Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2018/4147**

Re: **DKXY**

APPLICANT

And **Minister for Home Affairs**

RESPONDENT

DECISION

Tribunal: **Senior Member K Raif**

Date: **10 October 2018**

Place: **Sydney**

The Tribunal affirms the decision of the delegate dated 18 July 2018, to not revoke the cancellation of the applicant's visa.

.....[SGD].....

Senior Member K Raif

CATCHWORDS

MIGRATION – Class CD Subclass 851 Resolution of status visa – mandatory cancellation – non-revocation – failure to pass the character test – Ministerial Direction No 65 – protection of the Australian community – expectations of the Australian community – international non-refoulement obligations – Ministerial Direction No 75 – protection claims – strength nature and duration of ties – hardship in the event of removal – North Korea – decision affirmed

LEGISLATION

Migration Act 1958 (Cth) ss 197C, 198, 499, 501, 501CA
Migration Regulations 1994 (Cth) Schedules 1, 4

CASES

Ali v Minister for Immigration and Border Protection [2018] FCA 650
BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96
Do and Minister for Immigration and Border Protection [2016] AATA 390
The Trustee for the Fuzzy Events Unit Trust v Minister for Home Affairs [2018] AAT 3273
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
Direction No. 75, Refusal of Protection visa relying on section 36(1C) and section 36(2C)(b)

REASONS FOR DECISION

Senior Member K Raif

10 October 2018

BACKGROUND

1. This is an application for review of the decision of the delegate of the Minister for Home Affairs ("the Minister") not to revoke the cancellation of a Class CD Subclass 851 Resolution of Status visa ("the visa") held by the applicant.

2. The applicant is a national of North Korea born in May 1967. The last substantive visa that was granted to the applicant was issued in April 2011. In August 2008 the applicant was convicted of an offence 'supply a prohibited drug' and was given a two year and three months term of imprisonment. In June 2015 the applicant was convicted of an offence 'supply prohibited drug' and was given a six year term of imprisonment.

3. On 17 May 2017 a decision was made to cancel the visa held by the applicant under s. 501(3A) of the *Migration Act 1958* (Cth) ("the Act") because it was determined that the applicant did not pass the character test. The applicant was invited, and made representations about the revocation of the decision to cancel his visa. On 18 July 2018 a decision was made under s. 501CA(4) not to revoke visa cancellation. This is the decision under review.

4. The issues before the Tribunal are:

   (a) does the applicant pass the character test, as defined by s. 501; and, if not,

   (b) is there another reason why the original decision should be revoked.

5. For the following reasons, the Tribunal has concluded that the decision not to revoke the cancellation of the applicant's visa should be affirmed.

RELEVANT LAW

6. Section 501(3A) of the Migration Act relevantly states:

The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) (paragraph (6)(e) (sexually based offences involving a child); and

(b) the person is serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory

7. Section 501CA(3) provides that as soon as practicable after making a decision under s. 501(3A) the Minister must, among other things, notify the person of the decision, provide particulars of relevant information and invite the person to make representations to the Minister, "*within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision*".

8. Section 501CA allows for a revocation of a decision under s. 501(3A) and relevantly states as follows:

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.

9. Section 501CA(4)(b)(ii) of the Act requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision. If the Tribunal is satisfied that the cancellation should be revoked following that evaluative exercise, the Tribunal must revoke the visa cancellation.

10. On 22 December 2014 the Minister issued *Direction No. 65 - Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* ("Direction 65") under s. 499 of the Act. Direction 65 is binding on decision-makers, including this Tribunal, performing functions or exercising powers under s 501CA of the Act.

11. Direction 65 sets out the principles that provide a framework within which decision-makers should approach their task of deciding whether to revoke mandatory cancellation decisions. These principles include (see cl 6.3 of Direction 65):

> *1 … 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… and will not cause or threaten harm to individuals or the Australian community.*
>
> *2 ...*
>
> *3 A non-citizen who has committed a serious crime, including of a violent or sexual nature ... should generally expect ... to 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 considerations may be insufficient to justify not cancelling or refusing the visa.*

12. In determining whether or not to revoke a mandatory cancellation decision, a decision-maker must take into account the considerations set out at Part C of Direction 65. Part C comprises of 'primary considerations' and 'other considerations'. The primary considerations which are set out in cl 13 of Part C of Direction 65 are:

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

(b) The best interests of minor children in Australia; and

(c) Expectations of the Australian community.

13. The other considerations which are set out of cl 14 in Direction 65 are:

(a) Australia's international non-refoulement obligations

(b) The strength, nature and duration of ties to Australia

(c) The impact on Australian business interests

(d) The impact on victims, and

(e) The extent of impediments if removed.

DOES THE APPLICANT PASS THE CHARACTER TEST?

14. The character test is defined in s. 501(6) of the Act. Relevantly, s. 501(6)(a) states that a person does not pass the character test if the person has a substantial criminal record, as defined in subsection (7). Section 501(7)(c) provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more or, under subsection (7)(d), the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more.

15. The applicant's National Police Certificate shows that the applicant had been convicted in June 2015 of an offence 'supply prohibited drug >= commercial quantity' and he was sentenced to a term of imprisonment of 6 years commencing in January 2014. In August 2008 the applicant was convicted of 'supplying a prohibited drug' and was sentenced to imprisonment of 2 years and 3 months.

16. The Tribunal finds that the applicant has been sentenced to terms of imprisonment of 12 months or more. He has a substantial criminal record as defined in s. 501(7)(c) and (d) of the Act. As the applicant has a substantial criminal record, he does not pass the character test. The applicant concedes that he does not pass the character test.

IS THERE ANOTHER REASON WHY THE ORIGINAL DECISION SHOULD BE REVOKED?

17. The applicant made a request for revocation of the cancellation decision on 1 June 2017. The Tribunal has considered the applicant's comments, in addition to the evidence subsequently provided to the Tribunal by the applicant and the respondent. The Tribunal's considerations are set out below with regard to the Direction 65.

Primary considerations

Protection of the Australian community

18. As noted above in paragraphs 2 and 15, in 2008 the applicant was convicted for supplying a prohibited drug and received a sentence of imprisonment of 2 years and 3 months. In 2015 the applicant was again convicted of supplying a prohibited drug and received a sentence of 6 years.

19. The applicant has been convicted of two drug related offences over a period of seven years. Having served more than a year in prison following the conviction in 2008 for supplying a prohibited drug, the applicant reoffended in 2015. In his written submission to the Tribunal the applicant states that on that occasion, he had supplied 385.3 grams of methylamphetamine. The applicant has also been convicted of driving offences, having received several fines in November 2004 and a good behaviour bond in February 2007.

20. The Tribunal considers the nature of the offending serious. The offences took place over a lengthy period of time. The two sentences indicate that the second offence was considered more serious by the court, with the applicant receiving a substantially lengthier sentence compared to the first conviction. The Tribunal finds that the frequency and cumulative effect of the applicant's criminal offending is a matter of serious concern. The nature and seriousness of his offending weighs heavily against him. The applicant would have recognised the significance of his offending and had the opportunity to reform following the earlier conviction. The applicant agrees in his written submission to the Tribunal that while not extensive, his offending is serious. The applicant also accepts that there was a general trend of increasing seriousness with respect to his criminality. The applicant agrees that cl. 13.1.1 of the Direction weighs against the revocation. The applicant also acknowledges that if he were to engage in further criminal conduct, this may result in harm to others.

21. The applicant claims that he changed as a result of his imprisonment. He states that he no longer uses drugs and the main reason for his past drug offences was to finance his own drug habit. The applicant states that he is remorseful about his past conduct and has reformed. The applicant relies on the psychiatric reports by Dr Furst and Dr Elliot which refer to the applicant overcoming his dependence on drugs, accepting responsibility for the offending behaviour and his expression of remorse.

22. Importantly, Dr Elliot states in his report of 25 September 2014 that the applicant “appears to have achieved psychological abstinence from methamphetamines with the enforced abstinence from the drug in a custodial sentence”. In the psychiatric report dated 28 February 2015 Dr Furst supports the applicant’s claim that his own use of methylamphetamine “probably contributed to the offences”, but also notes that “financial profit was probably the most significant motivating factor” [for the offences]. Dr Furst acknowledges that the applicant has accepted guilt and expressed remorse and appears

motivated to engage in appropriate drug and alcohol counselling and / or rehabilitation but concludes that the risks of reoffending are "probably moderate". Dr Elliot suggests outpatient drug and alcohol counselling to reinforce [the applicant's] resolve although there is no evidence before the Tribunal that such counselling was offered or undertaken.

23. The applicant also refers to the sentencing remarks which show that he had an insight into his condition and offending. The applicant states that during the lengthy period of his second incarceration, he did not have any positive results for the use of drugs and it was not considered necessary for him to undergo a rehabilitation program while in detention. The Tribunal acknowledges the Pre-Release report dated 29 October 2017 which confirms the applicant's evidence that there was no known drug use during detention. The applicant states that there were no incidents during his engagement in the community while he undertook study at TAFE. The Tribunal acknowledges that evidence.

24. The Tribunal is mindful, however, that the 2015 conviction resulted in the second period of incarceration for the applicant. He has previously served more than one year in prison and that did not appear to have any effect on the applicant's subsequent conduct. Importantly, the sentencing remarks of Ellis J in relation to the 2008 offence indicate that the applicant pleaded guilty and accepted responsibility for his offence. The applicant stated in oral evidence to the Tribunal that he was aware that what he was doing was wrong. Ellis J found the applicant to have good prospects of rehabilitation. Yet despite the claimed remorse and appreciation of the wrong-doing at the time of his first conviction, the applicant again engaged in criminal conduct in 2014.

25. The Tribunal considers it significant that in January 2009 the applicant was given a formal warning that further offending may affect his residence in Australia and the applicant had signed that document indicating his understanding of it. Despite that, the applicant reoffended in 2015. On his own evidence, he fully appreciated the criminal nature of his conduct.

26. In his submission to the Tribunal the applicant states that his present circumstances are different because he has spent a longer time in prison and also because he now understands the serious consequences of his visa being cancelled. The Tribunal acknowledges that the applicant has spent a longer time in prison on the second occasion and also that he engaged in courses that may not have been available to him during the

first period of imprisonment. It is difficult to state whether that would alter the applicant's behaviour in the future. As for the applicant's appreciation of the consequences, the Tribunal is of the view that he had fully appreciated the consequences of his conduct after receiving the warning in 2009 that his visa may be cancelled. The applicant's oral evidence to the Tribunal is that he was aware that the conduct he engaged in which led to his second conviction, was wrong.

27. The applicant claims that the risk of reoffending is negligible. The applicant argues that he had no incidents during detention and while he was attending a course at TAFE, where he interacted with the community. The Tribunal accepts that this is so. However, the Tribunal also acknowledges the respondent's submission that the applicant has had quite limited interactions with the general community since his second imprisonment and that the applicant's stated resolve not to use drugs has not been fully tested in the community. The applicant's access to drugs is likely to have been more limited in criminal and immigration detention compared to his residence in the community. It may be that the applicant will maintain his resolve and will not rely on drugs in the future but it is also possible, in the Tribunal's view and having regard to the applicant's past conduct and past undertakings, that he may resume the drug use.

28. The Tribunal does not consider the applicant's undertaking to reform, or his indication that he has reformed, to be persuasive. The Tribunal is not satisfied that the risk of reoffending is non-existent or negligible. The Tribunal finds that such a risk exists and it is greater than negligible.

29. Having regard to the serious nature of the applicant's past drug-related offences, the Tribunal finds that if the applicant were to reoffend, it may have a detrimental effect on members of the Australian community. That poses an unacceptable risk. The Tribunal finds that the risk to the Australian community, should the applicant re-offend, is significant, given the serious nature of the offences. The Tribunal has formed the view that the protection of the Australian community does not favour the revocation of the cancellation.

Best interests of minor children in Australia affected by the decision

30. There are no minor children in Australia affected by the decision.

Expectations of the Australian community

31. Clause 13.3 of the Direction makes it clear that the Australian community expects non-citizens to obey Australian laws while in Australia. Importantly, that clause also states that decision-makers should have due regard to the Government's views in this respect.

32. The applicant argues that the nature and extent of offending, while significant, is not the only consideration for the Tribunal. The applicant acknowledges the reasoning in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 but states that this decision was clearly wrong and should not be followed. The applicant argues that, having regard to the wording of Direction 65, and by reference to a number of Tribunal decisions, that other considerations can be taken into account. The applicant refers to *The Trustee for the Fuzzy Events Unit Trust v Minister for Home Affairs* [2018] AAT 3273, where Stevenson J found that a broader consideration of the applicant's circumstances is warranted under the Directions. In particular, the applicant argues that the totality of his circumstances must be considered for the purpose of this aspect of the Direction and that consideration of the expectations of the Australian community must be made by reference to the community that is 'fair minded and mature' (*Do and Minister for Immigration and Border Protection* [2016] AATA 390 at [23]) and an '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' (*Waits and MIMIA* [2003] AATA 1336 at [36]).

33. The Tribunal considers the reasoning in *YNQY* to be binding. However, the Tribunal is also of the view that Direction 65 allows for consideration of the broad range of the non-citizen's circumstances when assessing the expectations of the community.

34. The Tribunal has considered the totality of the applicant's circumstances. As noted above, the nature of the applicant's offending is serious and the convictions are multiple. While the Tribunal accepts that the Australian community may not be vindictive and would appreciate that the applicant has served his sentence and may expect the applicant to have a 'fair go', the Tribunal also places weight on the fact that the applicant had already been warned about the consequences of his conduct in January 2009. He was given a 'fair go' at that time, despite the earlier conviction for a serious crime, and no action was taken in relation to his visa. Despite his earlier offending, the applicant was given a

second chance and an opportunity to remain in Australia and to continue to contribute to the Australian community. The applicant continued to engage in criminal conduct, leading to the 2015 conviction. On his own evidence, he did so knowing that the conduct he engaged in was inappropriate and criminal.

35. Paragraph 6.3(2) provides that 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. In the Tribunal's view, the community expectation, in relation to the applicant's criminal conduct, would be that the applicant's visa should remain cancelled.

36. The Tribunal has given consideration to the applicant's circumstances in determining whether community expectations in relation to the applicant may favour his application to stay in Australia. The applicant has lived the majority of his life in Australia and has formed some ties in Australia. There is no documentary evidence before the Tribunal of the applicant's employment or his contribution through the payment of taxes but the Tribunal is prepared to accept that the applicant did engage in employment in the past and that he may have paid taxes, thus contributing to the economy. The Tribunal also acknowledges the difficult circumstances that the applicant claims led him to flee North Korea and subsequently China. The Tribunal acknowledges the applicant's evidence that he was concerned about his family and their safety and the effect it has had on his health and well-being.

37. The Tribunal considers that there are some factors which weigh in the applicant's favour when considering community expectations. Despite these, the Tribunal is of the view that the Australian community does not expect people to repeatedly engage in serious criminal behaviour. This is particularly so when the applicant had already been warned that his visa may be cancelled and he had been given an opportunity to remain in Australia despite his earlier offences. He was fully cognisant of the consequences of his conduct and expectations of the community in relation to his conduct.

38. The applicant also submits that the community expects visa holders to remain in Australia for the duration of their visas. In this case, the applicant held a permanent visa. That may be the case but once the applicant's visa is cancelled, he is no longer a holder of a visa and can no longer have an expectation of remaining in Australia unless he is granted

another visa. Even though the visa the applicant held was a permanent visa, there are several provisions in the Act that may lead to the cancellation of such a visa. Clause 6.3(3) of Direction 65 states that a non-citizen who has committed a serious crime... "should generally expect ... to forfeit the privilege of staying in Australia".

39. The Tribunal accepts that the community may favourably view the applicant's personal circumstances, including the length of his residence in Australia and his actions in settling into the Australian community, being self-reliant, as well as his angst at losing his family. However, the Tribunal finds that the applicant's criminal history would not meet Australian community expectations. The Tribunal does not consider that the Australian community would expect the applicant to hold a visa in circumstances where he had committed an offence, expressed remorse about his conduct and was warned about the consequences of future misconduct but continued to offend. The Tribunal finds that the applicant's conduct does not meet Australian community expectations.

Other considerations

International non-refoulement obligations

40. In making the decision, the delegate took the view that the applicant can apply for a protection visa in Australia. The applicant argues that he cannot apply for a permanent protection visa because he previously held a temporary protection visa and, in any case, if such an application is made, his visa may be refused on character grounds. The applicant states that on the reasoning in *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96, the Tribunal is required to turn its mind to any international non-refoulement obligations that might arise if an applicant were returned to his home country because if the applicant were to apply for another visa, there is no obligation on the decision-maker to consider non-refoulement obligations before undertaking a character assessment. The Minister refers to *Direction No. 75 – Refusal of protection visas relying on section 36(1C) and section 36(2C)(b)* ("Direction 75") made under s. 499 of the Act, which came into effect on 5 September 2017 after, and presumably in response to, the judgment in *BCR16*. Part 2 of Direction 75 provides in part as follows:

> *In considering elements of the Protection visa assessment for applicants who raise character or security concerns, decision-makers are to follow the order set out below.*
>
> *1 The decision-maker must first assess the applicant's refugee claims with reference to section 36(2)(a) and any complementary protection claims with*

> *reference to section 36(2)(aa) before considering any character or security concerns. Where a decision-maker finds the claims do not meet the refugee or complementary protection criteria, the decision-maker must refuse to grant the visa.*

41. In his supplementary written submissions to the Tribunal the applicant argues that Direction 75 is invalid. However, this is not a matter to be determined by the present Tribunal.

42. The Tribunal accepts that the applicant is precluded from applying for a permanent protection visa by Item 1401(3)(d) of Schedule 1 to the *Migration Regulations 1994* (Cth). However, the applicant concedes that he would be eligible to apply for a Class XD Temporary protection visa or a Class XE Safe Heaven Enterprise Visa (SHEV). In light of Direction 75, the Tribunal finds that if the applicant were to make an application for a protection visa or a SHEV, his protection claims would be assessed before a character assessment is undertaken.

43. The applicant argues that if he were to make such an application, his application may be refused on character grounds, for the purpose of Public Interest Criterion 4001 (Item 4001 of Schedule 4 to the *Migration Regulations 1994* (Cth)) or s. 501 of the Act.

44. The circumstances of the present case are not dissimilar to those considered by the Federal Court in *Ali v Minister for Immigration and Border Protection* [2018] FCA 650. Flick J considered the reasoning in *BCR16* and the application of Direction 75. In considering the possibility that a future application may again be refused under s. 501 of the Act, His Honour stated at [33].

> *The prospect that future decision-making may confront the Minister with difficult choices, it is respectfully considered, cannot presently impact upon the present exercise of the power conferred by s 501CA(4). No matter how real the prospect may be of future decisions being impacted upon by the adverse assessment made by the Assistant Minister on 25 October 2017 for the purposes of s 501CA(4)(b)(i), the power exercised on that date was to be exercised – and was in fact exercised – by reference to the facts and circumstances then prevailing.*

45. Thus, while the Tribunal acknowledges the applicant's submission that there is at least a possibility that a future visa application may be refused on character grounds, this is a decision that will be made in the future in the context of such an application and in light of the circumstances existing at that time.

46. In reaching this conclusion, the Tribunal acknowledges the applicant's argument in his supplementary submissions that many other Tribunal decisions have not followed *Ali* and have assessed non-refoulement obligations.

47. The Tribunal finds that, for the purpose of the present decision, Australia's non-refoulement obligations would not be breached as a result of the cancellation not being revoked because the applicant has the opportunity to make another visa application which would allow for the assessment of his claims and Australia's obligations.

48. The Tribunal acknowledges, and accepts the applicant's submission, that his circumstances, including the consequences of the cancellation and possible removal, and his claimed fear of harm, must nevertheless be considered in the context of the discretionary considerations. These matters are addressed elsewhere in this decision.

49. However, if the Tribunal is wrong in this determination and if there is a broader obligation for the Tribunal to consider non-refoulement obligations that may arise as a result of cancelling the visa, the Tribunal has considered whether such obligations arise and the impact of such obligations.

50. The applicant's claims in relation to his fear of harm are minimal. He provided a statement in which he has, with some brevity, outlined the circumstances of his departure from North Korea. These are not supported by any independent and probative documentary evidence. The applicant presented a number of country reports but these do not necessarily deal with the applicant's particular circumstances. The applicant has not presented satisfactory evidence that at present he continues to be of adverse interest to the authorities in North Korea or that he will be of interest to the authorities in the future. There is insufficient evidence, in the Tribunal's view, to enable the Tribunal to be satisfied that protection obligations arise at present.

51. Nevertheless, the Tribunal acknowledges that the applicant has previously held a temporary protection visa. A criterion of that visa was that the applicant be a person to whom Australia owed protection obligations under the Convention relating to the Status of Refugees, as amended by the 1967 Protocol relating to the Status of Refugees. The grant of the visa signifies an acceptance that the applicant may be at risk of harm upon return to his home country.

52. For the purpose of this review, the Tribunal accepts that the applicant's home country is North Korea. The respondent submits that the applicant may be eligible to travel to South Korea, although he has not made any inquiries in relation to this, and has taken no steps to acquire South Korean nationality. The Tribunal notes that there is nothing at present to indicate that the applicant does have a right to enter and reside in South Korea. Even if he may be able to acquire such a right in the future, it is likely to be dependent on a number of factors which may include consideration of the applicant's criminal convictions. There is no guarantee that the applicant will be granted the right to enter and reside in South Korea. In the Tribunal's view, the mere possibility to acquire such a right in the future is not sufficient.

53. Giving the applicant the benefit of the doubt, and only for the purpose of the present application, the Tribunal is prepared to accept that the applicant may have a genuine fear of returning to his home country. The Tribunal accepts, for the purpose of this review only and without a thorough assessment of the applicant's claims, that there may be some risk that the applicant may be harmed upon return to North Korea because of his past activities. For these reasons, the Tribunal accepts that Australia may owe protection obligations to the applicant and that Australia's non-refoulement obligations are engaged. This provides a strong reason in favour of revoking the cancellation.

The strength, nature and duration of ties to Australia

54. The applicant has been living in Australia for over twenty years. He refers to his employment in Australia and although he presented no documentary evidence of such employment, the Tribunal accepts that the applicant would have been employed in the past. The applicant refers to his past marriages but it does not appear that he has family in Australia. There is little evidence of other social, family or community ties in Australia. The Tribunal has formed the view that the applicant's ties to Australia are limited, despite the duration of his stay in Australia.

Impact on Australian business interests

55. There is no evidence that Australian business interests would be adversely affected if the cancellation is not revoked.

Impact on victims

56. There is no information before the Tribunal about the impact of a decision not to revoke the cancellation on members of the Australian community including victims of the applicant's criminal behaviour and family members or victims.

Extent of impediments if removed

57. The respondent submits that the applicant may be removed to South Korea, rather than North Korea but as noted above, there is nothing to indicate that at present, the applicant has a right to enter and reside in South Korea. At best, he may seek to acquire such a right in the future but there is no probative evidence that he will be granted the right to enter South Korea. There is no absolute right for the applicant to obtain residence rights in South Korea. Any such rights will be subject to legal and policy requirements in South Korea and it is not established that the applicant will necessarily meet those requirements. In such circumstances, the Tribunal cannot consider the applicant's removal to South Korea as a likely option and must consider the possibility that the applicant would be removed to North Korea.

58. The applicant has been living in Australia for over twenty years and is settled in Australia. Removing him from Australia would remove the applicant from the surroundings, culture and way of life that he has become familiar with and accustomed to. He may lose whatever entitlements he has acquired as a result of his residence in Australia. He has not lived in North Korea for about thirty years and the Tribunal accepts that it may be difficult for the applicant to re-establish himself in his home country given the length of time he has spent outside of this country, as well as the general situation in the country.

59. The Tribunal also accepts that the applicant may have a genuine fear of returning to North Korea. The applicant presented various submissions and country information relating to North Korea. He states that he may be subjected to harm if returned to North Korea. As the applicant's claims had been accepted in the context of an earlier application for a protection visa, and it was found that Australia owed protection obligations with respect to the applicant, the Tribunal is prepared to accept that there is a risk that the applicant may be harmed if returned to North Korea. The Tribunal accepts that if that is to occur, there will be significant impediments to the applicant if he is removed.

60. The applicant claims that he cannot be removed to North Korea and if his visa is cancelled, he may be subject to indefinite detention as an unlawful non-citizen. If Australia's non-refoulement obligations are engaged, it may be that it is 'not practicable' for the applicant to be returned to North Korea, for the purpose of s. 197C and s. 198 of the Act. The respondent notes that there are provisions in the Act which permit the Minister to intervene in certain circumstances and while this may occur, there is also a possibility that it will not. Unless the applicant is granted another visa, there is thus a real possibility that the applicant will be detained for a very lengthy period of time. The Tribunal accepts that this is likely to cause severe hardship to the applicant.

61. Overall, the Tribunal finds that the applicant will face significant impediments if he is removed to North Korea. This weighs heavily in favour of revoking the cancellation.

CONCLUSION

62. The Tribunal has considered the totality of the applicant's circumstances. The Tribunal acknowledges that the applicant has been living in Australia for many years, is settled in Australia and has formed some ties. The Tribunal accepts that if the applicant were to be removed to his home country of North Korea, there will be significant impediments to the applicant for a variety of reasons. The Tribunal places very significant weight on the fact that the applicant may face harm upon entering North Korea and that Australia's non-refoulement obligations are engaged. An alternative to the applicant's removal may be lengthy or even indefinite detention which would cause significant hardship to the applicant. The Tribunal considers there are strong reasons why the cancellation should be revoked.

63. Against these considerations, the Tribunal has formed the view that the protection of the Australian community does not favour the revocation. This is because the offences were multiple and of a serious nature. The Tribunal has determined that there is a risk of reoffending, which is greater than a negligible risk. The Tribunal also determined, having regard to the applicant's circumstances, that the expectations of the Australian community would not favour revocation. The Tribunal reached that conclusion while acknowledging that there are many factors which the community may view as being favourable to the applicant. The applicant claims that he should be given a second chance. The Tribunal places weight on the fact that he had been given a chance following his first conviction for

the drug offence and was warned about the possibility of his visa being cancelled. Neither that possibility, nor the applicant's expression of remorse and reform following the first conviction, precluded his re-offending.

64. The Tribunal has formed the view that the protection of the Australian community and community expectations outweigh other considerations. The Tribunal finds that the decision not to revoke the cancellation of the applicant's visa should be affirmed.

DECISION

65. For the reasons set out above, the Tribunal affirms the decision of the delegate of the Minister not to revoke the cancellation of the applicant's visa.

I certify that the preceding 65 (sixty -five) paragraphs are a true copy of the reasons for the decision herein of Senior Member K Raif

.....[SGD].....

Associate

Dated: 10 October 2018

Date(s) of hearing:	**25 September 2018 and 9 October 2018**
Date final submissions received:	**4 October 2018**
Counsel for the Applicant:	**Mr J Donnelly**
Solicitors for the Applicant:	**Mr A Leone**
Solicitors for the Respondent:	**Mr A Keevers - Sparke Helmore Laywers**