FEDERAL COURT OF AUSTRALIA

DOY17 v Minister for Immigration and Border Protection [2019] FCA 1592

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| Appeal from: | *DOY17 v Minister for Immigration & Anor* [2018] FCCA 621 |
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| File number: | VID 339 of 2018 |
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| Judge: | **STEWARD J** |
|  |  |
| Date of judgment: | 26 September 2019 |
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| Catchwords: | **MIGRATION** – appeal from a decision of the Federal Circuit Court of Australia – where student visa was cancelled – whether the Administrative Appeals Tribunal failed to take into account relevant considerations – whether the Tribunal took into account irrelevant considerations – whether the Tribunal misconstrued or misapplied s 116(1)(e) of the *Migration Act 1958* (Cth) – where bridging visa E was refused – whether the Tribunal did not afford the appellant procedural fairness – whether the Tribunal failed to take into account a relevant consideration – where protection visa was refused – whether the Tribunal failed to consider an integer of the appellant’s claims – whether the Tribunal misunderstood the true nature of the appellant’s claims to fear harm |
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| Legislation: | *Migration Act 1958* (Cth) ss 116, 501 |
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| Cases cited: | *AYJ15 v Minister for Immigration and Border Protection* [2016] FCA 863  *Dalla v Minister for Immigration and Border Protection* [2016] FCA 998  *EBO17 v Minister for Immigration and Border Protection* [2018] FCA 1227  *HZCP v Minister for Immigration and Border Protection* [2018] FCA 1803  *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173  *Minister for Home Affairs v Sharma* [2019] FCA 597  *Minister for Immigration and Multicultural Affairs v Ali* (2000) 106 FCR 313  *Minister for Immigration and Multicultural Affairs v SRT* (1999) 91 FCR 234  *Navoto v Minister for Home Affairs* [2019] FCA 295  *Navoto v Minister for Home Affairs* [2019] FCAFC 135  *Montero v Minister for Immigration and Border Protection* (2014) 229 FCR 144  *Secretary to the Department of Justice and Regulation v LLF* [2018] VSCA 155  *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 |
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| Date of hearing: | 20, 29 August 2019 |
|  |  |
| Registry: | Victoria |
|  |  |
| Division: | General Division |
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| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 72 |
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| Counsel for the Appellant: | Mr R Knowles on a *pro bono* basis |
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| Counsel for the First Respondent: | Mr D Brown |
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| Solicitor for the First Respondent: | Australian Government Solicitor |

ORDERS

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|  | | VID 339 of 2018 |
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| BETWEEN: | DOY17  Appellant | |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTION  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| --- | --- |
| JUDGE: | STEWARD J |
| DATE OF ORDER: | 26 SEPTEMBER 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs as agreed or assessed.
2. The Administrative Appeals Tribunal be added as the second respondent.

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

REASONS FOR JUDGMENT

STEWARD J:

1. The appellant arrived in Australia in 2013 as the holder of a student visa. In 2015 he was charged with one count of “stalking” and four counts of an “indecent act with a child under 16”. The appellant’s visa was then cancelled by a delegate of the first respondent (the “Minister”) pursuant to s 116(1) of the *Migration Act 1958* (Cth) (the “Act”). He ultimately pleaded guilty to two counts of acting indecently with a child and was convicted and fined $3,000. He next sought a bridging visa E. This was refused in 2016 by a delegate of the Minister. He then sought a protection visa. This was refused in 2017 by a delegate of the Minister. The three aforementioned decisions were then separately affirmed by three decisions of the Administrative Appeals Tribunal (the “Tribunal”). An application to judicially review each Tribunal decision was dismissed by the Federal Circuit Court in 2018. The appellant now appeals that decision to this Court.

## Preliminary Observations

1. I make two preliminary observations.
2. First, by his entirely new grounds of appeal, the appellant attacks each Tribunal’s consideration of his criminal conduct. This is a case where the appellant, for the purposes of seeking a visa, denies any criminal wrongdoing, but does so in the face of his plea of guilty. He also makes that denial in the face of a finding made by one Tribunal member below that the appellant’s evidence was “plainly false” and that he was “almost incapable of telling the truth”. Those findings were the product of an examination of CCTV footage of the crime the appellant had committed (described below).
3. In *Minister for Home Affairs v Sharma* [2019] FCA 597, Anastassiou J recently re-stated how criminal convictions should be considered by a Tribunal (adopting the language of Bromberg J in *HZCP v Minister for Immigration and Border Protection* [2018] FCA 1803 at [78]) as follows:

(1) Where a previous conviction is the foundation for the exercise of power by the decision-maker, no challenge can be made to the fact of the conviction (or sentence, as the case may be) or to the essential facts on which it was based, but the circumstances of the conviction may be reviewed for a purpose other than impugning the conviction itself.

(2) Where the exercise of the power is not founded on the conviction, then the essential facts underlying the conviction are not immune from challenge and the conviction is only conclusive of the fact of the conviction itself, albeit there is a heavy onus on a person seeking to challenge the facts upon which the conviction is necessarily based.

I shall return to *Sharma* and this twofold taxonomy.

1. Secondly, the appellant had no legal representation before the Circuit Court. However, he was represented before me by Mr Knowles of Counsel, acting on a *pro bono* basis. The Court is very grateful to Mr Knowles for his assistance. His intervention led, as can sometimes happen, to the abandonment of all of the grounds deployed below and to the substitution of wholly new grounds that were never raised before the learned primary judge. The appellant needed leave to rely upon them. The effect of granting leave would result in this Court, in the exercise of its appellate jurisdiction, practically speaking, re-hearing the entire judicial review application on a completely fresh basis. That is not the usual function of an appellate Court. As Reeves J observed in *AYJ15 v Minister for Immigration and Border Protection* [2016] FCA 863 at [17]:

The only explanation the appellant has offered for his failure to raise before the Federal Circuit Court any of his three proposed new grounds of appeal was that he had changed his lawyer and his new lawyer had taken a different view of the matter. For obvious reasons, this is not an adequate explanation. It moves the arena for judicial review of the Tribunal’s decisions from the Federal Circuit Court to this Court: see *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at 7 per Gibbs CJ, Wilson, Brennan and Dawson JJ. It perverts the role of this Court as an appellate court reviewing error in the Federal Circuit Court: see *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [14] per Gleeson CJ, Gaudron and Hayne JJ. It subverts the deliberate intention of the Legislature expressed in the *Migration Litigation Reform Act* *2005* (Cth) to remove this Court’s original judicial review jurisdiction in migration matters and confer that role on the Federal Magistrates Court (now Federal Circuit Court) confining the role of this Court, in such matters, to that of an appellate court (ss 476 and 476A of the Act). It is therefore inimical to the due administration of justice in migration appeals.

See also *SZWCO v Minister for Immigration and Border Protection* [2016] FCA 51 at [28]‑[39] per Wigney J.

1. Ultimately, whether leave should be granted depends on the interests of justice. A key factor will be the merits of the proposed grounds. Another will be whether the appellant had legal representation in the Circuit Court. Yet another dimension is the appropriateness of this Court, when it exercises appellate jurisdiction, being used as a court of first instance: *EBO17 v Minister for Immigration and Border Protection* [2018] FCA 1227 at [53] per Robertson J.

## Background

1. The evidence discloses that the appellant was charged with five offences and then convicted twice in 2015 of an indecent act with a child under the age of 16. His student visa had earlier been cancelled (that is, before he was convicted) as a delegate was satisfied that the appellant’s presence in Australia “is or might be a risk to the safety of a segment of the Australian community, in this case children and minors”. The delegate arrived at this decision based upon the fact of the five charges. They were as follows:

1. The accused at Sunshine on 24/03/2015 did wilfully commit an indecent act namely kissing with a child under the age of 16 years to whom he was not married.

2. The accused at Sunshine on 24/03/2015 did wilfully commit an indecent act namely taking hold of the victim’s breasts with a child under the age of 16 years to whom he was not married.

3. The accused at Sunshine on 24/03/2015 did wilfully commit an indecent act namely putting his hand up the victim’s skirt with a child under the age of 16 years to whom he was not married.

4. The accused at Sunshine on 24/03/2015 did wilfully commit an indecent act namely rubbing his penis against the victim’s body with a child under the age of 16 years to whom he was not married.

5. The accused at Sunshine on 24/03/2015 did stalk another person namely [redacted] in that the accused did act in any other way that could reasonably be expected to arouse apprehension or fear in the victim for their own safety or that of any other person.

1. The child in question was 12 years old. The best description of what happened may be found in the reasons of the Tribunal’s decision affirming the delegate’s decision not to grant a bridging visa. Those reasons included a consideration of what the appellant asserts had happened. It is worth setting out those reasons in some detail. Senior Member Fice found as follows (at [35]-[46]):

35. In a written statement made on 7 September 2016 [the appellant] described the incident in the following way:

*One day in March 2015 [24 March 2015] I was going to the bus stop to go home. I saw from the schedule that it would depart in 30 minutes. During this wait, I met a girl.*

*She smiled at me and I wanted to improve English so I talked to her. I asked her: “how old are you?” She said: “I am 18 years old”. She had a lot of make up on. While we were waiting she met four people and she hugged and kissed all of them.*

*I asked her what she was doing there and she said she was waiting for someone. She asked me what I did and we talked for a while.*

*She was friendly to me. I only hugged her because she hugged me first, she was a friend and she even gave me her number.*

*I think the Australian people are friendly and open minded. When girls are friends with boys they kiss each other and say good bye and leave. I was accused of kissing and hugging the girl, but I did not know she was under 16 years, because she said she was 18.*

*She lied to me about being over 18 so that I felt comfortable to* *continue chatting and behave in a mature way towards her. I kissed her and she voluntarily kissed me. I did not force her to kiss me. It was a minor mistake without intention to break the law on my part.*

36. I had in evidence CCTV footage which discloses the course of events quite clearly. They took place after 9 p.m. on 24 March 2015. Initially, the victim together with a male person appears, walking past the bus stop shelters where the offence eventually took place. The victim is clearly small in stature and although wearing a jacket with a hood, her dress is readily identifiable as part of a school uniform. There are two other young male persons standing near the bus shelter, one of which is plainly known to her. She goes up to that person and greets the person with a kiss on the cheek. Those four persons then stand around apparently waiting for a bus to arrive.

37. Shortly thereafter, another group of young people arrive and she greets one of those young persons with a kiss on the cheek and a hug. She then gives another one of those young persons a brief hug. The group then walks out of camera shot, disappearing behind the bus shelter. At this stage, [the appellant] is not in view and not obviously present around the bus shelters in question.

38. Between 5 and 10 minutes later, [the appellant] first appears walking towards a crosswalk area at right angles while talking on a mobile telephone. The victim is not in view at that time. As [the appellant] is about to cross into the crosswalk area at right angles, the victim appears on the other side of the road walking towards the crosswalk. [The appellant] appears to end his telephone conversation while walking across the crosswalk at right angles while the victim commences to cross the road on the crosswalk a short distance behind him. [The appellant] does not appear to have seen the victim at this stage. As the victim walks across the crosswalk [the appellant] turns his head to the left, noticing her come towards him but behind. [The appellant] is watching the victim as she walks across the crosswalk, having himself slowed down to look at her. As the victim passes behind him, [the appellant] turns to the right and changes direction moving in the same direction as the victim. There is no obvious verbal exchange between the two as the victim walks past [the appellant] on his right side but [the appellant] continues to turn to his right and watches her pass by going to where toilets are located. [The appellant] then walks behind her off to her left also heading for the toilets. The victim does not look back at him or acknowledge his presence. [The appellant] watches her go into the toilet and he appears to go to the male toilets which are situated to the left.

39. A short time later the victim reappears from the toilet and commences crossing the road back towards the bus shelters. As the victim reaches the other side of the road heading towards a bus shelter [the appellant] reappears from the toilet entrance and appears, at first, to turn towards the right away from the bus shelter. He then turns his head towards the left and notices the victim about to enter the bus shelter. [The appellant] watches her apparently reading a bus timetable and although looking away from her to his right side, he begins to cross the road on the crosswalk heading towards the bus shelter. The victim, by this time, has taken a seat on the bus shelter. [The appellant] looks both left and right, as if to see who else is around and as he walks up to the bus shelter he appears to make verbal contact with the victim. [The appellant] again appears to look in the direction of the camera as if looking to see if other persons might be about before walking up to the bus shelter and sitting down beside the victim.

40. A short time afterwards, it is obvious that [the appellant] has physical contact with the victim but there is no obvious sign of the victim being a wilful participant in that contact. After a short time [the appellant] stands up, turning towards the victim and leaning towards her. There is plainly physical contact between the two, and when he stands up again it is clear that his right hand was down at the lower part of the victim’s body. [The appellant] gets up again standing in front of the victim but then sits down again. He then gets up again and plainly is using his right hand to touch the body of the victim. He then turns around facing her directly with his left hand on her shoulder and, while standing, leans forward to place his head on the left side of the victim’s head. [The appellant] appears to have his left arm draped around the back of the victim’s head and appears to be restraining her.

41. The victim then appears to turn to her left and stand up. She attempts to move forward out of the bus shelter but is restrained by [the appellant], who pushes her back, standing in front of her with her back against the back wall of the bus shelter. With the victim pinned against the back wall of the bus shelter, [the appellant]’s left arm moves down and obviously makes contact with the lower part of her body. The contact appears clearly to be sexual. [The appellant] ceases that activity as a bus drives past the bus shelter. However he commences again when the bus passes. Throughout this activity, the victim appears motionless. Eventually she turns away to her left again and attempts to walk out of the bus shelter and it is clear that [the appellant] has both arms around her shoulders and appears to be restraining her. Although she attempts to walk away he walks in front of her and pushes her back towards the bus shelter again. In fact he pushes her back into the bus shelter and recommences the activity he was previously engaged in. [The appellant]’s hands are obviously in the lower region of his own body and her body and the contact can only be described as sexual. It is sufficiently clear from the video that he is removing part of her clothing. There is no evidence whatsoever of active participation by the victim. Eventually, [the appellant] allows the victim to move from the bus shelter out onto the footpath where he can be seen to be readjusting his clothing. At that point two other persons appear in the picture walking towards [the appellant] and the victim.

42. The victim and [the appellant] then appeared to engage in a discussion on the footpath in front of the bus shelter and the victim appears to point to an oncoming bus, perhaps indicating that was the bus she was waiting for. As the victim walks towards the bus, [the appellant] places his left arm around the victim and leads her back towards the bus shelter. In fact they walked behind the bus shelter and disappear from view.

43. Another CCTV camera records [the appellant] and the victim walking towards the bus which the victim had pointed to. [The appellant] is following the victim. On getting into the bus, the victim appears to speak to the driver while [the appellant] stands on the doorstep. The driver appears to talk to [the appellant] briefly before disembarking from the bus. [The appellant] proceeds to enter the bus and the CCTV on-board the bus shows him taking a seat in the same row as the victim but on the other side of the aisle. Shortly thereafter, two Protective Service Officers arrive and have a discussion with the bus driver. The bus driver re-enters the bus and opens the midsection doors to where the Protective Service Officers have moved. The victim then alights from the bus followed by [the appellant]. They are then interrogated individually by those officers. At one point [the appellant] walks away from the officer interrogating him and attempts to go over to the victim to speak with her. The Protective Service Officer moves towards him and brings him back away from the victim. The bus moves off while the Protective Service Officers continue to talk to both [the appellant] and the victim. Shortly thereafter the police arrive.

44. I had in evidence a number of documents produced by the Minister’s representatives pursuant to s. 501G of the Migration Act (G documents). They included the transcript of an interview with the victim conducted by Victoria Police at 2 minutes past 12 a.m. on 25 March 2015; a statement prepared by one of the police officers who had been notified of the incident and attended the scene at Sunshine railway station; a statement from each of the Protective Service Officers who attended the incident following notification by the bus driver; and a witness statement from the bus driver.

45. The transcript of the interview with the victim accurately describes the conduct of [the appellant] which I observed when viewing the CCTV footage. While it is not possible to see the express detail described by the victim of the offending sexual contact made by [the appellant], the actions of [the appellant], including the positioning of his hands and arms and the obvious interference with clothing of the victim, throughout the incident are entirely consistent with her description of the events. In the course of the hearing, [the appellant] was shown the CCTV footage but continued to maintain that his conduct was restricted to hugging and kissing the victim. It plainly was not.

46. Despite the CCTV footage showing that [the appellant] made the contact with the victim rather than her initiating the contact, he continued to maintain that he did not follow her into the bus shelter. His explanation was that he was looking at the bus timetable and then saw the victim. That evidence was plainly false. As I have described above, his conduct was clearly predatory and targeted the young girl. To begin with, he was walking away from the area where the toilets are situated when he first noticed the victim. When he saw her go into the toilet he turned and went into the male toilet. After she came out of the female toilets and had crossed the road towards the bus shelter, he came out of the male toilet and initially turned to the right apparently searching for her. When he saw her, he turned left and followed her to the bus shelter.

1. I should record that the appellant disputes the foregoing recitation of what occurred. As already mentioned he protests that he was innocent. He states that he only pleaded guilty because he could not afford to contest the charges. At one stage he made the following claims:

On 25/03/2015 when I was sitting on the bus stop, I met a girl and talked to her to improve my English …

As I talked to the girl, she said she is 18 years old and she also gave me her phone number to make friend. I did not violate these above criminal offenses, but the girl she told the Police about. I am innocent. I and the girl talked at a bus stops and we got on the bus. We sat on the bus and kept continue talking …

The Police called us to get off the bus and talked to I and her separately, then the girl told the Police that I stalked her and violated Indecent act with children under 16.

(Errors in original.)

1. In a document entitled “Final Submission to AAT”, he made the following claims:

Dated 25.03.2015 as I was going to the bus stop to go home, I met a girl. I and the girl sat and talked. I want to improve English so I talked to her. The girl smiled and made friend with me first.

As I talked to the girl, she said she is 18 years old and also gave me her phone number to make friend.

I kissed goodbye the girl when we were sitting at the bus stop. Then I and the girl went on the bus. The girl told police and the police accused me of 5 offenses.

(Errors in original.)

1. On another occasion, the appellant gave the following version of the incident:

The girl is a bad girl. She is a street girl, who left home for many days … I only kissed the girl and when we kissed, my body touched her body. The Melbourne Magistrates court made the final decision … I was only fined and I was not sentenced. I was fined at the minimum level. It was a minor mistake without my intention. The girl told me that she is 18 and I believed that she is 18.

(Errors in original.)

The appellant gave evidence to this effect before the Tribunals below.

1. I should also record that upon the cancellation of the appellant’s student visa, he did not at first seek a bridging visa. Instead he remained in Australia as an unlawful non-citizen until March 2016 when he was found working illegally at a restaurant. He attempted to escape, but was caught and taken into immigration detention, where he has been ever since.
2. Finally, I note that the appellant’s claims for protection were fairly summarised in the Minister’s written submissions as follows:

36.1. He is a Buddhist who follows Master Supreme Thich Thanh Hai and worships Avalokitesvara Bodhisativa, which involves encouraging people to become vegetarian and to keep five precepts. As the Vietnamese people did not have enough food to eat, encouraging them to become vegetarian went against the Vietnamese government regime. Although a Buddhist, the Appellant attended a Catholic Church in Kew.

36.2. He is the son of a Communist Party member who quit the party so that he could do business and keep his family from starving. The Appellant had property interests in Vietnam, but some of them had been stolen, and the police would not help him to get them back. He was unable to pay property fees due to the Vietnamese government. He feared harm from the people who had stolen his properties.

36.3. He had been in the company of many top leaders in Vietnam, and their reputations would be adversely affected, which could cause them harm, if his visa was refused.

36.4. Some people who committed crimes while overseas disappeared when they returned to Vietnam.

## Legislative Provisions

1. The appellant’s student visa was cancelled pursuant s 116(1)(e) of the Act which provides that the Minister may cancel a visa if he or she is satisfied that:

the presence of its holder in Australia is or may be, or would or might be, a risk to:

(i) the health, safety or good order of the Australian community or a segment of the Australian community; or

(ii) the health or safety of an individual or individuals;

1. The bridging visa was refused pursuant to s 501 of the Act which relevantly provides:

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

...

(6) For the purposes of this section, a person does not pass the ***character test*** if:

...

(e) a court in Australia or a foreign country has:

(i) convicted the person of one or more sexually based offences involving a child; or

(ii) found the person guilty of such an offence, or found a charge against the person approved for such an offence, even if the person was discharged without a conviction; or

…

1. It is unnecessary to set out s 36 of the Act in relation to the protection visa sought.

## The proceeding in the Federal Circuit Court

1. Because the appellant seeks to rely on entirely new grounds of review, it is unnecessary to set out the views of the learned primary judge other than to note his Honour’s observation at [6]:

I have attempted to keep these reasons brief so as not to add to the excessive amount of material already on the court files.

1. That “excessive amount of material” comprises over 2,260 pages contained in four large volumes. In my view, and with respect, the learned primary judge very successfully, and appropriately, kept his “reasons brief”.

## Grounds of Appeal – Student Visa Cancellation

1. Before the Tribunal reviewing the delegate’s decision to cancel the student visa, the appellant was represented by a registered migration agent. The Tribunal also received oral evidence from both the appellant and his wife, with the assistance of an interpreter.
2. The proposed grounds of appeal in relation to the decision of the Tribunal concerning the student visa are as follows:

1. The Federal Circuit Court erred in not finding that the decision of the second respondent, the Administrative Appeals Tribunal, dated 5 June 2016 was affected by jurisdictional error for one or more of the following reasons:

(a) the Tribunal failed to take into account relevant considerations;

(b) the Tribunal took into account irrelevant considerations;

(c) the Tribunal misconstrued or misapplied s 116(1)(e) of the *Migration Act 1958* (Cth);

(d) the Tribunal’s decision was legally unreasonable or otherwise contrary to law.

**Particulars**

The Tribunal affirmed a decision of a delegate of the first respondent, the Minister for Home Affairs, to cancel the appellant’s student visa.

In that regard, s 116(1) of the Migration Act relevantly states that the Minister may cancel a visa if the Minister is satisfied that the presence of its holder in Australia may be a risk to the health, safety or good order of the Australian community or a segment of the Australian community or to the health or safety of an individual or individuals: see s 116(1)(e).

In finding that the appellant may be a risk to the health and safety of a segment of the Australian community, the Tribunal took into account five criminal charges against the appellant, including three charges that, by the time of the Tribunal’s decision, had been withdrawn: see, for example, [19].

By that time, it was not open to, or reasonable for, the Tribunal to have regard to those withdrawn charges for the purposes of reaching a positive state of satisfaction about the possible risk posed by the appellant to the health and safety of a segment of the Australian community.

Further or alternatively, the appellant claimed before the Tribunal that he had not committed the offences the subject of the two charges for which he had been convicted. He claimed that he only pleaded guilty to those two charges because he was unable to afford the costs of legal representation to contest them.

While the Tribunal referred to these claims in its decision, the Tribunal did not take steps to look behind the essential facts underlying the convictions. The Tribunal wrongly considered that it was unable to do so: [17]. In doing so, the Tribunal erroneously deprived itself from looking behind the essential facts underlying his convictions. See: *Minister for Home Affairs v Sharma* [2019] FCA 597, [20]-[21]; *HZCP v Minister for Immigration and Border Protection* [2018] FCA 1803, [75]-[78]; *Secretary to the Department of Justice and Regulation v [LLF]* [2018] VSCA 155, [42].

For these reasons, the Tribunal did not address the threshold requirement in s 116(1)(e) according to law.

2. The Federal Circuit Court erred in not finding that the Tribunal’s decision dated 5 June 2016 was not affected by jurisdictional error for one or both of the following reasons:

(a) the Tribunal’s purported exercise of discretion for the purpose of s 116(1) of the Migration Act miscarried;

(b) the Tribunal’s decision was otherwise contrary to law.

**Particulars**

The discretionary power in s 116(1) of the Migration Act must be exercised by taking into account the particular circumstances of the person the subject of its exercise. A failure to have regard to those circumstances may give rise to the exercise of discretion miscarrying. See: *Khan v Minister for Immigration and Citizenship* [2011] FCAFC 21; (2011) 192 FCR 173, [59]-[64], [74]-[76] and [88]; *Montero v Minister for Immigration and Border Protection* [2014] FCAFC 170; (2014) 229 FCR 144, [1], [2] and [35]; *BGM16 v Minister for Immigration and Border Protection* [2017] FCAFC 72; (2017) 252 FCR 97, [86] and [92].

In exercising the discretion under s 116(1), the Tribunal should have had, but did not have, regard to the following circumstances put forward by the appellant:

(a) the appellant’s claims that he did not commit the offences the subject of his convictions and only pleaded guilty due to his inability to meet the costs of contesting the charges;

(b) the appellant’s claims about matters relevant to the nature and seriousness of his alleged offending, including his release on bail before trial and the imposition of a fine without imprisonment, and how those matters bore upon the risk presented by him; and

(c) the appellant’s otherwise unblemished criminal record.

In exercising its discretion, the Tribunal made no attempt to assess the nature and extent of any possible risk posed by the appellant. Without doing so, the Tribunal was unable to weigh that possible risk against other countervailing considerations.

3. The Federal Circuit Court erred in not finding that the Tribunal’s decision dated 5 June 2016 was not affected by jurisdictional error for one or both of the following reasons:

(a) the Tribunal’s purported exercise of discretion for the purpose of s 116(1) of the Migration Act miscarried;

(b) the Tribunal’s decision was otherwise contrary to law.

**Particulars**

The appellant refers to and repeats the first paragraph of the particulars to ground 2. In exercising the discretion under s 116(1), the Tribunal should have had, but did not have, regard to the following additional circumstances put forward by the appellant:

(a) the appellant’s claims to fear harm upon any return to Vietnam due to an imputed political opinion of opposition to the Vietnamese government and the Vietnamese Communist Party; and

(b) the appellant’s claims that cancellation of his student visa would shock his mother and adversely affect her health.

1. With considerable reluctance, but acknowledging the fine work of Mr Knowles in representing the appellant, I granted leave to rely on these new grounds. Mr Brown, who appeared for the Minister, did not otherwise object to this.
2. The appellant pointed out that the decision of the Tribunal comprised two parts: (i) considering as a threshold issue whether s 116(1)(e) was satisfied; and then (ii) considering whether the Tribunal should exercise its discretion to cancel the appellant’s visa.

#### Threshold issue

1. In relation to the threshold issue, it was submitted that the Tribunal erred because it wrongfully took into account in assessing the risk to the community the three charges which had, by the time of the Tribunal’s decision, been dropped. The appellant relied upon a decision of Logan J in *Dalla v Minister for Immigration and Border Protection* [2016] FCA 998 where his Honour held that a Tribunal, in affirming a Minister’s decision to cancel a visa, had erred by relying upon the charging of Mr Dalla with certain criminal offences and nothing else. At [29] his Honour said:

At the heart of the challenge made by Mr Dalla, is that one factor which was counted adversely against him was the fact of his being charged. What this Tribunal member ought to have done, was to remind himself that, unless and until Mr Dalla was convicted or unless and until the Tribunal member made an affirmative finding on the basis of material reasonably probative of the fact that Mr Dalla had breached our law, he was entitled to the presumption of innocence. This, the Tribunal member did not do. It is that use which was not lawful …

The “presumption of innocence”, referred to by Logan J as pivotal to the Australian legal system, is sometimes described as the “golden thread” of British justice.

1. The appellant also complained that the Tribunal did not look behind the essential facts underlying the two convictions. It was said that it needed to do this. For example, the appellant claimed that he only pleaded guilty because he could not afford representation. It was said that it was open to the appellant to squarely deny his guilt and that the Tribunal was obliged to consider that claim, like any other material claim made. For the reasons set out below, I do not consider that the appellant could deny his guilt on the evidence before the Tribunal.
2. Reading the Tribunal’s reasons here, this is a case where the Tribunal did not merely act on the existence of two convictions without more, but considered the totality of the appellant’s claims, including his explanation for pleading guilty. The Tribunal considered the appellant’s explanation and understanding of the offences including his assertions that the victim was a “bad girl”, that his conduct was “minor”, and that he believed he had done nothing wrong. It also noted the appellant’s occupation as a schoolteacher and tutor. One can see the Tribunal’s consideration of the material before it at [17]-[18] as follows:

It is not for this Tribunal to make any findings regarding the charges or convictions of [the appellant]. However [the appellant’s] explanation of the offences and his understanding of these offences may be relevant to whether he might pose a risk to a segment of the Australian community. [The appellant] says the complainant voluntarily kissed him. This is not consistent with his earlier submissions that they had only been talking. He states she was smiling when the police took her photo at interview at the police station, and that if she was forced to kiss him she would not be smiling. He says he did not do the wrong thing because he believed she was 18. He denied that he did acts that he was subsequently found guilty of by the Magistrates Court. In one statement to the tribunal he stated he was just talking to her. In a later statement he said that she told him she was over 18 and that he kissed her and touched her breasts. He states this is a minor offence and a minor mistake, as shown by the penalty which is a fine of $3,000. He says in the future he will never touch a child under 16 or make any mistakes.

On being asked if he had anything further to say about whether his presence in Australia may be a risk to young people, he said that the girl dobbed him in to run away from her crime. He also went on to say that he was not able to defend himself in the Magistrates Court. I note [the appellant] was represented at the hearing before the Magistrates Court, but stated in material provide after the hearing that accepted two offences as he could not afford to defend the charges.

(Errors in original.)

1. In my view, this case is different to *Dalla*. No weight was given to the fact of the three charges which were later dropped. At most, they formed part of the background leading to the delegate’s decision. Thus, at [11], the Tribunal observed:

I find the existence of these charges at the time the delegate made the decision shows that at the time the visa was cancelled there was a possibility that [the appellant] may be a risk to people in the community who are under sixteen years of age.

1. That was an historical observation. The Tribunal then made its decision based upon all of the material before, including the two convictions. It otherwise fully considered the appellant’s claims in reaching its positive state of satisfaction about the possible risk posed by the appellant to the health and safety of minors in Australia.

#### Discretion to cancel the visa

1. I now turn to the exercise of the discretion to cancel the appellant’s visa. In *Montero v Minister for Immigration and Border Protection* (2014) 229 FCR 144, Flick J (with whom Allsop CJ agreed) said at [35]:

A visa holder who fails to comply with the “conditions” of a visa is liable to have his visa cancelled: *Migration Act*, s 116. That power is conferred in discretionary terms and is to be exercised by reference to facts known at the time of the decision. Even where non-compliance with a condition of a visa is accepted, the Minister retains a discretion to cancel the visa or to leave it on foot. Presumably the seriousness and importance of the condition and the gravity of the circumstances surrounding the reasons for non-compliance may be relevant to the Minister when exercising the discretion. In circumstances where a visa holder may have failed to strictly comply with the terms of a particular condition, the fact that he may have “substantially complied” with the object and purpose sought to be achieved by the condition, would equally be relevant to the exercise of the discretion.

1. The appellant contended that the Tribunal had overlooked a number of claims. In that respect, I note that Allsop CJ has recently expressed the obligation to consider representations made to a decision-maker in the following terms:

From the above discussion it can be taken that a failure to consider or take into account matters of sufficient importance in the representations may amount to jurisdictional error either because it cannot be said that the required state of satisfaction has been reached in accordance with the section in all the circumstances, or because not to take such an important matter into account reflects a failure to take into account all the representations. One should be cautious about over reliance on textual taxonomical precision in this area. There will be jurisdictional error if material important in the representations has not been taken into account so as to make the purported exercise of the power not one that can be seen or characterised as being based on, or having taken into account, the representations as a whole. An evaluation of this will be context and circumstance specific. Textual formulae are of little assistance.

See *Navoto v Minister for Home Affairs* [2019] FCA 295 at [47].

1. I respectfully adopt Allsop CJ’s formulation of the test which has recently been upheld on appeal in *Navoto v Minister for Home Affairs* [2019] FCAFC 135 at [86].
2. I also accept the appellant’s submission that for the purposes of exercising the discretion in s 116, the Tribunal was required to consider the circumstances in which the ground for cancellation arose. As Flick J observed in *Khan v Minister for Immigration and Citizenship* (2011) 192 FCR 173 at 192-193 [74]-[75]:

Those matters which a decision-maker is bound to take into account when exercising the power conferred by this section nevertheless remain to be determined by reference to the objects and purposes of the Act itself: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 39-40 per Mason J.

Whether or not the Manual identifies considerations going beyond those that must be taken into account when making a decision under s 116, those considerations which must be taken into account when making such a decision include “the circumstances in which the ground for cancellation arose”. Counsel for the Respondent Minister did not contend to the contrary. Consideration of a matter which must be taken into account requires that the matter be “really and genuinely” considered and requires “an active intellectual process”: cf *NAJT v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 51 at [212] per Madgwick J (Conti J agreeing at [227]-[230]). Whilst care must be exercised to avoid trespassing into the merits of a decision (see *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts* (2009) 165 LGERA 203 at [37]), there must nevertheless be a “proper, genuine and realistic” consideration of relevant material: *Williams v Minister for Environment and Heritage* (2003) 74 ALD 124 at [29].

1. Here, the appellant submitted that the following claims had not been considered:
2. the appellant’s claims that he did not commit the offences the subject of his convictions and only pleaded guilty due to his inability to meet the costs of contesting the charges;
3. the appellant’s claims about matters relevant to the nature and seriousness of his alleged offending, including his release on bail before the trial and the imposition of a fine without imprisonment, and how those matters bore upon the risk presented by him;
4. the appellant’s otherwise unblemished criminal record;
5. the appellant’s claims to fear harm upon any return to Vietnam due to an imputed political opinion of opposition to the Vietnamese government and the Vietnamese Communist Party; and
6. the appellant’s claims that cancellation of his student visa would shock his mother and adversely affect her health.
7. I respectfully disagree with the appellant’s submission that he can impugn his convictions and proclaim his innocence before the Tribunal. In my view, the Tribunal did not err when it said: “[i]t is not for this tribunal to make any findings regarding the … convictions of [the appellant]” (at [17]). The facts surrounding the appellant’s convictions may of course be the subject of submissions and claims for the purpose of determining the seriousness of the offending and the likelihood of re-offending. This may include, subject to what I say below, in a case concerning the cancellation of a visa pursuant to s 116 of the Act, a challenge to the facts underlying a conviction; but there is a “heavy onus” on an applicant who seeks to do this: *Minister for Immigration and Multicultural Affairs v Ali* (2000) 106 FCR 313. But the fact of conviction cannot be impugned before the Tribunal.
8. The appellant contended that the recent decision of this court in *Sharma* is authority for the contrary proposition. Again with great respect to Mr Knowles, the decision of Anastassiou J in *Sharma* did not go so far. In my view, on a fair reading of his Honour’s reasons, the learned judge did not suggest that a person’s conviction of a criminal offence could itself be the subject of legitimate attack. The findings considered in that case went to the issue of the risk Mr Sharma posed to the Australian community. Moreover, in *Sharma*, the applicant successfully demonstrated that he was not a risk to the community notwithstanding his convictions. In contrast, here, the appellant’s claims of innocence rose no higher than bare assertions which were, as the Minister submitted, “self-serving” and not supported by any separate and cogent evidence. Indeed, at times, the appellant contradicted his own account of the event underlying his convictions; so much so is evident at [9]-[11] above. Additionally, when directly asked by the Tribunal member what should be made of the convictions in assessing whether he was a risk to the safety of minors in the community, the appellant’s immediate response was to cast aspersions on the victim. The fact that unsubstantiated smears against the appellant’s victim were made by him in a witness box did not render them any the less regrettable. In the circumstances of this case, there was no probative evidence before the Tribunal of the kind present in *Sharma.* The appellant never discharged the heavy onus he bore (assuming such an occasion arose, as to which see below).
9. As for the distinction recognised in *Sharma* (and *HZCP*) and set out above at [4], I am respectfully reluctant to embrace it. It is derived from a decision of the Victorian Court of Appeal in *Secretary to the Department of Justice and Regulation v LLF* [2018] VSCA 155 at [42] per Beach, McLeish and Niall JJA. That case concerned the *Working with Children Act 2005* (Vic). The relevant passage in *LLF* – which underpins the quote in *Sharma –* starts with the following sentence which may dilute the authority of that which follows: “The parties were agreed as to the applicable legal principles”.
10. It may be doubted whether the principle in issue, namely the impugning of criminal convictions before an administrative tribunal, should be bifurcated in the manner suggested by the Victorian Court of Appeal. In my view, it is a matter of statutory construction in each case to determine whether, for the purposes of exercising a particular power, Parliament intended that a decision‑maker should be able to go behind a pre-existing criminal conviction. The answer to that question will not always turn upon whether the power is expressly conditioned upon a criminal conviction.
11. Here, the parties were of the view that the power exercised in s 116 fell into the second category of cases referred to by the Victorian Court of Appeal. That may be so. But whilst s 116(1)(e) does not expressly turn upon the existence of criminal conviction, it does turn on, broadly speaking, the “risk” posed by the person to the health and safety of the Australian community. The existence of criminal convictions may be critically relevant to such an assessment. For that reason, in my view, it may not follow that Parliament intended that the Minister, or on review the Tribunal, should be obliged to entertain and investigate a challenge to the essential facts which support that conviction. I consider that an unlikely condition on the exercise of the power. However, it is unnecessary for me to reach any final view, because here, as already mentioned, the appellant’s claims about the crime were considered, and they rose no higher than bare assertions.
12. I should record here that the second Tribunal decision (concerning the refusal of the bridging visa) plainly fell within the first category of cases referred to by the Victorian Court of Appeal. As such, it was governed by the principles derived from *Minister for Immigration and Multicultural Affairs v SRT* (1999) 91 FCR 234 where Branson, Lindgren and Emmett JJ said at 244 [40]-[42]:

The manner in which the Tribunal satisfies itself is determined by s 33 of the *Administrative Appeals Tribunal Act 1975* (Cth). Under that provision, the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate. *But* *where the decision to be reached depends upon there having been a sentence that satisfies s 201(c) of the Act, it is not open to the Tribunal to engage in any enquiry which would impugn the sentence. Accordingly, at least the essential facts found by a sentencing judge in the course of his or her* *deliberations concerning sentence and upon which the sentence is based must be accepted by the Tribunal*. *The most obvious example of such a fact is a finding as to the circumstances of the commission of the offence*. The starting point for consideration by the Tribunal in relation to sentence, when concerned with the question of an order under s 200 of the Act, must be the findings made by the judge in imposing the sentence that satisfies the statutory description of a sentence of imprisonment for a period of not less than one year.

There are good policy reasons why such a principle should prevail. It could only undermine the criminal process for an administrative decision to be based on considerations inconsistent with the conviction or sentence imposed.

Counsel for the respondent submitted that, so long as the decision-maker accepts the fact of the sentence, it is open to the person sentenced to challenge any finding of fact made by the sentencing judge in the course of imposing that sentence. We reject the submission and, as explained later, we do not understand Davies J to have gone so far in *Beckner*.

(Emphasis added.)

1. *SRT* was a deportation case where the applicant had been convicted of feloniously slaying a man. The Tribunal thought that it was open to it to impugn that conviction. The Full Court of this Court disagreed (at 240 [25]). At 243-244 [39], the Court explained how a Tribunal might consider the fact of conviction:

The Tribunal must, of necessity, consider matters at a time different from that at which a sentencing judge considers them. Circumstances may change. An offender who showed no sign of rehabilitation at the time of sentence may, by the time when deportation is being considered, have shown significant rehabilitation so that the risk of further offences has reduced considerably. Moreover, accepting the findings of the sentencing judge does not prevent the Tribunal from distinguishing between those findings in terms of weight. For example, while Wood J considered that less weight should be given to rehabilitation in sentencing the respondent, the risk of recidivism was obviously a matter of particular importance for the Tribunal. It was with reference to such considerations that Davies J said in *Beckner v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 30 FCR 49 at 50‑51:

“The Administrative Appeals Tribunal, when it is reviewing a decision to deport, is not bound by or limited to all the findings of fact made by a sentencing judge in the course of giving his reasons for sentence. The function of sentencing a person convicted of a crime is a different function from that of deciding whether or not the convicted person should be deported. Matters which may be of great significance to a decision to deport, because for example they go to the risk of recidivism, may be of little significance to a sentencing judge. In the present case, for example, where a long term of imprisonment was imposed because of the nature and seriousness of the crime, it was not necessary for the sentencing judge to determine whether Mr Beckner’s crime was an isolated event or formed part of a pattern of drug-related activity on his part. From the point of view of deportation, however, such a matter was important. The Tribunal had to form a view as to whether Mr Beckner was such a person as should be allowed to remain in Australia.”

1. It follows that in my view the Tribunal in the present case did not err at [17].
2. In my respectful opinion, the Tribunal otherwise took into account all of the matters of sufficient importance that bore upon the exercise of the discretion in the sense required by *Navoto*. The Tribunal knew about the appellant’s claims of innocence, his claim that he had committed only a minor offence or minor mistake and his contention that he could not defend himself in the Magistrates’ Court. I also note that the contention that the appellant had not been able to defend himself was, in any event, misconceived; he was in fact legally represented. These matters were expressly addressed at [17]-[18] of the reasons. The Tribunal otherwise stated that it understood his (uncorroborated) claim of impecuniosity (at [46]).
3. It is true that the Tribunal did not expressly repeat its consideration of the foregoing matters when exercising its discretion in s 116. In the appellant’s submission, they were thus never weighed in the balance in determining how that discretion should be exercised. However, in the context of the conferral of a discretion which forms part of s 116(1)(e), it is quite clear that the Tribunal considered and understood the appellant’s claims concerning the crime he committed. In weighing what had happened before the magistrate at Melbourne, it specifically invited the appellant to put on more material. It said at [46]:

During the hearing it seemed from [the appellant’s] evidence that he had agreed to plead guilty to the charges against him. This could be of concern if the person’s English is poor and they have no knowledge of the Australian legal system. As a result I invited him to provide further information on what had led to his conviction.

1. What followed was a letter in which the appellant made a number of claims, including the following:
2. that the crime was an isolated event that may or may not have been true;
3. that he only “got fined” and that this demonstrated that notwithstanding his conviction he had not “definitely committed” the offences;
4. that he was misrepresented and falsely accused; and
5. that it was speculation that the crime had occurred.
6. The Tribunal took this material into account and, in my view, must be taken to have weighed it in the balance. It expressly also considered the appellant’s version of what happened when considering his wife’s evidence (at [35]) in the context of an analysis of any hardship that would be caused by cancelling the visa. It said:

On being asked if there was any reason her husband could not return to Vietnam, [the appellant’s wife] returned to saying that [the appellant] was innocent and that the complainant was not a good girl and that she kissed a lot of people. She said when [her] husband kissed the girl it was a cultural misunderstanding and that he was just kissing her goodbye. She said he does not cause harm to the community and it was a minor mistake due to a misunderstanding about whether the girl was over 18.

1. The fact remains, as the Tribunal appreciated, that the appellant had committed a serious crime and was, inferentially, aware of his criminal record in Australia. The Tribunal was also, I find, aware of the claims made about the appellant’s mother (at [27]) and his claims for fear if returned to Vietnam. It very specifically asked him why he could not return. His answer is recorded in the reasons at [41]:

On being asked if [there] was any reason he could not return to Vietnam, he said he has photographs taken with many top leaders in Vietnam and that if his visa was cancelled this would also affect their reputation, and might cause him harm. On being asked to specify the harm he feared, he said he could not predict what would happen but that some people who had committed offences overseas had gone missing when they returned to Vietnam. He said he doesn’t know why he has to return to Vietnam whereas the girl who reported him will become a major crime figure. He said if he is required to return to Vietnam the girl will gain her reputation, and he will lose his reputation.

1. In my view, the Tribunal was entitled to consider the answers set out at [41] as subsuming the very vague statements now relied upon by the appellant and previously given.
2. None of the foregoing grounds are made out.

## Grounds of Appeal – Bridging Visa

1. The proposed grounds of appeal in relation to the Tribunal decision concerning the bridging visa (where the appellant was represented by a lawyer) were as follows:

4. The Federal Circuit Court erred in law in not finding that the decision of the Tribunal dated 20 December 2016 was affected by jurisdictional error for the reason that the Tribunal did not afford the appellant procedural fairness.

**Particulars**

The Tribunal affirmed a decision of a delegate of the Minister refusing to grant the appellant a bridging visa E on character grounds. See s 501(1) of the Migration Act.

In the conduct of its review of the delegate’s decision, the Tribunal was obliged to afford the appellant procedural fairness. To that end, the Tribunal was obliged to give the appellant an opportunity to be heard and to deal with the case put before it by the appellant. In particular, the Tribunal was obliged, in the conduct of its review, to address the appellant’s submissions and evidence insofar as they went to matters relevant to the exercise of the discretionary power in s 501(1) of the Migration Act.

The Tribunal failed to comply with those obligations. In particular, the Tribunal failed to take into account one or more of the following submissions made by the appellant:

(a) save for the alleged offending the subject of his two convictions, the appellant had never engaged in wrongful conduct of a similar nature before or since;

(b) in respect of the alleged offending, the imposition of a fine without imprisonment suggested that the Magistrates’ Court had found the appellant to represent a lesser risk to the community;

(c) another (differently constituted) Tribunal had previously accepted that the appellant would not engage in future criminal activity in the nature of the alleged offending;

(d) the appellant had substantial ties to Australia, and particularly Melbourne, beyond just his relationship with his wife; and

(e) in the event of the appellant being refused a bridging visa on character grounds, his wife and daughter would be prevented from ever being granted a permanent visa.

Each of these submissions made by the appellant went to matters of substance relevant to the exercise of the Tribunal’s discretion under s 501(1). In failing to take them into account, the Tribunal denied the appellant natural justice.

5. The Federal Circuit Court erred in law in not finding that the decision of the Tribunal dated 20 December 2016 was affected by jurisdictional error for the reason that the Tribunal failed to take into account a relevant consideration or otherwise acted contrary to law.

**Particulars**

The appellant refers to and repeats the particulars to ground 4.

Insofar as the appellant’s submissions went to the risk, if any, posed by him to the community, they affected the way in which the Tribunal had regard to a mandatory relevant consideration. See *Moana v Minister for Immigration and Border Protection* [2015] FCAFC 54; (2015) 230 FCR 367, [1], [48] and [66]. The Tribunal’s failure to take those submissions into account gave rise to jurisdictional error for this additional and separate reason.

6. The Federal Circuit Court erred in law in not finding that the decision of the Tribunal dated 20 December 2016 was affected by jurisdictional error for the reason that the Tribunal failed to comply with its obligations under the Migration Act or otherwise acted contrary to law.

**Particulars**

The appellant refers to and repeats the particulars to ground 4.

For the purposes of the conduct of its review, the Tribunal stood in the shoes of the Minister. See, for instance, s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth). The Minister was obliged to consider additional relevant information given by the appellant: see ss 54 and 55 of the Migration Act. The Tribunal was under the same obligation in respect of relevant information given to it by the appellant and that information included the appellant’s submissions which the Tribunal failed to take into account. See *Minister for Home Affairs v Ogawa* [2019] FCAFC 98, [85]-[103].

1. Once again, with some reluctance, I gave leave for these grounds to be relied upon. The Minister made no objection.
2. In his written submissions, the grounds of appeal were distilled into a failure by the Tribunal to take into account the following submissions:
3. save for the alleged offending, he had never engaged in wrongful conduct of a similar nature before or since;
4. in respect of the alleged offending, the imposition of a fine without imprisonment suggested that the Magistrates’ Court had found him to represent a lesser risk to the community;
5. another (differently constituted) Tribunal had previously accepted that the appellant would not engage in future criminal activity in the nature of the alleged offending;
6. the appellant had substantial ties to Australia, and particularly Melbourne, beyond his wife; and
7. in the event of the appellant being refused a bridging visa on character grounds, his wife and daughter would be prevented from ever being granted a permanent visa.
8. The Minister submitted that the Tribunal took all of these matters into account. In that respect, it was stressed that the Tribunal’s consideration of the appellant’s claims had to be considered in the context of its finding that the appellant was “almost incapable of telling the truth”. As the Minister submitted in writing:

The Tribunal was gravely concerned that the Appellant appeared “almost incapable of telling the truth”, that he had deliberately targeted his victim before making contact, that the contact was plainly not consensual and the girl had not initiated the contact, and that numerous statements made by the Appellant sought to blame the victim. The Tribunal found that the offending was very serious, especially as the victim was a 12 year old girl, and the risk of him reoffending was reasonably high, particularly given the way he had attempted to justify his conduct, minimising what he had done and attempting to blame the victim. The risk of reoffending, particularly against a minor remained real, and not insignificant.

1. In that respect, the Minister made the following four submissions.
2. First, that it should be inferred that the Tribunal was fully aware that the appellant had only offended on one occasion. I agree that this inference should be made. For the reason expressed below I am also satisfied that it was considered by the Tribunal in exercising its discretion under s 501. I otherwise am of the view that it was open to the Tribunal to reject the appellant’s explanation of his criminal offending as falsehood.
3. Secondly, that the Tribunal was fully aware of and took into account, in assessing whether the appellant failed to pass the character test for the purposes of s 501 of the Act, the contention that the offence was minor because the appellant had only been fined $3,000. It said this at [33]:

Mr Nikolic submitted that [the appellant’s] offending, while serious, was very much at the lower end of the spectrum given that no term of imprisonment was imposed on [the appellant] but rather, he was fined $3000.

I also note that the Tribunal very properly observed as follows:

However, the *Sentencing Act 1991* (Vic) makes it clear that there are many factors which are taken into account when sentencing, including the circumstances of the case, entering a plea of guilty or the presence of any other mitigating or aggravating factors.

In my view, when the Tribunal came to consider the exercise of its discretion to not issue a bridging visa, and for that purpose in assessing the risk to the community, it was fully aware of and did consider all of those claims which were directed at mitigating the gravity of what the appellant had done. Inferentially, that included the claims set out at [50(a)] and [50(b)] above. It addressed them in two ways at [62]. It found that the appellant was “almost incapable of telling the truth” and it observed that the appellant had “made every attempt to minimise the seriousness of his conduct”. It nonetheless found that the crime was “far more serious than he described”.

1. Thirdly, that the Tribunal was aware of the earlier Tribunal decision and correctly distinguished it because it addressed a different issue. I agree with that submission. At [23], the Tribunal said:

It should be readily apparent that the decision made by the AAT-MRD was not based on character grounds which, although there may be some overlap, particularly regarding the risk of reoffending, are significantly different to those matters which must be considered when examining a refusal to grant a visa on character grounds. A refusal to grant a visa, including a Bridging Visa, on character grounds is a very different matter.

1. Finally, the Minister submitted that the appellant’s ties to Melbourne and the impact on his wife and daughter of the refusal to issue him a bridging visa (that they would be denied a permanent visa) were not relevant matters under Part B of Direction 65 (which deals with a refusal to issue a visa). That was because his daughter remains in Vietnam and his wife is not an Australian citizen or permanent resident. Part B requires a decision-maker to take into account the best interests of “minor children in Australia”. It also requires a decision-maker to consider the impact on family members “in Australia where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely”. Neither the appellant’s wife nor his daughter appear to fall within this category.
2. The appellant nonetheless submitted that the fact that something is not expressly required to be considered by Direction 65 does not mean that it should not be taken into account. His Counsel relied upon para 12 of Part B of Direction 65 which requires a decision-maker to consider “other considerations”. An expressly non-exclusive list of such matters is there set out. Here, the claim made about the wife and daughter should have been considered in the sense that it was a material claim that had been made: *Navoto*. I am for the moment inclined to agree with that submission. However, I am not satisfied that a claim for permanent residence had ever been made. The claim made by the wife was expressed in 2016 as follows:

After I graduate from my university, I hope to join a research project at my university for three years. My daughter and I will stay in Australia for [a] few years.

1. It follows that the Tribunal did not err in not considering the claim as particularised. No such claim had ever been made. The possibility that the seeking of a permanent visa might have been an “option” that would be “shut down” if the Tribunal’s decision were now to be affirmed is not, with respect, sufficient to make it an integer which should have been considered by the Tribunal.
2. In any event, the impact on the wife and daughter was considered by the Tribunal and was found to weigh in favour of the grant of a bridging visa (at [79]-[82]).
3. As to the ties to Melbourne, I agree with the Minister’s submission that this claim was immaterial. The submission made to the Tribunal by the appellant’s lawyers was in these terms:

The applicant’s ties to Australia are substantial. He has also developed a network based in Melbourne. The applicant has submitted numerous letters of support which the Tribunal should take into account.

1. In the context of Part B of Direction 65, which is focused upon assessing the risk to the Australian community and which does not expressly require a consideration of a person’s “ties” to Australia, in my view the generalised assertion made about ties to Melbourne was immaterial. It was not supported by any evidence or reasoning.
2. For these reasons I respectfully reject the grounds relied upon in relation to the bridging visa decision.

## Ground of Appeal – Protection Visa

1. The ground relied upon was as follows:

7. The Federal Circuit Court erred in law in not finding that the decision of the Tribunal dated 27 June 2017 was affected by jurisdictional error for the reason that the Tribunal failed to take into account relevant considerations.

**Particulars**

The Tribunal affirmed a decision of the Minister’s delegate to refuse to grant the appellant a protection visa.

In doing so, the Tribunal did not consider an integer of one of the appellant’s claims to fear serious or significant harm on account of an imputed political opinion of opposition to the Vietnamese government or the Vietnamese Communist Party. In particular, the Tribunal did not take into account the appellant’s claim to fear harm by reason of his attendance at a political rally in Australia at which he stood under a South Vietnamese flag.

Further or alternatively, the Tribunal misunderstood the true nature of the appellant’s claims to fear harm on return to Vietnam on account of his criminal record in Australia. In this regard, the Tribunal focussed on the mere existence of the appellant’s criminal record without taking into account the nature of the offending the subject of that criminal record. In particular, the Tribunal did not consider, but should have considered, what harm the appellant might face on return to Vietnam by reason of his status as a convicted child sex offender.

1. I again granted leave to rely on this ground. There was no objection from the Minister.
2. The appellant contended:
3. that the Tribunal did not have regard to the appellant’s claim to fear harm by reason of his attendance at political rallies in which he stood under the flag of the former Republic of Vietnam (or South Vietnam); and
4. that the Tribunal failed to consider the harm the appellant might face in Vietnam having been convicted in Victoria of a child sex offence.
5. I reject the first contention. The claim which was said to have been overlooked was expressed in the visa application in the following way:

They cannot protect me because I asked the Party, Government and police to go against the people who stole my properties and projects, but they could not do that. At the same time, they could not protect a person who supported advanced ideology, who took part to assist the chairman of the merchant board in Australia. Sometimes there were a group of people who spread the word against the regime, they resented the Communist Part flag and joined a group under the flag of the former regime Saigon. In all the meetings, I always stood under that flag, being a volunteer to spread the words to ask for freedom and democracy. In my regime, doing those works meant going against the regime so they would never protect me, if possible they would arrest and imprison me at any time; many patriots were imprisoned when they returned to my country.

(Errors in original.)

1. In my view, the Tribunal considered and then evaluated the appellant’s claim to fear harm arising from imputed opposition to the Socialist Republic of Vietnam. It found, on the material before it, that the appellant had not been involved in anti-Vietnamese government activities in Australia. It reasoned at [27]-[28]:

The applicant has claimed that he is an opponent of the Vietnamese government. In support of that claim and that he will be harmed upon his return, he has presented photographic evidence of himself with some elderly Vietnamese men in Melbourne who he says are South Vietnamese veterans and a photo of himself with others at the Victoria Street Business Association event. He has also submitted a copy of an application, he made for the Luna Street Festival Group to Yarra Trams for approval to work adjacent to tramway electrical apparatus. He said he attended events 2-3 times every year for four years and that he was an assistant to the Chairman of the Association of Former Vietnamese Soldiers which he said was within the Business Association. I have considered all of the applicant’s documentary and oral evidence: however I do not accept that he has been involved in anti-Vietnamese government political activities in Australia. The evidence he has submitted relates far more to minor involvement in Vietnamese community and business activities rather than the expression of anti-government opinion …

The applicant has submitted photos of himself with a Vietnamese general and with Communist Party officials in Vietnam and claimed that he had protested against the Chinese government and confronted corruption. Whilst I accept that he had photos taken with these individuals, his evidence as to his participation in political activities in Vietnam was extremely vague, undetailed, confusing and fanciful and I do not accept that he is involved in any political activities against the Chinese or Vietnamese governments. I note that he was never harmed or targeted when he was in Vietnam and returned there on a couple of occasions without problems. Whilst he claimed that he lost his job as a lecturer, I note that he did not return to his position and that therefore it was not unusual that this would occur.

1. The Tribunal also relied on country information that persons in Vietnam are not targeted or harmed for past involvement with the South Vietnamese government or military. The war against the North, it observed, had ended over 40 years ago. In my view, as a matter of substance, his claims were considered.
2. As to the second contention, the Minister submitted that the appellant had never claimed that the nature of his criminal offending might expose him to a real risk of harm if returned to Vietnam. His claim was that “some people who committed crimes overseas disappeared when they returned to Vietnam”. In his visa application, he added in relation to the victim of his crime: “She said she is over 18 criminal offence invaded to kiss under 18, she was a bad girl and police were searching for her, I want helped police to arrest her that is why she complained on me” (errors in original).
3. I accept the Minister’s submission, but note that, in any event, the Tribunal expressly considered whether the nature of the appellant’s criminal offending might expose him to risk. It said at [31] as follows:

The applicant has been convicted in Australia for offences of indecent assault against a minor. DFAT stated in 2004 that it would be highly unlikely that a Vietnamese citizen who has served a jail sentence in Australia for a drug-related offence would be retried or subjected to other punitive action upon their return. Whilst I have taken into account that the applicant has not been convicted of a drug-related offence, I consider this information supports that the applicant would not face harm *as a result of his different type of criminal conviction*. In a 2007 report, DFAT responded to an information request from the Refugee Review Tribunal regarding whether there had been any recent reports of people with Australian criminal records being “harmed, arrested or imprisoned on their return to Vietnam” by advising, “Not to our knowledge”. The Tribunal has not identified any later reports of Vietnamese with Australian criminal records being harmed upon their return.

(Footnotes omitted and emphasis added.)

1. In my opinion, the Tribunal did not fail to consider the nature of the appellant’s criminal offence. This ground is not made out.
2. For these reasons, this appeal should be dismissed with costs. I shall also make an order adding the Tribunal as a second respondent.

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| I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Steward. |

Associate:

Dated: 26 September 2019