Federal Court of Australia

Renton v Minister for Home Affairs [2022] FCAFC 11

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **CHARLESWORTH, STEWART AND HALLEY JJ** |
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| Date of judgment: | 14 February 2022 |
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| Catchwords: | **MIGRATION** – mandatory cancellation of a visa under s 501(3A) of the *Migration Act 1958* (Cth) – decision not to revoke cancellation under s 501CA(4) – where the Minister made a finding that the appellant has psychological sexual issues relating to children – whether expert evidence was required – whether leave should be granted to raise new grounds – where new grounds are either without merit or do not allege jurisdictional error – appeal dismissed  |
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| Legislation: | *Migration Act 1958* (Cth) ss 501, 501CA(4)  |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 26 |
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| Date of hearing: | 9 February 2022  |
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| Counsel for the Appellant: | The appellant appeared in person |
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| Counsel for the Respondent: | Mr T Reilly |
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| Solicitor for the Respondent: | Minter Ellison |

ORDERS

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|  | NSD 939 of 2021 |
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| BETWEEN: | JOHN WILLIAM RENTONAppellant |
| AND: | MINISTER FOR HOME AFFAIRSRespondent |

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| order made by: | CHARLESWORTH, STEWART AND HALLEY JJ |
| DATE OF ORDER: | 14 February 2022 |

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

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

REASONS FOR JUDGMENT

THE COURT:

## Introduction

1. The appellant, Mr Renton, is a 68-year-old citizen of the United Kingdom. He arrived in Australia from England on 23 April 1961 by boat at the age of seven and has lived continuously in Australia. In the 61 years he has lived in this country, he has returned to the UK only once in 1989. Most recently, he resided here under a Class BF transitional (permanent) visa, which was granted on 1 September 1994. The evidence does not reveal why he did not become an Australian citizen despite such long residence in Australia.
2. On 4 May 2017, Mr Renton was convicted in the New South Wales District Court of various offences relating to the possession of more than 300,000 images of child pornography in respect of which he was sentenced in total to three years and seven months imprisonment with a non-parole period of two years. The sentencing judge’s sentencing remarks referred to prior relevant convictions, namely that in 1987 Mr Renton received community service for an offence of committing an act of indecency with a person under 16 years and in 1994 he received a bond for an offence of wilful and obscene behaviour. Her Honour concluded that “there is evidently a sexual deviancy that has not been addressed.”
3. By reason of having been sentenced to a term of imprisonment of more than 12 months, on 8 August 2018 Mr Renton’s visa was cancelled pursuant to s 501(3A) of the ***Migration******Act*** *1958* (Cth) by a delegate of the **Minister** for Home Affairs. Subsequently, Mr Renton made representations to have the visa cancellation revoked pursuant to s 501CA(4) of the Migration Act. Under that provision:

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. On 1 September 2020, the Minister personally decided not to revoke cancellation of the appellant’s visa. Mr Renton applied for judicial review of the Minister’s decision not to revoke cancellation of his visa. That application was dismissed by the primary judge in *Renton v Minister for Home Affairs* [2021] FCA 931. Mr Renton now appeals from that decision.

## The Minister’s reasons

1. In his statement of reasons, the Minister first noted that, in the representations Mr Renton made, he did not dispute that he does not pass the character test. Accordingly, s 501CA(4)(b)(i) was not satisfied.
2. The Minister then considered whether, pursuant to s 501CA(4)(b)(ii), there is another reason why the cancellation decision should be revoked.
3. The first matter the Minister considered was the extent of the impediments that Mr Renton will face if removed to the UK. The Minister acknowledged that Mr Renton no longer knows anyone in the UK and that his returning there “might be a difficult process on a personal level at the beginning”. However, the Minister considered that the support services available to him would be comparable to that of Australia such that the difficulties in resettling would not be insurmountable.
4. The second matter the Minister considered was the strength, nature and duration of Mr Renton’s ties to the Australian community. The Minister acknowledged Mr Renton’s strong ties to Australia including that he has lived here for most of his life and the emotional hardship that his removal would cause his daughter (then aged 19). The Minister also found that Mr Renton had contributed positively to the community for over 40 years, including doing volunteer work for the Museum of Fire and the Salvation Army. The Minister considered that the Australian community would have a higher tolerance of criminal conduct for persons with ties such as Mr Renton.
5. The final, dispositive, matter considered by the Minister was the protection of the Australian community. The Minister considered Mr Renton’s offending to be “very serious” and that he had failed to acknowledge that he has psychological sexual issues relating to children. The Minister considered that the Mr Renton’s attribution of his offending to mere “voyeurism” demonstrated inadequate insight into his offending and that, although he had sought out treatment and training, he had not addressed the causative factors of his offending by undertaking any such treatment or training. On the whole, the Minister found that there is an ongoing risk of his reoffending.
6. The Minister concluded in relation to s 501CA(4)(b)(ii) as follows:

45 I have considered the length of time Mr RENTON has made a positive contribution to the Australian community over 40 years and the consequences of non-revocation of the original decision for his family members, and the extent of impediments that Mr RENTON would face if he were removed to the United Kingdom.

46 On the other hand, in considering whether I was satisfied that there is another reason why the original decision should be revoked, I gave significant weight to the very serious nature of the crimes committed by Mr RENTON, some of which are of a sexual nature, and involved a vulnerable members of the community, that being a minors.

47 Further, I find that the Australian community could be exposed to harm should Mr RENTON reoffend in a similar fashion. I could not rule out the possibility of further offending by Mr RENTON.

48 I am cognisant that where harm could be inflicted on the Australian community even other strong countervailing considerations may be insufficient for me to revoke the original decision to cancel the visa, even applying a higher tolerance of criminal conduct by Mr RENTON, than I otherwise would, because he has lived in Australia for most of his life.

49 In reaching my decision about whether I am satisfied that there is another reason why the original decision should be revoked, I concluded that Mr RENTON represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed any other considerations as described above.

50 Having given full consideration to all of these matters, I am not satisfied, for the purposes of s 501CA(4)(b)(ii), that there is another reason why the original decision under s 501(3A) to cancel Mr RENTON's Class BF transitional (permanent) visa should be revoked.

[sic]

## The proceeding below

1. Although Mr Renton is unrepresented in the present appeal, he was represented by pro bono counsel and an instructing solicitor in the proceeding before the primary judge. Four grounds of review were raised in his amended originating application, of which the following two are relevant to the present appeal:
2. There was no evidence for the Minister’s finding that Mr Renton has “psychological sexual issues relating to children”.
3. The finding that Mr Renton has “psychological sexual issues relating to children” was legally unreasonable.
4. In relation to ground 1, the primary judge held (at [31]-[32]) that the Minister was not making a psychiatric diagnosis and nor was the Minister making a finding that Mr Renton had a recognised psychiatric illness. Rather, it was an observation or comment about Mr Renton’s disposition and history and no professional opinion was required in that respect. His Honour held that the observation made by the Minister was entirely open in light of:

(a) primarily, the fact of and nature of the applicant’s offending for which he was imprisoned;

(b) the applicant’s prior offending to which the sentencing judge referred, which included committing an act of indecency with a person under 16 years of age;

(c) the sentencing judge’s reference to a “sexual deviancy” that had not been addressed;

(d) the sentencing judge’s reference to the applicant’s admission of having obtained “sexual gratification” from accessing the images of children; and

(e) the applicant’s reference, in his representations to the Minister, to a psychological assessment of him as indicating “a tendency to voyeurism”.

1. His Honour therefore rejected ground 1. Counsel for Mr Renton accepted that if ground 1 failed, then ground 4 also failed.

## The appeal

1. The sole ground of appeal set out in Mr Renton’s notice of appeal is that:

The primary judge erred in failing to find that the respondent made findings for which there was no evidence.

1. There were no particulars to the appeal ground and Mr Renton was unable to elaborate on it orally. However, given that Mr Renton is unrepresented, that ground, fairly read, can be taken to allege that the primary judge erred in his disposition of review grounds 1 and 4 as described above. That is to say, Mr Renton contends that the primary judge ought to have found that the Minister made the finding that he has “psychological sexual issues relating to children” without evidence.
2. The difficulty with this ground is that the Minister was not, as the primary judge rightly held, using that phrase in a specialist diagnostic sense. The term “psychology”, acontextualised, is ambiguous in that it can refer to the scientific study of the human mind *or* the mental (in contrast to physical) characteristics, properties or attitudes of a person or persons. Similarly, its adjective form, “psychological”, is ambiguous when acontextualised in that it can denote the property of being related to psychology (in the scientific sense) *or* the property of being related to, affecting, or arising from a person’s mind or mental state.
3. In context, it is in the latter, unscientific sense that the adjective is used in the Minister’s reasons. That is made clear by the opening sentence of the paragraph in which the phrase appears, where the Minister states:

In my opinion the fact that Mr RENTON’s previous sexual offending against an underage person, and that more recently over a prolonged period he organised child abuse material, stored it systematically on various devices and made it available to others with similar interests and admitted to police that he accessed the images for “*sexual gratification*” demonstrate that he has an ongoing sexual interest in children.

1. It is in that context that the Minister uses the term “psychological sexual issues relating to children”. It was simply an observation, in light of Mr Renton’s possession of child pornography and offending history, that he has sexual issues relating to children, which issues are of a mental nature. That meaning not only explains the lack of specialist or expert evidence, it also obviates the need for there to be any.
2. So understood, the finding made by the Minister is entirely uncontroversial, even self-evident, in light of the materials before the Minister as enumerated by the primary judge. Accordingly, this appeal ground fails.
3. In submissions filed on 7 February 2022, Mr Renton appears to also raise two new grounds of appeal. They are:

In number 8 of the Minister’s statement of reasons it is stated that the Appellant does not dispute that he does not pass the character test. The fact that the Appellant submitted the Request for Revocation is that dispute. It was submitted in the hope of passing the test after being given the invitation to do so. [sic]

There are numerous references made by the Minister to the Appellant not having commenced any treatment or training following his offending. In number 35 of the Minister’s statement of reasons it is stated that he has not had that treatment at this time. The Appellant has been incarcerated since before that time, right up to the present day – firstly in prison, now for more than 19 months in immigration detention. Being taken straight from prison to immigration detention does not give anyone a chance of any rehabilitation. [sic]

(References to the appeal book omitted.)

1. Leave is required to rely upon those grounds, which we will refer to respectively as proposed appeal grounds 2 and 3.
2. Proposed appeal ground 2 appears to be based on a misapprehension and is without merit. Nowhere in Mr Renton’s form requesting revocation of the visa cancellation does he make reference to passing the character test. The reasons that he gave in support of his request concern his daughter, his attempts to seek treatment for his offending, and the fact that his offending was not of a predatory nature. They have nothing to do with the character test. His submission was rightly understood to be that there is “another reason” why the cancellation should be revoked, and not that he passed the character test. In any event, it cannot seriously be maintained that Mr Renton passes the character test.
3. In that regard, s 501(6)(a) of the Migration Act provides that a person does not pass the character test if the person has a “substantial criminal record” as defined by sub-s (7). Section 501(7)(c) in turn provides that, for the purposes of the character test, a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more. As mentioned, Mr Renton was sentenced to three years and seven months’ imprisonment with a non-parole period of two years. There can be no doubt that he does not pass the character test. Leave to raise proposed appeal ground 2 should accordingly be refused.
4. Proposed appeal ground 3 does not allege any error, let alone jurisdictional error, made by the Minister. Mr Renton in effect seeks impermissible merits review by arguing that he should be given the chance to undertake the treatment or training programmes that he has planned to undertake after his release from custody. Although by the way in which the submission is framed it carries the implication that Mr Renton did not have the opportunity to undertake any course of treatment while he was in gaol or, subsequently, in immigration detention, in a letter from him dated 12 August 2020 he explained that he had had opportunities to undertake such courses but that for various reasons he had decided to wait until, first, he was out of gaol and, subsequently, he was out of immigration detention.
5. The Minister considered the risk to the Australian community from the time Mr Renton would be released into the community if the cancellation of his visa was revoked, not only from some future time if and when Mr Renton had completed the courses of treatment that he refers to. There is no jurisdictional error in the Minister having framed his consideration in that way. That was a matter for him. Leave to raise proposed appeal ground 3 should accordingly also be refused.

## Disposition

1. The appeal should be dismissed with costs.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Charlesworth, Stewart and Halley. |

Associate:

Dated: 14 February 2022