Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2020/4874**

Re: **WQWS**

APPLICANT

And **Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

RESPONDENT

DECISION

Tribunal: **Deputy President B W Rayment OAM QC**

Date: **26 October 2020**

Place: **Sydney**

The Tribunal decides that the decision under review is set aside and that in substitution, the cancellation of the Applicant's Class XB Subclass 202 Global Special Humanitarian visa is revoked.

.....**[sgd]**.....

Deputy President B W Rayment OAM QC

CATCHWORDS

MIGRATION – mandatory cancellation of visa on character grounds under s 501(3A) – where offending relating to assault – Direction No. 79 considered – primary considerations – protection of the Australian community – where applicant is currently free from alcohol – where applicant assessed as Medium Low risk of reoffending – best interests of minor children – other considerations – whether international non-refoulment obligations exist – where applicant would be sent to Syria – where applicant is a Christian returnee – international non-refoulement obligations owed – humanitarian considerations – potential harm suffered if returned – decision set aside and substituted

LEGISLATION

Migration Act 1958 (Cth) ss 499, 501

CASES

AJL20 v Commonwealth of Australia [2020] FCA 1305
DMH16 v Minister for Immigration and Border Protection [2017] FCA 448; (2017) 253 FCR 576

SECONDARY MATERIALS

Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA
Department of Home Affairs, 'Syria Situational Updated November 2019' (17 December 2019)
United States Department of State, '2019 Report on International Religious Freedom: Syria'

REASONS FOR DECISION

Deputy President B W Rayment OAM QC

26 October 2020

1. The applicant is a 47-year-old citizen of Syria. He arrived in Australia on a Class XB Subclass 202 Global Special Humanitarian visa on 12 March 2015.

2. His visa was the subject of mandatory cancellation under s 501(3A) of the *Migration Act 1958* ('the Act') following the applicant being convicted on 15 November 2018 of two offences of wounding a person with intent to cause grievous bodily harm, and two offences of assault occasioning actual bodily harm. He was sentenced to imprisonment for three years and nine months, with a non-parole period of two years and three months. He was also convicted of failing to leave premises when required.

3. At the end of his non-parole period he was immediately taken into immigration detention, instead of being put under the supervision of a parole officer. He was, prior to the hearing before the Tribunal, taken to Christmas Island. I heard his evidence by video-link.

4. His visa having been cancelled, on 16 January 2019 the applicant made representations seeking revocation of the cancellation, and on 5 August 2020 a delegate of the respondent refused to revoke the mandatory cancellation. On 13 August 2020 the applicant sought review in the Tribunal about the delegate's decision.

5. Direction No. 79 ('the Direction') made by the Minister under s 499 of the Act binds decision-makers, including the Tribunal. The question before the Tribunal is whether there is another reason why the cancellation of the applicant's visa should be revoked within the meaning of s 501CA(4)(b)(ii) of the Act.

6. The Direction contains a non-exhaustive list of mandatory considerations for decision-makers. They are also required to take into account other relevant considerations not mentioned in the Direction.

7. The failure to revoke the cancellation of the applicant's visa would have the legal consequence that he is required to be returned to Syria as soon as it is reasonably practicable to do so: see *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448; (2017) 253 FCR 576 (North ACJ) and, for example, *AJL20 v Commonwealth of Australia* [2020] FCA 1305 (Bromberg J) at [10]. The applicant is an Assyrian Christian, and

for that reason, as well as because he would be a returnee in Syria, the applicant would be at risk of serious harm, and his life would be at risk.

8. Moreover, I have found that non-refoulement obligations are owed in respect of the applicant, with the consequence that Australia would be in breach of its international treaty obligations if he were returned to Syria.

9. I will first discuss the mandatory considerations expressly mentioned in the Direction and then the other considerations mentioned in the Direction, and other relevant considerations, which were also representations put before the Tribunal by the applicant, and as such, those representations constitute mandatory considerations under s 501CA of the Act.

10. Clauses 6.2 and 6.3 of the Direction sets out general guidance to decision-makers and principles providing a framework within which they should approach their task respectively. They inform the mandatory considerations. The Direction is published, and I will not repeat their terms.

11. Part C of the Direction, containing cls 13 and 14, refers to decision-making in relation to revocation requests. There are three so-called primary considerations, the first of which is the protection of the Australian community.

Protection of the Australian Community

12. Clause 13.1(1) repeats matter from cl 6.2(1) and some of the principles in cl 6.3. Mandatory considerations include the nature and seriousness of the non-citizen's criminal offending to date, and the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

13. On 8 September 2017, when the applicant had been living in Australia for about two years and six months, he went to an RSL Club to play the poker machines. At that time, he drank what the sentencing judge described as 'prodigious quantities of alcohol' and did so on the occasion in question. His blood alcohol concentration, measured four hours after the events giving rise to the charges, was 0.17.

14. The offending arose from the applicant asserting that he had reserved a poker machine. While he went to the bathroom, he found what he believed to be the same machine being

played by another person. He argued with the player and a member of staff called security, who then spoke to the applicant. The manager of the RSL Club said he would check the CCTV footage to see whether the applicant had in fact been playing the machine which he said he had reserved. The manager determined that he had not and had reserved another machine. The applicant was then asked to cash in the machine and leave the RSL Club.

15. The applicant took out a knife about 10 centimetres in length and slashed the three security guards as well as his own brother, who was attempting to restrain him. One security guard was stabbed in his neck, chest and arms, and another was slashed across the back of his scalp and on his arms. The third security guard was cut on his left torso and was grazed on his hand. The applicant's brother sustained a wound to his neck.

16. The brothers walked out of the RSL Club and the applicant was hit across the back of his head by another person with a metal pole and fell to the ground.

17. Two of the three security guards who were badly injured were taken to a hospital and their wounds were treated by medical staff. One of the guards required 14 stitches.

18. The applicant was also taken to hospital. He was found to be suffering a non-displaced skull fracture and a small haemorrhage in the brain. He remained under treatment in the hospital for one week.

19. He was described by the sentencing judge as being in a drunken rage at the time of the offending. He did not know his victims. He had no criminal record in Australia at the time of his offending.

20. The offending was, of course, very serious. The sentence was discounted to some extent because of the injuries inflicted on the applicant outside the RSL Club premises, which the sentencing judge described as 'extra-curial punishment'.

21. The sentencing judge accepted that the applicant was non-violent when sober and was told that the applicant was determined to cease gambling and remain sober in the future.

22. Ms Priest, a Community Corrections Officer at Long Bay gaol, assessed the applicant as being a 'Medium Low risk of reoffending' in October 2018, and her sentencing assessment

report was put before the sentencing judge. She recommended the applicant be under a supervision plan, requiring him to report to a Community Corrections Officer every four weeks and receive home visits from the officer every twelve weeks. He would be referred to a culturally appropriate assessment and counselling service and participate in a 'PGI: Managing stress and anger, managing cravings and pro-social lifestyle' program. That regime would have been applied had the applicant been released into the community rather than being taken into immigration detention and would presumably still affect him during the balance of his parole period if he were released into the community.

23. The applicant told Ms Priest that he intended to consult his general practitioner for treatment for his alcohol abuse and associated gambling issues and use the assistance of his family members to help him cease alcohol use and his gambling. I understand these remarks to be made in the context of the sentencing judge possibly not sentencing him as he did, and to refer to the 2018 period.

24. He was assessed by a forensic psychiatrist, Dr Sidorov, retained by solicitors acting for the applicant in July 2018. Dr Sidorov wrote a medico-legal report for the NSW District Court. He diagnosed the applicant with an 'Alcohol Use Disorder', then currently in remission in a controlled environment, as well as suffering from 'Substance Use Disorder' currently in remission, however said that he had not used drugs since coming to Australia.

25. The report of Dr Sidorov is now more than two years out of date. Since the offending, the applicant has now been free of alcohol use for more than three years. Whether Dr Sidorov would diagnose Alcohol Use Disorder now is quite unclear. The use of drugs now appears to be more than five years ago. Some evidence was given that while he was in gaol another prisoner in the gaol entered his cell and handed him some drugs, when he was pursued into the cell by prison officers. The applicant was charged with possession of those drugs. No reports exist of the applicant's drug use, and the circumstances suggest that it is possible that the drugs may not have been intended for his use.

26. The applicant was seen in 2015 by Dr Tsang, a consultant psychiatrist. The applicant at the time reported that he was drug-free but was drinking more and more. He reported being angry and that he had wasted most of his life. He alternated between being angry and being depressed. Dr Tsang diagnosed the applicant with 'Substance Use Disorder' and an 'Intermittent Explosive Disorder.' Those diagnoses may or may not be sound today.

27. Dr Donnelly, who appeared for the applicant, told the Tribunal that he had recommended the applicant be examined for the purpose of the Tribunal hearing, but financial circumstances did not permit his advice to be followed.

28. When estimating his risk of reoffending, a current report would have been very useful. As things stand, the most recent assessment of the applicant is that referred to in the report of the Community Corrections Officer, Ms Priest, dated 4 October 2018 (it is apparently repeated in a pre-release report dated 11 September 2019). The report states that he was assessed as a Medium Low risk of reoffending according to the Level of Service Inventory – Revised (LSI-R). I understand that to be an actuarial based test, administered by psychologists internationally and locally.

29. Paradoxically, the relatively low 'Medium Low' assessment led the prison authorities to not offer the applicant rehabilitation courses while in prison, which might have tended to prove the extent to which he has rehabilitated in these proceedings.

30. The applicant's witness statement was prepared with the assistance of his solicitor and counsel. He said that he is truly sorry for his criminal offending, which occurred when he was heavily intoxicated, and that it is difficult to recall what happened. Regardless, he says that he accepts that the offending was serious and very wrong.

31. He said that over the intervening period he has been able to eliminate his alcohol addiction.

32. He said that his imprisonment and visa cancellation has been a massive shock to his system. He does not wish to go back to prison ever again, and the prospect of future visa cancellation will be a significant deterrent to his reoffending.

33. He intends to reside with his sister, with whom he is very close to, if released. He plans to find work as a cleaner or painter.

34. He said he has a loving relationship with all his siblings, his five nieces and nephews under the age of 18 as well as his adult nieces and nephews who love him.

35. He expressed a fear of returning to Syria. The applicant said he had serious concerns, including mental and physical harm, and possible death.

36. Cross-examined by Mr Johnson, for the Minister, the applicant said that he regrets his offending immensely.

37. He denied that he formerly became aggressive when he drank alcohol and said that he did not usually become aggressive because he had been drinking. Usually, he said, he would just go home.

38. He said that he had decided not to drink in the future, however, that did not mean that he would never have a glass of beer if invited to do so on occasions. He said he might have a small glass to drink at Christmas, at a wedding or at a party. He said he will not be drinking at all, meaning, I gathered, that he will not be drinking as he did in the past.

39. The applicant appeared to me to be genuine both about his remorse and the fact that his imprisonment, the mandatory cancellation of his visa, and his immigration detention had made him determined not to drink heavily again and to be a law-abiding person.

40. His previous serious offending means that he will be a risk of reoffending in the future, a risk that cannot be estimated as negligible, but his prospects of not reoffending seem reasonably good. He had apparently been engaged in fights overseas, at a younger age. But his overall behaviour in Australia from 2015 to late 2017 was not accompanied by offending, although at that time he was drinking increasingly. His occupation was as a carer for his mother, now deceased. Several of his siblings in Australia expressed support for him, especially his sister, with whom he intends to live if he is released.

41. He said he intends to find a wife, marry and have children. If he does so, that will assist his rehabilitation, as will the support of his siblings.

42. He describes himself as a good man, with a strong Christian faith.

43. If he does reoffend as he did in 2017, the consequences could be serious for the Australian community.

Best Interests of Minor Children in Australia

44. As to minor children below the age of 18 years, he has a close and continuing relationship with five nieces and nephews in Australia, ranging in age from 7 to 13. He is also a great uncle to three children of his niece ranging in age from less than 12 months to four years.

45. The children below 18 have been protected from knowledge about his offending and present circumstances. Nevertheless, he has a strong familial affection for them, and his release from detention would enable him to relate to them fully. The relationship he has with all of them is non-parental. It is in the best interests of the nephews and nieces that he should be released from detention.

Expectations of the Australian Community

46. The consideration of community expectations is the subject of binding authority indicating that it is not the function of decision-makers to gauge those expectations for themselves, and that the consideration should take as its starting point the deemed community expectations stated in the Direction. As with all of the relevant considerations, the weight to be given to each consideration in the balancing exercise involved in exercising discretion is a matter for each decision-maker. The consideration favours non-revocation of the cancellation.

Other Considerations

47. The other considerations expressly mentioned in the Direction relevant in the case, including those mentioned including those mentioned in paragraphs [7] and [8] above, will next be considered, together with some other matters which are relevant, and which were also the subject of representations made by the applicant.

48. The fears of the applicant if he were returned to Syria have been referred to above. There are two main pieces of published country information about Syria to which the Tribunal and counsel for the parties have had regard. The first is the Department of Home Affairs publication titled ‘Syria Situational Update November 2019’, and the second is the ‘Syria 2019 International Religious Freedom Report’ published by the United States Department of State.

49. In summary, those published reports show that if the applicant were returned to Syria, he would face the following risks:

(a) the security situation is dangerous;

(b) Islamic State ('IS') fighters and their families have escaped prisons controlled by the government forces, permitting IS groups to resume terrorist activities, including assassinations, bombings, raids, and open attacks;

(c) the Assad regime, which controls about 60% of Syria's area, is struggling to maintain order outside Damascus;

(d) in Turkish held areas to the north, northwest and northeast of Aleppo, Turkish backed militias have been accused of war crimes such as arbitrary detentions, and enforced disappearances;

(e) civilians across Syria are subjected to violence and human rights abuses committed by all combatants;

(f) the United Nations High Commissioner for Refugees ('UNHCR') has asserted that Syria is not safe for returnees, who face a lack of basic public services and economic opportunities;

(g) it is difficult to find sustainable work in Syria;

(h) Christian places of worship have been targeted not only by terrorist organisations but also by pro-government forces;

(i) Christians reportedly continue to face discrimination and violence, including kidnappings, at the hands of violent extremist groups;

(j) IS militants continue to target Christian communities;

(k) many Christians have fled Syria during the civil war, which has no end in sight; and

(l) the UNHCR has assessed that various groups with certain profiles are likely to be in need of international refugee protection, including persons forming part of the following groups, to each of which the applicant belongs: deserters from the armed forces (in that the applicant fled Syria in his twenties in order to avoid being sent to

Lebanon to fight on behalf of the regime); members of religious groups and minority ethnic groups.

50. These matters show that the applicant has a well-founded fear of persecution by reason of his membership of the following groups: Assyrian Christians; returnees; and deserting members of the armed forces.

51. Moreover, he has no family left in Syria who could assist with his employment, accommodation or sustenance. Any need he may have for medical assistance is likely to be unmet.

52. The Minister, by his counsel, accepted that he will, as a Christian and as a returnee, be someone who will be potentially at risk, in circumstances where non-refoulement obligations will arise.

53. The Minister pointed out that the applicant may apply for a protection visa, which, if obtained, may allow him to stay here, so that he may not be deported. That possibility will depend on whether reasons to refuse such a visa under s 501 of the Act are found to exist, which is a matter of speculation at this stage.

54. I would not infer, without evidence from the respondent, that the applicant is likely to have the benefit of personal intervention by the Minister.

55. I find that non-refoulement obligations arise in relation to the applicant. His removal to Syria would put Australia in breach of its international treaties, which is a powerful discretionary reason to revoke the cancellation of his visa.

56. Separately, I find that humanitarian grounds exist to revoke the cancellation of the applicant's visa because of the harm that he is likely to suffer if returned to Syria. This matter also goes to the mandatory consideration of the extent of impediments if removed.

57. The applicant has strong family ties in Australia, in that all members of his family live here, other than one brother, who lives in Germany.

58. He also has adult nephews and nieces. He has, as mentioned above, a close fraternal relationship with his five brothers and sisters in Australia, as well as with all of his nephews and nieces. His mother is buried here, which the applicant also referred to as a reason he wishes to stay here.

DECISION

59. In my opinion, the correct or preferable exercise of discretion in this case is to set aside the reviewable decision and revoke the cancellation of the applicant's visa. Notwithstanding what has been expressed above about the considerations of the protection of the Australian community, and the expectations of the Australian community, it seems to me that especially because of the humanitarian considerations I have mentioned, the existence of international non-refoulement obligations and the presence of almost all of his family in this country, on balance the discretion should be exercised in the applicant's favour.

I certify that the preceding 59 (fifty -nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President B W Rayment OAM QC

.....**[sgd]**.....

Associate

Dated: 26 October 2020

Date(s) of hearing:	**13 & 14 October 2020**
Date final submissions received:	**20 October 2020**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Applicant:	**John Fasha Solicitors**
Counsel for the Respondent:	**Mr G Johnson**

Solicitors for the Respondent: **MinterEllison**