Administrative Appeals Tribunal

# DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2020/3705**

Re: **Joshua Steven Clegg**

APPLICANT

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

RESPONDENT

## DECISION

Tribunal: **Mr Rob Reitano, Member**

Date: **3 September 2020**

Place: **Sydney**

I set aside the delegate's decision and substitute a decision revoking the mandatory cancellation of Joshua Steven Clegg's Class TY Subclass 444 Special Category (Temporary) Visa granted to him on 24 April 2006.

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Mr Rob Reitano, Member

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**CATCHWORDS**

*MIGRATION – cancellation of Applicant's Class TY, Subclass 444 Special Category (Temporary) visa – Applicant is a citizen of New Zealand – failure of the character test – whether there is another reason to revoke the visa cancellation – Direction No. 79 – protection of the Australian community – best interests of minor children in Australia – expectations of the Australian community – strength, nature and duration of ties – impact on victims – extent of impediments if removed – Articles 12(4) and 17(1) International Covenant on Civil and Political Rights – decision under review set aside*

**LEGISLATION**

*Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 13*
*Migration Act 1958 (Cth) ss 499, 501, 501CA*

**CASES**

*Amohanga v Minister for Immigration and Citizenship [2013] FCA 31*
*Azar v Minister for Immigration and Border Protection [2018] FCA 1175*
*Bugmy v The Queen [2013] HCA 37*
*Cayzer v Minister for Immigration and Border Protection [2017] FCA 1189*
*FYBR v Minister for Home Affairs [2019] FCAFC 185*
*Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70*
*Nweke v Minister for Immigration and Citizenship [2013] FCA 456*
*Suleiman v Minister for Immigration and Border Protection [2018] FCA 594*
*Steve v Minister for Immigration and Border Protection [2018] FCA 311*
*Viane v Minister for Immigration and Border Protection [2018] FCAFC 116*

**SECONDARY MATERIALS**

*Direction No 79 – Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA*
*First Optional Protocol to the ICCPR (adopted 16 December 2016 and ratified by Australia on 25 September 1991)*
*International Covenant on Civil and Political Rights (16 December 1966)*

*Nystrom v Australia, UN Doc CCPR/C/102/D/1557/2007 (18 August 2011)*

**REASONS FOR DECISION**

**Mr Rob Reitano, Member**

**3 September 2020**

1. On 10 June 2020, a delegate of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Minister) made a decision under ss.501CA(4) of the *Migration Act 1958* (Cth) (Act) refusing to revoke the Minister's decision on 13 March 2019 cancelling Joshua Steven Clegg's (Mr Clegg) Class TY Subclass 444 Special Category (Temporary) Visa (Visa) which was granted to him on 24 April 2006.

2. The delegate was not satisfied that Mr Clegg passed the character test or that there was another reason to revoke the Ministers decision to cancel the Visa as provided for by ss.501CA(4) of the Act. The effect of that delegate's decision if left undisturbed is that Mr Clegg must leave Australia and return to New Zealand.

3. Mr Clegg has asked the Tribunal to review the delegate's decision seeking that the Tribunal set aside that decision and substitute a decision revoking the cancellation of the Visa.

4. I have decided to set aside the delegate's decision and to substitute in its place a decision revoking the cancellation of the Visa for the reasons that follow.

**ISSUE**

5. The only issue is whether the Tribunal is satisfied that there is '*another reason*' under ss.501CA(4)(b) of the Act to revoke the decision cancelling the Visa. This is because Mr Clegg made representations to the Minister seeking the revocation of the decision to cancel the Visa which is the jurisdictional prerequisite to the exercise of the power to revoke that decision.[1] Mr Clegg cannot pass the character test because he was sentenced to a term of

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[1] ss.501CA(4)(a)

imprisonment of more than 12 months[2], and so, it is necessary for him to satisfy the Tribunal that there is another reason to revoke the decision cancelling his Visa.

6. The question of whether there is '*another reason*' to revoke the mandatory cancellation of the Visa depends upon the application and consideration of the matters arising under '*Direction No 79 – Visa Refusal and Cancellation under s.501 and Revocation of a Mandatory Cancellation of a Visa under s.501CA'* (Direction) because the Direction provides a framework about the principles and matters that need to be considered. It is necessary to first set out the facts of the matter.

**FACTS**

7. In 1986 Mr Clegg was born in New Zealand. He is a citizen of New Zealand. His parents separated in the first few years of his life due, so it would seem, to his father's alcohol abuse and violence towards his wife and children. Mr Clegg stayed in New Zealand with his mother, but his father, brother and sister moved to Australia. When about three years of age he was '*placed on a plane to Australia'* although strictly speaking what in fact happened was that his mother brought him to Australia and invited his father to care for Mr Clegg in the future. He then joined his brother, sister and father who were already living in Australia. He most probably had no say in the matter although he says that at the time, he missed his brother and sister who he was close to.

8. His mother, Cheryl Gilroy, is an Australian citizen by birth. She now lives in Australia and has done so for some years. Mrs Gilroy has been diagnosed in the past as suffering from bipolar disorder. Her relationship with her family is problematic. Mr Clegg has been estranged from his mother for much of his life. Ms Gilroy gave evidence in this case because when she '*heard the news he might be deported to New Zealand; I knew I needed to help him'*. She has offered to provide him with a car, accommodation, and employment at the café which she operates if he is allowed to stay in Australia.

9. His father is a New Zealand citizen and a permanent resident of Australia. His father lives in Singleton. Despite their troubled relationship during Mr Clegg's childhood, they have become closer since Mr Clegg's incarceration and detention.

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[2] ss.501CA(4)(b)(i)

10. Mr Clegg attended many schools in his early childhood as his father's work commitments required that the family move around. He moved to Singleton at the beginning of his eighth year of school. He has lived there since. He completed his schooling at Singleton High School and obtained a trades certificate in automotive spray painting at Glendale TAFE. He has qualifications that allow him to drive forklifts, serve alcohol, and administer first aid. He has worked almost all his adult life albeit in different callings in the hospitality, cleaning, retail, and automotive industries.

11. Mr Clegg is married to Ms Sky Hands (Ms Hands). Ms Hand's is an indigenous Australian from the Kamilaroi people whose traditional lands stretch from Northern New South Wales into Southern Queensland. She is respected by the Wonnarua[3] people whose traditional lands occupy much of the Hunter Valley region. She works as an Aboriginal Liaison Officer and holds a second job as an Administrative Officer. She is a Board Member of the Wonnarua Local Aboriginal Land Council.

12. Ms Hands and Mr Clegg are separated. Although the prognosis for their future relationship as partners is uncertain, Ms Hands and Mr Clegg enjoy in Ms Hands' words a '*positive relationship'*. Ms Hands said in her evidence that, irrespective of whether her and Mr Clegg's relationship return to that of husband and wife, she would '*always do [her] best to support [Mr Clegg} emotionally'*.

13. Ms Hands was an impressive witness. Her evidence was not given, as some might suspect, solely for the benefit of enhancing her children's prospects of having a relationship with their father. Ms Hands' evidence about the *'loving and special bond'* she and Mr Clegg had for one other was sincere. Ms Hands was very clear in her evidence that she wished for Mr Clegg to remain in Australia not just for the wellbeing of her children, but also for her own and Mr Clegg's wellbeing. Her evidence was frank, to the point and balanced. She did not hesitate, at least on one occasion, to brand something Mr Clegg had said as a 'lie' even though she must well have known that would not have assisted the outcome she preferred. In her evidence she demonstrated a high level of caring and acceptance of the things that confronted Mr Clegg, his mental health and substance abuse problems, both in the past and likely on his release from detention. She also very frankly acknowledged she wanted

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[3] I note that there is an alternative spelling 'Wanarruwa'.

Mr Clegg around to provide financial and practical support for her children. She described Mr Clegg's incarceration the day after he threatened her as the beginning of a *'nightmare'*. She made the point that the only time that Mr Clegg had ever threatened her in any way was on that one single occasion on 18 March 2018. He had never at any time during the time he had known her ever physically assaulted her.

14. Mr Clegg and Ms Hands have two children together: a daughter who is eight years of age and a son who is seven years of age. Mr Clegg has lived with Ms Hands for about 15 years and, it follows, with his children for all of their lives other than the period of his incarceration. Mr Clegg described the days his children were born as '*the proudest days of my life*.' Prior to being incarcerated he played an active role in raising, caring for and supporting both children. He regularly prepared the children for school, and took them to swimming, dancing and tennis lessons during the week and on weekends. He acted as a teacher's helper when his daughter was in kindergarten. He acted as the coach's assistant for his son's soccer team. Mr Clegg described himself as a *'good dad'* who '*always tried to make sure they [his children] were safe and happy'*. I accept his evidence about that especially because it is completely consistent with the evidence of Ms Hands who described Mr Clegg as a '*first-class father'*. The evidence was overwhelming and corroborated from all directions about the love and support Mr Clegg had demonstrated for Ms Hands and their children.

15. Since Mr Clegg's incarceration, his children have visited him reasonably frequently, almost every week while he was at St Heliers Correctional Centre at Muswellbrook and every few weeks or so whilst at other institutions. Ms Hands has ensured that he saw the children regularly. The visits would, at least whilst at St Heliers, often last for some hours. The circumstance, which was in evidence, of a six year old boy running up to his father in a prison dining room and embracing him '*before being picked up and cuddled'* tells a great deal about the relationship between father and son. As does the evidence that his daughter remains '*daddy's little girl, still for, you know, still to this day, given the circumstances*.'

16. Bradley Jones, a Forensic Psychologist, prepared a report about some of the matters relevant to this case. Mr Jones observed the children on one visit, recording in his report: '*both [children] demonstrated a very close and loving relationship with Mr Clegg and were often climbing on him as though he were playground equipment'* and that *'both children continue to display behaviours indicative of a strong and stable attachment to both parents'*. It is no matter of small moment that Mr Jones concluded in his report that '*the children's*

*separation from Mr Clegg is having a negative and damaging emotional impact upon them*' and '*permanent separation of Mr Clegg from his children will result in the development and maintenance of childhood anxiety and depression'*.

17. I accept Mr Jones' evidence because it sets out clearly the basis of his opinion and the reasons for it. He was qualified to express the opinions he did express by reason of his training. His evidence about the underlying facts was corroborated. Mr Jones expressed the opinion that Mr Clegg's continued absence from the children's lives had the potential to create personality disturbance into the children's adulthood. More recently, Mr Clegg's son has developed some behaviours that involve aggressive behaviour and violence. Ms Hands has attributed this to the increasing difficulty in their son visiting Mr Clegg.

18. There was an issue about the frequency of the children's visits whilst Mr Clegg was at Villawood. I do not think that is significant mainly because it was most likely due to the simple fact of the distance to be travelled and the imperative for Ms Hands to earn an income that prevented more frequent visits at Villawood. After March, the pandemic, of course, put paid to any visits at all. Mr Clegg has maintained contact with his children by telephone, video messaging and text messages. He said he speaks to the children every night or every couple of nights. Ms Hands' evidence was that children miss their father very much. She said that she has explained to the children that their father may have to go and live in a different country but that '*they do not properly understand what is going on*.' She has told the children that Mr Clegg's incarceration and detention is the consequence of his having made some '*bad decisions*', but they have been told no more than that.

19. Ms Hands' mental health has deteriorated in recent times as a result of Mr Clegg's visa cancellation, financial difficulties, and with her son developing the 'behavioural issues' to which I have referred. A psychologist's report confirmed the significant mental health impact that visa cancellation would have for her having regard to its consequence. Ms Hands herself gave evidence that being a single mother for the last few years has already taken its toll. She said that she needs Mr Clegg around to provide both herself and the children '*with emotional, financial and practical assistance*'. I believe her.

20. Mr Clegg's immediate and extended family, as far as he is concerned, live in Australia. He has a close relationship with his wife's extended family. Growing up Mr Clegg was close to his older brother, but in his adult years, he has grown closer to his sister. Mr Clegg has

seven nieces and nephews aged between one and 17 years of age who, before his incarceration, he saw regularly (with the exception of the one year old who was born whilst he was in prison). All of his friends live in Australia. He has strong ties by way of family and friendship to the Singleton community. His family and friends speak in one very genuine chorus of his compassionate and caring attitude especially towards his wife and children.

21. Mr Clegg has played an active role in assisting with setting up the local National Aborigines and Islanders Day Observance Committee days and assisting the local Wonnarua Local Aboriginal Land Council with things like mowing lawns, removing rubbish, and maintaining properties. This is because of Ms Hands' involvement in those things.

22. Mr Clegg has had a substance abuse issue for some time having started using methamphetamine at about 14 years of age and cannabis at about the same time. He has also had a significant issue with alcohol abuse for a long time. In no small part, as will be seen shortly, is his record of criminal offending evidence of that.

23. Mr Clegg has suffered in the past, and presently has been diagnosed as suffering from, mental illness. He attempted suicide when he was 15 years of age. He has experienced suicidal ideation at various times in his life since his teenage years, including immediately before being incarcerated, at around the time of the breakdown of his relationship with Ms Hands, and during his incarceration.

24. In December 2016 after self-presenting at Singleton Hospital he voluntary admitted himself to the mental health unit at Maitland Hospital. He said he was having ideas about suicide and self-harm. He was teary eyed. He reported his marriage breakdown to the medical professional who attended upon him. He frankly told those who he reported to at Maitland Hospital about his drug and alcohol abuse. When he was discharged from Maitland Hospital to Dooralong Transformation Centre (Dooralong), a rehabilitation facility, on 14 December 2016 he was assessed as having a substance abuse disorder and an adjustment disorder '*with low mood and suicidal ideation*.' He was considered at that time a moderate risk of harm to himself and low risk to others. The evidence was a little unclear as to how long Mr Clegg spent in Dooralong, but he said that he left Dooralong when Ms Hands asked him to as she needed his help with the children and with finances. Ms Hands confirmed that Mr Clegg's return from Dooralong was at her request.

25. There was an incident involving Mr Clegg shortly before Christmas 2017 when he was walking around in his back yard in the early hours of the morning with a knife. He had woken Ms Hands and asked her if she thought he was '*a bad person*'. He said something about '*having permission from God*' and that *'he had to go*.' He had been drinking the night before with Ms Hands. He may have been affected by drugs. Ms Hands called an ambulance. Mr Clegg was taken to hospital. There are two aspects of this evidence that are relevant. First, no matter what may be made of the circumstances one thing is clear: Mr Clegg did not threaten to harm anyone other than himself and in fact did not harm anyone. Second, the circumstance of him threatening to kill himself was completely consistent with his history of suicidal ideation and feelings of worthlessness and of mental illness. I reject any suggestion that the incident itself is relevant to the likelihood of Mr Clegg being disposed to harm others.

26. On 23 May 2018 Mr Clegg was convicted of two offences which he committed on 18 March 2018: common assault, and stalking and intimidating with intent to cause fear of physical harm. On that same day, he was also called up on two offences which he was convicted of on 13 February 2018 and for which he was placed on good behaviour bonds: intimidating (without actual bodily harm) a police officer in the execution of his duty, and driving with a high range prescribed concentration of alcohol in his blood. For all four offences he received an aggregate term of imprisonment of 30 months with a non-parole period of 16 months although this was reduced to 15 months on appeal. The indicative sentences for each offence are a little important as they inform the seriousness of each offence. Mr Clegg received the following indicative sentences: seven months imprisonment for intimidating a police officer; 11 months imprisonment for driving with a high range prescribed concentration of alcohol; 10 months imprisonment for stalk and intimidate with intent to cause fear of physical harm; and 12 months imprisonment for the common assault. The maximum penalties for each offence were: in the case of the high range prescribed content of alcohol, because it was second or subsequent offence, two years imprisonment and a fine of $5500; for the intimidate police officer five years imprisonment; for the stalk and intimidate five years imprisonment; and for the common assault two years imprisonment.

27. The first two offences, the high range driving with a prescribed concentration of alcohol and the intimidate police officer, occurred on the evening of 25 November 2017. Following a report about a vehicle driving erratically, Mr Clegg was taken to Singleton Police Station where he threatened to kill a police officer and returned a blood alcohol reading of 0.189. He was placed on a bond to be of good behaviour with suspended sentences for each of

these offences, but, as I have already observed, the bond was called up when the other two offences came before Local Court on 23 May 2018.

28. The other offences took place on 18 March 2018 in Ms Hands' home when Mr Clegg had an argument with her and threatened to '*slit her throat.*' He took a large knife from a kitchen drawer and motioned it towards Ms Hands' throat and stomach in a jabbing motion. The knife did not contact her at any time but came within centimetres of her throat and stomach. She screamed in fear. He threatened to kill Ms Hands. Mr Clegg had been drinking at the time. It is possible that at the time he was also affected by methamphetamine. Ms Hands told the police at the time that Mr Clegg had been '*on a bender with the drug ice for the past few weeks*' and was '*drug fried*.' The whole of his criminal offending that night so far as this offence was concerned occurred within a matter of about seven minutes according to the charge sheet. It changed the course of a family's lives for the years that followed.

29. I note that when sentenced by the Magistrate there was reference to Mr Clegg's drug and alcohol abuse but only so far as it was relevant to setting a non-parole period. There was no reference by the Magistrate at all to Mr Clegg's mental illness. On appeal to the District Court, Judge Gartelmann SC, when resentencing, accepted that Mr Clegg had '*a dysfunctional background in so far as he was exposed to alcohol abuse and violence from a young age'* but noted that this had not impacted upon him completing school or maintaining employment consistently. Judge Gartelmann SC took account of Mr Clegg's '*mental health difficulties'* without, so it would seem, knowing anything about the nature of the condition. It is not clear that Judge Gartelmann SC took into account anything to do with Mr Clegg's mental health difficulties for the purpose of reducing his moral culpability in the offence, but he did say he took it into account.

30. Although Mr Clegg pleaded not guilty to the offences he committed in March 2018, I accept his evidence that he is now very remorseful for what he did that night. He has expressed that remorse not only to the Minister and the Tribunal but significantly, and more importantly, to Ms Hands, his sister, his mother, and others. Further, his exemplary behaviour whilst in prison and then in detention confirms that I should have some confidence in the genuineness of his expressions of sorrow. His statements that he will live '*drug and alcohol free*' and that he desires to be a '*respectable member*' of the community should not be diminished. The insight he has demonstrated by understanding the relationship between his offending and his substance abuse issues also should not be diminished. Nor can the

context of these statements be ignored: a wife who has offered to provide him with support; a mother who is offering his accommodation and stable employment; a father who has taken on a more active role in his life since his incarceration; and a network of friends and family who have said they will be there for him. And then there is his own recognition and acceptance that at the core of his issues lay his substance and alcohol abuse.

31. In Mr Jones report, Mr Jones described Mr Clegg as experiencing a '*mild level of anxiety and a severe level of depression*' at the time of their consultation in June 2019. His depression was *'primarily marked by cognitive features such as negative expectancies and low self-esteem. He was likely to be quite pessimistic and plagued by thoughts of worthlessness, hopelessness, and personal failure.'* At that time, he was suffering from suicidal ideation. He was diagnosed by Mr Jones as suffering from '*Alcohol Use Disorder, moderate severity, in sustained remission, in a controlled environment*' and '*Amphetamine-type substance Use Disorder, severe, in sustained remission, in a controlled environment*.' He was also assessed as experiencing symptoms consistent with an '*impulsivity disorder and personality traits consistent with borderline personality*.'

32. Mr Jones concluded in his report that Mr Clegg *'presents a low/moderate risk for committing general offences relative to other offenders and presents a low/moderate risk of engaging in violent behaviours.'* He went on to say that '*If Mr Clegg were to reoffend, the most likely risk scenario would be if he were to return to the community and relapse into substance abuse, be without employment, without family support and associate with associate with antisocial and substance using peers.'*

33. Finally, it is important to record something of Mr Clegg's prior offending. In 2007 Mr Clegg committed some traffic offences which are fairly immaterial for present purposes. In 2010 he was convicted and fined for a series of driving offences: driving with a mid-range prescribed concentration of alcohol, driving whilst disqualified; and driving with a high range prescribed concentration of alcohol in his blood. He received fines, periods of disqualification and bonds for those offences. In January 2017 he was also convicted of driving as novice driver with a novice range prescribed concentration of alcohol in his blood, for which he was fined $300 and disqualified from driving for three months.

## IS THERE ANOTHER REASON FOR REVOCATION?

34. I am required, when considering whether '*there is another reason why the original decision should be revoked',* to be informed by the Direction because s.499(2A) of the Act requires the Tribunal, in exercising its functions and powers under the Act, to comply with any written directions given by the Minister under ss.499(1).

35. The purpose of the Direction is '*to guide decision-makers performing functions or exercising powers under section 501 of the Act…to revoke a mandatory cancellation under section 501CA of the Act'*[4]*.* Its object is to provide *'a framework within which decision-makers should approach their task of deciding whether…to revoke a mandatory cancellation under section 501CA'.* The Direction identifies '*relevant factors that must be considered in making a revocation decision.*'[5]

36. The Direction contains both '*principles*' and '*relevant factors that must be considered*' that are required to be applied in a particular way. The '*principles*' and the '*relevant factors that must be considered'* condition or regulate the satisfaction, or evaluative judgment, that a decision-maker is required to have, or make, under s.501CA(4)(b)(ii) of the Act.

### The principles

37. The principles '*inform*' a decision-maker about the matters that must be considered in determining whether the mandatory cancellation of a visa will be revoked.[6]

38. The first of the principles records the sovereign right of Australia to determine whether non-citizens of '*character concern*' are allowed to '*remain in Australia'*.[7] It records the fact that being in Australia is a privilege that is conferred in the expectation that non-citizens are '*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'*. The principle is about the fact that it is Australia who decides who can be in Australia and that Australia permits people to be here on the express basis that they will abide with Australian law.

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[4] Cl.6.1(4)
[5] Cl.6.2(3)
[6] Cl.7(1)
[7] Cl.6.3(1)

39. The second principle refers to the expectation of the Australian community 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.'*[8] This principle is reiterated later in the factors that must be considered, but it is important that it is the '*expectation*' of the Australian community that is relevant and not the general proposition that those who commit serious crimes in Australia or elsewhere should be refused entry or have their visa cancelled. That comes later in the principles

40. The third principle refers to '*a non-citizen who has committed a serious crime of a violent or sexual nature, and particularly against women or children or vulnerable members of the community such as the elderly or disabled, should generally expect to… forfeit the privilege of staying in, Australia*.'[9] This operates on the premise of a '*general*' expectation or rule and not one that is either to be applied in every case, or more importantly, in specific circumstances. The word '*generally*' suggests that in a given set of circumstances the '*general*' will, or might, give way to the specific. Further, a non-citizen who relies upon an expectation can be afforded no comfort at all that their expectation will be accorded any significance in the framework because of this principle; the logical extension of this is that a decision-maker should expressly act on the basis that there is no such expectation that can be afforded any relevance in the decision making process.

41. The fourth principle opens with the words '*In some circumstances*', indicating that there will be specific cases that attract its attention.[10] The '*some circumstances*' are those where '*criminal offending or other conduct…may be so serious, that any risk of similar conduct in the future is unacceptable'* and it is '*[i]n these circumstances*' that '*even strong countervailing considerations may be insufficient to justify not cancelling…the visa*.' This principle leaves open two possibilities relevant to not cancelling a visa: namely, that where criminal offending or other conduct is not so serious that '*strong countervailing considerations*', or even countervailing considerations alone, might justify not cancelling a visa; and that '*strong countervailing considerations'* may be, in any event, sufficient to justify not cancelling a visa.

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[8] Cl.6.3(2)
[9] Cl. 6.3(3)
[10] Cl.6.3(4)

42. The fifth principle is that: '*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'*.[11] So far as this principle is concerned sight should not be lost of the fact that living in the Australian community for most of their life, or from a very young age, is not at all qualified by the words '*participating in, and contributing to'* as applies in the case with those who have only been in Australia for a short time. Although it is not expressed to be, these are likely to be amongst the '*countervailing considerations'* that are relevant to the fourth principle. It is also important that living in Australia for '*most of their life'* or '*from a very young age'* is not something that is to be regarded as an automatic exception to the general position of *'low tolerance'*; the word '*may*' suggests that the issue is an open one presumably dependant on other of the principles, the relevant factors that must be considered and the circumstances of the particular case.

43. The sixth principle refers to Australia's '*low tolerance of any criminal or other serious conduct'* such that those who are hold a limited stay visa can have no expectation that they may remain here permanently.[12]

44. The seventh principle, like the fifth, refers that the '*length of time a non-citizen has been making a positive contribution to the Australian community, and the consequence of a visa…cancellation for minor children and family member*s' are considerations.[13] The use of the conjunction '*and*' suggest that positive contribution is not relevant to the issue of consequences for minor children and family members so that, so far as consequences for minor children and family members are considered, time is immaterial. Again, these are likely to be among the countervailing considerations referred to in other principles.

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[11] Cl.6.3(5)
[12] Cl.6.3(6)
[13] Cl.6.3(7)

**The primary and other considerations**

45. The Direction requires that the principles inform the decision makers consideration of the matters referred to in Part C[14].

46. Part C contains '*primary considerations'* and '*other considerations*.' Both classes of considerations may weigh in favour of or against revocation of the mandatory cancellation of a visa.[15] Of course, rationally viewed, some of them in particular cases might be entirely neutral or even irrelevant. Primary considerations should '*generally be given greater weight than other considerations.*'[16] Again, the use of the word '*generally*' suggests that there may be circumstances where that is not so. The inquiry is '*whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply."*[17] That raises a question about what '*the circumstances that generally apply'* might be. That issue as to when special consideration should be given to a factor or other factors is left to the good sense of the decision maker.

47. The '*primary considerations*' are the protection of the Australian community from criminal or other serious conduct[18], the best interests of minor children in Australia[19], and the expectations of the Australian community.[20]

48. The '*other considerations'* include, noting that the class of other considerations is not closed, international non-refoulment obligations[21], the strength, nature and duration of ties[22], the impact upon Australia business interests[23], the impact on victims[24], and the extent of impediments if a non-citizen is removed from Australia'.[25] I note that international non-refoulement obligations and the impact upon Australian business interests are not relevant considerations in this case. In this case two particular *'other considerations'* that have been

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[14] Cl.7(1)(b)
[15] Cl.8(3)
[16] Cl.8(4)
[17] *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 at [23]
[18] Cl.13.1
[19] Cl.13.2
[20] Cl.13.3
[21] Cl.14.1
[22] Cl.14.2
[23] Cl.14.3
[24] Cl.14.4
[25] Cl.14.5

raised concern Mr Clegg's 'dysfunctional upbringing' and Australia's international obligations under Articles 12(4) and 17(4) of the *International Covenant on Civil and Political Rights (ICCPR)* to which Australia is a party.

49. It is necessary to consider each of the considerations informed by the principles referred to earlier. It is convenient to record, consider and deal with each of the primary and other considerations in turn dealing with the facts relevant to each of them as they are considered.

**Protection of the Australian community**

50. I am directed to give consideration to: *'the principle that the Government is committed to protecting the Australia community from harm as a result of criminal activity or other serious conduct by non-citizens'*; and that *'remaining in Australia is a privilege that Australia confers on non-citizens' in the expectation that they will obey the law, will respect Australia's institutions and will not cause or threaten harm to individuals of the community*.[26] I am required to consider the nature and seriousness of the conduct and the risk to the Australian community should further offences or others serious conduct be engaged in[27].

51. The Direction details nine matters I must have regard to in assessing the nature and seriousness of the offence. The use of the word '*including*' in the introduction to the sub-paragraphs means that I may consider other matters. The phrase *'nature and seriousness of the offence'* is redolent of the kinds of things routinely considered in sentencing for criminal offences, but the use of that phrase should probably not be interpreted strictly in a criminal law sense because the sub-paragraphs which follow require consideration of matters that strictly are not relevant to the nature and seriousness of the offence. In particular consideration of *the sentence imposed by the courts'* will involve matters concerning the moral culpability of the offending and the subjective factors that accompanied commission of the offence. This is relevant because of Mr Clegg's reliance upon his dysfunctional upbringing as being a matter I should consider as an '*other consideration'* which I will return to later.

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[26] Cl.13.1(1)
[27] Cl.13.1(2)

52. The specific matters I must consider are: *'the principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed very seriously'*[28]; *'the principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed'*[29]; *'the principle that crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties, are serious'*[30]; *'the sentence imposed by the Court for a crime or crimes'*[31]; *'the frequency of the non-citizen's offending and whether there is any trend of increasing seriousness'*[32]; and *'the cumulative effect of repeated offending'*[33]. I have considered the remaining factors[34] and they are irrelevant in this matter. Neither party suggested otherwise.

53. The offences committed against Ms Hands are serious offences. Those offences were the offences of stalk or intimidate with the intention of causing someone to fear physical or mental harm[35] and common assault. They are violent offences that were committed in a domestic situation and were committed against a woman whilst that woman was alone. It is relevant that the offence did not involve actual physical violence. The sentences imposed, indicatively, were 10 and 12 months respectively. The maximum sentence for each offence was five and two years respectively which suggest that they are serious, but perhaps not in the category of the most serious offences. Nonetheless, given the fact that the offences were committed against a woman they must be regraded seriously. The intimidate police officer offence again was serious. It was committed against a government official performing his duties. The indicative sentence was seven months imprisonment for an offence that carried with it a maximum sentence of five years. It too involved no actual physical violence. It was committed whilst Mr Clegg was in custody and heavily intoxicated. The most recent prescribed content of alcohol offence was also serious involving as it did a high risk of danger to the public. The aggregate sentence imposed for all of these offences, two and a half years imprisonment, reflects the fact that the offences taken together were objectively serious. There is no reason why the offences should not be regarded as serious.

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[28] Cl.13.1.1(1)(a)
[29] Cl.13.1.1(1)(b)
[30] Cl.13.1.1(1)(c)
[31] Cl.13.1.1(1)(d)
[32] Cl.13.1.1(1)(e)
[33] Cl.13.1.1(1)(f)
[34] Cl.13.1.1(1)(g), (h) and (i)
[35] *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s.13

54. I should observe that Judge Gartelmann SC, when sentencing Mr Clegg, expressly referred to Mr Clegg's upbringing having been associated with his father's alcohol abuse and violence. This is important because it demonstrates that the sentencing process gave consideration to Mr Clegg's exposure as a child to violence and alcohol abuse such that Mr Clegg's *'recourse to violence when frustrated such that [his] moral culpability for the inability to control that impulse may be substantially reduced'*.[36] Although Judge Gartelmann SC did not use those words, his reference to Mr Clegg's exposure to violence and alcohol abuse can only be explained in that light. The relevance of this aspect of the matter is clearer when I consider the other considerations referred to in the Direction. For now, it is sufficient to say in passing that the sentence imposed, a matter I am required to consider, expressly considered the fact of exposure to violence and alcohol abuse as a child.

55. I do not think that it can fairly be said that Mr Clegg's offending has increased in frequency over time. Rather it seems Mr Clegg has had two periods of offending during his life, the latter more obviously explained by his relationship breakdown and his substance abuse, the former more concerned only with substance, specifically alcohol, abuse. Likewise, even though the offending has increased in seriousness it is, it would seem, qualitatively different, in that driving whilst affected by alcohol does not involve overt violence whereby the kinds of threats made to Ms Hands and the police officer in 2017 and 2018 are more overtly violent.

56. The nature and seriousness of Mr Clegg's criminal wrongdoing is serious albeit it must be accepted that the criminal offending is not at the highest level of seriousness of such offending. I think the descriptor very serious is nonetheless appropriate having regard to the principles that I am required to apply.

57. Next, I must consider the risk to the Australian community should further offences or other serious conduct be engaged in. I am required to have regard to, cumulatively, *'the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct'*, [37] and *'the likelihood of the non-citizen engaging*

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[36] *Bugmy v The Queen* [2013] HCA 37 at [44]
[37] Cl.13.1.2(1)(a)

*in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen reoffending'*.[38]

58. The harm caused by Mr Clegg's conduct falls into two categories. First, there is the psychological and mental harm caused to the victims of his offences of intimidation, like the fear instilled in Ms Hands and the police officer. There is no evidence of any ongoing or permanent harm to either of them, but the harm that was caused is material even if only for the minutes around which the words were spoken. Second, there is the potential harm to individuals and the community more generally posed by driving with high levels of alcohol in his blood. The likely harm from that conduct is self-evident, resulting as such conduct often does, in the loss of life and all the personal and social consequences that flow form that. The harm caused by such offending should it be repeated is significant.

59. The more difficult issue concerns the risk of Mr Clegg engaging in further criminal conduct based upon the available information and evidence on the risk of his reoffending. I consider the risk of Mr Clegg re-offending in the future to be low. There are five matters which I consider to be important. I will deal with them in turn.

60. First, I have accepted Mr Clegg's expressed remorse for all of his offending. His acceptance of responsibility for his actions and his sorrow for the consequences that have followed for his wife and children is sincere. His insight into the reasons behind his offending, largely pertaining to his substance abuse, is important.

61. Second, Mr Clegg's conduct whilst incarcerated and in detention demonstrates a genuine desire on his part to change his ways so far as alcohol and drug abuse are concerned. I accept that he did not take up all the opportunities of professional assistance presented to him whilst incarcerated and in detention, but this is against a background where he has been alcohol and drug free for more than two years. I also accept his commitment to remain alcohol and drug free when released into the community has not been tested either, but absent releasing him into the community that cannot really ever be tested.

62. Third, the level of support Mr Clegg is likely to receive form Ms Hands, his children, his family, his mother, his father, and his friends cannot be gainsaid. Mr Jones suggested that

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[38] Cl.13.1.2(1)(b)

these factors, in particular their absence, were some of the significant factors affecting the increased risk of re-offending. The evidence given by Ms Hands and Ms Gilroy are cause for some confidence that Mr Clegg will find significant support and assistance once released from detention.

63. Fourth, there is the evidence of Mr Jones itself which places Mr Clegg's likely risk of reoffending in the low to moderate range. Mr Jones' reference to Mr Clegg being at low to moderate range of re-offending is somewhat confirmed by the assessment of Mr Clegg before his offending that placed him at low risk of harming others. Of course, it needs to be remembered that Mr Jones' assessment of Mr Clegg was based on an interview that went for only a few hours.

64. Finally, I think the deterrent effect of having been imprisoned for so long is likely to have a significant impact on Mr Clegg. When asked in evidence why he should be believed about not re-offending Mr Clegg said:

> *'Because it can't happen again, I cannot (indistinct) my children, I can't go to gaol, I just don't have - it can't happen again because I will be deported, and I know that, the facts and things that could happen are just devastating my life. I can't take a chance of letting it happen again'.*

The word indistinctly recorded sounded very much like '*lose*'.

65. This consideration of the protection of the Australian community weighs against revocation of the decision to cancel the Visa, but especially having regard to the low likelihood of Mr Clegg reoffending, its significance should not be exaggerated. It weighs against revocation but not strongly so and, having regard to other considerations not determinatively so.

**Best interests of minor children in Australia affected by the decision**

66. Next, I am required to consider the best interests of children who may be affected by the decision to either revoke or not revoke the mandatory cancellation of the Visa. The Direction provides that I only consider minor children, that is children under the age of 18 years when I make my decision.[39] I must only consider the interests of any such children individually to the extent that their interests may differ.[40] This consideration does not at all focus on Mr

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[39] Cl.13.2(2)
[40] Cl.13.2(3)

Clegg's interest or interests such as in him having a relationship with his children or other people's children. His interests are quite beside the point, if not irrelevant.

67. In considering the best interests of minor children I must consider a list of factors. Those which are relevant here are: '*the nature and duration of the relationship between the child and the non-citizen*' noting that '*less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact*'[41]; '*the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18…*'[42]; '*the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child*'[43]; '*the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways*'[44]; '*whether there are other persons who already fulfil a parental role in relation to the child*'[45]; and '*any known views of the child (with those views being given due weight in accordance with the age and maturity of the child).*'[46] There are two other matters I am required to consider that relate to 'evidence' concerning any neglect or abuse of the child or children[47] and evidence concerning any physical or emotional trauma occasioned to the child or children.[48] These clearly have no relevance to this matter and neither party suggested otherwise

68. So far as the matters I must consider are concerned, the minor children who are directly concerned here are Mr Clegg's daughter and son. Each of them has had a relationship with their father for all of their lives: eight and seven years, respectively. I do not accept that Mr Clegg's incarceration or detention has interrupted the duration, or for that matter the strength, of the relationship with each child especially given the evidence about the children's frequent weekend visits. The relationship is of father and child. The relationship is overwhelmingly, on the evidence, a strong loving and caring relationship and one of significance to both children. It is likely that Mr Clegg will play an important part in their childhood right up until they are 18 years of age. He played a significant part in their lives

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[41] Cl.13.2(4)(a)
[42] Cl.13.2(4)(b)
[43] Cl.13.2(4)(c)
[44] Cl.13.2(4)(d)
[45] Cl.13.2(4)(e)
[46] Cl.13.2(4)(f)
[47] Cl.13.2(4)(g)
[48] Cl.13.2(4)(h)

before he was incarcerated, having an active involvement in their day to day lives, their schooling and their leisure time. There is no reason to believe that will change.

69. His criminal offences have not been a matter that has affected the children. There was no evidence at all that would suggest that the children were in any way exposed to any of his conduct whether leading to his offending or more generally concerned with his alcohol and drug abuse. They were told, because of their ages, that his incarceration was due to his '*bad decisions'* and no more. His offending has not impacted upon them other than that they have been without their father in their day to day lives for over two years.

70. Mr Jones' evidence that the children would suffer from anxiety and depression if their father was removed to New Zealand is significant, as is Ms Hands' evidence about her capacity to ensure Mr Clegg maintains contact with the children in the event of non-revocation given her limited financial means. More significant is Ms Hands' evidence that as a sole parent she is having some difficulty, both financially and emotionally, caring for their children on her own. Her capacity to continue caring for the children as a sole parent is not immutable.

71. I do not consider that the children having the prospect of maintaining a relationship by phone or other social media and occasionally, if it were in fact possible, visiting their father in New Zealand would be in their best interests. Their best interests are served by allowing them to grow up with their father.

72. It does strike me that in considering the *best* interests of Mr Clegg's daughter and son I cannot ignore the evidence, in particular of Mr Hands who is after all the children's mother, but also of Mr Clegg himself and of others, that Mr Clegg is a good father, or to use precisely the words of Ms Hands, a '*first-class father'.* That evidence strongly informs my conclusion that the best interests of Ms Hands and Mr Clegg's children is a powerful consideration weighing strongly in favour of revocation.

73. The evidence about the other minor children in his extended family is incapable of supporting a strong finding one way or the other about their best interests. To the extent that it plays any part it weighs slightly in favour of revocation because they are children, all of whom who have had a relationship that was more than of a passing nature with Mr Clegg.

**Expectations of the Australian community**

74. The third primary consideration is that found in cl.13.3(1) which provides:

> *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 not revoke the mandatory visa cancellation of such a person. Non-revocation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the non-citizen should not hold a visa. Decision-makers should have due regard to the Governments views in this respect.*

75. This primary consideration imputes to the Australian community the expectation that those who have permission to remain in Australia will obey Australian laws. I am not required to consider what or what not the Australian community expects because that is normatively expressed in the consideration itself. Rather, the relevant inquiry is whether it is appropriate to give more or less weight to a deemed community expectation of' non-revocation of mandatory cancellation *'that might otherwise arise simply because of the nature of the non-citizen's character concerns or offences*.'[49]

76. The principles obviously point to this consideration as being one that generally carries weight in favour of non-revocation, but I do not agree that in the circumstances of this case they mean that this consideration weighs heavily in that direction. The fifth principle which I referred to earlier refers in terms to the fact of having *'lived in the Australian community for most of their life, or from a very young age'* as being a factor that means the Australian community may extend more tolerance to a non-citizen's criminal conduct. The seventh principle refers to the length of time a person has been making a positive contribution to the Australian community, and the consequences for minor children and other immediate family members, as being considerations relevant to visa cancellation. These two principles are important to an assessment of the weight to be accorded to this primary consideration.[50] These two principles strongly point to a conclusion that the expectations of the Australian community, in this particular case, are not to be regarded as a very weighty consideration.

77. Mr Clegg's having spent most of his life from a very young age in the Australian community, as well as the fact that his entire immediate (and, less relevantly, extended) family for most

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[49] *FYBR v Minister for Home Affairs* [2019] FCAFC 185 at [77] (per Charlesworth J)

[50] *FYBR* at [22] per Flick J; at [77] per Charlesworth J

of that time have lived in Australia, strongly moderate this consideration. Moreover, Mr Clegg's positive contribution to the Australian community through work and life, assisting as a teacher's helper, being a manager of his son's soccer team, preparing for NAIDOC days, assisting the Local Aboriginal Land Council and so on have all made some contribution to the Australian community. I deal with these matters again later in these reasons.

78. These are matters that I consider, together with the greater tolerance the Australian community extends to him by reason of his having lived here almost all of his life, to mean I should not accord substantial weight to this consideration at all, even though it quite obviously weighs against non-revocation.

**Strength, nature and duration of ties**

79. The Direction requires that attention be paid to the strength, nature and duration of ties in Australia.[51] I am first required to address the issue of how long Mr Clegg has resided in Australia, but giving it '*less weight*' where the offending started '*soon after*' arrival in Australia[52] and *'more weight*' where '*time has been spent positively contributing to the Australia community'*.[53] Second, I must consider the strength, duration and nature of familial and social links with Australian citizens, permanent residents and others entitled to remain in Australia indefinitely.[54]

80. Mr Clegg has been in Australia for about 30 years, his offending having commenced after he was in Australia for about 20 years so it cannot be said that he commenced offending '*soon after'* his arrival in Australia. I have referred to the fact of Mr Clegg's positive contribution through paid employment and involvement in the community when addressing the previous consideration.

81. Mr Clegg's ties to the Australia community include ties to his immediate and extended family, which includes his wife, children, father, mother, stepfather, his sister and brother, their spouses and children, as well as to Ms Hands' extended family. It is true that until these proceedings he was estranged from his mother, but that does not diminish the fact of

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[51] Cl.14.2
[52] cl.14.2(a)(i)
[53] cl.14.2(a)(ii)
[54] Cl14.2(b)

their tie as mother and son. He also has ties to many friends in the community, some who provided documents attesting to his relationship with them albeit many of them did not identify their own citizenship or residency status. I have referred earlier to the positive contribution Mr Clegg as made to the Australian community through paid employment and other work with the local indigenous community and his children's school and sporting endeavours.

82. In my assessment having regard to the duration of Mr Clegg's time in Australia from a very young age and the many family members with whom he has a strong relationship, this consideration is significant in counting in favour of revocation.

**Impact on victims**

83. This consideration requires attention being given to the *'impact of a decision not to revoke on members of the Australia community, including victims of non-citizen's criminal behaviour, and the family members of the victim or victims where the information is available and the non-citizen being considered for revocation has been afforded procedural fairness.'*[55]

84. The Minister submitted that I was limited to considering only impacts on victims in circumstances where those matters were adverse to the interests of a non-citizen such that they favoured non-revocation. This was said to arise because the closing words of the consideration that required affording procedural fairness could only operate in circumstances where the victim was saying things adverse to a non-citizen. I do not agree. In my view this part of the direction should be ascribed its ordinary English meaning and the requirement to afford procedural fairness should be applied where it is relevant – most notably where the consideration of the impact upon victims might be inimical to the interest being pursued by a non-citizen.

85. The ordinary English grammatical words of the consideration require me to consider the impact of non-revocation on victims: in this case upon Ms Hands and, less relevantly, the police officer who was intimidated by Mr Clegg. I do not know what the impact of non-revocation is on the police officer because I have no evidence about that. It would be

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[55] Cl.14.4(1)

contrary to the rules of procedural fairness to rely on anything about the impact upon him. The consideration itself in that circumstance forbids relying in it.

86. I do have evidence about the impact of non-revocation upon Mrs Hands – non-revocation will leave her, on her evidence and my assessment of it, struggling financially, emotionally and practically in country New South Wales in the midst of a pandemic, rearing two young children as a single mother. Additionally, she will be left in those circumstances to deal with her own mental health condition which on her evidence is declining. All this in the context of a person who Ms Hands says she shares a special bond with, who cares very much for her and her children and who is only too willing to help her, being sent back to New Zealand. Procedural fairness requires me to put this specific and identified circumstance to Mr Clegg and ascertain his view upon it. This happened in the course of the hearing before me. It is no surprise that he says it is something I should consider that tells against non-revocation.

87. This kind of consideration was dealt with by Rangiah J in a slightly different context in *Viane v Minister for Immigration and Border Protection*[56]*("Viane")*:

> *The argument or information indicating that the appellant's partner would suffer hardship if she moved to Samoa was an important part of the appellant's case. The Minister's decision ultimately turned upon his view that there was a risk of the appellant reoffending, which could result in physical or psychological harm to members of the Australian community, and harm to the community itself. The appellant's partner was the victim of the offence which resulted in the cancellation of the appellant's visa. The Minister must, therefore, have had her at the forefront of his mind when considering the risk of harm. The appellant's partner is an innocent party in all of this. The complexities of relationships involving domestic violence are not well understood, and the appellant's partner has apparently decided that her interests, and those of her child, are best served by continuing her relationship with the appellant. If the decision is not revoked, the appellant's partner will suffer because either her family will be broken up, or she will be forced to move overseas with her child, possibly to Samoa. She has been the victim of domestic violence at the hands of the appellant and is now, in a sense, a victim of the cancellation decision. In these circumstances, the Minister's consideration and acceptance of the claim of hardship to the appellant's partner if she had to move to Samoa could have been decisive. In my opinion, by failing to consider the argument or information, the Minister fell into jurisdictional error.*[57]

88. It is almost the very circumstance that was considered in *Viane* that arises here. The issue, as Rangiah J observed, involves a complex issue about which not a great deal is

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[56] [2018] FCAFC 116
[57] [2018] FCAFC 116 at [32]

understood. Further, it so often informed by pre-judgement and stereotyping that deflects attention from a reasoned consideration of the real situation and rarely, for that reason, results in a proper or fair understanding of all the dynamics at work in the particular circumstances of a case. I accept, nonetheless, that great caution must be taken in assessing the evidence and in particular the evidence of Ms Hands.

89. I have already accepted Ms Hands' evidence, not only about her desire to have Mr Clegg in her children's lives, but also in her life as breadwinner and provider of practical and emotional support. It goes without saying that this is not a case that involves an issue about repeated and consistent threats of violence towards a domestic partner. This is not a case where it is at all possible to discern any scepticism about Ms Hands' evidence or her motivations for giving the evidence that she gave. Having seen her give her evidence I accept that she genuinely desires to have Mr Clegg to return to having some role in her and her children's lives. This is a case where her frank and honest evidence about the role she wishes Mr Clegg to play in her, and her children's, lives should be accorded significant weight. A decision in this case to refuse to revoke the mandatory cancellation decision would make her a victim for a second time.

90. Whether this matter is one that strictly falls under this heading of the *'other considerations'* or not matters little. Whether Ms Hands' views are considered because of the impact non-revocation will have on Ms Hands as a victim or, alternatively, as some other or further consideration under some other heading matters little. I consider her plight in the event of non-revocation relevant and a matter that strongly favours revocation.

**The extent of impediments if removed**

91. I am required to consider the extent of any impediments that exist for a non-citizen in establishing and maintaining a basic living standard if removed from Australia. I am required to consider age, health, language and cultural barriers and social, medical and economic supports that may be available.

92. There cannot be any serious issue that there are realistic language or cultural barriers that would present themselves to Mr Clegg if he were removed to New Zealand. Likewise, it is a given that the standard of economic, social, medical and like services in New Zealand would be of a standard similar to Australia. I also incline to the view that the COVID-19

pandemic has probably affected New Zealand as much as it has Australia. None of those matters create an impediment of any identifiable or important kind.

93. Mr Clegg has skills that would arm him with sound prospects of obtaining gainful employment in New Zealand. The fact that he has worked for most of his adult life in a range of different occupations is testament to his adaptability.

94. The more significant considerations are Mr Clegg's mental health and his lack of any ties by way of family or friends in New Zealand. Mr Jones' opinion that that Mr Clegg would, having regard to his history of poor emotional functioning and his involvement in alcohol and substance abuse, be at significant risk of suicide upon return to New Zealand, is a weighty matter so far as impediments to his return are concerned.

95. In simple terms an ordinary candidate for non-revocation might confront social barriers, even significant ones leading to social isolation and the need to start life afresh, that are ultimately capable of being overcome. In this case so much is known about Mr Clegg's history of alcohol and substances abuse and his mental health that vex the very question of him overcoming those impediments at all should he need to return to New Zealand. This consideration weighs in favour of revocation.

**A dysfunctional background**

96. Mr Clegg submitted that I should consider as an additional '*other consideration'* his *'dysfunctional background'* and that he had *a 'substantially deprived upbringing'* referring to his movement between New Zealand and Australia, his movement around Australia when here, being raised, at times, by a single parent and his witness to domestic violence as a child. It was said that these matters should be considered when considering the totality of Mr Clegg's criminal offending. Reference was made to authority in the criminal law to the weight accorded to an offender's '*profound deprivation'* when considering an offender's criminality.[58]

97. I do not consider that the evidence in this case allows me to confidently draw a conclusion that Mr Clegg's upbringing was one that involved profound deprivation like that which is

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[58] *Bugmy v The Queen* [2013] HCA 37

referred to in the authority concerned. It is fair, nonetheless, apt to observe that Mr Clegg's upbringing provides something of an explanation for many of the issues, his mental health issues and his substance abuse issues he has come to confront in his adult life.

98. I am not persuaded that the matter is one that should be properly considered as part of an *'other consideration'*. It seems more comfortably to fit amongst the range of factors relevant to the assessment of the weight to be accorded to the protection of the Australian community. That consideration involves consideration of the *'sentence imposed by the courts for crimes'* which necessarily will involve an assessment of matters relevant to moral culpability and, so it would seem, subjective considerations informing the sentence. Of course, strictly speaking in criminal law parlance those matters do not directly concern the nature and seriousness of the offence, but the fact that the Direction requires consideration of the sentence imposed directly calls up those kinds of considerations such that to consider them again under '*other considerations*' probably involves a significant element of double counting. As illustrated by this case, the very issue of violence and alcohol during formative or childhood years was in fact something that was considered in sentencing Mr Clegg. It may be that in a matter where the sentencing did not take those matters into account for one reason or another, these factors may be considered as an '*other consideration'*.

99. I am not persuaded that this consideration should be accorded any separate weight in my consideration of this matter.

**Articles 12(4) and 17(1) of the *ICCPR***

100. Mr Clegg invited me to give consideration to Articles 12(4) and 17(1) of the *ICCPR* as *'other considerations*' that I should consider as being relevant. Those two articles provide so far as is relevant that: '*No one shall be arbitrarily deprived of the right to enter his own country';* and that *'No one shall be subjected to arbitrary or unlawful interference with his … family…'.*

101. I accept that Australia's international obligations under the *ICCPR* may be relevant to determining whether there is a '*another reason*' to revoke a mandatory cancellation. That this is so is reinforced by the Direction's specific reference to Australia's non-refoulment obligations under the *ICCPR* and elsewhere.[59] The Minister did not suggest otherwise.

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[59] Cl.14.1

102. The question is whether the obligations in Articles 12(4) and 17(1) are engaged. There are two issues to be considered: first, whether Australia is Mr Clegg's '*own country'* in terms of Article 12(4) of the *ICCPR*; and second, whether any interference with his right to enter Australia or with his family would be '*arbitrary*' as that word is used in Articles 12(4) and 17(1). I will deal with each issue in turn.

103. In *Nystrom v Australia*[60] (*Nystrom*) the majority of the Human Rights Committee (Committee) held that the words '*own country'* were broader than the words '*country of nationality*', not limited to nationality acquired by birth or by conferral and '*at the very least, embraced an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien'* and that '*there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may even be stronger than those nationality'*. The majority in *Nystrom* said that '*the words 'his own country' invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere'*.

104. The Minister submitted that I should not follow *Nystrom* because the words '*own country'* should be understood as referring to nationality, consistent with Australia's position before the Committee in *Nystrom* as well as in its response to the Committee after *Nystrom* was published. In that response, Australia referred to the earlier matters that had been considered by the Committee and the dissenting opinions in *Nystrom* that adopted the position taken by the Committee in its earlier Communications. In that response Australia expressed its respectful disagreement with the majority opinion.

105. I should accord weight to the Committees because Australia has submitted to the jurisdiction of the Committee by its ratification of the *First Optional Protocol to the ICCPR (Protocol)*[61]. Article 1 of the Protocol says that Australia '*recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by [Australia] of any of the rights set forth in the Covenant'*. Further, so far as disputes both between States under the *ICCPR* and between individuals and States under the *Protocol* are concerned, the Committee is

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[60] *Nystrom v Australia*, UN Doc CCPR/C/102/D/1557/2007 (18 August 2011)

[61] Adopted 16 December 2016 and ratified by Australia on 25 September 1991

established as the authoritative body to express opinions about those disputes. It is appropriate to have regard to the views of the Committee when considering the construction to be afforded to words in a treaty.[62] I prefer the meaning accorded to the words 'own country' by the Committee for the reasons given by the Committee. The words *'own country'* are not the same as the word *'nationality'*. In my view the words *'own country'* accord with the meaning given to them by the Committee.

106. I have already found that Mr Clegg has strong, long standing and enduring ties within Australia such that so far as this aspect is concerned there can be little doubt that Australia is Mr Clegg's '*own country' a*s those words are to be understood in Articles 12(4) and 17(1). That is, his long standing residence in Australia, close and special ties to family and friends in Australia, and his lack of any ties at all within New Zealand, are such that Australia is his '*own country.*'

107. The second issue is whether Mr Clegg's removal from Australia, which would be the consequence of cancelling his visa, is '*arbitrary*' in interfering with his right to enter his own country or interfering with his family. In *Nystrom* the Committee, in dealing with the question of arbitrariness, referred to its earlier General Comment on freedom of movement, observing that '*even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances'* and that *'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.*'

108. In *Nystrom* the Committee did not identify, or even address, perhaps because in the circumstances of that case it was not necessary, the relevant '*provisions, aims and objectives of the Covenant'* that might be relevant to a determination that that the law being considered was or was not arbitrary. Rather, the Committee referred to '*the particular circumstances',* namely that the decision to deport Mr Nystrom had been taken many years after his various convictions for serious criminal offences, and '*years*' after his release from prison '*and more importantly at a time when [Mr Nystrom] was in the process of rehabilitation'.* This was where no justification was put forward for the late character of the decision. These circumstances led to the Committee forming the opinion that the decision to deport Mr Nystrom was '*arbitrary*' in the sense used in Article 12(4) of the *ICCPR*.

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[62] *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masr (Al Masri)* [2003] FCAFC 70 at [148]

109. Although the Committee considered other factors, such as the proportionality of protecting the commission of further offences as against the irreparable harm done to Mr Nystrom's family, when dealing with the issue of whether the interference with Mr Nystroms family was '*arbitrary*' the Committee again considered the lapse of time between the commission of the offences and the deportation as especially important to the issue of arbitrariness. The reference to proportionality is significant though.

110. Australian authority dealing with the meaning of the word '*arbitrary*' in of Articles 12(4) and 17(1) of the *ICCPR* starts with the obiter observation in *Amohanga v Minister for Immigration and Citizenship*[63] that it was '*clear that the process of cancellation and the hearing before the Tribunal could not, on any meaning of the word, be described as arbitrary'*.[64] In *Amohanga* the Court does not appear to have been taken to *Nystrom*, the *ICCPR* or *Al Masri*[65] (to which I will come shortly). The approach in *Amohanga* was followed in *Nweke v Minister for Immigration and Citizenship*[66]*;* referred to in *Steve v Minister for Immigration and Border Protection*[67]*;* and again, in *Azar v Minister for Immigration and Border Protection*[68]*.* The question was referred to in argument, but not decided by in *Cayzer v Minister for Immigration and Border Protection*.[69]

111. In *Al Masri,* Article 9 of the *ICCPR,* where the word '*arbitrary*' is also used, was considered by a Full Court of the Federal Court of Australia. The Full Court observed in relation to the requirement in Article 9 that it was not enough that *'the deprivation of liberty to be provided for by law, the law itself must not be arbitrary*.'[70] The Full Court held that so far as Article 9 was concerned '*arbitrariness*' is '*not to be equated with "against the law" but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are "unproportional" or unjust.'* That interpretation proceeded upon considerations concerning the *travaux preparatoires,* the history of Article 9, the views expressed in authoritative works about it, the views expressed by the Committee in other cases and views expressed by the European Court of Human Rights. None of those matters, so far as they were relevant to the use of the same word in Articles 12(4) and 17(1),

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[63] [2013] FCA 31
[64] At [40]
[65] [2003] FCAFC 70
[66] [2013] FCA 456
[67] [2018] FCA 311
[68] [2018] FCA 1175 at [25]
[69] [2017] FCA 1189
[70] [2003] FCAFC 70 at [143]

were dealt in argument in this case. It seems unlikely that the word 'arbitrary' when used in different parts of the *ICCPR* would have been intended to have different meanings. That *Al Masri* and *Nystrom* relevantly identify the word as having much the same meaning in Article 9 on the one hand and Articles 12(4) and 17(1) on the other, is a sound basis to proceed on the basis that the word has the same meaning in both contexts.

112. The approach in *Al Masri* accords with the approach in *Nystrom* which identified unreasonableness in the sense of disproportionately as one hallmark of arbitrariness. The consequence of the practical impossibility of returning to Australia is to be measured proportionately against the legitimate aim of preventing the commission of further crimes in Australia. *Nystrom* and *Al Masri* eschewed the proposition that because action was lawful it could not be arbitrary.[71] The fact that there is a hearing or a consideration of a person's case, that is, that a procedure is laid down, does not of itself mean that the decision to cancel a visa, with the consequence of depriving the person of the right to enter their own country, cannot be arbitrary. The question will always be whether the aim of securing the protection of the Australian community against the commission of further crimes is proportional to the response of permanent exclusion from Australia.

113. I incline to the view that a decision having the effect of depriving Mr Clegg of the right to enter his own country, or that would interfere with his family, would in the particular circumstances be disproportionate to the need to protect the Australian community from the commission of further offences by him. In particular, the likelihood of him committing further offences is, having regard to the findings I have made, low. The drastic outcome of preventing Mr Clegg from entering Australia or of interfering with his family life is, when measured against the low risk of him reoffending, a disproportionate response.

114. It perhaps makes little difference to the outcome in this case because of my overall conclusion about the primary and other considerations, apart from this one, when weighed together they provide another reason for revocation, but to the extent it is necessary to express any opinion about it this consideration weighs in favour of revoking the mandatory cancellation.

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[71] at [154]

## CONCLUSION

115. I have found that the protection of the Australian community weighs fairly in favour of the non-revocation having regard especially to the low risk that I have found of Mr Clegg reoffending. I have also found that the expectations of the Australian community favours that outcome albeit only slightly so having regard to the countervailing considerations. I have found that the best interests of Mr Clegg's children weigh strongly in favour of revocation. The primary considerations in this case clearly weigh in favour of revocation.

116. So far as the other considerations are concerned, I have found: that the strength, nature and duration of Mr Clegg's ties to Australia weigh strongly in favour of revocation; that the impediments if Mr Clegg is removed to New Zealand weigh in favour of revocation; and that the impact upon Ms Hands as a victim, or otherwise, strongly weighs in favour of revocation. I consider Australia's obligations under Articles 12(4) and 17(1) of the *ICCPR* weigh in favour of revocation of the mandatory cancellation. If it were necessary, and it is not, I would have found that the other considerations together with the primary consideration concerning the best interests of Mr Clegg's children, strongly outweigh the other primary considerations.

117. It follows from my findings and the weight I have ascribed to the primary considerations and the other considerations, that there is another reason why the mandatory cancellation of the Visa should be revoked.

118. I set aside the delegate's decision and substitute in its place a decision revoking the mandatory cancellation of Joshua Steven Clegg's Class TY Subclass 444 Special Category (Temporary) Visa granted to him on 24 April 2006.

*I certify that the preceding 118 (one hundred and eighteen) paragraphs are a true copy of the reasons for the decision herein of Mr Rob Reitano, Member*

............................................[sgd]............................

Associate

Dated: 3 September 2020

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| Date(s) of hearing: | **20 and 21 August 2020** |
| Date final submissions received: | **26 August 2020** |
| Counsel for the Applicant: | **Dr J Donnelly** |
| Solicitors for the Respondent: | **Sparke Helmore Lawyers** |