FEDERAL COURT OF AUSTRALIA

Benrabah v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 4

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| Appeal from: | *Benrabah v Minister for Home Affairs* [2019] FCA 521  |
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| File number: |  |
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| Judges: | **GLEESON, LEE AND WHEELAHAN JJ** |
|  |  |
| Date of judgment: | 7 February 2020 |
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| Catchwords: | **MIGRATION** – appeal from Federal Court of Australia – where primary judge upheld Tribunal decision not to revoke mandatory cancellation of the appellant’s visa under s 501 of *Migration Act 1958* (Cth) – whether Tribunal incorrectly applied Ministerial Direction 65 – whether Tribunal took irrelevant fact into account when considering the appellant’s ties to Australia – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 499, 501(3A), 501CA(4)*Ministerial Direction No. 65 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (Cth)  |
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| Date of hearing: | 21 November 2019 |
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| Registry: |  |
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ORDERS

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|  | VID 469 of 2019 |
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| BETWEEN: | BRAHIM BENRABAHAppellant |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRSFirst RespondentADMINISTRATIVE APPEALS TRIBUNALSecond Respondent |

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| JUDGES: | GLEESON, LEE AND WHEELAHAN JJ |
| DATE OF ORDER: | 7 February 2020 |

THE COURT ORDERS THAT:

1. The name of the first respondent be amended to “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.
2. The appeal be dismissed.
3. The appellant pay the first respondent’s costs of the appeal.

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 appeals from the dismissal of his application for judicial review of a decision of the Administrative Appeals Tribunal (**Tribunal**), which affirmed the decision of a delegate of the Minister for Immigration and Border Protection (**delegate**) not to revoke the cancellation of the appellant’s Class AZ Subclass 866 Protection visa under s 501(3A) of the *Migration Act 1958* (Cth) (**Act**): *Benrabah v Minister for Home Affairs* [2019] FCA 521.
2. The appellant contends that the primary judge incorrectly failed to find that the Tribunal had made the following jurisdictional errors:
3. Failure to take account of relevant considerations.
4. Error in interpreting or applying the law.
5. Error in taking account of an irrelevant consideration.

# Background facts

1. The appellant, an Algerian citizen, arrived in Australia in 1997 at the age of 29.
2. In 1999, the appellant commenced a relationship with an Australian citizen who continued to be the appellant’s partner at least until the time of the Tribunal’s decision. The appellant and his partner have one child, born in 2000. At the time of the Tribunal’s decision in February 2018, this child was 17 years old.
3. The appellant commenced paid employment in Australia in 1999. In 2001, he suffered a back injury while at work. In 2002, the appellant was granted a disability support pension because he could no longer work as a result of the injury.
4. Also in around 2002, the appellant commenced using drugs and became addicted to “ice”. Thereafter, over a lengthy period, the appellant was convicted of over 60 offences of varying degrees of seriousness. The primary judge found that the appellant carried out a large number of crimes commencing in 2003 for a period of around 13 years. His Honour noted the appellant’s contention that his crimes were committed for the purpose of funding the appellant’s drug habit.
5. In February 2016, the appellant’s visa was cancelled. The appellant accepts that the visa was subject to mandatory cancellation under s 501(3A) of the Act because of the combination of the sentences of imprisonment imposed on the appellant and the fact that, at the time the decision was made, the appellant was in prison.
6. In November 2017, the delegate declined to exercise the power under s 501CA(4)(b)(ii) of the Act to revoke the visa cancellation.
7. The appellant applied to the Tribunal to review the delegate’s decision. According to the Tribunal, the appellant requested revocation of his visa cancellation “principally on the ground of the harmful breakup of his family”.
8. In February 2018, the Tribunal affirmed the delegate’s decision. The appellant accepts that the Tribunal was required to conclude that the appellant failed the “character test” and then apply the Minister’s Direction No. 65 (**Direction**) under s 499 of the Act to the exercise of the Tribunal’s discretion whether to revoke the visa cancellation.

# Legal Framework

1. Section 501CA(4) provides:

(1) This section applies if the Minister makes a decision (the original decision) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.

…

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

1. At the time of the Tribunal’s decision, the Direction sets out the following relevant “General Guidance” (cl 6.2):

(1) The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The principles below are of critical importance in furthering that objective, and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable.

…

(3) The principles provide a framework within which decision-makers should approach their task of deciding … whether to revoke a mandatory cancellation under section 501CA. The … factors that must be considered in making a revocation decision are identified in Part C of this Direction.

1. Clause 6.3 of the Direction sets out the principles referred to in cl 6.2. Of potential relevance to this appeal, principle (5) is as follows:

Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.

1. Clause 8 of the Direction explains how decision-makers are required to take the relevant considerations into account. In particular, cl 8(4) provides: “Primary considerations should generally be given greater weight than the other considerations.”
2. Clause 13 of the Direction sets out matters concerning the “primary considerations” in deciding whether to revoke the mandatory cancellation of a non-citizen’s visa.
3. Clause 14 of the Direction sets out matters concerning “other considerations” in making such a decision.

# Alleged failure to take into account relevant considerations

## Unpremeditated aspects of appellant’s offending

1. Clause 13.1 of the Direction identifies the protection of the Australian community from criminal or other serious conduct as a “primary” consideration.
2. Clause 13.1(2) provides that that when considering this matter, decision-makers should also give consideration to, relevantly, “the nature and seriousness of the non-citizen’s conduct to date”.
3. This aspect of the appeal concerns the appellant’s convictions involving:
4. aggravated burglary, by reason of a person being present; and
5. assault with a weapon.
6. The Tribunal found that these were the “more serious” offences for which the appellant had been convicted.
7. As to the aggravated burglary, the Tribunal found that, in sentencing the appellant, the magistrate noted that a 90 year old woman had discovered him in her home during the burglary and that the magistrate reduced the sentence on the appellant’s guilty plea because, in part, the woman would be spared having to attend the trial and be cross-examined.
8. The Tribunal recorded that the appellant denied committing this offence, and associated offences, despite his plea of guilty. The Tribunal found that denial to be untruthful and that the relevant offending was serious because it was a crime committed against a vulnerable member of the community, who was vulnerable because she was elderly.
9. As to the assault with a weapon, the Tribunal recorded the following:

59. The sentencing remarks state that the offence involved the Applicant entering into a house through the rear unlocked glass sliding-door of the house. The house was unoccupied at the time. While in the house, the Applicant took a number of personal items. As he left the house he was observed by the victim who was arriving home and who then chased the Applicant along the street. When the victim caught up with the Applicant, the Applicant turned around and confronted him while holding a screwdriver and a Stanley knife in a threatening manner. The Applicant told the victim to get back and the victim did. Ultimately, the Applicant was caught three hours later in possession of an item that was taken during the burglary.

1. The Tribunal recorded that the appellant denied committing this and other associated offences. In summary, the Tribunal rejected the appellant’s denial and found that the relevant offence was a serious offence.
2. Before the primary judge, the appellant contended that the Tribunal failed to consider the unpremeditated and accidental or careless aspects of these two offences. His Honour dealt with this contention as follows:

[25] With respect, that submission is rejected. The Tribunal correctly understood that it could not question the propriety of the applicant’s convictions, but that it could examine the circumstances of each offence to assess their seriousness. The Tribunal was aware of the facts concerning each offence here, including those facts now described as “unpremeditated and accidental or careless”. In my view, having regard to those facts, it was open to the Tribunal to characterise each offence as serious. That was a matter for it to judge. What is now said not to have been considered is not the primary facts but the applicant’s own characterisation of these facts. That was not a matter raised below.

1. On the appeal, the appellant contended that the requirement to consider the nature and seriousness of the appellant’s conduct obliged the Tribunal to consider the following particular features of the offences:
2. there was nothing to suggest that the appellant knew or intended or was reckless as to the circumstances by which his burglary was aggravated, that is, that the elderly woman would find him; and
3. as indicated by the circumstance of the appellant turning around when chased by the victim of his burglary, the aggravating features of that crime were not premeditated.
4. The appellant has not demonstrated that the primary judge erred in rejecting the appellant’s contention on this point. As the primary judge correctly observed, the Tribunal plainly considered the nature and seriousness of the appellant’s conduct in relation to these two offences (referred to by his Honour as the “primary facts”) as revealed by the passages of its decision record identified above. The appellant’s argument is directed to the Tribunal’s factual assessment of the nature and seriousness of the two offences which, in any event, was not inconsistent with the features identified by the appellant.

## Appellant’s conduct in prison

1. By cl 13.1.2(2)(b) of the Direction, in weighing the primary consideration of protection of the Australian community, the Tribunal was obliged to consider “the likelihood of the non-citizen engaging in further criminal or other serious conduct”.
2. The Tribunal found, relevantly (citations omitted):

68. … The Applicant’s systematic denial of the majority of the offending that was put to him indicates a disregard for the law and the criminal justice system and importantly, evidences a lack of insight into his offending, which negatively impacts upon his prospects of rehabilitation and of not committing further offences in future. This is considered further below.

…

78. **Likelihood of re-offending:** …

…

95. Overall, I find that there is little likelihood of the Applicant not re-offending. Put another way, I find that it is more likely than not that the Applicant will re-offend if released from detention into the Australian community, and accordingly he poses an unacceptable risk of harm to individuals, groups or institutions in the Australian community.

96. I have taken into account the evidence from the Applicant and his wife that tends to support him, the evidence of his educational courses, which weigh in favour of the Applicant. Similarly, I have taken into account the absence of any other evidence of reform and most importantly, the Applicant’s decades long history of offending, which has involved on many occasions a second chance in the form of suspended sentences or similar orders, chances that the Applicant has not embraced on many occasions. I find that his repeated breaches of those second chances point to the fact that the Applicant has not been deterred from re-offending. The Applicant’s failure to provide any meaningful evidence of steps to address his drug problem further support a finding that he is more likely than not to re-offend.

97. In *Lam* … the Tribunal found that the extent of time of law-abiding behaviour may be relevant to the [A]pplicant’s rehabilitation.In the case of the Applicant, and of his 21 years in Australia; the first five years were law-abiding while during the following period, a period of some 16 years, he committed a large number of offences and committed them frequently and regularly.

…

Expectations of the Australian community

…

115. I have taken into account the very large number of offences that the Applicant has committed over many years and the fact that, having been granted a protection visa, the Applicant has spent the vast majority of his time in Australia as a non-productive member of the community habitually committing offences. I also take into account that the majority of those offences are at the lower level of serious offences that for the most part have not involved any offence against the person. I find that the primary consideration of the expectations of the Australian community weighs against revocation of the Applicant’s visa cancellation. The amount of offences and the length of time of offending weigh heavily against the Applicant and this is only partially ameliorated by the types of offences but also taking into account the three serious offences considered above.

1. Before the primary judge, the appellant argued that the Tribunal erred in determining the risk of re‑offending by not taking into account the fact that the appellant had committed no offences whilst in gaol.
2. At [26] of his Honour’s reasons, the primary judge noted that the appellant’s argument was based on the Tribunal’s failure to include the time spent in prison in observing that of the appellant’s 21 years in Australia, only the first five were law-abiding; and that the appellant was also law-abiding whilst in gaol.
3. The primary judge then rejected the appellant’s argument, at [27], as follows:

Having regard to the contents of the applicant’s “National Police Certificate”, which was before the Tribunal, it may reasonably be inferred that the Tribunal was aware that he had not committed any offences whilst in gaol. The Tribunal gave careful attention to each offence. In that respect, it was also aware of an extant charge of riot arising from an incident which had taken place in 2015 at the Metropolitan Remand Centre, which the Minister did not rely upon. Once again, the Tribunal was not obliged expressly to address the fact that the applicant had not offended in prison, nor was it obliged to expressly refer to the time spent in prison. In each case, I infer that the Tribunal did not consider these matters to be material when taken with the other facts and circumstances. In my view, and with respect, it was open to the Tribunal so to find.

1. On the appeal, the appellant argued that his time in Australia is properly classified into three periods, being the five year law-abiding period prior to his first conviction; his periods of offending; and his periods of incarceration during which no offences were committed (as thus, were also law-abiding). The appellant argued that, in the light of the appellant’s vigorous submissions that he was reformed, it was incumbent on the Tribunal, if it was going to divide his time in Australia in the way that it did, to do so accurately.
2. The appellant did not identify any particular error in the primary judge’s reasoning set out at [32] above. We do not detect any error. The appellant’s argument takes issue with the Tribunal’s fact finding, which involved an assessment of the appellant’s offending history for the purpose of making findings about his likelihood of reoffending (and, relevantly in this case, the appellant’s rehabilitation prospects) and the expectations of the Australian community. If the Tribunal made an error concerning the duration of the appellant’s law-abiding behaviour, that was an error of fact. In circumstances where the Tribunal was seeking to identify a period of law-abiding behaviour for the purpose of assessing the appellant’s rehabilitation prospects, it was open to the Tribunal to identify only the period prior to the commencement of the appellant’s offending.
3. In our view, the primary judge was correct to reject the appellant’s argument for the reasons given by his Honour.

## Circumstances of appellant’s “non-productive” time in Australia

1. By cl 14.2(1)(a)(ii) of the Direction, the Tribunal was obliged to consider time spent by the appellant in contributing positively to the Australian community. Specifically, cl 14.2(1)(a)(ii) provided:

(1) The strength, nature and duration of ties to Australia. Reflecting the principles at 6.3, decision-makers must have regard to:

a. How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that;

…

ii. More weight should be given to time the non-citizen has spent contributing positively to the Australian community.

1. The reference to the principles at cl 6.3 appears to relate, relevantly, to cl 6.3(5) set out above.
2. At para 133 of its decision record, in addressing the appellant’s “strength, nature and duration of ties to Australia”, the Tribunal said:

The Applicant has resided in Australia for 21 years. He arrived in Australia at the age of 29. The Applicant did not commence offending soon after arriving in Australia. However, when regard is had to the comparatively small amount of time that the Applicant has contributed to the Australian community, at least by way of paid employment, that is three years from those 21 years, the length of his being in Australia against his limited contribution to the Australian community tend to cancel each other out.

1. Before the primary judge, the appellant argued that the Tribunal erred in failing to consider that the “non-productive” aspect of his time in Australia was not his fault, but the result of injury, shown by his having worked, and not offended, before the injury.
2. At [29], the primary judge rejected this argument, giving the following reasons:

… First, the Tribunal was entirely aware that the applicant had been injured at work and was on a disability pension. Secondly, Direction 65 required the Tribunal at cl 14.2(1)(a)(ii) to give “more weight” to the “time the non-citizen has spent contributing positively to the Australian community”. At [133], the Tribunal accurately observed that here that time was only three years. This was then weighed against the applicant’s overall time spent in Australia. In my view, the Tribunal did not err in not referring in that paragraph to the reason why the applicant ceased paid employment. It was aware of that fact, but did not need to consider it when addressing an application of cl 14.2(1)(a)(ii).

1. The appellant submitted that the will to be productive, and the reason for not working, was relevant. Put another way, the appellant contended that the Tribunal erred in failing to have regard to the fact that his not working was a matter of inability. The appellant referred to cl 14(1) of the Direction, which states:

In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):

1. International non-refoulement obligations;
2. Strength, nature and duration of ties;
3. Impact on Australian business interests;
4. Impact on victims;
5. Extent of impediments if removed.
6. The appellant argued that, as a matter of construction of cl 14(1), the Tribunal was required to take into account other considerations that are relevant. According to the appellant, if it is relevant to consider how long a person has spent making a positive contribution, it must be relevant why he did not make a positive contribution to the Australian community through work.
7. For the reasons given by the primary judge, his Honour was correct to conclude that there was no relevant error by the Tribunal. The Tribunal did not make any finding that the appellant was a malingerer. To the contrary, at para 5 of its decision record, the Tribunal found that, in around 2001, the appellant suffered a workplace injury as a result of which he could no longer work, with the consequence that he was granted a disability support pension.
8. Clause 14.1(2)(a)(ii) did not require the Tribunal to consider either the appellant’s will to be productive or the reasons why the appellant had not worked following his injury.
9. Accepting that cl 14(1) requires the Tribunal to take into account matters of relevance to whether to revoke the mandatory cancellation of a visa, apart from those specified in cl 14(1), we do not accept that the reasons for a lack of contribution to the Australian community are such a relevant consideration. The mere fact that the Direction identifies positive contributions as a matter in favour of a non-citizen, does not imply that reasons for any lack of contribution are relevant, particularly when regard is had to the absence of any support for that proposition in the “General Guidance” the “Principles” set out in cll 6.2 and 6.3 of the Direction.

## Impediments the appellant may face if removed from Australia

1. Clause 14.5 of the Direction required the Tribunal to take into account:

(1) The extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

a. The non-citizen’s age and health;

b. whether there are substantial language or cultural barriers; and

c. any social, medical and/or economic support available to them in that country.

### Appellant’s medical conditions

1. Under the heading “International non-refoulement obligations”, the Tribunal stated (at para 129 of its decision record):

In a form provided by North East Valley Division of General Practice, dated 8 January 2014, in relation to a mental health care plan it is noted that the Applicant suffers from post-traumatic stress disorder, depression and anxiety.

1. Under the heading “Extent of impediments if removed”, the Tribunal stated (at para 144 of its decision record):

The Applicant gave evidence orally that he would struggle to find work in Algeria as his brother had told him that work was scarce. The Applicant did not raise the issue of his work injury and his incapacity to work and there was no evidence of the existence or otherwise of any form of disability support payments system in Algeria. Otherwise, the Applicant’s age and his medical conditions present no particular or specifically relevant impediment to the Applicant establishing himself in Algeria. Similarly, there was no independent evidence that the Applicant would face any specific difficulties in finding work in Algeria; these are difficulties that apply to any person seeking work in Algeria. When taking into account the close family the Applicant has in Algeria against the difficulties he may face in establishing himself and maintaining basic living standards, I find that this consideration neither weighs against or for the Applicant.

1. Before the primary judge, the appellant contended that the Tribunal failed to consider the evidence (which it apparently accepted, based on para 129 of the decision record) that he suffers from “post-traumatic stress disorder, depression and anxiety”.
2. At [31] of his Honour’s reasons, the primary judge concluded:

On balance, I am satisfied that the express reference in that paragraph to the applicant’s “medical conditions”, together with the reference to the applicant’s “post-traumatic stress disorder, depression and anxiety” at [129], support a finding that the Tribunal did take into account his mental illness.

1. The appellant submitted that the primary judge erred in his Honour’s construction of the Tribunal’s decision.
2. As the primary judge concluded, the reference to the appellant’s “medical conditions” indicates that the Tribunal took into account the appellant’s mental illnesses in the context of considering the issue raised by cl 14.5(1)(a) because these were the only identified medical conditions affecting the appellant apart from his back injury (noting that the Tribunal recorded that the appellant’s evidence was that he was “reformed from his life of crime and drugs”). The appellant did not suggest that the Tribunal has failed to identify any particular impediment that the appellant would face if removed to Algeria by reason of his mental illnesses.

### Appellant’s work prospects

1. The issue of whether the Tribunal had addressed the appellant’s back injury as a relevant impediment was raised by the primary judge. His Honour’s consideration of this issue was as follows (at [32]-[34] of his Honour’s reasons):

[32] I was … troubled by the statement in [144] that there was no independent evidence that the applicant would face “any specific difficulties in finding work in Algeria”. On the facts, the applicant has been unable to work since 2001. He had a “special” difficulty, namely the injury to his back. I asked the parties for further submissions on this point.

[33] The applicant submitted that the fact that he did not “raise the issue of his work injury and his incapacity to work” did not absolve the Tribunal from considering his injury. He was, after all, not legally represented. I generally agree with that submission. The Tribunal is under a duty to consider the material issues which arise from its consideration of the evidence regardless of whether it is the subject of submissions by the parties; *AYY17 v Minister for Immigration and Border Protection* [2018] FCAFC 89 at [18]; *Hong v Minister for Immigration and Border Protection* [2019] FCAFC 55 at [66], [69].

[34] However, it would appear that the Tribunal did raise the issue of employment with the applicant. The answer given by him was that whilst it would not be easy, he agreed that it would be possible to work. The Tribunal addressed this answer when it said at [144] that the applicant did not raise the issue of his work injury and his incapacity to work. Perhaps the Tribunal could have expressed its reasons more clearly and have set out in a more fulsome way the applicant’s evidence. It did not do so. But it was not obliged to record every aspect of its reasoning process; [*Minister for Home Affairs v Buadromo* [2018] FCAFC 151; (2018) 362 ALR 48] at [48]. Nor did the Tribunal fail to make an inquiry and consider the applicant’s prospects of employment in Algeria. Its findings followed from the applicant’s own answers.

1. On the appeal, the appellant submitted that [34] of the primary judge’s reasons involved error, in that his Honour did not identify the Tribunal’s failure to recognise the appellant’s back injury as “potentially a very grave impediment” to the appellant resettling in Algeria.
2. The appellant also contended that the primary judge had misstated the effect of his evidence concerning whether it would be possible for him to work in Algeria. The relevant passage of the appellant’s evidence to the Tribunal is as follows:

But what do you know, if anything, about the job opportunities in Algeria?---There is no jobs.

How do you know that?---Because I speak to my brother.

Beg your pardon?---I do speak to my brother on the phone. There is no jobs.

And your brother is based where?---Algeria.

Where in Algeria? Where is he in Algeria?---In my town, (Indistinct). In, like, East Algeria, like.

So it’s not actually in one of the big cities?---No, no, no.

The big cities are probably where most of the job opportunities are, is that right?---Yes.

So it would be possible for you to try and get yourself a job in one of those big cities?---Not - not easy.

Not easy. I don’t suggest it’s easy, but it is possible?---Yes.

1. Later, the appellant gave the following evidence:

You still say that you’re afraid to go back to Algeria because of the past events that you witnessed?---No, I say I don’t want to go back to Algeria because my family are here. That’s the main thing.

1. In our view, the primary judge’s paraphrase of the appellant’s evidence was accurate. It was implicit in the appellant’s evidence that any job he might possibly get would be a job that he was capable of doing.
2. Otherwise, the appellant did not take issue with any particular proposition in [34] of the primary judge’s reasons.
3. At para 144 of the decision record (set out at [48] above), the Tribunal turned its mind to the appellant’s work prospects, including by reference to his back injury, among other matters. The Tribunal noted the appellant’s evidence that he would struggle to find work as his brother had told him that work was scarce. This evidence implied that his incapacity may not preclude the appellant from finding work. The Tribunal further turned its mind to the extent of the relevant impediments by noting that the appellant did not raise the issue of his back injury and his incapacity to work, and that there was no evidence of any disability support payments system in Algeria.
4. By the word “Otherwise”, the Tribunal acknowledged that the appellant’s age and medical conditions, and the possible absence of a disability support payments system, may present impediments to the appellant establishing himself in Algeria but found that these were the only particulars or specific relevant impediments arising out of the appellant’s age and health. This implicit finding is reinforced by the Tribunal’s conclusion that the appellant may face difficulties in establishing himself and maintaining basic living standards in Algeria, although the Tribunal found that those difficulties were balanced against the appellant’s close family ties in the country.
5. In our view, the Tribunal’s reasons demonstrate that it gave consideration to the matters identified in cl 14.5(1)(a) and, in doing so, took into account the appellant’s back injury.
6. In those circumstances, the appellant has not identified any relevant error.

## Relationship between appellant and his daughter (appellant’s ties to Australia)

1. Clause 14.2(1)(b) of the Direction requires the Tribunal to have regard to:

The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of non-revocation on the non-citizen’s immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely).

1. The Tribunal’s findings about the relationship between the appellant and his daughter are set out in the course of the Tribunal’s consideration of the best interests of the daughter, who was a minor at the time off the Tribunal’s decision. Those findings are as follows:

101. The Applicant’s daughter gave evidence that she will be dramatically affected if her father were to be removed to Algeria. She presented as an articulate, intelligent and thoughtful young woman. She stated that the Applicant has been an extremely good father despite his periods of incarceration. She stated that her family would be devastated if her father were deported.

102. In a letter, dated 6 March 2016, the Applicant’s daughter states “[i]f my dad were to be deported it would emotionally break my family.”

103. She also provides a statement, dated 15 January 2018, noting the great emphasis on familial bonds in her family. She also states that losing her father by deportation would put her into further depression over and above what she has suffered while he has been in prison and immigration detention. She notes that at the end of 2017, her grades dropped considerably because of the constant stress and concerns about what would happen to her father. She states that even though she turns 18 in July that the stress, worries and depression do not end when she turns 18. She also notes that she is completing her VCE year 12 this year and that if her father were deported she might not have the strength or energy to be able to complete her studies as she might not be able to join him or if she does she will have to move to a country where she is not fluent in the language and leave the Australian schooling system at a time when she is so close to graduating.

104. The Applicant gave evidence of the strong bond in his family. He was distressed when speaking of the effect of deportation on his daughter. He said that his main focus and object in life was to provide for his daughter and to be there for her. He gave evidence that should he be deported, his daughter would live in Algeria with him and his wife. When pressed as to whether he would remove his daughter from Australia even if she gained entry into an Australian university, he stated that this would not change his decision as she would have to join him and his wife because there was no one to care for her in Australia.

105. The Applicant’s wife was similarly emotional when giving evidence of the effect deportation would have on her daughter. She stated that her daughter had suffered significantly due to his periods of being incarcerat[ed] and the fear of his deportation. Similarly, to the Applicant she gave evidence that their daughter would join them in Algeria if he is deported.

106. In a letter from the daughter’s high school from the student well-being coordinator, dated 4 March 2016, the author notes that she self-referred to a counselling service in March 2016 and that during sessions she has described feeling incredibly stressed and anxious about her father being deported to Algeria. She has also spoken about her fears regarding her father’s safety if he were to return to Algeria.

107. In a letter, dated 12 February 2018, the year 11 coordinator at the daughter’s high school states that throughout her secondary schooling she has been a lovely student and well regarded by her peers and staff alike. The author states that she is a mature and dedicated student who has managed to find a balance between studies and some difficult personal circumstances, including the stress of her father’s potential deportation.

108. I found the oral evidence of the Applicant, his wife and daughter to be compelling and consistent. They paint a picture of an extremely close-knit family. The Applicant is regarded with significant affection by his daughter notwithstanding his history of crime and incarceration. She stated that she knew little of his offending, which is a factor that tends to support the Applicant inasmuch as he has been able to shield his daughter from the details of his offending.

109. I find that revocation of the cancellation of the Applicant’s visa is in the best interests of the Applicant’s daughter. I attribute significant weight to the nature and duration of the relationship between the father and daughter as it is demonstrably significant and appears positive and typical, albeit in the attenuated circumstances of the Applicant. I find that the Applicant is likely to play a positive role in her future if his visa cancellation were revoked. However, this factor, as it concerns the interests of the daughter as a child, becomes almost neutral when considering that the daughter will turn 18 in a matter of months and that any future role in relation to her childhood is likely to be from custody as he is awaiting trial for a charge of riot.

110. I do not reduce weight due to the negative impact on the daughter of the Applicant’s prior conduct and any future criminal conduct, which I have found is more likely than not to occur. This is because the daughter has been successful in her studies, presents as articulate and intelligent and the father has provided, in her mind, the support to be expected from a father. I also accept that she has been shielded from some of the impact due to the intentional conduct of the Applicant in keeping her separate from his offending. The impact on the daughter of separation is likely to be significant. Despite the parents’ evidence, I do not believe that she will travel to Algeria because of her evidence which I consider below. As such, I consider that her ability to maintain contact will be seriously negatively affected.

111. I take into account that the Applicant’s wife has the responsibility for care of the daughter, which burden she has likely carried during periods when the Applicant has been incarcerated. I also take into account the daughter’s wishes that are of more significance due to her maturity.

112. The interests of the Applicant’s daughter is a significant consideration, which weighs strongly in favour of the Applicant. However, to that must be added as a significant countervailing factor that the daughter has only months until she turns 18. The strength of the consideration to be considered against the other considerations is of a lesser weight than it would otherwise have been should the daughter have had a substantial period remaining as a minor.

1. The Tribunal set out cl 14.2(1)(b) at para 132 of its decision record and then made the following relevant findings:

134. The strength, duration and nature of the Applicant’s family ties have been considered above. These ties weigh in favour of the Applicant.

135. The effect of non-revocation upon the Applicant’s daughter has been considered above. I take that into account and give it moderate weight under the primary consideration. The effect is also attributed weight, albeit a lesser weight, in relation to the period after she turns 18.

…

141. Taking into account the abovementioned factors, I find that the strength, nature and duration of ties weigh in favour of [revocation], this is largely due to the evidence of the Applicant’s wife and daughter.

1. In the Tribunal’s conclusions, the Tribunal added, relevantly:

150. I find that revocation is in the best interests of the Applicant’s daughter. I attribute significant weight to the nature and duration of the relationship between the father and daughter. However, this factor, as it concerns the interests of the daughter as a child, is of a lesser significance considering that the daughter will turn 18 in a matter of months.

…

152. I find that the strength, nature and duration of the Applicant’s ties to Australia weigh in favour of [revocation], largely due to the evidence of the Applicant’s wife and daughter. When taking into account the close family that the Applicant has in Algeria against the difficulties that he may face in establishing himself and maintaining basic living standards, I find that this consideration neither weighs against or for the Applicant.

1. The primary judge addressed this aspect of the Tribunal’s reasons as follows:

[35] Another concern I raised with the parties was the observation made at [135], for the purposes of considering the strength, nature and duration of the applicant’s ties with Australia, that the effect of deportation on the daughter was to be given “lesser weight” in relation to the “period after she turns 18”. Earlier, for the purposes of considering the best interests of a minor child, the Tribunal had observed at [109] that this factor was “almost neutral” because the daughter was about to turn 18. That finding was open to the Tribunal to make because Direction 65 limits a consideration of the best interests of a minor child to children younger than 18.

[36] My concern with [135] was that, in a different context (namely consideration of the strength, nature and duration of ties to Australia) the Tribunal appeared to be incorrectly importing the age limitation referred to above. In considering the strength, nature and duration of ties to Australia, adult children are not excluded. Nonetheless, the Tribunal gave “lesser weight” to the ties the daughter has with the applicant for the period after she turns 18.

[37] The effect of deportation on the applicant’s daughter is a very important issue. The two were found to be very close. Inferentially, the effect of deportation on her well-being should be just as significant, whether or not she just turned 18. I again called for further submissions from the parties.

[38] The Minister strongly disputed the foregoing proposition. He also disputed that there had been a wrongful importation of the exclusion of adult children into this factor. He submitted that [135] should be read as a finding made by the Tribunal that the effect of non-revocation on the daughter as an adult would be less than the effect of non-revocation on her as a child. This is because, it was said, as an adult she would possess greater capacity to cope with the effect of non-revocation: she could, for example, independently make arrangements to visit her father and communicate with him as necessary. The Minister submitted that it was open to the Tribunal to make that finding and to draw such a distinction between childhood and adulthood in assessing the impact of a decision not to revoke the cancellation of the visa.

[39] On balance, and after much hesitation, I agree that this is how [135] should be read. However, as a factual proposition, I strongly disagree with it. The distinction here between childhood and adulthood was not between, for example, a 10-year-old child and a 40-year-old woman; it was relatively, between someone who was 17 and who was about to turn 18. The Tribunal found at [110] that the impact on the daughter of separation was likely to be significant. In my view, that significance would not lessen upon her turning 18. It might lessen after a very significant period of years, if ever.

[39] Whilst this matter has troubled me significantly, I nonetheless accept that the Tribunal’s finding, which I strongly disagree with on the merits, was not an error of law. It was a finding open to it to make.

1. The appellant contended that, in considering the strength, duration and nature of the appellant’s family ties, the Tribunal did not consider the enduring, serious and important relationship between father and daughter, despite evidence that the relationship would be very likely to endure for as long as they both live. As the appellant’s counsel put it, the Tribunal “has not properly grasped the importance of that relationship”. The appellant contended that the primary judge erred to the extent that his Honour reached the contrary view.
2. The Tribunal made detailed findings concerning the father/daughter relationship. It is evident from its decision record that the Tribunal considered the father/daughter relationship in considering the strength, duration and nature of the appellant’s family ties to Australia: those ties concerned the appellant’s relationships with his wife and daughter. The Tribunal concluded that the strength, duration and nature of the father/daughter relationship was a matter that weighed in the appellant’s favour.
3. There is nothing in the Tribunal’s reasons to suggest that it did not consider the appellant’s ties to Australia in accordance with the findings that the Tribunal had previously made about the father/daughter relationship. In particular, the decision to attribute “lesser weight” to the effect of non-revocation upon the appellant’s daughter in relation to the period after she turns 18 does not reveal any failure to take into account a relevant consideration. The submission that the Tribunal “failed to engage” with the strength of the father/daughter relationship is, in substance, a complaint about the Tribunal’s fact finding.
4. Accordingly, the appellant has not identified any relevant error.

# Alleged error in interpreting or applying the law

1. The appellant contended that the Tribunal erred in interpreting or applying the law when it said that it gave “lesser weight” to the relationship between the appellant and his daughter because at the time of the Tribunal’s decision she was soon to turn 18 years old and therefore cease to be a child.
2. The appellant submitted that the appellant’s daughter’s attaining the age of majority and ceasing to be a child was not relevant to the weight to be attached to the father/daughter relationship in the consideration of the “strength, nature and duration” of the appellant’s ties to Australia.
3. The relevant passage of the Tribunal’s decision record is para 135, set out in full at [65] above.
4. In this passage, the Tribunal is addressing only one aspect of the relationship between father and daughter, that is, the effect of non-revocation of the cancellation decision on the appellant’s daughter. Particularly in the light of para 134, which states that the strength, duration and nature of the appellant’s family ties weigh in favour of the appellant, para 135 should not be read as a comprehensive statement of the weight attached by the Tribunal to the father/daughter relationship.
5. The primary judge addressed the question whether the Tribunal had erred by attributing different (“lesser”) weight to this aspect of the father/daughter relationship in the context of the two considerations to which it was relevant: the “primary” consideration of the “best interests of minor children in Australia” and the “other” consideration of the “strength, nature and duration” of the appellant’s ties to Australia.
6. His Honour concluded that it was open to the Tribunal to attribute lesser weight to the effect of non-revocation on the appellant’s daughter for the period after she turned 18, on the basis that it must entail an evaluation of factual matters such as the likely maturation of the daughter’s capacity to cope with the impact of non-revocation of the cancellation decision.
7. The question of the effect of non-revocation upon the appellant’s daughter is a factual one, and it was open to the Tribunal to accord it different weight in the contexts of the two considerations for which it was relevant. The different considerations raise different issues and operate over different periods of time. For the purposes of the “primary” consideration, the Tribunal was required to consider the best interests of the daughter as a minor. For the purposes of the “other” consideration, the Tribunal was entitled to take into account the effect on the daughter at any age for the broader purpose of considering the “strength, nature and duration” of the appellant’s family ties. In our view, the Tribunal’s attribution of different weight to the effect of non-revocation in those two different contexts does not reveal an error in interpreting or applying the relevant law.

# Alleged error of taking account of an irrelevant consideration

1. The appellant contended that the Tribunal erred in importing into its consideration the concept that after his daughter turned 18, the relationship between father and daughter should be given less weight.
2. As explained above, this is not a fair reading of the Tribunal’s decision. The issue to which the Tribunal gave “lesser weight” after the daughter turned 18 was the issue of the effect of non-revocation of the cancellation decision.
3. To the contrary of the appellant’s contention, the Tribunal plainly took into account the subsisting relationship between the appellant and his daughter as an aspect of the “strength, nature and duration” of the appellant’s ties with Australia which weighed in his favour.

# Conclusion

1. The appeal must be dismissed. Costs should follow the event.

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| I certify that the preceding eighty-two (82) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Gleeson, Lee and Wheelahan. |

Associate:

Dated: 7 February 2019