Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2024/0549**
Re:	**Mr Steward ATOO**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	Deputy President B W Rayment OAM KC
Date:	**16 April 2024**
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 – Applicant fled Iraq as refugee – multiple counts of family violence offences – ties to Australian community – consideration of minor children – decision under review set aside and substituted

LEGISLATION

Migration Act 1958 (Cth)

CASES

Ismail v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 2

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*

REASONS FOR DECISION

Deputy President B W Rayment OAM KC

16 April 2024

1. The applicant is aged 31 and comes from Iraq. He is a Chaldean Christian. When he was 19, he fled from Iraq after ISIS demanded money which he did not have, and threatened to kill him if he did not pay. His father advised him to leave Iraq and he fled to Lebanon where he lived for three years. Through the United Nations, he obtained a Class XB Subclass 200 Refugee visa, and he arrived here in 2015.

2. Within a year he had arranged for his two sisters, his two younger brothers and his parents to come to Australia. All his family now lives here, including infant children which were born to his sisters and their husbands.

3. He married in 2019, and from shortly then until 2021 he committed a large number of domestic violence offences against his wife and her mother. They have not communicated since 2021 and were recently divorced.

4. He worked in this country soon after his arrival. He worked in the building industry, and impressed his employer, who regards him as a talented construction manager, and is anxious to employ him again in that capacity. He told them Tribunal he was ready to employ the applicant immediately.

5. Because of the sentences of imprisonment which were imposed upon the applicant it is clear that he does not pass the character test. In 2021 his visa was the subject of (mandatory) cancellation and he made representations seeking revocation of the cancellation of his visa. The request for revocation was rejected by the Minister's delegate and the applicant sought review of the delegate's decision in the Tribunal. The issue for determination in the Tribunal is whether there is another reason why the cancellation should be revoked: See s.501CA(4) of the *Migration Act, 1958*.

6. Direction 99, which binds this Tribunal, specifies a number of considerations which are mandatory to be taken into account on this review, together with any other considerations which are relevant. The Direction is published, and I will not repeat its terms. Clause 5.2 (and also clause 8.1(1)) state principles within which decision-makers should approach their task and I note their terms.

7. Clause 8 describes the first primary consideration of protection of the Australian community. Clause 8.1(2)(a) requires consideration of the nature and seriousness of the of the non-citizen's conduct to date and clause 8.2(b) requires consideration of the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct. Clause 8.1.1 deals in more detail with the nature and seriousness of the conduct and clause 8.1.2 deals in more detail with the risk to the Australian community.

8. All of the applicant's offences relate to his former wife or her mother. There were more than 60 offences overall. The two national police certificates extend over more than 70 pages. At paragraph 9 of the applicant's statement of facts issues and contentions (settled by Dr Donnelly of counsel), the following summary of the offences is stated, which appears to me to be correct:

- Stalk/intimidate intending to instil fear of physical harm (domestic) (multiple offences).
- Contravene prohibition/restriction in Apprehended Violence Orders (AVOs) (domestic) (multiple offences).
- Common assault (multiple offences).
- Assault occasioning actual bodily harm (domestic violence) (x1)
- Attempt to stalk/intimidate intending to instil fear of harm (domestic) (x 1)

9. The nature of the offending is described in the remarks on sentence of Judge Hanley in the District Court dated 6 March 2023, which I adopt. His Honour made reference to the report of a psychologist which was before him, in which the psychologist expressed the view that he poses a low risk of reoffending, by applying the LSI-R revised system. The learned Judge had apparently some reservations about the LSI-R revised system. His Honour stated that he had guarded views about his prospects unless there is a substantial change in his attitude to come into accordance with the community standards in this country and particularly those that are required to be observed towards women.

10. The Magistrate who dealt with the applicant at first instance, and from whose decision the applicant appealed to Judge Hanley, made his final orders on 10 August 2022. Later that same month, the applicant attended in prison a course called Remand Domestic Abuse going over three days, to which the applicant referred during his evidence before the Tribunal. In effect the applicant said he learned a lot about the punishment for domestic violence in Australia from the course he undertook. No doubt the sentence imposed upon him earlier in August 2022 made the course directly of relevance to him.

11. I regard all the categories of the applicant's offending mentioned in [8] above as very serious offending. The multiple breaches of the apprehended violence orders no doubt (for the most

part) caused the applicant's wife to be fearful, and therefore fell within the definition of family violence contained in clause 4 of the Direction. Dr Donnelly also accepted that the applicant's offending was very serious, and I accept that submission or concession for all categories mentioned in [8] above.

12. As to the question of risk there are a number of protective factors. The applicant has no one from his family in Iraq and he is close to all of them. He strongly desires to remain with them. He does not want to return to Iraq and he may apply for a protection visa in an endeavour to avoid that result. He has a girlfriend here whom he does not wish to leave. He appreciates that his brothers and other siblings and his parents desire him to remain here. He has the opportunity to obtain valuable employment as a construction manager immediately in Australia and has no known job available in Iraq. He has connections with the local Chaldean community. All of those things, and his maturation predispose him not to reoffend, and he has sworn that he is a changed man. It may be added that the applicant repeatedly expressed remorse for his offending and when his girlfriend gave evidence, she said that he had told her the same thing, which she believed. Also, it should be mentioned that Corrective Services estimated in November last year that the likelihood of his reoffending was low. He said that he would be seeking help from a psychologist in the community.

13. His parole will continue until his full sentence of 40 months expires on 27 March next year. The parole will be supervised if he is in the community and he will no doubt be encouraged by his parole officer to resume his psychological treatment to keep the risk of recidivism low.

14. A matter was put to the applicant on behalf of the Minister, arising from corrective services notes, from the applicant's time in prison. Parole was granted to the applicant at the expiration of his non-parole period and it was noted that the applicant did work in the prison. The various matters put to the applicant were, in my opinion, satisfactorily dealt with by him in cross-examination and the various matters appear to have been minor in the light of his answers in cross-examination. Obviously, if he were to reoffend, or treat another woman as he treated his former wife, the Australian community would be significantly harmed.

15. Next, I turn to the provisions of clause 8.2 of the Direction. Family violence is, consistently with the High Court decision in *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2 such that it ought to be held that, despite a degree of

overlap, double counting is not involved with considering the applicant's conduct from the point of view of the government's concern about allowing a person who has committed family violence to remain in the country, depending on its extent and on the circumstances of the case. The applicant's offending was repetitive, and as I have said, very serious. The best that can be said about it is that it ceased in 2021. The circumstances engage the consideration in clause 8.2 of the Direction and it ought to be put into the balance.

16. The next primary consideration is set out in clause 8.3 of the Direction, the strength nature and duration of ties to Australia. This consideration needs ties to be considered to the applicant's parents, his brothers and sisters, his nephews and nieces, and his girlfriend. Each of them would be emotionally affected, perhaps desperately sad, if he were removed or if his detention became much prolonged. They are all permanent residents, or in the case of the nephews and nieces, Australian citizens. If he were returned to Iraq, the separation from the applicant would be permanent and limited electronic communication would not remove their pain. I saw the faces of many of the family members in the Tribunal hearing room. His younger brothers are amongst those who are minors at the time of writing these reasons. They love the applicant, and want his guidance and advice, and look forward to working by his side.

17. Next, clause 8.4 of the Direction refers to the best interests of minor children in Australia, The interests of the brothers do not differ and it is in the best interests of both of them for the cancellation of the applicant's visa to be revoked. As to the infant children of the two sisters, it is similarly in the best interests of each of them for the cancellation of the applicant's visa to be revoked. If he is removed, they will all lose their connection with a loving uncle, with some of whom he had already established a close relationship.

18. The last mentioned primary consideration is set out in clause 8.5, expectations of the Australian community, which depends on the government's views articulated in clause 8.5. that consideration is adverse to the revocation of the cancellation of the applicant's visa, and also must be weighed in the balance, like each other relevant consideration.

19. Among the expressly mentioned other considerations it is necessary to discuss legal consequences of the decision (cl. 9.1, 9.1.1 and 9.1.2), the extent of the impediments if removed (cl 9.2) and impact on Australian business interests (cl 9.4).

20. I will deal with those matters in reverse order.

21. His former employer is anxious to re-employ him. He regards the applicant as a person who would be valuable to him, and described him as very talented construction manager, able to manage 90 workers at a time. He said it is hard to find guys like him. the applicant expressed his willingness to work, which would provide him with income again. He has used his funds to pay school fees for his younger brothers and make gifts and would do so again. He will be in a position to continue working with his psychological counsellor, and to further or complete his rehabilitation.

22. DFAT reports about Iraq stress that it is a dangerous place to live. Although ISIS was defeated in 2017, it still has a presence at the border with Syria, and it could attack the applicant if he were returned there. The applicant has a case for a protection visa and may well be owed protection obligations.

23. The applicant has not completed school in Iraq and reads neither Arabic nor English.

24. He would be devastated to be removed or to suffer extended detention, not only because he has immediate employment available to him but because he loves his family and missed daily contact with them, and his girlfriend. The community is the best place to complete his rehabilitation in my opinion.

25. In my opinion, balancing the various considerations I have discussed, the correct or preferable decision is to revoke the cancellation of his visa.

26. The cancellation of the applicant's visa is revoked.

I certify that the preceding 26 (twenty-six) paragraphs are a true copy of the reasons for the decision herein of

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

Associate

Dated: 16 April 2024

Date(s) of hearing:	**28 March & 2 April 2024**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Respondent:	**Mr T Goodwin, AGS**