Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2019/7979**
Re:	**Vardana Ashweeni Singh**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Dr N A Manetta**
Date:	20 February 2020
Place:	**Sydney**

The Tribunal sets aside the decision under review and substitutes a decision that the cancellation of the Applicant's visa under section 501(3A) of the *Migration Act 1958* be revoked.

.....[Sgnd].....

Senior Member Dr N A Manetta

Catchwords

MIGRATION – mandatory cancellation of applicant's visa – applicant has substantial criminal record - whether discretion to revoke mandatory cancellation should be exercised- no jurisdiction – decision set aside

Legislation

Migration Act 1958 (Cth)

Migration Amendment (Character and General Visa Cancellation) Bill 2014

Cases

Brown v. Minister for Home Affairs [2018] FCA 1722

Saeed v. Minister for Immigration and Citizenship [2010] HCA 23; 241 CLR 252

SZTAL v. Minister for Immigration and Border Protection [2017] HCA 34; 262 CLR 362

Secondary Materials

Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA, 20 December 2018

REASONS FOR DECISION

Senior Member Dr N A Manetta

20 February 2020

1. This is an application by Ms Vardana Ashweeni Singh, a Fijian citizen, seeking a review of a decision of the Respondent's delegate dated 29 November 2019 not to revoke the cancellation of her visa.[1] The cancellation decision had been taken ostensibly under

[1] A Resident Return (Class BB)(subclass 155) visa.

section 501(3A) of the *Migration Act 1959* on 9 April 2019. At the hearing before me, Dr Donnelly appeared for Ms Singh; Mr Hornsby, for the Respondent.

CRITICAL ISSUE AND STATEMENT OF CONCLUSION

2. Hearing the matter afresh on the evidence adduced before me, I must decide whether the Respondent's delegate's decision should be affirmed or set aside. A jurisdictional question was argued before me that I shall describe in due course. In the circumstances, I have decided that the Respondent's delegate had no jurisdiction under section 501(3A) to cancel Ms Singh's visa in the first place and that the decision not to revoke the cancellation should be set aside for this reason.

3. Given that I might have concluded that the delegate had jurisdiction to cancel the visa, I heard extensive evidence and submissions bearing on the question of whether Ms Singh ought to have the cancellation decision revoked on the merits. In the circumstances, it has not been necessary to decide this question; and, for reasons I shall explain, I do not believe it is appropriate for me to express a view on the question.

4. I set out below the background facts and my reasons for these conclusions.

BACKGROUND FACTS

5. The background facts may be briefly summarised as follows. Ms Singh is a 44-year-old citizen of Fiji. She arrived in Australia as a teenager, at about the age of 14. Her life in Fiji was very troubled. Ms Singh described her life in a statement which was tendered.[2] Her parents divorced when she was four. She lived thereafter with her grandmother and was

[2] Exhibit A1.

eventually sent to live with an aunt and uncle in Suva. She suffered emotional distress when she was separated from her father and mother.

6. She also referred in her statement to the abuse she suffered as a child in Fiji. She was physically mistreated by her aunt and was ostracised from meals: she was often required to sit on the floor away from her cousins. She was sexually abused by a relative of her uncle. She also suffered the trauma of her sister's suicide.

7. Ms Singh indicates in her statement that with a very unhappy and disturbed childhood behind her, she had hoped her migration to Australia in 1989 would be the beginning of a happier stage in her life. Unfortunately, her mother sent her to live with an elderly man who sexually assaulted her on many occasions, apparently with her mother's knowledge.

8. Between 1990 and 1994, Ms Singh attended high school in Sydney. She left in year 11. She first obtained a traineeship at Woolloomooloo in the beverage-service industry. Between 1995 and 2000 she had jobs in factories. In 2001 she married a man (by arrangement through her grandmother). She had two children with him. Although she said in her oral evidence that he was not a bad man, she also said that she never really loved him. She left her husband in 2013. She is presently in a relationship with an Australian citizen to whom she says she is very committed.

9. Ms Singh has accrued a very large number of convictions in Australia.[3] Her first offences occurred when she was 18. She received fines on this occasion. She has multiple convictions from 1998 onwards for what might be called "dishonesty offences" and for the possession of drugs. In the circumstances, I need not set the convictions out.

[3] These are set out in Exhibit R1 at pp 33-40.

10. She has many driving convictions as well. The first occurred in 2004, where she was fined for negligent driving and disqualified for six months. In 2009 and 2010 she was convicted of a number of "driving-while-disqualified" offences. In 2012, there was a further offence involving driving with a middle-range "PCA" (or prescribed concentration of alcohol), which led to two years' disqualification.

11. Of particular importance to the application before me is a conviction in 2017. On 18 January of that year, Ms Singh was sentenced to 12 months' imprisonment with a four-month non-parole period for driving a motor vehicle during a disqualification period. On appeal, the sentence was suspended with immediate effect on 3 February 2017. Ms Singh was also in jail at this time for certain shoplifting offences.

12. Ms Singh's visa was cancelled mandatorily on 31 January 2017 under section 501(3A) because the delegate considered the threshold conditions for the cancellation of her visa had been fulfilled. On this occasion, Ms Singh made representations to the delegate requesting revocation of the mandatory cancellation decision, and she was successful. The cancellation of her visa was revoked.

13. In 2019, Ms Singh was convicted again of driving a motor vehicle during a disqualification period. She was sentenced to eight months' imprisonment and was required to serve a four-month non-parole period. During Ms Singh's time in prison, the Minister's delegate cancelled her visa under section 501(3A) for a second time. Ms Singh made representations to the Minister but these were rejected. At this point, Ms Singh appealed to this Tribunal.

JURISDICTIONAL QUESTION

14. Dr Donnelly raised a threshold jurisdictional question. He submitted there was no jurisdiction under section 501(3A) to cancel Ms Singh's visa in 2019. Dr Donnelly submitted that the Minister's delegate was unable in law to rely on the 2017 conviction because a delegate had already relied on it once before when cancelling Ms Singh's visa in 2017. The power in s501(3A) was "spent", so to speak, in respect of the 2017 conviction.[4] He submitted that as there was no other conviction on which the delegate could validly rely, there was no jurisdiction in the delegate to take action under s 501(3A).

15. I agree with Dr Donnelly's submission that there was no jurisdiction under section 501(3A) authorising the Minister's delegate to cancel Ms Singh's visa. I differ, however, from Dr Donnelly in my reasons for concluding that there was no jurisdiction. It will be sufficient if I explain my reasons without setting out and discussing Dr Donnelly's argument.

16. I set out section 501, subsections (1) to (5):

> *Decision of Minister or delegate- natural justice applies*
>
> *(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.*
>
> *Note:* ***Character test*** *is defined by subsection (6).*
>
> *(2) The Minister may cancel a visa that has been granted to a person if:*
>
> *(a) the Minister reasonably suspects that the person does not pass the character test; and*
>
> *(b) the person does not satisfy the Minister that the person passes the character test.*

[4] Dr Donnelly supported his submission by reference to the decision in *Brown v. Minister for Home Affairs* [2018] FCA 1722.

Decision of Minister- natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test;

and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(3A) The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

(3B) Subsection (3A) does not limit subsections (2) and (3).

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3) or (3A).

(6) …

…

17. A so-called “character test” is referred to in section 501, and it is elaborated at some length in subsection (6), which I have not set out. I note that under paragraph (6)(a), a person does not pass the test where he or she has a “substantial criminal record” as defined by subsection (7). This is only one of various ways in which a person may not pass the test.

18. Subsection (7) sets out the ways a person is taken to have a “substantial criminal record”. I need set out only the first four paragraphs ((a) to (d)):

> *(7) For the purposes of the character test, a person has a **substantial criminal record** if:*
>
> *(a) the person has been sentenced to death; or*
>
> *(b) the person has been sentenced to imprisonment for life; or*
>
> *(c) the person has been sentenced to a term of imprisonment of 12 months or more; or*
>
> *(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or*
>
> *(e) …; or*
>
> *(f) …*

19. When applying subsection (3A) in this case, the Respondent’s delegate acted on the basis that he or she was obliged to take into account Ms Singh’s earlier 2017 sentence of 12 months’ imprisonment and was also bound to take into account the term of imprisonment Ms Singh was serving at the time of his or her decision (albeit for a different offence). The threshold conditions in subsection (3A) having being satisfied in the delegate’s view, he or she cancelled Ms Singh’s visa.

20. The jurisdictional question that arises is whether that was the correct approach. Whether it was the correct approach depends upon the proper construction of subsection (3A). Both text and context are relevant to the process of interpretation in the manner explained

recently by the High Court.[5] I was not referred by either party to decisions directly on point.

21. I commence my consideration of section 501 by noting that there is a *discretion* to cancel conferred by subsection (2). There is no *duty* to cancel under subsection (2). In summary, the discretion is enlivened whenever the visa-holder does not pass the character test.

22. Unlike subsection (2), subsection (3A) imposes a duty, not a discretion, to cancel a visa; and, as one would expect, the jurisdictional threshold enlivening performance of the duty is circumscribed. One jurisdictional condition for enlivening the duty is that the visa-holder does not pass the character test because he or she has a substantial criminal record on the basis of paragraphs 7(a), (b) or (c) (but not, I note, (d), (e) or (f)). The second jurisdictional condition required to be satisfied is that the visa-holder is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth, a State or a Territory.

23. I further note that the cancellation is intended to take place without notice to the visa-holder and while the visa-holder is in jail (or other custodial institution). The visa-holder is intended to be removed to immigration detention upon release from jail pending the consideration of any revocation submissions.[6] The visa-holder's personal liberty is directly affected.

24. There is no doubt that at the time the Minister's delegate made his or her decision, Ms Singh was serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against the laws of New South Wales. This left the delegate with the

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[5] See *SZTAL v. Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14].

[6] This is explicitly confirmed in the Explanatory Memorandum for the *Migration Amendment (Character and General Visa Cancellation) Bill 2014* at p.8, paragraphs [32] and [34].

question of whether Ms Singh had, relevantly, a "substantial criminal record" on the basis of paragraphs (7)(a), (b) or (c) for the purposes of subsection (3A).[7]

25. At the time of the Minister's delegate's decision, Ms Singh was serving an 8-month term of imprisonment. Mr Hornsby properly accepted that this term could not justify the delegate's decision because it was not at least 12 months long. In this connection, I note that a delegate is not permitted to rely on paragraph (d) of subsection (7) when subsection (3A) is in issue. That is, the Minister's delegate may not aggregate terms of imprisonment to reach a total of 12 months when acting under subsection (3A). He or she may do so under subsection (2), but may not do so under (3A).

26. Mr Hornsby submitted to me that, on a proper construction of subsection (3A), the delegate was required to have regard to the 2017 conviction when Ms Singh was in jail in 2019. It followed in his submission that the Minister may in law − and given that subsection (3A) is mandatory, it follows that the Minister must in law − cancel a visa whenever two conditions are satisfied:

    (a) a visa-holder has been sentenced at any time in the past to a period of imprisonment for 12 months (or more); and

    (b) at the time the Minister exercises his or her power, the visa holder is in a custodial institution on a full-time basis (whether or not the term of imprisonment which the person is serving at that time is one of at least 12 months' duration).

27. Accordingly, Mr Hornsby submitted that in Ms Singh's case the Minister was obliged to cancel her visa under subsection (3A) because she had a substantial criminal record on

[7] I note Ms Singh's offending has never included sexual offences involving a child so as to enliven the threshold in section 501(3A)(a)(ii).

the basis of paragraph 7(c) as a result of her 2017 conviction and because she was in jail on a full-time basis (albeit in relation to a different conviction).

28. Mr Hornsby accepted that this construction can lead to severe results. Where, for example, a visa-holder has been sentenced to a period of imprisonment of 12 months or more at any time in the past and the sentence was on that occasion suspended wholly, the Minister's delegate may not act under subsection (3A) to cancel the visa. But, on the Respondent's argument, the delegate must cancel the visa where that visa-holder receives any sentence in subsequent years that is required to be served in whole or in part on a full-time basis in a custodial institution.

29. Mr Hornsby accepted that if Ms Singh had been sentenced in 2019 to just one month's imprisonment, or even a fortnight's imprisonment, rather than imprisonment for eight months, the Minister's obligation under subsection (3A) to cancel her visa would nevertheless have arisen. Mr Hornsby submitted that the Minister would be most unlikely, as a matter of fact, to have been in a position to act so swiftly; but that observation does not seem to me to be relevant to the question of statutory interpretation.

30. The consequences of an interpretation need to be considered in the process of statutory construction. The usual canon of statutory construction is that a legislative intention to affect a person's fundamental rights (including, relevantly, personal liberty) should be "clearly manifested by unmistakable and unambiguous language".[8] I do not believe the language of the provision unmistakably or unambiguously supports the interpretation advanced on behalf of the Respondent.

[8] See, for example, *Saeed v. Minister for Immigration and Citizenship* [2010] HCA 23; 241 CLR 252 at [58].

31. Moreover, the submission not only implies a severe regime, but one that is haphazard in its severity, which is a consideration that tells against the submission. The regime is haphazard in its severity for two reasons. As I have said, on the Respondent's argument, any period of imprisonment that is served, no matter how small, after the visa-holder has received at some earlier point a term of imprisonment of 12 months or more, requires the Minister to cancel the person's visa. On the other hand, no obligation to cancel a visa arises when a visa-holder receives numerous sentences over the course of a number of years unless and until a term of imprisonment of 12 months' duration or longer is imposed that is required to be served full-time in a custodial institution.[9] On the Respondent's argument, section 501(3A) was intended to operate in respect of any visa-holder in the community who has received a single sentence of imprisonment of 12 months or more at any point in the past – even a suspended sentence – but was not intended to operate in respect of others who may have, overall, a more substantial history of offending.

32. The second way that the provision appears to be haphazard in its severity flows from the transfer of the visa-holder into immigration detention as soon as the visa is cancelled. Mr Hornsby referred me to the Explanatory Memorandum in this regard.[10] The Memorandum confirms that the purpose of subsection (3A) is to ensure that a jailed person does not return to the community but is taken immediately to immigration detention upon his or her release. The logic of this approach can be understood when a person is serving some part or all of a term of imprisonment of 12 months or more. The length of the term of imprisonment in such a case indicates a more serious offence has been committed. On the other hand, it is strange that a short period of imprisonment in respect of minor offending should lead to a person being taken immediately into immigration detention

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[9] The Minister may not add terms of imprisonment: paragraph (7)(d) does not apply in respect of subsection (3A).

[10] Supra, fn 6.

without notice simply because the person has at some point in the past received a term of imprisonment of 12 months (even a suspended sentence).

33. In my opinion, the Memorandum does not support the Respondent's position, and, if anything, would suggest that subsection (3A) was intended to operate only in relation to those sentences of imprisonment of 12 months or more that are being served either wholly or in part at the time of the Minister's delegate's decision. Be that as it may, the Memorandum can only be of limited assistance in any event: a memorandum does not displace the need for a careful consideration of the legislative provision in question no matter how "clear or emphatic" the language of the memorandum is.[11]

34. Support for a more limited interpretation arises inferentially from paragraph (7)(d). As I have said, the Minister has a discretion to cancel a visa under subsection (2). The discretion will arise when a person has been sentenced to two or more terms of imprisonment where the total of the terms is 12 months or more: see paragraph 7(d). The threshold condition in subsection (2) permits the Minister to combine terms of imprisonment, and, once the 12-months aggregate is reached, a discretion to cancel arises. So far as the duty to cancel under subsection (3A) is concerned, however, paragraph (7)(d) is explicitly omitted as a jurisdictional condition. I infer from this omission that the Respondent's delegates were not intended to have regard to past terms of imprisonment and combine them with current sentences. I think the limitation in the threshold conditions specified for subsection (3A) is relevant, and it points away from the Minister's interpretation that past terms of imprisonment of 12 months or longer were intended to have ongoing and indefinite relevance to the performance of the duty under subsection (3A).

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[11] See *Saeed* (supra fn 8) at [31]*ff.*

35. Finally, the obligation the Minister has to cancel a visa has been imposed by Parliament. If the Respondent's argument is right, Parliament has imposed on the Minister a potentially significant administrative burden. Parliament intended the Minister, through his department, to maintain significant records of past offending by visa-holders (where a sentence of at least 12 months has been imposed) and to act promptly to ensure that any future sentence required to be served by a visa-holder in whole or in part on a full-time basis in a custodial institution results in a visa-cancellation. I accept that this is a secondary consideration in the scheme of things, but it does seem to me to be one that also points against the interpretation submitted by the Respondent in this case.

36. In my opinion, the Minister's delegate erred in finding the jurisdictional threshold in subsection (3A) was satisfied in Ms Singh's case. The delegate impermissibly relied upon the 2017 conviction when Ms Singh was not in jail at the time of his or her decision on account of that conviction.

37. It follows that in my view, the purported cancellation of Ms Singh's visa under subsection (3A) was beyond jurisdiction. I shall revoke the decision to cancel Ms Singh's visa because no duty to cancel it arose under subsection (3A).

MERITS OF THE APPLICATION

38. This conclusion makes it unnecessary for me to consider the merits of Ms Singh's application and to re-apply Direction 79, which guides the exercise of the discretion to revoke a mandatory cancellation. I have decided in the circumstances of this case not to indicate my view on the merits (on the assumption I am wrong on the jurisdictional question). There are certain factual matters that, at the time of my decision, are still unclear to me, and they may well impinge on a decision on the merits of Ms Singh's

application. The particular issue I have in mind is Ms Singh's recent diagnosis of cancer. At the time of the hearing, Ms Singh was about to undergo a surgical procedure or operation. She will find out on 20 February 2020 (the date of this decision) whether any further treatment is required and what that treatment will comprise.

39. On the assumption that some further treatment is required, the question may arise as to whether having to be treated in the less sophisticated health system in Fiji is a factor weighing in favour of setting aside the cancellation decision. Alternatively, if the Minister were to keep Ms Singh in immigration detention so she might undergo further treatment in Australia, the question may arise whether any prolonged period in detention would be a reason to set aside the cancellation decision. I do not have sufficient facts before me to determine what sort of treatment, if any, Ms Singh is likely to require or its estimated length, and the Minister's delegate is yet to decide whether Ms Singh should be deported to Fiji immediately or be permitted to stay in Australia while she receives future treatment (on the assumption that the decision under review were to be affirmed).

40. I accept that if I had ruled in the Respondent's favour on the question of jurisdiction, I would have been required to address these questions, as well as many others. It seems to me, however, that in the absence of all relevant information, it is undesirable for me to express my view on the merits given my decision on the question of jurisdiction. I also note that if the Respondent were successfully to seek a review of my decision on the jurisdictional question in the Federal Court, then, on remittal, the Tribunal would have access to more current and complete information than is presently available to me.

DECISION

41. The decision of the Tribunal will be to set aside the decision under review and substitute a decision that the mandatory cancellation decision under subsection (3A) be revoked because there was no jurisdiction under subsection (3A) to cancel the Applicant's visa in the first place.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for the decision herein of Senior Member N A Manetta

.....[Sgnd].....

Associate

Dated: 20 February 2020

Date(s) of hearing:	**3 & 4 February 2020**
Date final submissions received:	**13 February 2020**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Respondent:	**Mr B Hornsby, Minter Ellison**