Federal Court of Australia

Tran v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 1178

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| Review of: | *Tran and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration)* [2023] AATA 2011 |
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| File number: |  |
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| Judgment of: | **SNADEN J** |
|  |  |
| Date of judgment: | 11 October 2024 |
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| Catchwords: | **MIGRATION** – application for judicial review of decision of Administrative Appeals Tribunal affirming Minister’s decision not to revoke visa cancellation – where applicant convicted of various drug offences – whether tribunal erred in consideration of applicant’s continued unlawful presence in Australia – whether tribunal failed to afford proper weight to applicant’s rehabilitation prospects – whether tribunal erred in drawing conclusions about applicant’s English skills – whether tribunal failed to give proper consideration to evidence of applicant’s family – whether tribunal failed to give proper consideration to applicant’s fears of returning to Vietnam – application dismissed. |
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| Legislation: | *Migration Act 1958* (Cth) ss 499, 501, 501CA |
|  |  |
| Cases cited: | *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510  *Buntin v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1055  *Commissioner for Australia Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576  *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 196  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24  *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643  *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123  *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164  *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273  *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582  *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 |
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| Division: | General Division |
|  |  |
| Registry: | Victoria |
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| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 83 |
|  |  |
| Date of hearing: | 3 June 2024 |
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| Counsel for the Applicant: | Mr J Maloney |
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| Solicitor for the Applicant: | Carina Ford Immigration Lawyers |
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| Counsel for the First Respondent: | Mr A Yuile |
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| Solicitor for the First Respondent: | Clayton Utz |
|  |  |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | VID 572 of 2023 |
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| BETWEEN: | THE ANH TRAN  Applicant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | SNADEN J |
| DATE OF ORDER: | 11 october 2024 |

THE COURT ORDERS THAT:

1. The applicant’s amended originating application be dismissed.
2. The applicant pay the first respondent’s costs of the proceeding, to be assessed in default of agreement in accordance with the court’s Costs Practice Note (GPN-COSTS).

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

REASONS FOR JUDGMENT

SNADEN J:

1. The applicant, Mr Tran, is Vietnamese. Prior to September 2021, he resided in Australia as the holder of a Class BS Subclass 801 Partner (Residence) visa (the “**Visa**”) that had been issued to him pursuant to provisions of the *Migration Act 1958* (Cth) (the “**Act**”).
2. In August 2021, Mr Tran was convicted and sentenced in the County Court of Victoria (the “**County Court**”) for crimes involving drugs and theft. He received a total effective sentence of three years and nine months’ imprisonment, of which he served two years and six months.
3. On 21 September 2021—and in consequence of his offending—Mr Tran’s Visa was cancelled. That (the “**Cancellation**”) was effected pursuant to s 501(3A) of the Act. He later made representations pursuant to s 501CA of the Act with a view to having the Cancellation revoked. On 24 April 2023, a delegate of the first respondent (the “**Minister**”) decided not to accede to that request (I shall refer to that decision, hereafter, as the “**Delegate’s Decision**”). On 26 April 2023, Mr Tran applied to the second respondent (the “**Tribunal**”) for review of the Delegate’s Decision (the “**Review Application**”). By a decision dated 12 July 2023 (the “**Tribunal’s Decision**”), the Tribunal affirmed the Delegate’s Decision.
4. By amended originating application dated 8 May 2024 (which was filed in draft form but was the subject of leave granted at the hearing), Mr Tran moves the court for prerogative relief to set the Tribunal’s Decision aside and require that his Review Application be determined afresh and according to law.
5. For the reasons that follow, that application should (and will) be dismissed, with the usual order as to costs.

# The statutory framework

1. Section 501CA of the Act relevantly provided as follows, namely:

**501CA Cancellation of visa—revocation of decision under subsection 501(3A) (person serving sentence of imprisonment)**

(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.

(2) For the purposes of this section, ***relevant information*** is information (other than non‑disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for making the original decision; and

(b) is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.

(3) As soon as practicable after making the original decision, the Minister must:

(a) give the person, in the way that the Minister considers appropriate in the circumstances:

(i) a written notice that sets out the original decision; and

(ii) particulars of the relevant information; and

(b) invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.

(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. Presently, it is not controversial that the Visa was cancelled pursuant to s 501(3A) of the Act, nor that Mr Tran did not and does not pass the character test for the purposes of s 501CA(4)(b)(i). At issue before the Tribunal was whether there was “another reason” why the Cancellation ought to be revoked.
2. Section 499 of the Act empowers the Minister to issue directions related to the exercise of, amongst others, the power conferred by s 501CA(4). It relevantly provides (and provided) as follows, namely:

**499 Minister may give directions**

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

(a) the performance of those functions; or

(b) the exercise of those powers.

…

(2) Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.

(2A) A person or body must comply with a direction under subsection (1).

…

1. Insofar as is presently relevant, the Minister exercised that power by publishing—or otherwise issuing (including to the Tribunal) a written direction in the form of—what was known as Direction no. 99, *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (hereafter, “**Direction 99**”).
2. Direction 99 relevantly provided as follows, namely:

**5. Preamble**

**5.1 Objectives**

…

(3) …A non‑citizen who has had their visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the decision‑maker considering the request is not satisfied that the non‑citizen passes the character test, the decision‑maker must consider whether there is another reason to revoke the cancellation given the specific circumstances of the case.

(4) The purpose of this Direction is to guide decision‑makers in performing functions or exercising powers under section 501 and 501CA of the Act. Under section 499(2A) of the Act, such decision‑makers must comply with a direction made under section 499.

**5.2 Principles**

The principles below provide the framework within which decision‑makers should approach their task of deciding whether to refuse or cancel a non‑citizen’s visa under section 501, or whether to revoke a mandatory cancellation under section 501CA. The factors (to the extent relevant in the particular case) that must be considered in making a decision under section 501 or section 501CA of the Act are identified in Part 2.

…

(2) Non‑citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

(3) The Australian community expects that the Australian Government can and should refuse entry to non‑citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non‑citizen poses a measureable [*sic*] risk of causing physical harm to the Australian community.

…

(6) Decision‑makers must take into account the primary and other considerations [identified in Part 2 that are] relevant to the individual case. … In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph [8.5(2)] (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non‑citizen does not pose a measureable [*sic*] risk of causing physical harm to the Australian community.

**Part 2 Making a decision**

**6. Making a decision**

Informed by the principles in paragraph 5.2, a decision‑maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

**7. Taking the relevant considerations into account**

(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.

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

(3) One or more primary considerations may outweigh other primary considerations.

**8. Primary considerations**

In making a decision under section 501(1), 501(2) or 501CA(4), 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 strength, nature and duration of ties to Australia;

…

(5) expectations of the Australian community.

**8.1 Protection of the Australian community**

(1) When considering protection of the Australian community, decision-makers should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.

(2) Decision-makers should also give consideration to:

a) the nature and seriousness of the non-citizen’s conduct to date; and

b) the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.

**8.1.1 The nature and seriousness of the conduct**

(1) In considering the nature and seriousness of the non-citizen’s criminal offending or other conduct to date, decision-makers must have regard to the following:

a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:

…

iii. acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

…

iii. any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker’s opinion (for example, section 501(6)(c));

…

c) with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;

…

**8.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct**

(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community’s tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

(2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

i. information and evidence on the risk of the non-citizen reoffending; and

ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

c) where consideration is being given to whether to refuse to grant a visa to the non-citizen - whether the risk of harm may be affected by the duration and purpose of the non-citizen' s intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

**8.2 Family violence committed by the non-citizen**

(1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).

(2) This consideration is relevant in circumstances where:

…

b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.

(3) In considering the seriousness of the family violence engaged in by the noncitizen, the following factors must be considered where relevant:

a) the frequency of the non-citizen’s conduct and/or whether there is any trend of increasing seriousness;

b) the cumulative effect of repeated acts of family violence;

c) rehabilitation achieved at time of decision since the person’s last known act of family violence, including:

i. the extent to which the person accepts responsibility for their family violence related conduct;

ii. the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);

iii. efforts to address factors which contributed to their conduct; and

d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen’s favour. This includes warnings about the non-citizen’s migration status, should the non-citizen engage in further acts of family violence.

**8.3 The strength, nature and duration of ties to Australia**

(1) Decision-makers must consider any impact of the decision on the non-citizen’s immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

(2) In considering a non-citizen’s ties to Australia, decision-makers should give more weight to a non-citizen’s ties to his or her child and/or children who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

(3) The strength, duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

(4) Decision-makers must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:

a) the length of time the non-citizen has resided in the Australian community, noting that:

i. considerable weight should be given to the fact that a non-citizen has been ordinarily resident in Australia during and since their formative years, regardless of when their offending commenced and the level of that offending; and

ii. more weight should be given to the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and

iii. less weight should be given to the length of time spent in the Australian community where the non-citizen was not ordinarily resident in Australia during their formative years and the non-citizen began offending soon after arriving in Australia.

…

**8.5 Expectations of the Australian Community**

(1) The Australian community expects non‑citizens to obey Australian laws while in Australia. Where a non‑citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non‑citizen to enter or remain in Australia.

(2) In addition…non‑revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa…

…

(4) This consideration is about the expectations of the Australian community as a whole, and in this respect, decision‑makers should proceed on the basis of the Government’s views as articulated above, without independently assessing the community’s expectations in the particular case.

…

**9.1 Legal consequences of decision under section 501 or 501CA**

(1) Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(l) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen.

(2) A *non-refoulement* obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has *non-refoulement* obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia' s interpretation of *non-refoulement* obligations and the scope of the obligations that Australia is committed to implementing.

(3) International *non-refoulement* obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a *non-refoulement* claim.

**9.2 Extent of impediments if removed**

(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.

# The Tribunal’s Decision

1. The reasons published in support of the Tribunal’s Decision are lengthy. It is necessary only to replicate the small number of passages from them that are of relevance to the present appeal.
2. After recounting some essential background facts and the relevant regulatory framework, the Tribunal, in its reasons, proceeded to identify the evidence that had been laid before it. It summarised the documentary material with which it had been presented, as well as the evidence of the witnesses that Mr Tran called to support his application.
3. One such witness was Mr Tran’s mother-in-law. It is convenient to replicate in full the Tribunal’s summary of her evidence (emphasis original, references omitted):

30. The witness adopted her two statements as true and correct. In the statement dated 11 January 2022, she claimed to be suffering from: ‘*a multitude of medical condition, like imbalance thyroid gland* (sic)*, and I believe I have a tumour which requires invasive medical attention in the coming months*’. She also stated: ‘*I have been advised by my family doctor that in serious event of breathing complication, I can pass away suddenly at any minute*’. There is no corroborating expert evidence of the thyroid, tumour, or sudden death claims. The Tribunal has considered documents dated March 2023 relating to consideration of ‘*right middle finger trigger release*’ surgery, but there is no evidence this has occurred.

31. The witness claimed she was unaware of [Mr Tran’s] illegal residence in Australia when dating her daughter and only became aware after they married. She disapproved of their union not because of his illegal status but because her daughter was very young. When her daughter disclosed [Mr Tran’s] abusive conduct, she also disapproved of this. The witness said her daughter did not discuss the full details, but she was aware it occurred while they worked together in the nail salon, during which [Mr Tran] ‘*always abused and dominated*’ her daughter and ‘*never listened to her in almost everything*’.

32. The witness said if [Mr Tran] could remain in Australia, he could help her daughter care for their children. The witness and her husband, who is 77 years of age, find it ‘*very difficult*’ to have her daughter and two grandchildren live with them for so long. They will nevertheless support them until they can find their own place to stay.

1. The Tribunal next proceeded to consider the application of Direction 99. As is common (and, with respect, self-evidently sensible), the Tribunal was concerned to address in turn each of the various considerations of which Direction 99 required it to take account.
2. Considering its nature and seriousness, the Tribunal observed that Mr Tran’s history was relevantly (references omitted):

46. …not limited to criminal convictions and includes ‘*other conduct to date’*. For example, [Mr Tran] lived and worked in Australia unlawfully for approximately four years after [a former visa] was cancelled in 2013. Additionally, notwithstanding the absence of any drug use convictions in his criminal history, he disclosed using ice for approximately a year until December 2018 and then cannabis for approximately seven months until being arrested in July 2019…

1. Insofar as concerned cl 8.1.2 of Direction 99—the risk that Mr Tran might pose to the Australian community were he to commit further offences or engage in other serious conduct—the Tribunal noted Mr Tran’s submission that he had used his time in detention to undertake courses on anger management and drug and alcohol abuse, and to make “…serious and lasting efforts to be free from the problems that caused [him] to become involved in drug dealing”. It also noted the observations of the County Court; namely, that Mr Tran had good prospects of rehabilitation. Thereafter, the Tribunal observed (references omitted):

65. The [County Court] has noted [Mr Tran’s] expression of remorse during sentencing and subsequently in his documentary and oral evidence. His contrition at this hearing centred predominantly on the adverse implications his crimes have caused to him and his family, rather than the harm caused by commercial drug cultivation and trafficking. In that respect his remorse came across as somewhat self-serving. His criminal and other conduct cannot be regarded as impulsive or short-lived. During his decade-long residence in Australia, he lived and worked illegally in the community for about four years, took illicit drugs over an approximately 18-month period and committed very serious crimes, and has since spent the last four years in custodial settings. He has persistently acted in disregard of Australia’s laws when in contest with his own interests. The [County Court’s] finding that [Mr Tran] has good prospects of rehabilitation ‘*in all the circumstances*’, lacked a complete understanding of the circumstances, including [Mr Tran’s] illicit drug use. Several references were made during the hearing to [Mr Tran’s] open and forthright nature at the current hearing. It is frankly little to his credit that he has decided to be completely forthright about his crimes, illicit drug taking, and conduct against [his wife] at this hearing, rather than to the police and court four years ago.

…

67. …The Tribunal has also considered the certificates he provided for ‘*Anger Management 101*’ and ‘*Drug and Alcohol Abuse 101*’. These were issued to him on 24 April 2023 by an organisation called Universal Class, on the same day as the [Delegate’s Decision]. As raised by the Tribunal during the hearing, a review of the online presence for this organisation suggests the courses offered are informative or educational rather than therapeutic. This view was unchallenged. The only evidence about what the courses contain is from [Mr Tran] himself, which was limited and general at best, such as: ‘*How to get off drugs and how to rehabilitate from drug use*’. When challenged that his level of English raised concerns about how he could understand and complete these courses in one day, [Mr Tran] responded through the interpreter that he is ‘*very confident*’ he can ‘*understand English*’. This was unpersuasive given the Tribunal’s observations of [Mr Tran] over two days of oral evidence, including one occasion when Mr Poynder asked him to provide a response in English. It is noteworthy Mr Watson-Munro referred to these courses and the sessions with a mental health nurse as a ‘*starting point*’ only, but which did not obviate his recommendation for [Mr Tran] to be seen by a ‘*suitably qualified*’ psychologist or psychiatrist who speaks Vietnamese and has other relevant experience. Very little weight is placed on the two Universal Course certificates as advancing [Mr Tran’s] unmet rehabilitative needs relating to anger, family violence, illicit drug use, and better dealing with financial stress.

1. Ultimately, the Tribunal took the view that Mr Tran’s offending had been “very serious” and that there was a “moderate risk of reoffending”. In combination, those circumstances led it to conclude that the “risk to the Australian community” consideration established by cl 8.1.2 of Direction 99 weighed “substantially against revocation” of the Cancellation.
2. Insofar as concerned cl 8.2 of Direction 99, the Tribunal had occasion to consider Mr Tran’s history of controlling and verbally abusive conduct towards his wife, Ms Nguyen. The Tribunal noted:

81. Despite the absence of any charges or convictions for family violence, the Tribunal is satisfied [Mr Tran] committed family violence within the meaning of [Direction 99]. This includes by being verbally abusive, aggressive, controlling, and coercive against Ms Nguyen. The conduct occurred relatively frequently and caused Ms Nguyen to be fearful and avoid disagreeing with him, including because she did not want their children to observe his objectionable conduct. [Mr Tran’s] rehabilitative needs regarding family violence have not been meaningfully advanced by the recent course with Universal Class. The Tribunal accepts, however, [Mr Tran] is remorseful, has recently decided to fully disclose past conduct, and Ms Nguyen has forgiven him. That said, his aspiration not to repeat such conduct is untested by the daily pressures of a resumed relationship.

1. Insofar as concerned cl 8.3 of Direction 99—the strength, nature and duration of Mr Tran’s ties to Australia—the Tribunal was moved to consider the impact of the Cancellation on Mr Tran’s family. In doing so, it had occasion to replicate the submission that Mr Tran made on that score, namely (errors and emphasis original, references omitted):

86. [Mr Tran] submitted in a statement dated 19 October 2021:

‘*If my wife and children decide to remain in Australia, I fear for their welfare. I am concerned for my wife that without my presence the care and shared parental activities for our children will be extremely difficult.*

*Although my wife has her mother and step-father in Melbourne, they both have medical problems. Her stepfather has medical issue during the term of his employment with VicRoads such as chronic shoulder pains and long-term hypertension. Her mother suffers from a multitude of medical condition like imbalance thyroid gland, and I believe she has a tumour which requires invasive medical attention.*

*I understand that my mother in law has been suffering from difficulty from breathing due to the enlarged goitre from her neck, and she has last her daily sleep because of this medical condition. In addition, my mother in law has nerve compression issues to both of her arms, which causes ongoing numbness for the past few years, and specialised medical invasive procedures will be carried out and assessed by medical specialists in due course.*

*Every time when I have a telephone conversation with my wife, my wife has told me that her mother has been advised by her family doctor that in serious event of breathing complication, her mother can pass away suddenly at any minute.*

*In addition, my wife has been living with her mother and step father since my incarceration because of her mother's medical conditions and to assist her mother with the household chores due to great difficulty with the ongoing housework.*’

1. The Tribunal reasoned that Mr Tran’s connections to Australia—and, in particular, to his wife and children, whom it supposed would remain in Australia regardless of whether or not the Cancellation were revoked—weighed “moderately in favour of revocation”. In so concluding, the Tribunal reasoned as follows (references omitted):

87. The evidence discloses [Mr Tran’s] closest relationships in Australia are predominantly with his wife and two children, who are Australian citizens. The Tribunal accepts he is also supported by his mother-in-law in the terms reflected by her evidence. Although Ms Nguyen stated in her documentary evidence that [Mr Tran] also gets on with her stepfather, there is no evidence from him in this matter and the extent to which he supports [Mr Tran] is not persuasively established. There is also no independent corroboration of the work-related medical condition purportedly suffered by [Mr Tran’s] father-in-law, or how this is relevant in the circumstances of this case.

88. The Tribunal has considered statements in evidence from [Mr Tran’s] mother-in-law dated 11 January 2022 and 1 April 2023. Her oral evidence was earlier summarised at paragraphs [30]-[32]. The Tribunal has considered the reference to a possible tendon release procedure in one of her hands, but there is no evidence this operation has been undertaken. There is also no expert evidence to corroborate claims that she has a tumour, or debilitating thyroid condition, or is at risk of sudden death.

1. In so concluding, the Tribunal accepted that:

91. …the weight of evidence is that [Mr Tran’s wife] will remain in Australia because of the children’s best interests. If she does, the difficult task she has borne for the last four years would continue, in working, caring for her children, and eventually finding somewhere else to live to alleviate the burden on her ageing mother and stepfather.

1. The Tribunal also considered Mr Tran’s “contribution through past study, employment, and community engagement”. On that front, it observed (references omitted):

92. …There is scant evidence of [Mr Tran’s] past lawful employment in Australia or broader engagement in the life of the community. This includes only a very limited ability to speak English despite living here for over a decade.

1. Insofar as concerned cl 9.1 of Direction 99, the Tribunal noted that Mr Tran had raised for its consideration some concerns that he had about his potential return to Vietnam, specifically that (errors and emphasis original, references omitted):

123. …In a statement prepared by [Mr Tran’s former solicitor]…the following is stated:

***Concerns about returning to Vietnam***

*I fear returning to Vietnam to live. I fear for my safety given the surging Covid-19.*

*…*

*Vietnam is not a country like Australia where the laws is being upheld under many circumstances. Vietnam is not a country where human rights are respected.*

*The health care and education system in Vietnam is badly riddled with highly corrupt officials. Vietnam is one of the most polluted countries.*

1. Insofar as those submissions were concerned, the Tribunal reasoned as follows (emphasis original, references committed):

126. During the hearing, neither [Mr Tran] nor Mr Poynder advanced any fears [Mr Tran] holds about repatriation to Vietnam. No evidence was led about the previous claims submitted by [Mr Tran’s former solicitor] that [Mr Tran] fears for his safety ‘*given the surging Covid-19*’ in Vietnam, or for the welfare of his children, or the basis for the claim that laws in Vietnam are not upheld and human rights are not respected. No evidence was advanced about why health care and the education system in Vietnam is riddled with ‘*highly corrupt officials*’, or about pollution in Vietnam, or why these things are relevant to [Mr Tran’s] circumstances as someone who expresses no health concerns and whose children will not return to Vietnam. In [Mr Tran’s] parents’ statement reference is made to [Mr Tran] learning ‘*to cope, toil with the adversity and a very low socio-economic upbringing during his teenage years*’. The Tribunal finds no evidence manifest in the materials before it or any inference in those materials that bears out [Mr Tran’s] claims. On the contrary, the evidence suggests [Mr Tran] experienced unremarkable formative years in Vietnam, was educated to Diploma level, and his sister became a pharmacist. His parents and sister have also been able to remain in Vietnam without any reported issues.

1. After taking account of various other considerations with which the present application does not engage, the Tribunal recorded its conclusions. It found (indeed, it was not controversial) that, by application of ss 501(6)(a) and 501(7)(c) of the Act, Mr Tran did not pass the “character test” and that the question for immediate consideration was whether or not there was “another reason” why the Cancellation should be revoked. For present purposes, it suffices to record the following of the Tribunal’s conclusions, namely:

146. For most of [Mr Tran’s] decade-long residence in Australia, he has either been living and working here illegally, or in custodial settings. He has unmet rehabilitative needs and the protective factors he relies upon to prevent further reoffending are comparable to those of the past. He constitutes a moderate risk of reoffending and the crimes he committed fall into a category where even a low risk of repeat is unacceptable. Having regard for his criminal and other conduct, including illicit drug taking and family violence against Ms Nguyen, the Australian community would expect he should not continue to hold a visa.

…

149. Having weighed all relevant considerations individually and cumulatively, the Tribunal finds there is not another reason why the mandatory cancellation of [Mr Tran’s] visa should be revoked. That is because the primary considerations *Protection of the Australian community, Expectations of the Australian community*, and *Family violence committed by the non-citizen*, considerably outweigh the weight given to the primary considerations *Strength, nature and duration of ties to Australia, Best interests of minor children*, and the other countervailing consideration.

1. For reasons that will shortly become apparent, it is necessary at this juncture to record some details about the hearing that transpired before the Tribunal. A transcript from that hearing was received into evidence without objection. It records that Mr Tran gave his evidence with the assistance of an interpreter. The following exchange between Mr Tran and his representative, Mr Poynder, took place at the commencement of his evidence:

Mr. Poynder: …Mr. Tran, I know you speak and read some English, but when I talk to you today, could we always talk through the interpreter to avoid any confusion?

Interpreter: [Vietnamese language]

Mr. Tran: Yes.

Mr. Poynder: So even if you understand my question in English, wait until you hear in Vietnamese before you answer.

Interpreter: [Vietnamese language]

Mr. Tran: Yes, sir.

Mr. Poynder: Um, firstly, could you tell the tribunal your full name, and where you are currently living?

Interpreter: [Vietnamese language]

Mr. Tran: [Vietnamese language]

Interpreter: My name is T-R-A-N, Tran.

Mr. Tran: [Vietnamese language]

Interpreter: I am now living inside the detention center [*sic*].

Mr. Poynder: Thank you. Um, Mr., uh, Tran, um, do you have a copy of a bundle of documents called the G documents in front of you?

Interpreter: [Vietnamese language]

Mr. Tran: No.

Interpreter: No.

Mr. Poynder: I wonder if the witness could be given a copy of the G documents.

[Tribunal]: Can he read English, Mr. Poynder?

Mr. Poynder: Uh, partially, yes.

1. Thereafter, the transcript records that Mr Tran gave evidence predominately in Vietnamese, although very occasionally in English (generally only to affirm or deny propositions).
2. During the course of his evidence, Mr Tran had occasion to describe some courses that he had undertaken during his time in immigration detention. Relevantly to that consideration, the transcript records the following exchange:

[Tribunal]: Okay. And, um, what were the components or the modules that he studied in the drug and alcohol course?

Interpreter: [Vietnamese]

Mr. Tran: [Vietnamese]

Interpreter: So I remember the blog, including how to get off the drugs, and how to rehab-rehaf-rehab from drug use. [Vietnamese] The awareness about how the drug can affect, uh, yourself and your community [Vietnamese] And how drugs can affect your physical health and mental health.

[Tribunal]: How long did it take him to complete the course?

Interpreter: [Vietnamese]

Mr. Tran: [Vietnamese]

Interpreter: He said, one day.

[Tribunal]: Okay. Both certificates were issued on the 24th of April this year. So did you do both courses in one day?

Interpreter: [Vietnamese]

Mr. Tran: [Vietnamese]

Interpreter: Yes, I complete two courses.

[Tribunal]: Did he pay for the courses or were they free or?

Interpreter: [Vietnamese]

Mr. Tran: [Vietnamese]

Interpreter: No, uh, it was free for me.

[Tribunal]: Okay. Did he have to pay for the certificates?

Interpreter: [Vietnamese]

Mr. Tran: [Vietnamese]

Interpreter: No.

[Tribunal]: And what language were the courses conducted in?

Interpreter: [Vietnamese]

Mr. Tran: [Vietnamese]

Interpreter: In English.

[Tribunal]: Okay. He doesn't seem to speak very good English and the evidence before me is he has, uh, from the statements and things his previous lawyer saying, you know, his ability is in English and the fact he's using an interpreter here. Um, how could he understand what those courses contained if you can't speak very good English or can't-- And write in English?

Interpreter: [Vietnamese]

Mr. Tran: [Vietnamese]

Interpreter: Um, I am very confident with-- I can understand like with a receptive English. Like I can listen and understand the language, but better than my speaking ability. [Vietnamese] Actually, Senior Member, when you don't have more question for me, would you allow me to express what my thinking in front of you?

[Tribunal]: Yes. Well, it's not how it quite works, but [unintelligible]

Interpreter: [Vietnamese]

Mr. Tran: Yes.

1. Later, Mr Poynder re-explored with Mr Tran how well he had been able to understand the content of the courses that he had undertaken and his earlier request to address the Tribunal directly. The exchange is lengthy but it is convenient to replicate it in full:

Mr. Poynder: Um, can I ask this question without it being interpreted? Uh, could you answer me directly? Um, how well do you think you speak English, and were you able to understand the courses you were taking? You can answer in English.

Mr. Tran: Uh--

Female Speaker: Sorry. Just one moment.

Mr. Poynder: Oh.

Mr. Tran: Can you answer me again, please?

Mr. Poynder: Yes. Um, how well do you think you speak English, and how well do you think you read English? And could you understand those courses you were taking?

Mr. Tran: Okay. When-when I come in, first time come in Australia, I have to, uh, study in the ICU, uh, unit for the nursing-nursing-nursing. And then, uh, after that, like, I can't hear and I can't talk much. Before they're talking, I don't understand. But when in Vietnam, they checking me. They say, "Oh, you okay with-with the English." But when I come here, I can't hear properly and I can't speak. But after that, and then I-I go to the [unintelligible], and when I go in prison. And then I get better English from the TV, the channel, any channel in the TV, I-I see ev-everything in TV. I learn the English from the TV and then I can talk properly. And I can know a lot. Uh, normally, I wake up at 5:00, see the news on the Channel 80 or City. Eight or cha-- The new, the news from the Channel 80 or City.

Mr. Poynder: Mm-hmm. Mm-hmm.

Mr. Tran: The new, new, you know.

Mr. Poynder: Mm.

Mr. Tran: The 5-- they start five o'clock, uh, uh, AM.

Mr. Poynder: Mm-hmm.

Mr. Tran: They start the new already, and [unintelligible] one more time the-the- again.

Mr. Poynder: Mm.

Mr. Tran: And-and then after that, I see the- a lot of channel in the TV. In like, gardening in the Channel 20. Gardening in the Channel 20, [unintelligible]. And then 33 to [unintelligible] food. And a lot I-I learning from the TV. And then I go to the court, see, and-and I learn more. And I talk, keep talking with the OG guy. They pick me some no-not good language, but they feed me. They feed me for what I say wrong. They feed for me.

Mr. Poynder: Mm. Thank you.

Mr. Tran: Very he-helpful.

Mr. Poynder: Thank you.

Mr. Tran: And then I get better all the time I keep talking to them, keep talking to them, and they-they feed me. They-they say I-I- they- I-I-I talk funny language, but English funny language, but, um, I know I have the second language. But when they talking something, I understand.

Mr. Poynder: Thank you. Thank you.

Mr. Tran: Yeah.

Mr. Poynder: Um, just arising out of that exchange, um, there was something else. I'm not qui-quite sure, um, uh, Mr. Tran asked for permission to speak to you by himself, but I don't know whether that was gonna be a plea or something along those lines. Um, I'm happy to leave that alone if the tribunal would prefer it.

[Tribunal]: I-I-I-I think, um, we leave it alone. You've taken instructions about what you wish to present in your case.

Mr. Poynder: Yes, yes.

[Tribunal]: Um, um, you-you can ask him whatever you want.

Mr. Poynder: Mm.

[Tribunal]: Um, uh, a-and through the interpreter if there's any- if there's anything else he wishes to add on, it's- it's a matter for you. But I don't want to interfere with-

Mr. Poynder: All right.

[Tribunal]: -how you want to present your case.

Mr. Poynder: I'm- I'm just gonna touch there and see where it goes.

[Tribunal]: Yes, of course.

Mr. Poynder: Um, before I finish, um, did you want an opportunity to say anything to the tribunal member yourself? Uh, if you do, please don't make it too long.

Mr. Tran: Yes. Yes.

[Tribunal]: [unintelligible]

Mr. Tran: Can I stand up?

[Tribunal]: No, no, no need.

Mr. Tran: Oh, okay. I can sit from here.

[Tribunal]: Uh, just through the interpreter, please?

Mr. Tran: [Vietnamese language]

Interpreter: [Vietnamese language] So-

Mr. Tran: [Vietnamese language]

Interpreter: -I am really remorseful and regret about the mistake I made in the past. And, uh, and, uh-

Mr. Tran: [Vietnamese language]

Interpreter: -and during my time serving time in prison, I learned a lot of, uh, precious lesson for my life.

Mr. Tran: [Vietnamese language]

Interpreter: I think my time in prison was somehow- is my luck because I learned very precious lesson for my future.

Mr. Tran: [Vietnamese language]

Interpreter: And I wish that, uh, I'll be given again one more time the opportunity so that I can return back to my community, to my, um, lovely family, so that I can, together with my wife, take care for my children.

Mr. Tran: [Vietnamese language]

Interpreter: And I'm being grateful to you, [Tribunal].

1. During his oral submissions, Mr Poynder had an exchange with the Tribunal concerning the significance or otherwise of Mr Tran having remained unlawfully in Australia following the cancellation of his previous (student) visa. Asked specifically whether that, as well as Mr Tran’s having worked illegally for cash, upon which he did not pay any income tax, was “relevant to other conduct” for the purposes of assessing the “protection of the Australian community”, Mr Poynder responded:

Yeah, it's-it's-it's-it's conduct, which he needs to be criticised for.

# The present application

1. The present application was commenced in July 2023. It was set down for hearing in February 2024, prior to which the parties filed written submissions directed to the challenge that was then advanced.
2. On 7 February 2024, the High Court handed down its decision in *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 98 ALJR 196 (“***Ismail***”). It appears (although nothing turns on it) that Mr Tran’s then representatives considered that judgment to be detrimental (and possibly fatal) to his prospects of obtaining prerogative relief in this court. With the Minister’s consent, the February hearing was vacated and Mr Tran was given an opportunity to consider his position. Subsequently, he retained new representatives, who prepared the amended originating application of 8 May 2024. That document advances the following bases upon which Mr Tran’s challenge to the Tribunal’s Decision proceeds:

1. In applying [8.1] (‘Protection of the Australian community’) of [Direction 99] – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA’:

1A. The [Tribunal] placed weight on an irrelevant consideration, being that [Mr Tran] had overstayed his Student visa and worked in Australia outside of the conditions of that visa.

**Particulars**

The relevant reasons of the Tribunal are at [46] and [65] (Court Book 561 and 568).

1B. The [Tribunal] reasoned that little or no weight could be given to i) [Mr Tran’s] honesty and contrition or ii) the [County Court’s] view of [Mr Tran’s] prospects of rehabilitation, because [Mr Tran] had not disclosed his crimes, his past drug use or his family violence to police, corrections officials or the [County Court]. In the circumstances that conclusion was unreasonable, or else demonstrated that the Tribunal misconstrued the evidence before it.

**Particulars**

The relevant reasons of the Tribunal are at [65] (Court Book 568). The sentencing reasons it refers to are at Court Book 29.

1C. The [Tribunal] made unfavourable findings about the value of courses undertaken by [Mr Tran] because of its view that the courses were insubstantial, and that [Mr Tran’s] English language skills were not sufficient for him to have understood those courses. Given that the Tribunal i) had asked [Mr Tran] not to answer its questions in English, but instead to answer them in Vietnamese; ii) declined to give [Mr Tran] an opportunity to demonstrate his English skills to the Tribunal and iii) did not know the specific content of these courses, these findings were procedurally unfair and legally unreasonable.

**Particulars**

The relevant reasons of the Tribunal are at [67] (Court Book 569).

2. In applying [8.3] (‘The strength, nature and duration of ties to Australia’) of [Direction 99] – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA’:

2A. The [Tribunal] failed to consider evidence about the adverse impact on [Mr Tran’s] mother- and father-in-law of his return to Vietnam; and its assessment of the mother- and father-in-law’s claims was unreasonable and procedurally unfair.

**Particulars**

The relevant reasons of the Tribunal are at [87]-[88] (Court Book 578).

2B. The [Tribunal] gave little weight to the evidence of [Mr Tran’s] ties to the community because it considered he had ‘only a very limited ability to speak English despite living here for over a decade’. This was an irrelevant consideration. In any event, relying on it in circumstances where the Tribunal had asked [Mr Tran] not to communicate in English and had declined his offer to demonstrate his English skills was procedurally unfair.

**Particulars**

The relevant reasons of the Tribunal are at [92] (Court Book 580-1).

3. In assessing [9.2] of the Direction (‘Extent of impediments if removed’), of [Direction 99] – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA’, the [Tribunal] rejected [Mr Tran’s] fears about returning to Vietnam because they were uncorroborated. It did not raise this concern at the hearing nor make any attempt to assess for itself [Mr Tran’s] submissions. The Tribunal thereby failed to exercise its statutory task.

**Particulars**

The relevant reasons of the Tribunal are at [126] (Court Book 596-7).

1. I shall address each challenge in turn.

# Ground 1A: did the Tribunal consider something irrelevant?

1. Mr Tran first maintains that the Tribunal fell into error insofar as it was moved to consider that his having remained unlawfully in Australia fell within what cl 8.1(1) of Direction 99 describes as “other serious conduct”. Simply put, Mr Tran maintains that his continued presence in Australia following the cancellation of his previous (student) visa (and prior to his being granted the Visa) was not conduct that was apt to be considered pursuant to cl 8.1.
2. The proposition upon which that submission is advanced is difficult to reconcile with what was said on Mr Tran’s behalf before the Tribunal (above, [30]). Perhaps it might not be thought that Mr Poynder agreed that Mr Tran’s continued presence in Australia was “other serious conduct” *for the purposes of cl 8.1 of Direction 99*; but that does appear to be the context in which the query arose and there was no suggestion then that the consideration was irrelevant to that inquiry.
3. Regardless, in order that the Tribunal’s Decision to take account of that consideration might bespeak jurisdictional error as alleged, it is necessary that Mr Tran should show that it was irrelevant in the sense that Mason J recognised in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40. That invites some analysis as to whether there is something about the subject matter, scope or purpose of the Act that precluded the Tribunal, in the present matter, from bringing Mr Tran’s unlawful presence in Australia to bear upon its consideration of cl 8.1 of Direction 99.
4. Clause 8.1 of Direction 99 required the Tribunal, in the course of considering the protection of the Australian community from criminal or other serious conduct, to reflect upon “the nature and seriousness” of Mr Tran’s conduct: Direction 99, cl 8.1(2)(a). In considering the nature and seriousness of that conduct, cl 8.1.1(1) of Direction 99 required that it have regard to the non-exhaustive list of “types of crimes or conduct” that “the Australian Government and the Australian community” view as “serious”.
5. There is nothing about the subject matter, scope or purpose of those provisions or the statutory authority that underpins them that required the Tribunal here, when assessing the nature and seriousness of his conduct to date, *not* to take account of Mr Tran’s having remained and worked unlawfully in Australia. *Buntin v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1055 (Meagher J), which Mr Tran advanced in support of that very proposition, is in fact no such authority.
6. On the contrary, in assessing the nature and seriousness of Mr Tran’s conduct to date, the Tribunal was entitled to take account of anything that rationally bore upon that assessment. So long as it was made with appropriate compliance with the instruction conveyed by cl 8.1.1, the Tribunal’s assessment in that regard was not otherwise constrained.
7. But even were it otherwise—that is to say, even if cl 8.1.1(1) of Direction 99 precluded the Tribunal, when considering the nature and seriousness of Mr Tran’s conduct to date, from having regard to conduct that was not at the same level of seriousness as the species listed in subparagraph (b)—it does not follow that what the Tribunal did in the present matter involved consideration of an irrelevant matter. It is not in controversy that, during the period spanning the cancellation of his previous visa through to the granting of the one that he now wants back, Mr Tran remained in Australia unlawfully. He was not entitled to live or work here and yet he did both. He apparently received payments in cash, which was not declared for income tax purposes. It is not necessary that the court now should conclude that his conduct was relevantly criminal. It suffices to observe that it was open to the Tribunal to consider that it was serious; and, in particular, of an equivalent seriousness to the other species of conduct listed in cl 8.1.1(1)(b) of Direction 99.
8. Clause 8.1(1) of Direction 99 required that decision makers “…should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they [amongst other things] will respect important institutions”. There is no reason to doubt that the regulatory framework that governs Australia’s immigration policy should qualify as one such institution.
9. It follows that the Tribunal’s Decision here to take account of Mr Tran’s unlawful presence in Australia after the cancellation of his previous visa—and to factor it into its assessment under cl 8.1.1 of Direction 99 of the nature and seriousness of his conduct to date—does not bespeak any error of law on the Tribunal’s part. On the contrary (and with respect), the Tribunal was entitled to reason as it did.

# Ground 1B: treatment of sentencing remarks

1. By his second ground of challenge (“1B” in the amended originating application), Mr Tran maintains that the Tribunal acted unreasonably (in a sense that bespoke jurisdictional error) by failing to afford weight to the County Court’s assessment of his rehabilitation prospects. In his written submissions in support of the challenge, Mr Tran maintained (emphasis original, references omitted):

25. In sentencing [Mr Tran], his Honour Judge Hannebery noted that [Mr Tran] had pleaded guilty, had no prior convictions, had a ‘substantial history of employment’, had ‘engaged in and completed several educational courses’, was the ‘father of two young children’ to whom he was devoted, and had ‘expressed remorse’ for his actions. His Honour concluded that [Mr Tran] had ‘good prospects of rehabilitation’. Notably, the [County Court] was aware of [Mr Tran’s] family violence towards his wife.

26. Before the Tribunal, [Mr Tran] pointed to the [County Court’s] favourable assessment of [Mr Tran’s] recidivism risk, together with [Mr Tran] remorse and candour before the Tribunal. However, the Tribunal found as follows:

The [County Court’s] finding that [Mr Tran] has good prospects of rehabilitation ‘*in all the circumstances*’, lacked a complete understanding of the circumstances, including [Mr Tran’s] illicit drug use. Several references were made during the hearing to [Mr Tran’s] open and forthright nature at the current hearing. It is frankly little to his [credit] that he has decided to be completely forthright about his crimes, illicit drug taking, and conduct against Mrs Nguyen at this hearing, rather than to the police and courts four years ago.

1. Mr Tran’s complaint is that it was unreasonable for the Tribunal to attach any adverse assessment to his failure to inform the County Court about “…his crimes, illicit drug taking, and conduct against Mrs Nguyen”. He maintains that the evidence that the Tribunal had before it did not disclose what information the County Court (or police) had about those matters, nor that there was anything that he had been asked in those regards that he answered otherwise than honestly or with similar candour. In the circumstances, he submits that the Tribunal’s failure “…to afford favourable weight to the [County Court’s] assessment, [and] to [Mr Tran’s] own candid and contrite account of his past conduct, was unreasonable”.
2. There are numerous difficulties with that submission. The first and most obvious is that the weight that the Tribunal opted to attach to the observations of the County Court was a matter for the Tribunal: *Abebe v The Commonwealth of Australia* (1999) 197 CLR 510 (“***Abebe***”), 580 [197] (Gummow and Hayne JJ]), *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 176 [33] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) and *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582, 599 [24] (Kiefel CJ, Keane, Gordon and Steward JJ).
3. In any event, read fairly and in its proper context, the Tribunal’s observations do not distil to anything more than an acceptance that Mr Tran had been more forthright in his disclosure or acceptance of past offending than he had been before the County Court. That was a reality that Mr Tran himself acknowledged; and from which, quite plainly, he hoped to realise some measure of positive estimation. The Tribunal was entitled to view the observations of the County Court in the light afforded by that lens.
4. The Tribunal was also entitled to find that the credit that Mr Tran might be given for his more recent openness should be tempered by what was or was not said in the context of his sentencing. Again, read fairly and in context, the Tribunal was simply being careful to explain why it did not share the County Court’s view about Mr Tran’s prospects of rehabilitation. That was a view that it was entitled to form; and, in forming it, it was entitled to take account of the more generous candour that Mr Tran had shown.
5. It follows that challenge “1B” is not made good.

# Ground 1C: discounted value of detention courses

1. By his third challenge (or the third limb of ground one), Mr Tran submits that the Tribunal’s Decision is a product of jurisdictional error in that it was premised upon a conclusion that his English language skills are sufficiently poor that he likely did not benefit much from the anger management and drug and alcohol abuse courses that he undertook in immigration detention. That conclusion, he says, was procedurally unfair or legally unreasonable because:
2. having been asked to give (and having, for the most part, given) his evidence through an interpreter, Mr Tran’s English language skills could not have been sufficiently apparent;
3. he had requested and was denied an opportunity to demonstrate his English skills; and
4. the Tribunal did not know the content of the courses.
5. Mr Tran offered his completion of the two courses as evidence of his commitment that, if the Cancellation were revoked, he would not reoffend or engage in other serious misconduct. By his written submissions before this court, Mr Tran maintains:

37. There are two errors here. First, the Tribunal did not ask [Mr Tran] or his counsel to provide further information about the content of these courses. Nor did it seek out this information for itself, as it was entitled to do. In the circumstances, the assumption that the courses were of little or no use to [Mr Tran] is unreasonable.

38. Separately, the Tribunal’s unfavourable assessment of [Mr Tran’s] ability to understand English is entirely unreasonable and procedurally unfair…

1. The first of the “two errors” can swiftly be addressed. There was nothing unreasonable about the Tribunal’s failure to ask for further information about the content of the courses. The power that the Tribunal here declined to exercise—that is to say, the power of revocation conferred by s 501CA(4) of the Act—was one that Mr Tran asked it to exercise. It was for Mr Tran to establish his case in that regard: *Minister for Immigration and Border Protection v Maioha* (2018) 267 FCR 643, 655 [48] (Rares and Robertson JJ). The Tribunal was under no duty—and certainly not one referrable to common law standards of natural justice or procedural fairness—to make inquiries about aspects of the case that he advanced: *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 290 (Mason CJ and Deane J); *Abebe*, 576 [187] (Gummow and Hayne JJ).
2. Albeit not in an identical context, the proposition was put succinctly in *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, 1129 [24] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ):

It is difficult to see any basis upon which a failure to inquire could constitute a breach of the requirements of procedural fairness at common law.

1. Similarly, I do not accept that the Tribunal’s assessment of Mr Tran’s English language skills was attended by any procedural unfairness or want of reason. It may be accepted that Mr Tran, having given his evidence via an interpreter, had limited opportunity to impress upon the Tribunal the extent of his English language skills. Nonetheless, two observations bear noting.
2. First, he had *an* opportunity to showcase his English skills. As has already been recorded (above, [29]), Mr Tran’s evidence was not given exclusively in Vietnamese. Intending no disrespect, it is apparent that those parts of his evidence were not inconsistent with the Tribunal’s observations about his English proficiency.
3. Second, it is perhaps somewhat generous to suggest that Mr Tran was denied an opportunity to demonstrate his English skills directly to the Tribunal. It is apparent that the opportunity that Mr Tran requested was to demonstrate, in his own words, his remorse and regret for having engaged in his past conduct. That was precisely the opportunity that he was afforded and of which he availed himself.
4. What’s more, it is equally apparent that the opportunity that he was afforded to that end was one with which neither he nor his representative took issue. There was, for example, no resistance to the Tribunal’s request that Mr Tran’s plea be made “just through the interpreter” (above, [29]). Not only was that not objected to, Mr Tran expressed his gratitude for the opportunity that he was given.
5. The Tribunal’s conclusions about Mr Tran’s English language skills and the benefit that he might have realised from the courses that he undertook are not vulnerable to challenge in the ways that he posits. There was no procedural unfairness as alleged and the Tribunal did not proceed upon reasoning that was unreasonable or illogical in a way or ways capable of sustaining jurisdictional error.
6. It follows that ground “1C” is not made good.

# Ground 2A: impact on parents-in-law

1. Mr Tran’s second ground of challenge is also multi-dimensional. It’s first limb—ground 2A from the amended originating application—concerns the Tribunal’s consideration of the evidence that was led about the impact of the Cancellation upon Mr Tran’s parents-in-law.
2. At the time of the hearing before the Tribunal, the evidence established that Mr Tran’s wife and children resided with his mother and stepfather-in-law. His mother-in-law provided a written statement of evidence, in which she described various health conditions under which she and her husband laboured. In oral evidence, Mr Tran’s mother-in-law told the Tribunal of the difficulties that she and her husband experienced having Mr Tran’s wife and children living with them and in assisting with the children’s care.
3. Mr Tran complains that the Tribunal failed to consider the evidence of his mother-in-law (at all or in full); or, to the extent that it was considered and rejected, that its rejection of her evidence was unreasonable and procedurally unfair.
4. There can be no doubt that the Tribunal was alive to the adverse health conditions under which Mr Tran’s parents-in-law were said to labour. They are referred to in its reasons; and, specifically, in a way that discloses what the Minister described, correctly with respect, as “a comprehensive review and consideration of the relevant evidence”. The Tribunal acknowledged that Mr Tran’s absence was a burden that his parents-in-law partly bore; and that, in the event that the Cancellation were not revoked, they would continue to bear it at least until such time as his wife and children found somewhere else to live.
5. It follows that there was no relevant want of consideration.
6. There was also no obvious rejection of the evidence given by Mr Tran’s mother-in-law. Instead, the Tribunal identified reasons why that evidence might attract less weight than it otherwise could: for example, because Mr Tran’s stepfather-in-law did not give evidence himself and the evidence that was given about his role in caring for Mr Tran’s wife and children was “not persuasively established”. Similarly, the Tribunal noted that there was no independent medical evidence to substantiate the nature or impacts of the conditions by which Mr Tran’s mother-in-law was afflicted.
7. It was open to the Tribunal, in assessing the significance to Mr Tran’s Review Application of his mother-in-law’s conditions and the impact that his continued absence would inflict upon his family (including his parents-in-law), to take account of those evidential gaps. That it did so without first identifying them is neither here nor there. For reasons equivalent to those already outlined in respect of ground 1C, the Tribunal was not obliged to give advance notice of how it perceived the evidence that Mr Tran chose to put before it: *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 166 [48] (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ). It was, as has been said, for Mr Tran to advance his case as he saw fit.
8. Similarly, there was no unreasonable rejection of the evidence given by Mr Tran’s mother-in-law. The Tribunal was simply not disposed to accept that the hardship that Mr Tran’s absence visited upon her and her husband should (together with other circumstances) sound in anything more than “moderate” support for revocation of the Cancellation. Again, it was entitled to reason in that way.
9. Ground 2A is not made good.

# Ground 2B: ties to community

1. The second limb of ground 2 also concerns the Tribunal’s assessment of Mr Tran’s ties to the Australian community. It is said that it was procedurally unfair, legally unreasonable and a misapplication of Direction 99 for the Tribunal to assess Mr Tran’s “engagement in the life of the community” by reference to his “very limited ability to speak English despite living here for over a decade”.
2. Mr Tran complains—for the same reasons as were advanced in respect of ground 1C—that it was unreasonable and procedurally unfair for the Tribunal to find that his English skills are poor. It is unnecessary that I should say any more on those topics than has already been said. For the reasons addressed above in relation to ground 1C, there was no such procedural unfairness or want of reason in the Tribunal’s making of that assessment.
3. Mr Tran further submits that the Tribunal erred in proceeding upon an assumption that his poor command of English was capable of informing the strength of his ties to the Australian community. It is said that, by reasoning in that way, “…the Tribunal was exhibiting the kind of ‘cultural chauvinism’ of which the courts have elsewhere been critical”. That submission is to be understood as a suggestion that the Tribunal’s linkage of Mr Tran’s poor command of English with his ties to the Australian community involved a misapplication of cl 8.3 of Direction 99 or was legally unreasonable (or both).
4. It was neither.
5. With due respect to those who might think otherwise, applying labels like “cultural chauvinism” is likely a course that courts exercising powers of judicial review should best avoid. Excepting what extends into the distant realms of legal unreason, it is not for this court to offer value judgments about the manner in which administrative decision makers are minded to make their decisions. At issue presently is not whether the Tribunal was right in determining the strength of Mr Tran’s ties to the community by reference to his poor command of English; but rather whether it made its decision about revocation in a way that was authorised by the Act.
6. It is beneficial to restate the passage of the Tribunal’s reasons at which Mr Tran takes aim (references omitted):

92. …There is scant evidence of [Mr Tran’s] past lawful employment in Australia or broader engagement in the life of the community. This includes only a very limited ability to speak English despite living here for over a decade…

1. Whatever might fairly be said about the merits of that reasoning, there is nothing about it that betrays any want of legal reason or any misapplication of Direction 99. The Tribunal was entitled, if and as it saw fit, to figure that Mr Tran would likely have a better command of English than he has if it were the case that he had had “past lawful employment in Australia or broader engagement in the life of the community”. Reasoning in that way may or may not be open to challenge on its merits; but it does not bespeak jurisdictional error.
2. Ground 2B is not made good.

# Ground 3: uncorroborated fears of return to Vietnam

1. Mr Tran’s final ground of challenge proceeds as an attack on the Tribunal’s consideration of the impediments that he said that he would face in the event that he were removed from Australia.
2. In his evidence, Mr Tran expressed concern about his potential return to Vietnam. The Tribunal referred to them in its reasons for decision (above, [23]-[24]); but, so Mr Tran submits:

58. …[the Tribunal] addressed them in considering the application of Australia’s non-refoulement obligations. It reasoned that [Mr Tran] and his representative had not advanced these fears ‘at the hearing’; nor had they ‘advanced evidence’ about them; nor was there ‘evidence manifest in the materials before it or any inference in those materials’ that bore out [Mr Tran’s] fears.

1. In the amended originating application, the error that Mr Tran attributes to the Tribunal is described as a failure to exercise its statutory task, which is said to have inhered in the Tribunal’s having “rejected [his] fears about returning to Vietnam because they were uncorroborated” and having done so without first “rais[ing] this concern at the hearing [or making] any attempt to assess for itself [his] submissions”.
2. There can be no suggestion that the Tribunal made its decision about revocation without first appreciating the nature of the fears that Mr Tran expressed about his potential return to Vietnam. They are recorded in the Tribunal’s written reasons. Likewise, the Tribunal was conscious that Mr Tran “…suffers depressive symptoms and is understandably anxious about his future”.
3. Before the Tribunal, Mr Tran did not pitch his fears at a level that suggested particular impediments or engaged Australia’s obligations of *non-refoulement*. Perhaps for want of a better forum, the Tribunal addressed those concerns under the heading “Legal consequences of the decision”. Regardless, there can be no doubt that the concerns that were identified were addressed; and jurisdictional error does not inhere in the fact that a decision maker only once takes account of a contention that might be relevant to more than one consideration: *Ismail*, 207 [50] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ).
4. Insofar as Mr Tran complains that the Tribunal ought to have sought (but did not seek) further information to corroborate the concerns that he had raised, the complaint can be swiftly addressed in the same way that the equivalent contention has been addressed under ground 1C. It was for Mr Tran to advance the best case for revocation that he could. The Tribunal was not obliged to hunt down further information that might make it better. There are, in some matters, examples of facts that are readily ascertainable and critical to a point that a failure to obtain them might bespeak jurisdictional error: *Ismail*, 202-203 [25] (Gageler CJ, Gordon, Edelman, Gleeson and Jagot JJ); see also *Commissioner for Australia Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592 (Northrop, Miles and French JJ). The present case is not in that realm. The nature and veracity of Mr Tran’s fears were for Mr Tran to establish.
5. Ground 3 of Mr Tran’s challenge to the Tribunal’s Decision is not made good.

# Disposition

1. None of the bases upon which Mr Tran seeks to impugn the Tribunal’s Decision is sustainable. It follows that the amended originating application must (and will) be dismissed. There is no reason why the usual order as to costs should not be made and it will be.

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| I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Snaden. |

Associate:

Dated: 11 October 2024