FEDERAL COURT OF AUSTRALIA

BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 99

Appeal from:	*BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1429
File number:	NSD 1312 of 2021
Judgment of:	**FARRELL, PERRY AND DERRINGTON JJ**
Date of judgment:	6 June 2022
Catchwords:	**MIGRATION** – where the Primary Judge dismissed an application for review of a decision of the Administrative Appeals Tribunal to affirm a decision of a delegate of the first respondent not to revoke the mandatory cancellation of the applicant's Refugee visa – whether Tribunal failed to correctly apply Direction 90 issued pursuant to s 499 of the *Migration Act 1958* (Cth) – alleged error in weighing process in relation to the elements of the consideration of the appellant's links to the Australian community – no error by the Tribunal or the Primary Judge
Legislation:	*Migration Act 1958* (Cth)
Cases cited:	*FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 *Matthews v Minister for Home Affairs* [2020] FCAFC 146
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	42
Date of hearing:	19 May 2022
Counsel for the Appellant:	Mr D Hooke SC with Dr J Donnelly
Solicitor for the Appellant:	Zarifi Lawyers
Counsel for the First Respondent:	Mr G Johnson

Solicitor for the First Respondent:	Clayton Utz
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

NSD 1312 of 2021

BETWEEN:	**BOE21** Appellant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
ORDER MADE BY:	**FARRELL, PERRY AND DERRINGTON JJ**
DATE OF ORDER:	**6 JUNE 2022**

THE COURT ORDERS THAT:

1. The appeal is dismissed.

2. The appellant pay the first respondent's costs of the appeal.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 This is an appeal from the dismissal of an application seeking judicial review of a decision of the Administrative Appeals Tribunal (the Tribunal) which affirmed a decision of a delegate of the First Respondent. The delegate, in turn, had concluded that, as there was no other reason for revoking a cancellation of the appellant's visa, the power to revoke under s 501CA(4) of the *Migration Act 1958* (Cth) (*Migration Act*) was not enlivened.

2 Numerous grounds of review were advanced before the learned primary judge although only one is relied upon on this appeal.

3 For the reasons which follow the appeal must be dismissed.

Background

4 The appellant is a citizen and national of Somalia.

5 He arrived in Australia in November 2012 at the age of 17 and was granted a Class XB Subclass 200 Refugee visa.

6 On the basis of his recorded criminal history, he commenced to engage in criminal conduct within two years of his arrival. The evidence revealed that he had committed 60 offences over an extended period to about 2018. His initial offences were relatively minor, however, over time they became substantially more serious and included armed robbery involving violence and wounding, and assault occasioning bodily harm in company. He was convicted of the former offences on 29 August 2018 and sentenced to a period of three years in prison. He was convicted of the latter offences on 6 November 2019 and sentenced to, inter alia, two years in custody.

7 The cancellation of his visa occurred on 27 May 2019, and was based on his sentence of imprisonment for three years.

8 The appellant's visa was cancelled by a delegate of the Minister under s 501(3A) of the *Migration Act* on 27 May 2019 and his application for that cancellation decision to be revoked was refused on 15 February 2021.

The Tribunal's decision

9 The Tribunal affirmed the delegate's decision on 7 May 2021 after concluding that it was not satisfied that there was another reason why the cancellation decision should be revoked such that the power to revoke in s 501CA(4) was not enlivened.

10 Although there is no need to consider the Tribunal's reasons in detail it is appropriate to identify that it concluded (at [62]) that the appellant's "criminal conduct over the period from 2014 until his conviction in November 2019 is very serious conduct and should it be repeated constitutes a serious threat of harm to the Australian community." That finding is not disputed.

11 The Tribunal also concluded that:

(a) there was a high risk the appellant would commit further serious criminal conduct if released into the community, with the consequence that the primary consideration under *Direction 90 – Migration Act – 1958 – Direction under section 499 Visa Refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (Direction 90) of the protection of the Australian community "weighed heavily in favour of not revoking the cancellation of [his] visa" (at [81]);

(b) on the material there was no objective basis that it was in the best interests of the appellant's minor children for him to remain in Australia although it may be in the interests of his siblings if he did. Overall limited weight was given to this criteria (at [109]);

(c) the appellant's criminal record discloses a serious and sustained breach of Australian community expectations as expressed in Direction 90, with the result that this primary consideration weighed against revocation (at [113]);

(d) as a result of the general violence which exists in Somalia the consideration of Australia's non-refoulement obligations weighed significantly in favour of revocation because if he were returned there his life would be at risk and, if he were not returned, he would be at risk of a long period of detention (at [137]);

(e) the consideration of the impairments which the appellant would suffer if he were returned to Somalia weighed heavily in favour of revocation (at [143]);

(f) the elements of the consideration of the appellant's links to the Australian community were given differential weight (at [147] – [151]). It is this criteria which gives rise to

the sole ground of appeal and the Tribunal's consideration of it is set out in more detail below.

12 The Tribunal weighed the factors for and against revocation and concluded that it was not satisfied there was another reason to revoke the cancellation decision.

The decision of the primary judge

13 As mentioned above, numerous grounds of review were agitated before the primary judge although none succeeded. There is no need at this point to refer to his Honour's reasons for rejecting them.

The Ground of appeal

14 The substance of the sole ground of appeal is that the learned primary judge erred in failing to detect a jurisdictional error in the Tribunal's decision concerning the manner in which it applied cl 9.4.1 of Direction 90. By reason of s 499 of the *Migration Act* the Tribunal was required to apply that direction in the performance of its function under s 501CA. In substance, it was submitted that in the weighing process required by s 501CA(4) the Tribunal wrongly diminished the weight attributable to the issue of the strength of the appellant's ties to family or social links by reason of the appellant having commenced his criminal activities within a relatively short time of arriving in Australia.

15 Unfortunately, as with many judicial review applications in this Court, the ground of appeal and submissions were made at a relatively high level of generality without specific reference to the statutory context. The point advanced was, broadly, that an error occurred in relation to the application of Direction 90 which, because it was material, must have resulted in a jurisdictional error. However, a more precise way of articulating the real nature of the complaint is to say that an error occurred in the determination by the Tribunal that it was not satisfied that it had the state of mind required by s 501CA(4)(b)(ii); that is, satisfaction that there existed "another reason why the original decision should be revoked". On that basis, if an error was made, it gave rise to the question of whether the required subjective jurisdictional fact on which the power in s 501CA(4) was conditioned had occurred. Whilst there may be no doubt that an error which vitiates a subjective jurisdictional fact can have the consequence that a subsequent exercise or non-exercise of power involves a jurisdictional error, that conclusion is by no means direct. Moreover, the question of whether or not a jurisdictional fact exists or

has happened, whether that be an objective or subjective jurisdictional fact, does not necessarily involve questions of jurisdictional error.

16 In any event, the parties were content to contest the appeal on the basis on which it was advanced and it is appropriate to deal with it in that manner.

17 The passage in which the Tribunal dealt with this issue can be conveniently set out in full as follows:

> ***Links to the Australian community***
>
> 147. Paragraph 9.4 of Part 2 of Direction 90 requires that decision-makers reflect on the principles at paragraph 5.2 and have regard to the considerations set out in paragraphs 9.4.1 to 9.4.2.
>
> *Ties to Australia*
>
> 148. Paragraph 9.4.1. refers to the strength, nature and duration of the non-citizen's ties to Australia and sets out the following principles:
>
> (1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.
>
> (2) Where consideration is being given to whether to cancel a non-citizen's visa or whether to revoke the mandatory cancellation of their visa, the decision-maker must also consider the strength, nature and duration of any other ties that the noncitizen has to the Australian community. In doing so, decision-makers must have regard to:
>
> (a) how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:
>
> i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and
>
> ii. more weight should be given to time the non-citizen has spent contributing positively to the Australian community.
>
> (b) the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.
>
> 149. The Applicant has lived in Australia since he arrived as a young man in November 2012. He has strong family ties to Australia. He has a mother and stepfather and ten siblings living in Australia who are all Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely. The family lives together in two separate houses in close proximity in Brisbane. He also has two daughters who were born in Australia, although the Applicant has had very limited contact with either daughter. The Applicant also has a nephew. In addition, since 2015, the Applicant has established a role in the Muslim community centred on the Kuraby Mosque where he has friends and he

is involved in community activity and religious observance.

150. These are strong and enduring ties which weigh in favour of revocation. However, the relative weight to be given to these ties is diminished by the fact that the Applicant began offending in 2014, shortly after arriving in Australia.

151. The Tribunal accepts that a decision not to revoke the cancellation of the Applicant's visa would have an impact on the Applicant's immediate family. As the oldest sibling in his mother's household, he has provided practical and financial support for his mother in caring for her young children and especially A who has epilepsy. The continuity of this support has been interrupted by periods of imprisonment and he has now been absent from the family for over two years, due to his sentencing on 6 November 2019 and subsequent immigration detention. His contribution to his family as a role model and 'father figure' is diminished by his extensive involvement in criminal activity and the abuse of alcohol and drugs. On balance, the Tribunal accepts that there would be a negative impact on the Applicant's immediate family members if the cancellation of his visa is not revoked, but it does not give this consideration great weight.

18 Also relevant to the appeal are the Tribunal's comments in paragraph [165] of its reasons where it said:

165. To this consideration can be added the strength of the Applicant's links to Australia. The Applicant has strong extended family links to Australia, has lived here for almost 10 years and has significant community connections through his involvement with the Kuraby Mosque. His family would be negatively impacted if he were deported. This consideration is tempered, somewhat, by the Applicant's offending shortly after arriving in Australia and by his extended time in prison. Nevertheless, the Tribunal gives this consideration substantial weight in favour of revocation.

The appellant's submissions

19 The appellant's submissions on appeal are substantially the same as were made to the learned primary judge. He submitted that the Tribunal fell into error in the application of cl 9.4.1(2) which dealt with "the strength, nature and duration of any other ties that the noncitizen has to the Australian community". So the submission went, that clause is divided into two separate parts being the consideration of the length of time which the appellant had been in Australia (referred to as the "residence factor") in cl (2)(a), and the strength of ties to the community and family in cl (2)(b) (referred to the "ties factor"). It was submitted that the Tribunal erred by applying the abating impact of the appellant having commenced offending soon after his arrival in Australia – as is identified in (2)(a)(i) – to both the "ties factor" and the "residence factor" rather than to just the latter as is required by cl 9.4.1(2). This, so it was said, demonstrated a misunderstanding of the clause resulting in a material error in the decision-making process. In particular, it was submitted that there was nothing in cl 9.4.1(2)(b) which "requires" the Tribunal to give less weight to the "ties factor" because the appellant commenced offending

soon after arriving in Australia (AS [12]). It was submitted (AS [14]) that the Tribunal "wrongly assumed that it had to give less weight to the ties factor because the applicant commenced offending shortly after arriving in Australia".

20 It was further submitted (AS [16]) that the learned primary judge erred in holding that the Tribunal was entitled to take into account the appellant's offending soon after his arrival in Australia as a generally relevant consideration, including in relation to the ties factor. The reason, so it was said, was that the basis of the ground of review was, not that the Tribunal took into account an irrelevant consideration, but that it acted on a misunderstanding of the law. The appellant did not take issue with the proposition that the Tribunal was entitled to consider, as a general consideration, that the appellant commenced offending soon after arriving in Australia, but submitted that the primary judge failed to understand the application of that statement in relation to the findings of the Tribunal. The essence of the Tribunal's alleged error was said to be that, "Read fairly and in context, the Tribunal only reduced the attribution of weight to the ties factor because it erroneously assumed (as a matter of law) that it had to do so: AB46[150]" (at AS [16](i)).

21 It was also submitted that the error was material with the consequence that it amounted to a jurisdictional error.

The operation of cl 9.4.1

22 It must be kept in mind that Direction 90 imposes both mandatory and aspirational considerations for use in the exercise of the power under, inter alia, s 501CA(4). Its role is to act as a guide to the exercise of the identified powers. In *Matthews v Minister for Home Affairs* [2020] FCAFC 146, [45] the Full Court observed:

> In this regard, it is important to emphasise that the express purpose of Direction 65 is "to guide decision-makers performing functions or exercising powers under section 501 of the Act" (para 6.1(4), Direction 65; emphasis added). It remains the task of the Tribunal to determine what is and is not relevant in the circumstances of the individual case. Thus, as Perram J held by analogy in *SZTMD* (in a passage also approved in *HSKJ* at [44]):
>
> > 20 Although the applicant did not directly raise the issue, I would indicate that I accept Mr Hume's submission that it was for the Tribunal to form an opinion as to what was relevant under cll 2 and 3 [of Ministerial Direction 56 made under s 499 of the Act] and what was not. The usual way of reading provisions such as these clauses is that they are construed as requiring the formation by the decision-maker of an opinion on the standard (here, relevance) imposed; that is to say, they are not generally construed as requiring the existence of a jurisdictional fact: see, for example, *Australian Heritage Commission v Mount Isa Mines Ltd* (1995) 60 FCR 456 at 466-468 (FC).

> Consequently, there is no occasion to consider whether this Court is of the opinion that there were relevant parts of the guidelines or country information. It is the Tribunal's views on relevance which matter, not those of this Court.

23 It is well accepted that Direction 90 does not limit the matters which a decision-maker might take into account in determining whether there is another reason for revoking the cancellation decision. In addition, the weight given to a particular factor is a matter solely for the repository of the power.

24 In terms of the text of cl 9.4.1 it can be observed that:

(a) in sub-paragraph (1) the topic of consideration is the impact which a decision might have on the non-citizen's immediate family members who are in Australia. This can be referred to as the "family impact" consideration;

(b) conversely, sub-paragraph (2) is concerned with the nature and strength of the non-citizen's *other* ties to the Australian community (the "other ties" consideration). In general terms, that is the degree of the non-citizen's modal and substantive connection with the Australian community;

(c) in considering the weight to be given to sub-paragraph (2) the decision-maker is required to have regard to the length and value of the non-citizen's residency in Australia: (2)(a) being the "residence factor": as well as the strength, duration and nature of family or social links: (2)(b) or the "ties factor"; and

(d) in the course of considering the length and value of the non-citizen's residency the decision-maker is required to give it less weight where the non-citizen began offending soon after arriving in Australia and more weight where the non-citizen had positively contributed to the Australian community.

How did the Tribunal apply cl 9.4.1?

25 It was accepted by Mr Hooke SC for the appellant that in paragraph [151] of its reasons the Tribunal revealed its deliberations concerning the "family impact" consideration in cl 9.4.1(1). There was no criticism of that aspect of the Tribunal's reasons.

26 In paragraphs [149] – [150] of its reasons the Tribunal addressed those matters required by cl 9.4.1(2) being the "other ties" consideration. It noted the length of time the appellant had been in Australia and that he arrived as a young man. This relates directly to the residence factor in (2)(a)(i). It also recognised that he had strong family ties in Australia consisting of most of his family, that the family lived in two separate but proximate houses in Brisbane, that

he had two children of his own although he had little contact with them, that he had a nephew with whom he had some relationship, and that he had a role in the local Muslim community and mosque where he had friends and undertook religious worship. These matters are referrable to the "ties factor" in (2)(b).

27 In paragraph [150] the Tribunal attributed weight to the "other ties" consideration in cl 9.4.1(2) in a compendious manner by identifying that the appellant's strong and enduring ties weigh in favour of revocation, but the relative weight to be given to those ties was diminished because he began offending in 2014, shortly after arriving in Australia.

28 The Tribunal further touched on cl 9.4.1 in paragraph [165] of its reasons. That paragraph was conclusory in nature and dealt with the weighing up of the several factors in favour of revocation. There the Tribunal again referred to the abating effect on the "other ties" consideration of the appellant's offending soon after arriving in Australia as required by cl 9.4.1(2)(a)(i).

No error in the Tribunal's application of cl 9.4.1(2)

29 There was no demonstrated error in the manner in which the Tribunal applied cl 9.4.1(2) in the circumstances of this case. It correctly noted that the duration of the appellant's presence in Australia since he was a young man weighed in favour of revocation as did those matters relating to the ties factor, being the family and social relationships. It also correctly noted that the commencing of his offending soon after arriving had a diminishing impact in the weight to be given to the "other ties" factor. That it was particularly relevant to the "residence factor" in cl 9.4.1(2)(a)(i) may well be correct but there is nothing in the Tribunal's analysis which suggests that the abating effect was not applied to that. It is true that the Tribunal's analysis did not single out the impact of the length of time which the appellant was in Australia and apply the abating effect to it separately from other considerations. Rather it considered the combined influence of the "residence factor" and the "ties factor", as constituent parts of the "other ties" consideration in (2), and applied the abating effect to that consolidated whole. There is nothing to suggest that the Tribunal gave greater effect to the abating effect of the appellant's offending because it applied it to the consolidated weight of the other ties factor than it would have done had it applied it solely to the residence factor.

30 The matter might be represented by ascribing notional values to the several factors. Suppose a weight of 5 was given to both the "residence factor" and the "ties factor", and a value of negative 3 attributed to the fact that the appellant commenced offending soon after arriving in

Australia. On this basis, if the cerebral process which the appellant submitted was to be undertaken occurred, the value to be attributed to the "residence factors" is 5 – 3 or 2, to which the ties factor of 5 is to be added giving a total of 7; ie (5-3) + 5 = 7. The process undertaken by the Tribunal may well have been to add the residence factor of 5 to the ties factor of 5 and then reduce the total by 3 for the abating effect of the appellant's offending and, thereby, ultimately reaching the same conclusion. Represented numerically it is (5 + 5) – 3 = 7. This example should not be taken to suggest that a mathematical approach should be undertaken when considering the application of Direction 90. The example is used merely for illustrative purposes.

31 There is nothing in the reasons of the Tribunal which might suggest that it did other than correctly apply the abating effect of the appellant's offending shortly after arrival to the residence factor, whether it did so directly or as that factor constituted part of the consolidation of the residence factor and the ties factor. Moreover, there is nothing to suggest that the extent to which the appellant's offending reduced the weight of the "other ties" consideration (cl 9.4.1(2)) was any greater than it would have been had it been applied directly to the residence factor alone.

32 For the same reasons, no error arose in paragraph [165] of the Tribunal's decision. Again, the Tribunal diminished the weight of cl 9.4.1(2) generally rather than undertaking some specifically expressed off-setting analysis as between subparagraphs (i) and (ii) of sub-paragraph (a). There is nothing erroneous in that approach. A slight suggestion was raised that the abating effect of the appellant's offending was wrongly applied to the weight to be given to the "family impact" consideration in cl 9.4.1(1), however, that criticism cannot be sustained. Read fairly, the Tribunal was articulating its weighing analysis of all of the matters in cl 9.4.1 and the appellant's extended time in prison must necessarily have diminished any impact which his removal from Australia might have on his family members. In any event, this was not a ground of appeal.

The Tribunal did not act as if it were required to give less weight to the ties factor

33 As mentioned, a cornerstone of the appellant's submission was that the Tribunal erred by applying cl 9.4.1(2) in a way which *obliged* or *required* it to give less weight to the ties factor because the appellant commenced offending soon after arriving in Australia (AS [12]). This submission appeared to be advanced because it was accepted, as was identified by the primary judge (at PJ [55]), that the negative impact of a non-citizen commencing their offending shortly

after arriving in Australia, was a matter which could be taken into account by a decision-maker regardless of the content of Direction 90. It is by no means an "irrelevant consideration" which cannot be considered in the performance of the statutory function. On that basis, there was nothing preventing the decision-maker giving it significance and, indeed, applying its abating effect to any issue it considered relevant. As this was accepted by the appellant, he was forced to the position that the error occurred because the Tribunal believed that it was obliged to apply it in relation to a particular criteria.

34 However, there is nothing in the Tribunal's reasons which suggests that it held that belief. It merely applied the abating effect of the appellant's offending in relation to the precise topic to which it related.

35 In the course of submissions Mr Hooke SC sought to rely upon the decision of Thawley J in *FCFY v Minister for Home Affairs (No 2)* [2019] FCA 1990 (*FCFY*) being a case where the Tribunal had wrongly assumed that it was *required* by Direction 65 (an earlier version of Direction 90) to give less weight to the consideration of strength, nature and duration of ties to Australia because of the applicant's 'limited contribution to the Australian community'. The Tribunal member, in applying cl 14.2 of Direction 65 which was differently structured to cl 9.4.1, said, " However, I must place less weight on this consideration [the ties factor] because of the limited positive contribution to the Australian community over the past 30 years". Naturally enough, Thawley J identified (at [59]) that cl 14.2 of the Direction under consideration did not operate in this way and, in particular, because the lack of contribution to the Australian community did not require a reduction in weight to be given to the criteria of the length of residence. His Honour held that cl 14.2 was structured such that the lack of contribution to the Australian community was not intended to be weighed against the criteria of the applicant's ties to the Australian community.

36 The circumstances in *FCFY* and the learned judge's helpful comments have no application to the circumstances of the present matter. Most particularly, because here there is not a hint that the Tribunal considered itself obligated to apply the abating effect of the appellant's offending soon after arrival to the ties factor and even less evidence that it did.

37 It follows that the primary judge did not err in failing to detect any alleged error in the Tribunal's reasons in this regard.

The correctness of the primary judge's approach

38 Even if it were accepted that the Tribunal applied the abating effects of the appellant's offending against the ties factor, as the learned primary judge held, no error would result. There is nothing in the *Migration Act* generally or in s 501CA(4) specifically, which suggests that the fact that a non-citizen commenced offending soon after arrival cannot be taken into account in relation to any factor considered by the decision-maker. As his Honour correctly observed (at [55]):

> … However, this does not mean that offending soon after arrival in Australia cannot be taken into account as a generally relevant consideration, including in relation to the strength of ties in Australia more generally. That is, the argument depends upon a confusion between mandatory relevant considerations, and considerations that are generally relevant but not mandatory, treating the latter as if they are irrelevant forbidden considerations. Direction 90 does not create any such false dichotomy.

39 His Honour was entirely correct and, importantly, the appellant did not suggest otherwise. That being so, it is not possible for any error of the type relied upon to arise. It is within the decisional freedom of the decision-maker under s 501CA(4) to regard a non-citizen's offending soon after arrival as a weighty consideration which diminishes the impact of any and all other factors. For instance, if a non-citizen commenced engaging in serious organised crime soon after arrival in Australia, a decision-maker might view that as negating the weight of any ties that person has to persons in Australia or social institutions. Similarly, a decision-maker would be entitled to regard it as minimising any weight which might be accorded to any positive contribution which the non-citizen had made to the community or the impact on the non-citizen's family were the non-citizen to be deported.

40 On the assumption that it can be discerned that the Tribunal diminished the weight it gave to the ties factor by reason of the appellant's offending soon after arrival, the primary judge was correct to conclude that it committed no error in doing so.

Conclusion

41 It follows that the appellant has not established any error in the decision of the learned primary judge or that there was any error in the Tribunal's determination. For that reason there is no need to address the question of materiality.

42 The appeal must fail for this reason alone. The appellant should pay the Minister's costs of the appeal.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Farrell, Perry and Derrington.

Associate:

Dated: 6 June 2022