# Life after FYBR – The Expectations of the Australian Community in Migration Character Cases

## Dr Jason Donnelly*

*A great deal of the rules concerning character cases decided under the Migration Act 1958 (Cth) (the Act) are dictated by policy principles reflected in ministerial directions. These policy documents are made with the statutory backing of s 499(2A), which mandates that administrative decision-makers must have regard to the various considerations reflected in the relevant ministerial direction. This article explores an aspect of Direction 90 dealing with the primary consideration of the expectations of the Australian community. After considering the relevant jurisprudence in the area, the article concludes that a delegate of the Minister or the Administrative Appeals Tribunal can have regard to expectations of the Australian community independent of Direction 90 (now Direction 99) under Pt 9 of the Migration Act.*

## INTRODUCTION

In *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* (*HSRN*),[1] the Full Court of the Federal Court of Australia (Moshinsky, Stewart and Jackman JJ) determined that it was doubtful whether an administrative decision-maker could permissibly have regard to community expectations independent of Direction 90 (the Direction). The Direction is a form of policy[2] made by the Minister under s 499 of the *Migration Act 1958* (Cth) (the Act).[3]

It is fair to say that much doctrinal administrative law scholarship has not fully taken on the "lawyer's burden"[4] of thinking about policy.[5] It may be a striking feature of the case law,[6] but it is hard to find extended analysis of it in textbooks, beyond careful discussion of the issues that policy raises in relation to specific doctrines.[7]

A discussion of policy is often seen as a discussion about the relative merits of rules and discretion.[8] However, it is an important aspect of Australian administrative law. This article provides an analysis of the expectations of the Australian community in the context of character decisions made under Pt 9 of the

* Senior Lecturer, Western Sydney University; Barrister-at-Law. The author gratefully thanks the anonymous reviewer for their helpful comments and consideration of this article.

[1] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68, [44].

[2] Oliver Jones, "A Secret Interview with Sir Garfield Barwick" (2020) 49 *Australian Bar Review* 375, 376–377. Practitioners and scholars have long charted the doctrinal significance of "policy": For example, G Ganz, *Quasilegislation: Recent Developments in Secondary Legislation* (Sweet and Maxwell, 2nd ed, 1987).

[3] Direction 90 was replaced by Direction 99 with effect from 3 March 2023; see <https://immi.homeaffairs.gov.au/support-subsite/files/ministerial-direction-99.pdf>.

[4] R Megarry, "Administrative Quasi-Legislation" (1944) 60 *Law Quarterly Review* 125, 126.

[5] Elizabeth Fisher, "Why Doctrinal Administrative Lawyers Need to Think More about Policy" (2023) 29 AJ Admin L 254, 256.

[6] See *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 396, [42]–[76].

[7] Compare C Harlow and R Rawlings, *Law and Administration* (CUP, 4th ed, 2021) Ch 6 and M Fordham, *The Judicial Review Handbook* (Hart, 7th ed, 2021) [6.2]. See also the very thoughtful discussion in M Elliott and J Varuhas, *Administrative Law: Text and Materials* (OUP, 5th ed, 2017) 174–185.

[8] KC Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press, 1971); R Baldwin, *Rules and Government* (Clarendon Press, 1995).

THOMSON REUTERS

© 2023 Thomson Reuters (Professional) Australia Limited
for further information visit **www.thomsonreuters.com.au**
or send an email to **care.anz@tr.com**

Please note that this article is being provided for research purposes and is not to be reproduced in any way. If you refer to the article, please ensure you acknowledge both the publication and publisher appropriately. The citation for the journal is available in the footline of each page.

For information concerning permission to republish material from this journal, either in part or in its entirety, in any medium, please refer to **http://sites.thomsonreuters.com.au/journals/permissions.**
For general permission queries, contact **LTA.permissions@thomsonreuters.com**

Act. The article further considers whether it is lawful for an administrative decision-maker to consider expectations of the Australian community independent of the Direction.

## The Legal Regime

Part 9 of the Act provides a complex web of statutory provisions that regulates the issue of character concerning the entry and continued presence of non-citizens in Australia. It is critical to examine relevant statutory provisions before addressing the more complex question concerning the expectations of the Australian community.

A pivotal provision in the Act is s 501.[9] Section 501(1) 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) mandates that the Minister may cancel a visa that has been granted to a person if the Minister reasonably suspects that the person does not pass the character test[10] and the person does not satisfy the Minister that the person passes the character test.[11]

Section 501(3) 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 the Minister reasonably suspects that the person does not pass the character test and the Minister is satisfied that the refusal or cancellation is in the national interest.[12] The power must be exercised by the Minister personally, unlike s 501(1)–(2) of the Act.

Section 501(3A) is the mandatory cancellation power.[13] It provides that the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of having a substantial criminal record or being convicted of sexually based offences involving a child. The non-citizen must also be 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.

Section 501A[14] gives the Minister has a personal power to set aside a favourable decision made in relation to a non-citizen under s 501(1) or s 501(2). The Minister must reasonably suspect that the person does not pass the character test (as defined by s 501), the person does not satisfy the Minister that the person passes the character test and Minister is satisfied that the refusal or cancellation is in the national interest.

Section 501B[15] of the Act also gives the Minister the personal power to set aside an unfavourable decision to other refuse or cancel a visa of a non-citizen. Again, the Minister must reasonably suspect that the person does not pass the character test (as defined by s 501), the person does not satisfy the Minister that the person passes the character test, and the Minister is satisfied that the refusal or cancellation is in the national interest. A personal decision of the Minister under s 501B has the effect of abrogating merits review that might otherwise be available to the non-citizen.[16]

Section 501BA empowers the Minister personally to set aside a decision of his or her delegate or the Administrative Appeals Tribunal (the Tribunal) to revoke a mandatory cancellation decision made under s 501CA(4). The Minister must be satisfied that the person does not pass a limited version of the character test and is otherwise satisfied that the cancellation is in the national interest.

Section 501CA(4) empowers the Minister to revoke a mandatory cancellation decision if the non-citizen made representations in accordance with the invitation and either the Minister is satisfied that the person

---

[9] See *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; [2014] FCA 673.

[10] *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430; [2021] HCA 1.

[11] Jason Donnelly, "Tale of Two Characters – The Paradoxical Application of the Character Test between Visa Holders and Applicants for Australian Citizenship" (2018) 25 AJ Admin L 104, 108.

[12] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; [2001] HCA 51.

[13] *Gaspar v Minister for Immigration and Border Protection* (2016) 153 ALD 338; [2016] FCA 1166.

[14] *BFM16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 312.

[15] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1; [2017] HCA 33.

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

passes the character test or that there is another reason why the mandatory cancellation decision should be revoked.[17]

The character test is defined in s 501(6)–(7). Those provisions provide an extensive range of both objective and subjective basis upon which a non-citizen can be taken to fail the character test under Pt 9 of the Act.

For example, a non-citizen fails the character test if the person:[18]

- has a substantial criminal record;[19]
- been convicted with an offence connected to immigration detention;[20]
- has been or is a member of a group or organisation, or has had or has an association with a group, organisation, or person (and the group, organisation or person has been or is involved in criminal conduct);[21]
- has been convicted of various international law crimes;[22]
- past and present criminal or present conduct;[23]
- would engage in criminal conduct in Australia;[24]
- would harass, molest, intimidate or stalk another person in Australia;[25]
- would vilify a segment of the Australian community;[26]
- would incite discord in the Australian community or in a segment of that community;[27]
- would represent a danger to the Australian community;[28]
- has been convicted of sexually based offences involving a child;[29]
- has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security;[30] or
- is subject to 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.[31]

Generally, if a decision is made by a delegate of the Minister under one of the character powers in Pt 9 of the Act, the non-citizen has a right of review to the Tribunal.[32] Where a character power is being exercised by a delegate or the Tribunal, given the statutory effect of s 499(2A)[33] of the Act, they are bound to comply with the Direction.[34] The Direction gives flesh to the various statutory powers in

[17] *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125.

[18] Jason Donnelly and Amanda Do, "Character Applications before the Administrative Appeals Tribunal" (2022) 169 *Precedent* 27, 27.

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

[20] *Migration Act 1958* (Cth) s 501(6)(aa), 501(6)(ab).

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

[22] *Migration Act 1958* (Cth) s 501(6)(ba), 501(6)(f). This includes crimes of genocide, a crime against humanity, a war crime, a crime involving torture or slavery and a crime that is otherwise of serious international concern.

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

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

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

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

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

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

[29] *Migration Act 1958* (Cth) s 501(6)(e).

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

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

[32] *Migration Act 1958* (Cth) s 500(1).

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

[34] Some roles for policy have been explicitly accommodated into legislative frameworks: see further B Preston, "The Interaction of Policy and Law in Environmental Governance" (2022) 29 AJ Admin L 230.

Pt 9 of the Act.[35] The Direction co-ordinates action between a range of decentralised actors,[36] including delegates of the Minister and the Tribunal.

The Direction is a very detailed ministerial direction. In making a decision under s 501(1), 501(2) or s 501CA(4), Direction 99 mandates that a decision-maker must consider the following primary and other considerations.[37]

Primary considerations are taken to include:

- protection of the Australian community from criminal or other serious conduct;[38]
- whether the conduct engaged in constituted family violence;[39]
- the strength, nature and duration of ties to Australia;[40]
- the best interests of minor children in Australia;[41] and
- expectations of the Australian community.[42]

The other considerations:

- legal consequences of the decision;[43]
- extent of impediments if removed;[44]
- impact on victims;[45] and
- impact on Australian business interests.[46]

Paragraph 7(2) of the Direction mandates that the primary considerations should generally be given greater weight than the other considerations.

The procedure of administrative rulemaking is one of the greatest inventions of modern government.[47] Only a law democratically produced can fulfil its functional and normative role.[48] Although ministerial directions are not law, as seen in the next section, ministerial directions wield significant power akin to a law of Parliament.[49]

## FYBR

The Full Court of the Federal Court of Australia decision in *FYBR v Minister for Home Affairs* (*FYBR*)[50] is one of the most important decisions ever made in relation to character decisions made under Pt 9 of the Act.

---

[35] Fisher, n 5, 257.

[36] See Elizabeth Fisher, "Executive Environmental Law" (2019) 83 *Modern Law Review* 163.

[37] Compare soft law, which does not by its nature carry formal legal consequences: Greg Weeks, "Soft Law and Public Liability: Beyond the Separation of Powers?" (2018) 39(2) *Adelaide Law Review* 303, 323.

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

[39] *Deng v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 403 ALR 232; [2022] FCAFC 115.

[40] *Doves v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 134.

[41] Oliver Jones, "Unincorporated Treaties in Judicial Review Proceedings: Some Post Teoh Arguments" (2022) 29 AJ Admin L 178, 182.

[42] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454; [2019] FCAFC 185.

[43] *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1; [2014] FCAFC 38.

[44] *LRMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1039.

[45] *PGDX v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1235.

[46] *Arachchi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1311.

[47] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana University Press, 1969) 65.

[48] Robert Shelly, "Institutionalising Deliberative Democracy" (2001) 28(1) *Alternative Law Journal* 36, 38.

[49] Dayne Kingsford, "Accountable Administrative Decision-making: Revising the Federal Legal Duty to Consult in Australia" (2022) 29 AJ Admin L 162, 170.

[50] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454; [2019] FCAFC 185.

Before both the Federal Court and the Full Court, the non-citizen contended that the Tribunal failed to comply with para 11.3 of Direction 65 because it treated para 11.3 as conclusively "deeming" what community expectations are, irrespective of the individual's personal circumstances.[51]

Paragraph 11.3(1) of Direction 65 provided that:

> The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application of such a person. Visa refusal may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted a visa. Decision-makers should have due regard to the Government's views in this respect.[52]

The non-citizen argued that the Tribunal failed to appreciate that it was permissible under para 11.3 for it to assess whether community expectations would have been the same in relation to the applicant, given that he had already spent so much time in immigration detention.[53]

In rejecting the applicant's argument, Perry J concluded:

> It follows, in line with the authorities, that cl 11.3 of Direction 65 is a statement of the Government's view as to the expectations of the Australian community for the purposes of determining whether or not to refuse a visa. Contrary to the applicant's submissions, it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an applicant's circumstances or evidence about those expectations. Rather, the Tribunal must give effect to the "norm" stipulated in cl 11(3) which will of its nature weigh in favour of refusal, at least in most cases.[54]

The applicant appealed to the Full Federal Court. Charlesworth and Stewart JJ wrote separately to form the majority,[55] albeit adopting different reasoning for rejecting the appeal.[56] Charlesworth J concluded that para 11.3 contained a statement of the government's views as to the expectations of the Australian community that must be applied.[57] For Charlesworth J, it is not for the decision-maker to make his or her own assessment of the community expectations and to give that assessment weight as a "primary consideration".[58] Her Honour concluded that there may be cases in which it is not appropriate to give the community expectations discerned under para 11.3 any weight at all.[59]

Stewart J concluded that in the context of Direction 65, community expectations as expressed normatively are what the Government says that they are (even though ascertainable community expectations might be quite different).[60] For Stewart J, it is not the decision-maker who makes an assessment of community values on behalf of the community, and that those values are expressed as norms in Direction 65.[61]

Flick J wrote a powerful dissent and would have allowed the appeal.[62] His Honour concluded that para 11.3(1) did not purport to be an exhaustive statement of what the Australian community expects of non-citizens while in Australia in respect to their compliance with the law.[63] For the learned judge,

[51] *FYBR v Minister for Home Affairs* [2019] FCA 500.

[52] *FYBR v Minister for Home Affairs* [2019] FCA 500, [20].

[53] *FYBR v Minister for Home Affairs* [2019] FCA 500, [21].

[54] *FYBR v Minister for Home Affairs* [2019] FCA 500, [42].

[55] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [26]–[107]; [2019] FCAFC 185.

[56] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [86]; [2019] FCAFC 185.

[57] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [66]; [2019] FCAFC 185.

[58] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [67]; [2019] FCAFC 185.

[59] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [76]; [2019] FCAFC 185.

[60] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [91]; [2019] FCAFC 185.

[61] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [104]; [2019] FCAFC 185.

[62] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [4]; [2019] FCAFC 185.

[63] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [12]; [2019] FCAFC 185.

para 11.3(1) did not exclude the possibility that there may be other aspects of those expectations which need to be explored.[64]

The non-citizen's special leave application to the High Court of Australia was dismissed by Kiefel CJ and Keane J.[65] Since *FYBR* was handed down on 24 October 2019, it has been cited in over 1,000 decisions. Plainly, it is an important decision.

Some might observe that the majority reasoning in *FYBR* is consistent with affirming bureaucratic rationality,[66] which has the goal of advancing accurate decision-making, as defined by government, in an efficient and cost-effective way.[67] That is different from the so-called legal model,[68] which focuses on deciding competing interests of litigants.[69] The legal model clearly supports the emphasis on safeguarding the rights and interests of individuals,[70] which is more greatly advanced in the dissenting judgment of Flick J.

## The Argument

In *HSRN*,[71] the Full Court held:

> Leaving aside whether the Tribunal can permissibly have independent regard to community expectations as assessed by it, which must be considered at least doubtful given the Direction's express provisions with regard to that subject which can be expected to cover the field, the submission fails on the facts.

*HSRN* expressed an obiter statement to the effect that it was "doubtful" that the Tribunal could lawfully have independent regard to community expectations outside of cl 8.4 in Direction 90 (which deals with expectations of the Australian community).[72] It is that issue which is now addressed in the balance of this article.

It should be concluded that an administrative decision-maker, whether it be a delegate of the Minister or the Tribunal, can independently have regard to community expectations (as assessed by it) beyond those stated in cl 8.4 of Direction 90. In that way, the doubt expressed by the Full Court in *HSRN* concerning this issue is unpersuasive and should not be followed. There are six reasons for this conclusion.

*First*, is it useful to start with basic principles. A consideration is only "irrelevant" in the requisite sense if the decision-maker is prohibited from taking it into account.[73] In the simplest case, where legislation exhaustively defines the criterion that must be applied, or the matters that may be considered in the exercise of a power, other matters will be irrelevant.[74]

---

[64] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [12]; [2019] FCAFC 185.

[65] *FYBR v Minister for Home Affairs* [2020] HCATrans 56. This suggests acceptance of the result reached by the Federal Court, without approval of its reasoning towards the result: Michael Kirby, "Maximising Special Leave Performance in the High Court of Australia" (2007) 30 *University of New South Wales Law Journal* 731, 750.

[66] Simon Halliday and Colin Scott, "A Cultural Analysis of Administrative Justice" in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010) 185.

[67] Jerry Mashaw, *Bureaucratic Justice: Managing Social Justice Disability Claims* (Yale University Press, 1983) 25.

[68] Robin Creyke, "Administrative Justice in Australia" in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010) 274; Michael Adler renamed Mashaw's moral judgment model the legal model: Michael Adler, "A Socio-legal Approach to Administrative Justice" (2003) 25 *Law and Policy* 323, 329.

[69] Halliday and Scott, n 66, 186.

[70] Creyke, n 68, 275.

[71] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68, [44].

[72] The decision of *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68 has quickly been applied by the Administrative Appeals Tribunal: *Davis v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 1328, [122]; *Kalinov v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 1387, [113].

[73] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40.

[74] *Bewley v Cruickshanks* (1984) 1 FCR 534; *Parramatta City Council v Pestell* (1972) 128 CLR 305, 314, 325, 333; *Pharmacy Guild of Australia v Australian Community Pharmacy Authority* (1996) 70 FCR 462, 476–477; *Rosson v Minister for Immigration and Citizenship* (2011) 191 FCR 390, [19]–[23]; [2011] FCA 194.

Where legislation does not expressly or exhaustively define the matters that are relevant, this does not mean the decision-maker's discretion is "arbitrary and unlimited".[75] The limits of discretion and, consequently, the considerations that may permissibly be taken into account, are inferred from the subject matter, scope and purpose of the legislation, the nature of the power to be exercised, and the nature of the office held by the decision-maker.[76]

Hence it has long been accepted that open-textured statutory powers, with no indication of the purpose of considerations upon which the power must depend, are nevertheless confined by the subject matter and the scope and purpose of the statutory enactment.[77]

*HSRN* determined that the expectations of the Australian community were expressed in Direction 90. But that observation is largely beside the point. The question as to whether the Tribunal could have independent regard to community expectations as assessed by it, beyond the Direction, is not to be answered by reference to what is in the Direction. Rather, the question is to be resolved by reference to the subject matter, scope, and purpose of the Act.[78] *HSRN* did not engage in that latter exercise.

When one carefully considers relevant character powers in Pt 9 of the Act, the text provides no support for the doubt expressed by the Full Court in *HSRN*. For example, s 501(1)–(2) speak of the Minister having a discretion to refuse or cancel a non-citizen's visa if the person does not pass the character test. It provides no express limitation on the considerations a decision-maker can have regard when exercising the relevant power.

By way of further example, s 501CA(4)(b)(ii) of the Act speaks of revoking a mandatory cancellation decision if the Minister is satisfied that there is another reason why the original decision should be revoked. What is "another reason" provides no express limitation on the kind of considerations that a decision-maker can take into account in forming the requisite state of satisfaction.

*Second*, perhaps more concerning, is the comments by the Full Court that the "Direction's express provisions with regard to that subject which can be expected to cover the field".[79] The flaw in that reasoning is that Direction 90, being a ministerial direction, does not cover the field. Direction 90 merely outlines mandatory considerations that a decision-maker must have regard when exercising the power under ss 501(1), 501(2) and 501CA(4) of the Act. That is the statutory effect of s 499(2A) of the Act.[80] It is not a code.[81]

Further, acceptance of the "cover the field" analysis reflected in *HSRN* would be to usurp or undermine a fundamental principle of Australian administrative law. As Flick J stated in *FYBR*:[82]

> A proposition of more general application, but one which nevertheless provides a necessary background to the manner in which the Direction and other statements of government policy are to be construed, is the overarching imperative that no statement of government policy can confine what would otherwise be the full ambit of any discretionary power conferred by statute.

The "cover the field" point in *HSRN* is also a distraction from the statutory task. One does not determine whether a particular consideration is prohibited by reference to whether the subject matter is already

---

[75] *Shrimpton v Commonwealth* (1945) 69 CLR 613, 619–620; *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, 49; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40.

[76] *Re Randwick Municipal Council; Ex parte SF Bowser & Co* (1927) 27 SR (NSW) 209; *Vangedal-Nielsen v Commissioner of Patents* (1980) 49 FLR 44; *Shi v Minister for Immigration and Citizenship* (2011) 123 ALD 46, [10]; [2011] FCA 935. See also *Minister for Immigration and Citizenship v Makasa* (2012) 207 FCR 488; [2012] FCAFC 166.

[77] *Commonwealth v AJL20* (2021) 95 ALJR 567, [124]; [2021] HCA 21.

[78] Mark Leeming, "The Riddle of Jurisdictional Error" (2014) 38 *Australian Bar Review* 139, 150; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363, 364; [2013] HCA 18.

[79] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68, [44].

[80] A similar provision is reflected in *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 57(2). There, the Tribunal must apply a statement of policy issued by the relevant Minister in various circumstances.

[81] Greg Weeks, *Soft law and Public Authorities Remedies and Reform* (Hart Publishing, 2016) 129–130.

[82] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [23]; [2019] FCAFC 185.

addressed universally in a ministerial direction. As observed earlier, a more complex analysis is required by considering whether the impugned consideration is beyond the scope of the subject matter, scope, and purpose of the legislation.[83]

*Third*, the impugned obiter reasoning in *HSRN* also appears to be in tension with recent jurisprudence in the High Court of Australia. For example, when considering s 501CA(4) of the Act, a unanimous Bench of the High Court in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (*Viane*)[84] said this:

> What is "another reason" is a matter for the Minister. Under this scheme, Parliament has not, in any way, mandated or prescribed the reasons which might justify revocation, or not, of a cancellation decision in a given case.[85]

At [15], the Court continued:

> The breadth of the power conferred by s 501CA of the Act renders it impossible, nor is it desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation.

Two points can be drawn from the preceding extracts from *Viane*. First, the scope of the statutory scheme must be considered by what Parliament has stated. Second, the statutory power in s 501CA(4)(b)(ii) is considerably broad.

The difficulty with the impugned obiter reasoning in *HSRN* is that it does not look to Parliament. Instead, the reasoning seems to limit the analysis to what a ministerial direction states. Moreover, the cover the filed analysis, if adopted, would appear to impose considerable limits on the exercise of what is otherwise broad statutory powers reflected in ss 501(1), 501(2) and 501CA(4)(b)(ii) of the Act.

*Fourth*, in *FYBR*, the very learned Justice Stewart said this:

> There is the possibility that cl 11.3(1) also requires the decision-maker to have "due regard" to any statement by the Government as to community expectations in a particular case (i.e. a statement outside the Direction), provided that that did not amount to unlawful dictation. As that issue does not arise in the present case, it need not be decided.[86]

Although obiter, Stewart J seems to have left open the possibility that a decision-maker would be required to consider a principle concerning community expectations beyond the Direction.[87] However, that possibility seems to be in tension with the Full Court's obiter statements in *HSRN* (which expressed doubt that a decision-maker could go beyond the Direction to consider community expectations).

*Fifth*, the impugned obiter comments in *HSRN* also appear to be in tension with the Direction itself. For example, para 5.1(4) makes plain that the purpose of the Direction "is to guide decision-makers in performing functions or exercising powers under section 501 and 501CA of the Act".

So properly characterised, the Direction is a "guide" to assist decision-makers in the exercise of the relevant statutory powers. The Direction does not universally regulate and limit the nature of permissible considerations under ss 501 and 501CA of the Act.[88]

The non-exhaustive nature of the Direction is also made plain given para 9(1). There, the paragraph states that, inter alia, that the "other considerations include (but are not limited to)". Use of the words "but are not limited to" demonstrates the non-exhaustive nature of the Direction. Parties can advance an argument that a decision-maker should have regard to a consideration not directly reflected in the Direction.[89]

---

[83] Damien O'Donovan, "The Ghost of Teoh – International Law and Domestic Discretionary Decision-making" (2022) 29 AJ Admin L 195, 197.

[84] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13; [2021] HCA 41.

[85] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13, [13]; [2021] HCA 41.

[86] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [99]; [2019] FCAFC 185.

[87] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, [99]; [2019] FCAFC 185.

[88] *Rosson v Minister for Immigration and Citizenship* (2011) 191 FCR 390, [19]–[23]; [2011] FCA 194.

[89] *Clegg v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 3383.

Despite the preceding, para 8.4(4) of the Direction is expressed in the following terms:

> This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.

It might be thought that para 8.4(4) of the Direction supports the impugned obiter comments of the Full Court in *HSRN*. But it does not. Paragraph 8.4(4) is only concerned with the lawful application of the primary consideration of expectations of the Australian community reflected in para 8.4(1)–(2). It says nothing about whether a decision-maker can have regard to expectations of the Australian community outside the scope of para 8.4 of the Direction.

To the extent that it is suggested that para 8.4(4) of the Directions seeks to prohibit a decision-maker from considering the expectations of the Australian community outside of para 8.4, such a direction would be unlawful. That is because, as explored earlier, there is nothing in the subject matter, scope, or purpose of ss 501 and 501CA(4) of the Act that prohibits a decision-maker from having regard to a consideration invoking the expectations of the Australian community based on matters beyond the normative principles reflected in para 8.4 of the Direction.

Paragraph 8.4(4) of the Direction largely adopts the majority ratio in *FYBR*. However, the Full Court in *FYBR* did not consider the issue of whether an administrative decision-maker could independently have regard to a consideration concerning the expectations of the Australian community that went beyond para 11.3.[90]

*FYBR* concerned the correct construction of para 11.3 in Direction 65. It said nothing about whether the primary consideration of expectations of the Australian community had a field of operation that was said to cover the field in relation to that subject matter. This suggestion, as discussed earlier, was only picked up recently by the obiter comments in *HSRN*.

Kagan argued that when political authorities do not trust administrative officials "to remain faithful to the central government's policy goals",[91] administrative organisation is characterised "by a high degree of hierarchical authority and legal formality" and may be called bureaucratic legalism.[92] It emphasises uniform implementation of centrally devised rules, vertical accountability, and official responsibility for fact-finding.[93]

A great example of Kagan's argument is the introduction of para 8.4(4) in the Direction. It is clear the government wanted to introduce a stricter regime for administrative decision-making in this space. As the Full Court in *HSRN* observed:

> Like Direction No. 90, one of the primary considerations was the expectations of the Australian community. Much of the wording of the relevant paragraphs (paras 6.3 and 11.3) of Direction No. 65 is the same or similar to that in para 8.4 of Direction No. 90, except that the latter Direction is even clearer in material respects, its changed wording having been apparently based in part on the decision in *FYBR*.[94]

*Sixth*, something should also be said about the statutory objectives of the Act. Section 4(1) states that the "object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens". In other words, an important statutory objective of the Act is the promotion of the national interest. Section 4 of the Act does not expressly refer to community expectations.[95]

---

[90] For a very recent analysis of the Full Court judgment in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454; [2019] FCAFC 185, see *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559, [72]–[76].

[91] Robert Kagan, "The Organisation of Administrative Justice Systems: The Role of Political Mistrust" in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010) 168.

[92] Kagan, n 91, 166.

[93] Kagan, n 91.

[94] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68, [32].

[95] *Migration Act 1958* (Cth) s 4 refers to the following objectives of the legislation: regulate, in the national interest, the coming into, and presence in, Australia of non-citizens; provide for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain; provide for non-citizens and

In *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (*Djalic*),[96] the Full Court held as follows:

> Similarly, the authorities indicate that, insofar as s 501(2) permits the Minister to take account of community expectations as to whether non-citizens who commit serious offences should not be permitted to remain in the country….To take account of community expectations is to give effect to the Minister's conception of the public interest. Sometimes this consideration may work in favour of the non-citizen. In the present case, for example, the Minister said that he took into account that some members of the Australian community would feel compassion for the appellant, since he had lived in Australia as a young child. … There is therefore no occasion to read down s 501(2) to exclude consideration of community expectations from the scope of the Ministerial discretion to cancel the visa of a non-citizen.[97]

Now, *Djalic* is important for a number of reasons.[98] It demonstrates that the expectations of the Australian community are a permissible consideration under s 501. It further demonstrates that where a decision-maker gives effect to the expectations of the Australian community, the decision-maker is effectively having regard to his or her conception of the public interest.[99] A consideration related to the expectations of the Australian community may weigh in favour of an applicant. Critically, the impugned obiter of the Full Court in *HSRN* did not consider *Djalic*.

It might be thought that the national interest criterion is not directly relevant to the statutory powers in ss 501(1)–(2) of the Act. However, in *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (*Huynh*),[100] the majority (Kiefel and Bennett JJ) found that although not expressly reflected in s 501(2), that section implicitly permitted a decision-maker to have regard to the criterion of the "national interest".[101] Given the structural similarities between ss 501(1) and 501(2) of the Act, the impugned reasoning in *Huynh*[102] would also likely apply s 501(1).[103]

It follows that the statutory object of the national interest in the Act does not support reasoning that community expectations are a prohibited consideration under ss 501 and 501CA(4) of the Act. The Direction cannot purport to limit a decision-maker having regard to permissible considerations that are not expressly stated in the Direction.

## CONCLUSION

Before the Full Court, the non-citizen contended that the Direction does not forbid the Tribunal from having regard and giving weight to its own views or its own assessment of community expectations "outside the prism of paragraph 8.4".[104] The Full Court in *HSRN* was able to materially sidestep consideration of that argument.

---

citizens to be required to provide personal identifiers for the purposes of this Act or the regulations; provide for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act; and, provides for the taking of unauthorised maritime arrivals from Australia to a regional processing country.

[96] *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292; [2004] FCAFC 151.

[97] *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, [74]; [2004] FCAFC 151.

[98] *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292; [2004] FCAFC 151 was recently applied by the Full Court of the Federal Court of Australia in *CKL21 v Minister for Home Affairs* (2022) 293 FCR 634, [30]; [2022] FCAFC 70.

[99] *CMA19 v Minister for Home Affairs* [2020] FCA 736, [131]–[132].

[100] *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256.

[101] *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505, [74]; [2004] FCAFC 256.

[102] The majority reasoning in *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505; [2004] FCAFC 256 appears to remain good law at the time of writing: *LJTZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1209, [39]; *CKL21 v Minister for Home Affairs* (2022) 293 FCR 634, [69]; [2022] FCAFC 70. See further *ENT19 v Minister for Home Affairs* (2021) 289 FCR 100, [96]–[98]; [2021] FCAFC 217.

[103] Jason Donnelly, "Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door" (2017) 24 AJ Admin L 99, 100–101.

[104] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68, [43].

The Full Court found that the submission failed on the facts.[105] For the Full Court, the Tribunal did not take account of its own assessment of community expectations "outside the prism of para 8.4(4)".[106] The Full Court concluded that the Tribunal made its own assessment of community expectations expressly within the context of its consideration of para 8.4 (which was a clear error).[107]

This article has taken up and considered the preceding argument advanced by the non-citizen before the Full Court. It has concluded that a decision-maker exercising the statutory powers in s 501 or s 501CA of the Act may permissibly have regard to a consideration concerning the expectations of the Australian community outside of the Direction. That is consistent with the subject matter, scope, and purpose of the relevant statutory regimes.

The principles and standards of administrative justice vary both within context and over time.[108] Acceptance of the obiter comments expressed in *HSRN* provides little scope for flexibility in the context of administrative justice concerning the expectations of the Australian community.

Stewart J in *FYBR* held that it would be surprising if Direction 65 required decision-makers to assess and arrive at a conclusion on what the "community expectations" are, whether as to the applicable norms or, particularly, the outcome in a particular case.[109] Such a task would be impossible and would inevitably end up with a highly subjective result that might vary considerably from one decision-maker to the next.[110]

Cabinet Ministers in recent years have regularly exercised various national interest powers in Pt 9 of the Act. Much like the cognate consideration of expectations of the Australian community, a statutory criterion of the national interest is impossible to define.[111] Nonetheless, the exercise of such powers is lawful.

Further, the impossibility concern raised by Stewart J also needs to be considered in the context of common sense and the common law. As Sutherland has observed, the "common sense" of judges has typically played a crucial role in developing common law principles.[112] "Common sense" draws upon judges' knowledge of everyday life in the community in which the courts operate to ensure that the common law reflects shared community values.[113]

Although decision-makers in the Tribunal are not judges, they have an important role to play in the administration of justice. Like judges, they are also able to draw upon their knowledge to make a broad range of findings without probative evidence.[114]

Regardless of consideration of a permissible consideration concerning expectations of the Australian community, application of the current character powers in Pt 9 already leads to highly subjective results. That is because where there is the exercise of a broad discretionary power involving competing claims,[115] such as in s 501(1) and 501(2), questions of weight and determining the correct or preferable decision

[105] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68, [44].

[106] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68, [44].

[107] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68, [44].

[108] Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Bloomsbury Publishing, 2011) 11.

[109] *FYBR v Minister for Home Affairs* [2019] FCA 500, [88].

[110] *FYBR v Minister for Home Affairs* [2019] FCA 500, [88].

[111] See Jason Donnelly, "Utilisation of National Interest Criteria in the Migration Act 1958 (Cth) – A Threat to Rule of Law Values?" (2017) 7(1) *Victoria University Law and Justice Journal* 94, 96.

[112] Carolyn Sutherland, "Judging the Employment Status of Workers: An Analysis of Commonsense Reasoning" (2022) 46(1) *Melbourne University Law Review* 281, 282.

[113] Sutherland, n 112.

[114] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Mukiza* (2022) 291 FCR 568; [2022] FCAFC 89; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13; [2021] HCA 41

[115] Jerry L Mashaw, "Conflict and Compromise among Models of Administrative Justice" (1981) 2 *Duke Law Journal* 181, 188.

often bring about highly subjective results.[116] So too does the imposition of considering a miscellaneous claim outside the scope of the Direction, given the non-exhaustive nature of the Direction.

The normative and other values which surely lie at the heart of any form of justice will inevitably be contested to some extent.[117] It is also to be recalled that nowadays, open-textured criteria of reasonableness, fairness, justifiability, or proportionality are statutorily employed to cast on the courts the responsibility of forming value judgments that have, or might have, significant economic or social effects.[118]

Administrative justice is a highly contested concept[119] or "essentially contested".[120] There is no reason, as a matter statutory construction, to determine that a consideration (such as the expectations of the Australian community) is a prohibited consideration outside the scope of the Direction by reference to the application of subjective characteristics.

It will be for the non-citizen to advance a cogent persuasive representation to properly inform a decision-maker to exercise the relevant character power favourably to the non-citizen.[121] Those representations will be considered in the context of adjudicative independence, by a decision-maker who is assumed to be unbiased and exercise individual judgment.[122]

---

[116] Sir Gerard Brennan, "The Anatomy of an Administrative Decision" (1980) 9(1) *Sydney Law Review* 1, 4.

[117] Matthew Groves, "Administrative Justice in Australian Administrative Law" (2010) 66 *Australian Institute of Administrative Law Forum* 18, 18.

[118] Sir Gerard Brennan, "Judicial Independence" (Paper presented at the Australian Judicial Conference, Canberra, 2 November 1996).

[119] Chantal Bostock, "The Value of Adjudicative Independence: Overlapping Conceptions of Administrative Justice in the Administrative Appeals Tribunal's Review of Visa Cancellations" (2020) 27 AJ Admin L 154.

[120] WB Gallie, *Philosophy and the Historical Understanding* (Chatto and Windus, 1964), quoted in Michael Adler, "Understanding and Analysing Administrative Justice" in Michael Adler (ed), *Administrative Justice in Context* (Hart Publishing, 2010) 130.

[121] *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497, [22]; [2022] HCA 17.

[122] Gabriel Fleming, "Tribunals in Australia: How to Achieve Independence" in Robin Creyke (ed), *Tribunals in the Common World* (Federation Press, 2008) 87.