



[2013] AATA 628

Division **GENERAL ADMINISTRATIVE DIVISION**

File Number **2013/2939**

Re **Jope Iosefo Mua**
 APPLICANT

And **Minister for Immigration and Citizenship**
 RESPONDENT

DECISION

Tribunal **Ms N Bell, Senior Member**

Date **3 September 2013**

Place **Sydney**

The Tribunal sets aside the decision under review and instead decides that Mr Mua's visa should not be cancelled.

.....[Sgd].....
Ms N Bell, Senior Member

CATCHWORDS

IMMIGRATION – Visa cancellation – character grounds – substantial criminal record – decision under review set aside

LEGISLATION

Migration Act 1958 (Cth), ss 500(6H), 501(2), (6), (7)

CASES

Goldie v Minister for Immigration and Multicultural Affairs [2001] FCA 1318

Uelese v Minister for Immigration and Citizenship [2013] FCAFC 86

SECONDARY MATERIALS

Ministerial Direction No. 55 on Visa Refusal and Cancellation under section 501

REASONS FOR DECISION

Ms N Bell, Senior Member

1. Jope Iosefo Mua, now a man of 30 years, arrived in Australia when he was four years old. He has remained here, as a citizen of Fiji on a permanent visa, ever since. For more than 10 years, with the exception of just a few weeks, Mr Mua has been in prison, convicted of serious crimes.
2. When he was released on parole this year, he was taken into immigration detention because a delegate of the Minister for Immigration and Citizenship decided to cancel his visa. Mr Mua seeks a review of the Minister's cancellation decision.

3. Section 501(2) of the Act provides that the Minister may cancel a visa if “*the Minister reasonably suspects that the person does not pass the character test*”. Section 501(6) of the Act provides that a person does not pass the character test if the person has a “*substantial criminal record*”. “*Substantial criminal record*” is defined in section 501(7) of the Act as, among other things, having been sentenced to a term of imprisonment of 12 months or more. There is no dispute that Mr Mua has a substantial criminal record and that he does not pass the character test.

4. The discretion of the Minister to cancel Mr Mua’s visa is thus enlivened. In exercising the discretion, the decision maker must apply *Ministerial Direction No. 55 on Visa Refusal and Cancellation under section 501* of the Act. This Direction superseded *Direction No. 44* and came into effect on 28 July 2012 and varies from the previous direction in that it adds, to a range of primary and “other” considerations in the exercise of the discretion, a set of principles expressed to “*provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to cancel or refuse a person's visa under section 501*”. The principles are:

6.3 Principles

- (1) *Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*

- (2) *A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*

- (3) *In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.*

- (4) *Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.*

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

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

5. The Direction then contains a number of “primary” and “other” considerations to which the decision maker must have regard when considering whether to exercise the discretion to refuse or cancel a visa.

6. The primary considerations in the Direction in respect of visa holders are:

Primary considerations – visa holders

(1) *In deciding whether to cancel a person's visa, the following are primary considerations:*

(a) *Protection of the Australian community from criminal or other serious conduct;*

(b) *The strength, duration and nature of the person's ties to Australia;*

(c) *The best interests of minor children in Australia;*

(d) *Whether Australia has international non-refoulement obligations to the person.*

7. These considerations are elaborated on by a range of factors to which regard must be had. The additional “other” considerations contained in the Direction are indicated by the headings that appear below.

PRIMARY CONSIDERATIONS

8. The primary consideration most relevant to Mr Mua’s circumstances, given his convictions for violent crimes, is the protection of the Australian community. The other

primary consideration most relevant to his circumstances is the strength, duration and nature of his ties to Australia. To a lesser extent, the best interests of minor children are also relevant.

Protection of the Australian Community

9. The Direction provides further guidance to decision makers in assessing the level of the risk of harm to the community by identifying as factors relevant to that assessment the nature and seriousness of the person's conduct to date and the risk to the Australian community should the person commit further offences or engage in other serious conduct.
10. Mr Mua has the following convictions:

Date of Offence	Offence	Date of Conviction	Sentence
12 October 2002	Aggravated Robbery and Aggravated Assault with Intent to Rob	23 April 2004	4 years with a non-parole period of 2 years to commence on 17 November 2002 to be served concurrently
Released on bail: 24 April 2003			
20 May 2003	3 counts of Robbery in Company	15 November 2004	7 years, with a non-parole period of 3 years and 9 months, to commence on 4 May 2004
Released on parole: 3 February 2008			
17 February 2008	Robbery in Company and Resist Officer in Execution of Duty and Robbery Armed with Offensive Weapon	8 April 2009	1 year imprisonment to commence on 7 January 2009 and 5 years and 4 months with a non-parole period of 4 years to commence from 7 July 2009

11. In addition he was convicted in Lidcombe Children's Court on 16 March 2000 of two charges of Robbery in Company attracting a Community Service Order for 150 hours on

each charge, and Assault Occasioning Actual Bodily Harm, released on probation for 12 months. On 10 January 2002 he was convicted of possessing a prohibited drug and fined \$200 in Penrith Local Court. On 18 November 2003, he was convicted of four driving offences and was fined a total of \$2100 and received two six months disqualifications of his license.

12. The sentencing remarks by Armitage J for Mr Mua's April 2004 convictions for Aggravated Assault with Intent to Rob and Aggravated Robbery (a further offence of Aggravated Assault with Intent to Rob also taken into account by the court) described the circumstances of the offences. On 12 October 2002 Mr Mua and two other offenders went to Taylor's Gentlemen's Club in Lidcombe, where they said to a male staff member of the club "Give us the fucking money". Mr Mua then punched the man, pushed him down on the reception desk and then scuffled with him when he tried to get away to the rear of the club. The three offenders caught up with the staff member and again demanded money, with Mr Mua smashing a mirror and punching a wall. A female staff member was punched on the nose. Mr Mua said that he had a gun and threatened the male staff member, though no gun was actually produced. One witness said Mr Mua punched another female worker, with one of the co-offenders taking money from a handbag. In addition to the damage, about \$42, a rubber dildo and two packets of cigarettes were stolen. His Honour accepted that Mr Mua was heavily intoxicated at the time of the offending, but found that he was well aware of what he was doing. His Honour said the offences were "*of a very serious nature*". He did accept that Mr Mua had no recollection of what took place at the club. He also noted that the offences "*were not part of a planned or organised criminal activity.*"
13. His Honour noted Mr Mua's statement in an electronically recorded interview that he had no recollection of the events after he had got into a cab with his friends. That was in accordance with Mr Mua's evidence to the Tribunal. In the Police interview and in his evidence to the Tribunal, he said he had a great deal to drink.
14. The sentencing remarks by Finnane J for Mr Mua's convictions of November 2004, for three offences of Robbery in Company described the circumstances of those offences,

occurring on 20 May 2003. His Honour characterised the crime as a “home invasion”. Mr Mua and two other men forced their way into a house in Orange, wielding a knife and an iron bar. The three victims were confined to the bathroom while the offenders ransacked the house. It was claimed in court that the offenders had gone there to buy marijuana and were not armed, but the court rejected this version of events and found that they had planned their actions and used weapons to intimidate the victims.

15. His Honour noted Mr Mua’s acceptance that he drank too much and that he had a need for spiritual meaning in his life and that he now prayed twice each day. His Honour considered these claims to be genuine. The presence and support of Mr Mua’s father, sister and brothers was also noted. His Honour recommended classification to a minimum security prison.
16. King J’s remarks on sentence for Mr Mua’s 2009 conviction for robbery in company and resist officer in execution of duty provided the following description. On 17 February 2008, the victims were walking together with a friend. Victim 1 separated from the others and went near Mr Mua and another man. Mr Mua said, “Come over here, cuz”. Victim 1 approached Mr Mua and the co-offender. Mr Mua grabbed him by the right shoulder, then Mr Mua and the co-offender led Victim 1 around a corner and produced a Stanley knife, which Mr Mua placed to Victim 1’s neck. Mr Mua then said “Drop your pants” and the co-offender said “Don’t worry, I’ll do it” and proceeded to pull Victim 1’s jeans and underpants to the ground. Mr Mua then said, “Take off your shoes and socks”, which Victim 1 did, leaving him naked waist down. Mr Mua then said, “Empty your pockets” and Victim 1 immediately removed all items from the pockets of his jeans and handed them to the co-offender.
17. Victim 2 and the friend then approached. Mr Mua yelled out to Victim 2, “Hey, bro come over here”. The co-offender demanded to know what they were carrying and stood over Victim 2 in an aggressive manner. Victim 2 handed over his mobile phone and a fifty dollar note. The co-offender reached into Victim 2’s pockets looking for any further property. However, none was found and the two offenders walked away.

18. Police later found Mr Mua and the co-offender at a local hotel. They approached Mr Mua and informed him that he was under arrest. Mr Mua immediately started to run away. He was tackled to the ground, but continued to resist police by twisting and pushing/pulling with his arms before eventually being handcuffed. The police officer who tackled Mr Mua injured his right knee, requiring medical attention.

19. King J said:

In the circumstances of this matter, that is in each case, citizens of the State going about their ordinary business peacefully who are bailed up in one case with a knife by two gentlemen, in the second case, at least by two gentlemen, and the indignity in particular in relation to the disrobing of [Victim 1]..

I find that each of those offences, that is the robbery in company and the Form 1 armed robbery, fall within the mid range of objective seriousness for such offences.

...I find that the offence of resist an officer in the execution of his duty falls within the mid range of objective seriousness for such offences.

20. King J also said:

The offender has a criminal history which is significant in relation to these matters. His criminal history commenced with a robbery in company as a child which was dealt with in the Children's Court in March of 2000. There were two such offences dealt with on that day, as well as an offence of assault occasioning actual bodily harm. None of these offences resulted in any period in detention arising from sentencing proceedings, and those are the only juvenile matters on his record. However there is an irrelevant matter of possessing a prohibited drug that was dealt with by way of a fine on 10 January 2002.

Significantly, on 23 April 2004, he was dealt with for an offence which was committed on 12 October 2002. That was an aggravated assault with intent to rob, and on that occasion, he was also dealt with for a further charge, being one of aggravated robbery for which he was charged on 20 February 2003.

In respect of each of those offences, he received a term of imprisonment of four years, to date from 17 November 2002 and to conclude on 16 November 2006, with a non parole period of two years which was to conclude on 16 November 2004. Accordingly, it appears from the prison records provided as part of the Crown brief that he had been at liberty for approximately some four days before he committed the three robbery in company offences for which he was on parole at the time of his commission of these offences.

Indeed, his criminal history appears to indicate that from 17 November 2002, he has only had two brief periods of approximately two weeks each during which he has not been in a custodial situation. Relevant to this matter is the aggravating circumstance not only that these offences were committed whilst on parole, but that he has previous convictions for the same offences, or very similar offences that have resulted in significant periods of past custody. Those are of course matters of aggravation under s 21A(2) of the Crimes (Sentencing Procedure) Act.

21. King J also referred to the report of psychologist, Mr Watson-Munro:

Mr Mua demonstrated little insight into the consequences of his actions, stating that at the time he was under the influence of amphetamines and alcohol and in hindsight, should not have committed the offences.

...

Despite prior periods of incarceration for matters of a similar nature, the offender has not taken ownership of the triggers of his offending behaviour. He has continued to repeat his offending whilst under the influence of alcohol and illicit substances with his offending behaviour resulting to his return to custody.

In his pursuit of a life away from what he perceives as the restraints of a closely knit and supportive family, Mr Mua has made the choice of continuing to associate with anti-social elements which in turn have been a catalyst to his offending behaviour. Until the offender accepts the guidance and support from his family and acknowledges the destructive influence of his past anti-social associations, it may be the case that Mr Mua will be exposed to a continuing cycle of offending and imprisonment.

22. His Honour also said:

The offences themselves, on the evidence, appear to have been spur of the moment offences rather than falling within the category of planned or organised criminal activity.

23. His Honour also noted that the emotional harm or loss caused by the offence was not substantial.
24. I note that in 2008 his offence included, as a consequence of his resisting arrest, injury to a police officer. There is no evidence before me as to the extent of that injury.
25. There is also evidence that prior to his last offence, Mr Mua was aware of the risk to his immigration status.
26. On 1 November 2007 an officer of the Department of Immigration and Citizenship wrote to Mr Mua at the Mid North Coast Correctional Centre to advise him that consideration was being given to whether his visa is liable to cancellation under section 501(2) of the Act. The letter was headed "NOTICE OF INTENTION TO CONSIDER CANCELLATION OF YOUR VISA UNDER SUBSECTION 501(2) OF THE MIGRATION ACT 1958". The letter invited Mr Mua's comment and enclosed a Personal Details Form for that purpose. Mr Mua completed the form and returned it with a handwritten letter to the officer. His letter noted the courses he had completed in jail,

the importance to him of his relationship with his family, and assured the officer that he had learned from his mistakes.

27. However, Mr Mua maintains that he never received a formal warning letter from the Department even though it was sent to Mr Mua by registered post on 22 January 2008.
28. I note that the letter to Mr Mua from the Department on 1 November 2007 attached a copy of the then current Direction and relevant extracts from the Migration Act and noted the material on which the decision to cancel or not cancel would be made.
29. In the end, the Minister's delegate decided not to cancel Mr Mua's visa. The warning contained in the Notice of decision says: *"Please note that visa refusal or cancellation may be reconsidered if fresh information comes to notice or if you incur a liability on new grounds. Disregard of this warning will weigh heavily against you if your case is reconsidered."* Regardless of whether Mr Mua received this formal warning from the Department, he was on notice that he was in the migration authorities' sights. In spite of this awareness in 2007, he re-offended in 2008. Mr Mua said that at the time he received the 2007 correspondence and made his representations to the Department he was focused on the issue of parole and not on the issue of his migration status. However, he also said it had been a shock to him to realise that, unlike his five siblings, he was not an Australian citizen. This clearly made an impression on him.
30. All of Mr Mua's significant offences have involved violence. This must be viewed seriously. The sentences imposed by the courts have been substantial custodial sentences, with none since 2004 being less than five years. While a trend of increasing seriousness cannot be discerned between 2004 and 2008, given sentences of seven years in 2004 and five years and four months in 2008, there is a trend of increasing seriousness since Mr Mua's offences prior to October 2002. The frequency with which he has re-offended, first on bail in 2003 and then on parole in 2008, is striking. The cumulative effect of this is that over the last decade he has spent just six weeks in the community; almost all of his adult life has been spent in prison. He has shown an inability to learn from his mistakes. His last offences in 2008 were committed with knowledge of his migration status and the

possibility of visa cancellation. They were committed just two weeks after his release on parole. These considerations weigh heavily in favour of the cancellation of his visa.

31. As to the risk to the community if Mr Mua were to re-offend, the nature of the harm involved would be serious. His significant offences have involved the use of weapons and for each he has been in the company of others. As it turned out, and with the exception of the blow or blows delivered at the “Gentlemen’s Club” in 2002, and the injury suffered by the policeman in 2008, no physical harm was actually dealt by Mr Mua. However, his actions must have caused great fear and intimidation in his victims.
32. The risk of re-offending is difficult to assess. One is prompted to ask: what is different *this time*?
33. In evidence to the Tribunal, Mr Mua repeatedly accepted responsibility for his crimes, saying *“I put myself in that situation”*. He discussed having previously thought himself a victim and having sought to blame the people around him. In his evidence he abandoned that position and said he had *“put his hand up”* for all of the consequences of his conduct. I took this to mean that he had no-one to blame but himself.
34. When asked to describe his offences, Mr Mua’s descriptions were very brief and specifically excluded his having struck a woman in his 2002 offence, having used a weapon in the home invasion in 2003, and having used a knife in his 2008 offence. I note the Court’s acceptance that he had no recollection of the 2002 offence. As for the other offences and the details of his conduct, I detected some disagreement with the facts as found by the Court. However, Mr Mua readily accepted that the Tribunal cannot go behind the convictions and rather than seeking to press his own defence, he repeatedly accepted responsibility. He began at one stage to deny some aspects of his offences and to comment on the behaviour of his co-accused, but quickly returned to his acceptance of his own blameworthiness. I was urged by the Minister to take his failure to describe in detail the criminal conduct found by the Court as an indication of lack of remorse and an absence of rehabilitation. I do not take it that way. Rather, it struck me as the final acceptance of responsibility by a person whose recollection of events is at odds, in some respects, with the findings of the Court, but who accepts that, as Mr Mua said, he put

himself in that situation and put his hand up for it, and that having done so he must take all of the consequences that flow from it. This degree of acceptance of responsibility has not been evident in accounts of his earlier attitude.

35. The November 2007 Pre-release report of the Probation and Parole Service stated that Mr Mua *“appeared to lack a full understanding of the gravity of his crime and its impact on the victims”* and that *“Mr Mua continues to deny that the offence was premeditated or that violence was involved”*.
36. The April 2013 pre-release report in respect of Mr Mua’s grant of parole in 2013 noted, by contrast, that Mr Mua *“provided a detailed account of his offences and readily stated that he accepted responsibility for his actions.”* The report also said Mr Mua *“acknowledged the link between his illicit drug abuse and his offending behaviours”*. While expressing concern that Mr Mua had a number of prison misconduct offences within the previous 12 months, including Intimidation and Fail Prescribed Urine Test, it was acknowledged that *“he has not been involved in matters involving violence during this, or previous incarcerations, which perhaps supports the contention of the inmate that his primary criminogenic issue has been his abuse of illicit drugs”*. Mr Mua’s risk of reoffending was described as medium level.
37. The Probation and Parole Service Immigration Report of April 2013 noted that Mr Mua’s attitude was that he *“acknowledged that his prior response to supervision by this Service had been unsatisfactory, however, he cited greater maturity as a positive factor in his stated goal of rehabilitating himself, and adopting a pro-social role in the community”*. Mr Mua was assessed in this report as having a medium likelihood of reoffending, using the LSI-R assessment instrument, and it was noted that he has made constructive efforts towards his rehabilitation notwithstanding that he tested positive to cannabis on one occasion since completing the Getting SMART Program.
38. The record of Mr Mua’s conduct in prison as reported in the 2013 Probation and Parole Immigration report is as follows:

Date	Offence	Penalty
13/09/2012	Intimidation	3 days cells
26/07/2012	Possess Create Prohibited Goods	28 days off buy ups
06/06/2012	Fail to Comply with Correctional Centre Routine	14 days off buy ups
20/03/2012	Possess Create Prohibited Goods	35 days off buy ups
29/02/2012	Fail Prescribed Urine test (Cannabis)	42 days off buy ups 42 days off television 42 days off contact visits
07/02/2012	Possess Create Prohibited Goods	14 days off television 14 days off phone calls 14 days off contact visits 14 days off buy ups
29/12/2010	Make Unlawful Phone Call	14 days off phone calls
11/11/2010	Fail Prescribed Urine Test (Methyl Amphetamine)	42 days off contact visits
02/01/2010	Fail to Comply with Correctional Centre Routine	Reprimand and Caution

39. The report comments that descriptions of his conduct are conflicting, with the above infringements noted, but also with positive case notes by custodial staff regarding his general behaviour and his level of co-operation. I note that Mr Mua's last failure of a urine test was some 18 months ago in February 2012. When Mr Mua was questioned about his infringements in custody he said "*I'm not a robot*" and said that his family would visit him every second week and although he was very pleased to see them he also found it very frustrating and upsetting. He said that in some ways, during that time in his second custodial period, he preferred to be away in Wellington Correctional Centre so that he was beyond visits from his family. He said he was in a "*big hole*" at that time and did not want to see anyone. He said he was pleased to get back to Wellington in September 2012 and that things started to turn around for him then.

40. Mr Mua has, over the years, completed many courses in prison, including courses dealing with drug and alcohol issues. The full list of courses completed by Mr Mua is set out in Appendix A to these reasons.
41. I note that in the Probation and Parole Pre-release report of November 2007, Mr Mua was described as having struggled with a cannabis problem during his sentence and as having experienced his last positive urine test in January 2007 as a *“big wake-up call”*. He is noted as admitting *“he had previously not fully embraced the significance of his problem and had minimised the seriousness of his occasional use. ... Mr Mua stated that when released he intends to abstain from both cannabis and alcohol. His siblings, with whom he intends to reside, support his abstinence and have made it quite clear that they will not tolerate any further misbehaviour.”* Clearly, this approach did not work on that occasion and Mr Mua offended again in 2008, intoxicated and attempting to obtain drugs, just two weeks after his release on parole.
42. However, I also note that almost all of the drug and alcohol rehabilitation programs completed by Mr Mua were undertaken during his second custodial sentence. Of particular note are the ‘Getting SMART’ program in August 2009, the ‘Enough Is Enough ‘R’ Program’, the ‘Managing Emotions’ program and Mr Mua’s attendance at 12 meetings of ‘Narcotics Anonymous’, the last three programs having been attended by him in 2012 and all of them after his last failed urine test.
43. Mr Mua also gave evidence about his participation in the ‘Positive Lifestyle Program’, run by Pastor Jim Reidy, the prison Chaplain, and the positive impact it had on him. He also described the particularly confronting nature of the Narcotics Anonymous meetings he attended where he listened to the experiences of many long term drug users. When I asked him what he intended to do about alcohol if he is allowed to stay in Australia, his unhesitating answer was that the only way for him is complete abstinence. When I pressed that he might find himself at a gathering where others are drinking or that he might be invited to reunite with friends at a hotel, he said that he *“cannot handle alcohol at all”* and simply would not drink. He said he had told his father that he will not drink.

44. Mr Mua said he has found Christian faith. He distinguished this from the things he learned growing up in a Christian family and from his religious beliefs in 2004 when he was noted by the sentencing judge as praying twice each day. He gave evidence that the faith he has now is qualitatively different to his earlier experience of religion. He described having shared a cell with “Michael” who introduced him to Pastor Jim Reidy, Chaplain at Wellington. He said he started to attend services and Bible study and met weekly with Mr Reidy. Mr Mua described Mr Reidy as a person he admires greatly and as the person who has helped him to stop thinking of himself as a victim and to take responsibility for his own choices and actions. He spoke of his faith with much emotion.

45. For his part, Mr Reidy, a Chaplain in prisons for some 10 years, said he first met Mr Mua in 2008 but only came to know him in about September 2012 when he began to attend services with his cell mate who was a member of Mr Reidy’s group. He said that from September to May he engaged in pastoral counselling with Mr Mua on a weekly basis. Mr Reidy said that very few people wish to meet for such counselling so frequently and there are very few in his experience who demonstrate such a complete transformation. He said Mr Mua has become a person who puts other people first. Mr Reidy described Mr Mua as having excellent leadership skills and an excellent heart. He also described his plan, devised with Mr Mua and mentioned by Mr Mua in his evidence, to build a monthly gathering of newly released prisoners in the Western suburbs area and to arrange for employers and other professionals to also attend. At this point there are about 13 ex-prisoners who would take part. He said that Mr Mua will play an integral role in this project as well as in a mentoring project that he and Mr Mua have in mind. He said he already has a venue for the gathering and that it could commence at a month’s notice. Mr Reidy said that Mr Mua has “*gifts*” and that he intends to keep him very busy making good use of them.

46. Much has been made of the support available to Mr Mua from his large family. Mr Mua’s father and all of his five siblings provided statements of loving support. Other relatives in Sydney also made statements stressing their support for Mr Mua. Altogether 19 statements of support were tendered – six from immediate family, three from extended family and ten from friends. All were firm and unequivocal. I heard oral

evidence from his father, his older sister and from his brother. There could be no doubt about their love for Mr Mua or about the goodness of their intentions.

47. However, this love and support has always been there. It was the subject of comment in and prompted the grant of parole in 2008. What, if anything, is different now?
48. The evidence of Mr Mua's older sister, Ms Lusia Rabosea, suggests that there may be some differences. Ms Rabosea described the absence of Mr Mua's closest brothers and his father overseas when he was released in 2008. She also described her own preoccupation with her newborn child at that time. She ventured that, although there in theory, the family's support was not available in practical ways. She said she intends to change this and gave evidence of her intention to arrange and pay for a year of counselling for Mr Mua with the counsellor who assisted her with her own anxiety. A working mother of two, she said she intends to contribute financially to Mr Mua's support until he is able to obtain employment and confirmed that she agrees that he will need some time to adjust to life in the community before he takes the major step of re-entering the workforce. She gave as an example Mr Mua's difficulty and confusion when he was released in 2008 and attempted everyday tasks such as buying something at a supermarket. She said "*it all hit him at once. All he had was a weekly visit to parole and no real support*".
49. Ms Rabosea described her brother as having a new calmness and she attributed this to his faith. She said he has recognised that he has a gift and that he wants to help young Islander men by using sport and his "*closeness to God*" to do so. In answer to questions from me she gave evidence of another matter. However, I may not have regard to it because it concerns another individual from whom no statement has been obtained and concerns matters that had not been brought to the notice of the Minister in accordance with the provisions of section 500(6H) of the Migration Act. I note submissions by Counsel for Mr Mua that I may do so, but I have not taken the material into account. (*Goldie v Minister for Immigration and Multicultural Affairs* [2001] FCA 1318; *Uelese v Minister for Immigration and Citizenship* [2013] FCAFC 86.)

50. Ms Rabosea said her family has discussed "*how things will be*". They have decided that there will be no alcohol at home or at any family or family related gatherings. She said the family now knows that it is not enough to love Mr Mua and that practical things must be done to properly support him.
51. Mr Edward Mua is Mr Mua's father. He is an active member of his local Church. He said he retired in 2010, but is taking steps to restart his orthopaedic appliances business with a view to providing some employment for Mr Mua. He has begun to work on a room in his house for this purpose. He agreed it would be some months before this is ready. He said the plan is for Mr Mua to live with him in the family home together with two of Mr Mua's younger siblings.
52. Mr Mua Senior said that from the time he came to Australia from Fiji in 1987 he spent most of his time working. He described his separation from his wife in 2000 and her departure for the US in 2001. Mr Mua Senior visited his son in prison just three times. He said it was hard for him to visit because he was working and his son was being regularly transferred to different prisons by the authorities. He also said that while, in his heart, he was very close to his son, he also disapproved of what he had done and wanted to show his disapproval. He said he was in the US from 2005 to 2009 and so was absent when his son was released in 2008. He said that when he returned to Australia he had more telephone contact with him.
53. Mr Mua Senior said his son has a very big heart and likes to be protective. He ventured that this protective nature may have contributed in some ways to his offending, but it was unclear how he meant this.
54. For his part, Mr Mua said in relation to his father that he went from adoration as a child to being unable to stand him as a young adult and has now learned to respect him. He said he actively wants to spend time with his father in their home. When I asked him how he will handle being given orders by his father if they work together, he said he would have no difficulty now and wanted to learn from him.

55. Mr Mua's brother, Matthew Mua, also gave evidence of his intention to provide financial and other support to his brother, despite being newly married. He said he and his brother were very close when they were younger and that he has tried to keep in contact with him including by telephone when he lived in the US for three years. He said he consulted with his brother on his recent marriage and took his wife to visit him in the Detention Centre.
56. Mr Mua's older brother, Samuela Mua, unable to give oral evidence because of his temporary absence overseas, provided a statement to the effect that he would also contribute financially to his brother's support and that he did so when Mr Jope Mua was in prison.
57. Ms Maria Mua, Mr Mua's younger sister, also provided a statement in which she pledged financial support for her brother. In particular, she noted her enthusiasm at the prospect of his returning to the family home where she now resides with her father and younger brother.
58. When I asked Mr Mua about his old associates and friends, he said he has to stay away from them. He said he has other friends, some from school, with whom he can spend time and remain out of trouble. In this regard, I note the statements of Sione Helu, an old classmate of Mr Mua's; Ryan Feeny, a former rugby league colleague, and his mother, Colleen Feeny; and the statements of Alexander Moussawer and David Wheaton. I also note Ms Rabosea's evidence that the "*bad*" people who influenced Mr Mua in former years have now "*disappeared*".
59. Apart from the potential employment in his father's future business, Mr Mua has no firm employment prospects. He has, however, been steadily employed in prison. The reports of his conduct in this employment are excellent and describe him as hard working, affable and courteous. I note Mr Mua's intention to "*not jump in at the deep end*" and to take some time on his release to become accustomed to life in the community. His siblings have offered their financial support to enable this. It seems a cautious and reasonable approach. In any event, it seems he will not be idle given Mr Reidy's plans for him.

60. In addition, Mr Fedi Sleiman, President of the Auburn Warriors Junior Rugby League Football Club, in a letter dated 29 July 2013 has offered Mr Mua a rehabilitation program that he describes as a *“program that we offer certain players that need to be put on a strict code of conduct program”*. This, Mr Sleiman wrote, involves being responsible for a junior team and helping out with coaching, and close monitoring and placement with selected senior players who are considered to be excellent role models. Mr Sleiman said Mr Mua will be placed on a two year contract with the Auburn Warriors Ron Massey Cup Team, requiring a strict coaching style, attendance at training for three days each week and playing one game each weekend. Mr Sleiman also said that the program will include the aim of placement of Mr Mua in employment with one of the Club’s sponsors.
61. Mr Mua has also been offered a position as trainer for the Parramatta Women’s Rugby Team.
62. While I note the Probation and Parole Service’s assessment of a medium risk of reoffending and the similar factors of family support and remorse that were taken into account in the assessment made in 2007, there do appear to be some important changes that have been made since then. The attitude of Mr Mua’s supportive family has become more practical and realistic. They appear to be more focused on Mr Mua’s need for readjustment and long term self discipline. Others outside the family, including Mr Reidy and Mr Sleiman, have detailed the practical ways in which they will assist Mr Mua with his future and his rehabilitation through positive activity and occupation. Mr Mua’s faith, under the mentorship of Mr Reidy, appears to be of a deeper spiritual nature and to have ready opportunities for application through firm plans for the regular “gathering” and the mentoring program they have devised together. Mr Mua has consistently stated his acceptance of responsibility for his actions. There is also his and his family’s understanding that, for him, alcohol is poison. These matters represent a significant change from the matters he raised in his own support on previous occasions.
63. This change leads me to conclude that the risk of reoffending is less than medium and, while any risk at all must weigh heavily in favour of cancellation, it should not weigh as heavily as first thought by the Minister.

Strength, Duration and Nature of the Ties to Australia

64. Having arrived in Australia as a child of four, Mr Mua did all of his schooling in Australia up to, but not completing, Year 12. He lived with his family until his first custodial sentence which began in 2002 when he was 20. His first offending occurred when he was 17.
65. He attended high school at Patrician Brothers' College Fairfield and worked at a number of part time jobs. His attendance was interrupted by a month in juvenile detention. After his release from that detention, he played rugby league for the Patrician Brothers until the team was knocked out in the *Arrive Alive* competition. Mr Mua left school soon after this.
66. Mr Mua's success as a player meant that, after working as a storeman at 'ParaQuad' for approximately 18 months, he was selected to play for the under 20s 'Jersey Flegg Representative' side, as part of an important junior rugby league competition in NSW. Following that, he was selected to play for the 'Guildford Owls' and did so until 2002. This was a paid position.
67. In this way it can be argued that Mr Mua made a contribution to the Australian community through sport, in a sporting area of particular importance in the Australian community. He also contributed through employment in various part time jobs from the age of 14 and through full time employment for approximately 18 months. These are modest contributions but in this he can be contrasted with an individual whose school and post school years involved no successful activity and who has not engaged in regular employment.
68. From the time Mr Mua arrived in Australia at the age of four, he has never left. He considers himself an Australian and, until he found otherwise in 2007, he assumed he, like his siblings, was a citizen of Australia. He knows no other culture and no language other than English.

69. Mr Mua's family links have been canvassed above. There is no dispute that they are Australian citizens and that his links with them are close and very significant. Mr Mua's social links are also significant and extend beyond individual friends to sporting organisations that have offered him the opportunity to train, coach and play. In addition, Mr Mua is now a member of a Christian group led by Mr Reidy. He maintains close contact with Mr Reidy and will soon, if allowed to stay in Australia, implement the plans they have together for the group.
70. Mr Mua has no firm employment prospects or links, but I note his father's plan to employ him in his recommenced orthopaedic appliances business. There is also the work Mr Mua will undertake with Mr Reidy, although unpaid. In addition, there is the training, coaching and playing activity that the football clubs will offer, again unpaid, together with the efforts that one Club will make to place Mr Mua in paid employment with one of its sponsors.
71. The strength, duration and nature of Mr Mua's ties to Australia weigh heavily against cancellation of his visa.

Best Interests of Minor Children

72. There are two children who figure in Mr Mua's life and for whom Mr Mua has some significance: the five and one year old children of his sister Lusia Rabosea. However, Mr Mua's contact with the children has been limited because he has been in prison for almost all of their lives and has met them on only a few occasions.
73. Ms Rabosea gave evidence that her older child prays each night for Mr Mua. She described her hope that Mr Mua will play a significant role in her children's lives and also described Mr Mua as particularly gifted with her children. She said he is, of all of her siblings, the person with the biggest heart and the best with her children. She described Mr Mua as behaving with her children as though he has a great deal of time for them.

74. Of course, these children have their parents to care for them and they are not dependent on any care that might be offered by Mr Mua, notwithstanding that he might have a positive role to play in their future lives. They have had very limited contact with him and so separation from him would have limited impact on them.
75. This consideration weighs only minimally against cancellation of Mr Mua's visa.

Australia's Non-Refoulement Obligations

76. Mr Mua did not contend that this consideration arises and I see no basis for concluding that it does.

OTHER CONSIDERATIONS

Effect on Immediate Family

77. All of Mr Mua's immediate family have provided statements or given evidence that, were Mr Mua's visa to be cancelled and he to be deported from Australia, the effect on them would be severe. The evidence given in this respect by Mr Edward Mua and Ms Lusia Rabosea, in particular, was tearful and emotional. The statements given by them and by Mr Mua's other siblings described the likely effect on them as variously "*devastated*", "*absolutely shattered*", "*heart breaking*", "*living hell*". They are a tight knit family and they are all devoted to each other.
78. Against this is the fact that Mr Mua's family have already been without the ability to live with or freely commune with him for more than 10 years. However, they have been able to visit him at intervals over that time and to see him face to face. If he were to be deported, they would be able to maintain telephone and electronic contact with him. They would even be able to visit him, although at the considerable expense of overseas travel. But it would not be the same as being in the same room as their son and brother.
79. Notwithstanding other opportunities for contact were Mr Mua to be deported, I accept that the effect on his immediate family would be as severe as their statements and oral

evidence suggest. This consideration weighs heavily against cancellation of Mr Mua's visa.

Australian Business Interests

80. There is no evidence before me of any impact on Australian business interests.

Impact of Non-cancellation on Members of the Australian Community

81. There is no evidence before me of the likely impact of non-cancellation on the victims of Mr Mua's crimes or the families of those victims.

Impediments to be Faced on Removal from Australia

82. I have been provided with no information by the Minister on current conditions or social, medical or economic support that would be available to Mr Mua in Fiji.
83. He is a citizen of that country but he has no familiarity with its culture, government or social frameworks. He left when he was four years old and has never been back. He is now thirty years old.
84. Mr Mua tendered in evidence material from the website of the Department of Foreign Affairs and Trade, entitled *Republic of Fiji Country Brief* downloaded on 15 July 2013. That material describes the military coup in 2006 and the unstable governance that has ensued. The material also describes a struggling industrial sector and a stagnant economy. The material tendered by Mr Mua from the Fiji High Commission in Australia expresses a number of opinions. The only opinion to which I can give weight is that expressed about the likelihood of Mr Mua obtaining employment in Fiji. That likelihood is described as minimal.
85. The Direction requires me to consider impediments that would be faced by Mr Mua in the context of what is generally available to other citizens of Fiji. I have no evidence as to what is generally available to other citizens of Fiji. However, it is likely that a person who has no familiarity with systems and conventions in that country, no record of

employment there and no knowledge of other languages (Fijian and Hindi, according to material from the Department of Foreign Affairs and Trade) that might be used concurrently with the official language of the country (English) would be at a disadvantage in the labour market. He would also be likely to face disadvantage in accessing any social welfare or health benefits or services that may be available to citizens – at least until he develops familiarity with the country’s systems.

86. Significantly, in what the Department of Foreign Affairs and Trade describes as a “*military regime*” in which the military “*continues to interfere in the economy, including through the appointment of military figures and regime supporters to senior board positions*”, Mr Mua has no history of association with or participation in the military in Fiji or in Australia.
87. In addition, unlike other citizen residents of Fiji, Mr Mua would have no familiarity with the members of his extended family who live there. The evidence of Mr Edward Mua and Mr Matthew Mua establishes that members of Mr Mua’s extended family live in Fiji, although the only one with whom Mr Mua’s immediate family, through Mr Edward Mua, has regular contact is Mr Mua’s 80 year old grandmother whom he has not met since coming to Australia. There is no evidence to suggest that she or any other member of Mr Mua’s extended family would provide him with assistance or support.
88. This consideration weighs against cancellation of Mr Mua’s visa.
89. The Direction provides that the “Other” considerations listed in the Direction are not exhaustive and that consideration is not limited to the matters enumerated. In this regard, I was urged, on behalf of Mr Mua, to consider any detriment that might be suffered by Mr Mua if his visa were to be cancelled.
90. Notwithstanding the presence in Fiji of some members of his extended family, I accept that Mr Mua would suffer great distress at being removed from his immediate and extended family in Australia.

91. I also accept, on the basis of the material published on the internet by the Department of Foreign Affairs and Trade, that Fiji is a politically unstable country whose economic health has suffered since its last military coup. I have seen no detailed evidence of what government services or standards of living are available to citizens of Fiji. However, the description by the Department of Foreign Affairs and Trade of Fiji as a country in which the military coup has had “*significant economic consequences for the living standards of its people*” suggests that standards of living in Fiji fall significantly below those in Australia.
92. This additional consideration weighs against cancellation of Mr Mua’s visa.

THE BALANCE OF CONSIDERATIONS

93. In balancing the considerations detailed above and reaching a conclusion as to whether the discretion to cancel Mr Mua’s visa should be exercised, I must do so within the framework of the Principles set out in the Direction and extracted earlier in these reasons.
94. The Principles make it clear that the starting point in balancing the considerations set out in the Direction is that people who are non-citizens and who have committed serious crimes should generally expect to forfeit the privilege of staying in Australia.
95. I have concluded that, of the primary considerations, the protection of the Australian community weighs in favour of cancellation of Mr Mua’s visa. However, because I consider that the risk of reoffending is lower than the assessment made by the Probation and Parole Service, I do not consider that this weighs as heavily in favour of cancellation as the Minister first thought. I consider that Mr Mua’s conduct was serious, but not so serious that *any* risk of harm from repetition in the future is unacceptable. The changes in his attitude to his offending, his understanding of his problem with alcohol and drugs, his Christian faith, his links and plans with Pastor Reidy and the more informed and practical support now offered by his family and others all lessen the risk of his reoffending.
96. I have concluded that the strength, duration and nature of Mr Mua’s ties to Australia weigh heavily against cancellation. In this, I am mindful of the Principle that greater

tolerance will be afforded to a person who has lived in the Australian community from a very young age. Mr Mua has been shown tolerance before and still he reoffended. However, I consider that the quality and strength of his ties to Australia have developed since then. The network of support around him is remarkable, considered and practical.

97. I have also concluded that the effect on Mr Mua's immediate family were he to be deported would be severe and that this weighs heavily against cancellation. In this I am mindful of the Principle that the consequences of cancellation of a visa for members of the person's immediate family is a matter to be taken into account in the context of considering whether a visa should be cancelled.
98. I have also concluded that the best interests of Ms Rabosea's minor children would be minimally advanced by Mr Mua's remaining in Australia. This weighs only very slightly against cancellation.
99. Finally, I have concluded that Mr Mua would suffer some impediments to establishing himself and maintaining basic living standards in Fiji largely because he, now 30 years old, has not been to Fiji since the age of four and has no familiarity with the country or with his extended family there and because of political and economic conditions in Fiji. I have also considered the likely detriment to him in the distress he would experience in being removed from his immediate family and in the lower standard of living he would have in Fiji. These considerations weigh against cancellation.
100. On balance, I conclude that the considerations that weigh against cancellation, including the primary consideration of Mr Mua's almost lifelong ties to Australia, cumulatively outweigh the primary consideration of protection of the Australian community.

DECISION

101. The Tribunal sets aside the decision under review and instead decides that Mr Mua's visa should not be cancelled.

I certify that the preceding 101 (one hundred and one) paragraphs are a true copy of the reasons for the decision herein of Senior Member Bell.



[Sgd]
Associate

Dated 3 September 2013

Dates of hearing

22 and 23 August 2013

Counsel for the Applicant

Mr J Donnelly

Solicitors for the Respondent

**Ms L Buchanan, Australian Government
Solicitor**

Appendix A

Date	Award	Nature of Program
29 March 2004	Certificate of Achievement, completion of <i>One Day Alcohol And Other Drugs Workshop</i>	Education study of problems with alcohol and drugs
15 October 2004	Certificate of Completion, <i>Raising Awareness For Change Program</i>	Study of facilitating change, communication, alcohol and other drug awareness, welfare workshop, problem-solving resources and goal setting
4 July 2006	Statement of Competencies Achieved, <i>Hospitality Training Package</i>	Study of hospitality with particular focus on link between kitchen and service areas and food and beverage services
5 July 2006	Transcript of Academic Record, <i>Statement of Attainment in Outreach Access</i>	Study of individual education plan, learning and support (mental system and educational and employment options)
July 2006	Statement of Attainment, <i>Restaurant Operations With The New South Wales Department of Education and Training</i>	Study of restaurant operations managerial skills
September 2006	Certificate of Completion, <i>Gambling Prevention Workshop</i>	Study of the adult learning cycle, emotional awareness, controlled gambling, high risk situations, relapse prevention, problem-solving and coping strategies
October 2006	Statement of Attainment, <i>Outreach Access</i>	Study of learning support and educational and employment options
10 October 2006	Statement of Competencies Achieved, <i>National Unit of Competency</i>	Study of communication on the telephone, work with colleagues and customers, work in socially diverse environment, follow health, safety and security procedures
10 October 2006	Transcript of academic record, <i>Statement of Attainment in Outreach Access</i>	Study of hospitality industry, individual education plan and learning support
19 December 2006	Transcript of Academic Record, <i>BDB01 Business Services Training</i>	Develop financial plans and identify/research business opportunities

	<i>Package</i> Statement of Competencies Achieved, <i>Small Business Management</i>	Research business opportunities and undertake financial planning
20 December 2006	Transcript of Academic Record, <i>Statement in General Construction</i> <i>OHS Induction</i>	Introduction to <i>Occupational Health and Safety</i>
December 2006	Take Statement, <i>General Construction</i> <i>OHS Induction in New South Wales</i> <i>Workcover No. 03493</i>	Introduction to <i>Occupational Health and Safety</i>
December 2006	Statement of Attainment, <i>Small Business Management</i>	Study of running a small business
23 March 2007	Learning for life, “ <i>Jobs for the Boys</i> ” <i>Career Ambition Programs</i>	Assistance with focus upon future career prospects
26 March 2007	Statement of Attainment, Writing Skills for Work and <i>Certificate 1 Vocational Education and Training</i>	Development for writing skills for employment
26 March 2007	Statement of Attainment, Presenting Information – <i>Certificate 1 Vocational Education and Training</i>	Formation of ideas and development of oral skills
26 March 2007	Statement of Attainment, Managing Information – <i>Certificate 1 Vocational Education and Training</i>	Management of information and time skills
26 March 2007	Statement of Attainment, Job Seeking skills – <i>Certificate 1 Vocational Education and Training</i>	Skills for finding a job
26 March 2007	Statement of Attainment, workplace communication – <i>Certificate 1 Vocational Education and Training</i>	Development of positive advocacy skills in the workplace
4 October 2007	Achievement Award – <i>Theory in Hygiene Operations</i>	Occupational health and safety in commercial cleaning, colour systems and zones, effective cleaning methods
20 August 2009	Certificate of Completion, <i>Getting Smart</i> , Wellington Correctional Centre	Motivation to abstain, urge coping skills, problem-solving skills and lifestyle balance
27 March 2012	Certificate of Completion, <i>Participant in Enough Is Enough ‘R’ Program – 1 Day Workshop</i>	Responsibility, Rehabilitation and Reintegration at <i>Silverwater Correctional Facility</i>
August 2012	Certificate of Completion, <i>Managing</i>	Designed to assist participants to deal

	<i>Emotions</i>	with anger, fear, guilt and stress management, sadness, anxiety and worry, happiness, unhealthy relationships, and emotions in conflict situations
16 August 2012	Certificate of Attendance, <i>Narcotics Anonymous</i>	Attended 12 meetings of <i>Narcotics Anonymous</i> to deal with problems with drugs and becoming more educated in this area