Double Counting Family Violence for the Same Purpose – Permissible Decision-making or Legal Unreasonableness?

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Decision-makers who make decisions under ss 501 and 501CA of the Migration Act 1958 (Cth) are bound to apply relevant considerations reflected in Direction no 90. The general purpose of the Direction is to guide decision-makers making character decisions and ensure such decisions readily apply mandated government policy. This article explores the legality of an aspect of the application of the Direction, which effectively requires decision-makers to double count family violence committed by a non-citizen against that person when considering the exercise of the statutory power in ss 501 and 501CA of the Act. After examining legal principles relevant to legal unreasonableness, this article concludes that requiring decision-makers to double count the same conduct against a non-citizen for the same purpose is arguably an exercise of legally unreasonable decision-making.

INTRODUCTION

Towards the end of the Pt 9 (Div 2) of the *Migration Act 1958* (Cth) (the Act) sets out a number of statutory provisions related to regulating non-citizens on character grounds.[1] The provisions are complex and form part of an intricate web of law that has created a rich species of jurisprudence.

When a character decision is made by either a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs or Minister for Home Affairs or the Administrative Appeals Tribunal (the Tribunal), the decision-maker is bound to apply *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* (the Direction). Direction 90 is not a legislative instrument,[2] but a ministerial direction made under s 499(1) of the Act. That section provides that the Minister may give written directions to a person or body having functions or powers under the Act if the directions are about (1) the performance of those functions; or (2) the exercise of those powers. Pursuant to para 5.1(4) of the Direction, the purpose of the Direction is to guide decision-makers performing functions or exercising powers under ss 501 and 501CA of the Act. The balance of the paragraph indicates that under s 499(2A) of the Act, such decision-makers must comply with a direction under s 499.

One aspect of the Direction, which is the focus of this article, is that where decision-makers are making character decisions under ss 501 and 501CA of the Act, they are effectively required to take into account a non-citizen's engagement in family violence twice for the same purpose. It is concluded that the purported exercise of the character power in ss 501 or 501CA of the Act, by holding the same adverse conduct against a non-citizen twice for the same purpose, is legally unreasonable.

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[1] Jason Donnelly, "Rethinking the Character Power as It Relates to Refugees and Asylum Seekers in Australia" (2019) 13 *UNSW Law Society Court of Conscience* 97.

[2] *Jagroop v Minister for Immigration and Border Protection* (2015) 67 AAR 288, [47]; [2015] AATA 751; *PRHR v Minister for Immigration and Border Protection* (2017) 73 AAR 435, [149]; [2017] AATA 2782; *Tran v Minister for Home Affairs* [2019] AATA 199, [44]–[45]; *Uelese v Minister for Immigration and Border Protection* (2016) 248 FCR 296, [45]–[63]; [2016] FCA 348.

THE LEGAL ARCHITECTURE

It is first appropriate to provide an outline of relevant aspects of the statutory regime in Pt 9 (Div 2) of the Act and the Direction.[3]

Section 501(1) of the Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. Section 501(2) provides that the Minister may cancel a visa that has been granted to a person if (1) the Minister reasonably suspects that the person does not pass the character test; and (2) the person does not satisfy the Minister that the person passes the character test.[4] Notably, the rules of procedural fairness apply to decisions made under ss 501(1) and 501(2) of the Act.

Section 501(3) of the Act provides that the Minister may refuse to grant a visa to a person or cancel a visa that has been granted to a person if (1) the Minister reasonably suspects that the person does not pass the character test and (2) the Minister is satisfied that the refusal or cancellation is in the national interest. A decision made under s 501(3) can only be exercised by the Minister acting personally. The rules of procedural fairness do not apply. The exercise of the statutory powers under ss 501(1)–(3) of the Act involve the exercise of discretionary power.[5]

Where a visa has been mandatorily cancelled under s 501(3A) of the Act, that person can make representations seeking to have the mandatory cancellation decision revoked under s 501CA(4) of the Act.[6] Pursuant to s 501CA(4)(ii) of the Act, the Minister needs to be satisfied that there is another reason why the original decision should be revoked. The statutory test in s 501CA(4)(ii) of the Act is an administrative state of satisfaction and not a discretion.[7]

Section 501(6) of the Act defines when a non-citizen is taken not to pass the character test.[8] For example, a person is taken to fail the character test if that person has a substantial criminal record,[9] the person has been convicted of an offence related to immigration detention,[10] the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person that has been or is involved in criminal conduct,[11] the person has been convicted or involved in certain deemed offences,[12] having regard to the person's past and present general and criminal conduct,[13] the person poses an unacceptable risk of engaging in certain adverse conduct in Australia,[14] the person has been charged with certain deemed offences,[15] the person has been assessed by the Australian Security

[3] Chantal Bostock, "Expulsion: A Comparative Study of Australia And France" (2018) 92 *AIAL Forum* 87, 88.

[4] Gillian Triggs, "Human Rights and the Overreach of Executive Discretion: Citizenship, Asylum Seekers and Whistleblowers" (2016) 16 *Macquarie Law Journal* 3, 14.

[5] *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430, 439 [22], 440 [24], 441–442 [31]–[32], 444 [40]–[41]; [2021] HCA 1.

[6] Since the introduction of the mandatory cancellation regime, the number of visa cancellations has increased by over 1,100%: Department of Home Affairs, *Key Visa Cancellation Statistics* (14 October 2019) <https://www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/visa-cancellation>.

[7] *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125, [28]–[44].

[8] For a historical analysis of the character test in Australia, see Michelle Foster, "An 'Alien' by the Barest of Threads: The Legality of the Deportation of Long-term Residents from Australia" (2009) 33(2) *Melbourne University Law Review* 483. See further Savitri Taylor, "Exclusion from Protection of Persons of 'Bad Character': Is Australia Fulfilling Its Treaty-based Non-refoulement Obligations?" (2002) 8(1) *Australian Journal of Human Rights* 83, 91–92.

[9] *Migration Act 1958* (Cth) s 501(6)(a).

[10] *Migration Act 1958* (Cth) s 501(6)(aa).

[11] *Migration Act 1958* (Cth) s 501(6)(b).

[12] *Migration Act 1958* (Cth) s 501(6)(ba) and 501(6)(e).

[13] *Migration Act 1958* (Cth) s 501(6)(c).

[14] *Migration Act 1958* (Cth) s 501(6)(d).

[15] *Migration Act 1958* (Cth) s 501(6)(f).

Intelligence Organisation to be directly or indirectly a risk to security[16] or the person is the subject of an Interpol notice, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.[17]

The power reposed in the relevant Minister under ss 501 and 501CA does not, as a general proposition, impermissibly confer upon that Minister any judicial power.[18]

Notably, where the relevant Minister makes a decision personally, they are not bound to apply the Direction.[19] The use of character tests as a part of administrative decision-making raises multiple concerns on the breadth of discretion given to the Minister,[20] as well as the lack of robust accountability mechanisms.[21]

As to the Direction, the following important principles should be noted for present purposes. Directions are a flexible mechanism by which the government can shape policy, to reflect its broader social objectives.[22]

Paragraph 7(1) provides that in applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight. Paragraph 7(2) provides that primary considerations should generally be given greater weight than the other considerations. Paragraph 7(3) provides that one or more primary considerations may outweigh other primary considerations.

Paragraph 8 makes plain that in making a decision under ss 501(1), (2) or 501CA(4) of the Act, the following are primary considerations: (1) protection of the Australian community from criminal or other serious conduct; (2) whether the conduct engaged in constituted family violence; (3) the best interests of minor children in Australia; and (4) expectations of the Australian community.[23]

Paragraph 9(1) provides that in making a decision under ss 501(1), 501(2) or 501CA(4), other considerations must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to): (1) international *non-refoulement* obligations; (2) extent of impediments if removed; (3) impact on victims; and (4) links to the Australian community.

Paragraph 4(1) defines family violence to mean "violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful".

The Legal Principles

Having outlined, in summary, the statutory regime concerning the regulation of character matters under the Act, it is now appropriate to outline the relevant legal principles concerning legal unreasonableness in Australia:

[16] *Migration Act 1958* (Cth) s 501(6)(g).

[17] *Migration Act 1958* (Cth) s 501(6)(h).

[18] *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560, [329]; [2022] HCA 19; *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333; [2018] HCA 2.

[19] *Bochenski v Minister for Immigration and Border Protection* (2017) 250 FCR 209, [74], [78]; [2017] FCAFC 68.

[20] A topic which, by academic and judicial commentary, remains relevant. As at the time of writing, the Minister is granted the most "personal discretion of any Minister by an overwhelming margin": see Liberty Victoria, *Playing God: The Immigration Minister's Unrestrained Power* (Report, 2017) 3.

[21] Samuel C Duckett White, "God-like Powers: The Character Test and Unfettered Ministerial Discretion" (2020) 41(1) *Adelaide Law Review* 1, 2–3.

[22] *Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356; [2009] FCA 528; Chantal Bostock, "The Effect of Ministerial Directions on Tribunal Independence" (2011) 66 *AIAL Forum* 33, 35.

[23] Earlier versions of the Direction did not include family violence as a stand-alone primary consideration: see White, n 21, 8–9.

- Unreasonableness is concerned with both *outcome* and *process*.[24]
- Whether what is being reviewed is an exercise of a power or the formation of a state of satisfaction, a finding of unreasonableness is not limited to cases where the outcome is one which no reasonable decision-maker could have reached.[25]
- The correct approach is to ask whether it was open to the decision-maker to engage in the process of reasoning in which it did engage.[26]
- Given that the reasonableness condition is derived by implication from the statutory provision, its content is also shaped by the statutory context.[27] Legal unreasonableness is to be judged at the time that the power was exercised or should have been exercised.[28]
- Whether the implied requirements of legal reasonableness have been satisfied requires a close focus upon the particular circumstances of exercise of the statutory power: the conclusion is drawn from the facts and from the matters falling for consideration in the exercise of the statutory power.[29]
- A decision can be invalid if it is made in circumstances which exceed the high threshold of legal unreasonableness.[30]
- Materiality is bound up in the concept of legal unreasonableness.[31]

Five further observations on the topic of legal unreasonableness require mention.

First, a decision may be legally unreasonable in the sense that it was not an outcome that was reasonably open within "an area of decisional freedom".[32] This reflects legal unreasonableness that is "outcome focused".

Second, a decision may be unlawful where the process of reasoning deployed could be characterised as legally unreasonable.[33] This reflects legal unreasonableness that is "process focused".[34] Legal unreasonableness in the process of decision-making recognises an implication of a duty of legal reasonableness only in the performance or exercise of a statutory duty, function, or power.[35]

Third, as Edelman J neatly outlined in *ABT17 v Minister for Immigration and Border Protection*:[36]

> It suffices to say that factors which might point to the threshold for legal unreasonableness in the performance of this duty to give reasons being high, despite the importance of the issue being decided, include: the historical background against which Parliament legislated, the statutory context emphasising the limited nature of the review and the need for efficiency and speed, and authorities which, using strong adjectives, had described reasons as leading to jurisdictional error where the reasons fail to provide an "intelligible justification" for the decision or are "irrational or illogical irrespective of whether the same conclusion could be reached by a process of reasoning which did not suffer from the same defect".

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[24] *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 573 [81]–[82]; [2018] HCA 30.

[25] *Plaintiff S183/2021 v Minister for Home Affairs* (2022) 96 ALJR 464, [43]; [2022] HCA 15.

[26] *Plaintiff S183/2021 v Minister for Home Affairs* (2022) 96 ALJR 464, [43]; [2022] HCA 15; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 648 [133]; [2010] HCA 16.

[27] *DVO16 v Minister for Immigration and Border Protection* (2021) 95 ALJR 375, [68]; [2021] HCA 12.

[28] *Minister for Home Affairs v DUA16* (2020) 271 CLR 550; 95 ALJR 54, 61 [26]; [2020] HCA 46.

[29] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76]; [2013] HCA 18. See John Griffiths, "Judicial Review of Administrative Action in Australia" (2017) 88 *AIAL Forum* 9, 13.

[30] *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439; [2020] HCA 34.

[31] See, eg, *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134, 163 [107]; [2019] FCAFC 43; *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 564–566 [53]–[56], 572–573 [80], 583 [131]; [2018] HCA 30. See also, eg, *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 6 [12]; [2016] FCAFC 11.

[32] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351 [28]; [2013] HCA 18.

[33] *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, [122]; [2020] HCA 34.

[34] See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 266 [4.720], comparing *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 625 [40]–[42] (Gummow ACJ and Kiefel J) with 647–648 [130] (Crennan and Bell JJ); [2010] HCA 16.

[35] *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, [125]; [2020] HCA 34.

[36] *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, [125]; [2020] HCA 34.

Fourth, given that the Direction is not delegated legislation, the high threshold test for unreasonableness invalidating delegated legislation has no application here.[37] As such, principles such as reasonable proportionality do not squarely apply to the discussion that follows.[38]

Fifth, it has also been accepted that traditional principles of "illogicality" or "irrationality" are judicial review grounds open to a non-citizen to attack a decision of the Tribunal applying a ministerial direction relevant to s 501CA(4) of the Act.[39] Moreover, the grant of the discretionary powers in s 501 are presumed to have been made on the implied condition that they be exercised reasonably,[40] even where decisions are made by the Tribunal under s 501 of the Act applying a ministerial direction.[41]

Next, this article will demonstrate how the Direction requires a decision-maker to double count family violence against the non-citizen.

DOUBLE COUNTING FAMILY VIOLENCE CONDUCT

Paragraph 8.1.1 of the Direction requires a decision-maker to address the primary consideration of the protection of the Australian community. To that end, para 8.1.1(1)(a)(iii) requires a decision-maker to have regard to "acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed".

The decision-maker is required to consider such impugned conduct in the context of considering the broader question related to the nature and seriousness of the non-citizen's criminal offending and other adverse conduct. Clearly, then, family violence is a mandatory consideration (to the extent that it is relevant on the facts in a case) that the decision-maker is required to take into account for the purposes of considering the primary consideration of the protection of the Australian community.

Paragraph 8.2 of the Direction outlines the principles relevant to the primary consideration of family violence committed by the non-citizen. Paragraph 8.2(3) requires a decision-maker to again have regard to family violence committed by a non-citizen in the context of considering the seriousness of such conduct.

The following table below shows how decision-makers are required to repeat the process of considering a non-citizen's engagement in family violence for the purposes of two adverse primary considerations in the Direction:

Topic	Protection of the Australian Community	Family Violence Committed by the Non-citizen
Family Violence Conduct (FVC) Deemed to Be Very Serious	Para 8.1.1(1)(a)(iii)	Para 8.2(1)
Frequency of FVC	Para 8.1.1(1)(d)	Para 8.2(3)(a)
Cumulative Effect of Repeated Offending	Para 8.1.1(1)(e)	Para 8.2(3)(b)
Likelihood of Reoffending and Rehabilitation	Para 8.1.2(2)(b)	Para 8.2(3)(c)

Accordingly, should a non-citizen have engaged in family violence, this is a matter that will be adversely held against that person for the purposes of the primary consideration of the protection of the Australia

[37] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [54]–[56]; [2013] HCA 3.

[38] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, [59]; [2013] HCA 3.

[39] *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, [65]–[66].

[40] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EBD20* (2021) 287 FCR 581, 593 [49]; [2021] FCAFC 179.

[41] *BTZ19 v Minister for Home Affairs* [2019] FCA 1301, [64]–[68]; *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 1842, [41]–[43].

community. It will inevitably mean that the primary consideration will weigh against the non-citizen either being permitted to remain in Australia or come to Australia. In that context, the non-citizen's impugned family violence has rightly been held against the person for the purposes of the protection of the Australian community (being an important function of the character power in ss 501 and 501CA of the Act).[42]

However, as explored above, para 8.2 of the Direction requires a decision-maker to again hold against the non-citizen the very same family violence conduct that formed part of the decision-making process under para 8.1.1. The effect of such an analysis is plain – the repository of power (given the Direction) is required to double count the same adverse conduct against the non-citizen for the same purpose (ie protection of the Australian community).

This issue of double counting has been alive to the Tribunal. Regrettably, the issue has resulted in competing jurisprudence.

For example, one line of cases has refused to adopt reasoning that would result in double counting family violence against the non-citizen.[43] On this approach, the Tribunal only holds family violence against the non-citizen under *either* the protection of the Australian community or the primary consideration of family violence committed by the non-citizen.[44]

In a direct effort to avoid double counting of a non-citizen's family violence under two adverse primary considerations, the Tribunal reasoned as follows in *Mamatta v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*:[45]

> The Tribunal observes that sub-paragraphs 8.1.1(1)(a)(ii) and (iii) of the Direction, both ask decision makers to consider the Applicant's criminal and other relevant conduct with respect to these categories, "regardless of the sentence imposed". The Tribunal is of the view that to consider the Applicant's domestic violence related conduct where there are convictions, as well as conduct where there is no conviction recorded for the purposes of both sub-paragraphs 8.1.1(1)(a)(ii) and (iii) of the Direction, in addition to paragraph 8.2 (or Primary Consideration 2) of the Direction, could lead to the perception of "double counting". The Tribunal will consider the Applicant's criminal and other relevant conduct with respect to his domestic violence related offending in detail with respect to Primary Consideration 2, in the latter reasons of this decision. [own emphasis]

In the same decision,[46] Senior Member B Pola continued:

> With respect to the weighting the Tribunal has afforded this consideration [family violence committed by a non-citizen], and to the extent that there is overlap given the findings the Tribunal has expressed in Primary Consideration 1 [protection of the Australian community] of these reasons, the Tribunal has taken this into account to avoid "double counting".

In *RTTW v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[47] a differently constituted Tribunal said:

> Therefore, I am of the view that to take into account family violence-type conduct (especially where there are no conviction(s) recorded for it) for the purposes of both paragraphs 8.1.1(1)(a)(iii) and 8.2 of

[42] Jason Donnelly, "Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door" (2017) 24 AJ Admin L 99, 105.

[43] *BYMD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 3476, [155]; *FFXL v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 3655, [122]; *Nuuamoa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 3295, [108]; *Anderson v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 205, [217]; *Pourabbas Aghbolagh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4269, [59]; compare *Williams v Minister for Immigration and Citizenship* (2013) 136 ALD 299, [60]; [2013] FCA 702; *Batson v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 1715, [106].

[44] *Chand v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 2752, [124]; *DJTW v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 3822, [126].

[45] *Mamatta v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 1, [96].

[46] *Mamatta v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 1, [176].

[47] *RTTW v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4813, [47].

> the Direction must surely amount to double-counting or, put another way, double-referencing. I will thus refrain from applying the componentry of paragraph 8.1.1(1)(a)(iii) in any assessment of the nature and seriousness of the Applicant's conduct. [own emphasis]

In *Chand v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[48] Member Andrew McLean Williams held [footnotes omitted]:

> Although the Tribunal remains conscious of the mandated requirement to consider factual material relevant to consideration of the family violence primary consideration; and accepts this requirement as one that persists even in circumstances wherein that same factual material has already been considered as part of deliberations relating to Primary Consideration 1, the Tribunal concurs with Dr Donnelly's submission: that the fact that weight has already been attached to family violence matters as part of the deliberation and assessment of past conduct under Primary Consideration 1 has the effect that no additional adverse weight can reasonably attach to family violence, under Primary Consideration 2.[49]

The double-counting approach was also avoided in *Amos v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[50]

A second line of cases before the Tribunal has applied the double-counting approach.[51] In these cases, the Tribunal has double counted the impugned family violence against the non-citizen for the purposes of the protection of the Australian community and the primary consideration dealing specifically with family violence.[52]

On this latter approach, the Tribunal has attributed adverse weight against a non-citizen twice under two primary considerations in relation to the same impugned family violence conduct. By way of example, in *Musumeci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[53] Deputy President J Sosso outlined:

> The issue of family violence appears in both Primary Consideration 1 and 2. The Tribunal is required to properly consider and assess the question of family violence in the context of the wording of each Consideration. The issue of double counting does not arise.[54]

The difficulty with the impugned reasoning of Deputy President J Sosso is that there is very little analysis on the double-counting issue. The Deputy President appears to form a conclusion without any real consideration of the legal character of the two primary considerations and whether, in substance, double counting has occurred.

It is the legality of this second approach that is ultimately the subject of consideration in this article. Of course, the principle of legal precedent does not strictly apply in the Tribunal.[55]

At the heart of merits review may be the choice between a number of legally correct decisions.[56] The next section of this article will explore whether the reasoning adopted by the second line of cases is legally unreasonable.

Before moving to that section, it should perhaps be emphasised that it can readily be accepted that engagement in family violence is very serious. Family violence has the real potential to cause

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[48] *Chand v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 2752.

[49] *Chand v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 2752, [124].

[50] *Amos v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4774, [33].

[51] *JVGD v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 2830; *TCXM v Minister for Immigration, Citizenship, and Multicultural Affairs* [2022] AATA 2820; *CRFF v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 2750; *Kapanadze v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 2749; *Boaza v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 2645.

[52] *JTNW v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4948, [92]–[93].

[53] *Musumeci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 2885.

[54] *Musumeci v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 2885, [128].

[55] See Lisa Burton Crawford and Dan Meagher, "Statutory Precedents under the 'Modern Approach' to Statutory Interpretation" (2020) 42(2) *Sydney Law Review* 209, 212.

[56] David Thomas, "Contemporary Challenges in Merits Review: The AAT in a Changing Australia" (2019) 96 *AIAL Forum* 1.

considerable physical, psychological and economic harm to individuals and the wider community.[57] The legal argument explored below should not be taken to detract from that important observation.

LEGAL UNREASONABLENESS?

The argument can be expressed as follows. By double-counting the same adverse conduct against a non-citizen for the same purpose (ie protection of the Australian community), the repository of power has engaged in a process of reasoning that is legally unreasonable. In that respect, the unreasonableness[58] here is concerned with process and not outcome.

For the reasons that follow, it is argued that it is not open for a decision-maker to engage in a process of double counting impugned family violence against a non-citizen repetitively under two adverse primary considerations.

First, s 4(1) of the Act indicates that the object of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.[59] An aspect of the national interest is protection of the Australian community on account of matters related to security.[60] It is uncontroversial that the character powers in ss 501 and 501CA of the Act seek to advance the national interest by protecting members of the Australian community. That purpose is achieved by regulating the presence of non-citizens who seek to reside in Australia who have engaged in criminal or other adverse conduct.

Once a decision-maker takes into account a non-citizen's engagement in family violence when addressing the primary consideration of the protection of the Australian community, that important purpose has been served. In other words, the exercise of the relevant statutory power to advance the purpose of protecting the Australian community has been spent. Adverse weight has rightly been held against the non-citizen on account of their family violence.

To again take into account the non-citizen's family violence when addressing the primary consideration of family violence would be impermissible. As explained above, the decision-maker has already considered the impugned conduct to advance the purpose of protecting the Australian community. As that purpose has been exhausted when attributing adverse weight to the primary consideration of the protection of the Australian community, there is no foundation to repeat that process for the same purpose (under the guise of a different primary consideration) that is directed to the same purpose.

For example, when considering the primary consideration of the protection of the Australian community, a delegate of the Minister and the Tribunal are required to consider, inter alia, the deemed norm that family violence is taken to be very serious, the frequency of the non-citizen's family violence, the cumulative effect of a non-citizen's reoffending (which would include family violence) and the likelihood of reoffending.[61] These considerations are also reflected under the primary consideration of family violence committed by the non-citizen.[62]

As such, it is difficult to reconcile the lawful necessity for a stand-alone primary consideration dealing with family violence when such matters are sufficiently addressed under an earlier primary consideration.

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[57] New Zealand Law Commission, *Understanding Family Violence. Reforming the Criminal Law Relating to Homicide*, Report No 139 (2016).

[58] For a comprehensive recent academic analysis of legal unreasonableness, see Janina Boughey, "Legal Unreasonableness: In Need of a New Justification?" (2022) 45(1) *UNSW Law Journal* 113.

[59] Joanne Kinslor and James English, "Decision-Making in the National Interest?" (2015) 79 *AIAL Forum* 35.

[60] Gabrielle Appleby and Alexander Reilly, "Unveiling the Public Interest: The Parameters of Executive Discretion in Australian Migration Legislation" (2017) 28 PLR 293, 308; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, [70]; [2016] FCAFC 11; *Combet v Commonwealth* (2005) 224 CLR 494, 545; [2005] HCA 61; *Comcare v Commonwealth* (2011) 283 ALR 703, [8]; [2011] FCA 1043; Jason Donnelly, "Failure to Give Proper, Genuine and Realistic Consideration to the Merits of a Case: A Critique of Carrascalao" (2018) 91 *AIAL Forum* 69, 75.

[61] See the Table above under the heading of "Double Counting Family Violence Conduct".

[62] See the Table above under the heading of "Double Counting Family Violence Conduct".

Second, the content of legal reasonableness is also shaped by the statutory context. The character powers reflected in Pt 9 of the Act are not limited to the context of protecting the Australian community. As the plurality judgment in *Minister for Home Affairs v Brown*[63] makes plain:

> The provisions provide for important powers that touch upon the protection of the Australian community, but that also affect the lives of ordinary people living in, or as part of, the Australian community who do not have the status of citizenship.[64]

The plurality continued:

> The wide variety of circumstances to which these sections might apply is a factor that tends to the necessary flexibility of the provisions, but only to the extent the statute permits. An unnecessarily rigid interpretation of the sections may not only impede the smooth and sensible administrative operation of the sections, but also inhibit the reasonable re-examination of circumstances of a person's situation in the realistic and humane application of the power by the Minister and his or her delegate.[65]

The operation of the character powers in ss 501 and 501CA(4) of the Act has the real potential to bring about devastating consequences for a person or persons.[66] Genuine consideration of the human consequences demands honest confrontation of what is being done to people.[67]

It is not difficult to detect the unsatisfactory and potentially inhumane contingency of the double-counting issue here. One line of cases has refused to adopt double counting of family violence against a non-citizen when applying the Direction. In contrast, a second line of cases has adopted a contrary approach. It is the inconsistency and tension in these different approaches that itself, involving considerable human consequences, that is unsatisfactory. The ideal of consistency is central to the normative goal of administrative review.[68]

Poor and inconsistent decision-making by review tribunals attacks the core of the normative goal in that it goes beyond potential injustice in the determination of the individual case and shapes values and processes within the administration in direct opposition to those of review.[69] Courts (and, for that matter, national tribunals like the Tribunal) might have particular difficulties discerning community values in a federal system where different jurisdictions take different approaches on some questions.[70]

Adoption of the second line of cases, which permit double counting, unnecessarily gives effect to a rigid interpretation of applying the Direction strictly. Double counting the same conduct against a non-citizen for the same purpose has the *legal character* of being an inhumane application of power.

The necessary effect of embracing the reasoning of double counting can bring about devastating consequences for both the non-citizen and his or her ties in the Australian community. Without adoption of the double-counting approach, the non-citizen is likely to have greater prospects in succeeding in either not having their visa refused or cancelled on character grounds. Naturally enough, the non-citizen will have one less adverse primary consideration to worry about if double-counting reasoning is not applied.

Third, although not precisely on point, it is useful to consider jurisprudence in the criminal law space that has addressed the topic of double counting in a somewhat similar legal context. By examining

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[63] *Minister for Home Affairs v Brown* (2020) 275 FCR 188; [2020] FCAFC 21.

[64] *Minister for Home Affairs v Brown* (2020) 275 FCR 188, 199 [28]; [2020] FCAFC 21.

[65] *Minister for Home Affairs v Brown* (2020) 275 FCR 188, 199 [29]; [2020] FCAFC 21.

[66] Peter Billings, "Whither Indefinite Immigration Detention in Australia? Rethinking Legal Constraints on the Detention of Non-citizens" (2015) 38(4) *UNSW Law Journal* 1386, 1389.

[67] *Hands v Minister for Immigration and Border Protection* (2018) 267 FCR 628, [3]; [2018] FCAFC 225.

[68] Gabriel Fleming, "Administrative Review and the 'Normative' Goal – Is Anybody Out There?" (2000) 28(1) *Federal Law Review* 61, 64.

[69] See comments of Sir Gerard Brennan in the "Opening Address – The AAT 20 years Forward" in J McMillan (ed), *The AAT Twenty Years Forward: Passing a Milestone in Commonwealth Administrative Review* (Australian Institute of Administrative Law Inc, 1997) 17.

[70] Bernard McCabe, "Community Values and Correct or Preferable Decisions in Administrative Tribunals" (2013) 32(1) *University of Queensland Law Journal* 103, 109.

that jurisprudence, one can readily appreciate the logicality and rationality of avoiding double-counting reasoning.

For example, s 21A(2) of the *Crimes (Sentencing Procedures) Act 1999* (NSW) provides that "the court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence". That section prohibits double counting of aggravating features of an offence. The importance of the inclusion of s 21A(2) is to remind judges, who use s 21A as a "check list" for all offences, to ensure that any particular matter listed as an aggravating factor is not already an element of the offence.[71]

In *Kassoua v The Queen*,[72] Basten JA identified a general risk involved in counting aggravating factors by reference to paragraphs of s 21A(2) because those factors are often not independent of each other and attempting to give weight to a particular factor "will result in double counting, or worse".[73]

In cases where the aggravating factor is an element of the offence or may be thought to be an inherent characteristic of offences of the kind for which sentence is being passed the judge should explain why the factor is present in the case before the court.[74]

An absence of an explanation of how the aggravating factor has been taken into account creates a risk that there has been "double counting" by increasing punishment for a factor that has already been considered as an element of an offence and may constitute error.[75] This provides a neat example in relation to Australian criminal law principles where the adoption of double counting can lead to legal error.

There are numerous cases to illustrate direct double counting of an element of the offence. For example, in *R v Davis*,[76] the judge erroneously took into account the fact that the victim sustained actual bodily harm under s 21A(2)(b) when it was an element of the offence of taking and detaining in company with intent to obtain advantage and occasion actual bodily harm.

Where the lack of regard for public safety is so heinous that it "transcends that which would be regarded as an inherent characteristic of the offence", it may be given additional effect as an aggravating factor.[77]

An analysis of considering the preceding criminal jurisprudence demonstrates at least two things. First, where individual weight is given independently to particular factors that involve the same subject matter, that can amount to double counting. Second, the implication of adopting double counting can amount to an unlawful exercise of power. In the context of the criminal law, that is increasing punishment on an impermissible basis.

Seeking to draw upon criminal law principles in the administrative law context should not be so quickly dismissed.[78] On one view, an understanding of criminal law principles may well demonstrate, by implication, unlawfulness of decision-making in the public law space.[79] Immigration law principles may also have implications for the development of criminal law principles in Australia.[80]

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[71] *R v Johnson* [2005] NSWCCA 186, [22].

[72] *Kassoua v The Queen* [2017] NSWCCA 307.

[73] *Kassoua v The Queen* [2017] NSWCCA 307, [14].

[74] *Ward v The Queen* (2007) 168 A Crim R 545, [29]; [2007] NSWCCA 22.

[75] *Andrews v The Queen* (2006) 160 A Crim R 505, [18]; [2006] NSWCCA 42.

[76] *R v Davis* [2004] NSWCCA 310.

[77] *Elyard v The Queen* (2006) 45 MVR 402, [10], [43]; [2006] NSWCCA 43.

[78] Bagaric et al consider the obverse position, namely, the influence of immigration law principles in Australian criminal law: see Mirko Bagaric, Theo Alexander and Brienna Bargaric, "Offenders Risking Deportation Deserve a Sentencing Discount – But the Reduction Should Be Provisional" (2020) 43(2) *Melbourne University Law Review* 423.

[79] Administrative law is better conceptualised as part of the law that controls and shapes public power: Justice James Allsop, "The Foundations of Administrative Law" [2019] *Federal Judicial Scholarship* 5.

[80] Ellen Moore, "Sentencing Crimmigrants: How Migration Law Creates a Different Criminal Law for Non-citizens" (2020) 43(4) *UNSW Law Journal* 1271; Mirko Bagaric, Lidia Xynas and Victoria Lambropoulos, "The Irrelevance to Sentencing of (Most) Incidental Hardships Suffered by Offenders" (2016) 39(1) *UNSW Law Journal* 47.

In *ENT19 v Minister for Home Affairs* (*ENT19*),[81] the appellant contended that the Minister's decision was made for the substantial purpose of deterring others and therefore impermissibly served as a punishment of the appellant.[82] In accepting that argument, Katzmann J drew upon criminal law principles to demonstrate that the Minister had acted beyond power in an administrative law context:

> In the present case, it is indisputable that a substantial, if not the sole, reason the Minister refused to grant the appellant a visa was to deter people smugglers. In his remarks, the sentencing judge emphasised the importance of general deterrence in sentencing a person convicted of a people smuggling offence. Apart from the objective seriousness of the offence, it was the single most important factor accounting for the length of the appellant's sentence. In these circumstances the purpose of the Minister's decision can properly be regarded as punitive and refusing to grant the appellant a visa on this basis does amount to double punishment. That is because the practical effect of the Minister's consideration of the national interest was that in circumstances where the appellant otherwise engaged the criteria for a protection visa, the Minister determined that the appellant should be further punished by being denied a protection visa so as to give effect to considerations of general deterrence of people smugglers, when the appellant had already been sentenced on that basis.[83]

Beyond *ENT19*, a number of Australian cases support the proposition that a deportation order made for the sole or substantial purpose of deterring others would serve (impermissibly) as punishment of the criminal.[84] Migration litigation has long been a vehicle for the development of administrative law in Australia.[85]

Double counting a non-citizen's adverse family violence conduct twice might also well be said to be an irrelevant consideration when exercising the statutory power under ss 501 or 501CA of the Act. Taking to account the same adverse conduct twice, for the same purpose, might very well have the legal character of amounting to punishment in the sense explained in *ENT19*.

A decision-maker who is actuated by irrelevant considerations may be said to be acting "unreasonably", that is "legally unreasonably".[86]

Fourth, in *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (*Bale*),[87] Perram J held:

> Where a matter is relevant to two or more mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously: see *Hodgson v Minister for Immigration and Border Protection* [2017] FCA 1141 at [40] per Tracey J; *RZSN v Minister for Home Affairs* (2019) FCA 1731 at [67] ff per Anderson J. And, as [54] of the Tribunal's reasons shows, the Tribunal was well-aware that she was one of his victims.[88]

The second line of cases which have adopted the double-counting approach may well be in tension with *Bale*. For example, in *JTNW v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (*JTNW*),[89] Senior Member Linda Kirk reasoned:

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[81] *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100; [2021] FCAFC 217.

[82] *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100, [124]; [2021] FCAFC 217.

[83] At the time of writing, *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100; [2021] FCAFC 217 is currently before the High Court of Australia: see *ENT19 v Minister for Home Affairs* [2022] HCATrans 123.

[84] *Re Sergi and Minister for Immigration & Ethnic Affairs* (1979) 2 ALD 224, 231; *Re Gungor and Minister for Immigration and Ethnic Affairs* (1980) 3 ALD 225, 232; *Tuncok v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 172, [42].

[85] Laura Butler, "Defining the Boundaries of Non-statutory Executive Power in Australia: A Migration Law Perspective" (2019) 96 *AIAL Forum* 79.

[86] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, [27]; [2013] HCA 18.

[87] *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646.

[88] *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646, [26].

[89] *JTNW v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[2021] AATA 4948.

> It finds that it would be impermissible for it to disregard material relevant to the consideration of the family violence primary consideration merely for reason that it had already been considered in the context of one or more of the other three primary considerations or other considerations.[90]

Thus, the Tribunal in *JTNW* felt compelled to double count the applicant's family violence otherwise it would have engaged in "impermissible" reasoning. However, as *Bale* established, where a matter is relevant to two or more mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously. That said, it must be accepted that the impugned reasoning in *Bale* was expressed at a fairly broad level of abstraction and not said in the context of legal unreasonableness directly.

In *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (*XSLJ*),[91] Halley J held:

> The matters to be taken into account in addressing mandatory and other considerations may well overlap, particularly in circumstances where a consideration is expressed in general terms. It is neither desirable nor, in my view, permissible not to have regard to material that is otherwise relevant to a consideration in Direction 79 on the basis that it is more directly relevant to another consideration in that direction.[92]

XSLJ seems to have established that an error of law is not demonstrated simply on the basis that the Tribunal has taken into account a matter in addressing more than one mandatory or other consideration.[93] However, *XSLJ* was decided in the context of Direction 79 (the predecessor to the current ministerial direction). Direction 79 did not include a separate primary consideration specifically addressing family violence. For that reason, plainly enough, Halley J did not consider an argument of legal unreasonableness as advanced in this article.

In *Vovk v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[94] Senior Member DJ Morris outlined:

> The Full Court of the Federal Court recently endorsed the approach in *Bale* that double-weighting is not required and that an applicant, in a case where a victim might want his or her visa given back, is not entitled thereby to another "score on the board" (see Bromberg, Stewart and Goodman JJ in *XXBN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 74).[95]

Surely, the logic works both ways. If family violence is held against a non-citizen under the primary consideration of the protection of the Australian community, the Minister should also not be entitled to another "score on the board" in the context of a non-citizen's family violence conduct being held against him or her again when considering the primary consideration of family violence.

Fifth, depending on the reasoning adopted in a particular case, there is also the real prospect that a decision-maker may triple count or quadruple count family violence against a non-citizen. For example, para 8.3(4)(g) of the Direction mandates that in considering the best interests of a relevant child, the decision-maker must consider "evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen". However, these matters are accommodated under the primary considerations of the protection of the Australian community[96] and family violence committed by the non-citizen.[97]

Further, para 8.4(2) of the Direction mandates that the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious

[90] *JTNW v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[2021] AATA 4948, [95].

[91] *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1138.

[92] *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1138, [123].

[93] *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1138, [124].

[94] *Vovk v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 1328.

[95] *Vovk v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 1328, [112].

[96] See *Direction 90*, para 8.1.1(1) and 8.1.2(2)(b).

[97] *Direction 90*, para 8.2(3).

character concerns through conduct, in Australia or elsewhere, that involves "acts of family violence". Again, these principles are, in substance, reflected in earlier primary considerations of the Direction.[98]

Given the preceding, a non-citizen who has engaged in family violence (even without being criminally convicted) may have such a consideration held against him or her in relation to four primary considerations. The primary purpose appears to be essentially linked to the protection of the Australian community. However, once a decision-maker has considered family violence for this particular purpose, to repeat the process again under different primary considerations has the legal character of being legally unreasonable. It also gives the appearance that the non-citizen is being punished, which of course would be an unlawful exercise of executive power.

Conclusion

The proper elucidation and explanation of the concepts of legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another.[99] For that reason alone, any attempt to be comprehensive or exhaustive in defining when a decision will be sufficiently defective as to be legally unreasonable and display jurisdictional error is likely to be productive of complexity and confusion.[100]

In this article, it has been contended that the adoption of a reasoning process of double counting family violence for the same purpose against a non-citizen in character cases arguably has the legal character of being legally unreasonable. That argument was made against the backdrop of the terms, scope and policy of the Act and the fundamental values that attend the proper exercise of power – a rejection of unfairness, of unreasonableness and of arbitrariness; equality; and the humanity and dignity of the individual – which inform the conclusion, necessarily to a degree evaluative, as to whether the decision bespeaks an exercise of power beyond its source.[101]

The finality of any decision which affects a person's entitlement or interest engages a fundamental precept in the rule of law.[102] Double counting the same adverse conduct against a non-citizen (for the same purpose) sufficiently lacks a rational foundation and is plainly unjust. These descriptions, considered by reference to the text, context, and purpose of the impugned provisions of the Act and Direction (related to the character powers) demonstrate the adoption of a reasoning process that is legally unreasonable. The task is not definitional, but one of characterisation.[103]

[98] *Direction 90*, para 8.1.1(1)(a)(iii) and 8.2(1).

[99] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 3 [2]; [2016] FCAFC 11.

[100] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 3 [2]; [2016] FCAFC 11.

[101] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 5 [9]; [2016] FCAFC 11.

[102] Stephen J Moloney, "Finality of Administrative Decisions and Decisions of the Statutory Tribunal" (2010) 61 *AIAL Forum* 35.

[103] *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 5–6 [11]; [2016] FCAFC 11.