FEDERAL COURT OF AUSTRALIA

FYBR v Minister for Home Affairs [2019] FCAFC 185

Appeal from:	*FYBR v Minister for Home Affairs* [2019] FCA 500
File number:	NSD 672 of 2019
Judges:	**FLICK, CHARLESWORTH AND STEWART JJ**
Date of judgment:	24 October 2019
Catchwords:	**MIGRATION** – *Direction No 65* – the expectations of the Australian community – a primary consideration – correct interpretation of cl 11.3(1) – whether cl 11.3(1) a deeming provision – appeal dismissed
Legislation:	*Migration Act 1958* (Cth) ss 189, 499, 500, 501, 501CA
Cases cited:	*Afu v Minister for Home Affairs* [2018] FCA 1311 *Bread Manufacturers of NSW v Evans* [1981] HCA 69; 180 CLR 404 *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 255 CLR 514 *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 151; 139 FCR 292 *Drake v Minister for Immigration And Ethnic Affairs* (1979) 24 ALR 577 *DKXY v Minister for Home Affairs* [2019] FCA 495 *FYBR v Minister for Home Affairs* [2019] FCA 500 *Jack Woodridge on behalf of Gomilaroi People v Minister for Land and Water Conservation (NSW)* [2002] FCA 1109; 122 FCR 190 *Oluwafemi v Minister for Home Affairs* [2018] FCA 1389 *Plaintiff M64/2015 v Minister For Immigration and Border Protection* [2015] HCA 50; 258 CLR 173 *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* [1979] HCA 62; 144 CLR 45 *Re FYBR and Minister for Home Affairs* [2018] AATA 4281 *Tanielu v Minister for Immigration and Border Protection* [2014] FCA 673; 225 FCR 424 *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; 248 FCR 296 *YNQY v Minister for Immigration and Border Protection*

[2017] FCA 1466

Date of hearing:	22 August 2019
Registry:	New South Wales
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Counsel for the Appellant:	Mr DH Godwin with Mr J Donnelly
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Counsel for the Second Respondent:	The Second Respondent filed a submitting notice save as to costs

ORDERS

NSD 672 of 2019

BETWEEN:	**FYBR** Appellant
AND:	**MINISTER FOR HOME AFFAIRS** First Respondent
	ADMINISTRATIVE APPEALS TRIBUNAL Second Respondent
JUDGES:	**FLICK, CHARLESWORTH AND STEWART JJ**
DATE OF ORDER:	**24 OCTOBER 2019**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The Appellant is to pay the costs of the First Respondent, either as agreed or assessed.

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

REASONS FOR JUDGMENT

FLICK J:

1 In August 2018, a delegate of the Minister refused to grant the Appellant in the current proceeding, identified by the pseudonym FYBR, a Safe Haven (Enterprise) Visa. The delegate was of the view that the now-Appellant failed the "*character test*" prescribed by s 501(6)(e) of the *Migration Act 1958* (Cth) (the "*Migration Act*") by reason of his having been convicted of sexual offences involving a child. An appeal against that decision to the Administrative Appeals Tribunal (the "Tribunal") was unsuccessful, with the Tribunal publishing its reasons for decision in November 2018: *Re FYBR and Minister for Home Affairs* [2018] AATA 4281.

2 An *Application for an Extension of Time* in which to review the decision of the Tribunal was filed in this Court in December 2018. In April 2019, a Judge of this Court granted the application for an extension of time but proceeded to dismiss the application for judicial review: *FYBR v Minister for Home Affairs* [2019] FCA 500.

3 The Appellant now appeals.

4 Contrary to the views of Charlesworth and Stewart JJ, it is respectfully concluded that the appeal should be allowed.

5 The primary issue to be resolved on appeal is the correct construction and application of cl 11.3(1) of *Direction No 65* (the "*Direction*") made under s 499 of the *Migration Act*.

6 That *Direction* provides (*inter alia*) "*General Guidance for decision-makers*" in respect to a number of categories of decision-making, including the refusal to grant a visa, as sought by the Appellant. The form and content of the *Direction*, and other like *Directions* issued by the Minister, are by now well-known. But in very general terms, the *Direction* identifies, with respect to the refusal to grant a visa, both:

- "*primary considerations*", including relevantly for present purposes the "*Expectations of the Australian Community*"; and
- "*other considerations*".

The *Direction* provides that decision-makers "*must take into account the primary and other considerations*" (cl 8(1)).

7 In expanding upon what is embraced for the purposes of the *Direction* as being the "*Expectations of the Australian Community*", cl 11.3(1) provides as follows:

> The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application of such a person. Visa refusal may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted a visa. Decision-makers should have due regard to the Government's views in this respect.

8 Although the correct construction of cl 11.3(1) cannot be divorced from the context in which it appears, no question arises in the present proceeding to put in doubt:

- the fact that in addressing the "*Expectations of the Australian Community*", cl 11.3 is one of three "*primary considerations*" – the other two being the "*[p]rotection of the Australian community from criminal or other serious conduct*" and "*[t]he best interests of minor children in Australia*";
- the fact that, in exercising the discretion, decision-makers (including the Tribunal) "*must take into account the primary and other considerations*" of relevance to a claimant (cl 8(1)) – those "*other considerations*" being "*[i]nternational non-refoulement obligations*"; "*[i]mpact on family members*"; "*[i]mpact on victims*"; and "*[i]mpact on Australian business interests*" (cl 12);
- the fact that "*[b]oth primary and other considerations may weigh in favour of, or against, …refusal*" of a visa (cl 8(3)); and
- the fact that "*[p]rimary considerations should generally be given greater weight than the other considerations*" (cl 8(4)) and that "*[o]ne or more primary considerations may outweigh other primary considerations*" (cl 8(5)).

It is the *Direction* that primary considerations are generally to be given greater weight than other considerations (cl 8(4)) which assumes particular importance in the present proceeding.

9 Within these generally expressed guidelines as to the manner in which the discretion is to be exercised, the sole question for resolution is whether cl 11.3(1) either:

- operates as some kind of "*deeming provision*" such that the expectations of the Australian community are "*expectations adverse to the position of any applicant who has failed the character test*" and "*defined only in one particular way: namely that the Australian community 'expects' non-revocation*…" or, relevantly for the present

proceeding, refusal of the visa: cf. *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [76] per Mortimer J ("*YNQY*") – as was the conclusion of both the Tribunal and the primary Judge in the present case;

or whether cl 11.3(1):

- operates such that the expectations of the Australian community are to be determined by reference to all of the facts and circumstances of an individual case, permitting a finding being made by a decision-maker that community expectations with respect to a particular offence may not be such that "*simply because*" of the offence a person "*should not be granted a visa*…" – as was the argument now being advanced by the Appellant.

Confined in this manner, the manner in which other "*primary*" and "*other considerations*" may be weighed in the ultimate decision to be made, after having taken into account and weighed all the considerations, is not to the point. The confined point of construction is: how are the expectations of the Australian community to be resolved – are those expectations defined by the first sentence of cl 11.3(1) and in a manner which generally "*deems*" an unfavourable outcome for a claimant or may other factors indicate a more favourable assessment as to community expectations with respect to a specific claimant?

10 The answer to that confined question, with respect, is not to be answered by reference to such other clauses of the *Direction* which (for example) require a decision-maker to "*take into account the primary and other considerations*" of relevance to a particular case. The more confined question directs attention to the finding that is made with respect to the "*Expectations of the Australian Community*". It is only after such a finding is made that the weighing of that consideration can take its place in the overall weighing process.

11 The importance of correctly giving content to the "*Expectations of the Australian Community"* is thus at least two-fold:

- until those expectations are correctly identified, those expectations cannot properly be weighed against the considerations to be otherwise taken into account; and
- even though aspects of those expectations may well be required to be taken into account as part of the decision-making processes when addressing other considerations – including both the "*primary considerations*" and "*other considerations*" – the "*Expectations of the Australian Community"* are a "*primary consideration*" and the

finding made with respect to this consideration is generally to be given greater weight than the weight given to "*other considerations*" (cl 8(4)).

The fact that some matters may be taken into account when considering a number of different considerations provides no answer or no reason to exclude one or other of those matters from any finding to be made in respect to community expectations: cf. *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 at 50 per Stephen, Mason, Murphy, Aickin and Wilson JJ.

12 There is certainly no ambiguity in the opening words of cl 11.3(1): "*[t]he Australian community expects non-citizens to obey Australian laws while in Australia*". So much may be no more than a statement of the obvious. But cl 11.3(1), with respect, does not purport to be an exhaustive statement of what the Australian community expects of non-citizens whilst in Australia in respect to their compliance with the law. Nor does it purport to set forth an exhaustive definition of Australian community expectations. It is probably very prudent that it does not purport to do so. Community expectations in respect to compliance with the law have various dimensions and may well change over time and may well change with respect to the particular law in question. One constant, it may readily be accepted, is an expectation that non-citizens (and citizens) obey Australian laws. The terms of cl 11.3(1) most probably do no more than expressly state what would otherwise be implicit in s 501, s 501(6) "*show[ing] that the legislation is designed to protect the community from criminal or other undesirable conduct and to permit the Minister to give effect to what might loosely be described as community expectations that perpetrators of such conduct, should not be permitted to remain in Australia*": *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 151 at [71], (2004) 139 FCR 292 at 311 per Tamberlin, Sackville and Stone JJ. But the opening sentence to cl 11.3(1), and the balance of that paragraph, only set forth part of the expectations of the Australian community; these provisions do not exclude the possibility that there may be other aspects of those expectations which need to be explored.

13 Notwithstanding that constant expectation, the Australian community would unquestionably have different expectations with respect to different contraventions. An abused wife, for example, who assaults or murders her husband in retaliation for her past treatment may well have been expected to not commit assault or murder; but Australian community expectations and the expectations of that community that protection should have been provided to an abused wife, may well lead to an expectation different to that held with respect to premeditated murder

or assault. A child victim of a paedophile who murders their molester may similarly attract a different response as to the expectations of the Australian community as to how the offender is to be treated. One aspect of the expectations of the Australian community with respect to such offences may be that that the community has "*let the wife or molested child down*". An expectation may legitimately be held by the Australian community that to refuse a visa may be only further letting the wife or child down.

14 This construction of cl 11.3(1), it is respectfully considered, accepts that a decision-maker should have "*due regard*" to the stated government assessment as to the expectations of the Australian community and that visas be refused where a "*serious crime*" has been committed. That the "*Australian community expects non-citizens to obey the law…*" may be accepted as a generally expressed assessment to which all decision-makers should pay "*due regard*". But the drafting of cl. 11.3(1) leaves open the prospect that in an appropriate case a decision-maker may make an assessment that Australian community expectations are perhaps more tolerant than the inflexibly expressed assessment that operates "*in only … one particular way*". The prospect of an individual decision-maker making a subjective assessment as to Australian community expectations different to that generally expressed in the *Direction* – and to which "*due regard*" must be had - is no reason to give cl 11.3(1) a meaning which strips the clause of a more flexible interpretation.

15 There is nothing either expressly stated or impliedly to be inferred from cl 11.3(1) which precludes other aspects of the expectations of the Australian community being explored.

16 Indeed, the different considerations that may attach to different contraventions – and the different "*expectations*" that the Australian community may have with respect to such contraventions – is, most probably, already accommodated in cl 11.3(1). Those different "*expectations*" may already be accommodated (for example) by the guideline in cl 11.3(1) that "*it may be appropriate*" to refuse a visa application implicitly recognising that it may also not be appropriate to do so. The existing accommodation of these different considerations in the manner in which cl 11.3(1) is drafted would make difficult any challenge as to the validity of the *Direction* – at least on this basis.

17 The reference already made to cl 11.3(1) operating perhaps as a "*deeming provision*" is a reference derived from the following observations of Mortimer J in *YNQY* where her Honour set forth the comparable text of the *Direction* when addressing "*revocation requests*" (cl 13.3(1)) and continued:

> [76] In substance this consideration is adverse to any applicant. As the Minister submits, it is inextricably linked to the other primary consideration of protection of the Australian community. In particular, the last two sentences of para 13.3 of the Direction suggest the "expectations" about which it speaks are expectations adverse to the position of any applicant who has failed the character test and been convicted of serious crimes. In this primary consideration as expressed (and despite the references earlier in the Direction to "tolerance") the Australian community's "expectations" are defined only in one particular way: namely, that the Australian community "expects" non-revocation where a person has been convicted of serious crimes of a certain nature. That is, this is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government of which he or she is member, wish to articulate community expectations, whether or not there is any objective basis for that belief. That is the structure of this part of the Direction.

These observations have since been met with some approval. In apparent reliance upon the observations of Mortimer J in *YNQY,* Thawley J in *Oluwafemi v Minister for Home Affairs* [2018] FCA 1389 concluded that:

> [37] … It is not for the Tribunal to determine the expectations of the Australian community by reference to the applicant's circumstances or evidence as to what the expectations of the Australian community are…

Properly understood, those observations are no more than a recognition that the issue being addressed by his Honour is that of the expectations of the Australian community and not any expectations that the visa holder may hold personal to himself. Equally equivocal, perhaps, are the following observations of Bromwich J in *Afu v Minister for Home Affairs* [2018] FCA 1311:

> [85] … The concept of community expectations is not a matter to be measured as though it is a provable fact. It is an assessment of community values made on behalf of that community. That would be so even in the absence of the express terms of Direction 65. However, those express terms put the question beyond doubt. The norm is stipulated, *inter alia*, in Direction 65 reproduced above. The Tribunal was required to give effect to those norms, which is precisely what it did.

18 With great respect to Mortimer J, however, concurrence cannot be expressed with the unqualified conclusion (at para [76]) that "*the Australian community 'expectations' are defined only in one particular way: namely, that the Australian community 'expects' non-revocation where a person has been convicted of serious crimes of a certain nature*". Nor can concurrence be expressed with any conclusion that the Tribunal may not go beyond the "*norm*" which, relevantly to the present proceeding, cl 11.3(1) sets forth and go on to find that there may be further aspects of Australian community expectations of relevance to the facts and circumstances of a given case. Whether such further aspects of Australian community

expectations is a matter susceptible of evidence in all cases or is a matter that may be determined by the experience of decision-makers need not be resolved.

19 The Australian community expectations are, with respect, not "*defined only in one particular way*" – there is neither in the *Direction* any "*definition*" of Australian community expectations nor any "*definition*" that such expectations permit of only one outcome, namely "*non-revocation where a person has been convicted of serious crimes*" or, relevantly to the present proceeding, refusal to grant a visa in such circumstances.

20 Potentially contrary to the approach of Mortimer J, in *DKXY v Minister for Home Affairs* [2019] FCA 495 Griffiths J referred to her Honour's conclusions in *YNQY* and continued:

> [30] In my respectful view, her Honour's reasoning in [76] and [77] of *YNQY* would be plainly incorrect if this reasoning is read as stating that the primary consideration of expectations of the Australian community will **always** weigh against revocation. The Minister contended that the reasoning simply reflected the facts in *YNQY* and did not purport to be a construction of Direction 65 as suggesting that the expectations of the Australian community can never weigh in favour of an applicant. The difficulty with the Minister's submission is that the language in *YNQY* at [76] and [77] is not in its terms confined to the circumstances of the particular applicant there and, on one view, appears to have been intended to have a more general application. The ambiguity of the language is reflected in the division of opinion in the large number of decisions of the AAT in which the language has been viewed inconsistently and as supporting either a broad or a narrow approach to cl 13.1.
>
> [31] As the applicant here pointed out, there are numerous statements in Direction No 65 which require the primary consideration of expectations of the Australian community to be assessed in the light of **all** the relevant circumstances which appertain to it and it has to be weighed against all other relevant considerations (while noting that the Direction requires that primary considerations be given more weight than other considerations). In an appropriate case, and depending upon all relevant circumstances, the expectations of the Australian community may not weigh against revocation of the mandatory visa cancellation. Undoubtedly, decision-makers who are bound to give effect to the Direction are required to have due regard to the Government's view regarding community values, standards and expectations, as set out in, for example, cll 6.2 and 6.3 of the Direction, but nothing in the Direction indicates that community expectations will **always** favour non-revocation. Indeed, the totality of the relevant circumstances which bear upon the assessment and weighing of all three primary considerations and other considerations need to be considered, as is made clear in many clauses of the Direction …
>
> (emphasis in original)

Concurrence, with respect, is expressed in respect to his Honour's conclusion that "*the expectations of the Australian community may not weigh against revocation of the mandatory visa cancellation*". This conclusion is also applicable in the context of visa refusals.

21 The principal reason for construing cl 11.3(1) as permitting some exploration as to the content of Australian community expectations, beyond that propounded by Mortimer J in *YNQY*, is to be found within the text of cl 11.3(1) itself.

22 However, other features of the *Direction* which assist in reaching the same conclusion may be discerned from:

- the fact that the other two "*primary considerations*" identified in the *Direction*, namely the "*[p]rotection of the Australian community from criminal or other serious conduct*" and "*[t]he best interests of minor children in Australia*", permit factual analysis varying from case to case and there is no reason to construe the third "*primary consideration*" as to the "*Expectations of the Australian Community*" as not also susceptible of factual inquiry;
- the unlikely conclusion that the necessity to "*take into account the primary and other considerations*" (cl 8(1)) involves the taking into account of such considerations by reference to the facts and circumstances of any given case, but always confined in one particular manner in the case of Australian community expectations. It being unlikely that the weighing process necessary always requires a primary consideration having a fixed and immutable character;
- there being a tension between any conclusion that cl 11.3(1) is of a fixed immutable quality exhaustively defining Australian community expectations and other "*primary considerations*" permitting an examination of the circumstances in which a contravention of Australian law occurred.

Of even greater assistance, with respect, in reaching a conclusion that cl 11.3(1) does not exhaustively define the universe of Australian community expectations is the fact that cl 6.2 provides what is referred to as "*General Guidance*" and states that the "*Government is committed to protecting the Australian community from harm…*" and goes on to further provide (*inter alia*) that:

- the "*principles below are of critical importance in furthering that objective, and reflect community values and standards…*"; and
- the "*principles provide a framework within which decision-makers should approach their task…*".

Other provisions of the *Direction* are even more specific in their identification of aspects of community "*expectations*" or attitudes that Australia may have, being matters not expressly referred to in cl 11.3(1) but necessarily incorporated within an identification of what those "*expectations*" in cl 11.3(1) may embrace, namely:

- the fact that "*Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age*" (cl 6.3(5));
- the "*low tolerance of any criminal or other serious conduct*" that Australia has, "*reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently, in Australia*" (cl 6.3(6)); and
- a recognition of the relevance of "*the length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation of minor children*" being "*considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused*" (cl 6.3(7)).

In the present context of exercises of discretion refusing to grant a visa, there is an even greater imperative to construe cl 11.3(1) as including these matters by reason of the fact that such matters are not expressly embraced within cl 11.3(1) (or embraced by cl 12 which sets forth the "*other considerations*" in Pt B of the *Direction*) but are expressly stated as matters to be taken into account in other contexts, such as within the "*other considerations*" with respect to visa cancellation decisions (cl 10.2).

23 A proposition of more general application, but one which nevertheless provides a necessary background to the manner in which the *Direction* and other statements of government policy are to be construed, is the overarching imperative that no statement of government policy can confine what would otherwise be the full ambit of any discretionary power conferred by statute. If it be accepted, as it is in the present case, that a lawful exercise of the statutory power conferred by s 501(1) of the *Migration Act* necessarily involves as a "*mandatory relevant consideration*" a consideration of the expectations of the Australian community, no statement of government policy – and, in particular, cl 11.3(1) – can confine what would otherwise, on a proper construction of s 501(1), fall within the full ambit of what those expectations may embrace. There is nothing to be discerned from s 501, in particular, which would exclude from the considerations to be taken into account as a matter of statutory construction the various components of what the Australian community may expect with respect to those who fail the character test as prescribed by s 501(6).

24 Before the primary Judge, Counsel for the then Applicant confined his submission in respect to community expectations, and as summarised by the primary Judge in the transcript of the

proceeding, as a failure on the part of the Tribunal to ask "*what would the community expect with respect to someone who has been in immigration detention for such a long time*". That aspect of the decision-making process, however, was in fact taken into account by the Tribunal: [2018] AATA 4281 at [49]. But relief is not to be refused on the basis that any error committed by the Tribunal was not prejudicial. The error committed by the Tribunal went to the very heart of the manner in which cl 11.3(1) was interpreted and applied. That error deprived the then Applicant of the possibility that a proper construction and application of cl 11.3(1), and the weight to be given to the "*Expectations of the Australian Community*" as a primary consideration, may have led to a different outcome. On the facts of the present case involving a visa applicant who has convictions for sexual offences involving children, that possibility may not be great – but that is a matter to be determined by the Tribunal and not this Court.

25 It follows, with respect, that the Tribunal and the primary Judge erred in the construction and application of cl 11.3(1) of the *Direction* to the facts of the present case.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 24 October 2019

REASONS FOR JUDGMENT

CHARLESWORTH J:

26 On 5 November 2018, the Administrative Appeals Tribunal affirmed a decision of a delegate of the Minister for Home Affairs to refuse to grant the appellant a Safe Haven Enterprise (Class XE) visa on character grounds. The primary judge dismissed an application for judicial review of the Tribunal's decision: *FYBR v Minister for Home Affairs* [2019] FCA 500. This is an appeal from that judgment.

27 In the exercise of its powers the Tribunal was required to comply with a direction issued under s 499(1) of the *Migration **Act** 1958* (Cth) titled "Direction No 65: Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA" (the Direction). This appeal concerns the proper construction of the Direction in its application to the circumstances of the appellant's case.

28 The appellant is a citizen of Afghanistan. He arrived in Australia as an unauthorised maritime arrival on 12 March 2013. He was granted two consecutive bridging visas, the second of which was cancelled on 22 September 2015.

29 In March 2016, the appellant was convicted in the Local Court of New South Wales on offences of *common assault, procure child for unlawful sexual activity* and two counts of *stalking or intimidation with intent to cause fear or physical or mental harm*. For those offences, he was sentenced (upon an appeal) to imprisonment for 12 months with a non-parole period of seven months. At the time of his release from prison, the appellant was an unlawful non-citizen and so was taken into immigration detention under s 189(1) of the Act. He lodged the visa application forming the subject of the Tribunal's decision on 28 April 2017.

30 The delegate refused the visa in the exercise of the power conferred by s 501(1) of the Act. It provides:

> *Decision of Minister or delegate—natural justice applies*
>
> (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

31 The character test is defined by s 501(6) of the Act. It is common ground that the appellant cannot satisfy the Minister that he passes the test because he has been convicted of a sexually based offence involving a child: s 501(6)(e).

THE DIRECTION

32 Section 499(1) of the Act provides that the Minister may give written directions to a person or body having functions or powers under the Act if the directions are about the performance of those functions or the exercise of those powers. Section 499(1) does not empower the Minister to give directions that would be inconsistent with the Act: s 499(2). Both the delegate and the Tribunal were required to comply with a valid direction made under s 499(1): s 499(2A).

33 The Direction was issued by the Minister on 22 December 2014. It remained in force at the time of the Tribunal's decision.

34 Clause 6.1(4) of the Direction states that its purpose "is to guide decision-makers performing functions or exercising powers under section 501 of the Act".

35 Clause 6.2(1) appears under the heading "General Guidance". It states:

> The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The principles below are of critical importance in furthering that objective, and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable.

36 The principles are expressed in cl 6.3 as follows:

> **6.3 Principles**
>
> (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.
>
> (2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.
>
> (3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.
>
> (4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.
>
> (5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a

higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.

(6) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.

(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.

37 Clause 7 is titled "How to exercise the discretion". It relevantly provides that a decision-maker, informed by the principles in cl 6.3, "must take into account the considerations in … Part B, … in order to determine whether a non-citizen will forfeit the privilege of being granted … a visa". Clause 8 provides:

8. Taking the relevant considerations into account

(1) Decision-makers must take into account the primary and other considerations relevant to the individual case. There are differing considerations depending on whether a delegate is considering whether to refuse to grant a visa to a visa applicant, cancel the visa of a visa holder, or revoke the mandatory cancellation of a visa. These different considerations are articulated in Parts A, B and C. Separating the considerations for visa holders and visa applicants recognises that non-citizens holding a substantive visa will generally have an expectation that they will be permitted to remain in Australia for the duration of that visa, whereas a visa applicant should have no expectation that a visa application will be approved.

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

(3) Both primary and other considerations may weigh in favour of, or against, refusal, cancellation of the visa, or whether or not to revoke a mandatory cancellation of a visa.

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

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

38 The "primary" and "other" considerations in relation to a visa applicant are those contained in cl 11 and cl 12 of Pt B respectively. The primary considerations are the protection of the Australian community from criminal or other conduct, the best interests of minor children in Australia and the expectations of the Australian community.

39 Clause 11.1 provides that, in assessing the protection of the Australian community, decision-makers should give consideration to the nature and seriousness of the non-citizen's conduct and the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

40 Clause 11.3 contains a statement about the expectations of the Australian community in the following terms:

> **11.3 Expectations of the Australian Community**
>
> (1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application of such a person. Visa refusal may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted a visa. Decision-makers should have due regard to the Government's views in this respect.

41 Clause 12 is titled "Other considerations – visa applicants". It requires that other considerations be taken into account where relevant. The other considerations include (but are not limited to):

a) International non-refoulement obligations;

b) Impact on family members;

c) Impact on victims;

d) Impact on Australian business interests.

THE TRIBUNAL'S DECISION

42 In its reasons for decision the Tribunal referred to the Direction before noting that certain matters did not arise for consideration in the case before it, namely the best interests of minor children in Australia, the strength, nature and duration of the appellant's ties to Australia, and the impact of the decision on victims or Australian business interests.

43 The Tribunal then turned to assess the protection of the Australian community as a primary consideration. It described the appellant's criminal offending as serious. It found that the appellant had not taken any steps toward rehabilitation, although he had expressed a desire to do so. It noted that the appellant had not been in the community since he offended and that his intention not to reoffend had therefore not been tested. The Tribunal nonetheless said (at [37]):

> … the Tribunal does not consider that the harm that would be caused if [the

> appellant's] conduct were repeated is so serious that any likelihood that it may be repeated is unacceptable.

44 After referring to pre-sentence and psychological reports, the Tribunal said (at [53]):

> The Tribunal accepts that the nature and seriousness of the offences committed, the cumulative effect of [the appellant's] behaviour and the risk to the Australian community should he commit similar offences in future, supports the exercise of the discretion to refuse to grant the visa.

45 The Tribunal gave consideration to the expectations of the Australian community by reference to cl 11.3 of the Direction. It is necessary to extract that part of the Tribunal's reasons in full:

> **Expectations of the Australian community (11.3)**
>
> 54. In *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 Mortimer J considered expectations of the Australian community in the context of cl 13.3 of Direction 65. Her Honour concluded:
>
> > *... this is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government ... wish to articulate community expectations, whether or not there is any objective basis for the belief. That is the structure of this part of the Direction.*
>
> 55. Her Honour's reasoning is equally applicable to cl. 11.3.
>
> 56. The Tribunal accepts the Respondent's submission that the Australian community would regard [the appellant's] offending as unacceptable. The Australian community expects non-citizens to obey Australian laws. He has been convicted of serious offences, a sexual offence and three other offences against vulnerable members of the community.
>
> 57. The Tribunal accepts that this consideration favours the exercise of the discretion to refuse to grant the visa.
>
> (footnote omitted)

46 The decision of Mortimer J in ***YNQY*** *v Minister for Immigration and Border Protection* [2017] FCA 1466 concerned the application of cl 13.3 of the Direction which applies to decisions to revoke a visa cancellation decision mandated by s 501(3A) of the Act. In a footnote to [55] of its reasons, the Tribunal cited ***Oluwafemi*** *v Minister for Home Affairs* [2018] FCA 1389 at [37]. In *Oluwafemi*, Thawley J applied the reasoning in *YNQY* to a case involving the application of cl 11.3 of the Direction to a visa refusal decision. As the Tribunal correctly identified, cl 11.3 and cl 13.3 are cast in relevantly the same terms.

47 As to the "other considerations", the Tribunal found that the appellant was a person to whom Australia owed protection obligations. The Tribunal said that it was therefore possible that the

refusal of the visa would have the consequence that the appellant may be held in indefinite detention. There was no challenge to this conclusion before the primary judge or on this appeal.

48 The Tribunal said (at [66]) that "being in immigration detention for more than two years after having served the sentence determined by the justice system for the offences he committed, with uncertainty about when or if ever he may be released, weigh in favour of not exercising the discretion to refuse the visa".

49 The Tribunal concluded (at [67]):

> Taking into account all the circumstances discussed above, and being conscious of the lengthy period of time he has already been in detention, the Tribunal has concluded that in this case the primary considerations of protection of, and expectations of, the Australian community outweigh the other considerations in this case, Australia's international non-refoulement obligations and consequential prolonged detention.

THE APPLICATION FOR JUDICIAL REVIEW

50 In the proceedings before the primary judge the onus was on the appellant to show that the Tribunal's decision was affected by jurisdictional error: ***Plaintiff M64/2015*** *v Minister for Immigration and Border Protection* (2015) 258 CLR 173.

51 The grounds for judicial review alleged that the Tribunal had failed to comply with s 499(2A) of the Act because it had wrongly applied cl 11.3 of the Direction as "a kind of deeming provision". The grounds further alleged that the Tribunal had failed to complete the exercise of its discretion because it had failed to have regard to all of the relevant circumstances of the case when assessing the expectations of the Australian community.

52 The primary judge summarised the arguments advanced by the appellant as follows:

> 21 At the heart of the applicant's submission is that the Tribunal failed to comply with cl 11.3 of the Direction because it treated cl 11.3 as conclusively '*deeming*' (to quote Mortimer J in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 (***YNQY***) at [76]) what community expectations are, irrespective of the individual's personal circumstances. As a consequence, the applicant submitted that the Tribunal wrongly treated this consideration as necessarily suggesting that the discretion should be exercised so as to refuse the grant of the visa in cases where cl 11.3 was relevant. By contrast, the applicant submitted that cl 11.3 requires the Tribunal to undertake '*an assessment of community values made on behalf of [the Australian] community*', citing *Afu v Minister for Home Affairs* [2018] FCA 1311 (***Afu***) at [85] (Bromwich J). As such, in the applicant's submission, the Tribunal failed to appreciate that it was permissible under cl 11.3 for it to assess whether community expectations would have been the same in relation to the applicant, given that he had already spent so much time in immigration detention. He further submitted that if the Tribunal had appreciated that this was permissible,

> it may have reached a different decision. As such, it was the applicant's submission that the alleged error was material because it operated to deprive him of the possibility of a successful decision: *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; (2018) 92 ALJR 780 at [29]-[30] (Kiefel CJ, Gageler and Keane JJ); *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 at [3] (Bell, Gageler and Keane JJ).
>
> 22 The applicant accepted at the hearing that in order to succeed on this argument, it was necessary for him to demonstrate that the decision of Thawley J in *Oluwafemi v Minister for Home Affairs* [2018] FCA 1389 (***Oluwafemi***) was '*plainly wrong*': *Garrett v Federal Commissioner of Taxation* [2015] FCA 665; (2015) 233 FCR 226 at [33] (Kenny J). While the applicant also submitted that the passages from Mortimer J's decision in *YNQY* relied upon by the Tribunal were *obiter*, he submitted that if I were to find that they were *ratio*, they were also plainly wrong.

53 The primary judge concluded that it had not been established that the decisions of Thawley J in *Oluwafemi* and Mortimer J in *YNQY* were plainly wrong (at [27]). Her Honour said the reasoning of Bromwich J in ***Afu*** *v Minister for Home Affairs* [2018] FCA 1311 was consistent with the reasoning in *Oluwafemi* and *YNQY* and so did not lend support to the appellant's arguments (at [28] – [33]). Her Honour went on to say:

> 39 … it would render cl 8(3) unworkable if an '*other consideration*', which was required by cl 8(4) to be given less weight than a '*primary consideration*', was nonetheless to be taken into account as an aspect of a '*primary consideration*'. Read in context, therefore, cl 8(3), together with cl 8(4) and (5), do no more than explain the final exercise of balancing the primary and other considerations – adverse and favourable – in which the decision-maker must engage in deciding whether or not to refuse a visa. There is therefore nothing in cl 8(3) which undermines the construction of cl 13.3 adopted by Mortimer J in *YNQY* (and applied to cl 11.3 by Thawley J in *Oluwafemi*), namely, that it expresses the expectation of the Australian community only in terms of the negative conclusion that it may be appropriate to refuse to grant the visa by reason of an applicant's commission of serious criminal offences.
>
> 40 Finally, the applicant identified cl 6.3(5) of Direction 65 as the high point of his argument. This clause, together with the remaining paragraphs of cl 6.3, set out the principles which provide a framework within which decision-makers should approach the exercise of discretion to refuse or cancel a visa or to not revoke an automatic visa cancellation. Clause 6.3(5) reads:
>
> > Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.
>
> 41 In the applicant's submission, this clause expressly permits the decision-maker to take considerations which are subjective to an applicant into account. That is unquestionably correct. However, it does not mean that those subjective considerations must be taken into account by the Tribunal so as to reach its own conclusion about community expectations for the purposes of cl 11.3.

> Rather, provision is expressly made elsewhere in the Direction for individual or subjective considerations, such as the impact on family members and on victims, to be taken into account in the balancing exercise as '*other considerations*' in cl 12.

42 It follows, in line with the authorities, that cl 11.3 of Direction 65 is a statement of the Government's view as to the expectations of the Australian community for the purposes of determining whether or not to refuse a visa. Contrary to the applicant's submissions, it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an applicant's circumstances or evidence about those expectations. Rather, the Tribunal must give effect to the '*norm*' stipulated in cl 11(3) which will of its nature weigh in favour of refusal, at least in most cases. As such, the Tribunal did not fall into jurisdictional error in failing to have regard to the applicant's circumstances when assessing the expectations of the Australian community in applying cl 11(3) of the Direction.

SUBMISSIONS ON THE APPEAL

54 The grounds of appeal allege that the primary judge misconstrued cll 6, 8 and 11 of the Direction, particularly by concluding that cl 11.3 operated as a deeming provision which always weighed in favour of a refusal decision and which precluded the Tribunal from undertaking its own assessment of community expectations by reference to a visa applicant's personal circumstances. The appellant's arguments in support of the grounds of appeal were to the same effect as those advanced before the primary judge, as comprehensively summarised by her Honour in the passage extracted at [27] above. Particular emphasis was placed on the text of the principles in cl 6.3, which give expression to community expectations by reference not only to the objective seriousness of the visa applicant's past conduct, but on subjective considerations that may weigh in favour of the grant of a visa: see cl 6.3(5) and cl 6.3(7).

55 As Hill J said in *Jack **Woodridge** on behalf of Gomilaroi People v Minister for Land and Water Conservation (NSW)* (2002) 122 FCR 190 at [14], "as a matter of comity a judge of this Court should follow another single judge unless convinced that the previous decision was clearly wrong". The primary judge was correct to identify that the proper construction of cl 11.3 of the Direction had been the subject of previous decisions in *YNQY*, *Oluwafemi* and *Afu* such that the principle in *Woodridge* applied at first instance.

56 Judgment on the application for judicial review was handed down on 11 April 2019. On the same day, Griffiths J delivered judgment in ***DKXY** v Minister for Home Affairs* [2019] FCA 495. Griffiths J held that, in an appropriate case, the "expectations of the Australian community" was a primary consideration that may *not* weigh against a non-citizen (at [31]). His Honour said that the decision in *YNQY* would be plainly incorrect if it were to be interpreted

otherwise: *DKXY* at [30]. Speaking in relation to a decision to refuse to revoke a visa cancellation decision, his Honour said at [33] that cl 13.3 of the Direction did not preclude a decision-maker from having regard to "all relevant circumstances in the particular case which bear upon a general assessment of Australian community expectations".

57 At first instance, as on appeal, the Minister submitted that cl 11.3 must be understood as expressing the executive government's view about the expectations of the Australian community, being a view to which decision-makers should "have due regard", as the final sentence of cl 11.3 directs. That proposition, the Minister submitted, finds support in the reasoning of Griffiths J in *DKXY*.

58 It was further submitted that cl 11.3 gives expression to a relevant consideration under s 501(1) of the Act of the kind identified by the Full Court in ***Djalic*** *v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292 (Tamberlin, Sackville and Stone JJ) in relation to the visa cancellation power in s 501(2) (at [72]):

> … s 501(2) is sufficiently broad to allow the Minister to take into account his or her assessment of the expectations of the Australian community as to whether or not a non-citizen who commits serious criminal offences should be permitted to remain in the country.

59 The Minister submitted that cl 11.3 is "deeming" in the sense that it gives expression to the Minister's assessment of the content of the expectations of the Australian community in every case to which the Direction applies. The necessary corollary is that it is not for the Tribunal to determine for itself the expectations of the Australian community. To the extent that s 501(1) permits such an evaluative assessment to be made by the Minister as to the expectations of the Australian community in a particular case, cl 11.3 gives expression to the government's assessment of that expectation in a way that must tend against the grant of the visa in every case to which the Direction applies, so it was submitted.

60 The appellant did not submit that cl 11.3 would be *ultra vires* the Act if it were to be construed in the manner for which the Minister contended, nor was it suggested that *Djalic* was inapplicable or wrongly decided.

CONSIDERATION

61 The proper construction of cl 11.3 turns on two questions. The first is whether or not the clause expresses an expectation deemed by the government to be held by the Australian community.

The second is whether the clause gives expression to an expectation that must of its nature weigh against the grant of a visa in every case.

The deeming effect of cl 11.3

62 Clause 11.3 is to be construed in accordance with orthodox principles, having regard to its text, context and purpose.

63 On its terms, the Direction is intended to act as a "guide" to delegates of the Minister exercising powers under s 501(1) of the Act and to the Tribunal in reviewing a decision of a delegate on the merits in the exercise of its powers under s 500 of the Act: cl 6.1(4). The Direction provides a "framework within which decision-makers should approach their task": cl 6.2(3). The Direction is to be understood as a policy that is intended to achieve desirable objectives of the kind identified in *Plaintiff M64/2015* at [54] (French CJ, Bell, Keane and Gordon JJ):

> Policy guidelines … promote values of consistency and rationality in decision-making, and the principle that administrative decision-makers should treat like cases alike. In particular, policies or guidelines may help to promote consistency in 'high volume decision-making', such as the determination of applications for Subclass 202 visas. Thus in *Drake v Minister for Immigration and Ethnic Affairs [No 2]*, Brennan J, as President of the Administrative Appeals Tribunal, said that '[n]ot only is it lawful for the Minister to form a guiding policy; its promulgation is desirable' because the adoption of a guiding policy serves, among other things, to assure the integrity of administrative decision-making by 'diminishing the importance of individual predilection' and 'the inconsistencies which might otherwise appear in a series of decisions'. The subjectivity of the evaluation by a decision-maker in a case such as the present highlights the importance of guidelines. …
>
> (footnotes omitted)

64 As Mortimer J said in *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424 at [127], the visa cancellation and refusal powers conferred by s 501 of the Act involves the evaluation of "competing and conflicting interests as between an individual who may be excluded from Australia and the interests of the Australian community". The relative weight to be ascribed to each consideration bearing on the exercise of the discretion is a question in respect of which reasonable minds may differ. The Direction generally requires the decision-maker to give relatively more weight to some considerations than to others so as to achieve like results in like cases, so far as that may be done without imposing impermissible fetters on the discretion conferred on the decision-maker. The expectations of the Australian community is one such consideration.

65 As Robertson J said in ***Uelese*** *v Minister for Immigration and Border Protection* (2016) 248 FCR 296, in respect of a similarly worded clause (at [65]):

> … it is open to the Minister to make a statement of the Government's views as to the expectation of the Australian community and for the Tribunal to act on that statement.

66 The Minister's submission that cl 11.3 contains a statement of the government's views as to the expectations of the Australian community should be accepted for three reasons. First, there does not exist in fact an Australian community holding a homogeneous view as to the preferred outcome in any one particular case. Second, the clause expressly states that it is an expression of the "government's view". The government's view might be one in respect of which the decision-maker does not agree. Nonetheless, it is the government's view to which the decision-maker should have "due regard". The third reason is a structural reason similar to that expressed by the primary judge at [39] – [41] of her Honour's reasons, to be considered further below.

67 To the extent that cl 11.3 contains a statement of the expectations of the Australian community, the clause is "deeming", in the sense explained by Mortimer J in the limited passage from *YNQY* upon which the Tribunal relied at [54] of its reasons (extracted at [20] above). It is not for the decision-maker to make his or her own assessment of the community expectations and to give that assessment weight as a "primary consideration". I do not understand the judgment of Griffiths J in *DKXY* to differ from that of Mortimer J in *YNQY* in that respect. For my part, I prefer to describe the clause as imputing or ascribing to the whole of the Australian community an expectation that wholly aligns with the expectation of the executive government of the day in respect of its subject matter.

The content of the expectation

68 It is necessary to give content to the deemed expectation of the Australian community in a way that is capable of being afforded weight as a primary consideration in a particular case. In the particular case, the Australian community will either expect the visa to be refused, or it will not. In light of what is said above, the present enquiry does not concern what the Australian community expects in fact (assuming such expectations could be objectively ascertained), but rather concerns what the government has deemed the community's expectations to be. The content of the deemed expectation is to be discerned by construing cl 11.3 itself.

69 The clause expresses two expectations, the first concerning norms of conduct to be expected of non-citizens, as expressed in the opening sentence:

> The Australian community expects non-citizens to obey Australian laws while in Australia.

70 This statement is a reflection of the rule of law as it applies to citizens and non-citizens alike. It is an expectation that will not have been met in respect of a visa applicant who cannot pass the character test in s 501(6) of the Act and so must, of its nature, weigh against the refusal of a visa in all cases to which the Direction applies.

71 The second expectation is more difficult to interpret. It is expressed in the second and third sentences of the clause as follows:

> Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application of such a person. Visa refusal may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted a visa.

72 This part of the clause is concerned with the consequences that should befall a non-citizen who has fallen foul of the first expectation. It should be understood as expressing an expectation about the outcome of the exercise of the power conferred by s 501(1) of the Act in respect of the particular person whose circumstances are under consideration.

73 Before proceeding further it must be emphasised that cl 11.3 does not purport to preclude the decision-maker from reaching his or her own view as to whether the non-citizen should or should not be granted a visa, as the decision-maker must necessarily do. The question that arises on this appeal is not whether the decision-maker is precluded from doing so, but whether the decision-maker's own assessment of the appropriate outcome is relevant to the task of identifying the content of the expectations of the Australian community under cl 11.3 of the Direction. The clause implicitly recognises that the decision-maker's assessment as to whether or not a visa should be granted may differ from the expectations of the Australian community, as the government has deemed those expectations to be.

74 I have accepted the Minister's submission that cl 11.3 is intended to give effect to the principle that the Minister may make a statement of the government's views about the expectations of the Australian community, which statement may be acted on by the person conferred with the power in a particular case, as recognised in *Uelese*. In my view, the task of the decision-maker is to identify what is the "government's view" about community expectations in the particular

case, to "have due regard" to that view and to "generally" afford that view more weight than other non-primary considerations in accordance with cl 8(4). The phrase "may be appropriate" does not permit the decision-maker to equate the expectations of the Australian community (as expressed in cl 11.3) with the decision-maker's own view as to the preferable outcome in the ultimate exercise of the discretion. To construe cl 11.3 in that way would be to ignore the fact that the clause is intended to express a consideration that is capable of being given more weight relative to "other considerations" in the exercise of the discretion, as cl 8(4) of the Direction generally requires. The primary judge was correct to say that importing into cl 11.3 all countervailing factors bearing on the ultimate decision would render cl 8(4) of the Direction unworkable.

75 Having regard to all that is said above, cl 11.3 should be understood as expressing a deemed community expectation that all persons who have committed serious criminal offences giving rise to character concerns should have their visa applications refused. The nature of the character test is such that the deemed expectation will arise in most if not all cases falling for consideration under s 501(1) of the Act, having regard to the nature and seriousness of the non-citizen's conduct, assessed in accordance with cl 11.1. The text of the clause emphasises that it may be appropriate to act in accordance with *that* expectation, so anticipating a class of cases in which it may not be appropriate to do so.

76 The question of whether it is appropriate to act in accordance with the deemed community expectation is in all cases left for the decision-maker to determine in the ultimate exercise of his or her discretion. Flexibility in the decision-making process is reinforced by cl 8(4), which requires no more than that the government's assessment of community expectations is "generally" to be afforded greater weight than the "other considerations" listed non-exhaustively in cl 12. The word "generally" contemplates a case in which the decision-maker considers it appropriate not to afford the expectation of the Australian community more weight than favourable countervailing factors arising for consideration under cl 12. There may be cases in which it is not appropriate to give the community expectations discerned under cl 11.3 any weight at all.

77 In my view, the degrees of tolerance referred to in cl 6.3(5) and cl 6.3(7) are matters that fall for consideration by the decision-maker in the ultimate exercise of his or her discretion. They are factors that may be taken into account in determining whether it is appropriate to give more

or less weight to a deemed community expectation of visa refusal that might otherwise arise simply because of the nature of the non-citizen's character concerns or offences.

78 The primary judge concluded (at [42]) that the Tribunal "must give effect to the '*norm*' stipulated in cl 11(3) which will of its nature weigh in favour of refusal, at least in most cases".

79 I agree with that statement insofar as it recognises that the government's assessment of the expectations of the Australian community is that a non-citizen who has committed a serious offence should not be granted a visa. Strictly speaking, it is not correct to say that the expectation is one to which the Tribunal "must give effect". The Tribunal must in all cases determine whether it is appropriate to refuse to grant the visa. In an appropriate case, the Tribunal may make a decision that does not give effect to community expectations as the government has assessed them to be. In such a case, the decision-maker would depart from the relative ascription of weight for which cl 8(4) "generally" provides, as he or she is permitted to do. Read as a whole, the reasons of the primary judge should not be understood as suggesting otherwise.

NO JURISDICTIONAL ERROR

80 At [54] of its reasons the Tribunal cited *YNQY* in which Mortimer J described cl 11.3 as "a kind of deeming provision by the Minister about how he or she, and the executive government ... wish to articulate community expectations, whether there is any objective basis for the belief". For the reasons given above, the passage upon which the Tribunal relied is a correct statement of the law and the Tribunal did not commit jurisdictional error by applying it. The primary judge was correct to so conclude.

81 The Tribunal went on to say that the appellant had been convicted of "serious offences, a sexual offence and three other offences against vulnerable members of the community". It concluded that the Australian community would regard the appellant's offending as unacceptable. By those statements the Tribunal properly undertook an assessment of the nature of the character concerns and offences. Earlier in its reasons the Tribunal had undertaken a thorough examination of the offences and the circumstances in which they were committed. The Tribunal should be taken to have had regard to its earlier findings when concluding that the Australian community would regard the offending as "unacceptable".

82 These conclusions were clearly open to the Tribunal. At least it was not contended otherwise on the appeal.

83 Although it is not expressly stated, the reasons of the Tribunal proceed from the premise that the Australian community would expect that the appellant's visa application should be refused. The Tribunal afforded relatively greater weight to the "deemed" community expectation that the visa application should be refused, relative to other considerations, as cl 8.4(3) generally required be done. In light of the seriousness of the appellant's offending, there was nothing arising on the facts of the case that would preclude the Tribunal from having due regard to the government's views as to the expectations of the Australian community or from giving the expectations more weight as a primary consideration.

84 There is no appealable error of the kind asserted in the grounds of appeal.

85 Accordingly, the appeal should be dismissed.

I certify that the preceding sixty (60) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Charlesworth.

Associate:

Dated: 24 October 2019

REASONS FOR JUDGMENT

STEWART J:

Introduction

86 I have had the benefit of reading, in draft, the judgments of Flick and Charlesworth JJ. I agree with Charlesworth J that the appeal should be dismissed, and that the answer to both questions that her Honour poses in paragraph [61] is "yes", but my process of reasoning to that end differs in certain material respects from her Honour's. The differences between my approach and those of Flick and Charlesworth JJ only concern the construction of *Direction 65*. I gratefully adopt their Honours' summaries of the facts, the relevant decisions and the parties' submissions.

Context

87 With regard to the context of *Direction 65*, it is perhaps useful to start by acknowledging that there are no homogeneous, or even significantly homogeneous, or possibly even predominantly held, Australian "community expectations" with regard to applicable norms for the refusal or cancellation of visas on character grounds, nor with regard to the outcome in any particular case where the refusal or cancellation of a visa is up for consideration. It is notorious that immigration generally, and immigration by way of refugee status and for humanitarian reasons, in particular, is a highly contested issue in the Australian community. There are very different and strongly held views, and hence expectations, and there is no ready mechanism by which such expectations can be ascertained or measured.

88 In those circumstances, it would be surprising if *Direction 65* required decision-makers to assess and arrive at a conclusion on what the "community expectations" are, whether as to the applicable norms or, particularly, the outcome in a particular case. Such a task would be impossible, and would inevitably end up with a highly subjective result that might vary considerably from one decision-maker to the next. That would not promote consistency in decision-making which can be taken to be one of the objectives of *Direction 65*: *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 258 CLR 173 at [54] per French CJ, Bell, Keane and Gordon JJ.

89 It is therefore to be expected that the Government of the day may wish to set the norms by which decisions to refuse or cancel visas are made. Where those norms are expressed, at least in part, as reflecting "community expectations" then, in that sense, they might accurately be

understood as "deeming" what the community expectations are. That is because, as indicated, as a matter of practical reality there is no one or even necessarily dominant set of community expectations in this field.

90 However, it is not to be expected that the Government of the day would seek, via the device of "community expectations" or otherwise, to dictate to the statutory decision-maker the outcome of a visa refusal or cancellation in any particular case. That would be inimical to the process of decision-making that has been set up under the Migration Act and it would constitute unlawful dictation to the decision-maker: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 590-591 per Bowen CJ and Deane J; *Bread Manufacturers of NSW v Evans* [1981] HCA 69; 180 CLR 404 at 429-430 per Mason and Wilson JJ; *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; 255 CLR 514 at [37] per French CJ and [292] per Kiefel J.

91 The above contextual factors lead to two guiding considerations to the proper construction of *Direction 65*. *First*, "community expectations" as expressed normatively are what the Government says that they are, even though in actual fact if they were ascertainable community expectations might be quite different. *Second*, "community expectations" as expressed by the Government do not speak to the outcome in any particular case – they are to be understood and applied normatively.

92 There is also an important structural consideration, which is identified in the reasons of the primary judge (at [39]-[41]) and Charlesworth J (at [73]). It is that community expectations are to be taken into consideration (as a primary consideration) with other factors to inform the decision-maker's decision. The consequence of that is twofold. *First*, not every factor relevant to the decision will inform the content of community expectations and, *second*, the ultimate decision may differ from the community expectations.

93 This is an important further indication that it is not for the decision-maker to undertake an assessment of what the community expectations are in each case dependent on the circumstances of the case which circumstances would necessarily include all the considerations relevant to the ultimate decision. If that was so then the expectations of the community, as assessed, would determine the decision which would conflict with the requirement that they be taken as merely one of three primary considerations along with a number of other considerations to inform the ultimate decision.

Text

94 Turning now to the text of *Direction 65*, the critical provision is cl 11.3(1). It deals only with visa refusals, cancellations being dealt with under cl 9.3(1) which is in relevantly identical wording. By its heading, being "Expectations of the Australian Community", the clause is to be understood as being the Minister's statement of the community's expectations. It is not a statement about the process of decision-making. That is dealt with by clauses 7 and 8.

95 The *first sentence* of cl 11.3(1) says no more than what the law in any event demands of all people in Australia, non-citizens and citizens alike, namely that the Australian community expects non-citizens to obey Australian laws while in Australia. As expected, that is a normative principle. It is also one on which there would likely be almost universal agreement. It reflects the principle in cl 6.3(1). It is also just the starting point of the analysis, but draws attention to the fact that the disobedience of Australian laws by a non-citizen while in Australia will be relevant to the refusal decision in question.

96 The *second sentence* of cl 11.3(1) is more difficult. It refers to "breach of this trust" without identifying what "trust" is referred to. In context, the breach must be to act in conflict with the expectation of the Australian community, expressed in the first sentence, that non-citizens will obey Australian laws while in Australia. Thus, the second sentence means that the community expects that when a non-citizen has disobeyed Australian laws while in Australia whether confirmed by conviction or otherwise, or there is an unacceptable risk that they will break those laws, or where they have committed offences (i.e. broken laws) elsewhere, it "may be appropriate" to refuse the visa application. This is consistent with the principles in cl 6.3(2) and (3). It is also a matter on which one would expect widespread agreement.

97 The use of the phrase "may be appropriate" has the inevitable consequence that the community expects that there will be circumstances where the disobedience or breach or risk of disobedience or breach referred to in the earlier part of the sentence will not lead to refusal of the visa application. The community thus expects that it will be necessary in every case to assess the circumstances particular to the visa applicant in question in order to reach an evaluative assessment of "appropriateness". That assessment is not an assessment of what the Australian community expects in the particular case. The Australian community expects people to obey the law, and if they do not (or there is a risk that they will not) then that is relevant to whether or not they will be granted a visa, and in some cases it *may be* appropriate that they will be refused a visa because of their disobedience (or the risk of their disobedience).

Direction 65 does not ascribe to the Australian community a relevant expectation with regard to the outcome in the particular case. That is a matter for the decision-maker.

98 The *third sentence* of cl 11.3(1) is merely an adjunct to the second, and is consistent with the principle in cl 6.3(4). It means that in any particular case the refusal of a visa may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted a visa. This is to say no more than that in the case of a particularly egregious offence, or a particularly severe character assessment, that alone will be sufficient basis to refuse the visa. It is the one end of the spectrum. But that does not detract from the community's expectation that there must be an assessment as to "appropriateness" that is required by the second sentence.

99 The *fourth sentence* of cl 11.3(1) is merely a statement as to the requirement that the decision-maker give "due regard" to what the Government has stated in *Direction 65* as to its views on what the expectations of the Australian community are. That is the sense in which Robertson J referred to the decision-maker acting on a statement of the Minister of the Government's views in ***Uelese*** *v Minister for Immigration and Border Protection* [2016] FCA 348; 248 FCR 296 at [65] – the Minister's statement that is referred to is *Direction 65*. There is the possibility that cl 11.3(1) also requires the decision-maker to have "due regard" to any statement by the Government as to community expectations in a particular case (i.e. a statement outside the Direction), provided that that did not amount to unlawful dictation. As that issue does not arise in the present case, it need not be decided.

100 To summarise, as expressed in *Direction 65*, the Australian community has only three relevant expectations:

- non-citizens will obey Australian laws when in Australia;
- it may be appropriate to refuse a visa application where a non-citizen has breached, or where there is an unacceptable risk that they will breach, the expectation that they will obey the law or where they have been convicted of offences in Australia or elsewhere;
- in a particular case, the refusal of a visa may be appropriate simply because the nature of the character concerns or offences is such that they should not be granted a visa.

101 Understood in this way, community expectations are simply, and informally, expressed as follows: "If you break the law that will be held against you, the more serious the breach the more it will be held against you, and it may even be decisive." This limited expression of

"community expectations" by the Government is, one would expect, quite uncontroversial which is an attractive feature given the heterogeneity of views in this area.

102 It is difficult to conceive of a case where an unfavourable character assessment, whether on the basis of the commission of an offence or the risk that an offence will be committed, will be other than against the grant of a visa. In any particular case, the weight to be attached to that consideration because of the particular circumstances of the character assessment may be slight. In another case, because of the severity of the character assessment, the weight may be substantial. Thus, the character assessment, even through the prism of community expectations, may not be decisively against the applicant. In many cases it will not be. That is why the decision-maker must assess what is "appropriate" in the particular circumstances. Nevertheless, an adverse character assessment is necessarily against a visa applicant, to some degree or other; no one will be awarded a visa *because* they are of bad character.

103 The community expectations, as I construe cl 11.3(1), speak normatively; they are to be applied in every case but they are not expressed in relation to any particular case. This means that it would be wrong for the decision-maker to ask themselves a question along the lines of "what would the community expect in this case?" It is also incorrect to construe the community expectation as expressing or requiring, in any particular case, either the grant or the refusal of the visa. In a particularly egregious case, the weight to be afforded the community expectations would be such that a refusal might be thought to be inevitable, and at the other end of the spectrum a refusal might be thought to be unlikely, but in neither case and in all the area in-between the community expectation will not express or require one or the other. That is a matter for the decision-maker.

104 It follows from the above that I am essentially, and respectfully, in agreement with Robertson J in *Uelese* at [64], Mortimer J in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [76], Thawley J in *Oluwafemi v Minister for Home Affairs* [2018] FCA 1389 at [37]-[38] and [47], and the primary judge at [23]-[27]. I also respectfully agree with Bromwich J in *Afu v Minister for Home Affairs* [2018] FCA 1311 at [85] as understood by the primary judge (at [33]), i.e. it is not the decision-maker who makes an assessment of community values on behalf of the community, and that those values are expressed as norms in *Direction 65*.

105 The specific circumstances of the visa applicant are necessarily front and centre of every decision. That is made clear in cl 6.1(2) of *Direction 65* which requires the decision-maker to

consider whether to exercise the discretion to refuse or cancel the visa "given the specific circumstances of the case". That requires an evaluative assessment. *Direction 65* also identifies "principles" that "reflect community values and standards" (cl 6.2(1)). Those principles include that in the case of the commission of a "serious crime" a non-citizen "should generally expect" to be denied a visa (cl 6.3(3)). That principle is not expressed in absolute terms, as conveyed by the word "generally". It is a question of weight, not prescription as to outcome. Also, the consequence of criminal or other serious conduct by a non-citizen may be different depending on how long and from what age they have been in Australia (cl 6.3(5) to (7)). Further, the best interests of minor children in Australia who may be affected by the decision is also a primary consideration (cl 11.2, and referred to in cl 6.3(7)). In any particular case, that primary consideration may outweigh, or contribute with other considerations to outweigh, the consideration of the expectations of the Australian community (cl 8(3)).

106 The appellant relied heavily on cl 8(3) as dictating that each consideration, and hence also the expectations of the Australian community, can weigh in favour of or against the refusal of the visa. That approach gives that clause too much work to do in the light of the textual and contextual reasons to construe cl 11.3(1) as necessarily weighing, to some degree, against the visa applicant. Textually, cl 8(3) is capable of making perfect sense as saying that primary and other considerations may weigh in favour of or against refusal of a visa, rather than each and every primary and other consideration may weigh both ways.

Conclusion

107 It follows from my reasoning above that there is no jurisdictional error in the Tribunal's treatment of the primary consideration of expectations of the Australian community, and there is no error by the primary judge. The appeal should be dismissed.

I certify that the preceding twenty-two (22) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stewart.

Associate:

Dated: 24 October 2019