FEDERAL COURT OF AUSTRALIA

Arachchi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 1311

Review of:	Administrative Appeals Tribunal decision dated 2 September 2021
File number:	QUD 334 of 2021
Judgment of:	**RANGIAH J**
Date of judgment:	4 November 2022
Catchwords:	**MIGRATION** – Application for review of decision of Administrative Appeals Tribunal affirming delegate's decision not to revoke the applicant's visa – whether Tribunal failed to consider applicant's claim that minor children would be deprived of financial support – whether Tribunal misconstrued Direction 90 as excluding consideration of the limitations on applicant's ability to practice religion – whether the Tribunal misconstrued Direction 90 as only applying to impacts upon a major project or important service – Tribunal failed to comply with Direction 90 – Tribunal's decision set aside
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) s 43 *Migration Act 1958* (Cth) ss 476A(1), 499(2A), 500(1)(ba), 501(3A) and 501CA(4)
Cases cited:	*Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646 *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41 *KXXH v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 111 *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 390 ALR 590

NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004) 144 FCR 1

Nathanson v Minister for Home Affairs [2022] HCA 26; (2022) 403 ALR 398

Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17; (2022) 400 ALR 417

Plaintiff M61/2010E v Commonwealth (2010) 243 CLR 319

Singh v Minister for Home Affairs [2019] FCA 905

Tickner v Chapman (1995) 57 FCR 451

Division:	General Division
Registry:	Queensland
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	87
Date of hearing:	16 March 2022
Counsel for the Applicant:	Mr J Murphy
Solicitor for the Applicant:	Hearn Legal
Counsel for the First Respondent:	Mr G Johnson
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second Respondent:	The Second Respondent did not appear

ORDERS

QUD 334 of 2021

BETWEEN:	**KASUN WICRAMAKARULU ARACHCHI** Applicant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
ORDER MADE BY:	**RANGIAH J**
DATE OF ORDER:	**4 NOVEMBER 2022**

THE COURT ORDERS THAT:

1. The decision of the second respondent made on 2 September 2021 be set aside.
2. The matter be remitted to the second respondent for determination according to law.
3. The first respondent pay the applicant's costs of the proceeding.

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

REASONS FOR JUDGMENT

RANGIAH J:

1 On 2 September 2021, the second respondent, the Administrative Appeals Tribunal (the **Tribunal**) affirmed a decision of a delegate of the first respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the **Minister**), not to revoke the cancellation of the applicant's visa.

2 The applicant seeks judicial review of the Tribunal's decision.

3 I will describe the factual background and the legislative scheme before turning to consider the grounds of the application.

Background

4 The applicant is a citizen of Sri Lanka who arrived in Australia on 20 February 2009. On 12 February 2017, he was granted a Partner (Subclass 801) visa.

5 The applicant has been convicted of numerous criminal offences. Most notably, on 28 July 2020, he was sentenced to 2 years and 2 months' imprisonment for an offence of demanding property by oral threats.

6 By letter dated 12 August 2020, the applicant was notified that his visa had been cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (the **Act**).

7 On 26 August 2020, the applicant made representations to the Minister seeking revocation of the cancellation decision.

8 On 9 June 2021, a delegate of the Minister decided, under s 501CA(4) of the Act, not to revoke the cancellation decision.

9 The applicant then applied to the Tribunal for review of the delegate's decision. On 2 September 2021, the Tribunal made its decision affirming the delegate's decision.

10 In its reasons, the Tribunal correctly identified that it was required under s 499(2A) of the Act to apply, "Direction No 90 – Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA" (**Direction 90**).

11 The Tribunal found that the applicant did not pass the character test. There is no challenge to that finding.

12 The Tribunal went on to consider whether there was "another reason" why the cancellation decision should be revoked. In summary, the Tribunal found that:

- moderate to heavy weight should be given to the primary consideration of the protection of the Australian community;
- moderate weight should be given to the primary consideration of the best interests of minor children;
- moderate weight should be given to the primary consideration of the expectations of the Australian community;
- minor weight should be given to "other considerations" which favoured revocation; and
- the considerations against revocation of the cancellation decision outweighed those in favour of revocation.

13 Accordingly, the Tribunal affirmed the delegate's decision.

The legislative scheme

14 The applicant's visa was cancelled under s 501(3A) of the Act, which requires the Minister to cancel a visa if the Minister is satisfied that the visa holder does not pass the character test because, relevantly, the visa holder has been sentenced to a term of imprisonment of 12 months or more, and is serving a sentence of imprisonment on a full time basis in a custodial institution.

15 The delegate's decision not to revoke the cancellation decision was made under 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.

16 The applicant's application to the Tribunal for review was made pursuant to s 500(1)(ba) of the Act. Section 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) (the **AAT Act**) empowers the Tribunal to affirm or vary the decision under review, or set it aside and substitute another decision or remit the matter for reconsideration. Section 43(2) requires the Tribunal to give reasons for its decision. Under s 43(2B), where the Tribunal gives its reasons in writing, the reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.

17 The Federal Court of Australia has jurisdiction to review the Tribunal's decision under s 476A(1) of the Act.

The application for judicial review

18 The applicant's Amended Originating Application contains the following grounds:

> 1. In purporting to discharge the statutory task required by the *Migration Act 1958* (Cth) (**Act**) – in particular, s 501CA(4), read with s 499(2A) and Direction 90 issued under s 499(1) – the Administrative Appeals Tribunal (**Tribunal**) erred jurisdictionally by failing to consider a substantial and clearly articulated claim (or a claim or evidence that clearly arose from the material before the Tribunal) relating to the best interests of minor children, namely, that the removal of the Applicant would not be in the best interests of his two minor daughters because it would deprive them (and, relatedly,

their mother) of financial support.

Particulars

(i) In discharging its statutory task, the Tribunal was required to consider the best interests of minor children in Australia affected by the decision: Direction 90 [8.3];

(ii) The Applicant put on evidence and made arguments to the effect that a decision not to revoke his visa-cancellation would prevent him from providing financial support to his two minor daughters in Australia (and their mother) as he had previously been doing.

(iii) The Tribunal failed to deal with or otherwise consider the evidence and arguments referred to above at (ii).

2. In purporting to discharge the statutory task required by the Act – in particular, s 501CA(4), read with s 499(2A) and Direction 90 issued under s 499(1) – the Tribunal erred jurisdictionally by:

a. misunderstanding paragraphs 9.4.1 and/or 9.4.2 of Direction 90 as excluding any consideration of the Applicant's links to the Australian community through his co-ownership of a small business and the impact on that business (and the other co-owner) if the Applicant were not allowed to remain in Australia; or

b. failing to consider the Applicant's co-ownership of a small business, and the impact his removal would have on that business (and the other co-owner), as a residual 'other' consideration.

Particulars

(i) In discharging its statutory task, the Tribunal was required to consider the Applicant's links to the Australian community, including the strength, nature and duration of the Applicant's ties to Australia and the impact on Australian business interests if he were not allowed to remain in Australia: Direction 90 [9.4];

(ii) The Applicant put on evidence and made arguments to the effect that a decision not to revoke his visa-cancellation would adversely impact the small business of which he was a co-owner and would adversely affect the other co-owner;

(iii) As to ground 2(a), the Tribunal erroneously considered the evidence and arguments referred to above in (ii) as incapable of weighing in the Applicant's favour within the rubric of Direction 90 [9.4]: see Tribunal reasons [207], see also [204];

(iv) As to ground 2(b), the Tribunal did not otherwise consider the evidence and arguments referred to above in (ii) as a residual 'other' consideration, despite the Applicant explicitly submitting to this effect: see Court Book p 651 [113].

3. In purporting to discharge the statutory task required by the Act – in particular, s 501CA(4), read with s 499(2A) and Direction 90 issued under s 499(1) – the Tribunal erred jurisdictionally by:

a. misunderstanding paragraph 9.2 of Direction 90 as excluding any consideration of potential limitations on a person's ability to practice

their religion if they were removed; and/or

b. failing to consider the potential limitations on the Applicant's ability to practice his Christian religion if he were removed as a residual 'other' consideration.

Particulars

(i) In discharging its statutory task, the Tribunal was required to consider the extent of any impediments the Applicant may face if removed from Australia to his home country: Direction 90 [9.2];

(ii) The Applicant put on evidence and made arguments to the effect that if he were removed from Australia to Sri Lanka he would face a risk, albeit low, of official discrimination from government authorities impacting on his ability to practice his Christian faith freely;

(iii) As to ground 3(a), the Tribunal erroneously considered the evidence and arguments referred to above in (ii) as incapable of weighing in the Applicant's favour within the rubric of Direction 90 [9.2]: see Tribunal reasons [174];

(iv) As to ground 3(b), the Tribunal did not otherwise consider the evidence and arguments referred to above in (ii) as a residual 'other' consideration.

Consideration

Ground 1: Whether the Tribunal erred in failing to consider a claim that the applicant's removal would not be in the best interests of his children because it would deprive them of financial support

19 The applicant's first ground asserts that the Tribunal erred by failing to consider a substantial and clearly articulated claim, namely, that removal of the applicant would not be in the "best interests of minor children in Australia" because it would deprive the applicant's two daughters of financial support.

20 Although the ground as expressed refers only to financial assistance, the applicant's oral argument went further and asserted that his children would be adversely impacted by his removal because, "the mother of the children would have to work more thus depriving the children of hours of contact with the mother". This was described as, "the indirect effect on the children of depriving the mother of that financial assistance". The Minister accepted that this argument should be considered on its merits despite not having been raised by the first ground.

21 The applicant relies upon the following representations made by his lawyers to the Minister, and which were before the Tribunal:

99. Mr Arachchi provided [his ex-partner] and his daughters with financial

support up until he was imprisoned in December 2019.

100. Since his incarceration, [the Applicant's ex-partner] has had to find employment in order to provide for the children, while also being their sole carer. She currently works shift work and long hours, reducing the amount of time she can care for and play with the children.

22 The applicant also relies upon the following passages from a statement he made to the Minister, and which was before the Tribunal:

42 I believe that if I was to be removed from Australia, it would have a tremendous impact on my ex-partner, especially seeing as currently I am not in Australian community to provide for them and she had to start working again after 6 years. She currently works for DCP as a Child rehabilitating officer and her work hours are long and vary as its [sic] shift work and she has barely much time to spend with our children which is not a good way to raise two little girls.

43 I believe me being in the Australian community will help my ex-partner and myself to raise our kids in a much healthier way as I can be the provider for the family and my ex-partner and I can spend more time and focus on our children's wellbeing. … My Ex-partner's life would be much easier if I'm to be in the community to provide her financial and practical support.

23 The applicant also relies upon the following passage from one of his statements to the Tribunal:

38 My ex-partner indicated to me that she is working extremely long hours at present and having to juggle difficult work commitments and taking care of our two children.

…

40 [M]y ex-partner is upset that I have not been able to work at present and provide her with money. When I was in the community, I worked extraordinarily hard and gave my ex-partner a substantial portion of whatever money I made (for the benefit of my two daughters).

24 The applicant submits that his evidence and submissions raised clear claims that his inability to provide financial support for his children would adversely affect them, including by depriving them of contact with their mother. He submits that as the Tribunal made no reference at all to these claims, it should be concluded that they were overlooked. The applicant submits that if the Tribunal had not made that error, it could realistically have resulted in a different decision.

25 The Minister submits that the Tribunal considered the children's loss of financial support in the context of "other considerations" under Direction 90, so that the Tribunal must have also considered that matter in respect of "the best interests of minor children". The Minister also submits that there was no clear articulation in the applicant's Statement of Facts, Issues and

Contentions (**SFIC**) and other material before the Tribunal of any claim concerning adverse effects on the children through being deprived of contact with their mother.

26 In *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088, Gummow and Callinan JJ (with whom Hayne J agreed) held at [24] that to fail to respond to a, "substantial, clearly articulated argument relying upon established facts", was at least to fail to accord the applicant natural justice: see also *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 at [90]; *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [13]; *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17; (2022) 400 ALR 417 at [27].

27 In *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, the Full Court held at [63]:

> It is plain enough, in the light of *Dranichnikov*, that a failure by the Tribunal to deal with a claim raised by the evidence and the contentions before it which, if resolved in one way, would or could be dispositive of the review, can constitute a failure of procedural fairness or a failure to conduct the review required by the Act and thereby a jurisdictional error.

28 Before the Tribunal, the applicant's SFIC broadly followed the scheme of Direction 90 and addressed the considerations set out in that Direction.

29 Paragraph 6 of Direction 90 provides, relevantly, that a decision-maker must take into account the considerations identified in paras 8 and 9, where relevant to the decision. Paragraph 8 states that the following are primary considerations:

> (1) protection of the Australian community from criminal or other serious conduct;
>
> (2) whether the conduct engaged in constituted family violence;
>
> (3) the best interests of minor children in Australia;
>
> (4) expectations of the Australian community.

30 Paragraph 8 goes on to explain the primary considerations and specify the matters that decision-makers should or must consider.

31 Paragraph 9 requires "other considerations" to be taken into account where relevant, including:

> (a) international non-refoulement obligations;
>
> (b) extent of impediments if removed;

(c) impact on victims;

(d) links to the Australian community, including:

(i) strength, nature and duration of ties to Australia;

(ii) impact on Australian business interests.

32 Paragraph 9 goes on to explain each of these considerations and specify the matters that decision-makers should consider.

33 Paragraph 7 provides, relevantly:

(2) Primary considerations should generally be given greater weight than the other considerations.

34 The applicant's SFIC addressed the best interests of minor children, including the applicant's two daughters. The applicant contended that it would be in the best interests of his children for the cancellation decision to be revoked and that very significant weight should be given to that matter. The SFIC adopted the applicant's submissions and other material before the delegate concerning why it was in the best interests of the applicant's minor children that the cancellation decision should be revoked. In respect of "other considerations", under the sub-heading "links to the Australian community", the applicant contended that his former partner would face practical and financial difficulties in not having the applicant's support to take care of their children.

35 The Tribunal's reasons also followed the structure of Direction 90. In respect of the primary consideration of "the best interests of minor children in Australia", the Tribunal expressly considered para 8.3 of Direction 90. The Tribunal accepted that the applicant had regular and meaningful contact with his daughters up to the time of his arrest, and had regular telephone contact with them since his incarceration. The Tribunal did not refer to any loss of financial support for the children if the applicant were removed from Australia, nor to any adverse effects on the children through being deprived of contact with their mother.

36 The Tribunal concluded that the best interests of the applicant's children would be served by the applicant being allowed to remain in Australia, and that moderate weight should be given to this primary consideration.

37 Under "other considerations", the Tribunal proceeded to consider, "links to the Australian community", including, "strength, nature and duration of ties to Australia". The Tribunal referred to para 9.4.1 of Direction 90 which requires decision-makers to, "consider any impact of the decision on the non-citizen's immediate family members in Australia…". The

Tribunal noted the applicant's submission that if the applicant were returned to Sri Lanka, his former partner would face practical and financial difficulties without the applicant's support in caring for their children. The Tribunal found:

> 206. The evidence shows that there would be an emotional impact and, in the case of his daughters for whom he provides financial support, financial impact if the Applicant were to be deported.

38 The Tribunal continued:

> 211. I find that the Applicant's ties to the community and the community's ties to him are real and that the members of his immediate family, his daughters, would be significantly impacted if he were to be removed from Australia. This consideration, links to the Australian community, weighs in favour of the revocation of the cancellation of the Applicant's visa. Minor to moderate weight should be given to this consideration.

39 The applicant's SFIC had adopted, relevantly, an argument made to the delegate that the removal of the applicant from Australia would not be in the best interests of his children because it would deprive them of the applicant's financial assistance. While the Tribunal did not refer to that claim in its consideration of the primary consideration of "the best interests of minor children in Australia", it expressly found that there would be a financial impact upon the applicant's children if he were deported in the context of "other considerations".

40 The Minister relies upon the following passage from the judgment of Perram J in *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646 at [26]:

> Where a matter is relevant to two or more mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously.
>
> (Citations omitted.)

41 I do not consider that passage to be of assistance in deciding the applicant's first ground of appeal. The applicant's argument is not that there was a failure to take into account a mandatory relevant consideration. The applicant argues that there was a failure to consider a particular claim relevant to a primary consideration which, if accepted, would attract greater weight than if merely considered as part of "other considerations". The fact that the Tribunal considered the applicant's argument under "other considerations" does not necessarily mean that it was not required to also consider it as an aspect of "the best interests of minor children in Australia".

42 If it were established that the Tribunal failed to consider the claim concerning the deprivation of financial support for the children as a matter going to the primary consideration of, "the best interests of minor children in Australia", I would accept that there was error on the part of the Tribunal and that the error was material. That is because para 7(2) of Direction 90 provides that primary considerations should generally be given greater weight than "other considerations", and there is no indication in the reasons that the Tribunal departed from that instruction. Accordingly, the Tribunal is likely to have given the deprivation of financial support less weight under "other considerations" than would have been given if considered under "the best interests of minor children in Australia".

43 The Tribunal member was required to have regard to and bring his mind to bear upon the applicant's argument concerning deprivation of financial support for the children in the context of "the best interests of minor children in Australia": cf. *Plaintiff M1/2021 v Minster for Home Affairs* at [24]; *Tickner v Chapman* (1995) 57 FCR 451 at 462, 476, 495; *Carrascalao v Minister for Immigration and Border Protection* (2017) 252 FCR 352 at [45]. The issue is whether the absence of any reference to that argument in the Tribunal's reasons under "the best interests of minor children in Australia" should lead to an inference that it was not considered by the Tribunal under that primary consideration.

44 The Tribunal's reasons for decision must include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based: ss 43(2) and (2B) of the AAT Act.

45 In *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41, the Full Court observed at [79]:

> It must be emphasised that there is a distinction between the making of a decision by the Tribunal and the written statement it must give under s 368 of the Act. The making of a decision involves a mental process. The written statement functions as a record of the Tribunal's reasons for making its decision. Those reasons provide evidence of the mental process engaged in by the Tribunal. If the written statement does not set out a finding concerning any of the prescribed matters…it may (but will not necessarily) lead to an inference that the Tribunal member made no such finding as part of his or her mental process when making the decision.
>
> (Citations omitted.)

46 A failure by the Tribunal to deal with an issue may indicate a failure to consider the issue. Such an inference should not be drawn too readily where the reasons are otherwise comprehensive and the issue has at least been identified at some point: *Applicant WAEE v*

Minister for Immigration and Multicultural and Indigenous Affairs (2003) 236 FCR 593 at [47]. A conclusion that a decision maker has not engaged in an active intellectual process in respect of an argument will not be lightly made: *KXXH v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 111 at [47].

47 Taking into account the Tribunal's reasons as a whole, I consider that no inference should be drawn that the Tribunal member failed to apply an active intellectual process to the applicant's argument concerning deprivation of financial support for the children in the context of the primary consideration of "the best interests of minor children in Australia". The Tribunal found when dealing with "other considerations" that the applicant's children would be significantly impacted if the applicant were removed from Australia because they would be deprived of his financial support. It does not follow from the expression of the Tribunal member's reasons in a somewhat compartmentalised way, consistent with the structure of Direction 90, that his mental process must have been similarly compartmentalised and structured. The Tribunal member clearly formed an opinion that the removal of the applicant from Australia would deprive his children of the applicant's financial support, and it seems quite unlikely he disregarded or did not have that opinion in mind when reaching his conclusion that it was in the best interests of the children that the applicant remain in Australia. The appropriate inference is that the Tribunal took into account the applicant's argument in addressing the primary consideration of the best interests of minor children.

48 The applicant also submits that the Tribunal failed to take into account any claim concerning adverse effects on the children through being deprived of contact with their mother as a result of the children's mother having to work longer hours to financially support them. The applicant relies upon a submission to the Tribunal that his ex-partner, "currently works shift work and long hours, reducing the amount of time she can care for and play with the children", and aspects of his statements including that she, "has barely much time to spend with our children".

49 The Tribunal had an obligation to consider any substantial and clearly articulated argument advanced by a party. However, the statements relied upon by the applicant appeared directed towards adverse impacts upon his partner, rather than the children. They were, at best, ambiguous and failed to clearly articulate any claim that his children would be adversely

affected by being deprived of contact with their mother because she would have to work more as a result of deprivation of the applicant's financial support.

50 Even if such a claim was made, I would not accept that any error by the Tribunal was material. In *Minister for Immigration and Border Protection v SZMTA*, Bell, Gageler and Keane JJ held at [45]:

> A breach is material to a decision only if compliance could realistically have resulted in a different decision.
>
> (See also *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; (2021) 390 ALR 590 at [2]; *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 403 ALR 398 at [1], [30]-[33] (Kiefel CJ, Keane and Gleeson JJ), [41]-[47] (Gageler J), [95], [105], [127] (Edelman J)).

51 The Tribunal found that there would be significant emotional and financial impacts upon the applicant's children if he were removed from Australia. The Tribunal accepted that it would be in their best interests for the cancellation decision to be revoked and gave moderate weight to that consideration in the context of the primary consideration of "the best interests of minor children in Australia". In the context of the Tribunal's assessment of the other primary considerations, I am unable to accept that the Tribunal's consideration of any claim that consequentially upon the loss of the applicant's financial support the applicant's children would be adversely affected by being deprived of contact with their mother because she would have to work more could realistically have resulted in the Tribunal placing such greater weight on the best interests of the minor children as to result in a different decision.

52 The applicant's first ground of appeal must be rejected.

Ground 2: Whether the Tribunal misunderstood paras 9.4.1 and 9.4.2 of Direction 90 and failed to consider the applicant's argument regarding the impact on Australian business interests

53 The applicant's second ground asserts that the Tribunal misunderstood paras 9.4.1 and/or 9.4.2 of Direction 90 as excluding any consideration of the applicant's links to the Australian community through his co-ownership of a small business and the impact of the cancellation of the applicant's visa on that business. The ground also asserts that the Tribunal erred in failing to consider the applicant's co-ownership of a small business, and the impact his removal would have on that business and the other co-owner. These two aspects are closely linked and may be considered together.

54 Paragraph 9(1) of Direction 90 states that, "other considerations must also be taken into account, where relevant, in accordance with the following provisions". The specified considerations include, "impact on Australian business interests". Paragraph 9.4.2(3) provides:

> Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

55 In a "Personal Circumstances Form" provided by the applicant to the Minister in support of his representations for revocation of the cancellation decision, the applicant listed his occupation as co-owner of a pizza business. In response to a question about hardship to members of the Australian community if he were removed from Australia, the applicant stated that his business partner may suffer loss of employment. The applicant also stated that his partner may struggle to continue running the business without the applicant.

56 The applicant's business partner wrote to the delegate stating:

> I really miss him in the business, and it is hard to continue the business just only by myself. Therefore, I need him to be back in the business soon and it will help me to get a time off from this busy work schedule in Pizza Shop.

57 In submissions provided to the delegate, the applicant's legal representatives stated, under the heading, "Impact on Australian business interests":

> 139 Mr Arachchi was a co-owner of Pizza Express until he voluntarily resigned in February 2020 to allow the business to continue running in his absence. Mr Don has struggled to run the business and
>
> 140 Mr Arachchi intends to resume working as co-owner of Pizza Express if allowed to remain in Australia.
>
> …
>
> 142 Mr Arachchi's incarceration and detention has already affected the business, and this would continue if he were unable to remain in Australia.

58 The applicant provided a statement indicating:

> My pizza shop will not continue if I was to be removed from Australia as it is already struggling without my help. My business partner recently had twins and already struggling to continue the shop without my help. Covid has already affected the business very badly and me not being there has led my business partner to struggle with spending time with his precious family and carrying on and growing the business. I strongly believe that I should return to my business and help it grow and create more jobs and expand as a great franchise.

59 The Tribunal summarised the applicant's submission as follows at [198]:

> If the Applicant is removed from Australia, he and his business partner in the pizza shop, will suffer the loss of employment and will lose the money they invested in the business. Due to changes in his partner's circumstances and the Applicant's incarceration, the business is struggling. However, if he returns to the business, he can help it grow, creating more jobs and expand the business as a great franchise.

60 The Tribunal noted at [204] that the Minister had submitted that, "the pizza business referred to by the Applicant in his representations to the delegate is not a "major project" or "important service" that falls within this limb of Direction 90".

61 The Tribunal dealt with the applicant's argument concerning the impact upon the pizza business in the following way:

> 207 I agree with the Minister's submission in relation to potential impact on the pizza business (see [204] above) not being the sort of impact on Australian business interests to which para 9.4.2 of Direction 90 is referring.

62 The Tribunal seems to have interpreted the Minister's submission as being that para 9.4.2 of Direction 90 applies only to impacts upon a "major project" or "important service". The Tribunal accepted that construction of para 9.4.2 to be correct.

63 The applicant relies upon *Singh v Minister for Home Affairs* [2019] FCA 905. That case concerned the Tribunal's application of para 10.3 of Ministerial Direction 65 (since superseded by Direction 90), which similarly required decision-makers to consider the:

> Impact on Australian business interests if the non-citizen's visa is cancelled, noting that any employment link would generally only be given weight where visa cancellation would significantly compromise the delivery of a major project or delivery of an important service in Australia.

64 In that case, the applicant had worked as a security guard and his supervisor had given evidence that he was a dedicated and valuable employee. The Tribunal concluded at [160] that because the severing of employment links would not, "significantly compromise the delivery of a major project, or delivery of an important service in Australia", para 10.3 had no application to the services of the applicant and could not weigh in his favour at all.

65 Justice Middleton held that the Tribunal had misconstrued the Direction:

> 10 I can immediately say that the correct interpretation of the Direction is not to focus only on the delivery of a major project or delivery of an important service in Australia. The focus has to be on the impact on Australian business interests if the non-citizen's visa is cancelled. In my view, it is clear that the Tribunal fell into error by misconstruing paragraph 10.3 of the Direction and this is apparent from [160] of the Tribunal's reasons.

> 11 In effect, the Tribunal accepted a submission put on behalf of the Minister that the Direction applied solely to an occasion where cancellation of the visa would significantly compromise the 'delivery of a major project or delivery of an important service in Australia'. With that interpretation in mind, the Tribunal then looked at the evidence and found that there was no evidence that enabled the Tribunal to reach that conclusion.

66 The Minister submits that *Singh* is distinguishable as, in this case, the Tribunal did not find that para 9.4.2 could not extend to other business interests, but only that the claimed interests were, "not … the sort of impact on Australian business interests to which para 9.4.2 of Direction 90 is referring". The Minister submits that the Tribunal's observation was self-evidently correct having regard to the terms of para 9.4.2.

67 I do not accept the Minister's submissions. The Tribunal's finding that the claimed impact was, "not … the sort of impact on Australian business interests to which para 9.4.2 of Direction 90 is referring" must be understood as a finding that para 9.4.2 of Direction 90 applies only to impact upon a "major project" or "important service". Like in *Singh*, the Tribunal found that it was not required to consider any impact upon business interests unless the impact was upon a "major project" or an "important service".

68 Paragraph 9.4.2 of Direction 90 commences by stating that, "Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia …". The requirement is to consider *any* impact on Australian business interests. The requirement is not confined to business interests of a particular scale or importance.

69 Paragraph 9.4.2 goes on to state that, "an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia". Three observations may be made. First, this qualification applies only where there is a relevant "employment link". Second, even where there is a relevant "employment link", decision-makers are not relieved from their obligation to consider any impacts on Australian business interests. Third, while "generally" weight will only be given to the impact on business interests where the cancellation decision would significantly compromise the delivery of a major project or delivery of an important service in Australia, the Direction does not purport to preclude decision-makers from giving weight to impacts on business interests in other circumstances.

70 The expression "employment link" must refer to a link between employment of the former or prospective visa holder and impacts on Australian business interests resulting from the person not being able to engage in such employment as a result of cancellation or refusal of a visa. It is unnecessary, in the absence of argument, to consider precisely what is meant by "employment" in this context, or to consider the nature of the link that is envisaged. It is enough to conclude that, in the present case, the applicant's claim was not confined to any "employment link" but was that he had an ownership interest in a business and that his removal from Australia would affect his partner's business interests.

71 The Tribunal was required under s 499(2A) of the Act to comply with Direction 90. That Direction required the Tribunal to consider any impact on Australian business interests if the non-citizen were not permitted to remain in Australia. By misconstruing para 9.4.2 as only applying to an impact upon a "major project" or "important service", the Tribunal precluded itself from considering the applicant's claim concerning the impact of his removal upon his partner's interest in the pizza business. The Tribunal failed to comply with s 499(2A).

72 The Minister has not sought to argue that any misconstruction of para 9.4.2 of Direction 90 was immaterial. I accept that the Tribunal's decision could realistically have been different if it had correctly interpreted para 9.4.2 and then considered the impact of the applicant's removal from Australia upon the business interests of his partner.

73 In my opinion, the applicant has demonstrated jurisdictional error on the part of the Tribunal.

Ground 3: Whether the Tribunal misunderstood para 9.2 of Direction 90 as excluding consideration of limitations on the applicant's ability to practice religion

74 The applicant's third ground asserts that the Tribunal erred by: (a) misunderstanding para 9.2 of Direction 90 as excluding consideration of potential limitations on a person's ability to practice their religion; or (b) failing to consider potential limitations upon the applicant's ability to practice his religion as a residual "other consideration".

75 Paragraph 9.2 of Direction 90 provides;

> (1) Decision-makers must consider 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.

76 The applicant argued before the Tribunal that he would face a risk of discrimination impacting on his ability to practice his faith freely. The applicant relied on a 2019 DFAT report which concluded that Christians faced a "low risk" of "official" and "societal" discrimination and, "a low threat of violence from homegrown Islamic extremist groups".

77 The applicant submits that the Tribunal concluded that whatever discrimination the applicant faced would not, "adversely impact his ability to establish and maintain a basic living standard", and thus was not a relevant "impediment" within the meaning of para 9.2. The applicant submits that para 9.2 is not limited to the physical sustenance and medical care required to maintain "basic living standards". The applicant submits that for a person of faith, the maintenance of that faith can properly be described as essential to the establishment and maintenance of a basic living standard and that, accordingly, the Tribunal erred in understanding para 9.2 as excluding such a consideration.

78 The applicant submits, alternatively, that if para 9.2 of Direction 90 does exclude consideration of a person's ability to practice their religion, then the applicant's arguments about his ability to practice his Christian faith ought nevertheless to have been considered as an "other consideration". The applicant observes that the listed "other considerations" in Direction 90 are not exhaustive.

79 The Tribunal found:

> 173. In addressing the consideration of impediments if removed in closing, Dr Donnelly again referred to the Applicant wanting to practice Christianity and submitted that the Minister had not said "anything much about the DFAT report being independent". The DFAT report, however, as the Applicant himself set out in the ASFIC, states that Christians face a low risk of discrimination and even a low threat of violence from homegrown Islamic extremist groups (see [160] and [161] above). Even if I were to accept that the Applicant now wishes to practice his Christian faith if he were returned to Sri Lanka, which I have trouble accepting, the evidence is that he faces only a low risk of discrimination. His own evidence was that he had practiced Catholicism growing up in Sri Lanka and that his family members in Sri Lanka (mother and two sisters) still practice their faith.
>
> 174. Further, this consideration under Direction 90 requires the decision-maker to "consider 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 identified in sub-paras (a) to (c) (see [151] above). There was no explanation provided by the Applicant as to how, even if he were to face impediments in practicing Christianity (which the evidence does not establish), that would adversely

impact his ability to establish and maintain a basic living standard.

80 Paragraph 9.2 of Direction 90 requires decision-makers to consider the extent of any impediments the non-citizen may face if removed from Australia to their home country in establishing themselves and maintaining basic living standards. At [173], the Tribunal, proceeding upon a premise of accepting that the applicant now wished to practice his Christian faith in Sri Lanka, found that he would face only a low risk of discrimination which had not prevented the applicant and his family from practicing their faith in Sri Lanka. At [174], the Tribunal observed that the applicant had not explained how, "even if he were to face impediments in practicing Christianity (which the evidence does not establish), that would adversely impact his ability to establish and maintain a basic living standard".

81 In my opinion, the applicant's submission is answered by the Tribunal's finding at [174] that he would not practice Christianity in Sri Lanka. That finding is indicated by the words, "which the evidence does not establish". The Tribunal must be understood to have moved from its assumption at [173] that the applicant would now wish to practice his Christian faith in Sri Lanka, to a finding at [174] that he would not do so. In light of that finding, any misconstruction of para 9.2 is immaterial.

82 In any event, I do not understand the Tribunal to have construed para 9.2 as excluding the possibility that religious discrimination may be an impediment to maintaining basic living standards. The Tribunal was merely indicating that the applicant had not explained how the low risk of discrimination on the basis of religion would adversely impact his ability to establish and maintain a basic living standard.

83 The applicant's alternative argument is that even if para 9.2 excludes consideration of a person's ability to practice their religion, the applicant's arguments about his ability to practice his Christian faith ought nevertheless to have been considered. However, those arguments were considered, and the Tribunal found that the applicant would not wish to practice Christianity in Sri Lanka and that, even if he did, he would face only a low risk of discrimination.

84 The applicant's third ground must be rejected.

Conclusion

85 I have rejected the applicant's first and third grounds of review. However, I have upheld the second ground, concluding that through its misconstruction of para 9.4.2 of Direction 90, the Tribunal failed to comply with the Direction, and thereby failed to comply with s 499(2A) of the Act.

86 I will order that the decision of the Tribunal be set aside and that the matter be remitted to the Tribunal for determination according to law.

87 I will order that the Minister pay the applicant's costs of the proceeding.

I certify that the preceding eighty-seven (87) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rangiah.

Associate:

Dated: 4 November 2022