FEDERAL COURT OF AUSTRALIA

Fattah v Minister for Home Affairs [2019] FCAFC 31

|  |  |
| --- | --- |
| Appeal from: | *Fattah v Minister for Home Affairs* [2018] FCCA 2010  |
|  |  |
| File number: | NSD 1265 of 2018 |
|  |  |
| Judges: | **PERRAM, FARRELL AND THAWLEY JJ** |
|  |  |
| Date of judgment: | 27 February 2019 |
|  |  |
| Catchwords: | **MIGRATION** – appeal from Federal Circuit Court –whether Court erred in dismissing application for judicial review of decision of Administrative Appeals Tribunal – whether Minister’s power to cancel bridging visas for a person being charged with an offence applies only where person was charged while holding the visa – whether Tribunal decision unreasonable or irrational – whether Tribunal misconstrued discretionary nature of power to cancel bridging visas  |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) ss 91WA, 116, 189, 196, 499*Migration Regulations 1994* (Cth) r 2.43  |
|  |  |
| Cases cited: | *BGM16 v Minister for Immigration and Border Protection* [2017] FCAFC 72; 252 FCR 97*Cheryala v Minister for Immigration and Border Protection* [2018] FCAFC 43*Coco v The Queen* [1994] HCA 15; 179 CLR 427*Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280*DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; 258 FCR 175*Graham v Minister for Immigration and Border Protection* [2018] FCA 1012*Gupta v Minister for Immigration and Border Protection* [2017] FCAFC 172; 255 FCR 486*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1*Minister for Immigration and Border Protection v Tran* [2015] FCA 546; 232 FCR 540*Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203; 163 FCR 414*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 |
|  | *Tanioria v Commonwealth of Australia (No 3)* [2018] FCA 1623 |
|  |  |
| Date of hearing: | 7 November 2018 |
|  |  |
| Date of last submissions: | 15 November 2018 (First Respondent)20 November 2018 (Appellant) |
|  |  |
| Registry: | New South Wales |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 63 |
|  |  |
| Counsel for the Appellant: | Ms R Graycar |
|  |  |
| Solicitor for the Appellant: | Kinslor Prince Lawyers |
|  |  |
| Counsel for the First Respondent: | Mr G Johnson SC and Mr Liu |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |
|  |  |

ORDERS

|  |  |
| --- | --- |
|  | NSD 1265 of 2018 |
|   |
| BETWEEN: | SHARIF MOHAMMAD ABDUL FATTAHAppellant |
| AND: | MINISTER FOR HOME AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGES: | PERRAM, FARRELL AND THAWLEY JJ |
| DATE OF ORDER: | 27 February 2019 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The Appellant pay the First Respondent’s costs as taxed or agreed.

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

REASONS FOR JUDGMENT

THE COURT:

1. The Appellant is a citizen of New Zealand who has been living in Australia. He was arrested on 7 March 2017 and later charged with multiple counts of sexual intercourse without consent and assault with act of indecency. The charges related to conduct which was alleged to have occurred in the course of his practice as a medical practitioner. None of these charges have been heard.
2. The First Respondent (the **Minister**), after first providing to the Appellant notice of his intention to do so, cancelled the Appellant’s special category Subclass TY-444 visa (**444 visa**) on 16 October 2017. The 444 visa was cancelled under s 116(1)(e)(i) of the *Migration Act 1958* (Cth) (**the Act**). That section provides:

**Power to cancel**

Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

…

(e) 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 …

1. The decision to cancel the 444 visa under s 116(1)(e)(i) was based on the perceived risk considered to arise having regard to the circumstances underlying the charges for the alleged offences.
2. The cancellation of the 444 visa had the consequence that the Appellant became an unlawful non-citizen, liable to be detained under s 189(1) and kept in immigration detention under s 196(1) of the Act.
3. The Appellant sought review of the decision to cancel the 444 visa in the Administrative Appeals **Tribunal**. His application was received by the Tribunal on 19 October 2017. That application was unsuccessful and the Appellant applied to the Federal Circuit Court of Australia for judicial review of the Tribunal’s decision. That application has not yet been determined.
4. On 20 October 2017, the Appellant applied for a Bridging Visa E – subclass 050 (**Bridging E visa**). The Bridging E visa was granted on 8 November 2017. It was issued with conditions which included:

**8401 – Reporting obligations**

You must report:

(a) at **10:00am on 30 November 2017**; and

(b) at NSW Compliance, Lvl 4, 26 Lee St Sydney NSW 2001.

…

**8564 – Must not engage in Criminal Behaviour**

The holder must not engage in criminal conduct.

1. In accordance with condition 8401, the Appellant reported to “NSW Compliance” on 30 November 2017. On reporting, the Appellant was given notice of the Minister’s intention to cancel his Bridging E visa. This occurred at 10.26 am. The “possible grounds for cancellation” were identified as s 116(1)(g) “because a ground appears to exist at reg 2.43(1)(p)(ii)” of the *Migration* ***Regulations*** *1994* (Cth). Section 116(1)(g) provides:

Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that: …

(g) a prescribed ground for cancelling a visa applies to the holder.

1. Regulation 2.43(1)(p)(ii) was inserted into the Regulations with effect from 28 June 2013: *Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013* (Cth). It provides:

**Grounds for cancellation of visa (Act, s 116)**

For the purposes of paragraph 116(1)(g) of the Act (which deals with circumstances in which the Minister may cancel a visa), the grounds prescribed are the following:

…

(p) in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa—that the Minister is satisfied that the holder:

…

(ii) has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country …

1. There was no dispute between the parties that the charges which were considered to give rise to the possibility of cancellation under s 116(1)(g) included the same charges which were part of the information which had come to the Minister and from which he formed a satisfaction that the Appellant was a risk, and which then led to the Minister’s decision to cancel the 444 visa under s 116(1)(e). It should be emphasised, at the risk of repetition, that it was satisfaction of the existence of the statutorily prescribed risk which led to that cancellation of the 444 visa, not the satisfaction that charges existed.
2. At 1.04 pm on 30 November 2017, the Minister’s delegate commenced an interview with the Appellant who was, by that time, represented by an agent. The delegate decided to cancel the Bridging E visa at 4.44 pm.
3. The Appellant was detained on 30 November 2017 under s 189(1) of the Act and taken into immigration detention.
4. The Appellant unsuccessfully sought review of the decision to cancel his Bridging E visa in the Tribunal. He then sought judicial review of that decision in the Federal Circuit Court. He was again unsuccessful: *Fattah v Minister for Home Affairs* [2018] FCCA 2010.

# The APPEAL

1. The Appellant appeals from the decision of the Federal Circuit Court relying on three grounds which may be summarised as follows:
2. Properly construed, reg 2.43(1)(p)(ii) only applies to a person who has been charged with an offence at a time when the person in fact holds a Bridging E visa.
3. The Tribunal’s exercise of discretion was legally unreasonable and/or irrational.
4. The Tribunal had misunderstood the power it was exercising since it believed it was required to cancel the visa when, in fact, the decision was discretionary.
5. We reject these contentions. Regulation 2.43(1)(p)(ii) does not operate in the way the Appellant contends; the Tribunal did not exercise its discretion in an irrational or unreasonable way; and the Tribunal did not think it was bound to cancel the Bridging E visa and instead correctly approached the matter on the basis that it was exercising a discretion.

## Ground 1

1. It is appropriate to set out a little more of reg 2.43(1) to understand the correct construction of subpara (p)(ii):

**Subdivision 2.9.2****—Cancellation generally**

**2.43 Grounds for cancellation of visa (Act, s 116)**

(1) For the purposes of paragraph 116(1)(g) of the Act (which deals with circumstances in which the Minister may cancel a visa), the grounds prescribed are the following:

…

(oa) in the case of the holder of a temporary visa (other than a Subclass 050 (Bridging (General)) visa, a Subclass 051 (Bridging (Protection Visa Applicant)) visa or a Subclass 444 (Special Category) visa)—that the Minister is satisfied that the holder has been convicted of an offence against a law of the Commonwealth, a State or Territory (whether or not the holder held the visa at the time of the conviction and regardless of the penalty imposed (if any));

…

(p) Subclass 051 (Bridging (Protection Visa Applicant)) visa—that the Minister is satisfied that the holder:

(i) has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country (other than if the conviction resulted in the holder’s last substantive visa being cancelled under paragraph (oa)); or

(ii) has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country; or

(iii) is the subject of a notice (however described) issued by Interpol for the purposes of locating the holder or arresting the holder; or

(iv) is the subject of a notice (however described) issued by Interpol for the purpose of providing either or both of a warning or intelligence that the holder:

1. has committed an offence against a law of another country; and
2. is likely to commit a similar offence; or

(v) is the subject of a notice (however described) issued by Interpol for the purpose of providing a warning that the holder is a serious and immediate threat to public safety …

1. Regulation 2.43(1)(p)(ii) applies where the Minister is satisfied that the “holder” of, relevantly, a Bridging E visa “has been charged with an offence”. There was no dispute that the Appellant was the “holder” of a Bridging E visa. There was no dispute that, when he made the cancellation decision, the Minister was satisfied that the Appellant had been charged with offences, being those which existed at the time the Bridging E visa was granted.
2. The Appellant submitted, however, that the effect of the regulation, when read in context, was that the Minister had to be satisfied that the Appellant “has been charged with an offence” whilst being the “holder” of the visa, rather than being charged with offences before the visa was granted.
3. This understanding of the operation of the regulation was said to arise clearly from the language of the regulation, particularly by the reference to “the holder”. It was submitted that the word “holder” was “an active word indicating some currency”. It was said:

The clear inference to draw from this usage is that the conduct in question – the charging with an offence – occurs during the currency of the period in which the person is the holder of the [Bridging E visa], not at some time prior to the person being the holder of a [Bridging E visa].

1. That submission is rejected. The word “holder” simply identifies who it is that the Minister must be satisfied has been charged.
2. The language of subpara 2.43(1)(p)(ii), read in context, is clear: it does not matter when the charge occurred. All that matters is whether the holder of the visa “has been charged” at some time. This conclusion is consistent with obiter dictum of the Full Court of this Court in *Cheryala v Minister for Immigration and Border Protection* [2018] FCAFC 43 at [41]-[42] per Besanko, Flick and McKerracher JJ, and is supported by the distinction between the language “has been” (in subparas (i) and (ii) of reg 2.43(1)(p)) and “is” (in subparas (iii) to (v)). Other matters of context supporting this conclusion are referred to next in the course of addressing the Appellant’s submissions in favour of his position that subpara (ii) contained the contended “temporal limitation” referred to in paragraph [17] above.
3. The Appellant submitted that there were a number of indications supporting his construction.
4. *First*, the Appellant relied upon “Ministerial Direction 63 – Bridging E visas: Cancellation under section 116(1)(g) – regulation 2.43(1)(p) or (q)” (**Direction 63**) given on 4 September 2014, which it was said was consistent with the Appellant’s interpretation of reg 2.43(1)(p)(ii). In particular, the Appellant relied on cl 4.3(5) which provides:

Bridging E visa holders who have been found guilty of engaging in criminal behaviour should expect to be denied the privilege of continuing to hold a Bridging E visa while they await the resolution of their immigration status. Similarly, where Bridging E visa holders are charged with the commission of a criminal offence or are otherwise suspected of engaging in criminal behaviour or being of security concern, there is an expectation that such Bridging E visas ought to be cancelled while criminal justice processes or investigations are ongoing.

1. The meaning of reg 2.43(1)(p)(ii) cannot be controlled by a later Ministerial Direction made under s 499 of the Act. The way in which cl 4.3(5) has been drafted may suggest that the draftsperson had in contemplation convictions and charges which occur whilst the relevant person holds a visa. That does not assist in determining the scope of the regulations, the terms of which are not obviously so confined.
2. *Secondly*, the Appellant submitted that a cancellation results in a deprivation of liberty so there must be a “clear expression of an unmistakable and unambiguous intention to abrogate a fundamental freedom”, citing *Coco v The Queen* [1994] HCA 15; 179 CLR 427 and *Minister for Immigration and Citizenship v Haneef* [2007] FCAFC 203; 163 FCR 414. It was said that this “interpretive principle requires that any ambiguity be resolved in favour of not abrogating that fundamental freedom”.
3. The regulation does not deprive a person of liberty. The legislature’s “clear expression of an unmistakable and unambiguous intention to abrogate a fundamental freedom” is found in ss 189 and 196 of the Act which require that an unlawful non-citizen be detained, that is, taken into and kept in detention: *Graham v Minister for Immigration and Border Protection* [2018] FCA 1012 at [87]-[91]; *Tanioria v Commonwealth of Australia (No 3)* [2018] FCA 1623 at [17]-[25].
4. The “interpretive principle” has no work to do in reg 2.43(1)(p)(ii), which is merely identifying a matter about which the Minister is to be satisfied if he or she exercises his or her discretion to cancel a visa under s 116(1)(g).
5. *Thirdly*, the Appellant submitted that the “temporal limitation” for which he contended was supported by contrasting the language of reg 2.43(1)(p)(ii) with reg 2.43(1)(oa). It was observed that para (oa) referred to the Minister being satisfied that the visa holder:

… has been convicted of an offence against a law of the Commonwealth, a State or Territory (whether or not the holder held the visa at the time of the conviction and regardless of the penalty imposed (if any)).

1. It was contended that the words in parentheses are not, but could have been, included in reg 2.43(1)(p)(ii). Whilst that is correct, it could equally be said that the legislature could have used the words in reg 2.43(1)(p)(ii), “has been, whilst holding the visa”, if the provision was intended to have the contended “temporal limitation”.
2. On the other hand, an examination of reg 2.43(1)(oa) together with both subparas (i) and (ii) of reg 2.43(1)(p) is useful in confirming what we otherwise see to be the clear meaning of subpara 2.43(1)(p)(ii). Subparagraph (i) of reg 2.43(1)(p) provides:

Subclass 051 (Bridging (Protection Visa Applicant)) visa—that the Minister is satisfied that the holder:

(i) has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country (other than if the conviction resulted in the holder’s last substantive visa being cancelled under paragraph (oa)) …

1. Subparagraph 2.43(1)(p)(i) was amended when paras 2.43(1)(oa) and (ob) were introduced. The amendment and the reasons for it were explained in the Explanatory Statementto the *Migration Amendment (2014 Measures No. 2) Regulation 2014* (Cth): Select Legislative Instrument No. 199, 2014. The Explanatory Statement included:

**Schedule 3 – Character and general visa cancellation**

...

Item [6] – At the end of Subparagraph 2.43(1)(p)(i)

This item adds the words “(other than if the conviction resulted in the holder’s last substantive visa being cancelled under paragraph (oa))” at the end of subparagraph 2.43(1)(p)(ii) [sic – (i)] of Subdivision 2.9.2 of Division 2.9 of Part 2 of the Migration Regulations.

Subparagraph 2.43(1)(p)(ii) [sic – (i)] provides that for the purposes of paragraph 116(1)(g) of the Migration Act (which deals with circumstances in which the Minister may cancel a visa), the grounds prescribed are in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa - that the Minister is satisfied that the holder has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country.

The effect of this amendment is to make it clear that a prescribed ground for the cancellation of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa is that the Minister is satisfied that the holder has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country. **This ground will apply if the holder of the bridging visa is convicted of the offence at any time during their stay in Australia, not necessarily while holding the bridging visa that is now subject to consideration for cancellation. However, this would not apply if the conviction resulted in the holder’s last substantive visa being cancelled under paragraph (oa), inserted by item [5], above.**

(emphasis added)

1. The effect of para 2.43(1)(oa) and subpara 2.43(1)(p)(i) in circumstances where a person holding a 444 visa (like the Appellant) has been convicted rather than merely charged is as follows:
2. Rather than cancelling the 444 visa under s 116(1)(e) on the basis the Minister was satisfied the Appellant was or might be a risk to the health, safety or good order of the Australian community (a satisfaction which might be reached, amongst other things, having regard to the Appellant’s arrest and subsequent charging), the Minister could cancel the 444 visa on the basis of s 116(1)(g) and reg 2.43(1)(oa) if she or he was satisfied simply of the existence of the conviction. The Minister would not need to reach a state of satisfaction about risk, although, if he did, he could cancel under s 116(1)(e).
3. The Minister could grant a Bridging E visa, for example, to facilitate the Appellant seeking merits review in the Tribunal and subsequent judicial review, without the Appellant becoming an unlawful non-citizen liable to immigration detention as a consequence of the 444 visa cancellation.
4. If the Minister had then wanted to cancel the Bridging E visa he would not have been able to use the fact of the Appellant’s convictions to do so because of the words in parentheses in reg 2.43(1)(p)(i). The convictions were used to cancel the 444 visa, but could not be used a second time to cancel the Bridging E visa. Satisfaction of the existence of a different conviction to those relied upon to cancel the 444 visa could have been used to cancel the Bridging E visa and it would not have mattered when those different convictions occurred.
5. The statutory scheme allows for the satisfaction of the existence of convictions to be used, of itself, as a basis for cancelling a 444 visa or the other visas to which reg 243(1)(oa) applies. However, it does not allow the satisfaction of the existence of those convictions to be used a second time as a basis for cancelling a subsequent Bridging E visa.
6. There is, necessarily, no equivalent regime so far as concerns charges rather than convictions. The reason reg 2.43(1)(p)(ii) does not contain the words in parentheses in reg 2.43(1)(p)(i) is that satisfaction of the existence of charges is not, of itself, a sufficient ground to cancel a 444 visa under s 116(1). There is no equivalent to para (oa) that relates to charges rather than convictions.
7. The Minister cancelled the Appellant’s 444 visa under s 116(1)(e), concluding on the basis of information which had come to him, including the charges, that the Appellant was a risk to the health, safety or good order of the Australian community. Regulation 2.43(1) does not contemplate cancellation on the basis of satisfaction of the existence of charges. Nor is the existence of charges, of itself, sufficient to cancel a 444 visa under s 116(1)(g). It was accordingly unnecessary and inappropriate to include in subpara (ii) of reg 2.43(1)(p) equivalent words to those in parentheses in subpara (i).
8. What this demonstrates is that the words “has been convicted” in reg 2.43(1)(p)(i) are necessarily capable of referring to convictions which pre-date the grant of the Bridging E visa and to convictions whilst a person is the holder of a Bridging E visa. The words in parentheses contemplate that charges which predate the holding of the Bridging E visa would fall within the meaning of “has been convicted”. The words “has been charged” in subpara (ii) must carry an equivalent meaning. There is no “temporal limitation” in reg 2.43(1)(p)(ii). This confirms that the words have their ordinary meaning when read in the statutory context. There is no implicit “temporal limitation”.
9. *Fourthly*, the Appellant contended that the regulation, if it were not read as containing a “temporal limitation”, would lead to absurd results. The absurdity was said to arise because the Minister might cancel on the basis of charges which existed decades earlier, even if the person had been acquitted. However, equally absurd results could flow if the regulation were to be read as containing the contended temporal limitation. The Minister might grant a Bridging E visa only to learn the next day that the visa holder had, unbeknownst to the Minister, been charged a week earlier with a series of serious offences.
10. In support of his submission that the regulation allowed for absurd results, the Appellant relied upon *BGM16 v Minister for Immigration and Border Protection* [2017] FCAFC 72; 252 FCR 97 (‘*BGM16*’). In that case, the Full Court held that s 91WA(1)(a) of the Act applies only if a bogus document is provided as part of, or in connection with, an application for a protection visa: at [8] (Siopis J); [14], [105] (Mortimer and Wigney JJ).
11. Section 91WA(1)(a) provided:

The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a)  the applicant provides a bogus document as evidence of the applicant’s identity, nationality or citizenship; …

1. The Minister had submitted that the scope of the provision was unconstrained by any temporal or circumstantial limits: at [46]. The Full Court rejected that submission, noting at [47]:

If the Minister’s construction is accepted, a person who has “provided” a bogus document to enter a nightclub 20 years ago in a third country would be within this provision.

1. The Full Court considered the ordinary meaning was tolerably clear once the purpose and context of the provision were considered together with the text: at [44].
2. *BGM16* does not provide any real assistance to resolution of the correct construction of reg 2.43(1)(p)(ii) beyond the uncontroversial proposition that the regulation must be construed in its statutory setting.

## Ground 2

1. The Appellant submitted that if, as we would hold, the power to cancel the Bridging E visa was enlivened, then the Tribunal’s exercise of discretion was legally unreasonable and its findings were neither rational nor logical. The first aspect of the submission concerned the Tribunal’s approach to the question of risk posed by the Appellant to the community. In the Appellant’s submission this required the Tribunal to turn its mind to the actual risk the Appellant posed to the community. Whilst it was true that the Appellant had been charged with serious offences, the charges could not in themselves demonstrate that he was a risk to the community. Furthermore, the Appellant had been successful in obtaining bail from the Supreme Court of New South Wales so that the same Court which had examined the risk the Appellant posed to the community had also determined that he should be free on bail. This was more so where there was no evidence that he had failed to comply with his bail conditions. All of these considerations were said to be material because the Tribunal did not link its conclusions about the risk the Appellant posed to the community to any actual evidence.
2. The Tribunal began its treatment of this issue in a passage at [39] in its reasons:

Submissions were made regarding the applicant’s strict bail conditions that he so far complied with and the fact that he has the personal and financial support of a large number of witnesses. The Tribunal places some weight on the applicant’s evidence in that regard but also finds the strict bail conditions indicate the seriousness of the charges against him. The Tribunal has considered the evidence presented in the applicant’s case including his particular circumstances, the seriousness of the charges against him and the risk to the Australian community in making a decision.

1. It then went on to consider some other aspects of the matter before returning at [47] to observe that it was “satisfied the applicant is a possible risk to [the] Australian community and in weighing all the circumstances concludes that the visa should be cancelled”.
2. The Appellant invoked both irrationality and unreasonableness as grounds of review. To discern illogicality (or irrationality) one must demonstrate that there is only one conclusion open on the evidence or that there is no logical connection between the evidence and the inferences drawn: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 at 649 at [135] per Crennan and Bell JJ; *Gupta v Minister for Immigration and Border Protection* [2017] FCAFC 172; 255 FCR 486 (‘*Gupta*’) at [34] per Gilmour and Mortimer JJ; *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; 258 FCR 175 at [30] per Kenny, Kerr and Perry JJ. As to unreasonableness, this may appear in the decision-making process or merely from the outcome and one may ask whether the decision lacks an evident or intelligible justification: *Gupta* at [36] per Gilmour and Mortimer JJ; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at [8] and [21] per Allsop CJ.
3. The Appellant must therefore show as part of his rationality challenge that the Tribunal’s conclusion that he posed a risk to the community was not open on the evidence or that the conclusion was not logically connected to the evidence. As to unreasonableness, the Appellant needed to show that the conclusion that the exercise of power lacked an evident or intelligible basis.
4. It is necessary then to note the material which was before the Tribunal and to which it referred. This included a document entitled “Criminal History – Bail Report” which had been generated by the New South Wales Police Force. It revealed that the Appellant had been charged with multiple counts of the offence of having sexual intercourse without consent and multiple counts of the offence of assault with an act of indecency. The offences were alleged to have occurred over a long period of time. He had ultimately succeeded in obtaining bail from the Supreme Court but severe conditions were imposed upon him. These included that he was not allowed to practise medicine, to go within 200 metres of Camden Health Care Centre, to be in the company of any woman apart from his wife or to reside anywhere other than at his home. Furthermore, he was subject to strict curfew which prevented his being outside his home between 8 pm and 8 am unless in the company of his wife or son. He was also required to surrender his passport.
5. It is an intelligible process of reasoning to conclude from these bail conditions that he posed a risk to the community because they would not have been imposed otherwise. It is true that there is also logic in the Appellant’s submission that the bail conditions demonstrated that he was not a risk to the community. On this view, whatever risk he posed was neutralised by the bail conditions with the consequence that, contrary to the views of the Tribunal, the bail conditions proved he was no risk to the community, especially where it was shown that he had not breached them.
6. The difficulty for the Appellant is that whilst this latter view is certainly open, so is the former. It was not, therefore, irrational for the Tribunal to reason as it did. The Appellant’s submission that the Tribunal did not relate the evidence to its findings cannot be sustained. It explicitly referred to the bail conditions.
7. Largely for the same reasons, the argument that the Tribunal’s decision was legally unreasonable must fail too.
8. The primary judge dealt with the argument in these terms:

I do not accept the submissions advanced that the Tribunal failed to properly identify the nature of the risk. The submission that it was not reasonable to make a finding in relation to there being such a risk is without substance. The applicant had been the subject of serious charges with strict bail conditions identified by the Tribunal which was taken into account by the Tribunal in its reasons. The Tribunal’s reasons in respect of the nature of the risk bring to the Australian community were not irrational, illogical or otherwise unreasonable. Ground 2(a) fails to make out any jurisdictional error.

1. The Appellant contended that these reasons were not adequate in the sense that the primary judge had not disclosed his train of reasoning. It is not necessary to resolve that question. Even if the reasons were inadequate in the requisite sense his Honour was correct to reject the argument for the reasons just given.
2. The Appellant’s next submission focussed on [43] of the Tribunal’s reasons which was as follows:

The Tribunal has taken into account the evidence provided by the witnesses who attended the Tribunal hearing and gave statutory declarations in support of the applicant. The Tribunal accepts the witnesses are long term friends and colleagues who hold the applicant in high regard professionally and personally. The Tribunal is only able to give these witness statements limited weight in favour of the applicant because all the witnesses were of the same gender and similar age and background to the applicant and for this reason, they would not have been able to comment on relevant aspects of his character. The Tribunal also considered and gave some weight in the applicant’s favour to the character references from Hon Matthew Robson dated 2 May and 24 July 2017.

1. The Appellant called four witnesses at the hearing before the Tribunal. These were Dr Shamsuddin, Dr Islam, Mr Ali and Dr Ahmad. The three doctors had each studied medicine with the Appellant in the 1970s. Mr Ali, on the other hand, whilst not a doctor, had been a friend of the Appellant’s for 15 years. All four witnesses had a very high opinion of the Appellant. The Appellant also relied upon a written character reference of the Honourable Matthew Robson. Mr Robson was a member of the New Zealand Parliament and a Minister of the Crown.
2. The Appellant submitted that the Tribunal had dismissed the evidence of the four witnesses on the basis of their ethnicity. It had accepted Mr Robson’s evidence but not theirs and there was no other obvious distinction between them.
3. This is a serious allegation to make. However, it is not based on a fair reading of [43]. Rather, what the Tribunal was saying was that because of their backgrounds they would not really have known very much about the Appellant’s sexual proclivities. Whether one agrees with that as a style of reasoning may be a different issue. But it is not fair to describe the Tribunal as having approached the matter on the basis of their ethnicity. That is not what [43] is about.
4. The primary judge reasoned this way at [22]:

In relation to ground 2(b), Ms Graycar submitted that the reasons of the Tribunal in referring to the applicant’s gender, age and background had a potential racist overtone. No such overtone on a fair reading arises in the Tribunal’s reasons. The Tribunal was referring to the witnesses’ background as being longterm friends and colleagues. It was open to the Tribunal in the context of its reasons to take into account what weight should be given to those witnesses’ comments as to character in circumstances of being longterm friends and colleagues.

1. For the reasons just given his Honour was correct to reject the submissions based on ethnicity. The Appellant also submitted that his Honour had erred in concluding that the Tribunal was referring to the witnesses’ background as long-term friends and colleagues of his. The Tribunal set out the evidence of the four witnesses in detail at [19]-[25]. When seeking to understand what the Tribunal meant by the word ‘background’ one needs to be aware of that evidence. To read those paragraphs is to see that the Tribunal was referring, at least in the case of the doctors, to the fact that they had all gone to medical school together and had kept in touch over the long arc of the whole of their professional careers. Mr Ali was not a doctor but he had known the Appellant for 15 years and used to live at a flat at the same address. They had socialised together in consequence.
2. We do not think, given that evidence, that the Tribunal could have meant by the word ‘background’ anything more than they had been long-term friends and colleagues. The primary judge was correct to reason as he did.

## Ground 3

1. At paragraph [41] of the Tribunal’s reasons it said:

[t]he Tribunal agrees the Department relied on the Appellant’s criminal charges in cancelling his Bridging E visa but as already stated, the Tribunal considers the relevant provisions are clear and *cancellation of a visa is appropriate once a person has been charged with an offence*. In this case, against a law of the State of New South Wales.

(emphasis added).

1. This is not a correct statement. In making its decision the Tribunal was obliged to apply any relevant Ministerial direction: s 499(2A). Relevant to the cancellation of bridging visas is Direction No 63 which sets out certain primary and secondary considerations in the process of making a decision to cancel. One of the primary considerations is:

… the Government’s view that the prescribed grounds for cancellation at r.2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance should be considered for cancellation.

1. This did not require the Tribunal to conclude that the visa should be cancelled once a person has been charged. However, although the sentence at [41] does contain an incorrect statement of what Direction 63 required it is apparent that, in substance, it made no such mistake. Indeed, if it had held that view it is very difficult to understand why it bothered analysing the evidence or entering upon the process of weighing the conflicting discretionary considerations all of which would have been quite unnecessary on this view. Furthermore, the Tribunal accurately set out the statutory scheme in ways which are not suggested to be in error. The final conclusion of the Tribunal at [47] is set out above. It is expressed to be the result of ‘weighing all the circumstances’. Read as a whole, and not with an eye keenly attuned to the perception of error (*Minister for Immigration and Border Protection v Tran* [2015] FCA 546; 232 FCR 540 at [24] per Jagot J; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 per Neaves, French and Cooper JJ), it is therefore clear that the Tribunal did not make this mistake. The primary judge was correct so to conclude.

# CONCLUSION

1. The appeal should be dismissed with costs.

|  |
| --- |
| I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Perram, Farrell and Thawley. |

Associate:

Dated: 27 February 2019