KEYNOTE ADDRESS - IMMIGRATION LAW CONFERENCE 2024

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Introduction

1. In Hands v Minister for Immigration and Border Protection [2018] FCAFC 225 at paragraph 3, Chief Justice Allsop commented:

> By way of preliminary comment, it can be said that cases under s 501 and the question of the consequences of a failure to pass the character test not infrequently raise important questions about the exercise of Executive power. Among the reasons for this importance are the human consequences removal from Australia can bring about.

2. The Chief Justice continued later in the same paragraph as follows:

> The consequences of these considerations are that where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people.

3. We should keep the preceding context firmly in mind when considering the subject matter of this session. This afternoon, I want to touch upon some important developments relevant to our discussion.

Direction 99

4. I'd like to begin by addressing Direction 99, which took effect on 3 March 2023. As a pivotal ministerial instrument, Direction 99 emanates from the authority granted by s 499 of the Migration Act 1958 (Cth), serving as a guiding beacon for decision-makers operating under s 501. The introduction of Direction 99 marks a significant milestone in our migration law landscape, compelling those wielding this legal power to adhere strictly to its provisions.

5. Upon close examination, Direction 99 clearly stands out as a substantial enhancement over its predecessor, Direction 90. A critical area of improvement is the shift in how a non-citizen's ties to Australia are valued. Whereas Direction

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90 relegated such ties to a mere other consideration, Direction 99 elevates them to a primary consideration. This pivotal change acknowledges the depth, nature, and duration of a non-citizen's connection to Australia, emphasising its importance in decision-making processes.

6. Moreover, the specific stipulation in paragraph 8.3(4)(a)(i) of Direction 99, which assigns considerable significance to individuals who have spent their formative years in Australia—irrespective of the timing of their criminal activities—is a notable departure from Direction 90, which lacked such explicit mandates. This adjustment ensures that personal circumstances and the individual's integration into Australian society receive the attention they warrant, reflecting a more nuanced approach to decision-making.

7. These examples underscore a broader trend towards integrating personal considerations more effectively into the decision-making framework, ensuring a more balanced and empathetic evaluation of each case.

8. Despite these advancements, it's evident that further refinement of Direction 99 is necessary. For instance, the current emphasis on family violence as a standalone primary consideration could be reconsidered. The mandatory requirement for decision-makers to account for family violence within the broader context of protecting the Australian community primary consideration may inadvertently lead to a duplication of considerations. This repetition could be perceived as counterproductive, potentially undermining the principles of fair and efficient executive administration.

9. Additionally, the focus on the expectations of the Australian community as a primary consideration warrants re-evaluation. Judicial interpretations, as seen in cases like FYBR v Minister for Home Affairs [2019] FCAFC 185 and Ismail v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 2, have clarified that these expectations are confined to the normative principles outlined in paragraph 8.5 of Direction 99. This delineation implies that decision-makers are not at liberty to apply these expectations based on the unique circumstances of each case, often resulting in these considerations invariably counting against non-citizens.

10. The redundancy of this consideration is further highlighted by the fact that the normative principles it aims to represent are already encapsulated within other aspects of Direction 99. For example, acts of family violence are unequivocally condemned, and principles regarding non-citizens' engagement in criminal or serious conduct are clearly laid out, guiding decision-makers accordingly. Therefore, directing attention to these principles under the guise of community expectations seems unnecessary and potentially misleading.

11. While Direction 99 represents a progressive step forward in balancing the complexities of immigration law with the nuances of individual circumstances, the path to perfecting this balance requires ongoing reflection and adjustment. By critically examining and addressing these areas of concern, we can continue to evolve our legal framework to better serve both the interests of the Australian community and the fundamental rights of individuals.

Recent Jurisprudence

12. The landscape of Australian migration law is exceptionally dynamic, making it a formidable challenge for even the most dedicated migration law practitioners to stay abreast of the latest developments from the federal judiciary. This rapid pace at which legal precedents evolve demands a constant vigilance and a deep commitment to understanding the intricate nuances of the law.

13. Let’s delve into a nuanced discussion on several pivotal cases in the realm of character considerations that have recently made their mark.

14. In the landmark case of Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41, paragraph 18, the High Court of Australia elucidated a principle with far-reaching implications. The court inferred that in scenarios where no tangible evidence supports the Minister's assertions regarding language proficiency and service availability in American Samoa and Samoa, it could be presumed these assertions were derived either from the Minister's personal expertise or from facts generally regarded as common knowledge.

15. This ruling prompts a profound legal and philosophical question: How can one definitively ascertain whether a Minister's actions are grounded in personal or

specialised knowledge when there's no explicit requirement to disclose the basis of such knowledge?

16. Respectfully challenging the High Court's position, it appears an oversight to allow courts reviewing judicial applications to simply assume the presence of personal or specialised knowledge behind a Minister's evidentially unsupported findings. The lack of explicit guidance in the relevant sections of the *Migration Act 1958* (Cth) exacerbates this ambiguity, leaving a gap in procedural transparency and accountability.

17. The implication of the Viane decision is a substantial enlargement of the discretionary power afforded to Ministerial decision-making. This latitude potentially diminishes the scope of judicial review, raising concerns about the balance of power and the safeguarding of procedural fairness in the migration law landscape.

18. Turning our attention to Plaintiff M1-2021 v Minister for Home Affairs [2022] HCA 17, paragraph 30, we encounter another contentious judicial interpretation. The High Court posited that representations suggesting a non-refoulement claim under domestic law could lead a decision-maker to defer the assessment of such claims, contingent upon the individual's potential to apply for a protection visa.

19. This stance, respectfully, represents a disheartening development for the protection of human rights in Australia. The statutory framework of s 501CA(4) of the Migration Act 1958 (Cth) does not explicitly sanction the deferral of consideration for non-refoulement claims.

20. The practical outcome of this interpretation permits decision-makers to bypass a crucial element of a non-citizen's plea in revocation matters. Furthermore, this ruling risks subjecting non-citizens to extended periods of immigration detention, escalating legal costs, and delaying the adjudication of Australia's obligations under international law.

21. These cases underscore the evolving challenges within Australian migration law, highlighting the critical need for ongoing scrutiny, advocacy, and reform to ensure that the principles of justice, fairness, and human rights are upheld in

the face of rapid legal developments.

Conclusion

22. In conclusion, the outlook from our nation's highest judicial authority, the High Court of Australia, offers a beacon of hope rather than merely casting shadows of despair. This optimism is underscored by two landmark decisions: Lesianawai v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 6 and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton (2023) 97 ALJR 488. In these rulings, the Court found that jurisdictional error occurred when decision-makers improperly considered the criminal activities of non-citizens committed while they were minors.

23. The decisions in Lesianawai and Thornton mark pivotal moments in the landscape of Australian character cases, particularly concerning non-citizens whose criminal activities were committed during their minor years in New South Wales and Queensland. These rulings not only recalibrate the legal framework within these states but also signal a broader transformation that could resonate across all Australian jurisdictions.

24. The essence of both cases lies in their nuanced interpretation of how a non-citizen's offences as a minor should influence their character assessment under Australian migration law. By scrutinising the specific circumstances under which these offences were committed and considering the developmental trajectory of young offenders, these decisions underscore a more empathetic and contextually aware approach to character considerations. This perspective acknowledges the complex interplay between youth indiscretion and genuine rehabilitation, offering a more balanced foundation for evaluating a non-citizen's right to remain in Australia.

25. Although Lesianawai and Thornton are initially confined to New South Wales and Queensland, their implications are far-reaching. The legal reasoning and principles espoused in these judgments provide a persuasive precedent that could influence similar cases across other states and territories. This potential "butterfly effect" reflects the interconnected nature of legal precedents within

Australia's federal structure, where influential decisions in one jurisdiction can inspire shifts in legal practice and interpretation elsewhere.

26. The significance of these cases cannot be overstated. They represent a potential sea change in the approach to character assessments, moving towards a more individualised and fair consideration of a non-citizen's history and personal growth. As these principles gain traction, we may see a more humane and just application of migration law across Australia, one that better reflects the values of rehabilitation, redemption, and the nuanced understanding of human behaviour.

27. The challenge of navigating character cases before both the Administrative Appeals Tribunal and the courts underscores the intricate balance between state interests and individual rights. The complexity of these cases is further magnified by society’s general disdain for convicted criminals, sparking a debate on whether non-citizens of questionable character deserve a place in Australia.

28. However, it is crucial for legal practitioners, irrespective of their stance on this issue, to remember the profound human impact these cases carry. The essence of our profession lies not just in winning cases but in upholding justice and ensuring that our actions, especially in such sensitive areas, consider the far-reaching implications on human lives.

29. As we advocate, let us also uphold our paramount professional responsibilities to the administration of justice. Thank you.