FEDERAL COURT OF AUSTRALIA

QSVS v Minister for Home Affairs [2018] FCAFC 124

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| Appeal from: | *QSVS v Minister for Home Affairs* [2018] FCA 524 |
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| File number: | NSD 731 of 2018 |
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| Judges: | **COLLIER, BARKER AND DAVIES JJ** |
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| Date of judgment: | 9 August 2018 |
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| Catchwords: | **MIGRATION** – appeal from Federal Court of Australia – where appellant’s protection (class XA) visa cancelled on character grounds pursuant to s 501(3A) of the *Migration Act 1958* (Cth) – where primary judge dismissed application for judicial review of Administrative Appeals Tribunal’s decision – where Tribunal affirmed Minister’s delegate’s decision not to revoke visa cancellation under s 501CA(4) – whether primary judge erred in findings regarding the Tribunal’s reliance on an International Treaties Obligation Assessment – no jurisdictional error demonstrated – where appellant sought to raise additional grounds not contained in grounds of appeal – leave refused – appeal dismissed |
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| Legislation: | *Migration Act 1958* (Cth) ss 366D, 499, 501, 501(3A), 501(6), 501(7), 501CA(4), 501CA(4)(b)(ii) |
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| Date of hearing: | 7 August 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 71 |
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| Counsel for the Appellant: | Mr R Abbas |
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| Solicitor for the Appellant: | R&J Lawyers Pty Ltd |
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| Counsel for the First Respondent: | Mr A Markus |
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| Solicitor for the First Respondent: | Australian Government Solicitor |

ORDERS

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|  | | NSD 731 of 2018 |
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| BETWEEN: | QSVS  Appellant | |
| AND: | MINISTER FOR HOME AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| JUDGES: | COLLIER, BARKER AND DAVIES JJ |
| DATE OF ORDER: | 9 August 2018 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the costs of the first respondent, to be assessed if not 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** appeals from a judgment and orders of a judge of this Court dismissing his application for judicial review of a decision of the Administrative Appeals **Tribunal** made 18 December 2017. See *QSVS v Minister for Home Affairs* [2018] FCA 524.
2. By its decision, the Tribunal affirmed the decision made by a **delegate** of the **Minister** for Home Affairs made 22 September 2017 under s 501CA(4) of the *Migration* ***Act*** *1958* (Cth), refusing to revoke the mandatory cancellation of the appellant’s protection (class XA) **visa** which decision was made under s 501(3A) of the Act by another delegate of the Minister on 27 April 2016.

# Factual background

1. The circumstances in which the appeal arises are as follows.
2. The appellant is a citizen of Nigeria, born in 1974. He has two wives, seven children and one step daughter.
3. On 17 June 2005, the appellant was convicted of trafficking 360 grams of a Class A drug (cocaine) to England and sentenced to five years’ imprisonment in the United Kingdom (**UK**). He was deported to Nigeria on 2 June 2007.
4. On 26 May 2009, the appellant arrived in Australia with one of his wives and six of his seven children on tourist (subclass 676) visas.
5. On 26 June 2009, the appellant and members of his family applied for protection (class XA) visas. On the application form, the appellant did not disclose his previous conviction in the UK. The application was initially refused by the delegate, but following review by the Refugee Review Tribunal (**RRT**), was granted on 1 February 2010.
6. On 25 November 2011, the appellant departed Australia on the visa and returned to Australia on 25 February 2012. On his incoming passenger card the appellant once again failed to disclose his previous conviction in the UK.
7. On 11 June 2014, the appellant was convicted of attempting to possess a marketable quantity of imported border controlled drugs (namely methamphetamine), and was sentenced to five years’ imprisonment by the Supreme Court of Queensland, with a non-parole period of two and a half years. On 17 April 2015, the appellant’s application for leave to appeal against that sentence was dismissed by the Queensland Court of Appeal.
8. On 27 April 2016, the appellant’s visa was mandatorily cancelled by the delegate of the Minister pursuant to s 501(3A) of the Act, and the appellant was invited to make representations to the Minister about revoking that decision.
9. On 29 April 2016, the appellant made a written request for revocation of the mandatory cancellation decision.
10. On 1 February 2017, the appellant was notified that an International Treaties Obligation Assessment (**ITOA**) had been commenced. The ITOA was completed on 15 August 2017, with the assessor concluding that Australia does not owe non-refoulement obligations to the appellant.
11. On 22 September 2017, the delegate declined to revoke the mandatory cancellation decision under s 501CA(4) of the Act.
12. On 28 September 2017, the appellant applied to the Tribunal for review of the delegate’s decision. The central issue in the proceeding before the Tribunal was whether the Tribunal should exercise its discretion to revoke the cancellation decision dated 27 April 2016 pursuant to s 501CA(4) of the Act.

# Legislative framework

1. Under s 501(3A) of the Act, the Minister must cancel a visa held by a non-citizen, if the non‑citizen does not pass the “character test” and is serving a full-time custodial sentence of imprisonment. Section 501(3A) provides:

(3A) The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

1. The “character test” is set out in s 501(6) of the Act, which relevantly provides:

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

(a) the person has a substantial criminal record (as defined by subsection (7))…

1. Whether a person has a “substantial criminal record” is defined by s 501(7), which relevantly states:

(7) For the purposes of the character test, a person has a substantial criminal record if:

…

(c) the person has been sentenced to a term of imprisonment of 12 months or more…

1. Any cancellation decision made under s 501(3A) of the Act may be revoked pursuant to s 501CA(4) of the Act, which provides:

(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.

# The Tribunal’s decision

1. It was not in dispute before the Tribunal that the appellant had a “substantial criminal record” for the purposes of s 501.
2. As a result, the question was whether, under s 501CA(4)(b)(ii), the Tribunal could be satisfied that there is another reason why the original decision should be revoked.
3. In considering that issue, the Tribunal had regard to Direction No 65 - Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA (**Direction 65**), which was made under s 499 of the Act on 22 December 2014.
4. The Tribunal noted, at [18] of its decision record, that, under Part C of Direction 65, the primary considerations it had to have regard to were:

* protection of the Australian community from criminal or other serious conduct;
* the best interests of minor children in Australia;
* expectations of the Australian community.

1. The Tribunal proceeded to deal with the primary considerations at [21]-[28], [29]-[39] and [40]-[41], respectively, finding that while the best interests of all of the appellant’s children in Australia would be served by the revocation of the decision to cancel the appellant’s visa, the other two primary considerations strongly favoured the decision under review being affirmed.
2. In particular, at [28] of its decision record, the Tribunal said the appellant was not deterred from his first sentence of imprisonment from engaging in further similar conduct in Australia. The Tribunal said it was satisfied that the appellant represented a high risk of committing further offences, which were likely to be of similar seriousness, although other offences could be involved. It said these considerations weighed heavily against the appellant.
3. The Tribunal then turned to “other considerations”, relevantly including any non-refoulement obligations that may be owed to the appellant, and the extent of any impediments which the appellant may face if moved to Nigeria: at [43]-[46] and [49], respectively. In substance accepting the outcome of the ITOA, the Tribunal concluded that these considerations did not assist the appellant.

# The primary judge’s reasons

1. On the judicial review application before the primary judge, two grounds of review were advanced. The first ground alleged that the Tribunal failed to consider all the integers of the appellant’s claims in that it failed to give any, or any real, consideration to the best interests of the appellant’s children, and/or whether the appellant would face hardship, prejudice or other difficulty if he were returned to Nigeria. The second ground alleged that the appellant was denied procedural fairness in that he sought the assistance of an interpreter, but the Tribunal “insisted on proceeding without an interpreter”.
2. At the hearing, one of the arguments advanced was to the effect that the Tribunal fell into jurisdictional error in relying on the ITOA, as opposed to the decision of the RRT which, it was asserted, “could only be overturned by a competent Court, not by an administrative determination”.
3. The primary judge dealt with this argument at [30]-[33] of his reasons in the following terms:

30 I next consider the ground of more substance that, by relying upon the ITOA rather than the conclusions of the Refugee Review Tribunal, the present Tribunal failed to give any real consideration to non-refoulement obligations owed to the applicant.

31 I do not accept this submission. As was submitted on behalf of the Minister, the Refugee Review Tribunal decision was made a considerable time earlier, some 10 years. Also, as found by the present Tribunal, the ITOA found that the decision of the Refugee Review Tribunal was made in part on the basis of false and misleading information. In the circumstances, I see no error on the part of the present Tribunal in acting on the most recent information which was before it. I also do not accept that the decision of the Refugee Review Tribunal had any particular status in the context of s 501CA such that the present Tribunal ‘could not set a decision of a statutory Tribunal at nought’, or, that what the ITOA did was to that effect.

32 The statutory force of the Refugee Review Tribunal’s decision had ended with the original grant of the visa, which was revoked under 501(3A). I note that the ITOA contained a detailed examination of the Refugee Review Tribunal’s decision. Later material inconsistent with the Refugee Review Tribunal’s decision emerged.

33 As to the submission on behalf of the applicant that the present Tribunal did not state the basis on which it preferred the ITOA, this turns on the ‘status’ submission as to the Refugee Review Tribunal’s decision. As I have already found, the Refugee Review Tribunal’s decision had no particular status in the present case. The present Tribunal noted at [43] that the ITOA was made later in time, and by referring to the later material gave a basis for preferring the ITOA to the findings of the Refugee Review Tribunal.

1. As to the claim that the Tribunal failed to give any or any real consideration to the best interests of the appellant’s children, the primary judge noted that the Tribunal had, at [39], stated that clearly the best interests of the children would be served by the appellant’s presence in Australia; and had in earlier paragraphs identified and given consideration to the material before it in relation to each of the children.
2. Having regard to authority, the primary judge found that the Tribunal did consider, at [29]‑[39] and at [50], the best interests of the minor children in Australia affected by the decision and then reached the concluded view that their best interests would be served by the appellant’s presence in Australia.
3. The primary judge also noted that the delegate gave somewhat less weight to the three oldest children because it appeared they had adequate parental care and supervision available to them from other sources.
4. The judge rejected a submission that the finding so made was “equivocal”.
5. The judge also considered and rejected the claim that the appellant was denied an interpreter and so denied natural justice.

# Grounds of the present appeal

1. The notice of appeal filed on 7 May 2018 contains 14 numbered paragraphs under the heading “Grounds of appeal”. As the Minister submits, the 14 paragraphs do not clearly identify any specific ground of appeal. They are discursive in form, but ultimately seek to challenge the findings of the primary judge on the bases that:
2. the ITOA was an “irrelevant consideration”;
3. the Tribunal fell into jurisdictional error by having regard to the ITOA and by “re‑opening” the decision of the RRT; and
4. the primary judge erred by failing to so hold.
5. More generally, in his written submissions on the appeal, the appellant contends that the finding of the RRT, which resulted in the grant of the protection visa on 1 February 2010, cannot be overturned by a later tribunal, and it would be “tantamount to review of the decision of an Administrative Tribunal by an Administrative Tribunal having the same jurisdiction”. It would seem that to some extent the appellant wishes to argue that a doctrine of issue estoppel applied in the Tribunal in light of the RRT’s decision on the visa application.
6. More specifically, the appellant contends that the assessment resulting from the ITOA “cannot replace the finding of the [RRT] that the appellant was a person in respect of whom Australia had the protection obligation and for that matter a non-refoulement obligation as well”.
7. He also submits that the Tribunal failed adequately and properly to address the issue in relation to the non-refoulement obligation of Australia in relation to him.
8. The appellant additionally submits:
9. That the Tribunal failed to properly identify and give proper, genuine and realistic consideration and weight to the best interests of the appellant’s children.
10. That in a letter dated 15 November 2017, given to the Tribunal, he disclosed that he was remorseful and wanted to make his life better. He wanted to be a productive and beneficial part of the community. However, he says, no real consideration was given to this information, nor was there any assessment of his risk of reoffending.
11. That he was denied procedural fairness when he was required to proceed in the Tribunal without the services of an interpreter.
12. These submissions concerning how the Tribunal, and by inference the judge, dealt with the issues concerning the children, his remorse and risk of reoffending, and the lack of an interpreter do not appear as grounds to his appeal to this Court and on the face of it leave is required to raise each issue. While the issues concerning the children and the lack of an interpreter were the subject of grounds of review before the primary judge, the issue of remorse and risk of reoffending was not.

# Did the primary judge err in his findings concerning the tribunal’s reliance on the ITOA, rather than the conclusions of the RRT?

1. We do not detect any error in the reasons given by the primary judge for his orders, which we have set out above in some detail.
2. We have set out above the legislative framework relevant to the impugned decision‑making in this case.
3. Under s 501(3A) of the Act the Minister was obliged, in the circumstances where the appellant had a substantial criminal record, to cancel the visa then held by the appellant.
4. There is nothing in s 501(3A) or elsewhere in the Act that immunises a protection visa from cancellation under this provision. Thus, the fact that a person may previously have been found, as in this case, to be entitled to refugee status in Australia and not be liable to be returned to their country of origin out of concern that they will suffer harm should that occur, does not, of itself, mean that a protection visa can never be cancelled.
5. The question that fell for consideration in this case was whether, for the purposes of s 501CA(4)(b)(ii), there was another reason why the original decision cancelling the protection visa should be revoked.
6. In dealing with that question, the Tribunal was obliged to give attention to Direction 65, which included consideration of any non-refoulement obligations that may be owed by Australia to the appellant and the extent of any impediments which he may face if he moved to Nigeria.
7. In the course of meeting that requirement, the Tribunal had regard to the ITOA. It was a detailed document that included input at an earlier stage from the appellant, and a detailed assessment of the non-refoulement question, amongst other things. In the result, as the primary judge concluded at [34] of his reasons for judgment, the Tribunal made findings as to non‑refoulement obligations existing, or not existing, based on what the Tribunal said in its decision record at [43]‑[46], [49] and [50], read in light of the ITOA, and dealing with the matter as a matter of substance. We see no error in that finding.
8. Furthermore, it was a finding, on the evidence, that the Tribunal was entitled to make. So far as the Tribunal’s findings of fact concerning whether Australia owed the appellant non‑refoulement obligations are concerned, as the primary judge pointed out, the RRT’s decision was made some 10 years prior to the ITOA assessment to which the Tribunal had regard.
9. Further, the RRT’s decision was made, in part, on the basis of false and misleading information, namely a lack of knowledge about the appellant’s 2005 UK conviction.
10. The submission made on behalf of the appellant that, in effect, the Tribunal was bound by the earlier RRT decision concerning the appellant’s refugee status, is not correct and is a misapprehension as to how the decision‑making processes under the Act work.
11. We should add here that there may be cases where, in meeting the requirements of Direction 65, a decision made under s 501CA(4) recognises that Australia does owe non‑refoulement obligations to a person but that, nonetheless, in light of other compelling considerations, the cancellation of a protection visa should not be revoked. In such circumstances Australia would continue to owe such non-refoulement obligations to that person. The result would be that their existing protection visa remains cancelled. It would be open, however, under the Act, for the Minister to consider the grant of other forms of visa, if necessary, in order to satisfy the non‑refoulement obligations that Australia owes to the person.
12. In other words, as demonstrated in this case, an earlier decision by a tribunal that a person satisfied the refugee criteria in order to be granted a protection visa does not automatically determine the question that might arise in a later tribunal in a proceeding under s 501CA, as to whether Australia continues to owe that person non-refoulement obligations.
13. Ordinarily, the reasons for decision that supported the grant of a protection visa at an earlier time will be of relevance to the question whether the automatic cancellation of such a visa should be revoked. But the question may be affected by the consideration of other evidence relevant to the revocation question.
14. In this case, the assertions that the Tribunal committed jurisdictional error because it took into account the assessment in the ITOA and made findings having regard to that assessment, are misplaced and this ground of appeal fails.

# Did the primary judge err by failing to find that the Tribunal failed to give a proper, genuine and realistic consideration to the best interests of the appellant’s children?

1. As noted above, this is not one of the grounds of appeal and leave to raise it now is required.
2. So far as the merits of the proposed ground are concerned, it is plain that the Tribunal gave careful consideration to this issue, as the primary judge explained at some length in his reasons.
3. We have set those reasons out above. There is no basis upon which to find either that the Tribunal did not properly regard this decision-making criterion, or that the primary judge erred in finding that the Tribunal did not err in its decision-making.
4. Having regard to its merits, leave to raise this ground should now be refused.

# Did the primary judge err by failing to find that the tribunal gave no real consideration to the appellant’s letter dated 15 November 2017 and assessment of his risk of reoffending?

1. This was not a ground of review before the primary judge and it does not appear explicitly or implicitly in the grounds of appeal set out in the notice of appeal in this appeal.
2. Leave is required to raise any new ground of appeal not argued below.
3. In the circumstances, the matter not having previously been raised, we would refuse leave to develop this ground.
4. If the appellant had wished to agitate this ground, he should first have done so in the proceedings before the primary judge.
5. We would note, in any event, by reference to [28] of the Tribunal’s decision record to which we have referred above, that the Tribunal expressly dealt with the question of the appellant’s likelihood to reoffend, and found against him in that regard.

# Did the primary judge err by failing to find that the appellant was denied procedural fairness when he was required to proceed in the Tribunal without the services of an interpreter?

1. This issue also is not a ground of the appeal to this Court and leave to raise it now is required.
2. So far as the merits of this proposed ground are concerned, the primary judge rejected this ground of review for a number of reasons. First, he noted that in his application to the Tribunal dated 28 September 2017, the appellant indicated he did not need an interpreter.
3. Further, the transcript indicated that, in the Tribunal, the appellant said he needed an interpreter but did not wish to use the interpreter who had been provided. He agreed that he spoke adequate English but sometimes has to ask a speaker to slow down. He accepted the proposition put by the Tribunal that the Tribunal should see how far it and the appellant could proceed without an interpreter.
4. The primary judge also observed that the transcript did not show that the appellant had language difficulties. The judge said the entire transcript did not disclose that the appellant did not understand the proceedings. Questions, when not understood, were clarified. The appellant did not say during the course of the hearing that he did not understand the proceedings or that he was handicapped by the fact that English was not his first language. The judge took into account the fact that the appellant was self-represented.
5. We do not consider the judge erred in regarding this ground.
6. Having regard to its merits, leave to raise the ground now should be refused.

# Section 366D of the Act

1. In reply submissions the appellant raised for the first time the contention that the Tribunal, in breach of s 366D of the Act, allowed cross‑examination of the appellant. The contention has no merit and leave to rely on this contention as a new ground is also refused.

# Conclusion and orders

1. For the reasons we have given above, the appeal should be dismissed.
2. We would make the following orders:
3. The appeal be dismissed.
4. The appellant pay the costs of the first respondent, to be assessed if not agreed.

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| I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Collier, Barker and Davies. |

Associate:

Dated: 9 August 2018