



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2023/4544**

Re: **YNCP**

APPLICANT

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

RESPONDENT

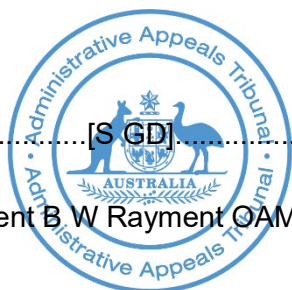
DECISION

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

Date: **1 September 2023**

Place: **Sydney**

The decision under review is set aside and substituted with the decision that the cancellation of the applicant's visa be revoked under s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth).



[S GD]

Deputy President B W Rayment OAM KC

CATCHWORDS

MIGRATION – refusal to revoke mandatory cancellation – citizen of Fiji – family violence, driving, drug and other offences – five minor children – decision under review set aside and substituted

LEGISLATION

Migration Act 1958 (Cth)

CASES

Pearson v Minister for Home Affairs [2022] FCAFC 203

SECONDARY MATERIALS

Minister for Citizenship, Citizenship and Multicultural Affairs, *Direction No 99: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA* (23 January 2023)

REASONS FOR DECISION

Deputy President B W Rayment OAM KC

1 September 2023

1. The applicant came to Australia from his home country of Fiji in 2010 at the age of 23 years. He is now 36 years old.
2. He has five children from two partners. He has separated from both partners. He has had employment over non-COVID periods in Australia as a stonemason since being in Australia, including recently when he was released from detention for several months earlier this year as a result of the *Pearson* decision.
3. He married an earlier partner and they have three sons together. That couple separated and the applicant took another partner, and they have two girls, one aged five and the other now one.

4. He has had a drug addiction (cannabis and once or twice, methamphetamines) and an alcohol addiction. He was diagnosed with PTSD when he was imprisoned arising apparently from trauma suffered in Australia, in the course of a motor vehicle incident referred to in detail below.
5. He has a lengthy criminal record, having been dealt with by the local courts. His most significant offending led on 17 May 2022 to a sentence of imprisonment for 18 months with a non-parole period of nine months.
6. As a result of the convictions of May 2022, the applicant's visa (a permanent partner visa) was the subject of mandatory cancellation. He was given notice under s 501CA(3)(a)(i) of the *Migration Act 1958 (the Act)* and made representations about revocation of the cancellation of his visa. Following a delegate having decided to refuse to revoke the cancellation of his visa, the applicant applied to the Tribunal for review of that decision.
7. His criminal record includes the following convictions:

Date of court appearance	Offence	Date of offence	Result
21/06/2013	Assault occasioning actual bodily harm (DV)-T2	03/06/2013	Bond s10: 8 months
29/10/2015	Possess prohibited drug	03/10/2015	Dismissed s10: drug to be destroyed
27/02/2017	Possess prohibited drug	25/01/2017	Fine: \$660
20/05/2020	Common assault (DV)-T2	26/02/2020	Fine: \$1,500
	Common assault (DV)-T2		Fine: \$2,000
	Fail to appear in accordance with bail acknowledgment (bench – non conviction)	28/04/2020	Fine: \$300
29/07/2020	Driver or rider state false name or home address	16/04/2020	Fine: \$400
	Use uninsured motor vehicle		Dismissed s10

	Drive, licence suspended under s 66 Fines Act - 1st off		Conditional release order without conviction: 12 months commencing 29/07/2020 concluding 28/07/2021
	Use unregistered registrable Class A motor vehicle on road		Dismissed s10
25/08/2020	Enter enclosed land not prescribed premises without lawful excuse	01/05/2020	S10A conviction with no other penalty
18/11/2020	Contravene prohibition/restriction in AVO (Domestic)	25/07/2020	Fine: \$1,000 [and below community correction order]
	Assault occasioning actual bodily harm (DV)-T2		Community correction order: 2 years commencing 18/11/2020 concluding 17/11/2022, to report to community corrections office within 7 days. Supervision: 2 years commencing 18/11/2020 concluding 17/11/2022 supervised by community corrections service
17/05/2022	3 counts (1 count call-up) contravene prohibition/restriction in AVO (Domestic)	25/07/2020, 07/09/2021, 19/09/2021	Imprisonment (aggregate): 18 months commencing 13/10/2021 concluding 12/04/2023, with 9 months non-parole period commencing 13/10/2021 concluding 12/07/2022
	Contravene prohibition/restriction in AVO (Domestic)	25/07/2020	
	Destroy or damage property (DV)	07/09/2021	
	Assault occasioning actual bodily harm (DV)-T2 (call-up)	25/07/2020	
	Contravene prohibition/restriction in AVO (Domestic)	07/09/2021	

	Police pursuit - not stop – drive dangerously - 1st off-T2	13/10/2021	Disqualification - driver: 15 months commencing 17/05/2022 [and above 18 months imprisonment]
	Possess prohibited drug	13/10/2021	S10A conviction with no other penalty
	Fail to stop and assist after impact cause injury - 1st off	13/10/2021	
	Learner not accompanied by driver/police officer/tester	13/10/2021	
17/01/2023	Stalk/intimidate intend fear physical etc harm (domestic)-T2	16/01/2023	Community correction order, with supervision: 18 months commencing 17/01/2023 concluding 16/07/2024, with supervision
	Contravene prohibition/restriction in AVO (Domestic)	16/01/2023	Fine: \$500
	Wield knife in a public place	16/01/2023	Fine: \$500
26/10/2023	Stalk/intimidate intend fear physical etc harm (domestic)-T2	01/03/2023	Pending court appearance
	Contravene prohibition/restriction in AVO (Domestic)	01/03/2023	

8. There being no doubt that the applicant fails the character test the question on this review is whether there is another reason under s 501CA(4) why the cancellation of the visa should be revoked.

9. In making that determination, the Tribunal is bound to take into account a number of considerations specified in Direction 99 made by the respondent Minister under s 499 of the Act. The Direction is published and for the most part I will not repeat all its terms, I note the principles stated in cl 5.2 of the Direction.

10. The primary considerations which should “generally” be given greater weight than the other conditions are: the protection of the Australian community from criminal or other serious conduct; whether the conduct engaged in constituted family violence; the strength, nature and duration of ties to Australia; the best interests of minor children in Australia; and the expectations of the Australian community. I will take those considerations first.

The protection of the Australian community (cls 8.1, 8.1.1. and 8.1.2)

11. I note the terms of cl 8.1(1).

The nature and seriousness of the conduct (cl 8.1.1)

12. The applicant has a lengthy criminal record as appears from his national criminal history check replicated at [7]. All of the sentences, fines and other penalties were imposed by local courts in New South Wales.
13. All of the offences were serious, including those falling into the category of family violence defined in cl 4(1). The family violence offences (falling within the examples mentioned in the definition at (a), (c) and (e)) are discussed here and below in relation to the second primary consideration.
14. The magistrate who dealt with the applicant on 17 May 2022 described the most serious offence as the police pursuit, not stop and drive dangerously offence. The applicant drove a vehicle at a time when he had a learner’s licence, driven when pursued by police at speed.
15. The applicant was then under the influence of drugs (both marijuana and methamphetamines). He said that he had taken the drugs in the vehicle at a time when he did not intend to drive it.
16. The applicant said that before he drove the vehicle, he had been sleeping in the vehicle and said that men attacked him at that time, including with a baseball bat, apparently in an attempt to steal the vehicle. He says that he drove off, and the police pursuit followed. He said that the police vehicle was driven by undercover police and that he did not know the vehicle was a police vehicle at the time of the pursuit.

17. A man aged 85 years was driving a vehicle which the applicant collided with on the near side, and the man was taken to hospital (as was the applicant and the driver of another vehicle he collided with). The 85-year-old man suffered five broken ribs and was in the intensive care unit at the hospital.
18. The applicant received an aggregate sentence of 18 months imprisonment with a non-parole period of 9 months for this and other offences including call-up offences dealt with on 17 May 2022.

The incident of January 2023

19. There is a conflict between the police facts sheet and the evidence of both the applicant and the partner (mother of the girls) mentioned in the discussion of two inter-related primary considerations mentioned below. The police facts sheet states that on 16 January the victim (who had contacted the police) said that she heard her garage door close and went to her balcony to see what was happening and sighted the applicant leaving the garage and walking towards the street. The victim saw the applicant carrying in his hands two swords, both in sheaths, one red in colour and the other black in colour. According to the facts sheet, as the accused ran from the unit, he pointed one of the swords towards the victim and said, "You wait there!" adding that this caused the victim to fear for her safety and to feel intimidated. The note says that later the same day the police came to the partner's unit at 3:40PM and the applicant "told police someone was trying to break into his garage, hence why he was in the location but made no mention of the swords". The note also records that while the applicant was in custody police questioned him again about being in possession of two swords to which he replied, "Someone broke into my garage, so I used it [sic] for my protection". The note adds: "The accused was not offered a chance to be interviewed due to his level of intoxication".
20. The version given in evidence by the applicant was that before he saw the partner on his balcony he had encountered young persons attempting to break into the garage and he took from the garage items that were not swords at all. Rather, he said, he took from the garage one or more poles with tennis balls attached, by cords being children's toys. He chased the young men but they escaped. He agreed to having said to the partner "wait there". He said that at the police station he declined to be interviewed. He said he was not drunk, nor intoxicated with drugs. He said he had not been drinking on the occasion at all.

21. The partner said at page 99 of the Transcript that she had thought initially that swords were involved but it was a “tennis pole”, a plaything she had bought at Kmart and the plastic pole was part of it. She said she did not know whether or not the applicant had been drinking at the time because he was too far away.
22. On the following day the applicant went before a Magistrate and on advice, pleaded guilty, being fined \$500 for each of two offences mentioned in [7] above. But for those convictions (albeit following advice that he should plead guilty to the two offences) I would not have been satisfied with the police facts relating to this incident, either about the swords or the alcohol in breach of the AVO conditions specified on 17 May 2022. However, the balance of authority is that the Tribunal is bound by the essential elements of lawful convictions, and it may be that the conviction for contravening the AVO of 17 May 2022 extends to his having drunk alcohol on the day in question. The alcohol may be an essential element of that conviction. The police facts have an unusual aspect in this respect because they attribute things to what the applicant told police, yet suggest that he was too intoxicated to be interviewed. The evidence given by the applicant was that he declined to be interviewed on 16 January.
23. Being bound by the essential elements of the convictions I cannot find that, as asserted by both the partner and the applicant, there were children’s tennis poles involved.
24. The police facts do not record the police as having seen the swords, and seem to rely on things reported by the partner.
25. On any view of the matter, no violent action using any sword was involved in the police facts or the convictions.
26. I also note that in prison, he was dealt with for the following infractions: entering other cells (14 days off buy-ups), intimidation (28 days off amenities), stealing (14 days off amenities) and failure to comply with correctional centre routine (14 days off amenities).
27. In detention, he was dealt with for the following infractions (all of which are categorised as ‘minor’ in the client incident report): contraband found, assault, assault and use of force - planned.

The risk to the Australian community (cl 8.1.2)

28. Generally as to cl 8.1.2(2)(b) of the Direction, I do not find that the applicant has now been rehabilitated from his alcohol and drug addictions and I note that in his statement it is said that his barrister is in the course of recommending future steps to be directed to his rehabilitation. If he is released, my understanding is that he would be entitled to a Medicare card as a permanent resident and treatment would be available to him through a mental health plan arranged with a general practitioner.
29. The applicant is well aware that he risks deportation should he offend again. That is one protective factor. Most important of all, the applicant strongly desires to remain associated with his children. And that factor, together with his adverse reaction to gaol and detention, will be the most important protective factors.
30. The applicant has never held a licence in this country and is, because of the orders made on 17 January 2023, subject to a community correction order for 18 months concluding on 16 July 2024.
31. There were other driving offences of 2020 as noted in [7] above, for which the punishments ought to have a salutary effect on his future conduct.
32. The consideration presently being discussed does not favour revocation of the visa.

Family violence (cl 8.2)

33. The applicant was convicted of several offences as noted in [7] above, which constitute family violence as defined in clause 4(1) of the Direction. Apart from the matters dealt with on 17 May 2022 and 17 January 2023 those are the convictions of 21 June 2013, 20 May 2020 (two counts) and 18 November 2020 (two offences). The offences concern the mothers of his five children, whose attitude to the offences is discussed below. The family violence was serious, but spasmodic and did not have a lasting effect on the victims. The slight altercation with his eldest son affected their relationship. This consideration also does not favour revocation of the cancellation.

Ties to Australia and the best interests of minor children (cls 8.3 and 8.4)

34. These two considerations are best dealt with together, since they both relate to the applicant's children. He has three sons by his wife, to whom he is still married. He has two girls by a subsequent partner, he said a number of times in evidence that his children are everything to him and I accept that evidence. I also heard from the wife and the subsequent partner, both of whose evidence I accept. Each said that he is very close to each of his children. The boys are aged 16, 13 and 11. The girls are aged 5 and 1 respectively.
35. The applicant said, as noted above, that his children are everything to him and that deportation would, in effect, be disastrous to him because it would mean separation from them.
36. The applicant is separated from his wife and partner. Each of the wife and the partner said that they have forgiven him for such family violence as he committed, and that the family violence was not the cause of the separation. The wife said that the breakup was caused by "outside interference" and explained that her parents, with whom they lived for a time, did not like the applicant. The partner said that the breakup was caused by differences in their lifestyles. They grew apart.
37. The wife described the relationship with the applicant's sons as very close. She said that although the boys wanted to visit him in detention, she did not have the time to take them to Villawood. She said that the applicant rang his eldest son weekly or twice weekly and that whenever the applicant telephoned her, he would speak to the two younger sons. She said he was pretty caring towards their sons. When the applicant was at liberty because of the *Pearson* decision, he lived with her and his sons from January to early March in their lounge room.
38. The applicant took the elder daughter, now aged 5, to Fiji for her first birthday. In Fiji he was able to introduce her to his parents. The partner said that on only one occasion was any kind of violence practised on her by the applicant. She arrived home when she herself was drunk and she attempted to remove the car keys from him. She said he did not hit her and just pushed her back with his elbow and his arm. She said: "He's not physical, he just says things". She said she was not fearful of the applicant and that she wanted him to have access to the girls for their benefit. She said that every time she and he argue, the kids are not around.

39. Since he had been in Villawood there has been no contact with the daughters because of apprehended violence orders. She asks that he not be deported on account of the girls.
40. These considerations favour revocation of the cancellation of the applicant's visa.

Expectations of the community (cl 8.5)

41. The deemed expectations stated in this factor are not examinable in the Tribunal. They do not favour revocation of the cancellation of the visa.
42. I will now turn to the other considerations in the Direction.

Legal consequences of deportation (cls 9.1, 9.1.1 and 9.1.2)

43. The existence of protection obligations is not suggested. Deportation of the applicant would, in the absence of Ministerial intervention, bar the applicant from returning to Australia. That would entail in all likelihood removal from the applicant's children, which would cause great distress to them and him.

Impediments if removed (cl 9.2)

44. The applicant's removal from his children, as stated above, would cause him and them great distress. The applicant has PTSD which he treats himself by exercise and contemplation. Although Fiji does not have an advanced health system for the treatment of mental health, that should not trouble the applicant unless his condition significantly deteriorates.

Impact on victims (cl 9.3)

45. As noted above, neither the wife nor the partner has any lasting concern about the acts of family violence perpetrated on them.

Exercising the discretion

46. This requires me to balance all of the considerations discussed above. In my opinion the most important consideration favouring non-revocation are those mentioned in cls 8.1 and 8.2 and the most important considerations favouring revocation are those mentioned in cls 8.3 and 8.4. I have concluded that on balance the correct or preferable decision is to favour

the continuing relationship between the applicant and his five children, taking into account also the views expressed by their mothers.

47. The cancellation of the applicant's visa will therefore be revoked under s 501CA(4)(b)(ii) of the Act.

*I certify that the preceding 47
(forty -seven) paragraphs are
a true copy of the reasons for
the decision herein of*

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

Associate

Dated: 1 September 2023

Date(s) of hearing:	29 & 30 August 2023
Counsel for the Applicant:	Dr J Donnelly
Solicitors for the Applicant:	Jack Rigg Solicitors
Counsel for the Respondent:	Mr G Johnson
Solicitors for the Respondent:	Sparke Helmore Lawyers