FEDERAL COURT OF AUSTRALIA

QHRY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 827

Review of:	Decision of the Administrative Appeals Tribunal
File number:	NSD 201 of 2021
Judgment of:	**RANGIAH J**
Date of judgment:	23 July 2021
Catchwords:	**MIGRATION –** *Migration Act 1958* (Cth) – application for judicial review of the Tribunal's decision to affirm the decision of the Minister's delegate to refuse the applicant's visa under s 501(1) – whether the Tribunal failed to address a substantial, clearly articulated argument – whether denial of natural justice — application allowed
Legislation:	*Migration Act 1958* (Cth) ss 499, 501, 501CA Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No. 79: Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA*
Cases cited:	*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088; [2003] HCA 26 *FYBR v Minister for Home Affairs* (2019) 272 FCR 454 *Minister for Home Affairs v Omar* (2019) 272 FCR 589 *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	49

Date of hearing:	22 June 2021
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Northam Lawyers
Counsel for the First Respondent:	Mr P Knowles
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent did not appear

ORDERS

NSD 201 of 2021

BETWEEN:	**QHRY** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent

ORDER MADE BY:	**RANGIAH J**
DATE OF ORDER:	**23 JULY 2021**

THE COURT ORDERS THAT:

1. The second respondent's decision is quashed.
2. The matter is remitted to the second respondent for a decision according to law.
3. The first respondent pay the applicant's costs of the application.

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

REASONS FOR JUDGMENT

RANGIAH J:

1 On 4 February 2021, the Administrative Appeals Tribunal (the **Tribunal**) affirmed a decision made by a delegate of the first respondent (the **Minister**) pursuant to s 501(1) of the *Migration Act 1958* (Cth) (the **Act**) refusing to grant the applicant a Partner (Temporary) (Class UK) visa. The applicant applies for judicial review of the Tribunal's decision.

2 The applicant contends that the Tribunal failed to address a substantial, clearly articulated argument, thereby denying him natural justice. The applicant's argument was that the Tribunal should attribute less weight to the "expectations of the Australian community" under cl 11.3 of Ministerial Direction No 79 (**Direction 79)** because of the consequences of the visa refusal for the applicant's Australian partner and their minor children. The Minister submits that the Tribunal dealt with that argument, and therefore did not make the error alleged by the applicant.

3 I will describe the relevant statutory provisions and the Tribunal's decision before considering the competing submissions.

The Act and Direction 79

4 Section 501 of the Act provides, relevantly:

> **501 Refusal or cancellation of visa on character grounds**
>
> *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).
>
> …
>
> *Character test*
>
> (6) For the purposes of this section, a person does not pass the ***character test*** if:
>
> (a) the person has a substantial criminal record (as defined by subsection (7)); or
>
> …
>
> Otherwise, the person passes the ***character test***.

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

…

(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

…

5 Section 499 of the Act provides:

499 Minister may give directions

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

(a) the performance of those functions; or

(b) the exercise of those powers.

…

(2A) A person or body must comply with a direction under subsection (1).

…

6 Direction 79 was given by the Minister under s 499(1) of the Act and is entitled, "Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA".

7 The objectives of Direction 79 are described in paragraph 6.1, which provides, relevantly, that its purpose is to guide decision-makers performing functions or exercising powers under s 501 of the Act.

8 The following "principles" are set out in paragraph 6.3:

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 women or children or vulnerable members of the community such as 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.

(6) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.

(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.

(Underlining added.)

9 Section 2 of Direction 79 is entitled "Exercising the discretion". Paragraph 7(1) provides that, informed by the principles in paragraph 6.3, a decision-maker, "must take into account the considerations in Part A or Part B, where relevant, in order to determine whether a non-citizen will forfeit the privilege of being granted, or of continuing to hold, a visa".

10 Paragraph 8(1) provides, "Decision-makers must take into account the primary and other considerations relevant to the individual case". Paragraph 8(4) provides that, "Primary considerations should generally be given greater weight than the other considerations".

11 The primary and other considerations relevant to exercising the discretion to refuse the grant of a visa are set out in Part B. Paragraph 11.1 describes the primary considerations as follows:

(1) In deciding whether to refuse 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.

12 Paragraph 11.1 explains the primary consideration of protection of the Australian community. Decision-makers are required to give consideration to the nature and seriousness of a non-citizen's conduct to date and the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

13 Paragraph 11.2 describes the primary consideration of the best interests of minor children in Australia affected by the decision. Paragraph 11.2(1) requires decision-makers to make a determination about whether refusal is or is not in the best interests of a child.

14 Significantly for this case, paragraph 11.3(3) describes the primary consideration of expectations of the Australian community. Paragraph 11.3(1) reads:

> **11.3 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 refuse the visa application of such a person. Visa refusal 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 be granted a visa. Decision-makers should have due regard to the Government's views in this respect.

15 Paragraph 12 requires "other considerations" to be taken into account where relevant. Such considerations include international non-refoulement obligations, impact on family members, impact on victims and impact on Australian business interests.

The Tribunal's decision

16 On 24 September 2020, the applicant's application for a Partner Visa was refused by the Minister's delegate pursuant to s 501(1) of the Act. On 13 November 2020, the applicant filed an application in the Tribunal seeking review of the delegate's decision.

17 On 4 February 2021, the Tribunal made a decision affirming the decision under review. On 23 February 2021, the Tribunal published its written reasons for the decision.

18 The Tribunal noted that the applicant was then a 31-year-old citizen of Papua New Guinea, who had applied for a Partner Visa on 14 March 2015. The applicant's criminal history included three terms of imprisonment for separate contraventions of domestic violence orders. The victim was the applicant's partner. The cumulative total of the terms of imprisonment was 14 months. The Tribunal found that the applicant did not pass the character test.

19 The Tribunal then went on to consider the exercise of the discretion under s 501(1) of the Act.

20 The Tribunal noted that it was bound by s 499(2A) of the Act to comply with Direction 79. The Tribunal summarised the principles set out in paragraph 6.3 and noted the primary considerations required to be taken into account under paragraph 11.

21 The Tribunal then proceeded to consider each of the primary considerations. In respect of protection of the Australian community, the Tribunal found that the risk of the applicant reoffending was very serious and that the risk of harm was so serious as to be unacceptable. The Tribunal concluded that protection of the Australian community weighed very heavily in favour of refusal of the visa.

22 The Tribunal found that refusal of the visa would likely have an adverse effect on the two minor children of his partner from a previous relationship and his own two children. The Tribunal found that the best interests of the children weighed heavily in favour of setting aside the decision to refuse the visa.

23 The Tribunal then turned to the expectations of the Australian community. The Tribunal noted that decision-makers are required to have due regard to the government's views as to the expectations of the Australian community, but that the question as to whether it is appropriate in all the circumstances to act in accordance with those expectations remains a matter for the Tribunal's discretion, citing *FYBR v Minister for Home Affairs* (2019) 272 FCR 454 at [76] and [97]. The Tribunal then referred to paragraph 6.3 of Direction 79, which sets out principles that must be taken into account in understanding the primary considerations. One of those principles, under paragraph 6.3(7), states that a matter for consideration is the consequences of a visa refusal for minor children and other immediate family members in Australia.

24 Significantly for this application, the Tribunal then assessed the expectations of the Australian community as follows:

> 111. The Applicant submits that the expectations of the Australian community 'generally weigh against' the Applicant, yet contends that, *where the non-citizen's conduct is not "very serious", the risk of reoffending is not high and where there is an Australian citizen partner and dependent* [minor] *children who will be deprived of his presence in the event of removal, this factor should not weight heavily against the applicant*.
>
> 112. The Tribunal has assessed the Applicant's conduct as 'very serious', and also assesses the risk of re-offending to be higher than as now submitted by the Applicant. Further, in light of paragraph 6.3(5) of the Ministerial Direction, it is to be observed that the Applicant has only been participating in and

> contributing towards the Australian community for only a short period of time (having arrived in 2012). In these circumstances - and in particular light of paragraphs 6.3(2) and 6.3(3) in the Ministerial Direction - the expectations of the Australian Community must be assessed as weighing very heavily in favour of visa refusal.
>
> (Citation omitted, emphasis in original.)

25 The Tribunal then went on to deal with "other considerations", described as the impact of visa refusal on family members and the impact on victims. The Tribunal noted that the applicant's partner was the primary victim of his offending. It accepted that refusal of the visa would have an adverse impact on the applicant's partner and other immediate family in Australia, but found that this was outweighed by the primary considerations of protection of the Australian community and expectations of the Australian community.

26 The Tribunal then went on to conclude:

> 118. In reaching this conclusion to exercise the power, I have had regard to the considerations referred to in the Direction. With regard to the weight allocatable (sic) to each of these Primary and Other Considerations, I find as follows:
>
> - Primary Consideration A weighs very heavily in favour of exercising the discretion to refuse to (sic) the subject visa;
> - Primary Consideration B weighs very heavily in favour of not exercising the discretion to refuse to grant the subject visa;
> - Primary Consideration C weighs very heavily in favour of exercising the discretion to refuse to (sic) the subject visa;
> - Other Considerations (a), (c) and (d) are of either neutral weight or not relevant to this consideration;
> - Other Consideration (b) weighs heavily in favour of not exercising the discretion to refuse to grant the subject visa;
> - The combined weight of Primary Consideration A and Primary Consideration B (sic) determinatively weighs in favour of exercising the discretion to refuse to grant the subject visa; and
> - A holistic application of the considerations in the Direction to the evidence therefore militates in favour of this Tribunal exercising the discretion to refuse to grant the subject visa to the Applicant.
>
> 119. In these circumstances those considerations in support of upholding the visa refusal outweigh the considerations in support of revocation of the visa refusal decision, such that the Tribunal determines that the decision of the delegate to refuse the visa is now affirmed.

27 It is unclear why the Tribunal described the primary considerations as "Primary Consideration A", "Primary Consideration B" and "Primary Consideration C", since they are not described in that way in Direction 79, or elsewhere in the reasons. However, the reference to "Primary Consideration A" appears to be to "protection of the Australian community"; "Primary Consideration B" to "best interests of minor children in Australia"; and "Primary Consideration C" to "expectations of the Australian community". Therefore, the sixth dot point in [118] appears to contain an error in that it should refer to "Primary Consideration C" instead of "Primary Consideration B". Although nothing ultimately turns upon this error, it is necessary to point it out in order to make sense of the conclusion.

Consideration

28 The applicant contends that he submitted to the Tribunal that the primary consideration of expectations of the Australian community should not weigh heavily against him because his Australian partner and dependent children would be deprived of his presence in the event of his removal (**the relevant submission**). He submits that the relevant submission was clearly made and was substantial. The applicant submits that the Tribunal failed to respond to that submission, and that such failure amounts to jurisdictional error.

29 The Minister submits that the Tribunal expressly set out the relevant submission at [111] of its reasons. The Minister submits that, therefore, the relevant submission was expressly considered by the Tribunal. The Minister submits that, in any event, the Tribunal proceeded at [118] to undertake a holistic application of the considerations in Direction 79 to all the evidence, which must have included consideration of the relevant submission. Further, the Minister submits that the impact on the decision of the effect upon the applicant's partner and children had already been the subject of detailed consideration earlier in the reasons, so that it was unnecessary to consider that subject again.

30 In *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088; [2003] HCA 26, Gummow and Callinan JJ (with whom Hayne J agreed) held at [24] that to fail to respond to a "substantial, clearly articulated argument relying upon established facts" is to at least fail to accord the applicant natural justice: see also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [90].

31 In *Minister for Home Affairs v Omar* (2019) 272 FCR 589, in the context of s 501CA(4), the Full Court held at [37] that the Minister's obligation was to, "engage in an active intellectual process with significant and clearly expressed relevant representations".

32 The applicant's argument raises four issues for consideration, namely:

(1) whether the relevant submission was in fact made;

(2) whether the relevant submission was a substantial submission that was clearly articulated upon established facts;

(3) whether the relevant submission was responded to (or considered) by the Tribunal; and

(4) whether any failure by the Tribunal to respond to (or consider) the relevant submission was a material error.

33 The Minister accepts that the first, second and fourth of these issues should be determined in favour of the applicant. The only issue in dispute is whether the Tribunal responded to, or considered, the relevant submission.

34 The relevant submission went to the weight the Tribunal should ascribe to the primary consideration of expectations of the Australian community. The Tribunal found at [112] that the expectations of the Australian community weighed "very heavily" in favour of refusal of the visa. The Tribunal went on at [118] to decide that the primary considerations of protection of the Australian community and expectations of the Australian community in combination, "determinatively weighs in favour of exercising the discretion to refuse to grant the subject visa". The issue is whether the Tribunal considered the relevant submission, in the sense of giving active intellectual attention to it, when reaching those conclusions.

35 At [111] of its reasons, the Tribunal expressly referred to the applicant's submission that the expectations of the Australian community should not weigh heavily against the applicant since his Australian citizen partner and dependent minor children would be deprived of his presence in the event of removal.

36 The totality of the Tribunal's reasoning for its finding that the expectations of the Australian community weighed very heavily in favour of refusal of the visa is found at [112]. The Tribunal referred to the following five matters in making its finding:

- the applicant's conduct was very serious;
- the risk of the applicant reoffending was higher than had been submitted by the applicant;
- in respect of paragraph 6.3(5), the applicant had only been participating in and contributing to the Australian community for a short period of time;

- paragraph 6.3(2) (which states that the Australian community expects that the Australian Government can and should refuse entry to non-citizens if they commit serious crimes in Australia or elsewhere);
- paragraph 6.3(3) (which states that a non-citizen who has committed a serious crime, including against women, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia).

37 The reasons given by the Tribunal for finding that the expectations of the Australian community weighed very heavily in favour of refusal of the visa did not refer to or engage with the applicant's submission that this consideration should not weigh heavily against him.

38 Since the Tribunal expressly identified the relevant submission, this is not the more usual type of case where the Court is asked to infer that because a submission was not referred to, it was not considered: cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [69].

39 In *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593, the Full Court observed at [47] that an:

> …inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point.

40 However, in *Omar*, the Full Court observed at [39] that the requirement to engage in an active intellectual process may require more than simply acknowledging or noting that a representation has been made and may, depending on the nature and content of the representation, require the decision-maker to make specific findings of fact.

41 In *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 at [76], the Full Court held that in assessing whether a court should infer that a decision-maker failed to consider a submission or material advanced by an applicant, regard must be had to, "the facts of each particular case and the [decision-maker's] reasons as a whole", and "[t]he reasons must be construed in a practical and common-sense manner and not with an eye keenly attuned to the perception of error".

42 The Tribunal, having referred to the relevant submission at [111], was plainly aware that the representation had been made. Further the Tribunal had acknowledged that whether it is appropriate to act in accordance with the deemed expectations of the Australian community

remains a matter for the Tribunal's discretion, citing *FYBR v Minister for Home Affairs* at [76] and [97] . The Tribunal also referred to paragraph 6.3(7) of Direction 79, which states that a matter for consideration is the consequences of a visa refusal for minor children and other immediate family members in Australia. Paragraph 7(1) states that the primary and other considerations are informed by the principles in paragraph 6.3. From these matters, it should be inferred that by expressly summarising the relevant submission at [111], the Tribunal was acknowledging that the submission was relevant and substantial.

43 However, at [112], containing the Tribunal's reasoning for finding that the expectations of the Australian community weighed very heavily in favour of refusal of the visa, the Tribunal failed to address, refer to, or respond to, the relevant submission. There are only two possibilities. Either, the Tribunal considered the relevant submission, or the Tribunal overlooked it. If the Tribunal considered the submission, it must have accepted it, rejected it, or decided that it was irrelevant or so trivial that it was unnecessary to otherwise deal with it. If the Tribunal accepted the submission, then it would not have made the finding that the expectations of the Australian community weighed heavily in favour of refusal. If the Tribunal rejected the submission, then it would have explained why, since the Tribunal evidently considered it to be a relevant and substantial submission. The Tribunal plainly did not think that the submission was irrelevant or trivial.

44 The only possibility left is that the Tribunal overlooked the submission. That is supported by Tribunal's reasoning at [112], which expressly referred to five factors, and suggests, by omission of any reference to the relevant submission, that the Tribunal did not engage with the submission. Otherwise, the Tribunal would have expressly dealt with it. The natural and appropriate inference is that the Tribunal overlooked the submission when concluding that the expectations of the Australian community weighed very heavily in favour of refusal of the visa.

45 In its conclusion at [118], the Tribunal said:

> A holistic application of the considerations in the Direction to the evidence therefore militates in favour of this Tribunal exercising the discretion to refuse to grant the subject visa to the Applicant.

46 The Minister submits that in this passage, the Tribunal indicated that it had conducted a final, overall consideration of all the relevant factors, including the relevant submission. I am unable to accept that submission because the word "therefore" indicates that the Tribunal was reaching its conclusion on the basis of the matters that it had already discussed in [118]. It did not

conduct some free-standing further review of all the relevant factors. This passage does not indicate that the Tribunal took into account the relevant submission.

47 The Minister submits that as the impact of the decision upon the applicant's partner and children had already been considered earlier in the reasons, it was unnecessary to consider that issue again at [112]. However, the method of reasoning adopted by the Tribunal was to first decide what weight was to be given to each primary consideration and other consideration, and later assess those considerations in combination having regard to the weighting already decided. The Tribunal's consideration of the effect upon the applicant's partner and children was in the context of assessing the weight to be given to the best interests of the children and other considerations. The matter complained of is that the Tribunal assessed the weight to be given to the expectations of the Australian community without considering the effect upon the applicant's partner and children. Having failed to do so, the Tribunal reasoned that the expectations of the Australian community weighed "very heavily", and then decided that this finding together with its finding upon protection of the Australian community, "determinatively weighs" in favour of refusing the visa. The consideration of the effect upon the applicant's partner and children elsewhere did not cure or otherwise affect the impact of the Tribunal's failure to consider that factor when deciding the weight to be given to the expectations of the Australian community.

48 The applicant has established that the Tribunal made a jurisdictional error by failing to consider the relevant submission.

49 The application must be allowed. The Tribunal's decision should be quashed and remitted for a further decision. The Minister should pay the applicant's costs of the application.

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

Associate:

Dated: 23 July 2021