SUPREME COURT OF QUEENSLAND

CITATION:	*Gostevsky v The Honourable Jarrod Bleijie* [2012] QSC 384
PARTIES:	**Spiridon Gostevsky** **(Applicant)** **v** **The Honourable Jarrod Bleijie** **(Respondent)**
FILE NO/S:	S350 of 2012
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	4 December 2012
DELIVERED AT:	Townsville
HEARING DATE:	05 November 2012
JUDGE:	North J
PUBLICATION OF REASONS - ORDERS MADE:	1. The application is dismissed. 2. I invite submissions as to costs.
CATCHWORDS:	CRIMINAL LAW – CRIMINAL COMPENSATION ADMINISTRATIVE LAW – JUDICIAL REVIEW
STATUTES	*Judicial Review Act* 1991 *Criminal Offence Victims Act* 1995
CASES:	*Pollentine v Attorney-General* [1998] 1 QdR 82 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 *NAIS & Ors v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2005) 228 CLR 470 *Buck v Bavone* (1976) 135 CLR 110; *MIMA v Eshetu* (1999) 197 CLR 611
COUNSEL:	J A Greggery for the applicant M Plunkett for the respondent
SOLICITORS:	Purcell Taylor Lawyers for the applicant Crown Solicitor for the respondent

Introduction

[1] The applicant seeks to review under the *Judicial Review Act* 1991 ("the Act") a decision of the respondent made on 26 June 2012 that the applicant was not the victim of a personal offence within the meaning of s 21 of the *Criminal Offence Victims Act* 1995 (Qld) (repealed) ("*COVA*"). The consequence of that decision is that the applicant is not entitled to apply for an ex gratia payment under *COVA*.

[2] The claim made by the applicant for criminal compensation and subsequent review has had an unfortunate history. A short relevant chronology leading to the application before me is found in the outline of submissions filed on behalf of the applicant:

9 Sept 2006:	Date of alleged assault upon the applicant
28 Sept 2006:	Applicant provides sworn statement to Queensland Police Service
14 August 2007:	Applicant brings an application for criminal injuries compensation pursuant to s. 33(1)(c) *COVA* via letter from Purcell Taylor
21 Dec 2009:	Decision to refuse the application for criminal injuries compensation by Honourable Cameron Dick
24 March 2010:	Application filed for statutory order of review of decision of 21 December 2009
1 August 2010:	Written outline of submissions filed on behalf of the applicant
3 Sept 2010:	Application for statutory order of review settled by way of consent orders by Justice Cullinane setting aside original decision and remitting it to the respondent to be re-considered according to law
31 May 2012:	Application filed for statutory order of review in respect of the respondent's failure to make a decision in accordance with the order of Justice Cullinane on 3 September 2010.
26 June 2012:	Respondent makes decision refusing the application for criminal injuries compensation
17 July 2012	Further amended application filed for statutory order of review of the decision.

[3] The further amended application for review relies upon two grounds:

(a) it was an improper exercise of power that is so unreasonable that no reasonable person could so exercise the power;[1]
(b) there was no evidence or other material to justify the making of the decision:[2]

The applicant in submissions also relies on failure to take into account relevant matters:[3]

Relevant background and evidence

[4] On the afternoon of 9 September 2006 the applicant was in Mackay, he was on a "real binge and sunk a whole bottle of bourbon and a few beers".[4]

[5] At about 6.00p.m. he was refused further service at Wilkes Hotel because bar staff considered he was too intoxicated and he moved further up the street to Molly's Irish Bar where he was refused further service after one drink. He went outside and sat down on the footpath where he commenced to annoy pedestrians by yelling at them. At about 6.18p.m. staff from Molly's Irish Bar called the police.[5] At about 6.30p.m. officers of the Queensland Police Service arrived. Police noticed a laceration injury to the applicant's head. He told them he had called an ambulance and police arrested the applicant for being drunk in a public place. The Watchhouse Custody Register recorded that he had a cut to the forehead and complained of a broken foot.[6] At 7.26p.m. he was attended by the Queensland Ambulance Service and a swollen foot was noticed. He was taken by ambulance to the Mackay Hospital. There is no record of a complaint of an assault made by the applicant to the Queensland Ambulance Service.

[6] The applicant was admitted to hospital at which time he was yelling, verbally abusive and aggressive to police and to hospital staff.[7] The hospital records note that the Applicant claimed that he had been assaulted by either being kicked in the foot or by being hit by something but the notes record that he said he did not know how because he was drunk.[8] He was found to have sustained a broken right ankle and was treated.

[7] On 18 September 2006 the applicant wrote to the police complaining that he had been "physically attacked by a person, I did not see. I was hit on the forehead above my right eye and hit on the right ankle."[9] On 28 September 2006 the Applicant attended at the Townsville Police Station complaining that he had been assaulted on the footpath prior to his arrest and alleged that he received a blow to the right side of the forehead above the right eye and a blow to the right ankle from an unknown offender.

[1] Ground 1 relying on s 20(2)(e); s 23(g) of the Act
[2] Ground 2 and 3 being interlinked relying on s. 20(2)(h); of the Act.
[3] s 20(2)(e); s 23(b) of the Act.
[4] Affidavit Louise Tran at p66.
[5] Affidavit Louise Tran at p38.
[6] Affidavit Louise Tran at p37.
[7] Affidavit Louise Tran at pp62 & 64.
[8] Affidavit Louise Tran at p64.
[9] Affidavit Louise Tran at p48.

[8] In the statement of 28 September, the applicant said[10]:

> "I recall Saturday the 9th September 2006. I had been drinking in Wilkes Hotel on Victoria Street, Mackay since about 4.30pm on that day. I had previously been drinking there with a friend, but he had left earlier on. At approximately 6pm I went up to the bar to get another drink, but the bar person refused to serve me because they said I was too drunk.
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> After being refused service, I had a few words to the security officer on the way out, and then walked outside the Hotel.
>
> I stood on the footpath for a while trying to decide what to do. While I was standing there someone came up to me, I think they came up from my right hand side. Suddenly I received a blow to the right hand side of my forehead above my right eye which instantly started bleeding down my face. I couldn't really see out of my right eye because it had blood trickling down it. I felt some moderate pain in this area.
>
> I put my hand over my eye to stop the blood and then I received one blow to my right ankle which made me fall backwards onto the footpath. I didn't see who did this, or how many people were involved, and I don't know whether these blows were punches or kicks."

[9] As the applicant was treated for his ankle injury at the Mackay Base Hospital, a report and medical opinion was sought from the hospital and one was given by Dr Milos Kolarik, orthopaedic surgeon, dated 29 July 2009.[11] In the report Dr Kolarik, after reviewing the hospital records, said:

> "In none of the physical examinations that he had is there a mention made of external damage to the leg. It's reported as painful, swollen and tender, but there are no reported skin lesions, abrasions or evidence of external damage having been applied to the leg. This would speak against external force having been applied to the leg and causing his fracture.
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> From the x-rays of the injury itself, there is a common appearance of a fracture caused by a fall and resulting in eversion of the ankle, inversion of the foot and internal rotation. The force involved would have been moderately severe, but the description is that of a typical fracture caused by a fall. As to whether or not this fall was self-sustained or was the result of external violence such as pushing, cannot be stated with any medical certainty on the basis of this medical record.
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> Therefore, it's unlikely that the fracture and injuries were caused by an external force such as a blow or a kick and it is much more likely to have been caused by a fall, whether self generated or secondary to external force."

[10] In his application for compensation of 13 August 2007 the Applicant said that he reported the assault to a police officer at Mackay Police Station on 9 September

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[10] Affidavit Louise Tran at p9-10.
[11] Affidavit Louise Tran at p50.

2006.[12] There is no record of this complaint, evidence or information gathered into this claim disputes that there was a complaint to police of an assault that day.[13]

[11] Consequent upon the application for compensation Detective Acting Sergeant Olsen investigated the claim by the applicant that he suffered injuries as a result of an assault and reported:[14]

> "Inquiries conducted by myself with the manager of the hotel at that time Marretje KLEINE confirmed there was no surveillance footage of the incident captured however recalls a male person whom is believed to be the complainant using a camera he had to take photos of underneath girls skirts who were present at the hotel at that time. The manager stated that soon after realizing what was occurring the male person has been asked to leave the premises and soon after this was assaulted on the footpath outside. The manager stated she did not know who assaulted the male person however suspects it may have been boyfriend of one of the girls that was photographed."

[12] A subsequent record made by Detective Olsen in relation to this investigation records:[15]

> "On the 4.10.2006 police from Mackay CIB attended Wilkes Hotel and took up with the Manager of the Hotel. There is no video surveillance of this incident. The manager states she does remember this incident as the complainant in this matter was inside the hotel using a camera he had to take photos of underneath girl's (sic) skirts. The complainant as (sic) asked to leave the hotel and soon after leaving was assaulted on the foot path. The manager stated she does not know who assaulted him, nor did she remember seeing this male person in the Hotel, however she suspects the male person may have been a partner of one of the girls the complainant photographed. Contact is to be made with the complainant to question about these allegations, as this is contrary to the details of the report. Please forward to PSCS OLSEN for this to be done."

[13] In 2011 following the compromise of the first application for compensation further investigations were made of the manager of Wilkes Hotel. The outcome of those investigations was that the manager whom Detective Sergeant Olsen had interviewed neither witnessed an assault of the nature the applicant described nor had a recollection of it. There is no suggestion such an assault was reported to her.[16] There was no film of the asserted assault and no contemporaneous notes nor report of it.

[14] Concerning these subsequent investigations by the police, on 18 February 2011 a police officer interviewed the manager of the hotel. His report of the manager's recollection is as follows:[17]

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[12] Affidavit Louise Tran at p19.
[13] Affidavit Louise Tran at p32-59.
[14] Affidavit Louise Tran at p27.
[15] Affidavit Louise Tran at p30.
[16] Affidavit Louise Tran at p124-5; p139; p156.
[17] Affidavit Louise Tran at p124-5.

"3. I asked Ms KLEINE the questions listed on page 2 of the attached report and she provided the following information:

- The only assault she recalled speaking to Police about was when a Plain clothes officer was assaulted by a drunk at the nightclub that she was the manager of. She stated that it was an attempted assault and that the drunk man was swinging punches at the plain clothes officer but did not connect.
- She stated that the drunk man was 45 to 50 years of age and that he was on the dance floor swaying from side to side. She stated that she decided to evict him from the premises but he was refusing to leave.
- She stated that at this time a male person came up the stairs and came to her assistance. She stated that it was then that the drunk man started swinging punches and that the other man quickly took the drunk man to the ground and put handcuffs on him. She stated that it was at this time that she realised that the other man was a Police Officer. She stated that the Police Officer was wearing casual clothes.
- She stated that the Police Officer then pulled the drunk man up off the floor and took him away down the stairs. She stated that the drunk male was yelling about Police brutality.
- She stated that the Police officer was young and had short dark hair.
- She stated that once the male person and the Police officer left the premises, she did not see them again that night.
- She stated that didn't (sic) recall if anything happened outside the pub after they left the premises. She also stated that she did not recall any person telling her about anything that happened outside the pub after the drunk man was taken out.
- She stated that within the next week she attended the Mackay Station and provided a typed statement to another Plain Clothes Police Officer. She stated that she recalled signing the statement. She stated that she recalled seeing the Plain Clothes officer who assisted her with the drunk man while she was giving the statement.
- She described the drunk man as being Caucasian but tanned, scruffy and bloated but no (sic) fat.
- She stated that she did not recall any officer making any handwritten notes.
- She stated that she has no memory of any male person taking photos up any persons (sic) skirt at this time or any other time.
- She stated that the Plain Clothes officer never assaulted the drunk man while he was handcuffed."

Further it was reported by police in a report of 29 September 2011 that the manager advised that at no time did she see an assault and it was for that reason she could not provide a description of any offender.[18]

[18] Affidavit Louise Tran at p139.

[15] In a further report prepared by Detective Senior Constable Sheraton of 20 May 2012 concerning an interview with the manager of the hotel that occurred the previous day Officer Sheraton reported:[19]

> "2. KLEINE stated that due to the significant time that has passed, she was not able to make comment on whether or not she was working at this time and she has no records to try and confirm this.
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> 3. KLEINE did however state that she clearly remembers two (2) incidents, and she believes this correspondence must relate to one of these incidents.
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> 4. The first incident KLEINE recalls occurred in the downstairs bar of the Hotel in the afternoon on an unknown date. KLEINE stated that a male person was hit with something (or by someone). She stated that this male person was bleeding from the back of his head and there was a significant amount of blood. KLEINE further stated that she believes there was an Assistant Manager by the name of 'Brad' also working at this time. KLEINE could not provide any further details in relation to Brad. KLEINE believes this male person was taken from the Hotel in an ambulance however she cannot be 100% sure about this.
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> 5. The other incident KLEINE recalls occurred in the upstairs bar late at night – approximately 11pm – 12 midnight. She stated that there was no blood involved in this incident. KLEINE stated that a heavily intoxicated male person was harassing females at the Hotel. KLEINE stated that an "undercover cop" wrestled this male person to the ground and then handcuffed him. KLEINE stated this male person was yelling out at the time of being handcuffed words similar to 'police brutality'. KLEINE stated that these comments were ridiculous as the "undercover cop" acted professionally and did not use excessive force at any stage. KLEINE believes she was the only manager working at this time. KLEINE further stated that after the drunk male was removed from the Hotel she did not see anything else."

[16] In the reasons for the decision the respondent said:[20]

> " 61. Section 36(4) of COVA permits me to have regard to the circumstances in which the injury happened and anything else I consider appropriate. I have taken into account the QPS Crime Report Print dated 27 August 2007, in particular the entry dated 4 October 2006, and consider that the assertion or suggestion that the manager of the hotel witnessed the applicant being assaulted was discredited by the outcome of the police investigation.
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> I also consider that the applicant's intoxicated state casts considerable doubt over his credibility, particularly as the police advised that no complaint of assault was made by the applicant at

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[19] Affidavit Louise Tran at p156.
[20] Affidavit Louise Tran at p7-8.

the time of his arrest or in the subsequent hours he was in police custody. Indeed several weeks passed before the applicant attended at a police station to report the alleged incident.

Having regard to the available evidence, I have concluded that police conducted a proper investigation into the alleged assault and accept that they were unable to locate any witnesses or identify an offender/s in relation to the alleged assault.

62. Section 36(5) of COVA permits me to have regard to the particulars of the injury and any medical examination. I accept the medical records from Mackay Base Hospital and the medical reports of Dr Kolarik, Orthopaedic Surgeon. I accept Dr Kolarik's opinions that:

- The applicant's recollection of his injuries at the time of his admission was unreliable due to his intoxication;

- There were no reported skin lesions, abrasions or evidence of external damage to the applicant's leg, which speaks against the application of external force causing the fracture; and

- It is unlikely that the fracture and injuries to the applicant's leg were caused by an external force such as a blow or a kick and much more likely to have been caused by a fall, whether self generated or secondary to an external force.

Again, I consider that the applicant's intoxicated state casts considerable doubt over his recollection of the alleged assault and the events of the evening as a whole. Weighing all of the available evidence, I have concluded that the applicant's injuries were likely sustained through a fall and since there is no independent or reliable evidence that he was pushed or assaulted before he fell, I am satisfied that the applicant probably fell due to his intoxication.

63. I made the decision to refuse the application of Spiridon Gostevsky for an ex gratia payment of criminal injury compensation for the reason that, based on all the material before me, I was not satisfied that the applicant is eligible to make an application for an ex gratia payment of compensation under section 33(1)(c) of COVA on the basis that, on the balance of probabilities, his injuries were not the result of a personal offence committed against him.

64. I reached this conclusion based on the available evidence, in particular the information received from police that there were no witnesses to the alleged assault and the medical opinion that the primary injury to the applicant's leg (as well as the minor head injury) was likely to have been sustained through a fall.

65. No other provision of COVA has application to the facts of this matter so as to provide a ground for eligibility."

The Legislative Scheme

[17] COVA relevantly applies to the application for compensation made by the applicant notwithstanding the Act has been repealed. Section 19(1)(a) provided:

> "**19 Scheme for compensation for injury, death and expenses from indictable offence**
>
> (1) This part establishes a scheme for the payment of compensation to a person (the ***applicant***) –
>
> (a) for injury suffered by the applicant caused by a personal offence committed against the applicant; or"

[18] The definition of a personal offence is found is s 21:

> "**21 Meaning of *personal offence***
>
> A ***personal offence*** is an indictable offence committed against the person of someone."

[19] Relevant to the applicant's situation, s 33(1)(c) applies and provided:

> "**33 Application for payment by State of compensation for injury from personal offence**
>
> (1) This section applies to anyone who has suffered injury because of any of the following acts committed against the person—
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> …
>
> (c) a personal offence for which someone would have been tried on indictment, but for the fact that the person cannot be identified or found after appropriate inquiry and search."

[20] For the purposes of this application, s 36(3) is relevant and provided:

> "**36 How applications are processed**
>
> (3) The Governor in Council may approve the payment of an amount only if satisfied that payment is justified in all the circumstances."

[21] It was not in dispute that the respondent was the duly authorised delegate of the Governor in Council for the purposes of making a decision in relation to the application.

The Rival Contentions

[22] It was conceded that if the applicant could establish that his injuries had been suffered because of a personal offence committed against him he could come within s 33(1)(c) as the person who had committed the assault and injuries could not be identified or found after appropriate inquiry and search. The issue therefore was whether a payment could be approved and that depended upon the delegate being

satisfied "that payment is justified in all the circumstances,"[21] in this case, that is his injuries had been caused by such an offence.

[23] On behalf of the applicant it was submitted that the decision was founded upon two factual findings recorded at paragraph 64 of the reasons, that there was no evidence upon which the findings could be made. In relation to the medical opinion it was submitted that the opinion of the doctor proceeded upon a letter of instruction which misapprehended the applicant's statement to police. The letter asked "whether an assault was the likely cause of his injury or whether the injury was likely self-inflicted through a fall"[22] but it was contended that the applicant's sworn statement did not attribute a blow to his right ankle as the cause of the fracture as distinct from a fall which resulted from the blow. It was submitted that this misunderstanding of the applicant's sworn statement found its way into the reasons for the decision. Further it was submitted that the reasoning in the decision that Dr Kolarik held the opinion that the applicant's recollection of his injuries was unreliable due to intoxication was a misapprehension of the doctor's report where he stated that he would "hesitate to state that he would have been a very reliable witness considering his condition"[23].

[24] Further in respect of the reasons the applicant submitted that the finding that "there were no witnesses to the alleged assault"[24] was illogical and without evidentiary basis. The applicant pointed to paragraph 61 of the reasons where it was stated that the "suggestion that a manager of the hotel witnessed the applicant being assaulted was discredited by the outcome of the police investigation"[25] which appeared to follow from the crime report dated 4 October 2006 which recorded that police had spoken to a manager on duty who recalled the incident but could not identify the assailant and the report dated 29 September 2011 which recorded that the police had spoken to the same witness who said that she did not see the assault. It was submitted that these reports did not discredit the witness's account forwarded shortly after the incident to police and that the only rational explanation is that the memory of the witness had been lost due to the passage of time (a period in excess of five years).

[25] The applicant submitted that the only sworn evidence before the respondent was the applicant's statement to police on 28 September 2006 which was supported by complaints to staff at the hospital on the night of the incident and again on 12 September 2006 following surgery and also his letter to the Queensland Police Service of 18 September 2006.

[26] On this basis it was submitted that the decision was an improper exercise of power and that it was so unreasonable no reasonable person could so exercise the power or alternatively that there was no evidence or other material to justify the making of the decision.

[27] On behalf of the respondent it was submitted that the applicant was subtly attempting a merits review of the decision. It was further submitted that consistent with authority that a "benign approach" is to be taken to the reading of reasons it

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[21] See s 36(3).
[22] Affidavit Louise Tran at p49.
[23] Affidavit Louise Tran at p50.
[24] Affidavit Louise Tran at p7.
[25] Affidavit Louise Tran at p7.

was settled that a court must not read reasons "minutely and finely with an eye keenly attuned to the perception of error".[26]

[28] The respondent submitted that the question for decision by the decision maker was whether he or she was satisfied that the payment is justified in all the circumstances. The critical factual issue upon which the decision was made was that the respondent was not satisfied that the applicant had suffered any injury caused by a personal offence. Accordingly the respondent submitted that on the evidence before the respondent it was open for the respondent not to be satisfied of that matter and that accordingly, it not being a merits review, it could not be concluded that the decision was so unreasonable that no reasonable person could form that view.

[29] In reply the applicant referred to *NAIS & Ors v Minister for Immigration and Multicultural and Indigenous Affairs & Anor*[27] in support of a submission that the circumstance that the manager of the hotel had in her most recent interviews with police admitted to not being able to recall the incident in question, contrary (it was submitted) to the earlier accounts apparently given to police further supported the contention that that delay had been productive of a loss of evidence which had contributed to the unfairness of the process and the decision.

Discussion

[30] The applicant was heavily intoxicated on the day. The police who attended upon him on the footpath did not make a record of any complaint by him that he had been injured as a consequence of an assault. At the watchhouse his injuries were noted and the ambulance was called. There is no record of any complaint by the applicant either at the watchhouse or to the ambulance personnel that he was assaulted. The notes in hospital records record a complaint of an assault by either being kicked in the foot or by being hit by something but those notes recalled that he did not know how because he was drunk. The first record of a complaint to police of an assault was in the letter of 18 September 2006. Then he provided police with the statement of 28 September 2006.[28] That statement was the first sworn evidence of an assault. The description of the assault was "a blow to the right hand side of [the] forehead above [the] right eye"[29] and "one blow to [the] right ankle which made [him] fall backwards onto the footpath"[30]. The assault therefore sworn to was of a blow above the right eye that caused bleeding and a blow to the right ankle which caused the applicant to fall onto the footpath.

[31] There was no independent contemporaneous corroboration of that account. Apart from the information provided by the hotel manager there is no record of a possible witness.

[32] The record of the first interview with the hotel manager[31] does not in terms confirm that the hotel manager is speaking of the same incident the applicant claims occurred. The applicant, in his statement, makes no mention of having used a

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[26] *Pollentine v Attorney-General* [1998] 1 QdR 82 per Fitzgerald P at 92 citing *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.
[27] (2005) 228 CLR 470.
[28] See para [7] above.
[29] Affidavit Louise Tran at p9-10.
[30] Affidavit Louise Tran at p9-10.
[31] See para [11] above.

camera in the hotel in the manner spoken of by the manager. The report of the information given by the manager does not confirm that she witnessed any assault. In the police records of Detective Olsen's interview with the hotel manager on 4 October 2006 the manager is recorded as confirming that she can remember that the applicant was using the camera to take photographs as indicated and that he was asked to leave the hotel. The manager is recorded as saying that she did not know who the assailant was. Nor does the report confirm that she witnessed any assault.[32]

[33] The subsequent material on file and information gathered by the police officers does not make it clear that the hotel manager witnessed an incident described by the applicant in his statement. The evidence suggests that she did not witness any assault. The incidents she described to Officer Sheraton in May 2012[33] describe different incidents. One concerns an assault where a male person was bleeding from the back of his head. The applicant was injured above his right eye. The second describes an entirely different event which concerns an ejectment from the hotel in circumstances not described by the applicant.

[34] The medical evidence from Dr Kolarik[34] does not corroborate the applicant's account. The applicant's account is that he was struck in the forehead but that it was the blow to his ankle that caused him to fall.

[35] Dr Kolarik's opinion is that it was unlikely that the damage to the ankle was caused by the effect of an external blow for the reasons he sets out. Nevertheless it is possible that a blow to the ankle may have caused the applicant to fall and Dr Kolarik's opinion is that a fall either induced by the effects of intoxication or by the effects of the application of external force may have been the cause of the damage to the ankle. While it might be observed that Dr Kolarik's opinion does not falsify the applicant's account, the medical evidence does not corroborate the account because there was no evidence on examination of physical damage consistent with an external blow to the ankle.

[36] In the upshot there is no medical evidence and no evidence from a witness that independently corroborates the applicant's account. There is no photographic or other surveillance evidence that corroborates the assault event.

[37] In *Minister for Immigration & Multicultural Affairs v Eshetu*[35] Gummow J quoted with approval a passage from the judgment of Gibbs J from *Buck v Bavone*:[36]

> "'In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the

[32] See affidavit Louise Tran at page 30.
[33] See para [15] above .
[34] See para [9] above.
[35] (1999) 197 CLR 611.
[36] *Buck v Bavone* (1976) 135 CLR 110 at 118-119; see *MIMA v Eshetu* (1999) 197 CLR 611 at [136] at page 654.

> authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached.'

Gummow J then observed:[37]

> "This passage is consistent with the proposition that, where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question. It may be otherwise if the evidence which establishes or denies, or, with other matters, goes to establish or to deny, that the necessary criterion has been met was all one way."

[38] Concerning the test of whether a reasonable decision maker could arrive at a decision, in *MIMA v Eshetu,* Gleeson CJ and McHugh J said:[38]

> "In *Puhlhofer v Hillingdon London Borough Council* Lord Brightman said:
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> > 'Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.'
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> In *Chan v Minister for Immigration and Ethnic* Affairs a delegate's decision that an Applicant for refugee status had a fear of persecution which was not well-founded was held to fall within the provisions of the legislation then applicable which corresponded to the concept of *Wednesbury* unreasonableness. The conclusion is conveniently summarised in the judgment of Toohey J as follows:
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> > 'In essence the delegate concluded that while the Appellant had a fear of persecution, that fear was not well-founded. However, the delegate had accepted that there may have been 'discrimination' against the appellant. Given the circumstances of that discrimination, no reasonable delegate could have concluded that it did not amount to persecution. Nor could a reasonable delegate have concluded other than that there was a real chance of imprisonment or exile if the appellant returned to China.'
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> In the same case Mason CJ criticised the Full Court of the Federal Court for having "trespassed into the forbidden field of review on the merits".

[37] *MIMA v Eshetu* (1999) 197 CLR 611 at [137].

[38] *MIMA v Eshetu* (1999) 197 CLR 611 at [41] – [44], p626-7.

> In *Wednesbury* itself, which was concerned with an issue as to whether the imposition of a condition imposed by a licensing authority was so unreasonable as to be beyond the proper exercise of the authority's powers, Lord Greene MR said that what a court may consider unreasonable is a very different thing from "something overwhelming" such that it means that a decision was one that no reasonable body could have come to. As Mason J pointed out in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, when the ground of asserted unreasonableness is giving too much or too little weight to one consideration or another "a court should proceed with caution…lest it exceed its supervisory role by reviewing the decision on its merits'."
>
> (footnotes omitted)

[39] The applicant on the evening after the event was intoxicated and he was noted at the hospital to be yelling and abusive.[39] These are grounds for any decision maker to be cautious before accepting the applicant's account.

[40] In the circumstances of the absence of evidence corroborative of the applicant's account the issue is whether the decision maker could be "satisfied" that the injuries suffered by the applicant had been caused by a personal offence committed against him. The applicant's contention comes down to the proposition that in the absence of evidence falsifying the applicant's sworn accounts in his statement to police and in the circumstances where his injuries are not necessarily inconsistent with having been sustained in the manner he alleges a decision maker was bound to be satisfied. Hence the submission that the decision was so unreasonable that no reasonable person could so decide.[40] But, as the Respondent submits, the question is one of satisfaction. In the context of the applicant's condition at the time in question, the absence of any record of him complaining to the police that day and in the circumstances where his injuries are consistent with those that might be sustained in a fall occasioned because of intoxication I am of the view that a decision maker acting reasonably was not bound to be satisfied of the matters contended for by the applicant.

[41] Further in my view the criticisms the applicant made of the conclusion reached by the decision maker in paragraph 64 of the reasons[41] involved a reading too critical of the reasons expressed as a whole. In the reasons the decision maker noted that the outcome of the police investigations "discredited" the notion that the hotel manager witnessed the assault upon the applicant.[42] For the reasons I have given I have concluded that this view was reasonably open.[43] In the view I take of the evidence before the decision maker and the reasons, when read as a whole, there was a basis for concluding that he was not satisfied. The decision maker was of the

[39] Affidavit Louise Tran p64.
[40] See s 20(2)(d) and s 23(g) of the Act.
[41] See para [16] above.
[42] See para 61 of the reasons quoted in para [16] above.
[43] See para [30] – [33] above.

view that the applicant's intoxicated state cast doubt over his credibility and unreliability particularly in circumstances where there is no record of an early complaint to police. On the viewing I take of the decision maker's summary of the medical evidence he correctly summarised the effect of the medical evidence that the ankle injury was likely to have been sustained as the result of a fall but that medical evidence could not confirm whether the fall was brought about by the application of force by an assailant or self-generated (in this case presumably contributed to because of the intoxication).

[42] In the circumstances the Applicant has failed to persuade me that the decision should be set aside.

Orders

[43] The orders that I would make are:

1. The application is dismissed.
2. I invite submissions as to costs.