FEDERAL COURT OF AUSTRALIA

EQV20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 129

Appeal from:	*EQV20 v Minister for Immigration, Citizenship, EQV20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1252
File number:	NSD 1183 of 2021
Judgment of:	**RANGIAH, STEWART AND CHEESEMAN JJ**
Date of judgment:	5 August 2022
Catchwords:	**MIGRATION** – appeal from a judgment dismissing review of a decision of the Administrative Appeals Tribunal – where appellant seeks to rely on an entirely new ground of appeal – whether leave to raise new ground should be granted – where proposed new ground has insufficient merit – appeal dismissed
Legislation:	*Migration Act 1958* (Cth) ss 499, 501, 501CA
Cases cited:	*AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389; 77 ALJR 1088 *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	26
Date of hearing:	2 August 2022
Counsel for the Appellant:	Dr J Donnelly
Solicitor for the Appellant:	Zarifi Lawyers

Counsel for the First Respondent:	Mr G Johnson
Solicitor for the First Respondent:	Sparke Helmore Lawyers
Counsel for the Second Respondent:	The Second Respondent filed a submitting notice

ORDERS

NSD 1183 of 2021

BETWEEN:	**EQV20** Appellant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent **ADMINISTRATIVE APPEALS TRIBUNAL** Second Respondent

ORDER MADE BY:	**RANGIAH, STEWART AND CHEESEMAN JJ**
DATE OF ORDER:	**5 AUGUST 2022**

THE COURT ORDERS THAT:

1. The appellant's application to file an amended notice of appeal be dismissed.
2. The appeal be dismissed.
3. The appellant pay the first respondent's costs as agreed or assessed.

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

REASONS FOR JUDGMENT

THE COURT:

Introduction

1 The appellant is a citizen of New Zealand. He arrived with members of his family in Australia in 1994 when he was nine years old. Most recently, he resided in Australia under the authority of a Special Category (Temporary) (Class TY) visa.

2 In January 2020, a delegate of the **Minister** for Immigration, Citizenship, Migrant Services and Multicultural Affairs cancelled the appellant's visa pursuant to s 501(3A) of the *Migration **Act** 1958* (Cth) on the basis that he was satisfied that the appellant had a substantial criminal record and was serving a full-time custodial sentence for an offence against Australian law. After the appellant made representations to the Minister seeking the revocation of the cancellation, a delegate of the Minister refused to revoke the visa cancellation pursuant to s 501CA(4) of the Act. The appellant then applied to the Administrative Appeals **Tribunal** for review of the delegate's decision. In September 2020, the Tribunal affirmed the decision of the delegate.

3 The appellant sought review of the Tribunal's decision in this Court. In October 2021, the primary judge dismissed the appellant's review application with costs: *EQV20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1252. The appellant now appeals from that decision.

4 The appellant does not seek to re-agitate the ground of review that was argued on his behalf before the primary judge, but rather seeks leave to rely on a ground of appeal which is new and which does not encompass any point raised before the primary judge. He seeks leave to file an amended notice of appeal which contains the proposed new ground of appeal. He abandons the grounds in the original notice of appeal.

The principles governing leave

5 The principles governing whether the appellant should be granted leave to raise a new point on appeal in the context of a migration case such as this are not in dispute. The relevant authorities were recently discussed and applied in ***Khalil*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 26 at [34]-[37]. Although there are various other considerations, it suffices for present purposes to identify that the merits of the proposed

new ground of appeal are relevant; if the merits are poor then there is no prospect notwithstanding the other considerations that leave would be granted. Also, it is inappropriate in this context to consider those merits in the depth and detail that would be required in the context of the appeal itself.

6 We turn immediately to the proposed ground of appeal.

The appellant's proposed ground of appeal

7 The proposed ground of appeal is put as follows:

> The learned primary judge erred in not finding that there was a constructive failure to exercise jurisdiction by the second respondent (the Tribunal):
>
> (a) **Strand 1**. The appellant was denied procedural fairness in that the Tribunal failed to respond to a substantial, clearly articulated argument relying upon established facts.
>
> (b) The appellant expressly contended that in addressing the allocation of weight to the primary consideration of expectations of the Australian community, the Tribunal should have due regard to the Government's views in this respect and the overarching principles in Direction 79 (the Direction): CB486[32].
>
> (c) When attributing weight to the primary consideration of expectations of the Australian community, the Tribunal failed to consider and apply overarching principle 6.3(7) of the Direction in moderating/offsetting the adverse ascription of weight to this primary consideration: CB557[68]-[70]. The error was material.
>
> (d) **Strand 2**. Independent of (1)(a) above, an unarticulated claim might "clearly emerge" before a decision-maker, having regard to his or her own findings and the material before the decision-maker upon which those findings are reached.
>
> (e) When summarising the principles relevant to paragraph 13.3 of the Direction (i.e. the expectations of the Australian community), the Tribunal itself made a clear finding that overarching principle 6.3(7) of the Direction was a relevant consideration in assessing the attribution of weight to this primary consideration: CB548[24].
>
> (f) The first respondent (the Minister) also raised the application of overarching principle 6.3(7) of the Direction when addressing the primary consideration of the expectations of the Australian community: CB506[55].
>
> (g) The appellant repeats particular 1(c) above.

8 In substance, the contention is that the Tribunal denied the appellant procedural fairness by not dealing with a submission made by him as to the application of **Direction** No 79. That is a direction by the Minister under s 499 of the Act which contains general guidance for decision-makers, and the principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to, relevantly, revoke a mandatory cancellation under s 501CA.

Consideration of the merits of the point

9 The structure of the Direction is that in paragraphs 6.2(1) and 6.2(3) it identifies that the principles in paragraph 6.3 are of critical importance and that they provide a framework within which decision-makers should approach their task of deciding whether to revoke a mandatory cancellation under s 501CA. They also identify that in Part C of the Direction are the relevant factors "that must be considered" in making such a revocation decision. Part C is divided into primary considerations and other considerations.

10 In paragraph 6.3(7), one of the identified "framework" principles is that 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 the non-citizen's visa should be cancelled, or their visa application refused. We will refer to these considerations as the "contribution, minors and family considerations".

11 One of the mandatory primary considerations identified in Part C of the Direction is the expectations of the Australian community as provided by paragraph 13.3. We will refer to this as the "community expectations consideration". It is in the following terms:

> 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 not revoke the mandatory visa cancellation of such a person. Non-revocation 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 hold a visa. Decision-makers should have due regard to the Government's views in this respect.

12 In respect of his identified "strand 1", the appellant contends that he made a representation about the applicability of the principles in paragraphs 6.3(5) and 6.3(7) of the Direction to consideration of the community expectations consideration, and that the Tribunal overlooked (specifically) paragraph 6.3(7). He submits that a "substantial, clearly articulated argument relying upon established facts" must be considered by the Tribunal in the exercise of its review function: ***Dranichnikov*** *v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389; 77 ALJR 1088 at [24].

13 Recently in ***Plaintiff M1/2021*** *v Minister for Home Affairs* [2022] HCA 17 at [24] it was said that:

> the decision-maker must have regard to what is said in the representations, bring their

> mind to bear upon the facts stated in them and the arguments or opinions put forward, and appreciate who is making them. From that point, the decision-maker might sift them, attributing whatever weight or persuasive quality is thought appropriate. The weight to be afforded to the representations is a matter for the decision-maker. And the decision-maker is not obliged "to make actual findings of fact as an adjudication of all material claims" made by a former visa holder.
>
> (Footnotes omitted.)

14 The foundation to the appellant's claim is that such a representation or submission was made. In that respect the appellant points to [32] of his statement of facts, issues and contentions before the Tribunal. That paragraph is in these terms:

> With respect to this Primary Consideration C and allocation of relevant weight, paragraph 13.3(1) of the Direction provides that the Tribunal should consider whether the Applicant has breached, or whether there is an unacceptable risk for the applicant to breach, the trust of the Australian community. *The Tribunal must also have due regard to* the Government's views in this respect and *any overarching principles in the Direction 79*.
>
> (Emphasis added.)

15 In respect of his identified "strand 2", the appellant contends that the Tribunal was obliged to take into account an unarticulated claim, having regard to the Tribunal's own findings: ***AYY17** v Minister for Immigration and Border Protection* [2018] FCAFC 89; 261 FCR 503 at [26]. The appellant refers in that regard to [24] of the Tribunal's decision which is in a section discussing the principles relevant to the community expectations consideration and is in these terms:

> The length of time a non-citizen has been making a positive contribution to the Australian community and the consequences of the visa refusal or cancellation for minor children and other immediate family members in Australia are relevant considerations.

16 Turning to how the Tribunal dealt with the mandatory consideration of the expectations of the Australian community, it stated as follows:

> 68. This consideration has been the subject of extensive judicial discussion (see *FYBR v Minister for Home Affairs* [2019] FCAFC 185). It is not up to the Tribunal to substitute its own view for the expectations of the Australian community by reference to the Applicant's circumstances. The Tribunal rather, must give effect to the "norm" stipulated in Direction No. 79 at 13.3(1). per Stewart J and Charlesworth J (93); (100 to 104); (68).
>
> 69. In this case, the Tribunal has considered the seriousness of the Applicant's offending history together with the risk of his re-offending. The Applicant's offending should be regarded as being less culpable because of his mental health issues. The length of time the Applicant has spent in Australia affords him a higher level of tolerance. Nonetheless, the seriousness of the domestic violence offences and persistence of his offending, overall, lead to the

> conclusion that the Australian community, in conformity with Direction No. 79, would expect that the Applicant should not continue to hold a visa.
>
> 70. This consideration weighs against revocation of the mandatory cancellation decision.

17 It is the absence of any consideration in this section of the Tribunal's reasons of the contribution, minor and family considerations that the appellant complains. The complaint is not that the terms of the Direction made it necessary for the Tribunal to consider those matters, but rather that his representation as to the relevance or applicability of those considerations to the community expectations consideration compels such consideration.

18 Separately, under the section considering the best interests of minor children in Australia affected by the decision, which is a mandatory primary consideration under paragraph 13.2 of the Direction, the Tribunal discussed the effect that non-revocation would have on the appellant's four biological children, three stepchildren and five nephews and nieces. It concluded at [67] that the consideration in question "weighs very heavily in favour of the Applicant remaining in Australia".

19 Also, at [82]-[85] the Tribunal considered the contribution that the appellant has made to the Australian community and the consequences of non-revocation on immediate family members in Australia. These matters were considered under the "other consideration" of "strength, nature and duration of ties". The Tribunal concluded that this consideration weighs strongly in favour of the appellant.

20 Returning to what the appellant represented to the Tribunal, it is to be noted that although reference was made to paragraph 6.3(7) of the Direction in the context of the community expectations primary consideration, there was no submission that the contribution, minors and family considerations should cause less weight to be given to the primary consideration. Other matters, including that the appellant is deserving of compassion and "a second go" were mentioned in this context, but not the factors in question.

21 In those circumstances, the submission relied on is too oblique to give rise to the denial of procedural fairness that the appellant complains of. It is simply not a "substantial, clearly articulated argument relying upon established facts" within the meaning of *Dranichnikov* and similar authorities. The appellant's submission is not given any greater substance or clarity by the Minister's statement of facts, issues and contentions before the Tribunal which contained a submission that, insofar as paragraphs 6.3(5) and 6.3(7) are relevant to the community

expectations consideration, any higher level of community tolerance will have been extinguished on account of the appellant's repeated breach of the community's trust.

22 With regard to "strand 2", the Tribunal's identification, in a section of its reasons dealing with relevant legislation and policy, that the contribution, minors and family considerations are relevant considerations to the community expectations primary consideration is not a finding of fact causing an unarticulated claim to "clearly emerge" and be required to be dealt with within the meaning of *AYY17* at [26] and the cases discussed there.

23 As it was said in *Plaintiff M1/2021* at [25], the "decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them". The appellant's claim with regard to paragraph 6.3(7) of the Direction is not such as to have required consideration.

24 In the circumstances, there is insufficient merit in the proposed appeal ground to justify the grant of leave for it to be argued.

Conclusion

25 In light of our conclusion with regard to the potential merit of the proposed ground of appeal, it is unnecessary to consider any other factors that may weigh in favour of leave being granted.

26 In the circumstances, leave to file an amended notice of appeal raising the new ground of appeal should be refused and the appeal should be dismissed with costs.

I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Rangiah, Stewart and Cheeseman.

Associate:

Dated: 5 August 2022