FEDERAL COURT OF AUSTRALIA

DKXY v Minister for Home Affairs [2019] FCA 495

Review of:	Application for judicial review of *DKXY and Minister for Home Affairs (Migration)* [2018] AATA 3779 (10 October 2018)
File number:	NSD 2048 of 2018
Judge:	**GRIFFITHS J**
Date of judgment:	11 April 2019
Catchwords:	**MIGRATION** – application for judicial review of a decision by the Administrative Appeals Tribunal (**AAT**) to affirm the Minister's delegate's decision not to revoke mandatory cancellation of the applicant's Class CD Subclass 851 Resolution of Status visa under s 501CA(4) – whether there was "another reason" for revoking mandatory cancellation of the visa – where the applicant fled North Korea more than 20 years ago – whether the AAT erred in adopting the reasoning in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [75]-[77] (***YNQY***) that the primary consideration of the expectations of the Australian community in Direction 65 always weighed against revocation – whether the AAT misunderstood or misconstrued its controlling rules by making a finding that it did not need to assess the applicant's protection claims and Australia's non-refoulement obligations because the applicant had the opportunity to apply for a protection visa at which time those claims could be substantively considered – whether s 36(3) of the *Migration Act 1958* (Cth) may prevent substantive consideration of the applicant's protection claims under ss 36(2)(a) or 36(2)(aa) in circumstances where the applicant may be able to seek enter and reside in South Korea **ADMINISTRATIVE LAW** – whether the AAT failed to respond to a substantial and clearly articulated argument with respect to the operation of s 36(3) resulting in a breach of procedural fairness – whether there was irrationality or illogicality in the AAT making statements that it was not satisfied that Australia owed protection obligations to the applicant and that it was bound by the relevant reasoning in *YNQY* and then proceeding to assess the applicant's claims on the assumed basis that protection obligations were owed and that it was entitled to examine the totality of the

	applicant's circumstances in applying the primary consideration of the expectations of the Australian community – whether findings by the AAT that it was not satisfied that the applicant continued to be of interest to the North Korean authorities lacked rational foundation or an evident or intelligible justification in light of the country information adduced by the applicant before the AAT
Legislation:	*Migration Act 1958* (Cth) ss 36, 499, 501
Cases cited:	*Ali v Minister for Immigration and Border Protection* [2018] FCA 650 *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; 248 FCR 456 *Burton and Minister for Home Affairs* [2018] AATA 1313 *DPI17 v Minister for Home Affairs* [2019] FCAFC 43 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 214 CLR 496 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 92 ALJR 780 *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158 *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 *Neilson v Overseas Projects Corporation of Victoria* [2005] HCA 54; 223 CLR 331 *Robertson and Minister for Home Affairs (Migration)* [2019] AATA 164 *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; 248 FCR 296 *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 162 ALD 13 *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466
Date of hearing:	4 April 2019
Registry:	New South Wales
Division:	General Division
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Category:	Catchwords

Number of paragraphs:	49
Counsel for the Applicant:	Dr J Donnelly and Mr J Adamopoulos
Solicitor for the Applicant:	Kyu & Young Lawyers
Counsel for the Respondents:	Ms R Francois
Solicitor for the Respondents:	Sparke Helmore Lawyers

ORDERS

NSD 2048 of 2018

BETWEEN:	**DKXY** Applicant
AND:	**MINISTER FOR HOME AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
JUDGE:	**GRIFFITHS J**
DATE OF ORDER:	**11 APRIL 2019**

THE COURT ORDERS THAT:

1. The originating application filed on 2 November 2018 be dismissed.

2. The applicant pay the costs of the first respondent, as agreed or assessed.

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

REASONS FOR JUDGMENT

GRIFFITHS J:

1 The applicant seeks judicial review of a decision dated 10 October 2018 of the Administrative Appeals Tribunal (**AAT**). The AAT affirmed a decision dated 18 July 2018 by a delegate of the Minister not to revoke the mandatory cancellation of the applicant's Class CD Subclass 851 Resolution of Status visa under s 501(3A) of the *Migration Act 1958* (Cth) (the ***Act***).

2 For the reasons that follow, the originating application will be dismissed, with costs.

Summary of background facts

3 The applicant is a national of North Korea. He was born in May 1967. He has lived in Australia for over 20 years. In around 1987 he fled North Korea to the People's Republic of China (**China**). He claims to have spoken out against the administration and government in North Korea before he fled. He spent six years in China before he hid in a cargo ship which brought him to North Queensland in about 1993, when he was aged about 25 or 26. He subsequently moved to Sydney where he worked as a kitchen hand in various restaurants. In around 1999 the applicant was detained by the Department of Immigration as an unlawful non-citizen. In 2001, he was granted a temporary protection visa and released from detention. He then worked as a tiler, welder and labourer. He also married for the first time. In August 2008, the applicant was convicted of the "supply of a prohibited drug" and was sentenced to imprisonment for a term of 2 years and 3 months. He was released on parole on 2 January 2009. In 2012, he married his second wife. At that time he was working as a professional golf coach in Australia. He and his second wife returned to China in 2013. His second wife miscarried while they were in China. He returned to Australia alone in November 2013. His wife remained behind in China because of visa issues.

4 When he returned to Australia from China, the applicant said that he increased his use of the drug "ice", which was costing him approximately $500-$600 per day. He ascribed his drug use to depression stemming from his wife's miscarriage and the loss of contact with his family since fleeing North Korea in 1987. He said that because he was not working then, he obtained money by selling drugs. In June 2015, he was convicted of the offence of "supply prohibited drug" and was given a six year sentence. This led to the cancellation of his visa on 17 May 2017.

5 It should also be noted that the applicant was given a formal warning by the Department in January 2009 that further offending by him might affect his residence in Australia. The applicant acknowledged the warning in writing.

6 One further relevant fact should be noted. As was acknowledged by the AAT, the applicant had previously held a temporary protection visa, a criterion for which was that he was a person to whom Australia owed protection obligations under the Convention relating to the Status of Refugees.

The AAT's reasons for decision summarised

7 It not being in dispute that the applicant did not pass the character test as defined in s 501 of the *Act*, the AAT identified the relevant issue before it as to whether there was "another reason" why the mandatory cancellation decision should be revoked. The AAT acknowledged that this required it to examine and weigh the matters for and against revoking that decision, while noting that it was bound by the relevant terms of Direction No 65 (the **Direction**), which had been issued by the Minister under s 499 of the *Act*. The AAT summarised the relevant parts of that Direction, including the reference in cl 13 of Pt 7 thereof which identified the following considerations as "primary considerations":

(a) protection of the Australian community from criminal or other serious conduct;

(b) the best interests of minor children in Australia; and

(c) expectations of the Australian community.

8 It is apt to set out the following relevant paragraphs from the Direction:

> **6.2 General Guidance**
>
> (l) The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The principles below are of critical importance in furthering that objective, and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable.
>
> (2) In order to effectively protect the Australian community from harm, and to maintain integrity and public confidence in the character assessment process, decisions about whether a non-citizen's visa should be refused or cancelled under section 501 should be made in a timely manner once a decision-maker is satisfied that a non-citizen does not pass the character test. Timely decisions are also beneficial to the client in providing certainty about their future.
>
> (3) The principles provide a framework within which decision-makers

should approach their task of deciding whether to refuse or cancel a non-citizen's visa under section 501, or whether to revoke a mandatory cancellation under section 501CA. The relevant factors that must be considered in making a decision under section 501 of the Act are identified in Part A and Part B, while factors that must be considered in making a revocation decision are identified in Part C of this Direction.

6.3 Principles

(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.

(2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.

(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.

(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.

…

8. Taking the relevant considerations into account

(l) Decision-makers must take into account the primary and other considerations relevant to the individual case. There are differing considerations depending on whether a delegate is considering whether to refuse to grant a visa to a visa applicant, cancel the visa of a visa holder, or revoke the mandatory cancellation of a visa. These different considerations are articulated in Parts A, B and C. Separating the considerations for visa holders and visa applicants recognises that non-citizens holding a substantive visa will generally have an expectation that they will be permitted to remain in Australia for the duration of that visa, whereas a visa applicant should have no expectation that a visa application will be approved.

(2) In applying the considerations (both primary and other), information

and evidence from independent and authoritative sources should be given appropriate weight.

(3) Both primary and other considerations may weigh in favour of, or against, refusal, cancellation of the visa, or whether or not to revoke a mandatory cancellation of a visa.

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

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

PART C

13. Primary considerations - revocation requests

…

(2) In deciding whether to revoke the mandatory cancellation of a non-citizen's visa, the following are primary considerations:

a) Protection of the Australian community from criminal or other serious conduct;

b) The best interests of minor children in Australia;

c) Expectations of the Australian community.

…

13.3 Expectations of the Australian community

(l) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the mandatory visa cancellation of such a person. Non-revocation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not hold a visa. Decision-makers should have due regard to the Government's views in this respect.

…

9 In its reasons for decision, after describing the nature of the applicant's offending as serious, the AAT said at [25] that it viewed as significant that, in January 2009, the applicant had been given a formal warning from the Department. Despite the applicant's claim that he was now reformed and no longer using drugs and that his risk of reoffending was "negligible", the AAT found that this risk was greater than "negligible". It also found that, should the applicant re-offend, the risk to the Australian community "is significant, given the serious nature of the offences" (at [29]).

10 Since the applicant had no children in Australia, that primary consideration was not relevant.

11 As to the third primary consideration (concerning expectations of the Australian community), the AAT viewed as important that cl 13.3 of the Direction obliged it to have "due regard to the Government's views" regarding the expectation of the Australian community that non-citizens should obey Australian laws while in Australia. It is desirable to set out [32] and [33] of the AAT's reasons for decision as they are relevant to Ground 1 in this proceeding. Those paragraphs are as follows (without alteration):

> 32. The applicant argues that the nature and extent of offending, while significant, is not the only consideration for the Tribunal. The applicant acknowledges the reasoning in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 but states that this decision was clearly wrong and should not be followed. The applicant argues that, having regard to the wording of Direction 65, and by reference to a number of Tribunal decisions, that other considerations can be taken into account. The applicant refers to *The Trustee for the Fuzzy Events Unit Trust v Minister for Home Affairs* [2018] AAT 3273, where Stevenson J found that a broader consideration of the applicant's circumstances is warranted under the Directions. In particular, the applicant argues that the totality of his circumstances must be considered for the purpose of this aspect of the Direction and that consideration of the expectations of the Australian community must be made by reference to the community that is 'fair minded and mature' (*Do and Minister for Immigration and Border Protection* [2016] AATA 390 at [23]) and an 'informed, reasonable member of the Australian community rather than a member of the Australian community who is only prepared to consider the punitive aspects of the power' (*Waits and MIMIA* [2003] AATA 1336 at [36]).
>
> 33. The Tribunal considers the reasoning in *YNQY* to be binding. However, the Tribunal is also of the view that Direction 65 allows for consideration of the broad range of the noncitizen's circumstances when assessing the expectations of the community.

12 The AAT then proceeded to consider what it described as "the totality of the applicant's circumstances" under the rubric of "expectations of the Australian community". These circumstances included the nature of the applicant's offending, the warning he was given in January 2009, his re-offending, the time he had spent in Australia and his ties here, the difficult circumstances in which he fled North Korea, his concern for his family's safety and the effect that had on his health and wellbeing. At [37], the AAT acknowledged that there were some factors which weighed in the applicant's favour when considering community expectations:

> 37. The Tribunal considers that there are some factors which weigh in the applicant's favour when considering community expectations. Despite these, the Tribunal is of the view that the Australian community does not expect people to repeatedly engage in serious criminal behaviour. This is particularly so when the applicant had already been warned that his visa may be cancelled and he had been given an opportunity to remain in Australia despite his earlier offences. He was fully cognisant of the consequences of his conduct and expectations of the community in relation to his conduct.

13 At [39], the AAT made clear that it accepted that the Australian community might favourably view the applicant's personal circumstances, but it also found that the applicant's criminal history would not meet Australian community expectations:

> 39. … The Tribunal does not consider that the Australian community would expect the applicant to hold a visa in circumstances where he had committed an offence, expressed remorse about his conduct and was warned about the consequences of future misconduct but continued to offend. The Tribunal finds that the applicant's conduct does not meet Australian community expectations.

14 The AAT then turned its attention to other considerations, as required by the Direction. These included international *non-refoulement* obligations. The AAT stated at [40] that it was bound to give effect to Direction No 75, which came into effect on 6 September 2017 in response to the Full Court's decision in *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; 248 FCR 456 (***BCR16***).

15 After referring to Flick J's decision in *Ali v Minister for Immigration and Border Protection* [2018] FCA 650 (***Ali***), the AAT found at [47] that, for the purposes of its decision, Australia's *non-refoulement* obligations would not be breached as a result of the mandatory visa cancellation not being revoked because "the applicant has the opportunity to make another visa application which would allow for the assessment of his claims and Australia's obligations".

16 Significantly, however, the AAT stated that if it was wrong and there was a broader obligation for it to consider *non-refoulement* obligations arising from the visa cancellation, the AAT turned its attention to whether such obligations arose and their effect. In this context, and on an assumed basis only, the AAT took into account that the applicant had previously held a temporary protection visa, which signified an acceptance that he may be at risk of harm upon return to North Korea. The AAT made the following statement at [53]:

> 53. Giving the applicant the benefit of the doubt, and only for the purpose of the present application, the Tribunal is prepared to accept that the applicant may have a genuine fear of returning to his home country. The Tribunal accepts, for the purpose of this review only and without a thorough assessment of the applicant's claims, that there may be some risk that the applicant may be harmed upon return to North Korea because of his past activities. For these reasons, the Tribunal accepts that Australia may owe protection obligations to the applicant and that Australia's non-refoulement obligations are engaged. This provides a strong reason in favour of revoking the cancellation.

17 At [60] the AAT responded to the applicant's claim that it might not be possible to remove him to North Korea because of Australia's *non-refoulement* obligations and that he might be subject to indefinite detention here as an unlawful non-citizen. The AAT said that unless the applicant

was granted another visa, there was "a real possibility that the applicant will be detained for a very lengthy period of time" and that this would be likely to cause him severe hardship. The AAT stated at [61] that this weighed "heavily in favour of revoking the cancellation" decision.

18 The AAT's ultimate conclusions are reflected in [62]-[64] of its reasons for decision:

> 62. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal acknowledges that the applicant has been living in Australia for many years, is settled in Australia and has formed some ties. The Tribunal accepts that if the applicant were to be removed to his home country of North Korea, there will be significant impediments to the applicant for a variety of reasons. The Tribunal places very significant weight on the fact that the applicant may face harm upon entering North Korea and that Australia's nonrefoulement obligations are engaged. An alternative to the applicant's removal may be lengthy or even indefinite detention which would cause significant hardship to the applicant. The Tribunal considers there are strong reasons why the cancellation should be revoked.
>
> 63. Against these considerations, the Tribunal has formed the view that the protection of the Australian community does not favour the revocation. This is because the offences were multiple and of a serious nature. The Tribunal has determined that there is a risk of reoffending, which is greater than a negligible risk. The Tribunal also determined, having regard to the applicant's circumstances, that the expectations of the Australian community would not favour revocation. The Tribunal reached that conclusion while acknowledging that there are many factors which the community may view as being favourable to the applicant. The applicant claims that he should be given a second chance. The Tribunal places weight on the fact that he had been given a chance following his first conviction for the drug offence and was warned about the possibility of his visa being cancelled. Neither that possibility, nor the applicant's expression of remorse and reform following the first conviction, precluded his re-offending.
>
> 64. The Tribunal has formed the view that the protection of the Australian community and community expectations outweigh other considerations. The Tribunal finds that the decision not to revoke the cancellation of the applicant's visa should be affirmed.

The proceedings in this Court

19 The applicant raised the following three grounds of judicial review. The first ground is that the AAT misconstrued or misunderstood the "controlling rules" under which it was operating such that it constructively failed to exercise its jurisdiction or strayed outside its jurisdiction in a way that amounted to jurisdictional error. This ground has the following two limbs:

(a) by adopting Mortimer J's reasoning in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 (***YNQY***) at [76] and [77], the AAT misconstrued or misapplied cl 13.3(1) of Direction No 65; and

(b) in proceeding on the basis that the applicant had an opportunity to apply for another visa which would allow for his protection claims to be considered and determined, the AAT misunderstood the *Act*.

20 The second ground is that there was procedural unfairness because the AAT failed to respond to a "substantial, clearly articulated argument relying upon established facts", namely that the Minister could refuse the applicant a protection visa under s 36(3) of the *Act* on the basis that the applicant had not taken all possible steps to enter and reside in South Korea, with the consequence that the applicant's *non-refoulement* claims might never be reached.

21 The third ground of judicial review is that the AAT's decision was legally unreasonable, because it was "obviously disproportionate, illogical, sufficiently lacking rational foundation or an evident or intelligible justification, lacking common sense and is plainly unjust". This was further particularised by reference to the applicant's claims that the decision was legally unreasonable because the AAT considered Australia's *non-refoulement* obligations in the alternative and made inconsistent findings; the inconsistency implicit in the AAT regarding itself as bound by *YNQY*, but also having regard to the applicant's circumstances in weighing the expectations of the Australian community, and that there was no evidence for the AAT's lack of satisfaction that the applicant was of continuing interest to North Korean authorities.

Summary of applicant's submissions

(a) Ground 1

22 As to the first limb of Ground 1, which relates to *YNQY*, the applicant contended that, in applying the reasoning in that case, the AAT misconstrued or misunderstood cl 13.3 of the Direction because *YNQY* is plainly wrong. The applicant contended that the effect of the relevant reasoning in *YNQY* is that cl 13.3 is to be treated as a deeming provision which will always weigh against revocation of the mandatory cancelation decision. The applicant referred to a series of AAT decisions which have viewed the reasoning in *YNQY* in this fashion (the "**narrow approach**": see for example *Burton and Minister for Home Affairs* [2018] AATA 1313 at [119]-[121] and there are many other similar decisions), as well as a series of other AAT decisions which have not treated cl 13.3 as a deeming provision but rather as dealing with a primary consideration which had to be weighed both internally and with other relevant considerations such that, in an appropriate case, it could favour revocation of a mandatory cancellation decision (the "**broad approach**": see for example *Robertson and Minister for*

Home Affairs (Migration) [2019] AATA 164 at [52]-[58] and there are many other similar decisions).

23 The applicant contended that the broad approach was supported by other aspects of the Direction, particularly cll 8(3), 6.1(3), 6.1(4), 6.3(3) and (4) and 13.3(1)), which indicated that **all** the relevant specific circumstances of the individual's case had to be explored and weighed in determining whether or not to revoke the mandatory cancellation decision. The applicant also contended that the AAT erred in considering that *YNQY* was binding in circumstances where the primary judge's relevant reasoning in that case was merely *obiter*.

24 As to the second limb, which relates to the alleged failure to understand the statutory scheme correctly, the applicant contended that the AAT erred when it stated at [47] of its reasons for decision that Australia's *non-refoulement* obligations would not be breached if the mandatory cancellation decision was not revoked because the applicant had an opportunity to make another visa application the consideration of which would allow for his claims and Australia's *non-refoulement* obligations to be assessed at that time. This was said to be wrong because:

(a) there is no legislative requirement that the Minister first address ss 36(2)(a) or 36(2)(aa) of the *Act* before considering whether s 36(3) was satisfied; and

(b) Direction 75 does not overcome this problem because it does not prevent a protection visa application being refused on the ground that the non-citizen has not taken all possible steps to avail himself or herself of the right to enter and reside in another country, in this instance, South Korea.

(b) Ground 2

25 Citing *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 214 CLR 496 (***Dranichnikov***) at [24] and *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 162 ALD 13 (***Viane***) at [77], the applicant contended that the AAT did not afford him procedural fairness because it failed to respond to a substantial, clearly articulated argument relying on established facts advanced by him, namely that in the light of s 36(3) of the *Act*, any *non-refoulement* claim raised by the applicant in a future protection visa application may never be reached. Although the AAT made certain findings, it did not make any explicit reference to s 36(3), which the applicant claimed gave rise to an inference that the AAT did not adequately address the applicant's argument.

(c) Ground 3

26 Citing the Full Court's decision in *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; 240 FCR 158 (***Eden***) at [58]-[65], the applicant contended that the AAT's decision was legally unreasonable because:

(a) there was a plain inconsistency in the AAT's findings that there was insufficient evidence for it to be satisfied that protection obligations arose at present in relation to the applicant (at [50]), while also finding that the applicant may face harm upon entering North Korea and that Australia's *non-refoulement* obligations were engaged (at [62]);

(b) there were additional inconsistent findings made by the AAT in finding at [50] that the applicant would not be the subject of harm if removed to North Korea, while also finding at [53] and [59] that there may be some risk that the applicant might be harmed upon return to North Korea because of his past activities there; and

(c) the AAT's finding that the applicant had not presented satisfactory evidence that he currently continues to be of adverse interest to North Korean authorities lacked a rational foundation or intelligible justification having regard to the matters the applicant placed before the AAT in support of his contention that he would be at risk of significant harm if removed to North Korea. In the light of all the relevant material bearing upon this issue which was before the AAT, the applicant contended that the AAT's decision did not fall within the range of possible lawful outcomes of the exercise of the power under s 501CA(4)(b)(ii).

Summary of Minister's submissions

27 It is unnecessary to summarise the Minister's submissions because, with two exceptions, they are substantially reflected in the reasons below for rejecting the applicant's judicial review challenge.

Analysis and determination

(a) Ground 1

28 This ground focuses on the correctness of the primary judge's reasoning in *YNQY*, which the AAT described as binding on it. It is desirable to set out [75] to [77] of the primary judge's reasons in *YNQY* (emphasis added in [76] and [77]):

> 75. This consideration can be found in para 13.3 of the Direction, and provides:

> **13.3 Expectations of the Australian community**
>
> (1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the mandatory visa cancellation of such a person. Non-revocation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not hold a visa. Decision-makers should have due regard to the Government's views in this respect.

> 76. In substance this consideration is adverse to any applicant. As the Minister submits, it is inextricably linked to the other primary consideration of protection of the Australian community. In particular, the last two sentences of para 13.3 of the Direction suggest the "expectations" about which it speaks are expectations adverse to the position of any applicant who has failed the character test and been convicted of serious crimes. **In this primary consideration as expressed (and despite the references earlier in the Direction to "tolerance") the Australian community's "expectations" are defined only in one particular way: namely, that the Australian community "expects" non-revocation where a person has been convicted of serious crimes of a certain nature. That is, this is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government of which he or she is member, wish to articulate community expectations, whether or not there is any objective basis for that belief. That is the structure of this part of the Direction.**
>
> 77. I do not consider that even if the applicant is correct to submit that the Tribunal did not undertake the task required of it by the Direction in relation to this consideration, he was deprived of a different outcome because of that failure. **It was inevitable that this consideration would weigh against revocation: that is what it is intended to do (see *Uelese* [2016] FCA 348; 248 FCR 296 at [64]-[66])**.

29 These paragraphs in *YNQY* appear in that part of her Honour's judgment in which she was addressing a contention that the AAT had erred by failing to make findings and/or take into account as a primary consideration the expectations of the Australian community.

30 In my respectful view, her Honour's reasoning in [76] and [77] of *YNQY* would be plainly incorrect if this reasoning is read as stating that the primary consideration of expectations of the Australian community will **always** weigh against revocation. The Minister contended that the reasoning simply reflected the facts in *YNQY* and did not purport to be a construction of Direction 65 as suggesting that the expectations of the Australian community can never weigh in favour of an applicant. The difficulty with the Minister's submission is that the language in *YNQY* at [76] and [77] is not in its terms confined to the circumstances of the particular

applicant there and, on one view, appears to have been intended to have a more general application. The ambiguity of the language is reflected in the division of opinion in the large number of decisions of the AAT in which the language has been viewed inconsistently and as supporting either a broad or a narrow approach to cl 13.1.

31 As the applicant here pointed out, there are numerous statements in Direction No 65 which require the primary consideration of expectations of the Australian community to be assessed in the light of **all** the relevant circumstances which appertain to it and it has to be weighed against all other relevant considerations (while noting that the Direction requires that primary considerations be given more weight than other considerations). In an appropriate case, and depending upon all relevant circumstances, the expectations of the Australian community may not weigh against revocation of the mandatory visa cancellation. Undoubtedly, decision-makers who are bound to give effect to the Direction are required to have due regard to the Government's view regarding community values, standards and expectations, as set out in, for example, cll 6.2 and 6.3 of the Direction, but nothing in the Direction indicates that community expectations will **always** favour non-revocation. Indeed, the totality of the relevant circumstances which bear upon the assessment and weighing of all three primary considerations and other considerations need to be considered, as is made clear in many clauses of the Direction, including those which are referred to in [23] above.

32 I also respectfully disagree with the primary judge's reference at [77] of *YNQY* that Robertson J's reasons for judgment in *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; 248 FCR 296 (***Uelese***) at [64]-[66] supported her Honour's view that it was "inevitable" that the primary consideration of the expectations of the Australian community would weigh against revocation because that is what this primary consideration is intended to do. It is desirable to set out those paragraphs from *Uelese*:

> 64. In my opinion, the reference by the Tribunal to what the Australian community expected of the Australian Government was not a matter that required evidence but was a statement of the views or policy of the Government. The language in paragraph 6.3(2) of the Direction, that the Australian community expects that the Australian Government can and should cancel the visas of non-citizens if they commit serious crimes in Australia, is found in a list of seven "Principles". There is a further reference to the expectations of the Australian community in paragraph 9.3 of the Direction where the statement is made that the Australian community expects non-citizens to obey Australian laws while in Australia. It states that where a non-citizen has breached, or where there is an unacceptable risk that they will breach, this trust or where the non-citizen has been convicted of offences in Australia, it may be appropriate to cancel the visa held by such a person. Visa cancellation may be appropriate, the paragraph

> states, "simply because the nature of the character concerns or offences were such that the Australian community would expect that the person should not continue to hold a visa". The paragraph ends by stating that decision-makers should have due regard to the Government's views in this respect.
>
> 65. This ground of review does not attack the statements in Direction no. 65. In my opinion it is open to the Minister to make a statement of the Government's views as to the expectation of the Australian community and for the Tribunal to act on that statement.
>
> 66. I conclude that there was no jurisdictional error in the statement of the Tribunal, at [109]: "I have no evidence to enable me to determine the expectations of the Australian community in this matter, other than the guidance provided by the Direction itself" or in the Tribunal's consideration of the expectations of the Australian community.

33 These passages are directed to a submission made by the applicant in that case to the effect that the AAT there had no evidence to make the findings that it did regarding the expectations of the Australian community. In rejecting that submission, his Honour said that those expectations were not a matter which required evidence because the Direction itself contained statements concerning the Government's views as to those expectations. There is nothing in these passages from *Uelese* which indicates that a primary decision-maker who is bound to apply the Direction cannot also take into account any material which is before the decision-maker which is relevant to an assessment of this primary consideration. The Government's views have to be taken into account and given "due regard", but so must all other circumstances which are relevant in the particular case. As Robertson J pointed out in the final sentence at [64] of *Uelese*, cl 9.3 of the Direction ends by stating that decision-makers should have "due regard" to the Government's views on Australian community expectations. What amounts to "due regard" will necessarily require attention to be given to all relevant circumstances in the particular case which bear upon a general assessment of Australian community expectations.

34 This does not mean, however, that the AAT fell into jurisdictional error when it described the reasoning in *YNQY* as binding on it. That is because, the AAT then proceeded to adopt and apply the correct approach to cl 13.1, i.e. the broad approach. As mentioned above, the ambiguity of the relevant reasoning in *YNQY* lends itself to either a broad or narrow approach. The AAT did not take the view that the primary consideration concerning expectations of the Australian community inevitably weighed against revocation. Rather, as the AAT expressly acknowledged at [33] of its reasons for decision, consideration had to be given to the broad range of the applicant's circumstances when considering the expectations of the Australian community. The AAT then proceeded to implement that broad approach by reference to the totality of the applicant's circumstances. Accordingly, there is no jurisdictional error (see

Hossain v Minister for Immigration and Border Protection [2018] HCA 34; 92 ALJR 780 at [25] and [30]-[31] per Kiefel CJ, Gageler and Keane JJ; *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 at [45]-[46] per Bell, Gageler and Keane JJ and *DPI17 v Minister for Home Affairs* [2019] FCAFC 43 at [48]-[49] per Griffiths and Steward JJ).

35 As to the second limb of Ground 1, which relates to Australia's *non-refoulement* obligations, this limb substantially overlaps with Ground 2. Accordingly, I will deal with it under the next section of these reasons for judgment.

(b) Ground 2

36 This ground, together with the second limb of Ground 1, concerns the effect of s 36(3) of the *Act* on the consideration of any future protection visa application by the applicant.

37 It is convenient to summarise how this matter was raised in the AAT. At the AAT's invitation, the parties filed further supplementary submissions on 4 October 2018 on the issues of the applicant's eligibility to apply for a temporary protection or Safe Haven Enterprise visa and whether the AAT had a legal obligation to consider *non-refoulement* obligations in light of Flick J's decision in *Ali v Minister for Immigration and Border Protection* [2018] FCA 650 (***Ali***). In the applicant's further supplementary submissions, the AAT's attention was drawn to the terms of s 36(3) which, for convenience, are now set out:

> *Protection obligations*
>
> (3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

38 The applicant then drew attention to Direction 75, which requires a decision-maker who is bound by that Direction to first assess the applicant's refugee and complementary protection claims before considering any character or security grounds (which plainly was intended to overcome the majority decision in *BCR16*). The applicant emphasised that it was significant that Direction 75 was silent about the operation of s 36(3). Accordingly, he submitted that there was nothing to stop the Minister from refusing a protection visa application relying upon s 36(3) and without having to address any *non-refoulement* claims by the applicant in a future protection visa application. It was in this context that in his further supplementary submissions in the AAT the applicant expressly addressed the contention which had first been raised by the Minister that the applicant might have a right to enter and reside in South Korea (i.e. that s 36(3)

might apply). This is reflected in [36] and [37] of the applicant's further supplementary submissions in the AAT (footnote omitted) (emphasis in original):

> 36. Significantly, *Direction 75* says nothing expressly about section 36(3) of the *Migration Act 1958* (Cth). In those circumstances, there is nothing stopping the Minister from attempting to refuse a protection visa application lodged by the Applicant on the basis of s 36(3) of the *Migration Act 1958* (Cth) *without* considering ss 36(2)(a) and 36(2)(aa) at all. Importantly, this is a "live issue" in these proceedings, as the Respondent has raised the issue (both in its 'Statement of Facts, Issues and Contentions' and at the oral hearing) that there is a prospect that the Applicant can be removed to South Korea (citing purported applicable scholarly literature and legislation from South Korea).
>
> 37. In light of the preceding, logically, it may be that any non-refoulement claims raised by the Applicant in a future protection visa application will never be reached. In other words, the Minister may refuse the Applicant's visa under s 36(3) of the *Migration Act 1958* (Cth) on the basis that the Applicant "has not taken all possible steps to avail himself" to enter and reside in South Korea in accordance with the *North Korean Refugees Protection and Settlement Support Act* or otherwise.

39 Contrary to the Minister's submission, I accept the applicant's contention that his argument relating to s 36(3) was sufficiently raised by him so as to attract the principle in cases such as *Dranichnikov* and *Viane*.

40 For the following reasons, however, I reject the applicant's submission that the AAT did not address this argument. Thus there was no procedural unfairness. Although there is no explicit reference in the AAT's reasons to the terms s 36(3), it is plain from [52] of those reasons that the AAT did address the argument and it explained why it concluded that there was a lack of evidence to indicate that the applicant had a right to enter and reside in South Korea (without alteration):

> 52. For the purpose of this review, the Tribunal accepts that the applicant's home country is North Korea. The respondent submits that the applicant may be eligible to travel to South Korea, although he has not made any inquiries in relation to this, and has taken no steps to acquire South Korean nationality. The Tribunal notes that there is nothing at present to indicate that the applicant does have a right to enter and reside in South Korea. Even if he may be able to acquire such a right in the future, it is likely to be dependent on a number of factors which may include consideration of the applicant's criminal convictions. There is no guarantee that the applicant will be granted the right to enter and reside in South Korea. In the Tribunal's view, the mere possibility to acquire such a right in the future is not sufficient.

41 In my view, the contents of [52] are sufficient to demonstrate that the AAT did turn its mind to the possible application of s 36(3), as initially raised by the Minister and to which the applicant responded in his further supplementary submissions. It is axiomatic that "foreign law is a

question of fact to be proved by expert evidence" (*Neilson v Overseas Projects Corporation of Victoria* [2005] HCA 54; 223 CLR 331 at [115] per Gummow and Hayne JJ). Although the AAT is not bound by the rules of evidence, it is a matter for the party seeking to rely on foreign law to adduce evidence upon which the AAT may make factual findings as to the content of the foreign law. In essence, the AAT was not satisfied, on the basis of the evidence before it that the applicant had a right to enter and reside in South Korea, with the effect that it could not be satisfied that s 36(3) had any application in the applicant's circumstances in the context of the particular proceeding before it. There was no procedural unfairness.

42 The passage extracted above at [52] of the AAT's reasons also answers the second limb of Ground 1 of the application for judicial review. As outlined above at [24], this limb argues that the AAT misconstrued or misunderstood its controlling rules by failing to appreciate that s 36(3) of the *Act* might bar substantive consideration of the applicant's protection claims under s 36(2)(a) or 36(2)(aa). This argument is necessarily premised on the applicability of s 36(3) to the applicant's circumstances. As explained in the previous paragraph, to establish the potential application of s 36(3) it was necessary for the AAT to be satisfied that the applicant had a right to enter and reside in South Korea. The AAT's statement that it was not satisfied of this fact implicitly rejected the potential application of s 36(3). In short, the applicant was unable to demonstrate that the AAT's reasons show it misconceived or misunderstood its controlling rules, rather than having rejected the case advanced by the applicant on the evidence before it.

(c) Ground 3

43 The first part of Ground 3 is that it was legally unreasonable for the AAT to make a series of alternative findings concerning Australia's *non-refoulement* obligations. On close analysis, however, the findings identified by the applicant at [27] of his outline of submissions are not inconsistent.

44 Fairly read in accordance with well-established authority, the AAT found that it was not satisfied on the evidence before it that Australia in actual fact owed the applicant protection obligations. Despite this finding, and noting that the applicant had previously been granted a temporary protection visa, the AAT accepted that, if the applicant were to apply for a protection visa in the future, it **might** be found that Australia owed *non-refoulement* obligations. The AAT then reasoned, on the basis of that hypothesis, that Australia's *non-refoulement* obligations weighed heavily in the applicant's favour. There is nothing illogical, irrational or legally unreasonable in this form of reasoning.

45 I reject the applicant's submission that the reasoning is inconsistent with the findings of the AAT in [50] concerning the country information relied upon by the applicant. It is made clear in [51] of the reasons that, notwithstanding the adverse findings made in [50], the AAT reasoned that it should proceed to consider the issue of Australia's *non-refoulement* obligation, not because of the material relied upon by the applicant but because of historical fact that the applicant had previously held a temporary protection visa, which signified an acceptance that he might be at risk of harm if he were returned to North Korea. There is no inconsistency between that approach and the adverse findings made at [50].

46 The second aspect of Ground 3 relates to the AAT considering itself to be bound by the reasoning in *YNQY*, but also having regard to the totality of the applicant's circumstances in assessing and weighing the expectations of the Australian community. This challenge must be rejected, for similar reasons to those given above for rejecting the first limb of Ground 1.

47 As to the third aspect of Ground 3, which raises the question whether the AAT's decision was legally unreasonable by reference to its finding at [50] that the applicant had not presented satisfactory evidence that he is of adverse interest to North Korean authorities either presently or will be in the future, I reject the applicant's submission that the finding lacked a rational foundation or was not reasonably to the AAT on the evidence before. The applicant relied upon various country information in support of this aspect of his claim including a document entitled "Human Rights Watch, World Report 2018 - North Korea". It contained material which described the serious risk of harm faced by North Koreans who were forcibly returned to North Korea by China. It was open to the AAT to state at [50] that such material did not deal with the applicant's particular circumstances. It is true that the same report also contains a statement that "North Koreans fleeing into China should be considered refugees *sur place* regardless of their reason for flight because of the certainty of punishment on return", but again, that statement when read in context plainly refers to North Koreans who flee into China and, unlike the applicant, do not then find their way to a third country. It is to be recalled that the applicant lived in Australian for over 20 years after he left China. I accept the Minister's submission that this particular part of ground 3 effectively invites the Court to engage in an impermissible merits review of the AAT's fact finding. No jurisdictional error has been established.

48 As part of ground 3, the applicant also contended that it was legally unreasonable, on the basis of disproportionality, for the AAT to accept on the one hand that there was a risk that the

applicant may be harmed if returned to North Korea (see at [59]) while ultimately concluding that this consideration was outweighed by other considerations, including those set out at [63] of the AAT's reasons. The applicant submitted that he was at risk of serious harm, including the possibility of execution, with reference to the Human Rights Watch Material referred to above. Again, however, that particular material related to North Koreans who were forcibly returned by China. Those are not the applicant's circumstances. I am not persuaded that the AAT's weighing of the competing considerations is irrational or lacks an intelligible justification. It is to be recalled that the principles of legal unreasonableness acknowledge and give effect to an "area of decisional freedom" vested in decision-makers who exercise statutory discretionary powers (see *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [28] per French CJ and at [66] per Hayne, Kiefel and Bell JJ).

Conclusion

49 For these reasons, the originating application filed on 2 November 2018 will be dismissed, with costs.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Griffiths.

Associate: 

Dated: 11 April 2019