



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2022/10145**

Re: **JFGN**

APPLICANT

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

RESPONDENT

DECISION

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

Date: **20 October 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).



[SGD]

Deputy President B W Rayment OAM KC

CATCHWORDS

MIGRATION – refusal to revoke mandatory cancellation – citizen of New Zealand – reckless grievous bodily harm – drug-induced psychosis – decision under review set aside and substituted

LEGISLATION

Crimes Act 1900 (NSW)

Migration Act 1958 (Cth)

SECONDARY MATERIALS

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association, 5th ed, 2013) (DSM-5)

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

20 October 2023

1. The applicant came here from New Zealand, his country of birth and citizenship, in 2018 with his wife and their three infant children.
2. The applicant is now 41 years of age and his children in Australia are aged 8, 11 and 13. The 11-year-old is a daughter and the other two children are boys. They came to the Tribunal during the hearing before me.
3. I heard from the applicant, his wife and Dr Kwok, a very well qualified psychologist. Her report of January this year contains amongst other things a good record of statements made to her by the applicant from Villawood Immigration Detention Centre, which I have found to be of assistance, as I found her evidence generally to be.

4. The applicant's history in New Zealand and for several years as a boy in Tonga is dealt with in Dr Kwok's report.
5. Some matters of background may be usefully explained before I make detailed findings about matters referred to in Direction No 99 (the **Direction**).
6. The applicant has six children in New Zealand by an earlier partner with whom he cohabited from the age of 17. Those children range in age from 14 to 22, and the applicant speaks to them all either singly or together very regularly, and also speaks to their mother weekly. The six children also have regular group chats with the three children who live here. The applicant explained to the six New Zealand children that he was coming to Australia for reasons of employment in 2018, and said that as his financial circumstances have permitted, he has from time to time sent money to New Zealand for their benefit.
7. In this country the applicant worked for the Sydney light rail, running a team that built tracks around Sydney. Some events referred to below arise from the COVID-19 outbreak and in particular events of Anzac Day 2020 when the applicant and his wife had both lost their jobs, and suffered much stress because they found that as New Zealand citizens, they had no Centrelink assistance. Their children must then have been aged about 5 to ten years old, and the future of the COVID-19 pandemic was then largely unknown. Husband and wife attended a party at the home of a friend of the wife on the evening of 25 April 2020 at which others offered them drugs. Their offending occurred early on the following day.
8. The applicant had a drinking habit which had commenced when he was six and by his teenage years he was drinking three days per week, and from the age of about 10 until the age of 26, while still in New Zealand, had a marijuana habit. When he met his present wife in 2009 who he married in 2012, he gave up regular use of marijuana and diminished his alcohol intake. He arrived here, if not as a non-user of marijuana, then at worst as an occasional user of marijuana in 2018. Until Anzac Day in 2020, he never took methamphetamines in his lifetime and nor did his wife.
9. His wife, who has suffered from depression and anxiety began using marijuana at the age of fifteen and was still using that drug when she arrived in Australia. She obtained employment in Australia.

10. Because of the applicant's conviction arising from his offending of 26 April 2020 the applicant's visa was the subject of mandatory cancellation while he was imprisoned, and the applicant was taken into detention in October 2022, where he remained at the time of the hearing before me earlier this week. Representations were made for the revocation of the cancellation of his visa, and a delegate refused to revoke the cancellation. Earlier this year, in March, the matter was first heard before another member of this Tribunal. That decision was unfavourable to the applicant. It was set aside by consent in the Federal Court for jurisdictional error and the matter was remitted to the Tribunal to be heard again.
11. There being no doubt that the applicant did not pass the character test the issue on the review is whether there is another reason to revoke the cancellation within the meaning of s 501CA(4) of the *Migration Act 1958* (the **Act**).
12. I now turn to the Direction, made under s 499 of the Act, the terms of which are published and which binds decision-makers including the Tribunal on this review.
13. As is apparent from the terms of the Direction, the primary considerations mentioned in clause 8 of the Direction and particularised in clauses 8.1, 8.1.1, 8.1.2, 8.2, 8.3, 8.4 and 8.5 of the Direction are, by clause 7, such that generally, they should be given greater weight than the other considerations, and that one or more primary considerations may outweigh other primary considerations.
14. The principles set out in clause 5.2 of the Direction are described in the Direction as providing the framework within which decision-makers should approach their task of deciding whether to revoke a mandatory cancellation under s 501CA of the Act. I note the terms of clause 5.2(1) - (6) inclusive.

Protection of the Australian community

15. I note the terms of clause 8.1(1).

The nature and seriousness of the non-citizen's conduct to date (cl. 8.1.1)

16. The offending of the applicant of 26 April 2020 was very serious because of its violent nature.

17. I have the benefit of the detailed and careful remarks on sentence of His Honour Judge Mahony SC DCJ of 2 July 2021 (G Documents, G7). The respondent also tendered three videos mentioned by the judge in paragraph 9 of his reasons and I have watched those videos.
18. It is useful to note that the evidence before me indicates that at the Anzac Day party the applicant was offered and took both marijuana and methamphetamine (ice) at the party which went on into the early hours of 26 April. The applicant's wife said that she was offered and accepted a marijuana joint but discovered at the hospital after she and her husband were arrested that her body also contained methamphetamine, causing her to conclude that the marijuana joint she was given was spiked (that is laced).
19. Dr Kwok referred in her report (which related to the applicant alone) to pages 110 - 111 of DSM-5, described as Substance/Medication-Induced Psychotic Disorder involving delusions and hallucinations which may occur during or soon after substance intoxication which is capable of producing delusions and hallucinations. As the judge notes at paragraphs 6 and 7 of his remarks on sentence both the applicant and his wife were noticed at 9:00AM on 26 April, before the offending occurred, to engage in manic behaviour and to discuss an unknown male person who they thought had injured or killed their friend who invited them to the party. At paragraph 6 of the remarks on sentence, the sister of the applicant's wife's (who had been babysitting the applicant's three children) said that she heard the applicant's wife say that "we think our friend T is dead in the car".
20. Dr Kwok said at paragraph 43 of her report that the applicant was experiencing a methamphetamine-induced psychotic disorder at the time of his offending.
21. In the course of the ten-minute video apparently taken by the wife's sister before the offending a voice may be heard complaining that the police have not yet arrived. The sentencing judge records at paragraph 7 of his remarks that the wife's sister was asked by the applicant and his wife to call the police, and that she did so at 9:24AM.
22. At about 9:50AM the victim, a lady, was walking by the applicant's house wearing headphones and did not hear the applicant screaming at her. The applicant ran out of the residence and chased her down the footpath followed by the applicant's wife and the wife's sister. Part of the event was depicted in the second and third videos taken from a

neighbouring property. The events described by the sentencing judge at paragraphs 12, and 16 - 27 inclusive of the remarks on sentence then took place.

23. Police arrived at 10:02AM and arrested the applicant and his wife, I assume, at the same time. She was imprisoned for a time as well. The offending lasted 12 minutes in all.
24. The aftermath of the attack on the victim is described by the judge together with the agreed facts of the injuries inflicted on the victim at paragraphs 28 - 31. The victim's impact statement (not to be confused with paragraph 9.3 of the Direction) is at S4 of the Respondent's Supplementary Documents. Its date indicates that it was placed before the sentencing judge.
25. The victim's impact statement graphically indicates her suffering and its consequences more than a year after the offending. The judge remarked at paragraph 102 of his reasons that the impact statement is a poignant reminder that victims of crime, particularly crimes of violence, carry the impact throughout their lives, and are left with understandable anxiety and fear when going about their daily activities.
26. The offending was a crime of a very violent nature against a woman, as described in clause 8.1.1(1)(a)(ii) of the Direction.
27. The sentence imposed was imprisonment for four years and six months with a non-parole period of two years and six months. The applicant was released from prison when his non-parole period expired. The judge noted that the offender had reasonable prospects of rehabilitation. Dr Kwok noted that without intervention such as she described the applicant has a moderate risk of reoffending. She said he presents as having a low risk for reoffending and low risk to the Australian community, if he responds to intervention. The intervention she has in mind is weekly appointments with a psychologist including cognitive behaviour therapy for the first six months, and thereafter for the next six months as determined by the psychologist, together with (from the beginning) monthly consultations with a specialist in drug and alcohol rehabilitation (either a counsellor or another psychologist). She said that the Department of Communities and Justice will also refer him to couples and parenting counselling.

28. Those recommendations led to two further enquiries in the review. First whether the applicant had a Medicare card if his visa were restored. That question was answered by the respondent conceding that he does have a Medicare card.
29. That means that he would become entitled to ten consultations with a psychologist at the present time. His wife has already paid for four such consultations with a psychologist.
30. The applicant's wife will seek to assist in meeting the cost of further appointments (estimated by Dr Kwok to be up to \$265 per week for a psychologist, with possibly a lower price being paid if a community-based service such as Anglicare, CatholicCare or another family relationship centre assists).
31. Assuming the applicant obtains employment if released, he himself can supplement the relevant costs as required and the wife's parents will endeavour to provide any other necessary further consultations so as to permit him to follow the recommendations of Dr Kwok, assuming that he is now released into the community. He is able and willing to accept employment, and if his visa is restored, construction work may be available to him. The applicant's wife said that "we're all trying – we will all try and help, whatever needs to be done for – help [the applicant] get through these stages."

The risk to the Australian community should the non-citizen reoffend (cl 8.1.2)

32. Those various matters all go to the issues referred to in clause 8.1.2 of the Direction. Both in prison and in detention the applicant has attended in-person or audio-visual courses with a view to his rehabilitation. Speaking generally, Dr Kwok's recommendations took account of the kind of courses he had already attended.
33. As will appear, the applicant's wife and children all miss him, and have suffered from his absence at their home. The applicant is well aware that he needs more rehabilitation. At the present time, of course, he has been abstinent from alcohol and he has taken no drugs between 2020 and today, so that he is presently in remission as a marijuana user. He said in evidence that he has not felt like he wanted to take drugs at all in in the past three and a half years.
34. The applicant has no other record of criminality in Australia and has a history of offending in New Zealand set out at G10, consisting of 10 offences between 2003 and 2013. He was

not sent to prison for any of those offences. For the most part he was sentenced to community work or community detention.

35. Most relevant for present purposes is a conviction on 25 October 2013 for 'Male Assaults Female (Manually)(Family Violence)'. The victim in that offence was the applicant's wife in the year after their marriage. Both the applicant and his wife were asked about this matter. The applicant said that he hit his wife after an argument when they were both drinking at a party. He said that he attended three sessions of 'prevention of family violence' because he wanted to save his marriage. He said that was the only time he hit his wife.
36. The wife said that the two of them emerged stronger than ever from the family violence event of 2013. She described their relationship and the relationship with the children as very strong.
37. Generally, I found the applicant's wife to be an impressive and reliable witness.
38. Offered by her cross-examiner the opportunity to have her parents and other adult persons in court put out while certain matters were asked of her, she declined, saying that she had no secrets from her family. Her evidence about the children's situation without their father at home particularly impressed me as genuine.
39. I also found the applicant to be a reliable and honest witness, whose remorse for what he did in April 2020 was genuine. He was difficult to hear on some occasions as the transcript also confirms in many places.
40. The events of April 2020 were clearly affected by the drugs taken by both the applicant and his wife at the Anzac Day party, and the involvement of ice in those events was fundamental to what occurred, having regard not only to Dr Kwok's report but also to their respective histories. It is obvious that if those events occur again, great harm might result to others. The risk of the applicant offending again as he did on 26 April 2020, affected by a psychotic disorder, is a very remote risk especially after the applicant's imprisonment and bearing in mind that his consumption of ice was on one occasion in his lifetime, the hours late on 25 April and early on 26 April. It was the methamphetamines which led to the psychotic disorder, not the marijuana. In any event, the applicant's more regular taking of marijuana ceased 15 years ago.

41. I understand that the recommendations of Dr Kwok (which if implemented she believes would likely result in the risk of recidivism being low) pay due regard to the seriousness of the offending of 26 April 2020.
42. The applicant was asked about the possibility that he might disregard Australia's laws in the future, as appears to have happened on some occasions in New Zealand, and I accept his answer in effect that in the light of his conviction of 2021, resulting in imprisonment and detention, he is now very conscious of legal consequences of misconduct. He would also be very conscious of the legal consequences given that the decision of the earlier Tribunal was going to result in his deportation.
43. The offences of which the applicant was convicted in 2021 were reckless grievous bodily harm in company pursuant to s 35(1) of the *Crimes Act 1900* (NSW) and a charge of destroy or damage property less than \$2000, relating to the destruction of the victims' Apple Watch.
44. The respondent asked the applicant and his wife how it occurred that methamphetamine was found by police in their home when they were arrested. An answer to the effect that the bag was found in their vehicle when they left the party. As noted above, I accept the evidence which each gave that they have never taken methamphetamines during their lifetime prior to 25-26 April 2020.
45. Finally as to clause 8.1.2(b) of the Direction, as noted above, the report of Dr Kwok is the most reliable evidence of the risk of "further criminal or other serious conduct" before the Tribunal.

Family violence (cl 8.2)

46. This consideration largely overlaps with what I have discussed above about the 2013 New Zealand conviction, insofar as concerns the applicant and his wife and the events which led to his 2013 conviction.
47. Both the applicant and his wife were cross-examined about a 2020 report on remarks made by their daughter regarding disciplinary action taken against her by her father and mother. The daughter was then about 8 years of age. The father described any discipline which he applied to his children as not involving excessive force, and the remarks attributed to his daughter do not deny that. The mother said that discipline administered by her was limited

to smacks using her hand. I am not satisfied that either the applicant or his wife has been guilty of family violence as defined in the Direction when disciplining their children.

The strength of ties to Australia (cl 8.3)

48. The applicant's ties to his wife, his children, and his parents-in-law are critical to this consideration.
49. As to the wife, she described her relationship with her husband as very strong. She said that she had found it extremely difficult to be without him, that is, at home. She suffers and has for many years suffered from depression. She said that "he's my biggest support, he's my best friend". She added that "my husband, he knows me better than anybody. I've been able to tell him everything, and when I'm not doing too well, he's always there".
50. Contact with the applicant was more limited when he was in prison, limited to a six-minute phone call.
51. In detention, she is able to visit the applicant most days and does so, usually with the children. She described her reaction to the previous AAT decision (in March 2023) as having caused her a mental breakdown and caused her to move in with her parents, because she could not live alone any more, and had to take three weeks off work. She thought her husband would get deported, and that she is having to choose between going with him, and being with him, or staying with the children. She thought that choice was intolerable.
52. Children's Court orders made in January 2021 (while criminal proceedings were pending against the applicant and his wife and while the husband, and I think the wife as well, were imprisoned), were to the effect that all aspects of parental responsibility concerning the three children were allocated to their maternal grandparents until the children reach the age of 18 years. As mentioned above, after the earlier AAT decision, the applicant's wife moved in with her parents, so that de facto she assists in their custody and has been able to take them regularly to Villawood. Previously an interim order was in force as of May 2020 for the children to live with their maternal grandparents.
53. If the applicant is released, and in due course, the applicant and his wife intend to seek to regain custody of the children.

54. If released the applicant has been invited to live with his parents in-law as well, and desires to do so. The grandparents attended the Tribunal proceedings and have expressed their support for the applicant to be released from Villawood. The applicant's mother-in-law stated in her statutory declaration that she believes it is in the best interests of the three children for their father and mother to be together with their children as a family in the Australian community.

Ties to the children

55. Asked by Dr Donnelly for the applicant about any impact of the children being away from their father, the applicant's wife said: "The children have suffered a lot. Their dad has always been very involved in all of their life from day one". She said that her eldest son has always been like a big protective brother of the two little ones, especially when she and her husband were incarcerated. She said her eldest son is:

[...] a lot like his father in the fact that he loves music and sport and all those things, but when the last AAT decision was made, my oldest son went from being a merit student that got along with everybody in his class, the teachers loved him, to being [disciplined] multiple times, and not having respect any more for authority. My daughter went from being the most outgoing happy little girl to being very cautious and very angry, and she bursts into tears very often and asks me when dad's coming home. She talks to her dad on the phone all the time. They used to spend time together, daddy-daughter days were her favourite thing, and she's even planned a party for her dad when he comes home, and my youngest was only four years old, and right before we were incarcerated there was a Christmas holidays, and my husband was a stay-at-home dad and he spent one-on-one time with my little one for, I don't know, a good couple of months, and it really affected him starting school without his dad, and he's just turned from a very happy little boy to one that's afraid of either – when we visit he cries and attaches himself to his dad, and he doesn't want me to leave the house. He's always by my side wherever I go. So it's separation anxiety, anger outbursts, they don't sleep, they have nightmares, and they cry all the time. The longer that they spend away from their dad the worse their behaviour gets. Between visits if there's a reason, like, the other week my daughter actually had COVID on 29 September which was the middle of the school holidays, and her first reaction was she burst into tears and walked away and said, 'I can't see my dad for five days'. Sorry. They all have a very close relationship with their dad and it's affecting them. The longer it goes on the worse their behaviour gets.

56. The applicant spoke of regular visits at Villawood from his wife and children, his copious use of his mobile phone at Villawood with his wife and each of the children, and when speaking of the effects on him of possible deportation to New Zealand, where he has his two parents and three siblings as well as his six children, he said that his older children have moved on and have partners and referred to the fact that his youngest New Zealand

daughter wants to live here. It is clear to me that if he were separated from his three Australian children or his wife, he would be devastated.

Best interests of minor children in Australia (cl 8.4)

57. I am satisfied by the evidence of the applicant, the applicant's wife and of the wife's parents referred to above that it is in the best interests of each of the three Australian children for the cancellation of the applicant's visa to be revoked.

Expectations of the Australian community (cl 8.5)

58. This other primary consideration is in the nature of a deemed expectation not permitting the Tribunal to consider that question for themselves as clause 8.5(4) makes clear. So understood, it is a consideration adverse to the request for revocation.

Legal consequences of a decision under s 501CA (cls 9.1, 9.1.1 and 9.1.2)

59. There are no protection obligations owed in respect of the applicant, and this other consideration is not engaged.

Extent of impediments if removed (cl 9.2)

60. This consideration is also probably not engaged at all.

Impact on victims (cl 9.3)

61. As expressed, this consideration only arises if information is available about the impact of a decision on the present review on victims or members of the family of victims or other members of the Australian community and no such information has been put before me.

Impact on Australian business interests (cl 9.4)

62. This consideration is not engaged.

Other (unmentioned) considerations

63. It seems to me that the most important matters requiring attention in relation to merits of the decision whether or not to revoke the cancellation in the circumstances of this case are those expressly mentioned.

Balancing the considerations

64. In my opinion the considerations most favouring revocation are the ties to the community and the best interests of the applicant's Australian children, and that it is more likely than not that the recommendations made by Dr Kwok will be followed. The factor of the expectations of the community discussed above should not in my opinion be accorded greater weight than the other matters to which I have just referred.
65. The cancellation of the applicant's visa will be revoked.

*I certify that the preceding 65
(sixty -five) paragraphs are a
true copy of the reasons for
the decision herein of Deputy
President B W Rayment OAM
KC*

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Associate

Dated: 20 October 2023

Date(s) of hearing:	16 & 17 October 2023
Counsel for the Applicant:	Dr J Donnelly
Solicitors for the Applicant:	Zarifi Lawyers
Solicitors for the Respondent:	MinterEllison