



Administrative  
Appeals Tribunal

DECISION AND  
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2022/7087**

Re: **Tevita Halafa'u**

APPLICANT

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

RESPONDENT

**DECISION**

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

Date: **17 November 2022**

Place: **Sydney**

The Tribunal decides to:

1. set aside the decision of a delegate of the respondent not to revoke the mandatory cancellation of the applicant's Class TY Subclass 444 Special Category (Temporary) visa pursuant to s 501CA(4) of the *Migration Act 1958* (Cth); and
2. substitute a decision that the cancellation of the applicant's visa be revoked under s 501CA(4) of the *Migration Act 1958* (Cth).

.....  
[SGD]  
Deputy President B W Rayment OAM KC



## **CATCHWORDS**

*MIGRATION – mandatory visa cancellation due to substantial criminal record – refusal to revoke mandatory cancellation – numerous motor vehicle offences – misconduct with police – applicant remorse – humanitarian concerns – decision under review set aside and substituted*

## **LEGISLATION**

*Migration Act 1958 (Cth)*

## **CASES**

*Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628

## **SECONDARY MATERIALS**

Minister for Immigration, Citizenship and Multicultural Affairs, *Direction No. 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* (8 March 2021)

## REASONS FOR DECISION

Deputy President B W Rayment OAM KC

17 November 2022

1. The applicant, a 27 year old man, is a citizen of New Zealand, who began to live in Australia in 2006 at the age of 11. For the last two years, he has had a girlfriend in this country who is an Australian citizen. His mother and both of his two sisters reside here permanently. His father, who is estranged from the applicant remains in New Zealand where he has remarried and has a new family. Rejection by his father who abused him and his mother is part of the trauma which affected the applicant.
2. Starting from the year 2011, he has had a substantial criminal record. On 6 July 2021 his Class TY Subclass 444 Special Category (Temporary) visa was the subject of mandatory cancellation under s 501(3A) of the *Migration Act 1958* (Cth) ('the Act'). He made representations under s 501CA(4)(a) of the Act seeking revocation of the cancellation and on 26 August 2022 a delegate of the Minister refused to revoke the cancellation and the applicant sought review of that decision in the Tribunal.
3. Most of his convictions stem from his fascination with motor vehicles. He has never had a licence but has owned two motor vehicles. He is presently banned from driving until 2028. He proposes to sell his remaining vehicle so as to remove any temptation to drive until he is legally able to do so.
4. The motor vehicle offending displays considerable immaturity and thoughtlessness. The remorse now expressed by the applicant suggests a degree of maturation. The psychologist's report describes unresolved mental health issues which may have contributed to the offending itself.
5. His elder sister is a nurse with a Bachelor of Nursing degree. His younger sister, aged 16, is in high school in year 10. His mother, his two sisters and the partner of his mother, who is his mother's fiancé, all gave evidence before me. His girlfriend, who practises as a solicitor, also gave evidence before me. All of his immediate family and his girlfriend have obvious affection for the applicant, as he has for them.

6. His elder sister has three children, a boy and two girls of whom one is very young, who are all Australian citizens. He is described by his elder sister as close to all of them.
7. The applicant does not pass the character test on account of his convictions and sentences. His most recent sentence was for twelve months with a non-parole period of eight months. He had earlier shorter sentences from 2015 onwards.
8. It will be convenient now to discuss the various mandatory considerations specified in Direction 90. Its terms are published and I will not repeat them. The mandatory considerations which are relevant are: protection of the Australian community, family violence, best interests of minor children in Australia affected by the decision, expectations of the Australian community, extent of impediments if removed, impact on victims and links to the Australian community.

#### **Protection of the Australian community**

9. Principles numbered (2) to (5) inclusive inform this consideration, as does clause 8.1(1) of the Direction.
10. The nature and seriousness of the applicant's conduct to date is reflected in the applicant's long criminal record which includes many driving offences, and which are set out in the national police certificate. The applicant was convicted on some twelve occasions of offences of driving while disqualified from 2011 to 2021, and of a number of offences of driving an unregistered or uninsured vehicle. He was convicted of possessing a prohibited weapon (a laser pointer) and of endangering a person on a railway by pointing the laser pointer. He was convicted of resisting and assaulting a police officer in the execution of his duty and failing to stop when directed to do so. He has several convictions for intimidating a police officer. There is an extended high speed police pursuit offence. There are several prescribed content of alcohol convictions.
11. There were two minor incidents at his mother's home involving a degree of violence against his mother and her fiancé as a result of which the police (not at the request of the applicant's mother or her fiancé) obtained an apprehended violence order against him. His mother and her fiancé have forgiven him for the incidents, do not fear him, and wish him to live with them if he is released. He desires to do so.

12. The motor vehicle and other offending of the applicant, which fortunately did not result in any person being harmed, was very dangerous activity, as is in the case especially of the high-speed pursuit and the PCA offences. The misconduct with police officers was also very serious, suggesting a need for anger management treatment, which the applicant has undergone.
13. The applicant told me that he is remorseful about all the offending and takes full responsibility for it and members of his family said the same in evidence, reporting that he has said that he firmly intends not to repeat his offending. He has taken steps for his own reform while in prison and in detention, as discussed in more detail below. He has also consulted a psychologist who traced his history and diagnosed him with a number of mental health conditions which are the result of trauma suffered in New Zealand and in Australia, especially involving his father and his uncle in this country. Those mental health conditions may explain the offending, at least in part. The psychologist stated that the applicant, during a number of interactions he has had with the applicant, had impressed him by repeatedly expressing remorse for his offending.
14. The period of time which the applicant has spent in detention, with the cancellation of his visa and prospect of his deportation to New Zealand, has given the applicant a “wakeup call”.
15. He has not drunk alcohol either in prison or in detention, and had been drug free for some years.
16. Direction 90 requires consideration of the risk of recidivism. The applicant well knows that reoffending may lead to imprisonment, a further cancellation of his visa and his deportation. That would mean the loss of his relationship with his girlfriend, who would be devastated, as would his immediate Australian family. Depression, one of his mental health diagnoses, may lead to his suicide if he is deported to New Zealand. He has job offers and an offer of accommodation here which he wishes to take up, and is apprehensive that the same may not be the case in New Zealand.
17. Importantly, the applicant intends to continue seeing his treating psychologist if he is released from detention. Mental health problems seem undoubtedly to have contributed to his previous offending. So has, undoubtedly in my opinion, a lack of remorse. For example,

some of his motor vehicle offending occurred close in time to very recent similar offending for which charges were pending. It is clear from the evidence both before the Tribunal and from other witnesses that the “wakeup call” of the detention centres he has attended has provoked real remorse in the applicant.

18. One other matter was clear from the applicant’s behaviour and evidence. His affection for his family and girlfriend was patent and will reinforce his intention not to regress into any recidivism. The mutual affection which he enjoys with his family and girlfriend, and his knowledge that if he offends again he will be deported with devastating consequences not only for himself but for those he loves, will assist to keep him from reoffending. He had a previous warning from the Department, but reoffended.
19. The recent steps taken by the applicant for his own rehabilitation apart from his interactions with his own psychologist are that whilst in prison he attended and engaged in a weekly EQUIPS addiction course and completed a traffic offender’s intervention program. He attended (at his own initiative) online Odyssey House group therapy sessions for alcohol and drug addiction, and mental health issues. He gained better understanding of his issues with anxiety, stress, depression, anger and domestic violence specific to his offending. The Odyssey House report states that the applicant was a valued member of the group who has developed insight into his issues. Also, at his own initiative, a psychologist interviewed him in Villawood and wrote a report addressed to Home Affairs.
20. Both in prison and in detention, the applicant’s behaviour has been disciplined.
21. Another matter which is of relevance is that the applicant has a history of employment and, if he is released, intends to take advantage of job opportunities presently available to him.
22. To sum up, the evidence has traced causes of his offending to trauma in his childhood, particularly in New Zealand, but also in Australia, and involving abuse and rejection by his father, and abuse of his mother in Australia by an uncle, which produced mental health issues which are likely to be the subject of further treatment if he is released. That further treatment may include interactions with Odyssey House, a body with a good reputation which the applicant said he would wish to communicate with in person if he is released.

23. At the present time, the applicant still has mental health issues, which his psychologist desires to continue to treat, and which the applicant intends should occur. He has had fifteen sessions to date with his psychologist. He has an elevated profile on various mental health matters as measured by the psychometric tests administered by his psychologist. His criminal record is substantial and some of his offending was quite serious. Despite hopeful signs clearly apparent from the evidence, the factor of protection of the Australian community counts overall against the revocation of the cancellation of his visa.

### **Family violence**

24. As to family violence, the relatively moderate violence practised upon his mother and the mother's fiancé of 2016 and the violence on the mother's fiancé of 2020 has been forgiven, and the desire of both his mother and her fiancé to receive the applicant into their home, if he is released, are to be noted. One of the incidents followed the applicant learning of the untimely death of a close friend.

### **Best interests of minor children**

25. I accept that the applicant has a close relationship with his elder sister's children, a boy and two girls, and I accept that it is in the best interests of those children for the applicant (their uncle) to remain in Australia. The applicant also has cousins in Australia some of which have children. The Tribunal has little evidence about the children of the cousins.

### **Expectations of the community**

26. The factor of expectations of the community, which expectations are those stated in Direction 90, do not favour the applicant in the light of his offending, and count against revocation of the cancellation.
27. No non-refoulement obligations are relevant in this matter.

### **Impediments if removed and links to the community**

28. The factor of extent of impediments if removed and links to the Australian community, particularly his family and girlfriend, are related matters. On the second day of the hearing the applicant sat in the hearing room throughout addresses, holding hands both with his mother and his girlfriend, which spoke for itself. Both his mother and his girlfriend intend to

remain in Australia, even if the applicant is deported, despite their love for the applicant. When the applicant's mother learned of the applicant's offending some years ago, it led to her suffering heart trouble. The girlfriend has maintained a strong connection with the applicant, despite his imprisonment and detention, contact being by telephone until the hearing of this review. In this country, his family and his girlfriend are what is most important to the applicant. His deportation would be devastating for him and them, a matter which is not irrelevant to the exercise of discretion in this case on humanitarian grounds. See generally the judgment of Allsop CJ in *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628 at [3].

29. The applicant does not know what awaits him in New Zealand as to employment, as to accommodation, but knows how much he would miss his family and girlfriend and how much they would miss him. He mentions the possibility of suicide, a risk which cannot be overlooked in the light of his presently unresolved mental health issues.
30. The applicant's firm intention to put away his past offending is evident, as is his remorse for what he has done in the past. He is on one view of the facts on the cusp of recovery from the causes of his offending and has the possibility of fulfilling his wish to marry, have children, buy housing and remain connected with his loved ones. Deportation is a large step to take in those circumstances. It would injure his family and girlfriend. On the face of it, his chances of recovery are better in Australia where his family and loved ones live and will give him any necessary support.
31. His lengthy record of offending has been punished by the courts, and his forced separation from the community after his release from prison in detention has brought him to the remorse and to what he describes as a wakeup call. He well knows the importance of his rehabilitation and the likely consequences for himself and his family and girlfriend if his past crimes are repeated.
32. The applicant has played rugby with the Campbelltown Harlequins, which he wishes to recommence if released. His younger sister also plays football and he has assisted her and desires to continue to do so.

For all of those reasons, in my opinion, on balance, the correct or preferable decision is to revoke the cancellation of the applicant's visa under s 501CA(4) of the Act.



*I certify that the preceding 32  
(thirty -two) paragraphs are a  
true copy of the reasons for  
the decision herein of Deputy  
President Rayment OAM KC*

.....[SGD].....

Associate

Dated: 17 November 2022

Date(s) of hearing:	<b>3 &amp; 4 November 2022</b>
Counsel for the Applicant:	<b>Dr J Donnelly</b>
Solicitors for the Respondent:	<b>Ms C Saunders, MinterEllison</b>