKinley. The irrelevant consideration identified in the question of law was described as the Tribunal's "impression of previously prepared Writeway reports". In the grounds relied upon in support of the question of law, the irrelevant consideration was identified as being "the fact that the Senior Member had read Writeway reports before and regarded them as impressive". In each case there is reference in the submissions to the impression said to have been created in the mind of the Tribunal member by reports that were not in evidence in the proceeding involving Ms McKinley. The word "impressed" does appear in the second last sentence in paragraph [76], but the impression referred to in that sentence was the impression created by the Writeway report about Ms McKinley and not the impression created by other reports. The impression the Tribunal referred to in that sentence related to "the research" referred to two sentences previously, namely, the historical research upon which the author had based the report about Ms McKinley and which the Tribunal took into account. That the Tribunal was referring to that report (and not to other reports in other matters) is also confirmed by the last sentence in the paragraph, which expressly refers to "the report" (emphasis added) rather than to any other unspecified report. The third last sentence in the paragraph conveyed no more than the fact that the Tribunal member was familiar with reports of consultants engaged by the Writeway organisation. It did not convey the view that the Tribunal was impressed by those reports in reaching the operative decision against Ms McKinley. The operative decision was based upon the relevant Writeway report which had impressed the Tribunal in part "by the quantity of documents and historical sources that were accessed in conducting the research" and which the Tribunal regarded also as being balanced.

11 The third question of law essentially relied upon the same criticism of the Tribunal's decision as that raised by question 2, but did so by contending that the Tribunal was "actuated by real or apparent bias"; in contrast to the contention in support of question 2 that the Tribunal had taken into account an irrelevant consideration. The third question of law was expressed as:

Was the decision of the Tribunal actuated by real or apparent bias in considering the Writeway report favourably (and preferentially) in light of previous experiences with the Writeway company?

The ground relied upon in relation to this question was that the decision of the Tribunal was "actuated by real or apparent bias", because the Tribunal preferred the Writeway report over Ms McKinley's evidence "owing to his positive impression of past Writeway reports".

12 It was contended for Ms McKinley, in support of question 3, that the Tribunal's view "in favour of the Writeway organisation...would render it impossible for the Tribunal to reach a fair and impartial decision in respect of Ms McKinley's evidence". The test to determine whether a decision-maker is disqualified because of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the decision. In *Johnson v Johnson* (2000) 201 CLR 488, in a passage relied upon by Ms McKinley, it was said by the majority at [11]:

It is not contended that Anderson J was affected by actual bias. It has been established by a series of decisions of this Court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of prejudgment) is whether a fairminded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. [Footnote omitted.]

In that case, a judge had stated during the course of a trial in the Family Court that he would be relying principally on witnesses other than the parties and upon independent documents in determining where the truth lay in a dispute for the alteration of property rights following the dissolution of a marriage. The majority judgment went on to say (at [12]-[13]):

That test has been adopted, in preference to a differently expressed test that has been applied in England, for the reason that it gives due recognition to the fundamental principle that justice must both be done, and be seen to be done. It is based upon the need for public confidence in the administration of justice. "If fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision". The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial".

Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation. At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. In *Vakauta v Kelly* Brennan, Deane and Gaudron JJ, referring both to trial and appellate proceedings, spoke of "the dialogue between Bench and Bar which is so helpful in the identification of real issues and real problems in a particular case". Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them. [Footnotes omitted.]

In that case, the High Court decided that the judge's statements did not create an apprehension of bias in the context in which they had been made. The Tribunal in this case, for the reasons considered in the context of question 2, did not reveal a predisposition in favour of reports written by the Writeway organisation and, therefore, there is no foundation for the claim that the Tribunal decided the questions before it while actuated by "real" bias. The construction urged for Ms McKinley misreads the Tribunal's reference to it being "impressed" by reports as a reference to reports which were not before the Tribunal. The Tribunal was saying, rather, that it was familiar with other reports and was impressed by the one urged upon it by the respondent in this dispute. In doing so, the Tribunal was explaining its reasons on the material before it and revealed no pre-disposition that would lead a fair-minded lay observer to apprehend that the Tribunal would not bring an impartial and unprejudiced mind to the resolution of the questions for the Tribunal to decide. Nor, therefore, is there any foundation for the claim of "apparent" (that is, apprehended) bias. Even assuming the construction of paragraph [76] urged by Ms McKinley, however, a fair-minded lay observer would not reasonably apprehend from that paragraph that the Tribunal would not bring an impartial and unprejudiced mind to the resolution of the dispute it was required to consider. Paragraph [76] is not to be taken in isolation and it is clear from the whole of the reasons that the Tribunal was taking into consideration, and carefully evaluating, all of the evidence in reaching its conclusion. The Writeway report was part of the material which one party had put to the Tribunal and which the Tribunal was required to consider. The Tribunal was not exhibiting any predisposition but simply deciding the matter on the materials and submissions which had been put.

13 The fourth question of law was expressed as:

Did the Tribunal make a finding that was irrational or illogical and/or manifestly unreasonable in determining that the applicant did not suffer from a category 1A or 1B stressor linking her [general anxiety disorder] to her service for the purposes of the applicable Statement of Principle as a result of preferring a Writeway report to the applicant's evidence.

The ground relied upon in respect of this question was that the Tribunal had determined that Ms McKinley did not suffer from a category 1A or 1B stressor linking her general anxiety disorder to her service because it had preferred the Writeway report to Ms McKinley's evidence. However, it would be neither accurate nor fair to describe the Tribunal's adverse decision as being "because [emphasis added] it preferred a Writeway report to [Ms McKinley's] evidence" as submitted.

14 The Tribunal's reference to the Writeway report, with the observation criticised by Ms McKinley, appeared in paragraph [76]. The consideration by the Tribunal, however, of whether Ms McKinley had experienced one or more of the severe traumatic events recorded under the description of a category 1A and 1B stressor was in a different section of the Tribunal's reasons beginning at paragraph [78]. Relevantly, the Tribunal said at [78]-[93]:

78. The focus in the remainder of this decision will be on whether the applicant experienced one or more of the severe traumatic events recorded under the description of a category 1A and 1B stressor.

79. The severe traumatic events within the ambit of a category 1A stressor can be narrowed because there was no evidence that the applicant was subjected to any serious physical attack or assault including rape and sexual molestation, nor held captive nor tortured or kidnapped. The only issue therefore to be considered as a category 1A stressor is whether she experienced a life threatening event.
80. The applicant recorded in her first statement that armed military personnel were present on arrival at Dili airport (incident (i)). In her second statement, she said she was confronted by Indonesian soldiers who had their rifles pointed at her and to other persons. In evidence, she said she was sure that it was Indonesian soldiers who were present at the airport. She also said she was affected by medication when she arrived at Dili. Being confronted by a person with a rifle, irrespective of whether it was an Indonesian soldier or another person probably constitutes experiencing a life-threatening event and/or being threatened with a weapon. However, I am not satisfied that such an event occurred. The historical records reveal that Indonesian air force personnel and marines had left the Dili airfield and the port of Dili before the applicant arrived. INTERFET, that is, allied forces, were in control of the airport from 28 September 1999. The applicant may have observed a member of the allied forces holding a rifle, whilst acting as a guard or otherwise. It is unlikely that a member of the Indonesian forces would have been armed and present at the airport 12 days after Indonesia withdrew and if that did occur it most certainly would have been reported, no less than it being on the occasion of the arrival of Australian forces.
81. The occasion of the applicant travelling from the airport to her base in the Land Rover and ordered to be at action with her rifle loaded (incident(ii)) was not an event or incident recorded in the applicant's second statement (for the purpose of this application) nor was it the subject of any evidence in this review.
82. Observing a building smeared with blood and excrement which was intended to be used for accommodation would have been shocking (incident (iii)). The applicant said in evidence that her major fear from that experience was that she would be shot and not be coming home. Objectively it is difficult to comprehend that reaction but subjectively, I acknowledge that the applicant realised that those premises were probably the site of some previous atrocity.
83. When the applicant travelled to Dili on about 6 occasions in the company of others, she had been ordered to be armed and on each occasion she said she was terrified, she feared attack from civilians and local military and feared injury from pipe bombs (incident (iv)). In her second statement, the applicant repeated, although not specifically in relation to her journeys to Dili, her fear of pipe bombs. There was no evidence of pipe bombs in East Timor from the documents completed by Army personnel and recorded in the Writeway report. In this review, the applicant said she had no memory of any incident involving a pipe bomb.

84. The applicant referred in her first statement to overhearing conversations in the Indonesian language which she interpreted as she and others being intruders and were not wanted in East Timor (incident (v)). The second report of Dr Peterson refers to an occasion where the applicant overheard a conversation by persons she feared may have been infiltrators. The applicant did not refer to these occasions in her second statement. The Writeway report referred to some non-specific examples of vigilantism by some persons who were detained, investigated and charged with offences.
85. The applicant recalled travelling to Balibo on one occasion, having been ordered to be at action, as the sole passenger in a vehicle where she sat with a rifle out of the window (incident (vi)). In her second statement, she recorded that on the occasion she travelled to Balibo, she heard Indonesian soldiers speaking in a threatening or menacing manner and she was frightened. (There is some uncertainty about the occasions when she overheard conversations and the content of them).
86. None of the above incidents or the other three incidents namely, the relationship between the applicant and her Commanding Officer (incident (vii)), standing at her window after a reported suspicious sighting (incident (viii)) and engaging in perimeter patrols (incident (ix)) satisfied me that on each of those occasions the applicant experienced a life threatening event
87. The veteran's perception of these events, that is, whether they posed a threat of death, is critical. The perception must be reasonably held, judged objectively from the point of view of a reasonable person in the position of and with knowledge of the veteran. The threat must also have been capable of and did convey the threat of death (*Border v Repatriation Commission* (No 2) (2010) 191 FCR 163 at [67]).
88. None of the incidents would satisfy these criteria.
89. The reaction of being in fear and being frightened (incidents (v) and (vi)) being the only events to which the applicant expressed a basis for concern do not support, a finding of a reasonably held and objectively judged perception of those events being life-threatening. Her reactions – fear and fright – absent any other additional description – do not convey a perception of the threat of death.
90. I cannot comprehend, that the applicant or a reasonable person in her position could perceive a threat of death when, 2 days after she arrived in East Timor, Indonesian troops had withdrawn, Dili was returning to normal and pipe bombs were never reported. When she travelled to Dili and Balibo, she overheard conversations. None of those incidents could reasonably amount to a perception of a threat of death, no less because she was armed and there was no evidence that the persons she overheard were carrying weapons or caused any physical threat or assault.

91. It could not reasonably be found at an objective level that her relationship with the commanding officer, standing at her window, being engaged in perimeter patrols, attending the hospital or her presence in the accommodation she was forced to clean conveyed a threat of death. I also dismiss as a fact that she was confronted by an Indonesian soldier with a rifle when she arrived in Dili.
92. Whilst the effect of an event as opposed to the threat is to be assessed, I am not satisfied that there was any threat and accordingly, there could be no reasonably held perception of a threat of death.
93. I am not satisfied that the applicant experienced any event which falls within a category 1B stressor because:
- a) she was not an eyewitness to a person being killed or critically injured;
 - b) there was no evidence that the applicant viewed corpses or critically injured casualties as an eyewitness (as defined). She did attend a hospital in Dili (incident (x)). In her first statement, she referred to observing casualties. In her second statement, she referred to observing many casualties. In this review, she said that she attended the hospital on a number of occasions, observed civilian and army casualties with missing limbs and bloodied bandages. When challenged, she said that the limbs appeared to be missing. The applicant's evidence does not point to the persons she observed as being critically injured casualties. The location on those persons' bodies of the bloodied bandages is not known. A more comprehensive description of the persons might permit an assumption to be reasonably drawn about whether those persons were in fact casualties and whether they were critically injured. It is unclear whether the incident, observed first hand by a person who asserts to being an eyewitness is the incident that caused the critical injuries or the incident of observing the person/s, later, with injuries of that description. The applicant did not observe injuries being sustained and for reasons given above, I am not satisfied that she was an eyewitness to critically injured casualties.
 - c) the applicant was not an eye witness to atrocities inflicted on another person or persons;
 - d) she did not kill or maim another person; and
 - e) she was not an eye witness to nor did she participate in the clearance of critically injured casualties. [Emphases in original]

What emerges from these paragraphs defeats the ground advanced by Ms McKinley that the Tribunal's finding was because of a preference for the Writeway report to Ms McKinley's evidence. The paragraphs show, rather, the Tribunal's consideration of the evidence which was before it in reaching its conclusion that Ms McKinley had not experienced one or more of the severe traumatic events recorded under the description of categories 1A and 1B stressor. The Tribunal accepted that a number of the incidents relied upon by Ms McKinley had occurred, whilst noting that there were differences in the evidence she had given as between the two earlier proceedings, and that there were differences as between the evidence she had given in the earlier

proceeding and what was contained in the Writeway report. The Tribunal accepted that Ms McKinley reacted with fear and fright to some of the events, but in all the circumstances was not satisfied that there was a "reasonably held perception of a threat of death". The Tribunal's conclusion that Ms McKinley did not experience a category 1A stressor, namely, a life threatening event, was a conclusion that was open for it to reach on the material available to it, and was not made "because it preferred a Writeway report to [Ms McKinley's] evidence". Similarly, the Tribunal's conclusion that she had not experienced an event falling within the definition of a category 1B stressor was based upon the facts identified at [93] and was not a conclusion reached "because it preferred a Writeway report to [Ms McKinley's] evidence. It too was based upon material before the Tribunal upon which the finding was open. Neither conclusion can be said to be "irrational, illogical and not based upon findings or inferences of fact supported by logical grounds" such that the decision-maker misconceived his or her purpose or function: see Minister for Immigration and Multicultural Affairs; Re Ex Parte Applicant S20/2002 (2003) 198 ALR 59, 67 [34].

15 The fifth question of law raised by Ms McKinley sought to argue that the Tribunal was obliged to make its own independent inquiries by calling the author of the Writeway report to give evidence before giving it weight. Question 5 was expressed as follows:

Did the Tribunal fail to make its own independent inquiries, as it was bound to do by law, by neglecting to suggest that the author of the Writeway report be called to give evidence given the weight it intended to attach to the content of the report, to the prejudice of the applicant?

The ground relied upon for this question was said to be an obligation on the Tribunal to make its own independent inquiries by calling witnesses to give evidence. It was also contended as part of this ground that the Tribunal's error in this regard was to be seen by its failure to suggest that the author of the Writeway report be called to give evidence.

16 The Tribunal has a review function which has been described as "inquisitorial" that may sometimes require it to make its own inquiries. In *Bushell v Repatriation Commission* (1992) 175 CLR 408, Brennan J said of that function at 424-5:

Proceedings before the A.A.T may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial. Each of the Commission, the Board and the A.A.T. is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it. If the material is inadequate, the Commission, the Board or the A.A.T may request or itself compel the production of further material. The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings.

The Tribunal may be restricted from making its own inquiries where, for example, the applicant has the onus of proof: see, for example, *Commissioner of Taxation v Glennan* (1999) 90 FCR 538, 558 [82]-[83]. In the context of repatriation claims, however, the applicant does not have the onus of proof and the Tribunal's duty "to arrive at the correct or preferable decision in the case before

it according to the material before it" does not confine the Tribunal to the material which the parties have submitted if it considers the material inadequate. That being said, the Tribunal's inquisitorial function to "obtain such information as it considers relevant" does not "impose upon it a general duty to undertake its own inquiries in addition to the information provided to it by the applicant and otherwise under the Act": *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429, 430 [1]. In *SZIAI*, the majority joint judgment also said at 436 [25]:

... The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error. [Footnote omitted.]

The Full Court considered these observations in *Kowalski v Repatriation Commission* [2011] FCAFC 43 at [33]-[34], concluding that they also applied to the review function under the Veterans' Entitlements Act 1986 (Cth). It may be, therefore, that the Tribunal would fail in its duty if there were some obvious reason to make an inquiry about a critical fact, or if it was put on notice in some way about a matter that needed to be explored, but that was not the case here. There was no reason for the Tribunal to call or suggest that the author of the Writeway report be called to give evidence beyond the fact, obvious to all in the proceeding, that the Writeway report was being relied upon by the Repatriation Commission. The Tribunal observed at [76], as was the fact, that the author was not called to give evidence, but it was clear at the hearing of the proceeding that the Repatriation Commission was relying upon the Writeway report and that counsel for Ms McKinley did not seek to have the contents of the report tested by cross-examination of the author. There was nothing suggested to the Tribunal, or to this Court on appeal, that would have caused the Tribunal to consider it necessary to call the author of the Writeway report in circumstances where Ms McKinley's legal representative was not seeking to do so. Counsel for Ms McKinley, rather, urged acceptance of his client's evidence in preference to the contents of the Writeway report, but did not otherwise seek to challenge the contents of the report. The facts upon which the Tribunal was asked to make its decision were before it, and no other fact or circumstance was identified in the appeal to this Court to require an independent inquiry by the Tribunal.

17 Questions 6 and 7, and the relevant grounds, can be dealt with together as they were by the parties' submissions. The questions were expressed as follows:

6 In considering the applicant's evidence of observing injured persons at the hospital in Dili (at [93]), did the Tribunal err in any of the following respects:

- (a) By failing to find that the material, particularly Ms McKinley's evidence, disclosed and pointed to a reasonable hypothesis that the applicant had indeed witnessed critically injured casualties?

- (b) By failing to provide adequate or sufficient reasons for its finding that the applicant did not witness critically injured patients or patients who had lost limbs, and in doing so breaching s 43(2B) of the Administrative Appeals Tribunal Act 1975 (Cth)?

7 Did the Tribunal give adequate and sufficient reasons as it was obliged to under s 43(2B) of the Administrative Appeals Tribunal Act 1975 (Cth) for its determination that the applicant:

- (a) Did not suffer from an injury or disease being [post-traumatic stress disorder]?
(b) Did not suffer from war-caused General Anxiety Disorder or alcohol abuse or dependence?

The ground relied upon in relation to question 6 was that the Tribunal had erred in rejecting Ms McKinley's evidence that she had seen critically injured people in the Dili hospital. The ground also contended, as did ground 7 (which related also to question 7), that there had been a failure to give adequate or sufficient reasons as required by s 43(2B) of the Administrative Appeals Tribunal Act 1975 (Cth).

18 Section 43(2B) of the Administrative Appeals Tribunal Act 1975 (Cth) does not impose upon the Tribunal an obligation to give reasons in respect of every fact which may not be accepted by it in reaching its decision. The obligation imposed by the section is an obligation to ensure that the reasons for its decision should include the findings on "material questions of fact". The section provides:

Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

In this case, the Tribunal did provide written reasons and those reasons did include its findings on material questions of fact including a reference to the evidence or other material on which those findings were based. Those reasons explained its findings and what it considered to be the material questions of fact in the sense of being the substantial issues on which the case turned: see *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402, 414. Those reasons were sufficient to enable the parties, and an appeal court, to understand the findings which the Tribunal had made and upon which its decision depended: see *Minister for Immigration v Yusuf* (2001) 206 CLR 323, 346 [69].

19 The material before the Tribunal permitted the findings it made. The Tribunal rejected the findings Ms McKinley wanted because it was not satisfied that Ms McKinley had been an eyewitness to critically injured casualties. At [93(b)], the Tribunal explained why it reached that conclusion contrary to the evidence Ms McKinley had given of having witnessed critically injured casualties:

[T]here was no evidence that the applicant viewed corpses or critically injured casualties as an eyewitness (as defined). She did attend a hospital in Dili (incident (x)). In her first statement, she referred to observing casualties. In her second statement, she referred to observing many casualties. In this review, she said that she attended the hospital on a number of occasions,

observed civilian and army casualties with missing limbs and bloodied bandages. When challenged, she said that the limbs appeared to be missing. The applicant's evidence does not point to the persons she observed as being critically injured casualties. The location on those persons' bodies of the bloodied bandages is not known. A more comprehensive description of the persons might permit an assumption to be reasonably drawn about whether those persons were in fact casualties and whether they were critically injured. It is unclear whether the incident, observed first hand by a person who asserts to being an eyewitness is the incident that caused the critical injuries or the incident of observing the person/s, later, with injuries of that description. The applicant did not observe injuries being sustained and for reasons given above, I am not satisfied that she was an eyewitness to critically injured casualties. [Emphases in original]

These reasons adequately explain why the Tribunal did not make the finding that Mr McKinley wanted to be made. The Tribunal noted, in particular, that "when challenged" she had said that the limbs "appeared" to be missing, but that the evidence did not point to the persons she had observed as having been "critically" injured casualties. Questions 6 and 7 are a complaint that the Tribunal failed to make the findings which Ms McKinley had sought to be made, but which the Tribunal was not obliged to make and which were not material to its decision: see *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 346 [68]. The role of the Court in reviewing the exercise of the administrative discretion of the Tribunal is not to substitute its own decision for that of the Tribunal: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41.

20 The Tribunal's reasons in relation to its conclusions that Ms McKinley did not suffer an injury or disease being a post-traumatic stress disorder, and that she did not suffer from war-caused general anxiety disorder or alcohol abuse or dependence, were also adequately explained in its reasons. In relation to the latter, the Tribunal followed the four step process described in *Repatriation Commission v Deledio* (1998) 83 FCR 82, where the Court said at 97-8:

At the risk of being repetitious we would restate the course which the Tribunal is to take in a case, such as the present, (that is, one involving a claim to be decided after the 1994 Amendments) in respect of the incapacity of a person from injury or disease, or in respect of the death of a person related to service rendered by that person as follows:

1. The Tribunal must consider all the material which is before it and determine whether that material points to a hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person. No question of fact finding arises at this stage. If no such hypothesis arises, the application must fail.
2. If the material does raise such a hypothesis, the Tribunal must then ascertain whether there is in force an SoP [Statement of Principles] determined by the Authority under s 196B(2) or (11). If no such SoP is in force, the hypothesis will be taken not to be reasonable and, in consequence, the application must fail.

3. If an SoP is in force, the Tribunal must then form the opinion whether the hypothesis raised is a reasonable one. It will do so if the hypothesis fits, that is to say, is consistent with the "template" to be found in the SoP. The hypothesis raised before it must thus contain one or more of the factors which the Authority has determined to be the minimum which must exist, and be related to the person's service (as required by ss 196B(2)(d) and (e)). If the hypothesis does contain these factors, it could neither be said to be contrary to proved or known scientific facts, nor otherwise fanciful. If the hypothesis fails to fit within the template, it will be deemed not to be "reasonable" and the claim will fail.
4. The Tribunal must then proceed to consider under s 120(1) whether it is satisfied beyond reasonable doubt that the death was not war-caused, or in the case of a claim for incapacity, that the incapacity did not arise from a war-caused injury. If not so satisfied, the claim must succeed. If the Tribunal is so satisfied, the claim must fail. It is only at this stage of the process that the Tribunal will be required to find facts from the material before it. In so doing, no question of onus of proof or the application of any presumption will be involved.

The Tribunal at [66] expressly turned to the four stage analysis set out in Deledio to determine whether Ms McKinley's generalised anxiety disorder and alcohol use disorder were war-caused. The Tribunal noted at [67] that the material before it pointed to an hypothesis connecting Ms McKinley's general anxiety disorder and alcohol abuse with the circumstances of her service, in the absence of any finding of fact in the first stage contemplated in Deledio. It also observed at [68] that there were Statements of Principles ('SoP') in force in respect of each hypothesis within the assessment period and set them out. In that context, the Tribunal observed that the factors relevant to connecting generalised anxiety disorder and alcohol use disorder to Ms McKinley's particular service were the same, namely:

experiencing a category 1A stressor within the five years before the clinical onset of [alcohol use disorder/anxiety disorder]; or

experiencing a category 1B stressor within the five years before the clinical onset of [alcohol use disorder/anxiety disorder].

The expressions "category 1A stressor" and "category 1B stressor" were fully set out at [70] and for those purposes the definition of "eye witness" was set out at [71].

21 The fourth and final stage set out in Deledio required the Tribunal to determine, as it correctly stated at [74], whether it was satisfied beyond reasonable doubt that the injury or disease did not arise from a war-caused injury. The Tribunal's consideration of that stage was set out at [74] to [93]. Paragraphs [74] to [77] of the Tribunal's reasons read as follows:

74 At the fourth and final Deledio stage, I must determine whether I am satisfied beyond reasonable doubt that the injury/disease did not arise from a war-caused injury. Only at this stage will findings of fact be made. Ten issues were distilled from the applicant's statement in the first application and which were considered by the author of the Writeway report.

75 During cross-examination in this review, when it was put to the applicant that her description of a number of events were [sic] inconsistent with the report of the Writeway author, her response was (or words to the effect) was he there? I understood those words to mean that the applicant was giving evidence that was truthful and was based on her first-hand experience of being present in East Timor for 3 ½ months between 10 October 1999 and 1 February 2000.

76. I accept that there were many occasions when the applicant was anxious and subjectively felt concerned for her safety. However, her recollection and description of events is inconsistent with a significant body of documented historical material, much of which was contemporaneously produced. Neither the applicant nor her representative challenged any of that material in this review, nor was the Writeway author called to give evidence. His report was based on his research of the historical material. I have had many occasions in reviews of veterans applications to read the reports of consultants engaged by the Writeway organisation. I was impressed by the quantity of documents and historical sources that were accessed in conducting the research. I also regard the report as balanced.
77. I am also conscious that the relevant events occurred more than 14 years ago and the applicant's interpretation and recollection of those events have also changed since she gave evidence in the previous application. The report of Dr Peterson of 1 July 2012 records that the applicant had recently recollected overhearing a conversation which caused her to be fearful. He reported that the history he obtained of that event was of the applicant in fear that those persons were infiltrators. She has never given that evidence. [Emphases in original]

The Tribunal went on at paragraphs [78] to [93] of its reasons (set out above) to evaluate whether Ms McKinley experienced one or more of the events falling within the description of a class 1A or class 1B stressor. The Tribunal concluded, on the material before it, that Ms McKinley had not suffered any of the "severe traumatic events" encompassed by those categories. What is set out in paragraphs [74] to [93] are reasons bearing upon the statutory task before the Tribunal. Those reasons disclose that the decision of the Tribunal was reached upon material available to the Tribunal. They were also reasons which were adequate and sufficient for the purpose of s 43(2B) of the Administrative Appeals Tribunal Act 1975 (Cth).

22 The Tribunal's consideration as to whether Ms McKinley suffered from post-traumatic stress disorder was set out at paragraphs [98] to [110]:

PTSD

98. The relevant SoPs for PTSD are No 5 of 2008 and No 9 of 2014 (Posttraumatic Stress Disorder).
99. The clinical diagnosis of PTSD found within DSM IV was reproduced in Instrument No 5 of 2008. Part A of the diagnosis is reproduced as follows:

(A) the person has been exposed to a traumatic event in which:

- (i) the person experienced, witnessed, or was confronted with an event or events that involved actual or threatened death or serious injury, or a threat to the physical integrity of self or others; and
 - (ii) the person's response involved intense fear, helplessness, or horror.
100. The other SoP issued within the assessment period for PTSD – No 19 of 2014 – only amends factors at paragraph 6 of the previous instrument. It did not amend Part A.
101. It is clear from Part A of the DSM IV definition that unless a person has been exposed to a traumatic event as described, a diagnosis cannot be made.
102. There were a number of medical opinions supporting the diagnosis of PTSD. The Full Federal Court decision in *Repatriation Commission v Bawden* [2012] FCAFC 176; (2012) 206 FCR 296, comprehensively analysed a number of previous decisions of the Federal Court involving PTSD. The Full Court concluded there must be a finding of an applicant having suffered a traumatic event within the meaning of Part A of the clinical definition within DSM IV (as it existed) in order to find a diagnosis of PTSD, on the balance of probabilities.
103. In *Bawden*, their Honours concluded at [47]:
- ... the decision-maker must be satisfied that a collection of symptoms manifests a diagnosable disease, and if it is so satisfied, it must then consider whether the illness or disease is war caused. The point for present purposes is that PTSD can only be diagnosed as an illness or disease in terms of a traumatic event.
104. Noting that the Tribunal at first instance was not satisfied that the veteran had suffered a traumatic event, their Honours said at [48 - 49] A diagnosis of the disorder depends on satisfaction as to the historical fact of a traumatic stress and a finding that a traumatic event has occurred is indispensable to a diagnosis of PTSD.
105. It therefore follows that a diagnosis of PTSD is not permissible without a finding of the applicant having been exposed to a traumatic event. I am not satisfied that the applicant was exposed to a traumatic event within the meaning of Part A of the PTSD definition. Accordingly, I cannot find the applicant does suffer from PTSD.
106. I deferred deciding the issue of PTSD because to do so earlier would have caused findings to be made about the circumstances of service, when consideration was being given to making findings, on the probabilities, of the other illnesses suffered by the applicant. Both processes are distinct. It would have also been impermissible to make findings of fact about the circumstances of service before consideration was given to the first of the 3 Deledio stages.
107. The clinical diagnosis of PTSD, unlike a number of other psychiatric illnesses, is predicated on exposure to a traumatic event as defined, with a response involving intense fear, helplessness or horror. Without that exposure and response, the diagnosis cannot be made.

108. On the basis of the findings made above in relation to the applicant's service. she did not experience or witness an event that involved actual or threatened death or serious injury nor a threat to her physical integrity or others. Even if she was confronted with such an event (Woodward v Repatriation Commission [2003] FCAFC 160; (2003) 200 ALR 332 at [122]), based on her observation of persons in the Dili hospital (incident (x)) and the occasion in Balibo when she heard language she interpreted as threatening or menacing (incidents (v) and (vi)), her responses, as she said and for reasons recorded earlier, did not involve intense fear, helplessness, or horror.
109. On the basis of the applicant's evidence and my earlier findings, I am satisfied that the applicant does not satisfy Part A in the DSM IV definition.
110. It is for the reasons expressed immediately above that I am satisfied, on the balance of probabilities that a finding cannot be made that the applicant suffers PTSD. [Emphases in original]

The Tribunal was required to be satisfied, first, that a collection of symptoms manifested a diagnosable disease and, secondly, if it was satisfied of the first matter, to consider whether the illness or disease was war-caused: see Repatriation Commission v Bawden (2012) 206 FCR 296, 307 [47]. In that context, the Tribunal observed at [104] that it was necessary to a diagnosis of the disorder that there be found a traumatic event which had occurred. The Tribunal's conclusion that a diagnosis of post-traumatic stress disorder was not open on the evidence before it was clearly explained at [105] and [108] as being based upon its finding that a traumatic event had not been suffered by Ms McKinley.

23 The last ground of appeal sought to argue that the Tribunal had applied the wrong standard of proof. Question 8 was:

Did the Tribunal satisfy itself beyond reasonable doubt, as it was required to do under s 120 of the Veterans' Entitlements Act 1986 (Cth), that the applicant's [general anxiety disorder] and alcohol dependence were not war-caused?

It was submitted for Ms McKinley that the Tribunal was required, but had failed, to apply the standard of proof required to be applied by s 120(3) of the Veterans' Entitlements Act 1986 (Cth) which provides:

In applying subsection (1) or (2) in respect of the incapacity of a person from injury or disease, or in respect of the death of a person, related to service rendered by the person, the Commission shall be satisfied, beyond reasonable doubt, that there is no sufficient ground for determining:

- (a) that the injury was a war-caused injury or a defence-caused injury;
- (b) that the disease was a war-caused disease or a defence-caused disease; or
- (c) that the death was war-caused or defence-caused;

as the case may be, if the Commission, after consideration of the whole of the material before it, is of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury, disease or death with the circumstances of the particular service rendered by the person.

The section requires the decision-maker to be satisfied "beyond reasonable doubt" that there are no grounds sufficient to determine one of the three matters identified in the section. In deciding whether it is so satisfied, the decision-maker is required to consider the whole of the material before it and to be of the opinion that the material before it does not raise a reasonable hypothesis connecting the injury, disease or death, with the circumstances of the particular service rendered by the person. Section 120A(3) qualifies s 120(3) by providing that an hypothesis is reasonable only if a relevant Statement of Principle upholds it.

24 Ms McKinley's submissions in the appeal in relation to this question depended upon what the Tribunal said at [96], namely:

Irrespective of whether an application is pursued on the basis of clinical onset or clinical worsening, there must be a finding on the probabilities that events or circumstances occurred in service which – for the purposes of this review – constitute 1A or 1B stressors.

In this paragraph the Tribunal referred to the need for a finding "on the probabilities" rather than "beyond reasonable doubt". The standard of proof referred to in the paragraph, however, was not directed to the determination to be made for the purposes of s 120(3) but, rather, to the existence of the relevant "events or circumstances [said to have] occurred in service". The reference to "on the probabilities" was, therefore, directed to the standard of proof of the evidence relied upon, rather than to the standard of proof for the statutory conclusion required by the section. It was the Tribunal's failure to be satisfied "on the probabilities" of the happening of the events or circumstances upon which Ms McKinley relied that led the Tribunal in the next paragraph to conclude, in accordance with the statutory requirement, that it was "satisfied beyond reasonable doubt that the conditions of Alcohol Use Disorder or [general anxiety disorder] were not war-caused". The clear language used by the Tribunal demonstrates that it did apply, and was conscious of, the correct standard of proof required in reaching its ultimate conclusion. Its reference to any lesser standard in relation to the events or circumstances which might lead to that ultimate conclusion was not erroneous and not surprising because there is no obligation for the evidence relied upon to be established beyond reasonable doubt. The higher burden of proof applies to the conclusion upon the established evidence.

25 Accordingly, the appeal will be dismissed with costs.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Pagone.

Associate:

Dated: 2 March 2015

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