# FEDERAL COURT OF AUSTRALIA

## CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2020] FCA 1842

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| Appeal from: | Application for extension of time: *[CGX20] and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (Administrative Appeals Tribunal, Orders dated 24 March 2020) |
| File number: | WAD 130 of 2020 |
| Judgment of: | **COLVIN J** |
| Date of judgment: | 22 December 2020 |
| Catchwords: | **MIGRATION** - application for judicial review of decision of the Administrative Appeals Tribunal - where Tribunal affirmed decision by delegate of Minister not to revoke cancellation of visa - whether Tribunal erred by taking into account irrelevant consideration - where Direction 79 requires decision-maker to consider impact on members of Australian community of decision not to revoke cancellation of visa - where Tribunal framed consideration in terms of impact of decision to revoke cancellation - whether Tribunal engaged in double counting by considering same types of matters under primary consideration and other considerations - whether Tribunal's decision was unreasonable, illogical or irrational - whether finding by Tribunal that no impediment to applicant maintaining contact with children through electronic means was irrational - whether Tribunal erred in finding no evidence of impact of applicant's removal from Australia - whether unreasonable to consider unfair conduct of applicant's ex-wife as reason why best interests of children not served by revocation of cancellation - application dismissed |
| Legislation: | *Migration Act 1958* (Cth) ss 499, 501, 501CA |
| Cases cited: | *ABT v Minister for Immigration and Border Protection* [2020] HCA 34<br>*CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1441<br>*HVLC v Minister for Home Affairs* [2019] FCA 616<br>*HVLC v Minister for Home Affairs* [2019] FCAFC 204; (2019) 272 FCR 538 |

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| | *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1<br>*Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; (2018) 263 FCR 531<br>*Vo v Minister for Home Affairs* [2019] FCAFC 108; (2019) 269 FCR 566<br>*Williams v Minister for Immigration and Citizenship* [2013] FCA 702 |
| Division: | General Division |
| Registry: | Western Australia |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
| Number of paragraphs: | 63 |
| Date of hearing: | 15 December 2020 |
| Counsel for the Applicant: | Dr J Donnelly |
| Solicitor for the Applicant: | Tajik Lawyers |
| Counsel for the First Respondent: | Ms C Symons |
| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
| Counsel for the Second Respondent: | The Second Respondent filed a submitting notice save as to costs |

# ORDERS

**WAD 130 of 2020**

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| **BETWEEN:** | **CGX20**<br>Applicant |
| **AND:** | **MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS**<br>First Respondent |
| | **ADMINISTRATIVE APPEALS TRIBUNAL**<br>Second Respondent |

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| **ORDER MADE BY:** | **COLVIN J** |
| **DATE OF ORDER:** | **22 DECEMBER 2020** |

**THE COURT ORDERS THAT:**

1. The name and citation of the judgment of the Administrative Appeals Tribunal appealed from be redacted from the first page of the published version of this judgment.
2. The application is dismissed.
3. The applicant do pay the costs of the first respondent to be assessed if not agreed.

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

# REASONS FOR JUDGMENT

## COLVIN J:

1 The applicant is a citizen of the United Kingdom who has lived in Australia since he was 12 years old. He is the father to three children. He was convicted of assault occasioning bodily harm and sentenced to 4 years and 6 months imprisonment. In consequence, his visa was cancelled. He sought to have the visa cancellation decision revoked. A delegate of the Minister decided not to exercise the statutory power to revoke conferred by s 501(3A) of the *Migration Act 1958* (Cth).

2 Thereafter, the applicant brought an unsuccessful application for review in the Administrative Appeals Tribunal. The applicant then sought judicial review of the Tribunal's decision, but the application was commenced 21 days out of time. An extension of time was granted in respect of two of the grounds raised by the application, being grounds numbered 2 and 3: *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1441. These reasons concern the substantive merits of grounds 2 and 3. The context in which those grounds arise is set out in the reasons on the leave application. Familiarity with those reasons is assumed.

### Direction 79

3 As explained in my reasons on the extension of time application, the Tribunal was required to comply with *Ministerial Direction No 79 - Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA (Cth)* (**Direction 79**).

4 As can be seen from its descriptive title, Direction 79 deals with three types of statutory power conferred by the *Migration Act*: the power to make a decision refusing a visa under s 501, the power to make a decision cancelling a visa under s 501 and the power (under s 501CA(4)) to revoke the mandatory cancellation of a visa under s 501CA. Each of the three powers is enlivened in circumstances where a person holding or seeking a visa does not satisfy the character test. Relevantly for present purposes, that may be the case where a person has been sentenced to a term of imprisonment of 12 months or more.

5 Direction 79 contains similar instruction as to the matters to which a decision-maker should have regard in exercising each of the three powers. The primary considerations required by Direction 79 to be taken into account in each instance include protection of the Australian

community from criminal or other serious conduct (**Primary Consideration A**). Direction 79 also specifies certain other considerations that must be taken into account where relevant. One such consideration is 'Impact on victims' (**Victim Consideration**). In the case of the exercise of the statutory power under s 501CA(4) to revoke the cancellation of a visa, the Victim Consideration is expressed in the following terms in cl 14.4(1) of Direction 79:

> Impact of a decision not to revoke on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims where that information is available and the non-citizen being considered for revocation has been afforded procedural fairness.

**Ground 2: Alleged taking account of irrelevant information**

6 By ground 2, the applicant contends that the Tribunal in dealing with cl 14.4(1) considered information that was irrelevant under the terms of that clause being information that had already been considered under Primary Consideration A. As a result there was said to be jurisdictional error by taking into account an irrelevant consideration that led to a form of double counting.

***The Tribunal's approach to Primary Consideration A***

7 In dealing with Primary Consideration A, the Tribunal considered, amongst other things, the nature and seriousness of the applicant's past offending, the nature of harm to individuals and the Australian community if the applicant was to offend again and the risk of the applicant re-offending. The Tribunal found that Primary Consideration A weighed heavily against revocation of the cancellation of the applicant's visa (para 71).

8 For the applicant it was submitted that, in dealing with Primary Consideration A, the Tribunal evaluated the likely future impact on victims of the applicant remaining in Australia, though it was accepted that such consideration was 'expressed at a broader level of abstraction' by the Tribunal. The applicant's submission as to the level of abstraction reflects the fact that the Tribunal, when dealing with the Primary Consideration, did not deal with any particularity with the impact on victims if the applicant was to re-offend. Nor did it deal with any specificity with the impact on the actual victims of the applicant's past offending. Rather, the Tribunal dealt with the seriousness of the applicant's past offending and undertook an assessment of the nature and likelihood of the risk of the applicant re-offending in the future on the Australian community in general. It is only in the sense that the particular victims of past offending formed part of that community that the reasoning might be said to have addressed them.

9 For the applicant it was said that the same types of matters that had been addressed in dealing with Primary Consideration A led the Tribunal to conclude that the victim's best interest would not be served by revoking the cancellation of the applicant's visa. It was this aspect that was said to amount to a jurisdictional error because such matters were said to be both irrelevant to the Victim Consideration and involved a form of double counting of those matters against the applicant.

***The Tribunal's interpretation of the Victim Consideration***

10 The Tribunal began its reasoning as to the Victim Consideration by noting that it required the decision-maker to consider the impact of a decision not to revoke cancellation of the visa on members of the Australian community, including victims (para 99). It then observed that the requirement to do so:

> … is curious given that a decision not to revoke the cancellation of the visa would result in the non-citizen being removed from Australia. It is not clear how the offending non-citizen being forced to leave Australia would impact other victims, other than positively.

11 However, the sad reality is that it is not uncommon for the victim of a crime to be a family member or someone with a close association with the offender. In those circumstances, the prospect of a close family member being removed from Australia may cause distress to those who have been victims of past offending behaviour and it is possible that they may support the revocation application. The circumstances considered in *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; (2018) 263 FCR 531 as explained by Rangiah J at [32] are an example. Therefore, with due respect, the Tribunal's observation was not entirely correct.

***The correct approach to the meaning of the Victim Consideration***

12 Nevertheless, the framing of the Victim Consideration as requiring the decision-maker to take into account, where relevant, the impact on members of the Australian community, including victims, of a decision *not to revoke* the visa cancellation of an offender was problematic. It appeared to invite a focus upon the consequence for victims if the person was removed from Australia which was an odd way of requiring a consideration of the likely case where victims may be expected to be concerned if the person was allowed to remain in Australia.

13 Assistance is gained in understanding what was meant by the relevant part of the direction by placing cl 14.4(1) in the context of the overall terms of Direction 79. The direction sets out

certain principles that provide a framework within which decision-makers should approach their task: cl 6.2(3). Those principles refer to a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa and that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia: cl 6.3(6). It states that a non-citizen who has committed a serious crime should generally expect to be denied the privilege of coming to or staying in Australia: cl 6.3(3).

14 Direction 79 then goes on to state separately the considerations to be taken into account in exercising each of the three statutory decision-making powers. However, as described below, the form of those considerations is expressed in substantially similar terms for each of the three instances.

15 In specifying the considerations to be taken into account in deciding whether to cancel a visa or to refuse to grant a visa because of a person's offending, Direction 79 requires the decision-maker to take into account, where relevant, a consideration expressed in like terms to the Victim Consideration. In the case of a visa cancellation decision, the direction refers to the impact of a decision 'not to cancel' (thereby framing the inquiry by reference to what would be the case if the person remained in Australia): see cl 10.4(1). In the case of a visa refusal decision, the direction refers to the impact of a decision 'to grant a visa' (thereby also framing the inquiry by reference to what would be the case if the person was permitted to enter and stay in Australia): see cl 12.3(1).

16 Direction 79 also makes separate provision for the consideration of the consequences of the decision for family members. In the case of a visa cancellation decision, the direction refers to the effect of cancellation on the person's immediate family in Australia: see cl 10.2(1)(b). In the case of a visa refusal decision, the direction refers to the impact of the refusal on family members in Australia: see cl 12.2. In the case of a cancellation under s 501(3A), the direction refers to the effect of non-revocation of the cancellation on family members in Australia: cl 14.2(b).

17 Therefore, in all the above instances, the required consideration is framed in terms that direct attention to what might be thought to be the likely adverse consequence for the affected party, whether it be a victim (likely to be adversely affected if the person was allowed to be in Australia) or Australian family members (likely to be adversely affected if the person was not allowed to be in Australia).

18 However, in the case of a cancellation under s 501(3A), Direction 79 requires the decision-maker to consider the impact of a decision *not to revoke* (thereby framing the inquiry by reference to what would be the case if the person was removed from Australia because the cancellation of the visa was not revoked). If the direction required there to be a focus on what would be the case if the visa cancellation was not revoked then it would be a most awkward way of directing attention to the adverse consequences for victims and their family members if the person was allowed to remain in Australia.

19 Therefore, in my view the Tribunal was correct to approach the task on the basis that there was an obvious error in the formulation of cl 14.4 of Direction 79. In all likelihood it was caused by the negative character of an application under s 501CA(4) in which the applicant seeks to revoke the visa cancellation.

20 For those reasons, cl 14.4 should be read in the manner expressed by the Tribunal and there was no error in approaching the present case in that way. What might be described as negative consequences for family members who were also victims of the offending if the person was not allowed to remain in Australia were matters to be considered under other aspects of Direction 79.

21 Therefore, the Tribunal did not misunderstand the nature of its task insofar as it concerned complying with the aspect of the provisions of Direction 79 in respect of the Victim Consideration discussed above.

22 However, the error alleged by the applicant by ground 2 did not complain of a failure to consider information from victims that might be said to support the revocation of the visa cancellation decision. No doubt that was because there was little information before the Tribunal, if any, as to the impact on family members of the applicant who were victims of his offending if the visa cancellation decision was not revoked and the applicant was removed from Australia. Rather, the complaint raised by ground 2 was that the Tribunal considered the negative consequences for victims if the applicant remained in Australia and in doing so took into account information that was irrelevant to the Victim Consideration in a way that amounted to a form of double counting as to such matters which had already been found by the Tribunal to count against revocation when dealing with the Primary Consideration.

***The Tribunal's reasoning as to the Victim Consideration***

23 The reasoning as to the Victim Consideration undertaken by the Tribunal was as follows:

(1) The Tribunal assumed that the Victim Consideration was meant to direct the decision-maker to consider the impact of revoking the cancellation rather than not revoking the cancellation (para 100).

(2) It was observed that there was 'no evidence of what impact the deportation of the Applicant would have' on the broader Australian community (para 101).

(3) It was then found that the only letter of support that refers to there being any impact 'other than an impact on his daughters and on the Applicant', was a letter provided by the partner of the applicant's cousin who said that the family and friends would suffer a great loss if the applicant was deported (para 101).

(4) Then the Tribunal said (para 102):

> Considering the impact of the Applicant remaining in Australia, that is considering the impact of revoking the cancellation of the Applicant's visa, fairly obviously the interests of the victims would be served by the Applicant's visa remaining cancelled and the Applicant being removed from Australia as that would effectively reduce to zero the possibility of the Applicant re-offending against those victims. While there are lifetime violence restraining orders against the Applicant communicating with or approaching [Mr W], the Applicant's half-brother … and the Applicant's ex-wife, the Applicant has in the past failed to adhere to protective bail conditions and there obviously remains the possibility that he will breach the violence restraining orders.

(5) The Tribunal then found that there was no evidence put before the Tribunal as to the attitude of the applicant's victims to him remaining in Australia (para 103). It went on to find on the general evidence available that the victims' best interests would be served by not revoking the cancellation of the applicant's visa (paras 103-104).

24 It can be seen that as to the Victim Consideration the Tribunal correctly reasoned by considering what would happen if the visa cancellation decision was revoked (and the applicant remained in Australia) rather than by reference to the impact of the decision not to revoke (with the consequence that the applicant would be removed). However, as I have noted, the applicant's complaint is not that there was evidence from victims to the effect that they wanted the visa cancellation to be revoked so that he could stay in Australia. Rather, his complaint was that the Tribunal's approach led to a form of double counting of matters that had already been counted against his request for reconsideration under the Primary Consideration.

***The decision in Williams***

25 The applicant placed particular reliance on the decision of North J in *Williams v Minister for Immigration and Citizenship* [2013] FCA 702. In that case a decision had been made to cancel a visa in the exercise of the power conferred by s 501(2) of the *Migration Act*. Speaking broadly, s 501(2) confers a discretionary statutory power upon the Minister to cancel a visa where, amongst other things, the person does not satisfy the Minister that the person passes the character test. The Tribunal declined an application by Mr Williams to review the decision to cancel his visa. At that time, the relevant direction under s 499 was known as Direction 55. It required the decision-maker exercising a power under s 501(2) to take account of the Primary Consideration. Also, like Direction 79, it included a requirement to have regard to other considerations, where relevant. One of those other considerations was expressed in the following terms (being cl 10(1)(c)):

> Impact of a decision not to cancel a visa on members of the Australian community, including victims of the person's criminal behaviour, and the family members of the victim or victims where that information is available and the person being considered for visa cancellation has been afforded procedural fairness.

26 It can be seen that the consideration to be taken into account, if relevant, was couched in terms of the consequence for victims and the family members of the victim of *not* cancelling the visa.

27 In that context, in dealing with the consideration stated at cl 10(1)(c) of Direction 55, the Tribunal said that the decision not to cancel the visa may have an adverse impact on the victims of Mr William's criminal behaviour and their family members: see [52]-[53].

28 North J found that such an approach involved jurisdictional error because, in the view of his Honour, there was a distinction between the impact of the offending on victims (on the one hand) and whether the victims or their families were concerned about whether the applicant would remain in Australia (on the other hand): at [58]. It was only the latter that was relevant under cl 10(1)(c). Therefore, when it came to the consideration stated in cl 10(1)(c) the issue was whether there was information that was available to the Tribunal to the effect that the victim or the victim's family *had a concern* about the applicant remaining in Australia. On that basis, his Honour found that the Tribunal had taken account of an irrelevant matter when it came to evaluating the significance of the consideration stated in cl 10(1)(c). His Honour found that there was jurisdictional error and reasoned to that conclusion in the following way (at [60]):

> Although the process adopted by the Tribunal seems to have been to have come to a general conclusion concerning each of the considerations and balance those general conclusions against each other, the exercise of balancing necessarily involved taking into account assessments of the individual factors which went to make up the general conclusions. In this way the Tribunal's view about the impact of the applicant's criminal conduct on the victims or their families may have added to or confirmed its view of the seriousness of the offending even though the general conclusion relating to the other considerations was against cancellation. In other words, the Tribunal took into account irrelevant information which may have affected its exercise of power. It thereby committed a jurisdictional error …

29 Therefore in *Williams* the nature of the jurisdictional error was found to be acting on the basis that information about the impact on the victim and his family was not relevant to the consideration in cl 10(1)(c) because the language of the direction required a focus on the views of the victims and their families, not upon an objective assessment of the consequences for them if the visa was not cancelled and the visa holder was allowed to remain in Australia uninformed by those views.

30 However, the reasoning in *Williams* must be considered in the light of the subsequent decision in *HVLC v Minister for Home Affairs* [2019] FCA 616.

***The decision in HVLC***

31 In *HVLC v Minister for Home Affairs*, I considered an argument of a similar character to that advanced in *Williams*. It arose in the context of a decision to refuse a visa on the basis that the applicant did not pass the character test. The exercise of that power was subject to the successor to Direction 55, being Direction 65. For present purposes the relevant language is the same under each of the three iterations of the direction.

32 In Direction 65, the Victim Consideration was expressed in cl 12.3(1).

33 Applying the reasoning of North J in *Williams*, I concluded that the Tribunal was in error in treating cl 12.3(1) as being concerned with the effects of past offending on the victim and his family. I held that the consideration required 'a particular focus upon the consequences [in the view of the victims and family members] of the exercise of a discretion to grant a visa with the result that the applicant will remain in Australia': at [13]. In that case, it was common ground that there was no such information. Therefore, cl 12.3(1) had no role to play.

34 Nevertheless, in that case the Tribunal relied upon its analysis of the impact on victims (mistakenly thought to be a matter covered by cl 12.3(1) in reaching its final conclusion). It did so by concluding:

> But this does not outweigh the two primary considerations relevant in this matter, coupled with the impact on victims, which are strongly against exercising the discretion to grant [the applicant] a visa.

35 The question that then arose was whether the Tribunal erred in taking such a matter into account in circumstances where (a) it did not fall within cl 12.3(1); and (b) it was a matter that fell within the scope of matters relevant to other considerations that the Tribunal found were matters that were strongly against exercising the discretion to grant the visa. As in the present case, it was contended that the approach of the Tribunal meant that the consequences for the victim (as distinct from the information available from the victim and his family members as to those consequences) being matters that were irrelevant to cl 12.3(1) were matters that were taken into account and as they had also been considered in dealing with other considerations the consequence was a form of double counting.

36 I determined that the Tribunal's finding about the way in which the conduct affected the victim and his family was an aspect of evaluating the seriousness of the offending conduct 'and also a consideration that could be viewed as independently relevant': at [14]. In short, it was not a matter that was properly described as being irrelevant in the required sense to the overall decision to be made as to whether a visa should be granted (as distinct from that which was required to be considered by cl 12.3(1)). My reasoning in that regard was upheld in *HVLC v Minister for Home Affairs* [2019] FCAFC 204; (2019) 272 FCR 538 at [21]-[22] (Kerr J, Banks-Smith and Jackson JJ agreeing).

37 I further determined that the double counting contention had not been made out: at [15]-[17]. In my view, on an analysis of the reasoning of the Tribunal there had not been any such double counting. The analysis of the seriousness of the conduct did not focus upon the effect upon victims and therefore as the effect upon victims could not be said to be irrelevant to the overall decision to be made there was no jurisdictional error of the kind alleged. As to that aspect, the Full Court dealt with the matter on the basis that the question of the effect on the victim of the applicant's conduct had not been addressed when considering the primary considerations (that is, the equivalent to the Primary Consideration in this case).

***Williams does not assist***

38 Therefore, it seems to me that the decision in *Williams* does not assist the applicant in the advancement of ground 2. First and foremost that is because I do not accept the submission advanced for the applicant that in dealing with the Primary Consideration A, the Tribunal

addressed the particular consequences for the victims of the applicant's offending. Rather, the Tribunal in that part of its reasons undertook the task of characterising the seriousness of the offending and then addressing the future risks for the Australian community in general of future offending.

39 Just as was the case in *HVLC*, the Tribunal dealt with the consequences of the offending for the victims when dealing with the Victim Consideration. In doing so it dealt with a matter that was irrelevant to the Victim Consideration, but not a matter that was mandatorily irrelevant to the overall decision to be made. Therefore, the Tribunal did not take into account an irrelevant consideration in the sense in which that description is used to describe jurisdictional error and it did not engage in any form of double counting.

**Ground 3: Alleged unreasonableness, illogicality or irrationality**

40 Ground 3 alleges that there were three respects (described by the applicant as strands of reasoning) in which the Tribunal adopted a mode of reasoning as to the facts that was unreasonable, illogical or irrational.

41 In *Vo v Minister for Home Affairs* [2019] FCAFC 108; (2019) 269 FCR 566, the applicable principles were summarised in the following terms at [43] (Derrington, Banks-Smith and Colvin JJ):

> (1) the test for unreasonableness is stringent and extremely confined: *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [11], [52], [135];
>
> (2) where reasons have been provided then the reasons are the focal point for assessing whether the decision was unreasonable: *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; (2014) 231 FCR 437 at [46]-[47];
>
> (3) unreasonableness will not be demonstrated on the basis of a complaint about the weight given to particular evidence or material because determination of the weight to be given to evidence or material is a matter entrusted to the Tribunal: *Tran v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 297 at [4]-[5];
>
> (4) it is for the Tribunal to reach conclusions about credibility and unreasonableness is not shown by complaints about credibility findings alone, but may be demonstrated where a finding on credit on an objectively minor matter of fact is used as a basis for rejecting the entirety of the claimant's evidence (a conclusion to be reached with a high degree of caution): *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; (2016) 253 FCR 496 at [40]-[45] and *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2; (2018) 258 FCR 175 at [30];

(5) generally speaking, the Tribunal has the authority to reach conclusions about the inferences that might be drawn from particular evidence or material;

(6) the Tribunal is not required to refer to every piece of evidence placed before it: *ETA067 v The Republic of Nauru* [2018] HCA 46 at [13];

(7) in many instances, by reason of the nature of the Tribunal's statutory obligation to give reasons, it may be inferred that a failure to refer to a particular matter reflects the Tribunal's view that it was not material to its decision: *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [5], [69] and *Minister for Immigration and Border Protection v SZSRS* [2014] FCAFC 16 at [34] (although the positon may be different where there is a failure to consider a factual issue that is an essential integer of a claim or that would be dispositive: *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184; (2003) 236 FCR 593 at [47] and *ETA067* at [14]);

(8) mere strong disagreement with factual reasoning does not establish jurisdictional error: *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611 at [40];

(9) a decision (not just a part of a decision) which lacks an evident and intelligible justification is unreasonable: *SZVFW* at [10], [82];

(10) a decision that no reasonable person could have arrived at is one circumstance in which the decision may be unreasonable, but there may be others - the category is not limited to such instances: *SZVFW* at [10], [59], [82], [89], [133]; and

(11) there must be an error that is so grave both as to its nature and the significance of its subject matter that it results in a decision that has been reasoned in a manner that it is not authorised: *Hossain* at [25], [30]-[31].

42 In addition, it is important to bear in mind the following aspect of the inquiry as described by Allsop CJ (Wigney J agreeing) in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1 at [12]:

> Crucial to remember, however, is that the task for the Court is not to assess what it thinks is reasonable and thereby conclude (as if in an appeal concerning breach of duty of care) that any other view displays error; rather, the task is to evaluate the quality of the decision, by reference to the statutory source of the power and thus, from its scope, purpose and objects to assess whether it is lawful. The undertaking of that task may see the decision characterised as legally unreasonable whether because of specific identifiable jurisdictional error, or the conclusion or outcome reached, or the reasoning process utilised.

43 Finally, as I stated on the leave application in the present matter at [34]:

> As to unreasonableness, the review ground is not made out by demonstrating an error in factual reasoning. It requires an assessment of the overall character of the administrative decision and whether it conforms to the implied statutory standard of reasonableness. Therefore, either the overall result must be unreasonable or the reasons as a whole must fail to provide an intelligible justification for the result: *Tsvetnenko v United States of America* [2019] FCAFC 74; (2019) 269 FCR 225 at

> [82]-[85]. The same approach pertains to claims of alleged jurisdictional error characterised in terms of irrationality and illogicality: *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; (2010) 240 CLR 611 at [119]; and *BHD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 151 at [29].

***Strand 1: Finding that there was no impediment to applicant maintaining contact with children***

44 The Tribunal reasoned that in normal circumstances the best interests of a child are served by having their father in their life. However, it then found that norm was 'diminished in the present case' because of factors identified by the Minister (para 81). Those factors were as follows (para 78):

> The Respondent points to the provisions of paragraph 13.2(4) of Direction 79 and contends that:
>
> (a) the Tribunal should take into account the Applicant's relatively long period of limited or no contact with the children (13.2(4)(a));
>
> (b) the Applicant's criminal history and the Applicant's turbulent relationship with his ex-wife, particularly in light of the threat made to his ex-wife before the stabbings on 19 November 2015, are likely to have a negative impact on the children (paragraph 13.2(4)(b) and (c));
>
> (c) there is no independent evidence of the effect that separation would have on the children given that they currently have no contact with the Applicant and there appears to be no impediment to the Applicant maintaining contact through electronic means if he were to be deported, assuming that such contact was permitted by the Family Court (paragraph 13.2(4)(d)); and
>
> (d) the Applicant's ex-wife, the mother of his daughters, and the Applicant's half-brother fulfil parental roles in relation to the three daughters (paragraph 13.2(4)(e)).
>
> and contends that little weight should be given to this consideration.

45 In those circumstances, the factors raised by the Minister may be taken to have been accepted by the Tribunal. They include a statement to the effect that there appears to be no impediment to the applicant in maintaining contact with his children through electronic means. The applicant submitted that a finding in those terms was irrational or lacked any intelligible justification or common sense in circumstances where the Tribunal had found, in effect, that there was a total breakdown in the relationship between the applicant and his ex-wife and there was a toxic dispute between them that made 'the likelihood of a normal, constructive and positive relationship between the Applicant and his daughters, if not impossible at least [un]likely' (para 77). The Tribunal also found that the children are 'in effect, being used as a weapon against [the applicant] by his wife' (para 81).

46 I do not accept the submission as to the Tribunal's reasoning concerning the best interests of the children. When the Tribunal referred to the normal circumstances being diminished in the present case, it referred to all of the matters summarised at para 78 of its reasons (as quoted above). It could hardly be said that in doing so the Tribunal was finding that there was no relational impediment to contact between the applicant and his children when there was an express statement to that effect in para 78(b). Rather, in context, the finding that there was 'no impediment' to the applicant maintaining contact through electronic means was a finding as to the availability of such technological means of contact. The other submissions of the Minister that were also accepted plainly emphasised the relational difficulties that would arise by reason of the turbulent relationship between the applicant and his ex-wife.

47 The applicant's submission is based upon a distorted reading of the Tribunal's reasons that takes a single sentence and reads it without regard to its context. As a result, the foundation for the submission is not made out.

***Strand 2: Finding as to impact of the applicant's removal from Australia***

48 In considering the strength, nature and duration of the applicant's ties to Australia, the Tribunal found that there was no evidence of the impact that the removal of the applicant would have on any of those who gave letters of support (para 95). The Tribunal had earlier summarised its findings as to matters raised by the letters of support in terms that are not criticised (para 30). Nevertheless, the finding that there was no evidence of the impact of removal on any of those who gave support is said to be lacking in rational foundation or an evident or intelligible justification because within the seven letters of support there was a single line that said that the applicant 'has a network of family and friends here and we would suffer a great loss if he were to leave the country'.

49 Later in the Tribunal's reasons in dealing with the Victim Consideration, the Tribunal stated that insofar as the Australian community is concerned there was no evidence of the impact that the deportation of the applicant would have and then referred to the part of the letter of support that is quoted above in stating (para 101):

> The only letter of support which refers to there being any impact, other than impact on his daughters and on the Applicant, is the letter provided by the Applicant's cousin's partner who says that the Applicant's family and friends will suffer a '*great loss*' if he is deported.

50 In context, this was to emphasise the very limited nature of the evidence of any relevant impact for the purposes of the Victim Consideration. As has been noted, there is no claim by the applicant that there was error by the Tribunal in failing to consider evidence of such impact.

51 Rather, the complaint made by strand 2 of the applicant's argument is that, contrary to the finding of the Tribunal at para 95 there was evidence of the impact of the deportation of the applicant on family and friends. Formulated in that way, it was an error that was said to affect the Tribunal's assessment of the strength, nature and duration of ties. It was submitted by the applicant to be a factual error that had the requisite significance to demonstrate error.

52 I do not accept the applicant's submission. The relevant evidence was one general sentence and is the only statement of that character in any of the letters of support. It was a statement made without detail or particularity. In those circumstances, it is by no means clear that the Tribunal was factually in error in finding on all the evidence that there was no evidence of the impact (that is, the particular consequence beyond a sense of 'great loss') that the deportation of the applicant would have on those who gave letters of support. Given the finding a few paragraphs later (at para 101) which referred expressly to the relevant passage from the letter of support (albeit in dealing with the separate Victim Consideration) and the express findings in para 95 that all the applicant's social links are in Australia and that he is well thought of by those who provided letters of support, in my view the Tribunal's statement that there was no evidence of the impact that the applicant's removal would have on those people is properly to be understood as a finding that there was no particular impact beyond the loss of social connection.

53 Even assuming contrary to that view that there was a factual error, it falls well short of that which might amount to a jurisdictional error. It was a statement made in the context of a consideration of the strength, nature and duration of the applicant's ties to Australia. As has been noted, in that context the Tribunal found that all of the applicant's social links are in Australia and that the applicant was well thought of by those who provided letters of support. Those and other findings led the Tribunal to conclude that the strength, nature and duration of the applicant's ties to Australia was a consideration that 'weighs in favour of the revocation of the cancellation of the Applicant's visa' (para 96).

54 Therefore, it is not an error that might lead the Court to conclude that the decision as a whole was unreasonable or illogical or irrational. For the Tribunal to make a factual error that lacks that character does not amount to jurisdictional error.

***Strand 3: Finding that the children are being used as a weapon***

55 As has been noted, part of the Tribunal's reasoning concerning the best interests of the applicant's children rested on a finding that they were being used as weapon against him by his ex-wife. It is convenient to repeat the relevant finding (para 81):

> The Tribunal accepts that in normal circumstances the best interests of a child are served by having their father in their life. That norm is, however, diminished in the present case because of the factors identified by the Respondent as set out in [78] above and by the fact that, on the Applicant's version of the circumstances, his daughters are, in effect, being used as a weapon against him by his wife. The children are the innocent victims in this circumstance.

56 It is a finding to be read in the context of the following earlier finding by the Tribunal (para 77):

> The allegations of sexual abuse are just that, allegations. There was no corroborating evidence and the police have not charged the Applicant with any such offending. The Tribunal makes no finding on whether the Applicant abused his daughters and his niece. However, even if the Applicant's assertion that his daughters and niece have been manipulated by his ex-wife into making these allegations, it is indicative of the total breakdown in the relationship between the Applicant and his ex-wife. This seemingly toxic dispute between the Applicant and his ex-wife, unfortunately, makes the likelihood of a normal, constructive and positive relationship between the Applicant and his daughters, if not impossible, at least less likely.

57 It was submitted that it was 'unjust, capricious, and otherwise … unreasonable' for the Tribunal to reason in such a manner. It was said to be unfair to the applicant for the Tribunal, in effect, to treat the unfair conduct of the applicant's ex-wife as a reason why the best interests of the children was a consideration that should be given little weight when evaluating whether to revoke the cancellation of the applicant's visa.

58 With respect, the submission misunderstands both the nature of the Tribunal's task and the process of reasoning adopted by the Tribunal. It was not for the Tribunal to adjudicate as to who was right or wrong in the history of dealings between the applicant and his ex-wife. The fairness or reasonableness of the conduct of the applicant's ex-wife vis-à-vis the applicant was not the issue. Rather, the consideration to which the Tribunal was required to have regard was whether the best interests of the children would be served by the applicant remaining in Australia. That was a matter to be evaluated in the context of the factual circumstances as they existed at the time of the Tribunal's decision, including the realities of the relationship between the applicant and his ex-wife.

59 It was the position of the applicant himself that the children were being used as a weapon against him by his ex-wife. That was a matter advanced by him. In the circumstances it was a

matter that formed part of the material to which the Tribunal may have regard in forming a view to what was in the best interests of the children.

60 In effect, the Tribunal found that on the material before it, the allegation by the applicant concerning his ex-wife using the children as a weapon together with other evidence of the turbulent relationship between the applicant and his ex-wife placed the children in the position that they were the innocent victims of the dispute between their parents.

61 These were factual matters that the Tribunal was entitled to bring to account in the manner in which it did it reaching a conclusion as to whether the interests of the children was a consideration that weighed in favour of revocation of the cancellation of the applicant's visa.

***Conclusion as to ground 3***

62 It follows that none of the three strands have been shown to be errors in reasoning by the Tribunal. Therefore, ground 3 has not been made out. Had any of those matters been established it would have been necessary to consider whether they gave the reasoning process the requisite unreasonable character such that the Tribunal's responsibility to act reasonably in the exercise of its review power was not satisfied. I doubt that allegations of the kind raised (either individually or together) as to the particular factual matters would have that consequence if they had been shown to be factual errors. They would not have made the decision-making process one that lacked an intelligible justification (as to which see *ABT v Minister for Immigration and Border Protection* [2020] HCA 34 at [20]-[21]). It is not enough that they concerned a significant topic. They must be shown to have had significance for the overall reasoning pathways of the Tribunal.

**Conclusion and costs**

63 For the above reasons the application for review must be dismissed. The applicant accepted that costs, including the costs of the leave application must follow the event if the application was unsuccessful. I will make the same order for the redaction as I made on the leave application for the same reasons. There should be orders accordingly.

I certify that the preceding sixty-three (63) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin.

Associate: 

Dated: 22 December 2020