FEDERAL COURT OF AUSTRALIA

Renton v Minister for Home Affairs [2021] FCA 931

File number(s):	NSD 1037 of 2020
Judgment of:	**WHEELAHAN J**
Date of judgment:	10 August 2021
Catchwords:	**MIGRATION** – application for judicial review of a decision of the Minister under s 501CA(4) of the *Migration Act 1958* (Cth) not to revoke the cancellation of the applicant's visa – where the visa was mandatorily cancelled pursuant to s 501(3A) of the Act because the applicant did not pass the character test – where the applicant pleaded guilty and was convicted of two child pornography offences and sentenced to a term of imprisonment – whether the Minister made a finding, for which there was no evidence, that the applicant had psychological sexual issues relating to children – whether that finding was legally unreasonable – whether the applicant was denied procedural fairness because the Minister's finding of psychological sexual issues was not obviously open on the material – whether the Minister took into account an irrelevant consideration, being that the applicant received a 25% discount on his sentence in consequence of his guilty pleas – the finding of psychological sexual issues was open on the material and not legally unreasonable – in consequence, no denial of procedural fairness – the matter of a discount on the applicant's sentence was not an irrelevant consideration – no jurisdictional error – application dismissed with costs.
Legislation:	*Judiciary Act 1903* (Cth) s 39B *Migration Act 1958* (Cth) s 476A(1)(c), s 499, ss 501(3A), (5), (7), s 501CA, s 501CA(4), s 501G(1)(e) *Migration Reform (Transitional Provisions) Regulations 1994* (Cth)
Cases cited:	*Australian Retailers Association v Reserve Bank of Australia* [2005] FCA 1707; 148 FCR 446 *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628 *Military Rehabilitation and Compensation Commission v*

May [2016] HCA 19; 257 CLR 468

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; 162 CLR 24

Minister for Home Affairs v Omar [2019] FCAFC 188; 272 FCR 589

Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; 185 CLR 259

Minister for Immigration and Multicultural and Indigenous Affairs v SGLB [2004] HCA 32; 207 ALR 12

Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383

Picard v Minister for Immigration and Border Protection [2015] FCA 1430

R v Australian Broadcasting Tribunal; ex parte 2HD Pty Ltd (1979) 144 CLR 45

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; 228 CLR 152

Tame v New South Wales [2002] HCA 35; 211 CLR 317

Registry:	New South Wales
Division:	General Division
Number of paragraphs:	41
Date of hearing:	27 July 2021
Counsel for the Applicant:	Dr J Donnelly
Solicitors for the Applicant:	Scott Calnan
Counsel for the Respondent:	Mr T Reilly
Solicitor for the Respondent:	Minter Ellison Lawyers

ORDERS

NSD 1037 of 2020

BETWEEN:	**JOHN WILLIAM RENTON** Applicant
AND:	**MINISTER FOR HOME AFFAIRS** Respondent

ORDER MADE BY:	**WHEELAHAN J**
DATE OF ORDER:	**10 AUGUST 2021**

THE COURT ORDERS THAT:

1. Leave be given to the applicant to file and serve an amended originating application in the form annexed to the affidavit of Ziaullah Zarifi filed on 8 April 2021.
2. The applicant is excused from the requirement to file and serve an amended originating application, and the form of amended originating application contained within the annexure referred to above and filed with the court stand as the applicant's amended originating application.
3. The name of the respondent be amended to "Minister for Home Affairs".
4. The application be dismissed.
5. The applicant pay the respondent's costs.

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

REASONS FOR JUDGMENT

WHEELAHAN J:

Introduction

1 The applicant is a 68 year old citizen of the United Kingdom, who arrived in Australia at Fremantle with his parents when he was seven years old, on 23 April 1961. The applicant has lived in Australia continuously since that time, and has held various valid visas since his arrival. On 1 September 1994, the applicant was granted a Class BF transitional (permanent) visa by operation of the *Migration Reform (Transitional Provisions) Regulations 1994* (Cth).

2 On 4 May 2017, the applicant pleaded guilty in the District Court of New South Wales to two counts, being offences relating to the transmission of child pornography, and the possession of child abuse material, in contravention of the Commonwealth *Criminal Code* and the *Crimes Act 1900* (NSW) respectively. To give an indication of the seriousness of the applicant's offending, the sentencing judge remarked that the child abuse material in the applicant's possession included 315,263 images that fell into the classification used internationally for child abuse material, the images possessed included victims aged from about six months to 16 years, and it was estimated that the images were of over 15,000 separate victims. The applicant was sentenced to an overall term of three years and seven months imprisonment, with an overall non-parole period of two years and four months. He was imprisoned at Long Bay Correctional Complex.

3 On 8 August 2018, a delegate of the Minister cancelled the applicant's visa pursuant to s 501(3A) of the *Migration Act 1958* (Cth), on the grounds that the delegate was satisfied that the applicant did not pass the character test because of the applicant's substantial criminal record as defined by s 501(7) of the Act, and that the applicant was serving a sentence of imprisonment upon a full time basis. Upon notifying the applicant of the cancellation, the applicant was invited to make representations to the Minister about revoking the decision to cancel his visa pursuant to s 501CA. The applicant's attention was drawn to *Direction No 65 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*, that was given by the Minister under s 499 of the *Migration Act*, as identifying issues that were relevant to the cancellation decision. A copy of the Direction was provided. The applicant was advised that although the Direction was not binding on the Minister acting personally, it provided a broad indication of the types of issues that the Minister was likely to

take into account. The applicant was also advised that he should address each paragraph in Part C of the Direction that was relevant to his circumstances. Part C included references to the considerations of the nature and seriousness of the non-citizen's conduct, risk to the Australian community should there be re-offending, and the expectations of the Australian community.

4 The applicant made representations to the Minister by documents received by the Department on 6 and 13 September 2018. Subsequently, on 25 November 2019 the Department wrote to the applicant disclosing some further information, upon which the applicant was afforded an opportunity to comment, as a result of which the applicant made further representations. In that letter, the Department also drew the applicant's attention to and enclosed *Direction No 79*, which replaced *Direction No 65*, and invited the applicant to read it carefully. The material difference between *Direction No 79* and *Direction No 65* was identified to the applicant by the Department as being to emphasise that crimes of a violent nature against women or children are viewed very seriously regardless of the sentence imposed. The applicant was again advised that the Direction provides a broad indication of the types of issues the Minister is likely to take into account in deciding whether to revoke the original cancellation decision. The applicant was advised to address each paragraph in Part C of *Direction No 79* that was relevant to his circumstances. As with the revoked *Direction No 65*, Part C of *Direction No 79* included references to the considerations of the nature and seriousness of the non-citizen's conduct, risk to the Australian community should there be re-offending, and the expectations of the Australian community.

5 On 1 September 2020, the Minister acting personally decided not to revoke the cancellation of the applicant's visa. The decision was communicated to the applicant on 2 September 2020, together with the Minister's statement of reasons.

6 The applicant now seeks a writ of certiorari quashing the Minister's decision not to revoke the original cancellation, and a writ of mandamus requiring the Minister to determine his request for revocation of the visa cancellation decision according to law. Those remedies are sought in the original jurisdiction conferred on this court by the combined operation of s 39B of the *Judiciary Act 1903* (Cth) and s 476A(1)(c) of the *Migration Act*. To succeed in his application, the applicant must demonstrate jurisdictional error affecting the Minister's decision. The applicant relied upon fours grounds set out in an amended originating application which he was given leave at the hearing to file, and to which I will return.

The applicant's representations

7 The applicant's representations to the Minister in support of revocation of the original cancellation decision included the following documents –

(a) a completed "Request for Revocation of a Mandatory Visa Cancellation under s 501(3A)" form (**request form**);

(b) a completed "Personal Circumstances Form";

(c) a handwritten statement of the applicant's daughter;

(d) a statement of the applicant's former de facto spouse;

(e) a statement of a long-time friend of the applicant;

(f) a handwritten statement of former housemates of the applicant;

(g) a handwritten statement of a cousin of the applicant; and

(h) photographs of the applicant with his daughter.

8 As I mentioned at [4] above, on 25 November 2019 the Department sent the applicant a letter which informed him that the Department had received further information relevant to his revocation request. The Department provided the applicant with copies of that further information, and invited him to comment on it. The further information was a national criminal history check of the applicant dated 27 September 2019 and sentencing remarks of the sentencing judge sitting in the District Court of New South Wales at Penrith on 4 May 2017. The applicant sent a letter to the Department dated 4 December 2019 in response to the invitation to comment, and that letter formed part of the material before the Minister.

9 By his representations, the applicant did not challenge that he did not pass the character test, but sought to establish that there was another reason why the original cancellation decision should be revoked. In the request form, the applicant gave broadly four reasons for the revocation. First, he described his connection with his daughter and the detriment that his absence from her life had caused her. Second, he described steps that he had taken to seek help for his offending behaviour, which included programs at the corrections centre and professional psychological treatment, though he had not commenced any program or treatment at that time. The applicant stated that a course with a psychologist was to commence upon his release from imprisonment. Third, the applicant stated that he acted alone in his offending, was not a part of anything of a predatory nature, and that he "ha[d] never touched a child". Fourth, and related to the first point, he stated that he had accepted his sentence, and that the Minister should not

impose further punishment on his daughter. The applicant stated that he wanted to dedicate his life to being there for his daughter. The applicant gave further detail of his relationship with his daughter in the personal circumstances form, and also described the detriment that the cancellation of his visa would have on his daughter and cousin, each of whom provided statements in support of the applicant's revocation request.

10 The applicant reiterated the treatment which he had sought, but not commenced, in the personal circumstances form. He further noted that an assessment with a psychologist had "indicated a tendency to voyeurism and nothing of any violent or predatory nature". The applicant separately stated that he did not have any diagnosed medical or psychological conditions. The applicant stated that there is "no likelihood whatsoever" of him reoffending. The applicant separately pointed to his compliance, cooperation and "faultless" records during the five months he was on bail and 16 months of imprisonment.

11 The personal circumstances form provided details of the applicant's schooling, various employment from 1971 to 2009, and volunteer work that the applicant undertook with the Museum of Fire, Salvation Army and his daughter's schools. He separately noted his employment at the prison, being almost one year in the library and approximately two months in food services. The applicant's subsequent letter to the Department noted that he had been running the library for well over two years.

12 The applicant expressed concerns that, if he was returned to the United Kingdom, he would be completely alone, may not be eligible for a pension, and would not know what to do for money.

13 The separate statements provided by the applicant's daughter, former partner, friend, former housemates, and cousin, painted a positive picture of the applicant. All described the applicant's close relationship with his daughter, giving examples of their observations of the applicant as a good and loving father. Generally, the statements suggested that the applicant was of good character and, acknowledging the seriousness of the offences, they expressed surprise at his offending. The applicant's daughter, aged 17 at the time of the statement, described the emotional hurt of being separated from him temporarily during his imprisonment, and potentially permanently if he were to be deported. The applicant's former partner noted that he may have suffered from depression following a redundancy and being unable to find a job. In his subsequent letter to the Department, the applicant stated that he did not seek out full time employment so that he could be available to support his daughter.

The Minister's decision

14 The Minister was not satisfied that the applicant passed the character test, due to his substantial criminal record. This was not disputed by the applicant. The Minister then considered whether he was satisfied that there was another reason the original decision should be revoked, but concluded that he was not. The Minister's statement of reasons for the decision not to exercise the revocation power summarised, in bullet point form, the substance of the applicant's representations and supporting documents, and proceeded to consider matters under three sub-headings: extent of impediments if removed; strength, nature and duration of ties; and protection of the Australian community. The statement of reasons attached 14 documents described as "relevant material". These were the nine documents constituting the applicant's representations (see [7]-[8] above), the letter and two documents which were provided by the Department to the applicant on 25 November 2018 (see [8] above), the applicant's "movement records" and the cancellation notice of 8 August 2018.

15 Whilst acknowledging the absence of a support network and personal difficulties for the applicant arising from this, the Minister stated that the difficulties the applicant would face if returned to the United Kingdom would not be insurmountable because of the broadly similar culture and society of the United Kingdom and Australia.

16 In respect of the applicant's ties to Australia, including his family, the Minister stated –

> 18. I acknowledge that Mr RENTON has family and social ties to Australia. Mr RENTON's close family in Australia consists of his daughter Phoenix Renton (born 16 May 2001, aged 19 years) and his cousin Lynne Gothard, whom he regards more as a sister. Ms Gothard submits that '*it will kill*' Mr RENTON and his family '*if he is taken away from us*'.
>
> 19. I find that Mr RENTON has contributed positively to the community through his long term employment in transportation, music and administration and his volunteer work for the Museum of Fire, the Salvation Army and his daughter's school. I find that Mr RENTON has been making a positive contribution for over 40 years to the community and I have taken this into account.
>
> 20. I have considered the effect of non-revocation upon Mr RENTON's immediate family in Australia and accept that those persons would experience emotional hardship, particularly his daughter Phoenix. I find that Mr RENTON has been making a positive contribution for over 40 years to the community and I have taken this into account and also recognise the effect of non-revocation for family members in Australia.

17 A substantial portion of the statement of reasons dealt with matters going to the protection of the Australian community. The Minister summarised the applicant's history of convictions. Particular emphasis was placed on the seriousness of his latest convictions for child

pornography offences, and the circumstances and investigations by the Australian Federal Police which led to those convictions –

> 28. The AFP then conducted a search warrant of Mr RENTON's home and he was found to be in possession of three hard drives and two external hard drives all of which contained child abuse material. Overall, 315,263 of the images found fell into the classification used internationally for child abuse material. A further 549,225 images were not reviewed. The Judge noted that the images involved over 15,000 separate victims ranging in ages from *'six months to 16 years and were almost exclusively female children'* including '*babies*'. Mr RENTON admitted using the software program for four years (a period longer than covered by the charges) and accessing the images for '*sexual gratification*'. He also admitted to organising the images, either *'alphabetically or by category'.* It was accepted by the court that the sharing of the files was *'not committed for personal gain'.* The Judge in sentencing stated that '*each offence is objectively serious and above the mid-range*'.
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> 29. While I acknowledge that Mr RENTON's 2017 conviction does not involve personal abuse of children, I find that the possession and distribution of child abuse material provides a market for and stimulates demand for such material, thereby contributing to its production and the sexual abuse of children. The huge volume of material in this case leads me to agree with the Judge's ranking of this offending and to find that this must be considered to be very serious criminal offending.
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> 30. I find that the sentence Mr RENTON received is a further indication of the seriousness of the offending. Dispositions involving incarceration of the offender are the last resort in the sentencing hierarchy and I have considered that the several custodial terms of up to three years and three months, resulting in a total term of three years and seven months, reflects the very serious nature of the offending.

18 The Minister considered whether the applicant posed a risk to the Australian community by reoffending. The Minister concluded that there was an ongoing risk that the applicant would reoffend. In summary, the reasons for that conclusion included the following –

(a) The applicant provided little explanation for his offending behaviour, other than stating that a pre-sentencing assessment by a psychologist indicated that he had "a tendency to voyeurism". The Minister noted that a psychologist's assessment tendered on the applicant's behalf, and which was referred to in the sentencing remarks, showed that there was nothing in the applicant's "personal life and relationships to indicate why he has offended", and that he had a "happy and stable upbringing" with "no disadvantage". The Minister also noted that there was no diagnosis of any psychiatric disorder. The absence of a diagnosis of psychiatric disorder had been referred to by the sentencing judge in the context of prospects of rehabilitation –

> Prospects of rehabilitation and likelihood of reoffending are difficult to gauge. The offender is now aged 63 and his antecedents reflect sexual issues dating

> back 30 years. The offender self-diagnosed that he has an issue with voyeurism. Despite being before the Court on two prior occasions for sexual type offences the offender sought no treatment. He has not received treatment for the current offences. *There is no diagnosis of any psychiatric disorder with any related opinion of risk of re-offending*. The paucity of evidence available to understand the offending limits the assessment of the offender's prospects.
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> (Emphasis added.)

(b) At [33] of his reasons, the Minister referred to the applicant having an "ongoing sexual interest in children", and stated that the applicant had "failed to acknowledge that he has psychological sexual issues relating to children". Because that latter statement was the subject of submissions on behalf of the applicant, I will set out the paragraph in full –

> 33. In my opinion the fact that Mr RENTON's previous sexual offending against an underage person, and that more recently over a prolonged period he organised child abuse material, stored it systematically on various devices and made it available to others with similar interests and admitted to police that he accessed the images for '*sexual gratification*' demonstrate that he has an ongoing sexual interest in children. I have had regard to and concur with the Judge's comments that he has a '*limited but telling criminal history*' and that his '*antecedents reflect sexual issues dating back 30 years*'. I am concerned that despite the experience of being tried for these crimes, hearing the comments of the Court when sentencing and receiving substantial terms of imprisonment, Mr RENTON has failed to acknowledge he has psychological sexual issues relating to children. In my opinion Mr RENTON's attribution of his protracted and repeated access and distribution of child pornography to 'voyeurism' demonstrates his insight into his offending and its impact on the victims is inadequate and not fully appropriate.

(c) The Minister referred to the seriousness of applicant's child pornography offences. Though the offences did not involve the applicant making physical contact with victims, the Minister was mindful that child pornography creates a market for the exploitation of children by others.

(d) The Minister stated that the applicant had not commenced any courses of treatment for his offending behaviour. Though the Minister had regard to the applicant's representations that he had sought help, the statement of reasons noted that "there is no evidence before me to suggest that [the applicant] has made any substantive rehabilitative efforts in relation to his sexual issues".

(e) As to the significance of the applicant's guilty plea, the Minister stated –

> 38. I acknowledge Mr RENTON's guilty plea and find this weighs in his favour. However, I am also mindful that by pleading guilty Mr RENTON obtained a 25 per cent discount in sentencing from the Court.

(f) In considering the applicant's risk of reoffending, the Minister noted that the applicant's daughter was very important to the applicant, and provided a strong incentive for him not to reoffend and risk being separated from her. The Minister further noted that the risk of separation could not prevent reoffending, given that the applicant's daughter was 11 years old and in the applicant's care when he commenced his offending.

(g) In conclusion, the Minister stated –

> 45. I have considered the length of time Mr RENTON has made a positive contribution to the Australian community over 40 years and the consequences of non-revocation of the original decision for his family members, and the extent of impediments that Mr RENTON would face if he were removed to the United Kingdom.
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> 46. On the other hand, in considering whether I was satisfied that there is another reason why the original decision should be revoked, I gave significant weight to the very serious nature of the crimes committed by Mr RENTON, some of which are of a sexual nature, and involved a [sic] vulnerable members of the community, that being a minors.
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> 47. Further, I find that the Australian community could be exposed to harm should Mr RENTON reoffend in a similar fashion. I could not rule out the possibility of further offending by Mr RENTON.
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> 48. I am cognisant that where harm could be inflicted on the Australian community even other strong countervailing considerations may be insufficient for me to revoke the original decision to cancel the visa, even applying a higher tolerance of criminal conduct by Mr RENTON, than I otherwise would, because he has lived in Australia for most of his life.
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> 49. In reaching my decision about whether I am satisfied that there is another reason why the original decision should be revoked, I concluded that Mr RENTON represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed any other considerations as described above. These include his lengthy residence and ties, employment, volunteer/charity and familial to Australia, and the hardship Mr RENTON, his family and social networks will endure in the event the original decision is not revoked.

The grounds of the application

19 Following the acceptance of a referral from the court by *pro bono* counsel, the applicant relied on an amended application which at the hearing he was given leave to file and serve. The amended application advanced four grounds of review, accompanied by particulars. I will summarise the grounds of the application, and the arguments that were advanced in support of them.

Ground 1 (no evidence)

20 The first ground of the application was that the Minister had made findings for which there was no evidence. The applicant drew attention to the Minister's findings at [33], to which I have referred above, including that the applicant had failed to acknowledge he has "psychological sexual issues relating to children". The applicant claimed that there was no expert evidence before the Minister that supported this finding: the only expert evidence before the Minister demonstrated that the applicant had no diagnosed psychiatric disorder, which was consistent with the applicant's representation to the Minister that he had not been diagnosed with a psychological condition. Counsel for the applicant submitted that the word "psychological" was not an ordinary term, but rather a topic which required fairly probative evidence before a finding of psychological issues could be made, which probative evidence was lacking in this case. The applicant claimed that this finding was a critical step along the path to reaching the ultimate conclusion as to whether or not to revoke the original decision to cancel the applicant's visa, because the Minister relied upon the finding in assessing the applicant's prospects of reoffending in the Australian community and evaluating the assessment of weight to be given to that consideration. Counsel for the applicant submitted that for these reasons the Minister's error was material, because without the impugned finding, the Minister might realistically have come to a different conclusion concerning the risk assessment that was undertaken.

Ground 2 (procedural fairness)

21 The applicant claimed that he was denied procedural fairness because the psychological sexual finding in [33] of the Minister's reasons would not obviously have been open on the known material, again noting that there was no relevant expert evidence before the Minister. The applicant claimed that he should have been advised of the proposed adverse conclusion before the decision was made, and the failure to do so amounted to a denial of procedural fairness.

Ground 3 (irrelevant consideration)

22 The applicant claimed that the Minister took into account an irrelevant consideration when having regard to his plea of guilty, in the terms set out in [38] of the Minister's statement of reasons, which I have set out above. The applicant claimed that to take account of the fact that he had received a 25% discount in sentencing from the court was to take into account an irrelevant consideration. Counsel for the applicant submitted that it was not clear how the discount in sentencing was relevant to the risk assessment undertaken by the Minister for the purposes of s 501CA(4) of the Act, which was in particular concerned with the risk of

recidivism. Counsel also submitted that the Minister did not make clear how the discount in sentencing was relevant to the prospects of the applicant reoffending in Australia. Counsel submitted that had the Minister not had regard to the sentencing discount, the Minister might have given more favourable weight to the applicant's guilty plea when undertaking the risk assessment exercise, and that the error was therefore material.

Ground 4 (legal unreasonableness)

23 The ground of legal unreasonableness was also directed to the Minister's reference at [33] of his reasons to the applicant's failure to acknowledge that he had "psychological sexual issues relating to children", and there was substantial, if not total overlap between this ground and the first ground alleging absence of evidence. The applicant claimed that there was no probative material in the nature of expert evidence that the Minister could rationally rely upon to make a finding that the applicant had psychological sexual issues relating to children, and that the error was material. Counsel for the applicant submitted that without expert evidence demonstrating that the applicant had a psychological or psychiatric illness or disorder, it was not open for the Minister to find that the applicant had psychological sexual issues relating to children. Counsel for the applicant submitted that in the absence of evidence, the Minister was not qualified to make the impugned finding. Counsel submitted that the remarks of the sentencing judge which expressed a desire that the applicant undertake some psychiatric help to ensure that he never came back before the court again, suffered from a similar defect, namely that the only expert evidence before the sentencing judge demonstrated that the applicant did not have a psychiatric disorder. Counsel submitted that the passing remark of the sentencing judge was not coextensive with a professional opinion that the applicant had psychological sexual issues relating to children, and that in the circumstances it was not permissible for the Minister to make any such finding.

Analysis

24 I will consider each of the grounds of the application. There is some overlap between them, and considerable overlap between grounds one and four.

Analysis – Grounds 1 and 4 – no evidence – legal unreasonableness

25 I will consider the first and fourth grounds together.

26 By his first ground, the applicant alleged that there was no evidence for the Minister's finding that the applicant had "psychological sexual issues relating to children". In *Australian Retailers*

Association v Reserve Bank of Australia [2005] FCA 1707; 148 FCR 446, Weinberg J said at [575] –

> Under s 39B of the *Judiciary Act* (which reflects the common law), the "no evidence" ground requires that there be simply no evidence, or other material, to justify the findings of fact made. Aronson[, M, Dyer, B and Groves, M, *Judicial Review of Administrative Action* (3rd ed, Lawbook Co, 2004)] suggests, at 239, that "no evidence" means "not a skerrick of evidence". If there is some evidence, no matter how unconvincing, and no matter how overwhelming the evidence to the contrary may be, the traditional approach is to treat the complaint as factual, and not legal. According to Mason CJ in *Bond* [(1990) 170 CLR 321] (at 356):
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> > So long as there is *some* basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.

27 I take the references to "no evidence" in the above passage to mean the absence of any supporting material or probative basis or logical grounds for an administrative decision: see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 282 (Brennan CJ, Toohey, McHugh and Gummow JJ). In *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 267 FCR 628, Allsop CJ, with whom Markovic J and Steward J agreed, considered a claim of jurisdictional error involving a finding of fact by an Assistant Minister in the absence of supporting material in the following terms at [44]-[46] –

> 44. … I do not consider that there was any rational or probative evidence to support such a conclusion that his emotional and psychological hardship would be short term. …
>
> 45. … [The statements by the Assistant Minister] are findings of fact simply incapable of being reasonably made by any decision-maker, there being no evidence at all to support them, and all evidence being to the contrary to a reasonable decision-maker.
>
> 46. The making of the findings, without any material to found them, given their central importance in the reasoning, is a sufficient basis to conclude that there has been jurisdictional error.

28 The statutory task for the Minister under s 501CA(4) of the *Migration Act* was to consider the applicant's representations, and to determine whether there was "another reason" to revoke the decision to cancel the applicant's visa. A requirement that a positive finding or inference of fact that is of central importance to, or which is a critical step in the Minister's reasoning be supported by some at least some material, is an aspect of the condition implied by common law rules of construction upon the exercise of the Minister's function under s 501CA(4) of the Act that the Minister must act reasonably in the manner in which the decision-making function is discharged. Judicial statements, citing Aronson, Dyer and Groves, that "no evidence" means

"not a skerrick of evidence" reflect the implication of a high threshold that must be established before the court will hold that the decision is beyond power on the ground of absence of evidence or probative material. Anything less risks the court sliding into merits review.

29 The claims advanced by the applicant in his representations included that a psychological assessment indicated that he had a "tendency to voyeurism" and nothing of a violent or predatory nature, and that he presented no danger to society. The applicant claimed in his representations that there was "no likelihood whatsoever" that he would re-offend. It was in the context of these claims that the Minister remarked upon the absence of any diagnosed psychiatric disorder.

30 There are some circumstances where the establishment of the existence of a recognised mental disorder may be essential to the adjudication of civil claims, or to issues such as capacity arising under the criminal law. Expert evidence of psychiatric diagnosis may be helpful in the assessment of such claims, and in some instances involving technicality, a court may have to be guided by expert evidence: *Federal Broom Co Pty Ltd v Semlitch* (1964) 110 CLR 626 at 633 (Kitto J) and 637 (Windeyer J). In the context of workers' compensation and common law damages proceedings, expert evidence may be particularly helpful where the fact in issue is whether the event is compensable, and where the case is close to the boundary: *Tame v New South Wales* [2002] HCA 35; 211 CLR 317 at [291]-[294] (Hayne J). The evidence to be adduced will vary from case to case, and may take into account common sense inferences: see, for example, *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; 207 ALR 12 at [41] (Gummow and Hayne JJ), which was raised by counsel for the applicant. However, there is no universal rule that a finding that there is a psychological or psychiatric condition must be founded upon expert medical evidence: see, *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19; 257 CLR 468 at [62] (French CJ, Kiefel, Nettle and Gordon JJ), and [80] (Gageler J). By way of example, in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 389-390, Barwick CJ held that no special medical or psychiatric knowledge was required to foresee the possibility of injury by way of mental disturbance as a result of the sight of severe burning of a person.

31 In this case, the Minister's reference to the applicant's "psychological sexual issues" was not a psychiatric diagnosis. Nor was it a finding that that the applicant had a recognised psychiatric illness. Read properly in its context, it was not a statement that involved the application of specialist expertise, still less an opinion that was not open absent a specialist diagnosis. The

applicant's submissions appeared to equate what was stated by the Minister with the making of a formal psychiatric or psychological diagnosis. The Minister's reference to the applicant's "psychological sexual issues relating to children" was an observation or a comment about the applicant's disposition and history that was well open to the Minister having regard to the combined weight of the following material –

(a) primarily, the fact of and nature of the applicant's offending for which he was imprisoned;

(b) the applicant's prior offending to which the sentencing judge referred, which included committing an act of indecency with a person under 16 years of age;

(c) the sentencing judge's reference to a "sexual deviancy" that had not been addressed;

(d) the sentencing judge's reference to the applicant's admission of having obtained "sexual gratification" from accessing the images of children; and

(e) the applicant's reference, in his representations to the Minister, to a psychological assessment of him as indicating "a tendency to voyeurism".

32 The absence of any diagnosis of a psychiatric disorder, to which the sentencing judge referred, did not deprive the Minister's reasoning of a foundation. The reference to the absence of a diagnosis was not tantamount to a finding by the sentencing judge that there was no psychological issue affecting the applicant. Other references by the sentencing judge including to the applicant's antecedents reflecting sexual issues, his "sexual deviancy", and to a hope that the applicant would obtain some psychiatric help tell against this. In relation to this last matter, I agree with the submission made on behalf of the applicant that the sentencing judge's remark was not coextensive with a professional opinion that the applicant had psychological sexual issues relating to children. However, for the reasons I have given, a professional opinion was not required for the Minister to make the statement which the applicant seeks to impugn, and so the point goes no further.

33 For the above reasons, the applicant's claim that the Minister made a finding for which there was no evidence must be rejected. Counsel for the applicant accepted that if the first ground of the application to the court was rejected, then it followed that the fourth ground alleging legal unreasonableness must also be rejected.

Analysis – Ground 2 – procedural fairness

In contrast to the original decision to cancel the visa under s 501(3A) of the *Migration Act*, the rules of natural justice are not excluded in relation to a decision under s 501CA(4) as to whether the original decision should be revoked, and they accordingly apply: *Picard v Minister for Immigration and Border Protection* [2015] FCA 1430 at [31] (Tracey J); *cf,* s 501(5). The obligation of the Minister to afford the applicant procedural fairness was a condition of the lawful consideration of whether to revoke the decision to cancel the applicant's visa pursuant to s 501CA(4), and arises as a matter of implication through the application of common law principles of statutory construction.

34 Procedural fairness is concerned with fair processes, and not with the actual decision: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152 at [25] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). The statutory framework within which the Minister discharged his function is important when considering what procedural fairness required, and the question whether a procedure was fair is necessarily tied to the particular facts of the case: *SZBEL* at [26]. Here, the Minister was required to consider the representations made by the applicant in determining whether he was satisfied that there was "another reason" why the original decision should be revoked, and was required to engage in an active intellectual process with significant and clearly expressed relevant representations: *Minister for Home Affairs v Omar* [2019] FCAFC 188; 272 FCR 589 at [34] and [37] (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ). Obviously enough, upon considering the applicant's representations the Minister was not required to accept them, but in refusing to revoke the original cancellation decision was required to set out his reasons: s 501G(1)(e). The Minister was not required to give advance notice of his thought processes or provisional views for the purpose of inviting comment before making the decision in question: *SZBEL* at [29]-[32], citing *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 (***Alphaone***) at 591-592 (Northrop, Miles and French JJ). Nonetheless, depending upon the circumstances of the case, procedural fairness may require that a person who is the subject of the decision be given an opportunity to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which would not obviously be open on the known material: *Alphaone* at 592, cited in *SZBEL* at [29].

35 There was some conceptual overlap between the applicant's claim of denial of procedural fairness, and the first and fourth grounds, because the claim was framed on the basis that the procedural unfairness arose because the Minister made a finding that the applicant had

"psychological sexual issues relating to children" when there was no expert evidence to support this finding, where it was claimed that the only expert evidence before the Minister was that the applicant had no psychiatric disorder, and that for these reasons, the Minister's conclusion was not obviously open on the known material.

36 I do not accept the applicant's claim that he was denied procedural fairness. As I identified at [3] and [4] above, the applicant was put on notice that the nature and seriousness of his conduct, and risk to the Australian community should there be re-offending, were issues to be addressed, and by his representations, he did so. As I have concluded above in relation to the first and fourth grounds, the Minister's observation that the applicant had "psychological sexual issues relating to children" was not a medical diagnosis, and did not require expert evidence. The Minister's observation was a response to the applicant's representations which included that that he had been assessed as having "a tendency to voyeurism", and that there was no likelihood of him re-offending. The Minister's observation was one that was obviously open on the material, having regard especially to the applicant's pleas of guilty to the offences with which he was charged. It did not require the opinion of a psychiatrist or a psychologist to support the observation that the Minister made in order for it to be obviously open on the material. The absence of a diagnosis of a psychiatric disorder appeared to be relevant to the sentencing judge's search for some explanation in the applicant's background or upbringing for his offending. The sentencing judge referred to referees speaking well of the applicant, but then stated that there was "evidently a sexual deviancy that has not been addressed". And after referring to the absence of any diagnosis of any psychiatric disorder with any related opinion of risk of re-offending, the sentencing judge referred to "the paucity of evidence available to understand the offending", which her Honour considered limited the assessment of the applicant's prospects of rehabilitation. However, the absence of a formal medical diagnosis of a psychiatric disorder did not preclude the Minister's observation that the applicant had psychological sexual issues relating to children which, as I have found, was obviously open on the material.

Analysis - Ground 3 – did the Minister take account of an irrelevant consideration?

37 To establish that the Minister took account of an irrelevant consideration giving rise to jurisdictional error requires the applicant to establish that the Minister took account of a consideration that the *Migration Act* precluded him from considering, either expressly, or by implication from the subject-matter, scope and purpose of the legislation such that the

consideration is extraneous to the power: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; 162 CLR 24 at 39-42 (Mason J) and 55-56 (Brennan J); *R v Australian Broadcasting Tribunal; ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 49-50 (Stephen, Mason, Murphy, Aickin and Wilson JJ).

38 The Minister's statement in [38] of the reasons (see [18(e)] above) that the applicant obtained a 25% discount on sentence by his plea of guilty was supported by the sentencing judge's remarks. The sentencing judge stated as follows in her Honour's remarks –

> …There were pleas of guilty in the Local Court on 16 December 2016. In accordance with State sentencing, the early plea is such as to warrant a reduction of 25% to an otherwise appropriate sentence. In considering the principles guiding Commonwealth sentences, I consider that the plea demonstrates a willingness to facilitate the course of justice and is not merely a recognition of the inevitable.
>
> I also accept that the pleas are reflective of remorse. Although not required to express a quantification of the discount, I intend to apply a reduction of 25% on the Commonwealth offence.

39 The Minister acknowledged that the applicant's plea of guilty weighed in his favour, but stated that he was "mindful" that by pleading guilty the applicant obtained a 25% discount in sentencing from the court. This passing reference to the fact that there had been a 25% discount on sentence did not feature further in the Minister's path of reasoning. Fairly read, the Minister's reference to the 25% discount on sentence served to contextualise the plea of guilty, and to imply some qualification upon the significance of the applicant's plea of guilty, which the Minister otherwise accepted weighed in the applicant's favour. It was open to the Minister to reason in this way, and no jurisdictional error has been shown.

Conclusions

40 The application will be dismissed with costs.

41 The adversarial system of hearing depends upon the presentation of the parties' cases by competent counsel. This application was well argued by Dr Jason Donnelly, counsel for the applicant, who accepted a *pro bono* referral from the court to appear for the applicant. Dr Donnelly prepared an amended application and written submissions on behalf of the applicant, and appeared at the hearing. The court is most grateful for the assistance that Dr Donnelly provided to it, which had the consequence that the applicant had his case capably presented. I commend Dr Donnelly for acting in this application in the best traditions of the Bar. Dr Donnelly also arranged for the applicant to be represented by an instructing solicitor, Ziaullah Zarifi, who is also to be commended for the assistance provided.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan.

Associate:

Dated: 10 August 2021