FEDERAL COURT OF AUSTRALIA

CRNL v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCAFC 138

Appeal from:	*CRNL v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCA 252
File number:	WAD 89 of 2023
Judgment of:	**COLVIN, STEWART AND JACKSON JJ**
Date of judgment:	22 August 2023
Catchwords:	**MIGRATION** – appeal – Direction No. 90 – whether Tribunal took the "other considerations" into account – whether Tribunal engaged in required evaluative exercise of weighing or balancing the considerations identified as being relevant to the decision whether there is "another reason" to revoke the cancellation of the appellant's visa – failure of Tribunal to carry out statutory task – appeal allowed
Legislation:	*Migration Act 1958* (Cth) ss 499, 501(3A), 501(6)(a), 501(7)(c), 501CA(4), 501CA(4)(b)(ii)
Cases cited:	*FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 19 *Navoto v Minister for Home Affairs* [2019] FCAFC 135 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417
Division:	General Division
Registry:	Western Australia
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	45
Date of hearing:	9 August 2023
Counsel for the Appellant:	Ms S Tully and Mr R Reynolds
Counsel for the First Respondent:	Ms C Taggart

Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent did not appear

ORDERS

WAD 89 of 2023

BETWEEN:	**CRNL** Appellant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**COLVIN, STEWART AND JACKSON JJ**
DATE OF ORDER:	**22 AUGUST 2023**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. Orders 3-6 made by the primary judge be replaced with orders that:

   (a) the decision of the Administrative Appeals Tribunal dated 21 June 2021 affirming the decision by a delegate of the first respondent dated 26 March 2021 to not revoke the cancellation of the applicant's visa be set aside;

   (b) the matter be remitted to the second respondent for redetermination according to law; and

   (c) the first respondent pay the applicant's costs of the proceeding as taxed or agreed.

3. The first respondent pay the appellant's costs of the appeal as taxed or agreed.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 This is an appeal from a judgment of a single judge of the Court. The primary judge dismissed an application for judicial review of a decision by the second respondent, the Administrative Appeals **Tribunal**. The Tribunal had affirmed a decision of a delegate of the first respondent, the **Minister** for Immigration, Citizenship and Multicultural affairs, not to revoke the mandatory cancellation of the appellant's visa under s 501CA(4) of the *Migration **Act** 1958* (Cth).

2 The appellant contends that the decision of the Tribunal is vitiated by jurisdictional error in two respects, and that the primary judge erred in not so finding.

Background

3 The appellant, a New Zealand national, held a visa that entitled him to reside in Australia. It was cancelled because he failed to pass the character test by reason of a "substantial criminal record" due to having been sentenced to a term of imprisonment of 12 months or more and serving a full-time sentence of imprisonment: ss 501(3A), 501(6)(a) and 501(7)(c) of the Act.

4 The appellant requested revocation of the visa cancellation decision on the basis that there was "another reason", ie, other than a contention that he passed the character test, for the cancellation to be revoked: s 501CA(4)(b)(ii) of the Act. It is uncontroversial that the appellant fails to pass the character test. The delegate of the Minister was not satisfied that there is such another reason with the result that the cancellation of the visa remained. The appellant then sought merits review of the delegate's decision in the Tribunal.

5 The gravamen of the appellant's case before the Tribunal as to why the cancellation of his visa should be revoked is the adverse impact that his removal from Australia would have on him and members of his family, in particular three minor children. A brief overview of the facts relevant to that case, which are not in dispute, can be extracted from the Tribunal's reasons and the primary judgment.

6 At the time of the Tribunal's decision, the appellant was 38 years of age. He arrived in Australia from New Zealand when he was 22, ie, 16 years earlier. He has thus lived most of his adult life in Australia and considers it his home.

7 The appellant has two biological children and two step-children. He considers himself to be the father of his step-children and by all accounts is a devoted and loving father. The appellant's eldest child, an adult, resides in New Zealand. The other children reside in Australia and are all under the age of 18, and on the evidence they are all Australian citizens.

8 The appellant's de facto partner, an Australian citizen, and immediate family, including his mother, step-father and four siblings, like him, reside in Western Australia along with numerous extended family members. The appellant's mother is undergoing treatment for cancer and requires the assistance of the appellant to help her with the daily management of her small business.

9 The appellant has had relatively regular employment in Australia in a number of different roles, including as a labourer and a small business owner and has gained tertiary level trade qualifications.

10 The appellant's criminal record is significant. In 2013 he was sentenced to 15 months imprisonment for conviction on charges of threats to injure, endanger or harm another person and threats to destroy, damage, endanger or harm property, wilfully and unlawfully destroying or damaging property, deprivation of liberty, and common assault in circumstances of aggravation. Significantly, the conduct occurred in relation to a dispute with a former partner.

11 In November 2020, the appellant was convicted of six counts of breaching a family violence restraining order and then sentenced to seven months imprisonment for each count, to be served concurrently. He was also convicted of breaching the terms of a previous imprisonment order imposed earlier that year – he had been convicted of common assault and sentenced to a seven months suspended sentence.

12 The appellant has also received a number of non-custodial sentences for offences that include, but are not limited to, possession of a prohibited drug (cannabis), possession of drug paraphernalia, disorderly behaviour in public, breaching bail conditions, wilful and unlawful destruction of property and driving offences.

The Tribunal's decision

13 After having set out some background matters and summarised some of the evidence before it, the Tribunal identified the relevant statutory provisions and acknowledged that it was bound to apply ***Direction*** *No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*, a direction made by the Minister under

s 499 of the Act. The Tribunal identified the applicable principles as mandated by the Direction, including the four "Primary Considerations" and the "Other Considerations" that it was bound to take into account and weigh in reaching its decision.

14 The Tribunal proceeded to consider each of the "primary" and "other" considerations in turn and to ascribe a certain descriptor of weight to them, identifying whether in each case that was in favour of or against revocation of the visa cancellation.

15 In respect of primary consideration 1, being the protection of the Australian community from criminal or other serious conduct, the Tribunal analysed the nature and seriousness of the appellant's criminal conduct in detail, as well as the risk to the Australian community should he commit further offences or engage in other serious conduct. That entailed considering the nature of the harm should the appellant engage in further criminal or other serious conduct and the likelihood of him engaging in such conduct. During the course of that consideration, the Tribunal stated the following (which is reproduced here because of its significance to the Minister's argument on the appeal):

> 65. I find the nature of the harm that would be caused if the [appellant] reoffended to be so serious that any risk that it may be repeated may be unacceptable, bearing in mind that paragraph 5.2(5) of the Direction provides that the inherent nature of conduct such as family violence is so serious that even strong countervailing considerations may be insufficient in some circumstances.

16 Ultimately, the Tribunal concluded that primary consideration 1 "mitigates heavily against the revocation".

17 In respect of primary consideration 2, being whether the conduct engaged in constituted family violence, the Tribunal found that the appellant has continually and frequently perpetuated violence against domestic partners. The Tribunal found that the consideration "weighs very heavily against revocation".

18 In respect of primary consideration 3, being the best interests of minor children in Australia, the Tribunal made a number of findings with regard to the appellant's minor children and his relationship with them, and concluded that it is in the best interests of the appellant's children to have the cancellation order revoked. On that basis, the Tribunal stated that it placed "significant weight" on this consideration.

19 In respect of primary consideration 4, being the expectations of the Australian community, the Tribunal concluded that it "weighs heavily against the revocation".

20 Moving on to the "other considerations", the Tribunal found that other consideration (a), being Australia's international non-refoulement obligations, is not relevant.

21 In respect of other consideration (b), being the extent of impediments likely to be faced by the appellant if he was removed from Australia, the Tribunal concluded that that factor is of "moderate weight supporting revocation".

22 The Tribunal found that other consideration (c), being the impact on victims of the appellant's criminal behaviour of a decision to revoke the visa cancellation, to be of "moderate weight supporting revocation". That was because the appellant's partner gave persuasive evidence that she wishes the appellant to remain in Australia to help with their children's upbringing.

23 In respect of other consideration (d), being the appellant's links to the Australian community, the Tribunal placed "moderate weight" on the strength, nature and duration of his ties to Australia. It decided to place no weight on the consideration of any impact on Australian business interests.

24 That last-mentioned conclusion with regard to business interests is in paragraph [112] of the Tribunal's reasons. Thereafter the following appears:

> **Findings: Other Considerations**
>
> The application of the Other Considerations in the present matter can be summarised as follows:
>
> (a) international non-refoulement obligations: no weight;
>
> (b) extent of impediments if removed: moderate weight;
>
> (c) impact on victims: moderate weight; and
>
> (d) links to the Australian community including the strength, nature, and duration of ties to Australia; moderate weight; and the impact on Australian business interests; no weight.
>
> **CONCLUSION**
>
> 113. I am now required to weigh all of the Considerations in accordance with the Direction:
>
> (a) **Primary consideration 1: protection of the Australian community**
>
> For the reasons outlined above, I place considerable weight upon this consideration mitigating against revocation.

(b) **Primary consideration 2: family violence**

I also place considerable weight upon this consideration weighing against revocation because of the nature of the family violence offences committed against both his current partner and at least one former partner, including breaching the conditions of FVOs.

(c) **Primary consideration 3: the best interests of minor children in Australia**

I have found the revocation would be in the best interests of the Applicant's children, and I place significant weight upon this consideration.

(d) **Primary consideration 4: the expectations of the Australian community**

For the reasons outlined above I find this consideration weighs strongly against revocation especially bearing in mind the community's attitude towards those who commit offences involving domestic violence.

114. The Application of the Direction therefore favours the non-revocation of the cancellation of the Applicant's visa.

115. Consequently, I do not exercise the discretion to revoke the cancellation of the Applicant's visa.

Significant aspects of the Direction

25 Section 6 of the Direction states that a decision-maker "must take into account the considerations identified in sections 8 and 9, where relevant to the decision". Sections 8 and 9 are the sections setting out the "primary considerations" and the "other considerations" respectively.

26 Section 7 of the Direction is headed "Taking the relevant considerations into account" and says:

(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.

(2) Primary considerations should generally be given greater weight than the other considerations.

(3) One or more primary considerations may outweigh other primary considerations.

27 Therefore, the Direction requires greater weight to be given to primary considerations unless there is some reason why that general approach should not be adopted. Further, the Direction does not confine the decision-maker to the primary and other considerations. It follows that part of the task for a decision-maker in complying with the Direction is to evaluate whether it

is appropriate for a consideration that is not a primary consideration to be given greater weight than one or more primary considerations. In addition, when evaluating whether there is "another reason" to revoke a visa cancellation in the exercise of the power conferred by s 501CA(4), the decision-maker must evaluate whether one or more primary considerations outweighs other primary considerations.

28 In consequence, compliance with the Direction is not achieved by focussing upon individual considerations and attributing some form of "weight" to that consideration viewed in isolation. The real burden of the task to be undertaken by a decision-maker who must comply with the Direction is to bring together the considerations as part of a single evaluation of their relative significance thereby weighing them all together. A task of that kind cannot be performed by fragmenting the consideration into an evaluation of individual considerations, attributing to each of them some form of individual abstract term purporting to be a measure of their significance, and then aggregating by some form of calculus each of those individual assessments. To undertake the task in that manner is not to comply with the Direction.

The primary judgment

29 The primary judge identified that the appellant contended before his Honour (1) that the Tribunal failed to have regard to the mandatory relevant considerations in that it failed to have regard to "other considerations" identified in the Direction, and (2) that it failed to give active intellectual consideration to the task of balancing the mandatory relevant considerations it was required to take into account.

30 In a detailed and careful judgment, his Honour concluded with regard to the first ground of review that the Tribunal's reasons, when considered as a whole, do not reveal a failure to take into account the relevant other considerations as required by the Direction. With regard to the second ground, his Honour concluded that although the manner in which the Tribunal expressed its evaluation of the relevant considerations was "perfunctory" and could have been better explained, he was not satisfied that there was a sound basis upon which it could be inferred that the Tribunal adopted a mechanical approach lacking intellectual engagement. The primary judge considered that the fact that the Tribunal identified and evaluated the primary and other considerations, and ascribed relative weight to those various relevant considerations throughout its reasons, indicated that the Tribunal engaged in the required balancing exercise.

31 For those reasons, the primary judge dismissed the application for judicial review of the Tribunal's decision.

The grounds of appeal

32 The appellant contends that his Honour erred in failing to find that the decision of the Tribunal is vitiated by jurisdictional error on one or more of the following two grounds:

(1) The Tribunal failed to consider the "other considerations" as required by the Direction; and

(2) The Tribunal failed properly to balance the relevant considerations to decide whether or not to exercise the s 501CA(4) discretion.

Consideration

33 Where the decision-maker undertaking the statutory task under s 501CA(4) is a delegate of the Minister or the Tribunal, the decision-maker must comply with the Direction: s 499 and *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 19 at [6]-[7] (noting that if the relevant direction exceeds the authority conferred by s 499 because it requires an approach that would not conform to the nature of the particular power being performed or exercised – in this case the formation of the state of satisfaction for the purposes of s 501CA(4) – then it may be an error to conform with its terms).

34 This case is not about how the decision maker must engage with the non-citizen's representations, as was considered in *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; 400 ALR 417 at [21]-[27]; it does not concern whether the appellant's *representations* were considered, or were adequately considered, but whether the *requirements* set out in the Direction to take into account the considerations identified in the Direction where relevant to the decision were met. As explained above (at [27]-[28]), in order to meet the requirements of the Direction, the Tribunal had to undertake a process of balancing the different considerations, or evaluating them against and in comparison to each other, in order to arrive at a decision whether there is "another reason" to revoke the cancellation.

35 The balancing process is directed to determining whether there is "another reason" why the visa cancellation should be revoked. It requires an identification of the matters that may constitute "another reason" and bringing to bear the considerations that the Direction requires the Tribunal to take into account where relevant in determining whether or not the Tribunal is satisfied that there is another reason (or reasons) to revoke the visa cancellation. Some of the considerations set out in the Direction, where relevant, may weigh in favour of revocation, and so may constitute "another reason" capable of supporting the state of satisfaction required in

order for revocation under s 501CA(4)(b)(ii) to occur. But whether they do qualify as a reason of that kind will need to be assessed in the context of different considerations set out in the Direction which may weigh against revocation, where relevant. That is why it is appropriate to describe it as a process of weighing and balancing. But to go beyond that to treat the Direction as mandating some sort of calculation of the net weight to be given to the considerations on each side is to lose sight of the ultimately evaluative nature of the statutory task.

36 In the present matter, the Tribunal identified and considered, in varying detail, each of the primary and other considerations mandated by the Direction. It did so, in each case, with reference to the factual findings that it made on the evidence before it. In those circumstances, the first ground of appeal must fail. That is to say, the primary judge was correct to conclude that each of the mandatory considerations was considered and weight was ascribed to them as required by the Direction.

37 The same cannot be said for the second aspect of the Tribunal's task, namely to evaluate the different considerations in relation to each other in a balancing exercise in order to reach the ultimate conclusion. It is apparent from the concluding paragraphs of the Tribunal's reasons (quoted at [24] above) that having undertaken the first aspect of the task, the Tribunal proceeded merely to conclude that the Direction "therefore" favours the non-revocation of the cancellation. There was no express evaluation or balancing; the reasons given do not disclose any process of reasoning which led from the attachment of weight to each consideration, as part of the first aspect of the task, to the ultimate conclusion.

38 The primary judge rightly described the Tribunal's reasons in this regard as perfunctory. They can also be described as formulaic. They do not disclose that there was any process by which the Tribunal grappled with the competing considerations, each of which had been ascribed a different descriptor of weight and some of which had the status of being "primary" considerations and others not, in order to bring them to bear in forming a state of satisfaction as to whether there was "another reason" to revoke the cancellation. The statutory task is not fulfilled by ascribing a descriptor of weight, such as "strong", "significant", "considerable" or "moderate" (in favour of or against revocation) to the different considerations, primary and other, and then stating a conclusion as if that conclusion was made inevitable by the application of a mathematical formula.

39 The Minister submits that to conclude that the Tribunal did not balance and evaluate the various considerations in relation to each other is to impermissibly approach the Tribunal's reasons with an eye too finely attuned to error. The Minister submits that, read as a whole, the reasons reveal that the Tribunal properly understood the task conferred upon it with reference to the Direction and considered in detail the appellant's representations from which it should be inferred that it executed its task in the absence of express error in its reasoning. In that regard, the Minister places particular emphasis on paragraph [65] of the Tribunal's reasons (quoted at [15] above), submitting that it is to be inferred that the Tribunal reasoned that countervailing considerations identified by it (namely the interests of minor children, impediments if removed and impact on victims) were insufficient to displace a preliminary conclusion expressed in that paragraph that the nature of the harm that would be caused if the appellant reoffended is so serious that any risk that it may be repeated may be unacceptable.

40 The difficulty with that submission is that paragraph [65] of the Tribunal's reasons does not purport to express a preliminary view, and there is no sense in which such a preliminary view, even if it had been expressed, was subsequently explained or expressed as having been confirmed. The paragraph in question expresses a finding that the nature of the harm that would be caused if the appellant reoffended is so serious that any risk that it may be repeated *may* be unacceptable. It then paraphrases a particular paragraph of the Direction which states, in effect, that in any particular case even strong countervailing considerations may be insufficient to outweigh such a risk of harm in reaching a decision with regard to revocation. That is not the expression of a preliminary view or conclusion with regard to the risk being of such a nature in this particular case, and there is no subsequent consideration in the Tribunal's reasons of whether such a risk is outweighed by countervailing considerations.

41 Some emphasis was placed in argument on both sides of the case on the structure of the Tribunal's reasons, and in particular on the significance, if any, of the unnumbered paragraph following paragraph [112] and the headings preceding and succeeding that paragraph. In that regard, just what the decision-maker did may be "a matter of inference to be drawn in particular from … the structure, tone and content of the decision-maker's reasons"; what is required is "a qualitative assessment" of whether the decision-maker has, as a matter of substance, fulfilled the statutory task: *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [89] per Middleton, Moshinsky and Anderson JJ.

42 It is to be observed in this case that the Tribunal's reasons are structured in accordance with a three-tier system of headings. Consideration of each of the primary considerations was dealt with under the first tier represented by headings that are capitalised and emboldened. The "other considerations" were dealt with under a single first tier heading "OTHER CONSIDERATIONS" and second tier sub-headings for each other consideration. The heading "Findings: Other Considerations" which appears immediately before the unnumbered paragraph following [112] is such a second tier sub-heading. Both because of that matter of structure and from its content, the unnumbered paragraph is apparently deliberately located within the section of the reasons dealing with the other considerations.

43 It is only thereafter that the first tier heading "CONCLUSION" is given. It is in that concluding section that the dispositive reasoning of the Tribunal is to be found. Because the Tribunal recognised in paragraph [113] that it was required to weigh "*all* the Considerations" (emphasis added), and because it had expressly gone through the process of considering each of the "other considerations in turn", as explained above, it cannot be concluded that the Tribunal failed to *consider* the "other considerations". However, there is nothing in the concluding section of the Tribunal's reasons, or indeed anywhere, which reveals any process of balancing and evaluation. Nor is there anything which demonstrates that in reaching its ultimate conclusion, the Tribunal brought to bear its assessment of the weight of the various "other considerations". After summarising, and rephrasing, its earlier ascription of descriptors of weight to each of the primary considerations, the Tribunal then simply concluded in paragraphs [114] and [115] by use of the words "therefore" and "consequently" that the visa cancellation should not be revoked. Such a conclusion does not inevitably or necessarily follow from those unexplained, un-balanced and un-weighed descriptors of weight; it may be that such a conclusion is justified by what preceded it but it is not apparent that the Tribunal undertook the required process of evaluation in order to reach its decision. It is not even apparent that the Tribunal considered that the weight of all the primary considerations were compelling against revocation of the cancellation of the visa, since it placed "significant weight" on one of those considerations, the interests of minor children, as favouring revocation.

44 The Minister submits that the Tribunal undertook the required task of balancing and evaluation by asking the rhetorical question, "What did the Tribunal do in reaching its conclusion not to revoke the cancellation of the visa if not an evaluation and balancing of the various factors to which it had ascribed weight in order to undertake exactly that task?". There is no obvious or necessary answer to that rhetorical question, which therefore deprives it of any rhetorical force.

The Tribunal must be taken at its word. What it did, on the face of its reasons, is ascribe weight to the various considerations having considered each in isolation and then express a conclusion without demonstrating that it actually weighed the various considerations against each other and undertook a proper evaluation of whether there was indeed "another reason" why the cancellation should be revoked. That amounts to a failure to undertake the statutory task.

Conclusion

45 For those reasons, the appeal succeeds on the second ground. The parties accept that the costs should follow the event.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Colvin, Stewart and Jackson.

Associate: 

Dated: 22 August 2023