# FEDERAL COURT OF AUSTRALIA

## PGDX v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1235

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| Appeal from: | *PGDX and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 339 |
| File number(s): | NSD 247 of 2021 |
| Judgment of: | **KERR J** |
| Date of judgment: | 18 October 2021 |
| Catchwords: | **MIGRATION –** application for review of a decision of the Administrative Appeals Tribunal affirming a decision of a delegate of the Minister to cancel the Applicant's visa – where decision to cancel Applicant's visa was a mandatory cancellation resulting from a criminal conviction and sentence of imprisonment – whether the terms of cl 14.4 of Direction No 79, properly construed, exclude the decision maker from having to take into account under that clause the "impact" on a victim of a decision to revoke a visa cancellation where the evidence of the victim is that the impact of such a decision on the victim will be positive – *DKN20 v Minister for Immigration, Citizenship and Migrant Services and Multicultural Affairs* [2021] FCAFC distinguished – considerations to be taken into account by a decision maker pursuant to cl 14.4 of Direction No 79 may weigh either in favour of, or against whether to revoke a mandatory cancellation of a visa – information provided by a victim must be taken into account whether adverse to or consistent with the interest of the offender – application granted and review remitted |
| Legislation: | *Migration Act 1958* (Cth)<br>*Direction No 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*, cl 14.4, s 2(8)(3) |
| Cases cited: | *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 64<br>*CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 69<br>CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2020] FCA 1842 |

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| | *DKN20 v Minister for Immigration, Citizenship and Migrant Services and Multicultural Affairs* [2021] FCAFC 97<br>*DKN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1158<br>*Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 |
| Division: | General Division |
| Registry: | Victoria |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
| Number of paragraphs: | 95 |
| Date of hearing: | 22 September 2021 |
| Counsel for the Applicant: | Mr Donnelly |
| Counsel for the First Respondent: | Mr Johnson |
| Solicitor for the First Respondent: | Australian Government Solicitor |

# ORDERS

**NSD 247 of 2021**

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

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| **ORDER MADE BY:** | **KERR J** |
| **DATE OF ORDER:** | **18 OCTOBER 2021** |

**THE COURT ORDERS THAT:**

1. A writ of certiorari issue quashing the decision of the Second Respondent.
2. A writ of mandamus issue requiring the Second Respondent to determine the Applicant's application for review according to law.
3. The First Respondent pay the Applicant's costs as agreed, or in default of agreement as may be taxed.

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

# REASONS FOR JUDGMENT

**KERR J:**

1 The Applicant was born in India. He arrived in Australia on 14 September 2013 when he was 28 years old. Apart from a period of approximately 6 months in 2015 when the Applicant returned to India for a visit, he has resided in Australia since that time.

2 On 5 February 2019, pursuant to s 501CA(3) of the *Migration Act 1958* (Cth) (**Migration Act**), a delegate of the First Respondent cancelled the Applicant's Regional Sponsored Migration Scheme (class RN subclass 187) visa (the **cancellation decision**). This was a mandatory cancellation. It was the result of the Applicant having been convicted on 8 May 2018 of *Aggravated sexual assault – break and enter with intent (DV)-SI* and being sentenced to a term of imprisonment of 5 years.

3 On 18 February 2019, the Applicant made representations to the First Respondent (the **Minister**) requesting revocation of the cancellation decision. On 7 December 2020, in response to those representations, a delegate of the Minister decided that they were not satisfied that the decision should be revoked.

4 On 16 December 2020, the Applicant applied to the Administrative Appeals Tribunal (the **Tribunal**) for a review of that decision. The Tribunal affirmed the decision on 26 February 2021: *PGDX and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 339.

5 On 25 March 2021, the Applicant applied to this Court for a review of the Tribunal's decision. By way of an amended application dated 6 July 2021 he seeks a writ of certiorari to quash the decision of the Tribunal and a writ of mandamus requiring the Tribunal to determine his application for review according to law.

6 The amended grounds of appeal are in the following terms:

> **1. There has been a constructive failure to exercise jurisdiction.**
>
> (a) The Tribunal failed to consider available information/evidence within the meaning of cl 14.4(1) of Direction No. 79 (**Direction 79**).
>
> (b) Clause 14.4(1) of Direction 79 requires a decision-maker to take into account available information about the impact of a decision to revoke a mandatory cancellation decision on victims of the non-citizen's criminality.

(c) First, there was available information from the victim of the applicant's criminality to the following effect:

- the applicant made a mistake under the condition of alcohol
- after the applicant's punishment ends, he will not do that thing again
- the applicant should be given another chance
- it is very hard for me; I need the applicant's help
- the applicant did a mistake when he was drunk, and now after much time, he should be given one chance that will make my life a bit easier.

(d) Secondly, when considering information for the purposes of cl 14.4(1) of Direction 79, the Tribunal failed to lawfully have regard to the preceding information above.

(e) Thirdly, the Tribunal concluded that the victim's evidence all related to what she perceived to be in the best interests of the minor child. That conclusion either ignores or misconstrues the victim's evidence. The tenor of the victim's evidence included, inter alia, that she forgave the applicant, the applicant made a mistake, the applicant will not re-offend and the applicant being permitted to remain in Australia will make her life easier (as the applicant can help her take care of their child).

**2. The Tribunal's decision was legally unreasonable and/or illogical or irrational.**

(a) The Tribunal concluded that, for the purposes of cl 14.1(1), there is nothing that would allow any weight to be assigned to this consideration. However, that finding was contrary to evidence that was before the Tribunal. The applicant repeats the particulars of Ground 1 above for the purposes of Ground 2.

7 When this appeal came before the Court, Mr Donnelly, counsel for the Applicant accepted that if Ground 1 was not upheld, Ground 2 necessarily must also fail. In that circumstance neither party addressed oral submissions towards Ground 2. In closing submissions Mr Donnelly informed the Court that Ground 2 was not pressed. I proceed therefore on the basis that Ground 1 is the only live ground in this appeal.

## SUMMARY OF THE OUTCOME OF THIS APPEAL

8 The principal issue in this proceeding concerns whether the terms of cl 14.4 of *Direction No 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (**Direction No 79**) which provides a framework within which decision makers are required to undertake their task when deciding whether or not to exercise the discretion to revoke the mandatory cancellation of a non-citizen's visa, properly construed,

excludes the decision maker from having to take into account under that clause the "impact" on a victim of a decision to revoke a visa cancellation where, contrary to the usual position where the victim might want the offender sent out of Australia, the evidence of the victim is that the impact of such a decision on the victim (letting him or her to remain) will be positive.

9 Such a circumstance may be rare but I explain below that I am satisfied that properly construed cl 14.4 of Direction No 79 operates in recognition that an offender's victim is to be given appropriate agency in the decision making process. That means a victim's interests in respect of the impact of such a decision must be taken into account by the decision maker consistently with the usual position that a relevant consideration may weigh either in favour of, or against, whether or not to revoke the mandatory cancellation of a visa.

10 In the present case I have concluded, notwithstanding the otherwise exemplary attention the Tribunal gave to its task, it omitted to discharge that prescribed responsibility. The impact on the Applicant's victim was not taken into account by it as cl 14.4 of Direction No 79 required, notwithstanding that his victim (his ex-wife) had given evidence inter-alia that she had forgiven him and, that rather than wanting him to have his visa revoked, she needed him to remain in Australia to assist her with the care of their son.

11 The result is that the decision made by the Tribunal must be set aside. The views of a victim are not controlling, but must be taken into account, whether they are adverse to or inconsistent with, the interests of the offender. The Applicant's review will be remitted to the Tribunal for re-consideration according to law. It will be for the Tribunal on remittal to give such weight to the victim's interests as it determines to be appropriate.

## THE CONSTRUCTION ISSUE

12 In *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 69 (**CGX20**) the Full Court grappled with the proper construction to be given to cl 14.4 of Direction No 79. That provision is in the following terms:

> **14.4 Impact on victims**
>
> (1) 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.

13 When CGDX had been before the Tribunal, the Tribunal had reasoned to the effect that the word "not" in cl 14.4 could be ignored as a drafting error and surplusage. The Tribunal had further observed at [99]–[100] of its reasons that the phrasing of cl 14.4:

> … 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 victims, other than positively.
>
> The Tribunal adopts the course taken in the above matters. The considerations listed in paragraph 14 of Direction 79 are not exhaustive and the Tribunal assumes, in any event, that paragraph 14.4(1) was meant to direct the decision maker to consideration of the impact of revoking the cancellation rather than not revoking the cancelation. The Tribunal therefore considers the former consideration.

14 The primary judge, Colvin J dismissed an application for judicial review of the Tribunal's decision: *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2020] FCA 1842.

15 The construction of cl 14.4 had not been the subject of a ground of the appeal before the primary judge. However, in giving reasons Colvin J observed that the Tribunal was correct in its approach to the construction of cl 14.4. However his Honour prophylactically also noted that the Tribunal's reasoning to the effect that the revocation of a non-citizen's visa would always have a positive impact on a victim was mistaken.

16 The primary judge's reasons in those regards were summarised by the Full Court in *CGX20* (at [9]) as follows;

> 9 The primary judge considered that the Tribunal's construction was correct on the basis that there was an obvious error in the phrasing of cl 14.4. He said that, in all likelihood, the error was caused by the negative character of an application under s 501CA(4) in which an applicant sought to revoke a visa cancellation. He noted that there are many instances in which a victim of violence, including family violence, may have a relationship with the non-citizen whose visa has been, or is at risk of being cancelled, and wishes the person to remain in Australia so as to maintain a relationship. His Honour did not agree with the Tribunal's suggestion that not revoking the decision to cancel a non-citizen's visa would always have a positive impact on victims, because sometimes it may have an adverse impact on a victim and cited, as an example, *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 at 539 [32] per Rangiah J.

17 Notwithstanding that the correct construction of cl 14.4 of Direction No 79 had not been raised as a ground of appeal before the primary judge, in CGX20's appeal to the Full Court the Minister consented to CGX20 being permitted to rely on a single ground of appeal; viz that his Honour had erred in failing to identify and apply the proper interpretation of cl 14.4.

18 Despite consenting to that course, counsel for the Minister informed the Full Court that, first, her client did not embrace the primary judge's reasoning as to the construction of cl 14.4 and, second, she had no instructions as to how the Full Court should interpret or otherwise approach the construction of cl 14.4. As their Honours noted at [3] of their reasons "To say the least, the Minister's approach was unhelpful".

19 Notwithstanding, both understandably and properly concerned that the correct meaning of cl 14.4 had been the subject of uncertainty for some time, the Full Court in *CGX20* seized the opportunity to settle how cl 14.4 was lawfully to be construed.

20 In doing so the Full Court (Rares, O'Callaghan and Jackson JJ) reasoned as follows;

> 22 Given the importance in the practical, day-to-day work of delegates and the Tribunal in applying cl 14.4 as Direction 79 mandatorily requires, it is important that they have some authoritative understanding of how the clause should be construed. As we have said, it was unhelpful that the Minister failed to give any assistance in arriving at a different construction which, apparently, he would have wished us to find but without explanation of how we could have done so except by making a literal construction of cl 14.4.
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> 23 The construction arrived at by the Tribunal, which the primary judge considered correct, is more consistent with the analogously expressed requirements in cll 10.4 and 12.3 than with a literal construction of cl 14.4. The failure of the Minister to advance any intelligible reasoning process as to why the literal construction ought be applied enables us more confidently to find that the primary judge was correct in treating the word "not" in cl 14.4 as an error or surplusage that should be ignored so that persons bound by Direction 79 will approach their decisions consistently under cll 10.4, 12.3 and 14.4 in respect of the impact on the community, including victims, if the non-citizen were to hold a visa.
>
> 24 The parties agreed that the amended ground of appeal as formulated before the Full Court was not argued before the primary judge but sought to have this Court determine the appeal on that basis. Given that we have found his Honour's construction of cl 14.4 to be correct, the appellant's arguments as to materiality do not arise. However, we note that he wished formally to argue that the minority decision in SZMTA 264 CLR at 460 [95] was correct, and that materiality was not relevant to the grant of relief if a jurisdictional error were established. We note that submission, but, of course, must reject it.

21 The Full Court concluded, consistently with that analysis, at [26] that there had been "no jurisdictional error in the application of cl 14.4 in the Tribunal's decision, and, of course, no error in the primary judge's decision because the point agitated now was not expressly raised before his Honour".

22 In this proceeding counsel for the Minister, Mr Johnson, submits that the Full Court reasoning in *CGX20* is binding upon me as a single judge and "for that reason alone the Applicant's case fails".

23 I accept that *CGX20* is binding on me, however I reject Mr Johnson's contingent submission.

24 There is nothing in the Full Court's reasoning in *CGX20* that requires the conclusion that a victim of offending who advances a claim that the impact on them should the cancellation of an offender's visa be revoked would be positive is disentitled from having that contention and their interest as a victim taken into account in the application of cl 14.4 of Direction No 79. I identify nothing in *CGX20* as would deny that as a relevant impact.

25 At first instance, Colvin J with reference to the reasoning of Rangiah J in *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531 (**Viane**) had expressly rejected the Tribunal's supposition that to not revoke a decision to cancel a non-citizen's visa would always have a positive impact on a victim. His Honour accepted that while that might be the usual situation in less common instances the impact on a victim of permitting a non-citizen to remain in Australia in might be positive. Colvin J's reasoning in those regards was both noted by the Full Court and included in its summary of his Honour's reasoning. I discern nothing in the Full Court's reasoning to suggest any disapproval of that observation.

26 It is convenient to give attention to what was decided in *Viane* because it both crystallises what was and was not decided by the Full Court in *CGX20* and identifies what is at stake in this proceeding.

27 In *Viane* a Full Court of this Court held that the Minister fell into jurisdictional error when he had not taken into account the impact of a non-revocation decision on the appellant's partner. She earlier had been his victim (he had violently assaulted her). Rangiah J's reasoning (with which Reeves J agreed) was as follows;

> [32] ….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.

28 The Minister dos not submit that *Viane* was incorrectly decided in those regards.

29 The logical corollary of the reasoning in *Viane* (as had been applied by Colvin J as the primary judge in *CGX20*) is that the impact of permitting an offender to remain in Australia will not necessarily be negative.

30 I take it to be self-evident that a claim that a victim will suffer a detriment if the person who has offended against them is removed from Australia will often, if not always, equally be capable of being advanced as a claim that if the offender is permitted to remain the impact of a decision permitting that will be of benefit to them. The evidence in support of one will be evidence in support of the other.

31 Having regard to that observation I discern nothing at all in the reasoning in *CGX20* to suggest that the consequence, as a matter of construction, of disregarding the word "not" in cl 14.4 was intended, by a side wind, to have rendered the evidence of a victim inadmissible or irrelevant if directed to a beneficial impact on them if a person whose visa status is in issue is permitted to remain in Australia. To the contrary their Honours' reference to the primary judge's reasoning as had included his reference to Rangiah J's reasoning in *Viane* was that there had been "no error in that reasoning".

32 Clause 14.4 as construed in *CGX20* remains structurally part of Direction No 79. In that regard it remains a mandatory consideration to be applied by all persons, other than the Minister acting personally when making decisions in an administrative capacity under the Migration Act.

33 The constructional issue settled by *CGX20* (as relevant to this proceeding) simply requires the decision maker to direct his or her attention to the impact on a victim of a decision to revoke the loss of the offender's visa: that is the impact on the victim of a decision which would permit the person whose visa status is in issue to remain in Australia.

34 There is nothing in the reasoning in *CGX20* to suggest that the Full Court, by settling the construction henceforth to be given to cl 14.4, without any articulation of the premise, intended (or is to be applied) to lock out a victim from having their contended for interests as might in rare circumstances be positively impacted upon such that their interests would coincide with those of a person who had earlier caused them harm.

35 Mr Johnson however submits on behalf of the Minister that I am to give effect to that unlikely conclusion because I am bound by a later decision of a Full Court in *DKN20 v Minister for Immigration, Citizenship and Migrant Services and Multicultural Affairs* [2021] FCAFC 97 (**DKN20**) (Collier, Markovic and Anastassiou JJ) to do so.

36 I acknowledge that what Collier, Markovic and Anastassiou JJ stated at [37] might be thought to justify that conclusion:

> 37 We respectfully adopt the reasoning of Colvin J in *CGX20*. There was no scope for the Tribunal to consider the impact on Ms J as a victim pursuant to cl 14.4 and accordingly no error in its construction of that clause, nor in its reasoning consequent upon that construction.

37 However there are three reasons why I am satisfied that I am entitled to reject Mr Johnson's submission.

38 First, the operative decision made by the Full Court in *DKN20* was to decline to grant the appellant leave to rely on a proposed (and manifestly weak) ground of appeal. *DKN20* is self-evidently an interlocutory decision. As such it neither creates a res judicata nor binds this Court as would a final judgment made on the merits.

39 Second, on the assumption that the decision in *DKN20* is not binding but the reasoning in [37] should nonetheless be followed I note without any disrespect that their Honours' observation in that paragraph, to the effect that the reasoning of Colvin J in *CGX20* supports the conclusion that there was "no scope" to consider the impact on Ms J as a victim, appears to have been made in disregard to his Honour's approving reference to the reasoning of Rangiah J (with whom Reeves J had agreed) in *Viane* and Colvin J's own express rejection of the reasoning of the Tribunal to the same effect. I need not repeat in those regards what I have sufficiently referred to above.

40 Third, on the contrary assumption that I am in error in reasoning that there is nothing stated in *DKN20* that binds me I am satisfied that I am entitled to distinguish *DKN20* on the facts and confine its binding authority to instances in which a person claiming victimhood is merely indirectly and colloquially a "victim".

41 Many, perhaps most, of those who break the law indirectly and colloquially "victimise" their own families. Their offending conduct and its consequences can bring shame, misery and sometimes even poverty to those within their orbit. To the extent that that common circumstance is insufficient for a person who suffers such consequences to come within the

meaning of the term "victim" in cl 14.4 and as such any impact upon them need not be specifically considered pursuant to that clause I would accept the reasoning of the Full Court at [37] of *DKN20* to bind me but to be distinguishable. I should explain why that is so.

42 In fairness to counsel representing the Minister the facts that have led me to be satisfied that *DKN20* is to be distinguished on the basis that Ms J was not the victim of DKN20's offending is far from immediately apparent if the passage at [37] is read in isolation. I also recognise that the Full Court's reference at [5] to the nature of DKN20's serious offending (stalking etc) on first blush could easily be understood as suggesting Ms J may have been the actual victim of DKN20's offending conduct.

43 However, once regard is had to the reasons of Perry J at first instance: *DKN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* 2020 FCA 1158 it becomes apparent that none of DKN20's serious offending as had occasioned the automatic revocation of his visa had involved him stalking or threatening Ms J. DKN20 had come to perceive that he had been treated unfairly by the police; see at [9]–[11]. His serious offending as had occasioned the revocation of his visa (which had been affirmed and which decision he had sought to review) involved a number of instances of his stalking and making death threats to police.

44 Perry J's reasons confirm that DKN20 was already separated from his wife prior to his having engaged in the criminal conduct (threatening and stalking police) which had given rise to the charges he had been convicted of in 2015 and 2016 as had triggered the revocation of his visa. She might have colloquially been his victim but I do not apprehend there to have been any basis for reasoning that such "victimhood" would come within the terms of cl 14.4 of Direction No 79. None of the police who had been the victims of his offending for that purpose had sought to be heard.

45 In that context it is entirely unsurprising that no submissions were made to the Tribunal and none had been advanced before the primary judge that cl 14.4 was of any relevance to the impugned non-revocation decision.

46 The straw the drowning appellant sought to seize by way of advancing a proposed ground of appeal against the judgment of Perry J in the Full Court was that the Tribunal had had before it a letter of support from Ms J. His proposed ground of appeal for which he required leave to advance was based on the proposition that that letter should have been taken into account

pursuant to cl 14.4. The Tribunal's failure to have done so was asserted to have been jurisdictional error.

47 The terms of Ms J's letter are set out in the Full Court's reasons at [23]. It is sufficient for present purposes to note that while Ms J had expressed sympathy for her husband's plight and concern regarding her children's interests, nothing in her letter was capable of being understood as Ms J identifying herself as being the victim of her husband's offending. She advanced no case that the decision of the Tribunal, whatever it might be, would have a positive (or negative) impact on her. That she had not advanced such a case and in that circumstance the Tribunal had fully and adequately taken Ms J's and her children's interests into account in so far as they were otherwise relevant was the conclusion reached by the Full Court. Thus their Honours observed:

> 42 In its Reasons, the Tribunal considered the impact of its decision on Ms J as a family member, under the heading "Best interests of minor children". This was appropriate as her statements in the letter of support concerning her desire to co-parent and to preserve the relationship between the Appellant and his daughter were plainly relevant to a consideration of the best interests of her and the Appellant's daughter. It is clear that the Tribunal had turned its mind to Ms J, and the impact on her of removing the Appellant from Australia, when deciding whether or not to revoke the visa cancellation decision, though it had not done so by express reference to cl 14.4.
>
> 43 **In *Bale,* Perram J noted at [27] that this proposition could be "outflanked" if there was some aspect of the wife's evidence as a victim which was distinct from the evidence put forward as a spouse**. Ms J's letter of support expressed reasons for supporting her husband's desire to remain in Australia. **However, the letter neither expressly, nor impliedly, makes any statement regarding the impact of non-revocation on her as a victim, as distinct from the impact on her daughter and the co-parenting of her daughter.** Both of these matters were considered by the Tribunal in its Reasons. In *Navoto,* the Court held at [88] that "importantly, decision-makers under s 501CA(4) of the Act are not required to consider a reason in favour of revocation not advanced by the person making representations to the decision-maker". No other material relating to the impact on Ms J as a victim was expressly put to the Tribunal. Accordingly, the Tribunal was not required to separately consider the impact of its decision on Ms J as a victim.
>
> (emphasis added)

48 Not only did the Full Court in *DKN20* reject at the factual level that the issue I am tasked with considering in this proceeding was material but also, and in contradistinction to their Honour's earlier seemingly unqualified statement at [37] which the Minister relies on at [43] their Honour's expressly left open whether, had the facts been different, the views expressed by Perram J in *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646 (**Bale**) might require a different answer.

49 That is sufficient to dispose of the contention that there is an underlying proposition of law that binds me.

50 However I am further satisfied that at a higher level of abstraction *DKN20* must be distinguished. It is not simply that Ms J had advanced no claim to be a victim that distinguishes that matter from the present. Rather, on the facts as were before the Court, Ms J could not have pressed such a contention within the ambit of cl 14.4 of Direction 79 as would have required that contention to be taken into account as a mandatory relevant consideration. It was the police, not Ms J who were DKN20's victims, within the meaning of that clause.

51 For those reasons I proceed on the basis that *DKN20*:

(a) Was interlocutory; and in any event can be distinguished because (a) Ms J had made no such claim and because (b) Ms J was not relevantly a "victim" within the meaning of cl 14.4 of Direction No 79; and

(b) Does not purport to exclude that in different circumstances the reasoning to the effect of that given consideration to by Perram J in *Bale* might be open to be applied.

52 I therefore reject that I am bound by *DKN20* to accept the Minister's submissions.

**The purpose and application of cl 14.4 of Direction No 79**

53 Mr Johnson acknowledged on the Minister's behalf in oral argument that the evident purpose of cl 14.4 of Direction No 79 is to give some, if necessarily limited, agency to a victim in the decision making process. I accept that to be so.

54 Clause 14.4 does not give paramountcy to a victim's interests but it requires the impact on them of a decision (if brought to attention) to be taken into account as a mandatory relevant consideration.

55 Having regard to the diversity of human dimensions as potentially may arise (as the example given by Rangiah J in *Viane* illustrates) I apprehend there to be no principled reason why a victim's agency is to be confined to instances in which the victim wants the offender to have his or her right of residency in Australia brought to an end. Mr Johnson identifies nothing in the text of that clause to suggest that it is to operate only to the disbenefit of the person whose visa status is in issue.

56 The guidance given to decision makers in s 2(8)(3) of Direction No 79 is that the primary and other considerations they are required by the direction to take into account "may weigh in

favour of, or against, refusal, cancellation of the visa, or whether or not to revoke a mandatory cancellation of a visa".

57 I am satisfied that nothing in *CGX20* as has settled the construction to be given to cl 14.4 requires, contrary to that guidance, a victim to be heard only as to such impacts as weigh in favour of the cancellation of a visa. I reject that *DKN20* requires it.

58 It can be accepted that usually such impacts will weigh in favour of the cancellation of an offender's visa.

59 Usually, but not always.

60 Having rejected that judicial authority binds me to a contrary conclusion I turn to the application of cl 14.4 by the Tribunal in the facts of this case.

61 Distinct from the circumstances that were in issue in *DKN20* it is uncontentious that the Applicant's offending as triggered the automatic revocation of his visa had directly concerned his ex-wife. She was his victim. The judge on sentencing referred to PGDX's offending conduct as follows:

> … [PGDX] comes before the Court in respect of one offence. That offence is contrary to s 61J(1) Crimes Act 1900. The offence is that he, on 17 November 2017, at Griffith in the State of New South Wales, did have sexual intercourse with [the Ex-wife] without her consent, and knowing that she was not consenting to the sexual intercourse, in circumstances of aggravation, to wit, the said [PGDX] breaks and enters dwelling house with the intention of committing the offence. He was arrested on 17 November 2017.
>
> He pleaded guilty in the Local Court on 11 April 2018, that being the Griffith Local Court. The matter came on for sentence today. He adhered to his plea of guilty and at all times the defence were committed to the matter proceeding as soon as possible. I convict him of this offence.

62 Her Honour specifically observed in sentencing PGDX that the circumstances did not disentitle the Applicant to leniency:

> The maximum penalty prescribed is imprisonment for 20 years. The standard nonparole period is ten years. He is entitled to a reduction of 25 percent for utilitarian considerations only. In addition, I am firmly of the view he is contrite and remorseful for his offending behaviour and is entitled to the mitigating factor found in s 21A(3)(i) Crimes (Sentencing Procedure) Act 1999.
>
> …
>
> It was accepted by both sides of the bar table that the prisoner made significant admissions in the interview. He also, by his plea, accepted he entered the dwelling house with the intention of committing sexual intercourse without consent. This is a significant matter. The defence submitted that the offending was well below the

> midrange. The Crown submitted it was below the midrange. In my view it is certainly below the midrange.
>
> His record is one which in my view does not disentitle him to leniency. I say this even though he has two offences, charge date 11 March 2016, court date 13 April 2016, stalk/intimidate and contravene prohibition in apprehended violence order (domestic). He received s 9 bonds for 18 months. This offending was described by the Crown as involving drunken rants. The bonds would have expired on 12 October 2017, before the present offence. The date of the present offence was 17 November 2017. In my view, he has good prospects for rehabilitation, and on the balance of probabilities it is unlikely he will re-offend.

63 All of that offending involved his ex-wife as his victim. The Applicant was sentenced to a term of imprisonment of 5 years with a non-parole period of 2 ½ years.

**APPLYING THE FACTS TO DIRECTION NO 79**

64 Once the question of "construction" is settled, the disposition of this review can dealt with shortly.

65 The Minister submits that the Applicant's ex-wife's evidence "did not rise any higher than expressing support for the applicant to remain in Australia so he could be more involved in his son's life". In so far as that is directed to the contention that his former wife's concerns had involved no claim on her own part that her interests would be affected and were focussed entirely on the impacts that the decision would have on her son and her ex-husband I reject it.

66 I am satisfied that to the extent the Applicant's ex-wife made representations which went to the impact of a decision that would revoke her former husband's visa she was relevantly his "victim" and her representations in those regards were required to be taken into account pursuant to cl 14.4.

67 The evidence-in-chief of PGDX's ex-wife in the Tribunal (in which she was questioned by the Senior Member) included the following (CB435, CB436):

> Yes. And you now believe that the tribunal should give PGDX a second chance to stay in Australia, and you've written a letter saying that. So would you please tell me, why do you think that he should be given a chance to stay in Australia?---So basically (indistinct) like, he is not a criminal. He wasn't a bad boy. He was a good boy of his family. He looked after S PGDX when he - I used to work all the time, because I was sponsored by my company, like after I gave birth to S PGDX, like after six months, when S PGDX was six months, I (indistinct) continue work. And PGDX looked after him. So I (indistinct) choose my - he immediately (indistinct) life from everything. (Indistinct) every single day. Every day, (indistinct), and I had to say like, he will be coming soon. **It's very hard for me, like, at the moment,** if like, his mental - he is not, like, improving mentally. Like, he just keeps thinking this, why is my mum keeping me away from my dad? And it's impacting him very badly. And I just - like, I just want PGDX to be close to him for like - like, suppose if he can take him for

> weekend, or like fortnightly, that will help S PGDX a lot. Because S PGDX has been suffering a lot. It's just like - it's just mentally, he's just suffering. He's - when he doesn't get any answer from me, he just goes and asks my sister or my brother, everyone, just when is my dad coming? I want to go and see him. It's very bad. It's very sad for him. I know like, PGDX, he made a mistake under the condition of alcohol, and I know that after he ends his punishment, he will not do that thing again. So I just - I just request the Department to give him another chance. I know all the like, procedures and everything, but I just want you to give him a chance. So it will be good for my S PGDX, that's all. Like, for me, **it's hard for me, too**. Like, with (indistinct) my parents to come and look after him or taking him to school. That is very hard for me. I am (indistinct). But I have to - now (indistinct) and I have to (indistinct). And at the moment, (indistinct). It's getting very hard for me, because I - it's just like**, I need his help with S PGDX** to (indistinct)

68 The cross-examination of the Applicant's ex-wife as is relevant was as follows (CB437, CB438):

> MS NG: Yes, so look I (indistinct). Ms K PGDX, can you hear me?---Yes, I can hear you.
>
> Thanks for your time today. So the first question I have for you is just to ask whether you and Mr PGDX have discussed how you would be involved in your son's life if he was released from immigration detention?---Me and my sister have enough funds to - for basic (indistinct) and support him for the - wherever he want to (indistinct). And then he was, like, he had enough (indistinct) able to get good job easily and everything. He has enough contacts. He will be able to get job at (indistinct). We will (indistinct).
>
> Yes, so my question was whether you had discussed with him the arrangements for him to be involved in S PGDX's life?---Sorry - I don't - sorry, I didn't understand the question, sorry?
>
> SENIOR MEMBER: No, Ms K PGDX, what Ms Ng is asking you is: if PGDX is allowed to stay in Australia, have you discussed with him what role he will play in S PGDX's life?---No, I haven't discussed with him that. No, sir.
>
> SENIOR MEMBER: Yes.
>
> MS NG: And my other question for you, Ms K PGDX, is: would it be right to say that the impact on you of Mr PGDX not being allowed to remain in Australia is - well, it relates only to the care of your son?---Yes, I'm just worried about my son because he's struggling everyday.
>
> Okay. Thank you, Ms K PGDX.

69 Had the evidence stopped at that point it arguably may have been plausible to regard Ms K PGDX's response to the last question asked of her as her explicitly disowning that there was any impact on her as a victim that she wanted the Tribunal to take into account.

70 However consistently with the generally exemplary attention the Tribunal gave to its task the Senior Member as if in reply asked further questions, Ms K PGDX's answers to which clarified the position.

> SENIOR MEMBER: Okay, look, I just have one final question. How does S 35 PGDX

> get on with Keith?---They are really very good friends, but S PGDX gets jealous so much when Keith come here. Because he has - Keith has full (indistinct) custody of his son, so he comes one week and then - you know, it's just like - so S PGDX is very jealous, it's why I can't go and see my dad. And that's not how (indistinct). He - S PGDX is (indistinct) asks me so many questions. He says, mum, you are not a very good mum because you don't let me go see dad. I want to go with dad to shopping, I want to go in a park. Why you are not letting me? And he just gave it all - when he comes from the school, because he now is 7, and he gets a lot of things - he learns a lot of things about school. So he can literally come and say, mum, look, women have so many (indistinct) mother and father, but they allow them to go, and you're not letting me go. **And I say S PGDX, your dad will be coming soon, you just have to wait. So it's just very hard for me, sir.**
>
> …
>
> Yes, okay. All right, Ms K PGDX, is there anything that you would like to say to me? We've finished asking you any questions. Is there anything you would like to say to me that I ought to be thinking about while I make -when I make my decision?---**Only thing, sir - there are PGDX did a mistake when he was drunk, and now after like this much time (indistinct) and giving him one chance, then it makes my life** and my son's life **a little bit easier,** and he doesn't have to go through so much. And - yes, that's all I can say. It's just 20 my request as a mother, too. And PGDX won't be burden to the country, because he has enough skill - he can easily get the job, and - yes. That's all, sir.
>
> (emphasis added)

71 In PGDX's closing submissions to the Tribunal, he asked the Tribunal to take into account that:

> **If I'm asked to return to India it will have an adverse effect** not only on my son **but even on my ex-wife** and sister…
>
> (emphasis added)

72 In its discussion of the potential application of cl 14.4 the Tribunal reasoned:

> 114. Strictly speaking there is only one "victim" in terms of the Applicant's behaviour, although other members of his family may be considered as having been impacted by his actions. His ex-wife has given clear testimony to the effect that she wants the visa cancellation revoked. However, her reasons for this all relate to what she perceives to be in the best interests of the minor child, Child S. Even so, in one of her statements she refers to the "*agony and trauma I have had to pass through*". In relation to the Applicant breaking and entering her premises prior to committing the sexual assault itself, she describes feelings of being "*very scared and terrified*" because she "*couldn't recognise him*". Again, this is indicative that she did not consent to either the Applicant coming to her home that night or her agreeing to have intercourse with him.
>
> 115. Despite this, the Applicant's ex-wife has made consistent representations to support her ex-husband's application to remain in Australia. She has even sought to appropriate some of the blame for their marriage problems to herself, and has indicated a desire for the Applicant to remain in Australia in order to help support their son.
>
> 116. The Applicant has mentioned on several occasions that his conviction led to his mother suffering a heart attack and his sister being divorced by her husband

because of the "shame" which his actions have brought upon the family.

117. There is nothing, however, which would allow any weight to be assigned to this consideration, rendering it effectively neutral in the present calculus of considerations.

73 I am satisfied that once regard is had to the evidence of Ms K PGDX I have set out above the reasoning of the Tribunal regrettably but self-evidently manifests jurisdictional error. Contrary to the conclusion stated by the Tribunal at [117] there was evidence, which, had it been taken into account pursuant to cl 14.4 of Direction No 79, would have required the Tribunal to give attention to the impact of the revocation of the cancellation of PGDX's visa on his victim: Ms K PGDX, his ex-wife.

74 There can be no doubt that the Tribunal recognised that Ms K PGDX was PGDX's victim. The Tribunal acknowledged that to be so when it observed at [114] of its reasons that "strictly speaking there had been only one 'victim' in terms of the Applicant's behaviour". The Tribunal's observation in that regard was wholly correct. Moreover it is consistent with why I am satisfied the reasoning of the Full Court in *DKN20* must be distinguished.

75 I return to the Tribunal's reasoning with respect to what K PGDX had informed the Tribunal about the impact on her of a decision to revoke the cancellation of PGDX's visa.

76 Ms K PGDX told the Tribunal she wanted the cancellation of PDGX's visa to be revoked. Her evidence in chief was that she wanted him to stay in Australia because, inter-alia, she needed his help with her son.

77 In cross-examination Ms K PGDX gave an answer to one question (see P 80 lines 28-31) which, in isolation, might be understood as her having repudiated having any self-interest in the outcome. However her responses to further questions asked of her by the Tribunal made clear that was not the case. She told the Tribunal that her son was blaming her for his father's absence. She informed the Tribunal that she had been promising her son that his dad would be coming soon—so it was very hard for her. Her position was summarised when Ms K PGDX was asked by the Tribunal if there was anything she wanted to add to her evidence and she had responded "Only thing, sir - ….PGDX did a mistake when he was drunk, and now after like this much time (indistinct) and giving him one chance, then it makes my life… a little bit easier…"

78 In my view there is nothing in the Tribunal's reasons at [114]-[115] to suggest that the Tribunal correctly understood the import of that evidence or gave it lawful consideration. It is not to the

point that the Tribunal noted that Ms K PGDX had been disturbed by the seriousness of the sexual assault she had suffered and that her account "was indicative" that she had not consented to either PGDX coming to her home or to his having intercourse with her. That was no more than PGDX had admitted to at his trial.

79 Such circumstances were open to have been taken into account by the Tribunal when assessing the weight it should give to the considerations provided for in cl 11 of Direction 79 but the objective seriousness of PGDX's offending was of no relevance, other than as background, to the Tribunal's duty to give consideration to the impact on Ms K PGDX of a decision to revoke PGDX's visa cancellation and to evaluate what weight should be given to it. That was its duty as provided for in cl 14.4 of Direction No 79.

80 It was an error of law for the Tribunal to have treated those background factors as materially decisive to the quite different question it was required to determine.

81 To the extent it was open for the seriousness of PGDX's previous offending to be taken into account as background, that background was such as might be anticipated usually would be a reason for Ms K PGDX to have welcomed rather than to have opposed the prospect PGDX's visa being revoked. The fact that notwithstanding, and to the contrary, Ms K PGDX had told the Tribunal that the impact of a decision to permit PGDX to stay in Australia would make her life "a little bit easier" might be thought to indicate how important the outcome was to her. But that was for the Tribunal.

82 However, there is nothing in the Tribunal's reasoning to suggest it understood that Ms K PGDK's status as a victim had required it to give specific consideration to the impact on her of a decision to revoke PGDK's visa cancellation 'where that information is available'.

83 That information was available. It was not open to be ignored.

84 Contrary to the submissions the Minister advances, I am satisfied that information was effectively ignored by the Tribunal. In particular I am satisfied that the Tribunal was mistaken in its conclusion that all of what Ms K PGDX had stated in her testimony related to "what she perceive[d] to be in the best interests of her minor son Child S."

85 As a mother it would have been surprising if the gravest of the concerns of Ms K PGDX had not related to her child's wellbeing. But her evidence was confined to that. She advanced, albeit modestly, her own claims.

86 She informed the Tribunal that the impact of permitting PGDX to remain in Australia would be of benefit to her. It would make her life a little bit easier.

87 Such humble evidence had to be taken into account pursuant to cl 14.4 of Direction No 79 and its import weighed in the balance of the matters required to be addressed by the Tribunal pursuant to Direction No 79.

88 To revert to Rangiah J's reasoning in *Viane* cited above at [27] the effect of Ms K PGDX's evidence was that as PGDX's ex-wife she had suffered as his victim and now faced being adversely impacted again if the Tribunal made a non-revocation decision.

89 Ms K PGDX's status as a victim entitled her to limited agency such that that information had to be taken into account by the Tribunal as a mandatory relevant consideration. It was not. She was denied that agency.

90 The Applicant put to the Tribunal in his closing submissions that his return to India also would have an adverse effect on Ms K PGDX. I reject that that he did not sufficiently identify the relevant issue. In a circumstance in which the sentencing judge had recorded that in the judge's view not only that "his record is one which….does not disentitle him to leniency" but also "he has good prospects of rehabilitation" it is not advanced, and it would be implausible to advance, that had the factor provided for in cl 14.4 of Direction No 79 been given lawful regard, a different outcome in his review could not reasonably have been reached. I am satisfied that the error was material.

91 I need not decide if generic matters of the kind identified by Perram J in *Bale* might in a different case be sufficient to engage the operation of cl 14.4 of Direction No 79. That is because Ms K PGDX's several modest, mundane but direct claims regarding the impact on her of a decision to revoke the cancellation of her former husband's visa extend beyond the generic. As she had explained to the Tribunal when she was asked if she had anything she wanted to add she informed the Tribunal that she wanted it to take into account that PGDX being given his visa back and being permitted to stay in Australia would make her life "a little bit easier."

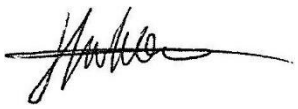
92 Remittal of this matter will not compel Ms K PGDX's interests to prevail. Her expressed views did not prevail when, after PGDX's offending she had requested the prosecution not to proceed with putting her former husband on trial (see CB 436). They may again not prevail if this matter is remitted for review according to law.

93 However Ms K PGDX is entitled to the limited agency provided for victims in cl 14.4 of Direction No 79. Her status as PGDX's victim required the impacts she identified to the Tribunal to be addressed by it as a mandatory relevant consideration. To the present they have not been. It will be for the Tribunal, upon remittal, to give such weight to those claimed impacts as it sees fit.

94 I uphold the appeal. I will make orders accordingly.

95 The parties are agreed that costs should follow the event. I will order the Minister to pay the Applicant's costs as agreed or in default of agreement as may be taxed.

I certify that the preceding ninety-five (95) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kerr.



Associate:

Dated: 18 October 2021