Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2018/2357**

Re: **ZCNR**

APPLICANT

And **Minister for Home Affairs**

RESPONDENT

DECISION

Tribunal: **Senior Member Linda Kirk**

Date: **20 July 2018**

Place: **Sydney**

The reviewable decision made on 26 April 2018 not to revoke the cancellation of the Applicant's Class BB Subclass 155 Five Year Resident Return visa, is set aside. In substitution, the decision to cancel the Applicant's Class BB Subclass 155 Five Year Resident Return visa, made on 8 February 2017, is revoked.

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

Senior Member Linda Kirk

CATCHWORDS

MIGRATION – exercise of discretion to revoke Mandatory Visa Cancellation Decision - failure to pass character test - Ministerial Direction 65 applied – protection of the Australian community – nature and seriousness of Applicant's conduct – risk to Australian community - best interests of minor children - expectations of Australian community – whether non-refoulement obligations owed to Applicant – strength, nature and duration of any family or social links – extent of impediments if applicant removed – decision set aside and substituted

LEGISLATION

Migration Act 1958 (Cth) – *ss 499, 501, 501CA, 501E*

CASES

Ayache and Minister for Immigration and Border Protection (Migration) [2018] AATA 310
Ayoub v Minister for Immigration and Border Protection [2015] FCAFC 83
BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96
Do and Minister for Immigration and Border Protection [2016] AATA 390
HSKJ and Minister for Immigration and Border Protection [2017] AATA 1802
Labi and Minister for Immigration and Border Protection [2016] AATA 316
Lau and Minister for Immigration and Border Protection [2017] AATA 138
Murphy v Minister for Immigration and Border Protection [2018] AATA 150
Nigam v Minister for Immigration and Border Protection [2017] FCAFC 127
QSBL and Minister for Home Affairs [2018] AATA 2074
Rabino and Minister for Immigration and Border Protection [2016] AATA 999
Tahuriorangi and Minister for Immigration and Border Protection (Migration) [2018] AATA 2158
Uelese v Minister for Immigration and Border Protection (2015) 256 CLR 203
Uelese v Minister for Immigration and Border Protection [2016] FCA 348; 248 FCR 296
Waits and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 1336
YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

SECONDARY MATERIALS

Direction No. 65, Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA - paragraphs 6, 7, 8, 13, 14

REASONS FOR DECISION

Senior Member Linda Kirk

20 July 2018

1. ZCNR (the **Applicant**) was born in Shanghai in the People's Republic of China ('China') in 1969. He first arrived in Australia on 3 March 1989 as the holder of a student visa. On 16 June 1998 he was granted a Class BB Subclass 155 Five Year Resident Return visa and has since resided in Australia.

2. On 8 February 2017, the Department of Immigration and Border Protection (the **Department**) issued the Applicant with a Notice of Visa Cancellation (the **Mandatory Visa Cancellation Decision**) under s 501(3A) of the *Migration Act 1958* (Cth) (**the Act**).

3. On 13 February 2017 the Applicant made a request for revocation of the Mandatory Visa Cancellation Decision. The Applicant made representations to the Minister in support of his revocation request and provided supporting documents. On 14 September 2017 the Applicant provided a further submission and further representations were made on 15 April 2018 following correspondence from the Department on 9 April 2018.

4. On 26 April 2018 a delegate of the Minister decided not to revoke the Mandatory Visa Cancellation Decision under section 501CA(4) of the Act and the Applicant was notified of the decision on 27 April 2018. It is this decision of which the Applicant seeks review (the **Reviewable decision**).

5. On 3 May 2018, the Applicant lodged an application with the Administrative Appeals Tribunal (the **Tribunal**) seeking a review of this decision.

6. The matter was heard in Sydney on 13 July 2018. The Applicant attended the hearing in person and was represented by counsel. The Applicant, his partner and his mother gave evidence with the assistance of a Mandarin interpreter.

7. The material before the Tribunal consists of:

- Applicant's Statement of Facts, Issues and Contentions dated 10 July 2018
- Applicant's Submissions dated 27 June 2018;
- Applicant's Tender Bundle including:
  - Statement of the Applicant dated 8 July 2018
  - Supplementary Statement of the Applicant dated 9 July 2018
  - Statement of the Applicant dated 15 April 2018
  - Statement of the Applicant's partner dated 9 July 2018
  - Statement of the Applicant's mother dated 16 February 2017
  - Annexures
- Minister's Statement of Facts, Issues and Contentions dated 27 June 2018
- the s 501 documents (G-documents) (G1 to G30) (**GD**)
- Respondent's Tender Bundle (**RTB**) TB1 to TB3 pages 1 to 632.
- Respondent's Further Tender Bundle (**RFTB**) TB4 to TB5 pages 633 to 848.

8. The Tribunal has reviewed all of the evidence before it and refers to all relevant materials below.

ISSUES FOR DETERMINATION

9. The principal matter for determination is whether the discretion contained in s 501CA(4) of the Act should be exercised, such that the Mandatory Visa Cancellation Decision is revoked. Section 501CA(4) provides:

> *(4) The Minister may revoke the original decision if:*
>
> *(a) the person makes representations in accordance with the invitation; and*
>
> *(b) the Minister is satisfied:*
>
> *(i) that the person passes the character test (as defined by section 501); or*
>
> *(ii) that there is another reason why the original decision should be revoked.*

10. There are two issues to be considered in determining whether this discretion should be exercised:

1) Does the Applicant pass the 'Character Test' contained in s 501 of the Act; and

2) Is there another reason why the Mandatory Visa Cancellation Decision should be revoked.

DOES THE APPLICANT PASS THE CHARACTER TEST?

11. The "*character test*" is set out in s 501(6) of the Act, as augmented by s 501(7):

(6) For the purposes of this section, a person does not pass the character test if:

(a) the person has a substantial criminal record (as defined by subsection (7)) or

…

(7) *For the purposes of the character test, a person has a* ***substantial criminal record*** *if:*

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution

12. On 19 November 2007 the Applicant was convicted in the District Court of New South Wales of the offence *Supply prohibited drug – commercial quantity* and was sentenced to 13 years and six months imprisonment with a non-parole period of 10 years (the **Principal offence**). This is plainly a sentence of a term of imprisonment of more than 12 months and therefore the Applicant has a '*substantial criminal record'* pursuant to s 501(7)(c) of the Act.

13. The Applicant concedes and the Tribunal finds that he does not pass the '*character test'* under s 501(6)(a) of the Act and accordingly his visa was appropriately cancelled pursuant to s 501(2) of the Act.

IS THERE ANOTHER REASON TO REVOKE THE CANCELLATION?

14. As the Applicant's visa was appropriately cancelled on the grounds that he did not pass the *character test*, pursuant to s 501CA(4)(b)(ii) of the Act, consideration is to be given to whether there is another reason to revoke the Mandatory Visa Cancellation Decision.

Ministerial Direction No. 65

15. In considering whether to exercise the discretion in s 501CA(4) of the Act the Tribunal is required under s 499(2A) to have regard to the Minister's Direction relevant to s 501CA, *Direction No. 65 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (the **Direction**).

Objectives

16. The *Preamble* to the Direction provides a framework for the guidance of decision-makers considering cancellation of a visa. Paragraph 6.1 of the Direction begins with a statement of *Objectives*, the first of which is as follows:

> *(1) The objective of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.*[1]

17. The *Objectives* are followed by paragraphs 6.2 and 6.3 described as *General Guidance* and *Principles* respectively. The latter set the framework within which the individual considerations set out in Parts A, B and C of the Direction are set.

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[1] Direction No. 65 at para 6.1(1).

General Guidance and Principles

18. The first paragraph of the *General Guidance* (paragraph 6.2) provides:

> *(1) The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The principles below are of critical importance in furthering that objective, and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable.*

19. Paragraph 6.3 sets out the *Principles* that should inform the decision-maker in exercising the discretion:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.*
>
> *(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or forfeit the privilege of staying in Australia.*
>
> *(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing consideration may be insufficient to justify not cancelling or refusing the visa.*
>
> *(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.*
>
> *(6) Australia has a low tolerance of any criminal or other serious conduct by visa Applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in Australia.*
>
> *(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.*

Exercise of the Discretion

20. Paragraph 7(1) provides guidance for decision-makers as to how the discretion under s 501 is to be exercised. Relevantly it provides

> *(1) Informed by the Principles in paragraph 6.3 above, a decision-maker:*
>
> *(c) …*
>
> *(d) must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked.*

21. In the Applicant's case, Part C is applicable as it is directed to revocation requests made in relation to Mandatory Visa Cancellation Decisions made under s 501(3A). Part C of the Direction provides the considerations relevant in determining whether to revoke a mandatory cancellation of a non-citizen's visa.

22. Paragraph 8(1) of the Direction provides that decision-makers must take into account the primary and other considerations relevant to the individual case.[2]

23. Paragraph 13 of the Direction provides the three ***Primary considerations*** that the Tribunal must take into account:

> *(a) Protection of the Australian community from criminal and other serious conduct;*
>
> *(b) The best interests of minor children in Australia affected by the decision; and*
>
> *(c) Expectations of the Australian community*.

24. The ***Other considerations*** which must be taken into account are provided in a non-exhaustive list in Paragraph 14 of the Direction:

> *(a) International non-refoulement obligations*
>
> *(b) Strength, nature and duration of ties [to Australia];*
>
> *(c) Impact on Australian business interests;*
>
> *(d) Impact on victims;*
>
> *(e) Extent of impediments if removed*.

[2] Direction No. 65 at para 8(1).

25. Paragraph 8(2) of the Direction stipulates that in taking into account the primary or other considerations, a decision-maker must give appropriate weight to information and evidence from independent and authoritative sources.[3] Paragraph 8(3) provides that "*Both primary and other considerations may weigh in favour of, or against … cancellation of the visa …*". Generally, *primary considerations* should be given greater weight than *other considerations* and one or more primary consideration may outweigh other primary considerations.[4]

Primary Considerations

(1) Protection of the Australian Community from Criminal or other Serious Conduct

26. The Tribunal must have regard to the protection of the Australian community from criminal or other serious conduct. Paragraph 13.1(2) of the Direction provides that decision-makers should also give consideration to:

> (a) *the nature and seriousness of the non-citizen's conduct to date; and*
>
> (b) *the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.*

(a) The Nature and Seriousness of the Applicant's Conduct to Date

27. A National Police Certificate dated 16 February 2017 issued in respect of the Applicant shows that he has been convicted of a number of offences in Australia. In his representations to the Department and the Tribunal the Applicant did not dispute the charges and convictions in the National Police Certificate regarding his criminal convictions and sentences. The offences recorded in the National Police Certificate are as follows:

Court date	Offence	Sentence
5 September 1999	Possess prohibited drug	Fine $400 Fine
	Use uninsured motor vehicle on road	$750
	Use unregistered vehicle on road area (not a trailer)	Fine $750
26 October 1999	Possess prohibited drug	Fine $200

[3] Direction No. 65 at para 8(2).

[4] Direction No. 65 at paras 8(4) and 8(5).

26 September 2001	Driver/rider state false name or address Unlicensed for class, class c/t/lr/mr- 1st offence Head/tail/number plate light/lights not on/visible	Fine $400 Fine $300 Fine $100
20 June 2008	Supply prohibited drug = commercial quantity	Imprisonment: 13 years and six months commencing on 26/07/2007 Non parole period: 10 years commencing 26/07/2007
		Severity appeal lodged: court case reference 07/11/172
26 November 2008	Possess thing like Australian driver licence with intent to deceive Never licensed person drive vehicle on road – 1st offence Driver/rider state false name/address Fail to appear in accordance with Bail Granted undertaking	Fine $200 Fine $200 Fine $200 Imprisonment: three months commencing 26/11/2008

28. The Applicant's records produced by the New South Wales Police Force [RTB, pp 10-17] reveal a number of additional incidents involving the Applicant not reflected in the National Police Certificate. None of these incidents led to a criminal conviction.

Drug possession and supply offences

29. The National Police Certificate records that the Applicant was first convicted of *Possess prohibited drug* on 5 September 1999 following his arrest on 21 August 1999 when he was stopped by police and found to be driving an unregistered and uninsured vehicle. The vehicle was searched and a quantity of cannabis was found [RTB, p 18]. He was convicted on 26 October 1999 for the same offence *Possess prohibited drug* arising from an incident on 19 September 1999 when he was found to be driving an unregistered vehicle and, following a search of the vehicle, a quantity of cannabis was found [RTB, p 18].

30. Records of the New South Wales Police Force record an incident involving the Applicant on 18 December 2002 [RTB, p 15]. The Fire Brigade were called to the unit block where the Applicant then resided to attend to a reported flooding. The source of the flooding was

identified to be plastic hose in the laundry of the Applicant's unit. Police were then called to the unit and executed a search warrant, and found white powder (amphetamine), acetone, plastic bags and rifle ammunition. When the Applicant returned to the unit he was searched and keys to the unit and a car were found on him. A search of the vehicle recovered a receipt for the purchase of two four litre cans of acetone. Also found at the unit was identification belonging to a person known to be a member of a Triad group. The Applicant was charged with *Knowingly concerned with the Manufacture of a Prohibited Drug*.

31. When questioned about this incident at the hearing, the Applicant admitted that he was involved in drug supply and organised crime since 2002, particularly that he was associated with the Triad group, Sin Wah. He was aware that what he was involved in was illegal but at the time he was concerned only to get money to feed his drug habit.

32. Records of the NSW Police Force record an incident in 2007 resulting in a search of a vehicle the Applicant was driving which revealed a substance believed to be 'ice weighing 2.4g' and 'a crack pipe in a black pouch' [RTB, p 10]. The Applicant was not charged with an offence arising out of this incident.

33. On 20 June 2008 the Applicant was convicted of the Principal offence, *Supply prohibited drug – commercial quantity* and sentenced to 13 years and six months with a non-parole period of 10 years. The Agreed Facts in relation to this offence record that, on two occasions in 2005 and 2006, an undercover police operative entered into negotiations with the Applicant and another person for the cumulative supply of 3000 methlyenedioxymethylamphetamine (MDMA) tablets [RTB, pp 38-40]. The Applicant supplied the MDMA tablets to the person negotiating with the undercover police operative which led to a search of the Applicant's home [RTB, p 41]. The police found approximately $104,320 in cash, drug paraphernalia, an amount of methylamphetamine weighing 5.24 grams and a number of mobile phones [RTB, p 41]. The total amount supplied by the applicant was 852.9 grams (which exceeded the 'large commercial quantity' of 500 grams) [GD, p 42].

34. In his Sentencing remarks, Judge Hulme SC stated that the non-parole period of 13 years and six months reflected the 'objective gravity of the offence.' [GD, p 49]. The maximum penalty for the offence is imprisonment for life and the standard non-parole period is fifteen years imprisonment. As the Applicant pleaded guilty to the offence his sentence was discounted by ten percent [GD, p 44].

35. The Judge found that the Applicant committed the offence 'on such a significant scale for motives of financial gain' [GD p 44]. He found that the Applicant 'was higher up the scale' in the drug supply hierarchy than his co-offender and the Applicant was 'closer to those involved in the manufacture or importation of such drugs' and that the material found upon his arrest was 'clearly indicative of him being substantially involved in drug trafficking' [GD, pp 46-47]. He found that the Applicant's criminality could not be characterised as an isolated aberration. He characterised the Applicant's criminality with respect to the offence in the 'middle range of objective seriousness' for offences of this kind [GD, p 47].

Driving and vehicle related offences

36. In his Sentencing remarks, Judge Hulme noted that the Applicant did not have a 'significant record of previous convictions' [GD, p 44].

37. In September 1999 the Applicant was convicted and fined $750 for two offences relating to his driving of an uninsured and unregistered vehicle [GD, p 39]. In September 2001 he was convicted and fined for three offences arising from him driving while unlicensed and providing a false name and address [GD, p 39].

38. In November 2008, the Applicant was convicted of *Using a false instrument with intent* arising from an incident on 19 November 2007 when he was on bail for the principal offence. The Applicant was pulled over by police and gave a false name and address and subsequently provided a false licence. For these offences and the offence *Fail to appear in accordance with bail granted undertaking* the Applicant received fines of $200 and a concurrent period of imprisonment of three months [GD, p 38].

39. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 13.1.1 of the Direction specifies that decision-makers must have regard to a number of factors. Relevant factors in this case are:

    (a) Nature of the offences
    (b) Victims
    (c) Sentence imposed by the courts for a crime or crimes;
    (d) Frequency of the non-citizen's offending and whether there is any trend of increasing seriousness;
    (e) Cumulative effect of repeated offending

Nature of the offences and victims

40. Having regard to paragraph 13.1.1(1)(a) and paragraph 13.1.1(1)(b) of the Direction, the Tribunal finds that although the Applicant's offences were neither violent or sexual crimes, nor were they committed against vulnerable members of the community, the sale and supply of prohibited drugs, particularly methylamphetamine, is intrinsically a serious offence. The Applicant concedes in his Statement of Facts, Issues and Contentions that the Principal offence is 'plainly a "serious" offence.'[5]

41. The Tribunal has had regard to the remarks of the Sentencing Judge in relation to the Applicant's conduct and role in the Principal offence, particularly his observation that the evidence showed that the Applicant was relatively high up in the supply chain and close to those involved in the manufacture or importation of methylamphetamine, indicating that he was 'substantially involved in drug trafficking'.

42. In *Tahuriorangi and Minister for Immigration and Border Protection (Migration)* [2018] AATA 2158 (10 July 2018) at [45] the Tribunal commented on the seriousness of this type of offending 'involving the large-scale and commercial movement or trafficking of these substances commencing at a high-end level and moving downwards through the sale and supply of these unlawful substances into the general community.' Senior Member Tavoularis referred to the following passage from the decision of Deputy President Kendall in *Lau and Minister for Immigration and Border Protection* [2017] AATA 138 at [46]:

> Mr Lau was found to be in possession of methylamphetamine. The trial evidence shows that he intended to sell or supply those drugs in the Australian community. Given the well documented devastation inflicted on the community as a result of the production, distribution and use of methylamphetamine, this is a most serious crime. Mr Lau's failure to acknowledge the consequences of his actions is inexcusable in these circumstances.

43. Senior Member Tavoularis concluded:

> The often catastrophic health consequences for gullible, naïve and addicted consumers of these substances frequently involves very serious illnesses and related maladies. There is nothing passive or non-violent about the frequently disastrous

[5] Applicant's Statement of Facts, Issues and Contentions, para 21.

effects of these substances, not just on individuals who consume them but on families forced to deal with the unpredictable conduct of a family member affected by them.

44. The Tribunal endorses the findings of the Tribunal in these cases and finds that it indicates the seriousness of the offences for which the Applicant was convicted.

45. The Tribunal finds that seriousness of the Applicant's offences and their impact on victims, including vulnerable members of the community, is such as to render his criminal offending very serious for the purposes of this Primary Consideration, which is concerned with the protection of the Australian community.

Sentence imposed by the courts

46. Having regard to paragraph 13.1.1(1)(c) of the Direction, the Tribunal has had regard to the sentences of imprisonment the Applicant has received for his criminal offending. The Tribunal notes that sentences involving terms of imprisonment are the last resort in the sentencing hierarchy and finds that these sentences of imprisonment indicate the objective seriousness of the Applicant's offences. The Tribunal notes that the imposition of a sentence of 13 years and six months for the Principal offence, which includes a ten per cent discount for the plea of guilty, reflects the standard non-parole period of 15 years for this offence. In his Sentencing remarks, Judge Hulme characterised the Applicant's criminality in the 'middle of the range of objective seriousness' for offences of this kind [GD, p 47]. A severity appeal against the sentence was dismissed by the NSW Court of Appeal [GD, p 51]. In November 2008 the Applicant was further sentenced to two terms of three months' imprisonment to be served concurrently for offences he committed while on bail for the Principal offence. The imposition of terms of imprisonment undoubtedly indicate the seriousness of the Applicant's offences and weigh against the exercise of the discretion to revoke the cancellation of his visa.

Frequency of offending and trend of increasing seriousness

47. With regard to paragraph 13.1.1(1)(d) of the Direction, the Tribunal notes that the Applicant had been convicted and/or questioned in relation to drug possession prior to the Principal offence. Whereas the Applicant was charged or convicted of drug-related offences on three occasions over a period of eight years, there is a clear trend of increasing seriousness in his offending as seen in the progression from charges or convictions for drug possession

(1999), knowledge of involvement in the manufacture of prohibited drug (2002) and supply of prohibited drug – commercial quantity (2008).

Cumulative effect of repeated offending

48. The Tribunal has had regard to the cumulative effect of the Applicant's offending in determining the seriousness of his conduct in accordance with paragraph 13.1.1(e) of the Direction. The Tribunal finds that the Applicant's criminal offending demonstrated a sustained pattern of drug-related offences over a nine year period. The cumulative effect of these offences indicates the seriousness of his criminal offending.

49. The Tribunal has had regard to the Applicant's claims that he did not begin using 'ice' until after the death of his father in a workplace accident in 1999. He told the Tribunal that following a visit to Hong Kong to identify his father's body prior to the funeral, he could not erase the image of his father's face from his mind, and he started using 'ice' to help him to sleep. By the time of the commission of the Principal offence in 2005-6, the Applicant was spending about $200 per day on 'ice' and was gambling $100 to $500 per day [GD, p 43]. The Applicant's difficulty coping with what was a tragic incident and disturbing event in his life does not make less serious the offences for which he was convicted and sentenced to terms of imprisonment.

50. The Tribunal finds on the basis of the evidence before it that the nature, frequency and cumulative effect of the Applicant's criminal conduct are very serious and this element weighs against the revocation of the Mandatory Visa Cancellation Decision.

(b) The Risk to the Australian Community Should the Applicant Commit Further Offences or Engage in Other Serious Conduct

51. Paragraph 13.1.2(1) provides that a decision maker should have regard to the principle that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. In assessing the risk, the Tribunal must have regard to the two factors cumulatively listed in paragraph 13.1.2(2). They are:

(i) The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

(ii) The likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen reoffending

(i) Nature of the harm to individuals or the community

With respect to the first of these factors, the Applicant contends that the possession of drug offences are examples of 'victimless crimes' and that whereas his driving and traffic offences pose a risk of economic and physical harm to road users, there is no evidence that the extent of the harm from either category of offence would be 'very substantial'. As noted above, offences relating to the sale or supply of a prohibited drug are intrinsically serious. The potential impact on and harm to individuals and the community if the Applicant were to reoffend is considerable, and includes economic, psychological and physical harm.

(ii) Likelihood of engaging in further criminal or other serious conduct

52. The Applicant's SFIC argues that the likelihood of the Applicant engaging in the supply of a large commercial quantity of a prohibited drug or other serious criminal offences in the future is 'negligible'. This is claimed for reason that the Applicant:
    (a) is a first-time offender (in the context of the Principal offence);
    (b) pleaded guilty to the Principal offence;
    (c) provided sworn evidence that he is remorseful for his past criminality;
    (d) successfully undertook a number of vocational and English courses;
    (e) had no reported adverse incidents whilst a prisoner in New South Wales;
    (f) was granted parole at the expiration of the non-parole period of his sentence;
    (g) travelled (without incident) on public transport to attend a TAFE course during the final year of his sentence;
    (h) no longer has a drug or gambling addiction

Remorse for past criminality

53. In his Sentencing remarks in relation to the Principal offence, Judge Hulme noted that because the Applicant did not provide evidence to the Court, he did not have sufficient material to make a finding in relation to the Applicant's remorse, and specifically was 'unable to find that he is unlikely to reoffend and has good prospects of rehabilitation.'

Whereas this was the first occasion on which the Applicant's offending was in relation to the supply of drugs, 'he did so on such a scale for motives of financial gain' and therefore the Judge could not 'be assured that he is unlikely to do so again.' [GD, p 44].

54. In his statement dated 15 April 2018, the Applicant stated,

> kindly give me another chance to prove myself … I just need a chance to go back to the community again as a proud and law abiding person. I am not dangerous to the community and I will never harm the Australia (sic) community
>
> …
>
> I have be (sic) fully rehabilitated and now remorseful having served 10 years in custody, now vowed (sic) to maintain a honest and healthy lifestyle.

55. In his statement dated 8 July 2018 the Applicant said the following in relation to his criminality and remorse for his criminal conduct:

> I reflected on my criminality throughout my period of imprisonment. I had the opportunity to see many other prisoners on a daily basis, some of which had been severely impacted by drugs. In that context, I was able to gain an insight into the adverse impact drugs can have on members of the community. More broadly, my time in prison has given me an opportunity to reflect on my life and my criminal record. I am sincerely sorry and remorseful for my criminal conduct in the past. Not only has my criminality potentially posed a significant risk of harm to members of the Australian community, it has had a significant impact on my mother and partner …

56. In her statement dated 16 February 2017, the Applicant's mother, referred to her son's sense of remorse and the low risk he will engage in further criminal behaviour:

> I feel he is genuinely asking for forgiveness and has learnt his lesson. He understands that he has done wrong at a young age and cannot repay the damages done to the Australian country … He said he is very regretful to what he had done and hopes to repay …

57. In a letter to the National Character Consideration Centre [GD, p 86], the Applicant's partner wrote:

> I believe he is a changed man and much more mature. He seems more cautious and contemplates everything he is going to do. He also recognises his responsibility and accountability of the consequence if he has any wrong doing.

58. A Corrective Services New South Wales (CSNSW) Pre-Release report dated 12 May 2017 [RFTB pp 764-769] in relation to the Applicant stated:

> [The Applicant] was able to identify the negative effect that the supply of illicit drugs has on drug users and the greater community. He stated that since his admission into custody, he has witnessed the effects of drug use on individuals and consequently the impacts on families, particularly his own family.

Employment in Prison

59. In his statement dated 8 July 2018 the Applicant reported that his employment in prison included working in the sewing shop for several years, as a sweeper for one and a half years, in upholstery assisting to construct furniture for approximately one year, and in the kitchen for one year.

60. The CSNSW Pre-Release report records that the Applicant has maintained institutional employment since his admission into custody, in positions in various industries including a laundry sweeper in reception, head fabric cutter, a wing cleaner and work in the kitchen. The Report notes that CSNSW records indicate that the Applicant:

> is considered a reliable worker who is polite and well-mannered and displays a good attitude towards staff and inmates … his attendance is satisfactory and [he] can work unsupervised.

Vocational and other courses

61. While in prison the Applicant undertook a number of vocational and English language courses at TAFE NSW including:
    - Elementary English Language Skills (2016)
    - Statement of Attainment related to cookery and food safety (2016)
    - Statement of Attainment related to workplace safety issues and processes (2010)
    - Completion of several units in Certificate III in Upholstery (2013)

62. In the final nine months before being released on parole, the Applicant attended the Kingswood TAFE for commercial cookery and English classes. He travelled without incident on public transport to the campus at least four or five days a week and attended classes and studied in the Library. He was unaccompanied by a corrections officer but was monitored (ankle bracelet).

Behaviour in prison and immigration detention

63. The CSNSW Pre-Release report notes that the Applicant was housed in a number of correctional centres in NSW during his sentence and progressed through the classification system in a satisfactory manner to attain a C3 Minimum Security classification in July 2016. He 'consistently received positive reports from correctional staff and … maintains a high level of compliance with unit and centre routine'.

64. A Villawood Immigration Detention Centre (VIDC) Client Incident Summary Report [GD, p 136] dated 19 April 2018 details four adverse incidents in relation to the Applicant between the period December 2017 and March 2018 involving contraband items being found in his room, namely a mobile phone and SIM card and disposable razors and aluminium foil strips. He admitted that the items belonged to him and apologised for the breach of VIDC policy [GD, p 137]. In September 2017 a visitor to see the Applicant was refused entry due to returning two positive test readings on the MDI Itemiser Screening Process. The Applicant said in his statement dated 8 July 2018 that the person concerned was an 'old friend' and he has since contacted him and told him not to visit him if he is still associated with drugs.

Drug and gambling rehabilitation

65. The Applicant told the Tribunal that during his time in custody he was unable to undertake any drug or alcohol related programs or courses as he was ineligible to do so for reason that the offence for which he was sentenced involved drug supply. The CSNSW Pre-Release report confirms that the Applicant did not undertake any alcohol or other drug programs in custody as he did not meet the criteria for inclusion due to his assessed low-medium risk of re-offence (LSI-R rating) [FTB, pp 766, 768].

66. While in prison, the Applicant successfully undertook two courses to address his gambling addition:

- Best Bet Gambling program – November 2013

- Enough is Enough – December 2014

67. In his Personal Circumstances Form [GD, p 79] the Applicant claims that he has 'not once used illicit drugs during my time in custody.' The CSNSW Pre-release report states that the Applicant was subject to five urinalyses in the preceding 12 months, all of which returned negative results for any illicit substances [RFTB, p 766].

68. The Respondent claims in the SFIC that 'the applicant's rehabilitation has not been tested outside of incarceration and there is no probative evidence that the applicant has overcome his gambling or drug addiction.' The claim is further made that even if there is such evidence, this 'does not address his propensity to engage in the commercial supply of drugs for commercial gain.'

69. The CSNSW Pre-Release report recommended his release to parole on the date of the expiry of his non-parole period, 25 July 2017. Upon release he was transferred to VIDC where he has been held for the past 11 months. If the Applicant had been released into the community he was to reside with his mother and partner in Revesby. This arrangement for the Applicant post-release was deemed suitable at the time of the assessment for parole. The evidence given by the Applicant's mother and partner to the Tribunal and in their written statements, supports a finding that the Applicant will have the assistance and incentive he requires to not re-offend or resume his drug and gambling habits that were significant contributing factors to his past criminal offending.

70. Having regard to the evidence before it, the Tribunal finds that the risk of the Applicant re-offending is not 'negligible' but it is sufficiently low as not to be unacceptable.

71. For the reasons above, and applying the guidance in paragraph 13.1 of the Direction, the Tribunal finds that Primary Consideration 1, the Protection of the Australian Community, on balance supports the non-revocation of the Mandatory Visa Cancellation Decision.

(2) The best interests of minor children in Australia affected by the decision

72. Primary Consideration 2 of Part C in Paragraph 13.2(1) requires decision-makers to make a determination about whether revocation is, or is not, in the best interests of the

child. This consideration applies only if the child is expected to be under the age of 18 years at the time the decision is made.[6]

73. The evidence before the Tribunal is that the Applicant has a close relationship with his partner's two children: her son (aged seven years) and daughter (aged five years) ('the children'). The Applicant is not the biological father of the children who were born during his incarceration when their mother was in a relationship with their father.

74. Paragraph 13.2(4) of the Direction sets out a number of factors that must be taken into account when assigning weight to this consideration. Relevantly, some of the factors include:

> *(a) The nature and the duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental … and/or there have been long periods of absence, or limited meaningful contact;*
>
> *(b) …*
>
> *(c) …*
>
> *(d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child's or the non-citizen's ability to maintain contact in other ways;*
>
> *(e) Whether there are other persons who already fulfil a parental role in relation to the child;*

Nature and duration of the relationship

75. In his statement dated 8 July 2018 and in his oral evidence to the Tribunal the Applicant described his relationship with his partner who is the mother of the children. They met in 1998 and since then have 'predominantly been together'. She was a regular visitor to the various correctional centres where he was incarcerated during his sentence and they 'maintained a close relationship'. In her statement dated 9 July 2018 and in her oral evidence at the hearing, the Applicant's mother stated that she took the children from a very young age to visit the Applicant in prison and VIDC. The Applicant has 'built a very strong relationship' with the children and 'seeks to play an adoptive fatherly role' in their lives. In her evidence at the hearing, the Applicant's mother who lives with the Applicant's partner and the children stated that the children call the Applicant 'Uncle' and often ask when he will be coming home.

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[6] Direction No. 65 at [13.2(2)].

76. The Respondent drew attention to the Applicant's Personal Circumstances Form dated 13 February 2017 [G9 in GD, pp 69-84] noting that he did not list the children in this form in response to the questions relating to family and children. The first mention he made of them was in his statement dated 8 July 2018 in which he states that he loves the children and has 'developed a close relationship and bond' with them particularly given his 'ongoing and loving relationship with their mother'. He considers them to be part of his 'immediate family', wishes to 'play a fatherly figure' to them and really hopes 'to make a difference in their lives'. The Applicant told the Tribunal that he completed the Personal Circumstances form 'in a hurry' without the assistance of a lawyer or an interpreter and he thought references to 'children' in the form referred to any biological children.

77. Having regard to the factors outlined in paragraph 13.2(4)(a) above, the Tribunal finds that the Applicant has a relationship with children but it is a non-parental role that has involved very limited contact and meaningful interaction with them. Both children were born while the Applicant was incarcerated and not in a relationship with their mother, and although they accompanied her on many occasions when she visited the Applicant in prison and VIDC, they have had no contact with him outside these environments. He has therefore had little, if any, opportunity to be involved in their daily lives and upbringing. Whereas their limited and infrequent interactions with the Applicant have been positive, the total absence of him in their daily lives is such that limited weight can be assigned to their relationship with this Applicant in relation to this Primary Consideration.

Others who fulfil a parental role

78. The evidence before the Tribunal is that whereas the children's mother and father are separated and they live with their mother and the Applicant's mother who they regard as their grandmother, they do have an ongoing relationship with their father who they see on a regular basis, particularly on weekends. Having regard to the factors outlined in paragraph 13.2(4)(e) the Tribunal finds that the presence in the children's lives of other adults who play a primary parental role in their upbringing is such that the Applicant's relationship with the children is not of significant consequence in determining their best interests for the purposes of the second Primary Consideration.

Effect of separation and ongoing contact

79. As the relationship between the Applicant and the children is limited to visits to see him in prison or detention, they have effectively been physically separated from him for all of their lives. If the Applicant were to leave Australia, the children would be able to visit the Applicant in China, albeit not as often, and continue to maintain contact with him via phone and other means of communication such as Skype. Having regard to paragraph 13.2(4)(d) the Tribunal finds that the children will not be significantly affected by their physical separation from the Applicant.

80. For the reasons above, that Tribunal finds that the relationship between the Applicant and the children is non-parental and insufficiently close for their best interests to be a relevant factor in the exercise of the discretion to revoke the Mandatory Visa Cancellation Decision.

81. Accordingly, on this Primary Consideration, the Best Interests of Minor Children in Australia affected by the Decision, the Tribunal makes a neutral finding. This approach was endorsed by the Full Court of the Federal Court in *Nigam v Minister for Immigration and Border Protection* [2017] FCAFC 127 at [43]-[44] in which Siopis, Griffiths and Charlesworth JJ adopted the approach of the High Court in *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203 at [70]:

> [43] … Paragraph 11.2 of Direction 65 does not require the Tribunal to make a binary choice as to what is in the best interests of the child. There may be cases in which, as the plurality [in *Uelese*] observed, the cancellation or refusal of a visa is neutral as far as the child is concerned. Insofar as the remarks are obiter, we respectfully agree with them and adopt them.
>
> [44] When a neutral conclusion is lawfully arrived at on the evidence, the primary consideration of the best interests of the child will, strictly speaking, weigh neither for nor against the refusal of the visa.

(3) The expectations of the Australian community

82. Paragraph 7(1) of the Direction provides guidance for decision-makers as to how the discretion under s 501 is to be exercised. A decision-maker, '*informed by the*

Principles in paragraph 6.3' must take into account the relevant Primary and other considerations.

83. The third Primary Consideration emphasises the relevance of the expectations of the Australian community in the exercise of the discretion. Paragraph 13.3(1) provides :

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

The Effect of this Primary Consideration on the Exercise of the Discretion

84. In *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, Justice Mortimer said that this description of community expectation in paragraph 13.3(1) operates as a 'deeming provision' and is inevitably adverse to any applicant:

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

expectations, whether or not there is any objective basis for that belief. That is the structure of this part of the Direction.

[77] … It was inevitable that this consideration would weigh against revocation: that is what it is intended to do (see *Uelese* [2016] FCA 348; 248 FCR 296 at [64]-[66]).

85. The Applicant's representative drew the Tribunal's attention to a number of Tribunal decisions which have questioned the assumption contained in Justice Mortimer's observations that community expectation will always dictate non-revocation of a cancellation decision. In *Ayache and Minister for Immigration and Border Protection (Migration*) [2018] AATA 310 Deputy President Forgie said:

[65] …To assume that the expectations of the Australian community will always be a consideration that will weigh against a visa applicant who has failed to pass the good character test does not, I respectfully suggest, sit comfortably with the discretionary nature of the power given to the Minister. The Minister himself recognises in the Principles set out in paragraph 6.3 of Direction No. 65 that a discretion is involved. He talks in terms of what should generally be expected as in paragraph 6.3(3), of there being some circumstances in which the harm that would follow is so great as to be unacceptable even if there are other countervailing considerations paragraph 6.3(4). These are but two of the seven principles in paragraph 6.3 but each of the seven shows that what may be, and what may not be, acceptable to the Australian community is a matter of balance to be considered in each case.

[66] It follows that I respectfully suggest that the statement made by Mortimer J in YNQY that "It was inevitable that this consideration [being that in [13.3]] would weigh against revocation; that is what it is intended to do …" is too broadly stated. It may be that it has that effect in some cases but I respectfully suggest that the way in which it is framed overlooks that paragraph 13.3, and so paragraphs 11.3 and 13.3 are drafted in terms that recognise that a decision-maker has discretion to come to a conclusion about the expectations of the Australian community in a particular case. It requires the decision-maker to have regard to the Government's views but they are views that, as I said, allow regard to be had to the whole of the circumstances.

86. In *Murphy v Minister for Immigration and Border Protection* [2018] AATA 150 Senior Member Taylor referred to what he described as the 'prescriptive nature of the concept of community expectation' in paragraph 13.3 emphasised in Justice Mortimer's observations in *YNQY* and suggested that when the paragraph is considered as a whole, 'it does not dictate an inflexible conclusion that community expectation will always call for non-revocation' at [58].

> [58] When cl 13.3 is read as a whole, and applied in a context where all relevant considerations required to be taken into account (see cl 8(1)), it does point to the likelihood, but it does not dictate an inflexible conclusion, that community expectation will always call for non-revocation. Nor is to be taken as elevating community expectation to the status of a determinative consideration. It remains as a primary consideration, to which appropriate weight must be given. But what constitutes appropriate weight, and whether that weight is a determinative factor in the exercise of the revocation discretion, will depend on the totality of the relevant circumstances.

87. The third Primary Consideration, Expectations of the Australian Community, is one to which appropriate weight must be given in the exercise of the discretion. The Tribunal finds that it is for the Tribunal to determine the weight to be attached to this consideration and it cannot be regarded as inevitably favouring non-revocation.

88. Having regard to paragraph 13.3 and informed by the Principles in paragraph 6.3, the Tribunal must have regard to whether the offences for which the Applicant has been convicted would create a community expectation favouring non-revocation of the Mandatory Visa Cancellation Decision.

89. An appropriate consideration of this Primary Consideration requires an objective analysis of the Applicant's offending with regard to their individual circumstances and the nature and consequences of their criminal offending. Of relevance are the Principles in paragraph 6.3 of the Direction:

- the Australian community expects the Australian Government to cancel the visas of non-citizens who commit serious crimes (paragraph 6.3(2));

- non-citizens who commit serious crimes, including of a violent or sexual nature, should generally expect to forfeit the privilege of staying in Australia (paragraph 6.3(3));

- in some circumstances if the offence were to be repeated the consequences would be so serious that any risk of similar conduct is unacceptable (paragraph 6.3(4));

- a higher degree of tolerance of criminal or other serious conduct may be afforded to a long term non-resident (paragraph 6.3(5)); and

- the length of time a non-citizen has been making a positive contribution to the community (paragraph 6.3(7))

90. In *Labi and Minister for Immigration and Border Protection* [2016] AATA 316 at [60], Deputy President McCabe observed in relation to this Primary Consideration:

> The Direction points out the Australian Community expects non-citizens will obey Australian laws while they remain in this country. But the Direction implicitly acknowledges the community is not completely intolerant of risk: rather, it will have regard to the nature of the character concerns or offences and make a reasonable judgment. In short, one can rely on the Australian community, when fully informed of the facts, to demonstrate some perspective and settle on an outcome that is proportionate.

91. A similar formulation of the approach was expressed in *Waits and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] AATA 1336 at [36]:

> … the expectations of the Australian community should be taken to be the expectations of the informed, reasonable member of the Australian community, rather than a member of the Australian community who is only prepared to consider the punitive aspects of the power under s 501.

92. The Tribunal notes Deputy President Forgie's comments in *Rabino and Minister for Immigration and Border Protection* [2016] AATA 999 at [68] that "*the Principles are directed to whether the Australian community is prepared to give the person another opportunity to remain in Australia.*" That assessment should be made on the basis of

the individual circumstances of each case and considered in light of the purpose of the legislation.

93. The Tribunal also notes Deputy President McCabe's comments in *Do and Minister for Immigration and Border Protection* [2016] AATA 390 at [23]:

> A decision-maker is, to some extent, required to guess at the community's expectations... As I begin my deliberations, I assume the Australian community would be fair-minded and mature... The community would certainly not be vengeful. The applicant has already been punished for his offence, and the community would not want to see visa cancellation misused to inflict further punishment. I would also expect the community to be conscious of the length of time the applicant has lived in Australia and other circumstances which might assist the community to form a proper judgment about the individual and what should be done.

94. In many cases the possession and sale/supply of methylamphetamine would be sufficient for the Australian community to expect the cancellation of the visa of the offender. In the case of the Applicant, many of the Principles contained in paragraph 6.3, which must inform the Primary Considerations, are applicable to his circumstances.

95. Having regard to paragraph 6.3(2) and 6.3(3), the offences the Applicant committed, particularly the Principal offence, are serious but they did not involve violent or sexual crimes nor were they perpetrated against vulnerable members of the community. Whereas the Applicant had offended prior to the Principal offence, this was the first offence for which he received a sentence of imprisonment.

96. Having regard to paragraph 6.3(5) the Tribunal notes that the Applicant has been resident in Australia for almost thirty years, arriving here as a student in 1989. The Applicant came to Australia alone with the support of his parents at the age of 20 to undertake English language study. He worked as a kitchen hand and then chef in a number of Chinese restaurants in Sydney for a period of 15 years until his sentence for the Principal offence in 2008. The Applicant has lived in this country for almost three decades, and for most of his adult life. The length of time the Applicant has been living in Australia and the circumstances under which he migrated here are factors that support a finding that there is a higher level of tolerance by Australia for his serious

criminal conduct than there would be for a non-citizen who has lived in the community for a much shorter period of time.

97. The length of time the Applicant has been in Australia makes relevant paragraph 6.3(7). Prior to his incarceration in 2008 he contributed to the community and paid taxes through his employment as a chef for a period of 15 years. The Tribunal finds that a fair minded member of the community would recognise that the Applicant committed one particularly serious offence for which he has served a substantial term of imprisonment, and that his behaviour in prison and VIDC indicate that he has addressed the causal factors that led to his criminal offending, namely drug and gambling addictions. The fair-minded Australian would not want to see the cancellation of the Applicant's visa used as an opportunity to inflict further punishment.

98. Having regard to paragraph 13.3 informed by the Principles in paragraph 6.3 the Tribunal finds that the Applicant's relatively few, albeit serious, offences, the period he has spent in prison, the length of time he has spent in Australia, and his contribution to the community prior to his custodial sentence, the Australian community's expectation would be that the Applicant be given a second chance.

99. The Tribunal finds that this third Primary Consideration weighs marginally in favour of revocation of the Mandatory Visa Cancellation Decision.

Other considerations

100. While the *Primary considerations* carry particular weight, the Direction acknowledges at paragraph 14 that *Other considerations* must be taken into account by the decision-maker where relevant.

101. The five *Other considerations* are summarised in paragraph 14(1):

(a) International non-refoulement obligations;
(b) Strength, nature and duration of ties;
(c) Impact on Australian business interests;
(d) Impact on victims;
(e) *Extent of impediments if removed*.

(a) International non-refoulement obligations

102. The Applicant has made claims in his evidence which might give rise to international *non-refoulement* obligations.[7]

103. Paragraph 14.1(3) of the Direction recognises that claims that may give rise to international *non-refoulement* obligations can be raised by the non-citizen in a request to revoke the mandatory cancellation of their visa under s 501CA(4) of the Act.

104. Paragraph 14.1(4) provides that in such circumstances, if the non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary for the decision-maker to make a determination in relation to the international *non-refoulement* obligations.

> *Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked.*

105. Section 501E(1) prevents an application for a visa in the migration zone in circumstances where the Minister has made a decision to cancel a visa and the decision has not been revoked. However section 501E(2) provides that section 501E(1) does not prevent the non-citizen making an application for a protection visa.

106. The statutory effect of ss 501E(1) and 501E(2) of the Act is that the Applicant will be able to make an application onshore for a protection visa. It would appear therefore, having regard to paragraph 14.1(4) that it is unnecessary for the Tribunal to determine whether *non-refoulement* obligations are owed to him for the purposes of determining whether the Mandatory Visa Cancellation decision should be revoked.

107. In the recent decision in *QSBL and Minister for Home Affairs* [2018] AATA 2074 (2 July 2018) the Senior Member Dr Evans found that although paragraph 14.1(4) of Direction

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[7] Applicant's statement dated 8 July 2018 [21]-[30] and Applicant's statement dated 9 July 2018 [2]-[10].

no. 65 provides that it is 'unnecessary' to determine whether *non-refoulement* obligations are owed to the non-citizen for the purposes of considering whether the cancellation of their visa should be revoked if the Applicant can make an application for a protection visa, a contrary view was adopted by a majority of the Full Court of the Federal Court in *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 ("*BCR16*") in which the majority Bromberg J and Mortimer J stated (at 48):

> That returning an individual to a country where there is a real possibility of significant harm, or a real chance of persecution, may contravene Australia's non-refoulement obligations, is also a matter to be weighed in the balance of deciding whether to revoke a mandatory visa cancellation.

108. The effect of the majority's decision in *BCR16* was discussed by Deputy President Kendall (as he then was) in *HSKJ and Minister for Immigration and Border Protection* [2017] AATA 1802 ("*HSKJ*") who stated (at 87 and 88):

> [87] Until recently, the Tribunal would have found that, because of his ability to apply for a Protection visa, the Tribunal was not required to assess any non-refoulement obligations owed to HSKJ. It was generally accepted that because Direction No. 65 specifically states that it is not necessary to determine a non-refoulement issue in circumstances where an applicant can apply for a Protection visa, the Tribunal would normally rely on any non-refoulement assessment being made by another body specifically charged with determining the validity of a Protection visa claim.
>
> [88] That position is now disputed, however, because of the recent decision of the Federal Court in BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96 ("BCR16"). Following BCR16 (now on appeal to the High Court but which is binding on this Tribunal) the Tribunal is required to assess (to the extent that it can on the evidence) any type of harm that might arise to him should HSKJ be deported to Iraq. This is so regardless of whether an applicant specifically frames his risk of harm as a non-refoulement issue.

109. In light of these authorities, the Tribunal is required to consider whether the Applicant's claims of a risk of harm if he were returned to China would constitute another reason why the cancellation decision should be revoked. However, before the Tribunal

undertakes this consideration, it is relevant to have regard to the following comments of Deputy President Kendall in *HSKJ* (at 89-91):

> [89] In assessing any non-refoulement obligations, the Full Court has previously noted that the level of analysis required by the Tribunal is less than that required in assessing a claim for a Protection visa. Relevantly, in *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83 in relation to a s 501 refusal, the Court found (at [28]):
>
> > An exercise of the statutory power conferred by s 501 of the Migration Act does not require the same analysis to be undertaken as would be required if an application for a protection visa is made and s 36 is invoked. Nor is that analysis to be undertaken even where the Minister does take into account Australia's non-refoulement obligations.
>
> [90] Nor, it should be stressed, *could* the Tribunal engage in the sort of evidentiary analysis that would be undertaken if a Protection visa claim were examined elsewhere by those specifically charged with analysing a Protection visa claim. Normally, when a protection visa application is determined, the decision maker has access to an extensive interview with the applicant and, importantly, a detailed International Treaties Obligations Assessment ("ITOA"). That is not the case here. Before this Tribunal, in an expedited hearing that requires the Tribunal to make an assessment in a very short period of time, the Tribunal does not have the benefit of an ITOA or the full body of evidence one would expect in a protection visa hearing.
>
> [91] In these circumstances, the Tribunal can only assess the often limited evidence before it in determining any risk of harm to HSKJ. This is arguably less than ideal given the possible negative consequences for an applicant in this context.

110. This is a case where there is limited evidence regarding the risk of harm to the Applicant in China. The evidence before the Tribunal is that the Applicant fears being prosecuted for being a part of organised drug activities, particularly his role in drug trafficking for which he was not charged or punished in Australia. His evidence to the Tribunal was that he was involved for several years in the illegal activities of the Hong Kong-based international organised crime group, Sin Wah, which sourced prohibited

drugs from China. The Applicant's SFIC elaborates on these claims based on provisions of the *Criminal Law of the People's Republic of China* and information issued by the Department of Foreign Affairs and Trade (DFAT) in December 2017.

111. Based on the limited evidence before it, the Tribunal is unable to make a finding as to whether *non-refoulement* obligations are owed to the Applicant. Accordingly, this Other consideration has not been accorded weight in determining the exercise of the discretion.

(b) Strength, nature and duration of ties

112. Paragraph 14.2(1) of the Direction sets out two main factors to be considered in assessing this consideration:

> *… Reflecting the Principles at 6.3, decision-makers must have regard to:*
>
> *(a) How long the non-citizen has resided in Australia, including whether the non-citizen has arrived as a young child, noting that:*
>
> *(i) less weight should be given where the non-citizen began offending soon after arriving in Australia; and*
>
> *(ii) more weight should be given to time the non-citizen has spent contributing positively to the Australian community.*
>
> *(b) The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of non-revocation on the non-citizen's immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely).*

Length of time resident in and positive contribution to Australia

113. The evidence before the Tribunal is that the Applicant first came to Australia on 3 March 1989 [GD, p 142] and has resided here for almost 30 years. During this period he has made some short trips overseas [GD, pp 142-144]. In the first years of his residency in Australia, the Applicant undertook English language study and then commenced employment in various positions in Chinese restaurants as a kitchen hand and chef for about 15 years [RTB, p. 152] thereby contributing positively to the Australian economy and community. The Applicant did not commence criminal offending until a decade after his arrival in 1999, and he was sentenced to a term of

imprisonment in 2008. He has remained incarcerated in prison or immigration detention for more than a decade.

114. Having regard to the factors in paragraph 14.2.1(a) and the evidence before it, the Tribunal finds that the length of time the Applicant has spent in Australia and his contributions to the Australian economy and community prior to his serious criminal offending and incarceration support a finding of the strength and duration of the Applicant's ties to Australia.

Strength, nature and duration of any family or social links

115. The evidence before the Tribunal is that the Applicant has substantial family ties to Australia, particularly with his partner and mother, both of whom are Australian citizens.

116. The evidence is clear that the impact on his family of the Applicant returning to China will be significant, particularly the emotional hardship they will endure and the impact on their lives. His partner and mother will undoubtedly be detrimentally affected by the physical separation between them and the Applicant, and the loss of the opportunity to re-establish their relationships with him after his decade in prison.

117. The evidence before the Tribunal is that the Applicant has an ongoing relationship with his partner with whom he has been 'in a close personal and loving relationship' for a substantial period of his life, and with whom he has been in a 'committed and exclusive relationship' since 2014. He also has a relationship with her children, both of whom are Australian citizens.

118. In her statement dated 8 July 2018 the Applicant's partner said:

> If my partner is removed to China I would be absolutely devastated. I also understand that my two children would become emotionally distressed and upset at the prospect of my partner being removed overseas.
>
> …
>
> At this stage I am not minded to leave Australia and join my partner in China. Both of my two children are Australian citizens. I wish for my children to be raised in a free country like Australia …

119. The evidence before the Tribunal is that should the Applicant be able to remain in Australia he will live with his mother, partner and her two children at their family home. The Applicant's mother migrated to Australia and became an Australian citizen in June 2015. She came here to support her son during his trial in 2008 and migrated permanently following his conviction for the Principal offence. She has resided with the Applicant's partner since her arrival, including the period during which the Applicant's partner was in a relationship with the father of her children. The Applicant's mother is very close to the children who call her 'Grandma' and is very involved in their care and upbringing. She frequently visited and spoke to her son during his incarceration during the past decade. The evidence before the Tribunal is that she has significant health issues. In February 2017 she was diagnosed by a psychologist to be suffering Severe Major Depressive Disorder and she underwent heart surgery in November 2017.

120. In a letter dated 16 September 2017, the Applicant's mother wrote about the impact on her should her son be unable to remain in Australia:

> I am a single mother of aged (sic) 70. My husband passed away in 1998 during employment. The passing of my husband caused very serious emotional impact on my son. I only have a son left. I do not have any close family support. He is very important to me … Once I knew about his charges, I came to Australia … I sold my only property in China and nothing left (sic). My main purpose for immigration to a new country is for the hopes that my son could return home after he has served his sentence.
>
> If my son were to be sent back to China I will be left in a very difficult position as I have given up my country to be a proud part of Australia. I have nothing left in China and unable to return.

121. There is no evidence to indicate that the Applicant's family would not be able to maintain regular contact with his family via phone and other forms of communication if he returns to China. The Respondent claims that if he is returned then the 'status quo' will prevail given that he has been separated from his partner and mother for more than a decade due to his incarceration and they have had limited one-on-one contact for this period.

122. Given the Applicant's mother's age and health conditions, she is most unlikely to be physically capable of visiting her son if he is returned to China. This will in effect mean that if the Applicant leaves Australia she will not have the opportunity to see him again, as he will be prohibited from returning here to visit her. The overwhelmingly negative effect on the Applicant's mother, an Australian citizen, is a factor that weighs strongly in favour of revocation of the cancellation.

123. Having regard to the factors in paragraph 14.2.1 and the evidence before it, the Tribunal finds that this consideration weighs strongly in favour of revocation of the Mandatory Visa Cancellation Decision.

(c) Impact on Australian business interests

124. Paragraph 14.3(1) of the Direction states:

> *(1) Impact on Australian business interests if the non-citizen's visa cancellation is not revoked, noting that an employment link would generally only be given weight where non-revocation would significantly compromise the delivery of a major project, or delivers an important service in Australia.*

125. The Applicant's employment prior to his incarceration in 2008 was working in the hospitality industry, principally as a chef in Chinese restaurants. There is no evidence of a relevant 'employment link' and the Applicant does not claim that any Australian business interests would be affected by his removal to China.

(d) Impact on victims

126. Paragraph 14.4(1) of the Direction states:

> *(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.*

127. The Tribunal finds that there is no evidence of any potential impact on the victims of the Applicant's criminal activity of a decision to revoke the Mandatory Visa Cancellation Decision.

(e) Extent of impediments if removed from Australia/not permitted to return

128. The Direction states in paragraph 14.5(1) that:

(1) The extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

(a) The non-citizen's age and health;

(b) Whether there are substantial language or cultural barriers; and

(c) Any social, medical and/or economic support available to them in that country.

129. The evidence before the Tribunal is that the Applicant speaks fluent Mandarin and spent the first twenty years of his life in China. He is 48 years of age and an experienced chef who is qualified to work in the hospitality industry as well as having other work skills obtained during his employment in NSW Correctional Centres.

130. The Applicant claims that he will face significant impediments if he is returned to China. His evidence is that has no family or friends in China, he will be alone, unable to re-establish himself or re-integrate into the community and gain employment.

131. In his Personal Circumstances Form the Applicant stated:

> The China I knew has changed so much in the 28 years I have been in Australia. I wouldn't know the country, people. I have no family that I have kept in contact with, no support, no employment options.

132. The Applicant gave evidence that he requires knee surgery for an ailment recently diagnosed by a doctor at VIDC. He claims that without this surgery he will not be fit to work in China. However although he is a Chinese citizen, he claims he will not have access to government medical services or economic support for reason that the provision of services and support are tied to the *hukou* system. He claims that having been absent from China for three decades he will be unable to obtain a *hukou* permit and have access to the same benefits that are generally available to other Chinese citizens. The Applicant provided evidence to the Tribunal in relation to the *Hukou* (Household Registration) System including a DFAT report that includes information in relation to the granting of *hukou* permits. There is insufficient evidence before the Tribunal for it to make a firm finding in relation to whether the Applicant will be granted or reissued with a *hukou* permit upon return to China, however there is uncertainty about whether he will have access to government health and welfare benefits.

133. The Tribunal finds that the obstacles the Applicant may experience in finding employment and reintegrating into the community on his return are real but are not insurmountable. The uncertainty surrounding the Applicant's access to health, welfare and other Government services in China means that it is unclear whether he will have similar entitlements as other Chinese citizens in the same position. The Tribunal finds that the impediments the Applicant may face on return to China weigh marginally in favour of revocation of the Mandatory Visa Cancellation Decision.

CONCLUSION

134. There is no doubt that on the basis of his offending, the Applicant does not pass the 'character test' as defined in s 501(6) of the Act. In considering whether there is another reason to exercise the discretion afforded by s 501CA(4) of the Act to revoke the Mandatory Visa Cancellation Decision, the Tribunal has had regard to the *Considerations* referred to in the Direction.

135. The Tribunal finds that *Primary Consideration* 1, the Protection of the Australian Community, weighs in favour of non-revocation of the Mandatory Visa Cancellation Decision. The Applicant's offences were serious and by their very nature are the type of offences which have significant impacts on victims, including vulnerable members of the community .The Applicant regrets his past criminal behaviour and has an appreciation of its impact and consequences. He appears to have addressed the underlying causes of his offending and taken positive steps to equip himself with knowledge and skills. The risk to the community of him re-offending, while not remote, is sufficiently low as not to be unacceptable. As this Primary Consideration cannot be favourable to the Applicant, it weighs on balance marginally in favour of non-revocation.

136. *Primary Consideration 2,* the Best Interests of Minor Children*,* is not relevant in determining the exercise of the discretion in relation the Mandatory Visa Cancellation Decision. The Applicant does not play a parental role in relation to the children nor is he involved in their daily lives or upbringing. Accordingly, as the finding of the Tribunal on this *Primary Consideration* is neutral, it weighs neither in favour nor against revocation of the Mandatory Visa Cancellation Decision.

137. *Primary Consideration 3,* Expectations of the Australian Community, weighs marginally in favour of revocation of the Mandatory Visa Cancellation Decision as a fair minded Australia would likely find that having regard to the Applicant's criminal offending and his individual circumstances, he should be given a second chance.

138. In regard to the *Other Considerations*, for the reasons detailed above the strength, nature and duration of the Applicant's ties to Australia, particularly his relationship with his partner and mother, weigh strongly in favour of revocation of the Mandatory Visa Cancellation Decision. The extent of the impediments the Applicant will face if he is removed from Australia weigh marginally in favour of revocation.

139. The Tribunal finds that *Primary Consideration 1* weighs in favour of non-revocation whereas *Primary Consideration 3* weighs in favour of revocation of the Mandatory Visa Cancellation Decision. Two of the *Other Considerations* weigh in favour of revocation. Accordingly, pursuant to s 501CA(4)(b)(ii) of the Act, the Tribunal finds that there is another reason to revoke the Mandatory Visa Cancellation Decision

DECISION

140. The reviewable decision made on 26 April 2018, being the decision of the delegate of the Minister for Home Affairs not to revoke the cancellation of the Applicant's Class BB Subclass 155 Five Year Resident Return visa, is set aside.

141. In substitution, the decision to cancel the Applicant's Class BB Subclass 155 Five Year Resident Return visa, made on 8 February 2017, is revoked.

I certify that the preceding 141 (one-hundred-forty-one) paragraphs are a true copy of the reasons for the decision herein of Senior Member Linda Kirk

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

Associate

Dated: 20 July 2018

Date of hearing:	**13 July 2018**
Counsel for the Applicant:	**Mr J Donnelly, Latham Chambers**
Solicitors for the Applicant:	**Mr M Bellingham, Jack Rigg Solicitors**
Solicitors for the Respondent:	**Mr A Keevers, Sparke Helmore**