



Administrative  
Appeals Tribunal

DECISION AND  
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2021/0433**

Re: **SFPH**

APPLICANT

And **Minister for Immigration, Citizenship, Migrant Services and  
Multicultural Affairs**

RESPONDENT

**DECISION**

Tribunal: **Deputy President B W Rayment OAM KC**

Date: **16 May 2024**

Place: **Sydney**

The decision under review is set aside and substituted with the decision that the cancellation of the applicant's visa is revoked under s. 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth)



[SGD]

Deputy President B W Rayment OAM KC

## **CATCHWORDS**

*MIGRATION – Direction 99 - refusal to revoke mandatory cancellation – applicant from Afghanistan – victim of violence and trauma in home country – sex-based offences – nature and seriousness of offending – risk to Australian community – strength nature and ties to Australia – expectations of the community – other considerations – decision under review set aside and substituted*

## **LEGISLATION**

*Migration Act 1958 (Cth)*

## **SECONDARY MATERIALS**

Minister for Citizenship, Citizenship and Multicultural Affairs, *Direction No 99: Visa Refusal and Cancellation under Section 501 and Revocation of a Mandatory Cancellation of a Visa under Section 501CA*

## **REASONS FOR DECISION**

**Deputy President B W Rayment OAM KC**

**16 May 2024**

1. The applicant suffered significant trauma in his home country of Afghanistan. When he was five years old, his father was killed, and the applicant's mother was left alone to look after her three children and those of a paternal uncle who had also been killed. She could not get a job. Later, two of his aunts were executed in public for not following rules requiring male chaperones. Two of his uncles and one of his grandmothers were killed by a suicide bomber. The family fled to Pakistan and spent seven years in a refugee camp. Further trauma followed. Ultimately, when the applicant was 15 years old, his mother obtained a visa to come to Australia and the applicant, his brother and sister came here in 2003 under their mother's visa.
2. The applicant's mother now lives in Melbourne and came to sit in the Tribunal room during the hearing. The applicant is in Villawood Detention centre, and it has been a long time since the applicant last saw her. The affection between the applicant and his mother was very evident at those times when the applicant was not in the witness box. One of his strongest desires is to return to Melbourne and be with his mother, to look after her.

3. His offending in this country led to the mandatory cancellation of his visa when he was serving three years and ten months in gaol. He was subsequently taken into immigration detention following his release on parole and has remained there for a further three and a half years.
4. He has been diagnosed with a number of mental health conditions, including post-traumatic stress disorder. He did not know of that diagnosis until 2015. He was at school in Dandenong for years 11 and 12, then commenced a panel beating course, following his late father's occupation.
5. Starting at school he self-medicated with marijuana and later ice after which his offending commenced. I will summarise the offending when I begin to discuss Direction 99.
6. He has made efforts to rehabilitate himself in gaol and in detention, including by engaging a psychologist at his family's expense.
7. This is the third time he has been before the Tribunal with the two previous adverse Tribunal decisions having been set aside and remitted to be re-heard.
8. Dr Donnelly of counsel appeared for the applicant and Mr Johnson of counsel instructed by Mills Oakley, solicitors, appeared for the Minister. I heard oral evidence from the applicant, his brother and sister on 22 April. The papers in the case are voluminous.

#### **DIRECTION 99**

9. The Ministerial direction binds decision-makers, including this Tribunal, to take into account a number of mandatory considerations, while leaving the weight to be given to each such consideration to be determined by the decision-makers. The so-called "other considerations" may be supplemented by unexpressed considerations that may appear to the decision-maker to be relevant.
10. The statutory question in the review, given that the applicant fails the character test, is whether, within the meaning of s.501CA(4) of the *Migration Act, 1958*, there is another reason why the original decision to cancel the applicant's visa should be revoked.

11. Clause 5.2 of the Direction states principles within which decision-makers should approach their task. I note its terms.
12. Clause 8 specifies a number of considerations (described as “primary”) which, according to clause 7(2) should generally be given greater weight than the other considerations.
13. The first of those primary considerations is the protection of the Australian community, dealt with in clauses 8.1, 8.1.1 and 8.1.2. I note clause 8.1(1). As to the nature and seriousness of the applicant’s conduct to date, the applicant’s offending is summarised in his police certificate at pages 1156-1158. Between 8 July 2004 and 7 December 2016, he was convicted in Victorian Magistrates Courts of many offences for which he was fined and given community protection orders. The offences included motor vehicle offences, including drink driving offences which led to his licence disqualification, offences of dishonesty and a drug offence. He then came before the County Court and with effect from April 2017 he was imprisoned. The papers include the remarks on sentence of her Honour Judge Fox at pages 1159-1173. In general, I adopt her Honour’s reasons for sentence as part of these reasons insofar as she describes the most recent offending of the applicant, and in the other matters I attribute to her Honour. In short, he was convicted of two separate sexual assaults one in 2014 and the other in 2016. The sexual assaults involved compelled fellatio on girls aged respectively 16 and 18. The offence involving the 18 year old was also accompanied by punching her in the head resulting in a charge of common assault. Both victims were vulnerable. He was also dealt with for robbery of \$6,000. He was sentenced to three years and ten months of imprisonment, with a non-parole period of two years and five months. In fact, he served the whole of that sentence, 528 days of pre-sentence detention having been treated as time served, because his visa was cancelled and the Victorian authorities denied him parole. At the expiration of his sentence, he was taken into immigration detention. The two sexual assaults are within clause 8.1.1(1)(a)(i) and (ii) being considered very serious. I accept that description.
14. Thus, to date, he has spent the period commencing on 4 April 2017 in prison (including on remand) and in immigration detention — a period of more than seven years. His being detained in Villawood rather than in Victoria has been distressing for him since he has been deprived of physical contact with his mother and his siblings, and other relatives including his nephews and niece, all of whom live in Melbourne. When he reconnected with his mother in the Tribunal room, it had been six years since he saw her.

15. The judge described the applicant as having taken recreational marijuana in high school in Dandenong and having for a period of 12-18 months taken methamphetamines. He is drug free at this time.
16. The applicant was attacked in 2012 when he was stabbed in the face, chest and torso and still bears the scars. The attacker was a person breaking into his girlfriend's aunt's car. In gaol, he was attacked again, being stabbed by other prisoners.
17. He was put into protective custody in gaol and also in detention, resulting in his being kept in isolation in both places.

**THE RISK TO THE AUSTRALIAN COMMUNITY SHOULD THE APPLICANT COMMIT FURTHER OFFENCES OR ENGAGE IN OTHER SERIOUS CONDUCT (CL 8.1.2).**

18. The judge found evidence of his remorse in having pleaded guilty to the charges. He told the Tribunal that he has written to the victims of the sexual assaults expressing his sorrow for his offending and in his evidence, he repeatedly expressed his remorse for what he had done. He also pointed out that steps were not taken for his rehabilitation in detention.
19. The judge referred to the fact that the applicant worked as a panel beater before his imprisonment and had a good employment history. Further the judge also noted the evidence of a psychologist stating that the applicant, after using a risk assessment tool, scored within the low risk category of reoffending in relation to sexually based offences. The psychologist diagnosed him as suffering PTSD, depression and anxiety. In a 2019 report at pages 1234-1244, the same psychologist assessed him to be in a low-moderate level of recidivism, which would further reduce with his continued involvement in therapeutic interventions and with the ongoing support of his family, which she described as imperative to his rehabilitation.
20. Although he has not been offered rehabilitative treatment in detention, he has made efforts of his own towards his rehabilitation. In his most recent statement of February 2024, he said at paragraphs 2-4 that he has completed the following programs:
  - Building Self Esteem.
  - Creative Thinking.
  - Depression Management.
  - Developing Great Social Skills.
  - Emotional Intelligence.

- How to deal with Difficult Personalities.
- How to Improve Your Concentration.
- Mediation 101.
- Personal Communication Skills Level 3.
- Slack.
- Understanding Addictions.
- Workplace Sexual Harassment in the #MeToo Era.
- Workplace Violence: A Guide to Responding and Preventing.

The Applicant further identified, at paragraph 3, precisely how each of these programs has contributed to his rehabilitation and personal growth:

*a. Building Self Esteem. Previously, my low self-esteem often led me to seek validation through negative behaviours. Now, with a bolstered self-image, I no longer feel the need to assert dominance or control over others, fostering healthier interactions and reducing the likelihood of reoffending.*

*b. Creative Thinking. This training has opened up new avenues for me to express myself and solve problems without resorting to impulsivity or negative behaviours. I've learned to view situations from multiple perspectives, enhancing my empathy and understanding towards others.*

*c. Depression Management. Managing my depression has been crucial. Before, it contributed to isolation and distorted thinking, which sometimes led to harmful behaviours. Now, with healthier coping mechanisms, my mood and behaviour have significantly improved.*

*d. Developing Great Social Skills. Enhancing my social skills has been instrumental in understanding and respecting boundaries, interpreting social cues correctly, and engaging in respectful communication. This directly counters previous tendencies associated with sexual and indecent assault.*

*e. Emotional Intelligence. Developing emotional intelligence has allowed me to better recognise, understand, and manage my emotions and those of others. This has led to better decision-making and a reduction in behaviours driven by unmanaged emotions.*

*f. How to Deal with Difficult Personalities. Learning to navigate challenging interactions without aggression or inappropriate behaviour has been key to preventing conflict escalation and reoffending.*

*g. How to Improve Your Concentration. Improved concentration has enhanced my focus on rehabilitation efforts, allowing me to more fully engage in behaviour change processes and apply new skills in real-life scenarios.*

*h. Mediation 101. Acquiring mediation skills has enabled me to resolve conflicts peacefully and appropriately, avoiding aggressive confrontations or misunderstandings.*

*l. Personal Communication Skills Level 3. Advanced communication skills have ensured that I can express myself clearly and respectfully, understand others, and navigate social situations.*

*j. Understanding Addictions. Recognising and managing my addictions has been vital; substance abuse previously impaired my judgment and disinhibited negative behaviours. Now, I'm more in control and less likely to engage in criminal behaviour.*

*k. Education on Workplace Sexual Harassment and Violence. Understanding the gravity and impact of sexual misconduct, especially in the workplace, has promoted my empathy towards victims and reinforced the importance of consent and respectful behaviour in all interactions.*

21. The applicant added, at paragraphs 5 – 11 of his February 2024 statement, that he is committed to addressing his mental health issues. Specifically, he has sought mental health treatment from a psychologist at Guiding Light Psychology, tasked with primarily treating his post-traumatic stress and anxiety. The applicant acknowledges that the sessions provided him with ‘a safe space to explore the depths of [his] emotions, understand the root causes of [his] behaviour, and develop strategies for managing [his] mental health’. The applicant states at paragraph 8 that various therapeutic techniques, such as cognitive-behavioural therapy and exposure therapy have taught him how to confront and reframe his negative thought patterns and behaviours. Further, he states that these strategies have assisted him in managing his anxiety and post-traumatic stress symptoms, which he acknowledges as having been barriers to his personal growth. Indeed, the applicant states that the ‘therapeutic process has been challenging yet profoundly rewarding’.
22. The psychologist from Guiding Light Psychology currently treating the applicant wrote a letter at page 4044 in which he stated that he can confirm the applicant has shown progress in understanding his emotions and behaviour during the course of therapy. He said that the applicant has engaged well in sessions thus far and seems motivated to continue to engage in therapy. The psychologist also opined that that the applicant is committed to improving his mental health, as well as himself as an individual.
23. In an earlier statement of the applicant at page 1045 he made reference to other rehabilitation courses undertaken by him in detention, namely stress management, problem solving strategies, critical thinking drug and alcohol abuse and domestic violence, and 4 to 5 sessions of the Smart Recovery Program (page 1096). In oral evidence, he said that he

is currently receiving treatment at his family's expense from a psychologist firm called Guiding Light Psychology (Transcript, 16). He has had 20-30 consultations (some in person, some by telehealth from STARTTS (Transcript, 16).

24. In Australia, he is closest to his brother, his sister and his mother. He also has two nephews and a niece born in Australia to his brother and sister-in-law, four aunts and four uncles in Australia and some 27 cousins, also here.
25. The applicant said that he owes his mother everything and that before his imprisonment it was his job to care for her, and that she is ill and cannot speak English and cannot care for herself. He said he has failed her through his offending. And that his focus is on the future, which he says will never involve further offending. In prison he finished a drug and alcohol course. As discussed below, his sister, now a qualified pharmacist gave up her full time job to assist the applicant's mother since his imprisonment and detention commenced.
26. He proposes to obtain employment and continue with his therapeutic treatment if released into the community. He said at Transcript, 23 that he wants to open his own business as a panel-beater.
27. As to the present risk of recidivism, I accept the evidence of the psychologist mentioned in [19] above that the applicant is presently in a low-moderate category of further offending, with good prospects of further rehabilitation if he is released. He is in my opinion genuinely remorseful for his offending. He has found his time in prison and detention eye-opening and is determined not to reoffend.
28. Mr Johnson of counsel put some incident reports from Villawood to the applicant which he agreed with only in part and which he sought to correct. I do not doubt that the applicant has a difficult time in detention. Without primary evidence capable of being tested from Serco officers I am not satisfied of the accuracy of the incident reports.
29. The second primary consideration (cl 8.2) relates to family violence committed by the non-citizen. There is no evidence of family violence.



### **THE STRENGTH, NATURE AND DURATION OF TIES TO AUSTRALIA (CL. 8.3)**

30. This primary consideration relates mainly to the applicant's immediate family and his nephews and niece, although there are other relatives in Australia mentioned above.
31. The applicant's sister has signed a statement at pages 1057-1059. She describes her relationship with the applicant as loving. They are very close. She said she is very stressed and worried about his well-being in detention, where he has really struggled, especially since he does not know when he will be released. He has told her of his remorse for his offending. She works part-time because of her mother's needs, which could potentially change if he were released. She says she and her immediate family would be devastated if he were deported., and that her mother is largely depressed because of his current predicament. Her own mental health has been compromised because of the applicant's detention.
32. They have never been separated since birth prior to his imprisonment. She is aged 36, close to the applicant's age.
33. She used to manage over five pharmacies in Melbourne's CBD and had to give that up when he brother was imprisoned. Before his imprisonment, he gave a lot of support to her mother such as taking her to doctors' appointments and helping financially. The mother has chronic pain and other ailments, including depression, stress, anxiety and wakes up during the night. She talks a lot about the applicant's circumstances. The house still has a room for him. She sees herself returning to full-time work if he is released.
34. She said in oral evidence that he is a changed man since he went to prison. He has demonstrated growth and she thinks he has been positively impacted by the reading he has been doing.
35. I next heard by telephone from the applicant's brother who is a printer, married with three children. He said that he used to visit the applicant when he was in prison in Victoria. And once took his then only child to visit him there. He said that the three kids communicate with the applicant by facetime.
36. He said he is close to his brother, whom he loves very much.

37. The next primary consideration in cl. 8.4 is the best interests of minor children in Australia (Cl. 8.4). The applicant has been told by a former girlfriend that he is the father of a daughter with whom he has had no contact. That fact, if it is correct, can only be discussed speculatively.
38. The applicant told me that he wishes to play a real role in person with his nephews and niece, and I accept that evidence. It would be in the best interests of the nephews and niece for him to be released.

#### **EXPECTATIONS OF THE COMMUNITY (CL 8.5)**

39. This factor depends on the statement of Government views as to community expectations, not to be independently assessed by decision-makers. It does not favour revocation of the cancellation of the applicant's visa, and is to be put into the balance when deciding the correct or preferable decision in the review.

#### **OTHER CONSIDERATIONS.**

#### **LEGAL CONSEQUENCES OF THE DECISION (CL 9.1)**

40. No protection finding has yet been made in respect of the applicant. He has not yet applied for a protection visa. The applicant's father and other family members have been killed in Afghanistan and there is reason to be apprehensive about his safety if he is deported to Afghanistan. I do not have sufficiently detailed information about the question of protection obligations to be satisfied as to their existence or non-existence.

#### **EXTENT OF IMPEDIMENTS IF REMOVED (CL 9.2)**

41. If the applicant were deported, he would have no family support. His spoken Dari is not as good as his English. He is culturally tied to this country more than any other having been here since 2003. His mental health would be adversely affected if he were deprived of the company of his immediate family, and he would be distraught to say the least. It is also unlikely that he would receive mental health treatment in Afghanistan comparable to that which he has received during his time with Guiding Light Psychology, given the limitations on medical health assistance available there.
42. No other expressly mentioned other consideration is relevant.

43. One other relevant matter is that he is adversely affected by continuing detention, and the loneliness arising from the protective conditions applicable to him.

**BALANCING THE CONSIDERATIONS**

44. In my opinion balancing the considerations discussed above, against one another, the correct or preferable decision is to revoke the cancellation of his visa, allowing him to reunite with his family for their mutual benefit. He would resume caring for his mother, to her benefit and that of his sister, who would be able to practice her profession as she desires. He has shown himself to be a person likely to be in full employment and able to contribute financially and otherwise to his family which he is anxious to return to. Further, he has demonstrated a clear intention to seek and undergo additional therapeutic intervention and rehabilitation. There is reason to think that he will not offend again and that he will take further steps to bring about his rehabilitation.

45. The cancellation of the applicant's visa will be revoked.

*I certify that the preceding 45 (forty-five) paragraphs are a true copy of the reasons for the decision herein of Deputy President B W Rayment OAM KC*

.....[SGD].....

Associate

Dated: 16 May 2024

Date(s) of hearing:	<b>22 April 2024</b>
Counsel for the Applicant:	<b>Dr J Donnelly</b>
Counsel for the Respondent:	<b>Mr G Johnson</b>
Solicitors for the Respondent:	<b>Ms J Schultz, Mills Oakley</b>