Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2022/10338**
Re:	**QBQS**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**The Hon. John Pascoe AC CVO, Deputy President**
Date:	**17 February 2023**
Place:	**Sydney**

The Tribunal finds that it has jurisdiction in the application for review.

....[SGD]..

The Hon. John Pascoe AC CVO, Deputy President

CATCHWORDS

PRACTICE AND PROCEDURE - migration – jurisdiction – mandatory visa cancellation – where applicant no longer has a substantial criminal record – Pearson v Minister for Home Affairs [2022] *FCAFC 203 - whether the Tribunal has jurisdiction to continue the application – where the convictions considered by the Minister were for sexual offences involving a child – Tribunal has jurisdiction.*

LEGISLATION

Migration Act 1958 (Cth) s 501, s 501CA

CASES

Pearson v Minister for Home Affairs [2022] FCAFC 203

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16 [2019] FCA 2033

XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 6; (2022) 289 FCR 256

MZACP v Minister for Immigration and Border Protection [2021] HCA 17

Minister for Immigration and Border Protection v Makasa [2021] HCA 1

REASONS FOR DECISION

The Hon. John Pascoe AC CVO, Deputy President

17 February 2023

BACKGROUND

1. On 19 December 2022, the Applicant filed an application for review of the decision by the delegate of the Respondent dated 15 December 2022, not to revoke the mandatory cancellation of the Applicant's visa pursuant to subsection 501CA(4) of the *Migration Act 1958* (Cth) (the Act). The decision not the revoke the cancellation was made under subsection 501CA(4) on the basis that the delegate was neither satisfied that the Applicant passed the character test nor was there another reason why the cancellation decision should be revoked.

2. I note the Respondent's submissions contain a helpful factual summary of this application, much of which is replicated below.

3. The Applicant is an Iraqi national who first arrived in Australia on 17 April 2011. He was granted a Protection (Class XA) (subclass 866) visa on 15 December 2011.

4. On 27 August 2019, the Applicant was convicted in the District Court of New South Wales of:

   (a) '*commit act of indecency with victim under 10 years';*

   (b) *'take/detain person w/I to obtain advantage'; and*

   (c) *'Indecent assault person under 16 years of age'.*

5. For which he was sentenced to an aggregate term of four years and six months imprisonment.

6. On 30 August 2019, the Minister cancelled the Applicant's visa under subsection 501(3A) of the *Migration Act 1958* (Cth) (**the Act**) on the following bases:

   (a) he did not pass the character test under paragraphs 501(6)(a) because he had a '*substantial criminal record*' for the purposes of paragraph 501(7)(c) of the Act (see subparagraph 501(3A)(a)(i)); and

   (b) the Applicant was serving a full-time sentence of imprisonment in a custodial institution because he committed an offence or offences against Australian law (paragraph 501(3A)(b)).

7. On 27 September 2019, the Applicant made representations seeking revocation of the cancellation decision in accordance with the delegate's invitation, pursuant to paragraph 501CA(4)(a) of the Act.

8. On 21 January 2022, the Court of Criminal Appeal of the Supreme Court of New South Wales quashed the verdicts and ordered a re-trial for the '*commit act of indecency with victim under 10 years*' offence and the '*take/detain person w/i to obtain advantage offence*'.

The Applicant was found not guilty of the '*indecent assault person under 16 years of age*' offence.

9. On 2 September 2022 in the District Court of New South Wales, the Applicant was again convicted of '*commit act of indecency with victim under 10 years*' and '*take/detain person w/i to obtain advantage*' and was sentenced to an aggregate four year term of imprisonment. Indicative sentences were recorded against each of the Applicant's offences, with an aggregate term imposed for both offences in compliance with section 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

10. On 15 December 2022, a delegate of the Minister refused to revoke the cancellation decision on the basis that the delegate was not satisfied the Applicant passed the character test under section 501 and there was not another reason why the cancellation decision should be revoked pursuant to subsection 501CA(4) of the Act. In the delegate's reasons, the delegate refers to the mandatory cancellation decision under subsection 501(3A) and notes that the delegate was not satisfied that the Applicant met the character test under paragraph 501(6)(a) of the Act. On 22 December 2022, the Full Court of the Federal Court of Australia decided in *Pearson v Minister for Home Affairs* [2022] FCAFC 203 (*'Pearson'*) that aggregate sentences did not fall within the definition of a 'substantial criminal record' under paragraph 501(7)(c) of the Act. The effect of *Pearson* in this matter, is that the mandatory cancellation of the Applicant's visa pursuant s 501(3A)(a)(i) on the basis of a single aggregate term of imprisonment of 4 years and 6 months for three separate offences qualifying as a 'substantial criminal record' was legally ineffective.

ISSUES

11. The issue before this Tribunal is whether it has jurisdiction to review the decision in circumstances where at the time of the Minister's original decision he was, alternatively, bound to cancel the Applicant's visa pursuant to the second limb of s 501(3A)(a), on the basis of the Applicant's convictions for sexual offences involving a child.

DISCUSSION

12. The Tribunal must decide whether it has jurisdiction, post-*Pearson*, to hear an application for review of the delegate's decision dated 15 December 2022, pursuant to s501CA(4) of the *Migration Act 1958* (Cth) (the Act), not to revoke the mandatory cancellation of the

Applicant's visa. The original cancellation was made on the basis that he was sentenced to an aggregate term of 4 years imprisonment, and had a 'substantial criminal record' pursuant to s501(3A)(a)(i).

13. The original notice under the heading 'Purpose of this notice" informed the Applicant of the cancellation of his visa as follows:

> *You were granted a Class XA Subclass 866 Protection visa on 15 December 2011 (your visa). The purpose of this notice is to advise you that on 28 August 2019 your visa was cancelled under s501 (3A) of the Migration Act 1958 (the Act).*
>
> *Section 501 (3A) of the Act is a mandatory cancellation power, and provides that the Minister must cancel your visa if:*
>
> - *the Minister is satisfied that:*
>   - *you do not pass the character test under s501 (6)(a) because you have a 'substantial criminal record' according to s501 (7)(a), (b), or (c) of the Act; or*
>   - *you do not pass the character test under s501 (6)(e) because a court in Australia or a foreign country has convicted you of one or more sexually based offences involving a child; or the court has found you guilty of such an offence or found a charge for such an offence proved against you, even though you were discharged without a conviction; and*
> - *you are serving a full-time sentence of imprisonment in a custodial institution because you have committed an offence or offences against Australian law.*
>
> *The full text of s501 of the Act, including s501 (3A) (mandatory cancellation power), s501(6) and s501(7) (character test), are included in Attachment 1.*

14. Under the heading 'Particulars of relevant information' the notice stated as follows:

> *Based on the information before him, the Minister was satisfied that you do not pass the character test on the following ground:*
>
> > *You have a substantial criminal record within the meaning of s501(6)(a) on the basis of s501 (7)(a), (b) or (c) of the Act.*
>
> *Under s501 (7)(c) a person has a substantial criminal record if the person has been*
>
> *sentenced to a term of imprisonment of 12 months or more. On 27 August 2019, you were convicted of <u>commit act of indecency with victim under 10 years</u>, <u>take/detain person w/i to obtain advantage indecent assault person under 16 years of age</u>, and <u>indecent assault person under 16 years of age</u> and sentenced to four years and six months imprisonment on each charge. [Emphasis added]*
>
> *The information based on which the Minister was satisfied that you do not pass the character test is a New South Wales Department of Corrections Convictions, Sentences and Appeals report dated 28 August 2019.*

Imprisonment on a full-time basis

Based on the information available, the Minister was also satisfied that, at the time of the decision, you were serving a sentence of imprisonment, on a full-time basis, in a custodial institution for an offence against a law of the Commonwealth, a State or a Territory. In particular, regard was had to a New South Wales Department of Corrections Convictions, Sentences and Appeals report dated 28 August 2019.

15. The notice goes on to invite the Applicant to make representations to the Minister about revoking the Minister's original decision. It goes on to state that the representations must be made in accordance with the instructions contained in the notice of visa cancellation. Including:

While your visa has been cancelled and you no longer hold a visa, you have an opportunity to make representations to the Minister about revoking the decision to cancel your visa under s501 (3A) ('the original decision').

You are hereby invited to make representations to the Minister about revoking the original decision. The representations must be made in accordance with the instructions outlined below, under the headings 'How to make representations about revocation of the original decision' and 'Timeframe to make representations about revocation'.

The original decision may be revoked by the Minister under s501 CA(4) of the Act if you make representations in accordance with the specified instructions and the Minister is satisfied that:

- *you pass the character test (as defined by s501 of the Act); or*
- *there is another reason why the original decision should be revoked.*

16. The full text of s501CA of the Act is included in Attachment 1. In considering the decision made by the Minister it is useful to have regard to what the High Court said in *Makasa* in relation to the construction of section 501(2) of the *Migration Act*. In doing so, I note that in this case the Tribunal is dealing with a mandatory cancellation, and in that case the High Court was dealing with a discretionary cancellation. However, in my view the reasoning of the High Court is relevant and helpful.

17. For ease of reference the relevant paragraphs are set out in full below:

[34] Bearing centrally on the construction of s 501(2) of the Act is recognition that s 501(2) confers a single power that is exercised by the Minister or a delegate in the first instance, and that is re-exercised by the AAT under s 43(1) of the AAT Act on review, according to a two-stage decision-making process.

[35] The first stage of the decision-making process begins with the decision-maker forming a reasonable suspicion that the visa holder in question does not pass the character test. By operation of s 501(6), a person either passes the character test or does not. The person does not pass the character test in any one or more of the circumstances exhaustively enumerated in s 501(6). Otherwise, the person passes the character test.

[36] Reasonable suspicion is a state of mind − "a state of conjecture or surmise" − that is based on "sufficient grounds reasonably to induce that state of mind"[15]. The necessary precondition to the decision-maker forming a reasonable suspicion that the visa holder does not pass the character test is therefore the existence of facts sufficient to induce a reasonable person to surmise that one or more of the circumstances exhaustively enumerated in s 501(6) has occurred.

[37] The decision-maker having formed a reasonable suspicion that the visa holder does not pass the character test, the first stage of the decision-making process is completed by the decision-maker making a binary decision either to be satisfied by the visa holder that he or she passes the character test or not to be so satisfied and in consequence to maintain the reasonable suspicion.

[38] Satisfaction too is a state of mind − an "actual persuasion of [the] occurrence or existence"[16] of the thing in issue. Implicit in the statutory placing of the onus on the visa holder to satisfy the decision-maker that he or she passes the character test is a requirement of procedural fairness that the visa holder be given notice and an opportunity to make representations before the first stage of the decision-making process can be completed. Implicit in the statutory need for satisfaction or non-satisfaction is that the satisfaction or non-satisfaction is to be reasonably based on the totality of the facts then known to the decision-maker[17].

[39] If the outcome of the first stage of the decision-making process is that the decision-maker is satisfied by the visa holder that he or she passes the character test, the only decision open to the decision-maker is not to cancel the visa. The decision-making process necessarily ends with the making of that decision.

[40] The second stage of the decision-making process is reached only if the outcome of the first stage is that the decision-maker, not being satisfied that the visa holder passes the character test, maintains a reasonable suspicion that the visa holder does not pass the character test by reason of the occurrence of one or more of the circumstances set out in s 501(6). The second stage then involves the decision-maker, reasonably[18] and in compliance with applicable directions given under s 499, exercising a discretion the outcome of which is the making by the decision-maker of a further binary decision either to cancel the visa in the exercise of discretion or not to cancel the visa in the exercise of discretion.

[41] Accordingly, exercise of the power in every case begins with the decision-maker forming a reasonable suspicion that a visa holder does not pass the character test and exercise of the power in every case ends with a decision either to cancel the visa or not to cancel the visa. The decision that constitutes the end point of the exercise of the power, if it be to cancel the visa, can only have come about because the decision-maker has not been satisfied by the visa holder that he or she passes the character test and has gone on to exercise discretion to cancel the visa. If the decision be not to cancel the visa, the decision can have come about either because the decision-maker has been satisfied by the visa holder that he or she passes the character test or because the decision-maker has gone on to exercise discretion not to cancel the visa.

[42] Whether the decision is to cancel the visa or not to cancel the visa, the decision is therefore the end point of an exercise of the power conferred by s 501(2) of the Act.

18. It is important to note that the notice given to the Applicant by the Minister made it quite clear that the Minister's decision to cancel the visa was based on him having been convicted of 'sexually based offences involving a child' and the fact that the Applicant was serving a full-time sentence of imprisonment in a custodial institution because he had committed an offence, or offences against Australian law. There can be no doubt that the Minister was satisfied that the Applicant did not pass the character test as a result of his convictions for sexual offences, and that the Minister's state of non-satisfaction as to whether the Applicant passed the character test was reasonably based on all of the facts known to the Minister at the time.

19. Attachment 1 to the notice, set out the full text of the Act including section 501(3A) which is the mandatory cancellation power and sections 501(6) and 501(7), which set out the details of the character test.

20. Thus, on reading the notice it must have been quite clear to the Applicant that the Minister had formed a 'reasonable opinion' in accordance with the test in Makasa that the Applicant did not pass the character test by reason of the provisions of s 501(6), and in particular his convictions for child sex offences.

21. The Minister, having reached that decision, then was required as a matter of procedural fairness to give the Applicant an opportunity to make representations as to either why he passed the character test, or any other reason as to why the cancellation of the Applicant's visa should be revoked.

22. The Applicant made representations to the Minister, and those representations dealt directly with the Applicant's convictions for child sex offenses. However, after the Applicant's representations, the Minister continued not to be satisfied that the Applicant passed the character test, and the mandatory cancellation of the Applicant's visa was not revoked.

23. It was argued on behalf of the Applicant that the Minister, in his original decision, did not specifically turn his mind to s 501(3A)(a)(ii), and subsequently s 501(6)(e), and therefore

the Minister could not have been said to have reached a 'state of satisfaction' in relation to this ground.

24. The Tribunal finds, on the basis of the material before it, that as a question of fact the Minister had before him all of the details of the Applicant's sex offences against a minor and that both the Minister and delegate were aware of the remarks of the sentencing judge in relation to the Applicant's child sex offending. It is clear that the Applicant's convictions for child sex offenses were the basis for his visa cancellation.

25. There were no other offences referred to in the notice of cancellation.

26. Prior to *Pearson,* it might be regarded as unsurprising that the Minister referred only to s 501(6)(a) to find that the Applicant did not pass the character test as it appears to have been used as a 'catch all' in many cases before the Tribunal.

27. It is quite clear from the notice that the Minister must have turned his mind to section 501(6)(e) in reaching his decision, given that sexual offences involving children were the only offences specified in the notice.

28. It was stated on behalf of the Applicant that it was not for the Tribunal to speculate what might have been on the Minister's mind, but on the evidence before the Tribunal it is quite clear that the Minister had before him all of the details of the Applicant's convictions for child sex-offenses. In fact, as stated above, this appears to have been the only evidence of offending before the Minister. Accordingly, it is not necessary for the Tribunal to 'speculate'.

29. A number of cases previously before the Tribunal were referred to by both parties, but are of limited benefit to this Tribunal, because each turned on their particular facts.

30. There was also discussion in the hearing about the decision of Rares J in *Minister for Immigration, Citizenship, Migrant services and Multicultural Affairs v CPJ16 [2019] FCA 2033*. In that case, Rares J said as follows:

> *[58] Here, the delegate confined the inquiry as to whether the Applicant could satisfy him that she passed the character test, within the meaning of s 501(1), solely to the consideration of the criterion in s 501(6)(d)(i). I reject the Minister's argument that other criteria in s 501(6) remained open to consideration on a review of the delegate's decision.*

[66] I am of the opinion that the Tribunal's task in determining, on a review, what is the correct or preferable decision must be connected to the grounds of the decision to exercise the statutory power the subject of the review, as exposed in the statement of the delegate's findings and reasons, so that the character of the review can be shaped by that consideration. Once the challenged ground for the decision-maker's exercise of his or her power is identified, the Tribunal must make its decision having regard to the evidence, submissions and factual context at the time of its decisions.

31. I note firstly that this case is distinguishable from the matter before Rares J as this matter deals with the mandatory cancellation of the Applicant's visa under s 501(3A), whereas the case before Rares J dealt with a discretionary refusal of a visa under s 501(1), where the potential grounds are much wider. However, consistent with what Rares J said at paragraph 66 it is quite clear from the notice of mandatory cancellation that the Applicant's visa was cancelled on the basis of sexual offences against minors. The Applicant made representations to the Minister on that basis. It is therefore evident that the decision the Tribunal must make when exercising its powers of review relates solely to the Applicant's offences against minor children.

32. Further, I accept that the Minister could not have made any decision other than the mandatory cancellation of the Applicants visa under s501(3A).

33. Any failure by the Minister in the notice to refer specifically, under the heading 'Particulars of relevant information' to s 501(6)(e) is not material, as there was no other conclusion open to the Minister, given the objective fact that the Applicant had been convicted in Australia, in the Criminal Courts, of sex offences involving a minor child. In fact, in the notice, when setting out the grounds on which the Minister was satisfied the Applicant had failed to pass the character test, the notice refers to the fact that 'on 27th August 2019, you were convicted of:

commit act of indecency with victim under 10 years, take/detain person w/i to obtain advantage indecent assault person under 16 years of age, and indecent assault person under 16 years of age and sentenced to four years and six months imprisonment on each charge.

34. There was no prejudice to the Applicant whatsoever in the fact that the notice did not specifically make reference to section 501(6)(e), in the context of a notice which deals with section 501(6) in broad terms.

35. It is in my view not necessary for the Tribunal to deal with the Applicant's argument in relation to materiality, including the decision of the High Court in *MZACP and Minister for Immigration and Border Protection [2021] HCA 17,* because there was no alternative outcome available to the Minister.

36. There was little argument at the hearing in relation to the decision of Rares J in *XJLR*. But the Respondent in particular did make representations in relation to that case in their written submissions to the Tribunal. I do not accept the Respondent's arguments, which were not further elaborated at the hearing. The Applicant said little about the case. In any event, in my opinion the facts in this case are quite different to those considered by Rares J in XJLR. In that case, the Minister purported to cancel the Applicant's visa a second time, largely on the basis of a conviction that had previously been considered by the Minister and upon which he had previously reached a conclusion. Further, in that matter, emphasis was placed on the fact that the invalid cancellation had resulted in procedural unfairness to the Applicant. There is no procedural unfairness to the Applicant in this matter, as he was perfectly well aware of the grounds on which the decision was made, and in this case there is only one decision to be reviewed.

37. Accordingly, for the reasons set out above I am of the opinion that the Tribunal has jurisdiction to review the decision of the Minister.

38. There was also a question as to whether the notice itself was valid, as required under section 501CA(3). Which states as follows:

> *(3) As soon as practicable after making the original decision, the Minister must:*
>
> *(a) give the person, in the way that the Minister considers appropriate in the circumstances:*
>
> *(i) a written notice that sets out the original decision; and*
>
> *(ii) particulars of the relevant information; and*
>
> *(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.*

39. As outlined above, the current case, the notice did not refer to s 501(6)(e) at all but rather referred to s 501(6)(a). In other words, the notice referred to cancellation on the basis of the Applicant having a substantial criminal record due to being sentenced to an aggregate term of imprisonment of four and a half years.

40. The notice went on to give substantial detailed particulars as to the Applicant's offending in which the child sex offences for which the Applicant was convicted are clearly identified as the basis for the Minister decision to cancel the Applicant's visa.

41. In my view, the notice was a valid notice for the purposes of s 501CA(3) because it set out clearly the particulars that lead to the cancellation of the Applicant's visa.

42. The Applicant must have been well aware of the basis of the cancellation of his visa and the issues that he needed to address in any representations to the Minister in seeking to have the Minister reconsider his decision.

43. The failure of the Minister to the refer in the notice, specifically, to the provision of s 501(6)(e) was immaterial and did not disadvantage the Applicant in understanding the reasons for the cancellation of his visa.

DECISION

44. The Tribunal finds that it has jurisdiction.

NOTATION:

At the time of the hearing in this matter the finding of the Court in *Pearson* was in effect. The Tribunal has been notified that the *Migration Amendment (Aggregate Sentences) Bill 2023* (Cth) came into force on the day the decision on the issue before it was due to be published. The basis of this decision of the Tribunal is made on a separate point, even though, if the Amendment had been in force at the time of the hearing, the decision would be unnecessary.

I certify that the preceding 44 (forty -four) paragraphs are a true copy of the reasons for the decision herein of The Hon. John Pascoe AC CVO, Deputy President

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

Associate

Dated: 17 February 2023

Date(s) of hearing:	**2 February 2023**
Counsel for the Applicant:	**Dr Jason Donnelly**
Solicitors for the Joined Party:	**Mr Harry McLaurin**