

FEDERAL COURT OF AUSTRALIA

Omani v Minister for Immigration, Citizenship and Multicultural Affairs

[2024] FCA 376

Appeal from: *Omani v Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2023] AATA 4119

File number(s): NSD 1542 of 2023

Judgment of: **GOODMAN J**

Date of judgment: 15 April 2024

Date of publication of reasons: 16 April 2024

Catchwords: **MIGRATION** – application for judicial review of a decision of the Administrative Appeals Tribunal concerning a visa cancellation decision – Minister conceded jurisdictional error – proposed consent orders – jurisdictional error established to the satisfaction of the Court – relief granted

Legislation: *Migration Act 1958* (Cth), ss 499, 501

Cases cited: *Garland v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 144; (2023) 298 FCR 476
Kovalev v Minister for Immigration & Multicultural Affairs [1999] FCA 557; (1999) 100 FCR 323
LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12
Omani v Minister for Immigration, Citizenship and Multicultural Affairs (Migration) [2023] AATA 4119
VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 921; (2022) 181 ALD 49

Division: General Division

Registry: New South Wales

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 11

Date of hearing:	Determined on the papers
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Zarifi Lawyers
Solicitor for the First Respondent:	Mr J Fyfe of Minter Ellison
Solicitor for the Second Respondent:	The second respondent did not appear

ORDERS

NSD 1542 of 2023

BETWEEN: **MA'AKE LLAIKIMI TAUKOL OMANI**
Applicant

AND: **MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS**
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: GOODMAN J

DATE OF ORDER: 15 APRIL 2024

BY CONSENT, THE COURT ORDERS THAT:

1. The hearing listed on 17 April 2024 be vacated.
2. A writ in the nature of certiorari issue directed to the second respondent quashing its decision dated 28 November 2023 (2023/6611).
3. A writ in the nature of mandamus issue directed to the second respondent requiring it to determine according to law the review of the decision of the delegate of the first respondent, dated 5 September 2023.
4. The first respondent pay the applicant's costs of and incidental to the application for judicial review, to be taxed if not agreed.

THE COURT NOTES THAT:

1. The first respondent concedes that the decision of the second respondent (**Tribunal**) is affected by jurisdictional error of the kind identified in *Garland v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 144; (2023) 298 FCR 476. Specifically, the Tribunal misconstrued subparagraph 8.1.1(1)(b)(ii) of *Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* in finding that the applicant committed offences against a vulnerable member of the community (at [21] and [58]).

2. As the Full Court of the Federal Court of Australia explained in *Garland* (at 486 [48]), the phrase “*vulnerable members of the community...means members of vulnerable groups in the community; it does not encompass an individual who has physical characteristics or particular circumstances that make them vulnerable vis-à-vis a particular perpetrator but whose physical characteristics or particular circumstances do not identify the individual as a member of a recognised vulnerable group within the community...*”.
3. The Tribunal found that the victim was vulnerable, at least in part, because of the applicant's “*sheer size*” (at [21]). This finding misconstrues the meaning of “*vulnerable members of the community*” in the manner considered in *Garland* as it focuses on the comparative physical characteristics of the applicant and victim. The first respondent concedes that this error was material: *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GOODMAN J

A. INTRODUCTION

1 This proceeding was scheduled for hearing on 17 April 2024. On 15 April 2024, I made orders by consent for the issue of: (1) a writ of certiorari directed to the second respondent **Tribunal** quashing its decision dated 28 November 2023; and (2) a writ of mandamus directed to the Tribunal requiring it to determine the application made to it for review of the decision of a delegate of the first respondent **Minister** dated 5 September 2023 according to law.

2 Before making those orders I satisfied myself by reference to the materials filed on this application that the Tribunal had made a jurisdictional error. It is appropriate, despite the Minister's consent to the orders made, that I set out my reasons for reaching that conclusion: see, e.g., *Kovalev v Minister for Immigration & Multicultural Affairs* [1999] FCA 557; (1999) 100 FCR 323 at 327 [12] (French J, as his Honour then was); *VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 921; (2022) 181 ALD 49 at 50 [3] to [6] (Colvin J).

B. BACKGROUND

3 The applicant is a male citizen of New Zealand who was granted a temporary visa and arrived in Australia in February 2021.

4 On 6 December 2022, the applicant's visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (**cancellation decision**). The applicant made representations requesting the revocation of the cancellation decision.

5 On 5 September 2023, the Minister, via a delegate, made a decision not to revoke the cancellation decision. The applicant then sought review of the 5 September 2023 decision by the Tribunal.

6 The Tribunal undertook a review of that decision. In undertaking its review, the Tribunal was required to have regard to the considerations set out in *Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*, made under s 499 of the Migration Act including, under paragraph 8.1.1 of Direction No. 99, the nature and seriousness of the applicant's criminal conduct. As part of that exercise, the Tribunal was required by dint of subparagraph 8.1.1(1)(b)(ii) to have regard to

“crimes committed against vulnerable members of the community (such as the elderly and the disabled) ...”.

7 On 28 November 2023, the Tribunal affirmed the Minister’s decision to not revoke the mandatory cancellation of the applicant’s visa. In its reasons for decision, published on 8 December 2023 (*Omani v Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2023] AATA 4119), the Tribunal stated at [20], [21], [58], [67] and [68]:

20. **Sub-paragraph 8.1.1(1)(b):** this portion of the Direction refers to the sorts of crimes or conduct that may be seen as serious by the Australian Government and the community. The Applicant’s offending does not fall within the realm of the types of offences described in sub-paragraph (i) or (iv). In relation to sub-paragraph (iii) the Applicant’s conduct does not ground a finding that he does not pass an aspect of the character test which may be dependant on this decision-maker’s opinion.

21. The Applicant has, however, committed offences against what was arguably a vulnerable person, the subject of the assaults which led to the Applicant’s incarceration. By his own admission in oral evidence, the Applicant agreed that his victim did not understand him when he was demanding an apology for having cut him off in traffic. This was later disclosed to have been that the victim did not speak English. In addition, the Applicant acknowledged that his sheer size would have been most intimidating to the victim. Given this, I am of the view that the victim of the Applicant’s assault could reasonably be viewed as vulnerable, thus the Applicant’s offending would also be caught by the provision in sub-paragraph (ii).

...

58. As stated in the above reasons, in considering Primary Consideration 1, I have considered the assault victim to be a vulnerable member of the community, based on the inequality of size (the Applicant is of imposing stature), and the fact that the victim was harbouring under a limited capacity of the English language. Consequently, in the circumstances, the Australian community would expect that the Australian Government can, and should, revoke the Applicant’s visa.

...

67. In considering whether I am satisfied if there is another reason to revoke the mandatory visa cancellation decision, I have had regard to the considerations referred to in the Direction. I find as follows:

- Primary Consideration 1: is to be allocated a heavy weight against revoking the mandatory cancellation of the Applicant’s Visa.
- Primary Consideration 2: is to be allocated a neutral weight.
- Primary Consideration 3: is to be allocated a very limited weight in favour of revoking the mandatory cancellation of the Applicant’s Visa.
- Primary Consideration 4: is to be allocated a slight weight in favour of revoking the mandatory cancellation of the Applicant’s Visa.

- Primary Consideration 5: is to be allocated a heavy weight against revoking the mandatory cancellation of the Applicant’s Visa.

68. I have found that the combined weights I have allocated to Primary Considerations 1 and 5 respectively, are sufficient to outweigh the combined weights I have allocated to Primary Considerations 2, 3 and 4.

(bold emphasis in original; underline emphasis added)

C. CONSIDERATION

8 In *Garland v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 144; (2023) 298 FCR 476 the Full Court of this Court (Stewart, Feutrill and Hespe JJ) considered an appeal from the dismissal of an application for judicial review of a decision of the Tribunal in which the Tribunal found that the victim of the offending in that case was “vulnerable” because the perpetrator was “much larger” than the victim. The appeal was upheld. Stewart and Hespe JJ (with whom Feutrill J agreed) explained at 486 [48] and 487 [53]:

48. It is also noteworthy that the Direction identifies as “primary” considerations in the decision-making process whether the conduct engaged in constituted family violence and the best interests of minor children in Australia. Those primary considerations, taken together with the focus of concern in the Direction on identified vulnerable groups, namely women, children, the elderly and the disabled, and on exploitative crimes against vulnerable people (family violence, forced marriage, human trafficking and smuggling, and worker exploitation), suggest that **where the Direction uses the phrase “vulnerable members of the community” it means members of vulnerable groups in the community; it does not encompass an individual who has physical characteristics or particular circumstances that make them vulnerable vis-à-vis a particular perpetrator but whose physical characteristics or particular circumstances do not identify the individual as a member of a recognised vulnerable group within the community. That is to say, the victim’s membership of a vulnerable group within the community is covered by the relevant phrase, and not a victim’s vulnerability measured with reference to or by way of comparison with the perpetrator.**

...

53. It can be seen that in that context, the statement in question does not detract from the meaning of “vulnerable members of the community” developed above. That is to say, “vulnerable members of the community” means members of identifiable vulnerable groups within the community. **The “nature” of the victim, being such characteristics or circumstances that mean that they are part of an identifiable vulnerable group, remains at the centre of the inquiry. The physical characteristics of the perpetrator relative to the victim are not what require the victim to be recognised as a vulnerable member of the community.**

(emphasis added)

9 The findings made by the Tribunal which are set out at [7] above were based upon a construction of subparagraph 8.1.1(1)(b)(ii) of Direction No. 99 which is contrary to the proper construction of that subparagraph, as explained in *Garland*.

10 This is an error of law. When regard is had to the Tribunal's reasons as a whole, and in particular to paragraphs [21], [58], [67] and [68] of those reasons, the error is clearly material in the manner recently explained by the High Court of Australia in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] HCA 12. Thus, the error is jurisdictional.

D. CONCLUSION

11 For the above reasons, I concluded that the Tribunal had made a jurisdictional error, and I made the orders sought by the applicant and the Minister.

I certify that the preceding eleven (11) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman.

Associate:

Dated: 16 April 2024