



Administrative  
Appeals Tribunal

**DECISION AND  
REASONS FOR DECISION**

Division: General Division

File Number(s): **2018/6360**

Re: **Chom Roeun Sam**  
APPLICANT

And **Minister for Home Affairs**  
RESPONDENT

**DECISION**

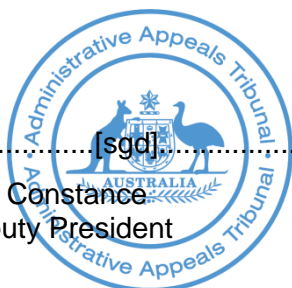
Tribunal: **Deputy President J W Constance**

Date: **18 January 2019**

Place: **Sydney**

1. The reviewable decision made 26 October 2018, being the decision of a delegate of the Minister administering the *Migration Act 1958* not to revoke the cancellation of Mr Sam's Class BC Subclass 100 Partner (Permanent) visa, is set aside.
2. In substitution, it is decided that the decision to cancel Mr Sam's Class BC Subclass 100 Partner (Permanent) visa, made 26 June 2017, is revoked.

.....  
[sgd]  
J W Constance  
Deputy President



## **CATCHWORDS**

*MIGRATION - mandatory cancellation of visa - failure to pass character test - substantial criminal record - drug trafficking - whether the discretion to revoke the cancellation should be exercised - Direction No. 65 - primary considerations - protection of the Australian community from criminal or other serious conduct - nature and seriousness of conduct - risk to the Australian community - best interests of minor children - expectations of the Australian community - other considerations - strength, nature and duration of ties to Australia - impediments if removed from Australia - decision set aside*

## **LEGISLATION**

*Migration Act 1958 (Cth)*

## **CASES**

*Marzano v Minister for Immigration and Border Protection [2017] FCAFC 66*

*YNQY v Minister for Immigration and Border Protection [2017] FCA 1466*

## **SECONDARY MATERIALS**

*Minister for Immigration and Border Protection (Cth), Direction [No 65] – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under section 501CA, 22 December 2014*

## REASONS FOR DECISION

**J W Constance**  
**Deputy President**

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### PART A: INTRODUCTION

1. Mr Sam is a 36-year-old citizen of the Kingdom of Cambodia.
2. In October 2008, Mr Sam married an Australian citizen. He first entered Australia in December 2009 on a Class UF Subclass 309 Partner (Provisional) visa. On 1 December 2011, Mr Sam was granted a Class BC Subclass 100 Partner (Permanent) visa.
3. On 22 January 2015, Mr Sam was sentenced to imprisonment for five years and ten months for importing a marketable quantity of heroin into Australia.<sup>1</sup> The non-parole period was set at three years and eleven months. He had been held in custody since his arrest on 14 July 2014.

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<sup>1</sup> Exhibit R2.

4. By reason of this sentence, on 26 June 2017 Mr Sam's visa was cancelled in accordance with subsection 501(3A) of the *Migration Act 1958* (Cth). I will refer to this cancellation as the *mandatory cancellation*.
5. On 26 October 2018, a delegate of the Minister administering the *Migration Act 1958* decided not to revoke the mandatory cancellation.<sup>2</sup> This decision was made on the basis that the delegate was satisfied that Mr Sam did not pass the character test set out in the *Migration Act 1958* (Cth) and that there was no other reason why the mandatory cancellation should be revoked. The decision of 26 October 2018, referred to as "*the reviewable decision*", is the subject of this application for review.
6. At the time of the hearing of this application, Mr Sam was being held in immigration detention.
7. For the reasons which follow, the reviewable decision will be set aside. In substitution, it will be decided that the cancellation of Mr Sam's visa is revoked.

#### **PART B: BACKGROUND**

8. Unless otherwise stated, the following findings of fact are based on the evidence of Mr Sam. I am satisfied that he was an honest witness who gave his evidence to the best of his recollection.
9. Mr Sam was born in a small rice-growing province in Cambodia in 1982. He had three siblings. After his father died (when Mr Sam was five or six years old), he and his mother worked to support the family. He would find and break up large rocks which his mother would sell to a building company. The family was poor.
10. Mr Sam's mother later re-married. The children did not relate well to their step-father and Mr Sam's younger brother ran away from home. Mr Sam found his brother four years later and persuaded him to return home. The brother again left home. He died of illness at age 23, which Mr Sam attributes to the unavailability of proper medical care in Cambodia.

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<sup>2</sup> Exhibit R1 at 7.

11. At the age of 16, Mr Sam moved into a Buddhist Temple where he lived for almost nine years, initially as a Monk Attendant and then for five years as a Buddhist Monk.
12. Mr Sam's formal education was limited.
13. There is one child of the marriage of Mr and Mrs Sam, a ten year-old son. Mrs Sam has five adult children and six grandchildren. They are all Australian citizens.

#### **Mr Sam's criminal record**

14. Mr Sam has no criminal convictions other than for the crime which he committed in July 2014.

#### **Warnings as to risk of visa cancellation**

15. Mr Sam was not warned as to the risk of his visa being cancelled prior to the mandatory cancellation as (apart from the offence of importing heroin) he had not engaged in any conduct which would have given rise to the possibility of a warning being given.

#### **Failure to pass the character test**

16. It is not in dispute that, by reason of his criminal record, Mr Sam does not pass the "character test" set out in the *Migration Act 1958* (Cth).<sup>3</sup>

### **PART C: THE RELEVANT LEGISLATION**

17. Subsection 501(3A) of the *Migration Act 1958* (Cth) provides:

*(3A) 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*

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<sup>3</sup> Applicant's Statement of Facts, Issues and Contentions filed 3 December 2018 at [8].

*(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.*

This mandatory cancellation decision is referred to later in the Act as “*the original decision*”.

18. Subsection 501(7)(c) provides:

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

*...*

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

19. Subsection 501CA(3) provides:

*(3) As soon as practicable after making the original decision, the Minister must:*

*(a) give the person, in the way that the Minister considers appropriate in the circumstances:*

*(i) a written notice that sets out the original decision; and*

*(ii) particulars of the relevant information; and*

*(b) 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.*

20. Subsection 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.*

21. The power of the Tribunal to review the decision to refuse to revoke the cancellation of Mr Sam’s visa is provided by section 500 of the Act.

## PART D: DIRECTION NO. 65

22. Under subsection 499(1) of the Act, the Minister has given written directions as to the exercise of the power to review the decision. Subsection 499(2A) provides that these directions must be complied with. The relevant direction is Direction No. 65, which commenced on 23 December 2014.

23. Subparagraph 6.1(3) of the Direction provides, in part:

*Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case.*

24. Paragraph 6.2 provides general guidance and directs that “*factors that must be considered in making a revocation decision are identified in Part C of this Direction.*”

25. Under the heading *General Guidance*, subparagraph (1) provides:

*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.*

26. Paragraph 7 of the Direction sets out how the discretion is to be exercised. “*Informed by*” the principles in paragraph 6.3, I must “*take into account*” the considerations in Part C in order to determine whether the mandatory cancellation of Mr Sam’s visa will be revoked. A copy of Part C is “Annexure A” to these reasons.

27. In paragraph 6.3, the Minister sets out the principles that provide the framework with which the task of exercising the discretion to revoke the cancellation of a visa is to be approached. The principles are:

(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 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.*
- (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.*

28. The Direction requires the decision-maker to take into account the primary and other considerations relevant to the individual case.<sup>4</sup> Primary considerations should generally be given greater weight than the other considerations.<sup>5</sup>

29. Paragraph 13(2) provides:

*In deciding whether to revoke the mandatory cancellation of a non-citizen's visa, the following are primary considerations:*

- a) *Protection of the Australian community from criminal or other serious conduct;*
- b) *The best interests of minor children in Australia;*
- c) *Expectations of the Australian community.*

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<sup>4</sup> Minister for Immigration and Border Protection (Cth), *Direction [No 65] – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under section 501CA*, 22 December 2014, at [6.2(3)], [8(1)].

<sup>5</sup> *Ibid* at [8(4)].



30. Paragraph 14(1) sets out other considerations to be taken into account where relevant. It provides:

*In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):*

- 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.*

#### **PART E: THE ISSUE FOR DETERMINATION**

31. I have set out subsection 501CA(4) of the Act earlier in these reasons (see paragraph 20). Before the power to revoke the original decision is enlivened, it is necessary for the decision-maker to be satisfied that the conditions for the exercise of the power have been met.
32. It is not in dispute that Mr Sam has made representations of the kind referred to in paragraph (a) of subsection 501CA(4). It is also not in dispute that he does not pass the character test in subparagraph (b)(i) of the subsection. It is, therefore, necessary to decide whether *“there is another reason [i.e. other than an applicant passing the character test] why the original decision should be revoked.”*<sup>6</sup>
33. If I am satisfied of all the relevant requirements of subsection 501CA(4)(b), then the cancellation must be revoked. To this extent, *“may”* in the subsection means *“must”*.<sup>7</sup>

#### **PART F: REASONING**

##### **F1: Primary Consideration 1: Protection of the Australian community from criminal or other serious conduct**

34. I must have regard to matters set out in paragraph 13.1, which include:

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<sup>6</sup> *Migration Act 1958* (Cth) s 501CA(4)(b)(ii).

<sup>7</sup> *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66 at [31].

- *the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Remaining in Australia is a privilege that 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;*
- *[t]he nature and seriousness of the non-citizen’s conduct to date;*
- *[t]he risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.<sup>8</sup>*

**F1.1: The nature and seriousness of Mr Sam’s conduct to date**

35. Mr Sam’s conduct in importing heroin into Australia must be regarded as very serious. As Herron DCJ observed when sentencing Mr Sam:

*The courts have recognised that couriers are a fundamental link in the chain of distribution, the courier is the very means by which drugs sourced internationally become available and consequently a courier’s conduct in the importing of drugs into Australia concealed internally to avoid detection forms part of a significant criminal drug enterprise.*

...

*The social and personal consequences of illicit drug use within the community continue to inflict a heavy burden on the community.<sup>9</sup>*

36. Prior to July 2014, Mr Sam had developed a gambling addiction which resulted in him incurring significant debts. In order to pay these debts he borrowed from people he had met at the club at which he gambled. He was charged interest at a very high rate.
37. When Mr Sam was unable to repay the loan and interest (totalling about \$20,000.00) he was threatened on three occasions that he and his family would be injured or killed. On the third occasion, three men attended his home and demanded that he speak with them outside while his wife and young son were told to remain in the house. One of the men carried a shotgun. Mr Sam was told that to repay the loan he would have to travel to Cambodia and bring back “a package”. Later, he was given \$6000 to meet the expenses

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<sup>8</sup> ‘*Serious conduct*’ is defined in Annex B to the Direction to include conduct of concern which may not constitute a criminal offence.

<sup>9</sup> Exhibit R1 at 33-34.

of his trip. The airfares for himself and his family were paid by the people to whom he was indebted. He was told that his family should travel with him to avoid suspicion.

38. The manner in which Mr Sam imported the drugs was set out by Herron DCJ:

*Briefly, the circumstances are that on 14 July 2014, you arrived at the Perth International Airport aboard a Singapore Airlines flight from Cambodia. You were travelling with your wife, her daughter Ms Soum, Ms Soum's infant daughter and you and your wife's young son.*

*Following a baggage examination by a Customs officer who took an itemiser swab sample returning a positive result for heroin, you were suspected of concealing a drug internally. A scan later revealed a number of foreign objects in your stomach.*

*Over the next few days you passed the objects. The objects were later analysed and found to be heroin with an average purity of 68.3 per cent. A gross weight of 522.9 grams, the total weight of pure heroin was 357.14 grams.*

*You later participated in a video record of interview with police in which you had told them you had incurred a significant drug debt from a gambling addiction in Sydney and were threatened by a group of men armed with guns if you did not repay your debt.*

*You were told that if you travelled to Cambodia and brought back a package and you would be paid 40 to US\$50,000. You agreed to travel to Cambodia to carry out the task.*

*You met a man in Cambodia, collected the package containing the pellets and swallowed all of the pellets. You had been instructed to travel to Melbourne where you were to meet another person and hand over the pellets...<sup>10</sup>*

The threats made to Mr Sam may explain, but do not excuse, his conduct, nor do they make the conduct less serious. I note that Mr Sam stood to gain a financial advantage in excess of the debt owed.

***F1.2: The risk to the Australian community should Mr Sam commit further offences or engage in other serious conduct***

39. Direction No. 65 states that I “*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.*”<sup>11</sup>

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<sup>10</sup> Exhibit R1 at 27-28.

<sup>11</sup> Minister for Immigration and Border Protection (Cth), Direction [No 65] – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under section 501CA, 22 December 2014, at [13.1.2(1)].

40. There are also considerations to which regard must be had cumulatively:

- (a) *[t]he nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
- (b) *[t]he 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 re-offending (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).<sup>12</sup>*

*The nature of future harm*

41. In view of the seriousness of Mr Sam's conduct and in line with the principle stated above, I am satisfied that the Australian community's tolerance for the risk of any harm which may result from future misconduct would be low. Nevertheless, there may be circumstances in which the community would tolerate the risk involved.

42. Should Mr Sam further engage in such conduct, there would be a significant risk of death and serious physical and financial harm to members of the community arising from the use of, and addiction to, prohibited drugs. In addition, there is the risk of loss of property arising from offences such as burglary and theft. Such offences would also cause uncertainty and concern in the community.

43. I conclude that the nature of future harm, should Mr Sam continue to engage in conduct such as that in which he has already engaged, is serious.

*The likelihood of Mr Sam engaging in further criminal or other serious conduct*

*Mr Sam's evidence*

44. In addition to giving oral evidence, Mr Sam provided detailed statements in his *Personal Circumstances Form* dated 3 July 2017 and attached correspondence.<sup>13</sup> Mr Sam said, in part:

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<sup>12</sup> Ibid at [13.1.2(2)].

<sup>13</sup> Exhibit R1 at 44-71.

*I have no criminal record prior to my offending behaviour. I am deeply sorry for what I have done. I never really understood the impact drugs had on the wider community however now I realize [sic] the effects drugs have in society. My behaviour has brought me great shame as I have caused my wife and son enormous hurt. The photos I received of my son hurt me greatly as I can see the sadness and loneliness [sic] in his face.*

*There is no risk of me re-offending as the consequences and hurt I have inflicted as [sic] a great deterrence. I have also educated myself with the following rehabilitation courses during my incarceration in order to improve my awareness and give insight into my behaviour and thought processes to ensure this never happens again.*

*Think First Program: This is a cognitive skills course designed to look at my thinking processes and consequential thinking. The tools I have learnt from this program are self-control, self-awareness, consequential thinking, problem awareness and problem solving, and lack of insight into offending behaviour.*

*From this program, I have acknowledged that I did make a poor decisions [sic] that had put myself into the gambling problem and had a bad debt from a bad group of people without any awareness of the consequences that was going to have on me and my family and community.*

*This program has guided me to understand about all my past offending behaviour, has taught me to prepear [sic] myself for any problems in the future and being aware to [sic] those problems, and has given me the solution to deal with all the situation that is similar [sic] to the past. The tools I have learnt have improved my self-control, problem awareness, consequential thinking, problem solving, and decision making. I believe I would be a better person from this treatment program, have more responsible on [sic] my decision making, and be aware [sic] all the consequences and impact of my future actions would reflect on myself, my family and my community.*

*Brief Intervention Cognitive Skills: This is an other [sic] cognitive skills aim to improve my thinking processes and consequential thinking. The tools I have acknowledged from this program are self-control, problem solving, interpersonal perspective taking and relapse prevention.*

*Gambling Anonymous: This is a twelve step recovery program that we have a meeting once a week and sharing our stories from one to others who have destroyed their lives through the gambling addiction and the effects that have on ourselves, our families, our vitems, and our community [sic].*

*Through this course has effectively helped me to understand the negative impact of gambling has had my life, my family, and the community [sic]. This makes me deeply regretful to my past behaviour that had put myself into the gambling problem which has caused all my families enormous hurt [sic].*

*Narcotics Anonymous: This is a twelve step recovery program that is similar to Gambling Anonymous. We have a meeting and sharing our stories between one to others [sic] every week about how the drugs destroyed our lives, our families, and our community. We have guided each other to reach the positivities being the drugs free lives through out this program [sic].*

*Life Skills Re-entry Program: This program has taught to all the prosoners [sic] to re-engage with their families and their community upon their release. All the skills I*

*have learnt help me to improve my personal's [sic] social skills, interpersonal relationships, and cultivate independent living skills including budgeting.*

*Parenting Course: This course is very important for me as a father of my son and a grand-father of six children. This remind me all the good memories we had together which has brought me the incredibly sadness that I made the mistake has caused my family a part [sic]. This course has also provided me a lot of skills to re-engage and to build up my healthy relationship with my son and six grand-children during my incarceration and after I be release [sic].*

*As well as the programs above, I have been speaking to centercare – gambling and financial counselling person every fortnight in order to deal with my gambling habit. I have learnt a lots from the counsellors I have been speaking to, has given the alternative solution for stressful situation, have helped me to focus on the consequences of the gambling problem, have taught me the impact of the gambling should have on me, family, and community [sic].*

*From this rehabilitation program, I could address what my past behaviour triggers are, and know how to deal with them. I have acknowledged the resources, helps, and support that could help me to keep on track after my release to the community, and I will that I am being a gambling free from this rehabilitation [sic] program, and will continue in order to improve myself to avoid from the gambling habit in the future [sic].*

*The awareness of my past behaviour, the suffering and hurt from the consequences that have had on me and my family, the skills and support that I have gained from my rehabilitation programs, I do believe that I would not be in any risk of re-offending to the Australian community any more [sic].<sup>14</sup>*

45. When he gave evidence at the hearing, Mr Sam said that he had participated in all rehabilitation courses available to him while in prison. He believes that he has benefitted greatly from these courses and his time in prison has made him realise how much his family has been affected by his offending.
46. While incarcerated, Mr Sam worked by assisting new inmates who were ill and by working in the prison kitchen, laundry and metal shop. He did this to gain new skills to assist him to find work if he was able to return to live in the Australian community and to provide distraction from his separation from his family.
47. Should Mr Sam be free to do so, he plans to return to live with his family in the family home, of which he is a part-owner. He will seek employment immediately so that he can resume providing for his family as he did prior to his imprisonment.

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<sup>14</sup> Exhibit R1 at 57-60.

*The evidence of Mrs Sam, Mr Sam's wife*

48. Mrs Sam provided a statement dated 30 November 2018<sup>15</sup> and gave evidence at the hearing. Mrs Sam impressed me as an honest witness who gave her evidence to the best of her recollection. I accept her evidence.
49. In her statement Mrs Sam said, in part:

*I have had an opportunity to speak with my husband on countless occasions during his period of imprisonment and time in immigration detention. During the course of various conversations I have had with my husband over the last several years, my husband has expressed sincere remorse for his offending. My husband realises, as he has communicated to me, that his offending has caused significant harm to his family and posed a substantial risk of harm to the Australian community more broadly.*

*My husband has completed a substantial number of educational programs in prison to improve himself. I believe my husband is reformed from his prior offending and will not commit any further criminal offences in Australia. My husband has had the opportunity to see firsthand the significant struggles his immediate family have had to endure as a result of his criminal conduct. For example, our family had previously suffered economic distress in keeping up with mortgage repayments in relation to our family home...<sup>16</sup>*

*Mr Sam's behaviour in prison*

50. Apart from an insignificant infringement noted below, prison records confirm that Mr Sam engaged in the courses available to him and indicate that he was a well-behaved prisoner.
51. *Offender Notes* kept by the Western Australian Department of Justice include:<sup>17</sup>

<b>Note Date/Time</b>	<b>Category</b>	<b>Note</b>
03/08/2017	Release Planning	Chom Sam's application for interstate transfer to NSW in accordance with the Prisoners (Interstate Transfer) Act 1983 has been approved by both relevant Ministers. Transfer arrangements will be made by Sentence Management which can take several weeks.
...		

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<sup>15</sup> Exhibit A3 at 3-4.

<sup>16</sup> Exhibit A3 at 3-4.

<sup>17</sup> Exhibit R3 at 22-24. Errors in original.

01/06/2017 Education/Re-entry Sam had a first successful t/counselling session today with Centrecare.

19/05/2017 Education/Re-entry Sam appl for gambaling t/counselling with Centrecare – actioned sent to Centrecare. Await apt with service provider.

...

04/05/2016 Treatment Would be useful for Sam to upgrade his English by doing The Sound Way program as a way to improve his English as a second language. He is also interested in doing Employment Short Courses.

...

07/03/2016 Case Management Prisoner was given a verbal warning for failing to present on time for muster. He was reminded of the expected standards of self care prisoner and was advised future occurences could result in LOP's.

...

26/04/2015 Case Management ISSUES: Prisoner SAM does not have any issues with his peers or Officers at present

...

ORIENTATION: Successful completion of Induction and One Star on 09/04/2015. Prisoner SAM presented as polite, cheerful and respectful actively participating when required.

WORK: Prisoner SAM is new intake and currently seeking employment.

COMMENTS: Prisoner SAM presents as polite and respectful towards staff and does not come to the attention of Officers in a negative way. At the time of interview I would not consider Prisoner SAM to be a management risk or issue.

...

09/04/2015 Education/Re-entry Successful completion of Induction and One Star on 09/04/2015. Prisoner Sam presented as polite, cheerful and respectful actively participating when required.

...

09/01/2015 Industries/  
Employment The prisoner has worked in the kitchen for some time now. He is a diligent worker who works to a high standard. As his language has improved the communication barriers are being broken down and there should be no further incidents like the one in the kitchen.

13/11/2014 Industries/ Prisoner has been caught trying to move cake out of



*Employment the kitchen. Prisoner has been advised that next time he will be sacked from the job.*

52. Following Mr Sam's completion of the Think First course in May 2016, a Senior Social Worker reported, in part:

*Mr. Sam presented with a number of protective factors during his involvement in the Think First program. These included: A desire to resume employment; pro-social role models, those being his brother (currently living in New Zealand), his mother who is now separated from his step father, and a supportive wife and children. Mr. Sam reported a seemingly genuine desire to control his gambling behaviour and to live a pro-social lifestyle. Mr. Sam has also identified his protective factors as "working; visit family members on weekend; working overtime to earn extra money; make a list of activities to do outside of work; not go to the club or casino; spend time with children at the weekends."*

...

*Mr. Sam attended 30 sessions of the Think First program...Mr. Sam was attentive during all sessions and actively participated during all aspects of the course...*

*He presented as motivated to address his offending behaviour and he was often encouraging of others in the group. Mr. Sams' [sic] motivation to address his offending behaviour was evidenced by his level of commitment and effort that he put into his worksheets and other tasks.*

...

*Mr. Sam demonstrated gains around managing his impulsive behaviour...Use of consequential think [sic] as evidenced above may also serve to curb impulsivity and support pro social decision making. It is likely if Mr. Sam continues to use the skills of replacement thoughts and self-instructions this may have a positive impact on his risk of reoffending.*

*Mr. Sam showed increased insight into his offending behaviour during his participation in the Think First program...After completing a general analysis of problem areas, he identified gambling, money and financial pressures as his highest problem areas. Increased awareness of his criminogenic factors, patterns in his offending, and general problem areas is relevant as it is likely to help him to understand the connection to his offending behaviour and how they may be contributing, therefore placing Mr. Sam in a better position to manage them.*

*Mr. Sam demonstrated gains in consequential thinking by suggesting negative consequences for maintaining offending behaviour, noting that the benefits of stopping offending outweighed those for maintaining the behaviour...Ongoing use of consequential thinking skills is likely to assist Mr. Sam in making pro social choices, should he choose to do so post release.*

...

*This was a positive gain toward understanding his problematic behaviour and demonstrated Mr Sam's ability to draw together the understanding of factors which ultimately led to negative outcomes. Ongoing use of these skills would likely positively impact on Mr. Sam's decision making, insight into his offending*

*behaviour and his risk toward future impulsivity, should he choose to implement these skills in the community setting.*

...

*Mr Chom Roem [sic] Sam completed the Think First Cognitive Skills program at Acacia Prison on 4<sup>th</sup> May 2016. He presented as a motivated participant who was able to to [sic] link concepts presented during the program to his own experiences and demonstrated a strong level of conceptual application to his offending behaviour; voluntarily contributing to group discussions. He addressed all of his identified treatment needs within the Think First Program; impulsivity, consequential thinking, problem awareness and problem solving, and lack of insight into his offending behaviour. Mr. Sam demonstrated his capacity to counter the above identified deficits throughout the program; however, as with any individual practising and implementing change, it remains to be seen if these gains are sustainable in a community context. Mr. Sam's plans to manage risk post release were centred on building pro social support networks and focusing on family/work commitments.<sup>18</sup>*

#### *Discussion*

53. It was argued on behalf of the Minister that:

*On the totality of the evidence before the Tribunal, there remains at least a moderate risk that the applicant will re-offend in the future. This is consistent with an Actuarial Risk Assessment conducted in October 2014, which found that there was a 19.1% probability of the applicant being 're-arrested' within two years of the assessment.<sup>19</sup>*

The report referred to is the Department of Corrective Services *Harm and Supervision Assessment* report of an assessment of Mr Sam made on 17 October 2014.<sup>20</sup>

54. Under the heading "Actuarial Risk Assessment" the report states that this assessment "*predicts the probability of re-arrest within the next two years (from the date of the ARA event being undertaken). This is shown in terms of a percentage, 100% being absolute certainty.*" The date of the "ARA event" is recorded as 17 October 2014.
55. I do not consider that this assessment provides a basis for concluding that the risk of Mr Sam's reoffending is moderate. It does not appear to take into account the reality that at the time the assessment was made, Mr Sam would be in prison for the whole of the two year period under consideration. Further, the report does not indicate that any

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<sup>18</sup> Exhibit R3 at 26-28 (Department of Corrective Services, *Think First Completion Report*, 30 May 2016).

<sup>19</sup> Respondent's Statement of Facts, Issues and Contentions dated 20 December 2018 at [33].

<sup>20</sup> Exhibit R3 at 61.

consideration is given to any rehabilitation courses undertaken by Mr Sam during and after that period.

56. On the basis of the evidence to which I have referred I am satisfied that the risk of Mr Sam re-offending or engaging in other serious conduct is low, and as such, is an acceptable risk for the Australian community to assume.

57. In reaching this conclusion I have taken into account that:

- Mr Sam has no other convictions and has no disciplinary record while in prison;
- he has accepted responsibility for his offending and recognises the serious effects of his conduct on his family;
- there is no evidence to suggest that Mr Sam was previously involved in any form of drug trafficking;
- he realises that further offending is likely to result in his again being sentenced to imprisonment and a high likelihood that he will be deported from Australia and separated from some of his family members;
- he has applied himself diligently to rehabilitation courses and employment opportunities while in prison;
- he has improved his fluency in English and in the areas of work in which he could seek employment;
- he recognises the problems which have arisen from his gambling habit and has developed skills to address issues which may arise if he is tested by a return to his community;
- he recognises the need to continue counselling to assist his re-integration into the Australian community should he be free to do so;
- he will have the benefit of supervision of his parole officer until May 2020;

- he will have the benefit of resuming contact with those associated with the Buddhist Temple near to his home;
- he is anxious to resume his role in his family and to provide for them; he does not wish to have his wife, son and step-granddaughter leave Australia to live with him in Cambodia;
- he is genuinely remorseful for his conduct and the effect it has had on his family and the wider community.

58. I am satisfied that Mr Sam has undertaken all the steps available to him to give himself the best chance to resume his role as a husband, father and grandfather, as well as a productive member of the Australian community. Having observed him in the witness box, I am satisfied that he is genuine in his commitment not to re-offend or engage in other serious conduct.

59. For the reasons I have stated, I am satisfied that the triggers to his offending behaviour have been addressed. In addition, I am satisfied that Mr Sam's experiences of incarceration and immigration detention will operate as a very strong deterrent to any further offending or misconduct. Herron DCJ referred to "*personal deterrence*" as being "*an important sentencing consideration*" in deciding the appropriate sentence to be imposed.<sup>21</sup>

60. Mr Sam's present situation is to be contrasted with that reported in the *Harm and Supervision Assessment* report made by the Department of Corrective Services in October 2014, just three months after he was taken into custody. At that time it was stated that:

*Requires intervention to address his gambling addiction, also appears to require intervention to develop his decision making.*

...

*Mr Sam's offending behaviour indicates a complete disregard for the law. His offending behaviour appears to be linked to his gambling addiction...Should the*

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<sup>21</sup> Exhibit R2 at 28.

*triggers to his offending behaviour remain unaddressed, there is significant concern that he will re-offend in a similar manner in the future.*<sup>22</sup>

**F2: Primary Consideration 2: Best interests of minor children in Australia affected by the decision**

61. Based on the evidence of Mr Sam and Mrs Sam I am satisfied that the following minor children in Australia will be affected by a decision in relation to the cancellation of Mr Sam's visa:

- a granddaughter of Mrs Sam, aged thirteen years;
- the son of Mr & Mrs Sam, aged nine years;
- a granddaughter of Mrs Sam, aged nine years;
- a granddaughter of Mrs Sam, aged eight years;
- a granddaughter of Mrs Sam, aged four years;
- a grandson of Mrs Sam, aged two years;
- a grandson of Mrs Sam, aged four months.

62. From the time of their son's birth until July 2014, Mr and Mrs Sam shared the responsibility of his care. They also shared the care of Mrs Sam's nine year-old granddaughter from her birth since the child's mother was very young when she gave birth. Mr Sam has fulfilled the role of a father-figure to the granddaughter since she was born.

63. With the exception of the two youngest grandchildren, Mr Sam has formed a close bond with all the children. He has a very close and loving relationship with his son and his nine year-old step-granddaughter with whom he shares a relationship akin to that of father-daughter.

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<sup>22</sup> Exhibit R3 at 64.

64. Prior to his imprisonment Mr Sam provided financial support for the children, took them to and from school and on outings, and played with them. Mrs Sam and two of her children gave evidence which corroborated the evidence of Mr Sam as to his close relationship with his son and his step-grandchildren.
65. After he arrived in Australia Mr Sam purchased the family home with two of his step-children. Previously, the family lived in rented accommodation. He also purchased a motor vehicle for the use of the family.
66. At present, Mrs Sam, two of her children and three of her grandchildren live in the family home. It has been difficult financially for the family to meet mortgage repayments without a contribution from Mr Sam, although they have been able to do so. They have been assisted by Mr Sam renegotiating the terms of the loan agreement with the mortgagee in order to reduce the repayments.
67. Mrs Sam gave evidence, which I accept, that should Mr Sam be deported, she, their son and her nine year-old granddaughter will go with him to live in Cambodia. Should this happen, the children remaining in Australia will lose their close relationship with Mr and Mrs Sam as well as their relationship with their young cousins. Further, the granddaughter living in Cambodia would lose the opportunity of direct contact with her mother.
68. On the basis of the evidence of Mr and Mrs Sam, to which I shall refer later in these reasons, I am satisfied that if the two nine-year children live in Cambodia they will not enjoy the same level of education, housing and health care as is available to them in Australia. They too will lose the relationships they presently enjoy with their cousins, aunts and uncles. Mr Sam's son will also be deprived of direct contact with his brothers and sisters.

### **F3: Primary Consideration 3: Expectations of the Australian community**

69. Clause 13.3 of the Direction provides:

*(1) The Australian community expects non-citizens to obey Australian 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.*

70. In *YNQY v Minister for Immigration and Border Protection*<sup>23</sup> the Federal Court said, in part:

*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.<sup>24</sup>*

71. Counsel for Mr Sam argued that I should not follow the reasoning in this judgement. He referred me to several decisions of the Tribunal which appear to have departed from it. However, this Tribunal is bound by precedents established by the Federal Court. In any event, I have no evidence which would permit me to make a finding as to the actual expectations of the community in this matter.
72. For the reasons set out by the Court, I am satisfied that the expectations of the Australian community weigh against the revocation of the cancellation decision.

#### **F4: Other considerations set out in Direction No.65**

73. Clause 14 of the Direction provides:

*(1) In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):*

- (a) International non-refoulement obligations;*
- (b) Strength, nature and duration of ties;*

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<sup>23</sup> [2017] FCA 1466.

<sup>24</sup> Ibid at [76].

- (c) *Impact on Australian business interests;*
- (d) *Impact on victims;*
- (e) *Extent of impediments if removed.*

***International non-refoulement obligations***

74. There are no non-refoulement obligations relevant to the determination of this matter.

***Strength, nature and duration of ties to Australia***

75. Clause 14.2 of the Direction provides:

*(1) The strength, nature and duration of ties to Australia. 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 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).*

76. Mr Sam has resided in Australia for just over nine years although more than four of those years have been spent in custody. However, I am satisfied that between his arrival in December 2009 and July 2014 he contributed positively to the Australian community. In that time Mr Sam settled in a new country, gained employment, and began paying taxes. He provided a better lifestyle for his family through his care and financial contribution, including assisting in moving them out of rental accommodation and into their own home. He also assisted at his local Buddhist Temple.

77. In addition to his wife, son and step-grandchildren, Mr Sam has three step-daughters and two step-sons who reside in Australia. The step-children all resided in the family home with Mr and Mrs Sam prior to his imprisonment. One step-daughter, one of her children



and two step-sons continue to reside in the home<sup>25</sup> and will share it with Mr Sam should he be able to return to live in the Australian community.

*The evidence of Ms S, Mr Sam's step-daughter*

78. Ms S provided a statement dated 29 November 2018<sup>26</sup> and gave evidence. I am satisfied that she was an honest witness. I accept her evidence.
79. Ms S and Mr Sam have “*always enjoyed a very close and loving relationship.*”<sup>27</sup> She has viewed Mr Sam as her father for many years and he has played an important role in the lives of her children.
80. Ms S kept in contact with Mr Sam by telephone and skype while he was imprisoned and has visited him regularly at the Immigration Detention Centre.

*Evidence of Mr S, Mr Sam's step-son*

81. Mr S provided a statement dated 29 November 2018<sup>28</sup> and gave evidence. I am satisfied that he was an honest witness. I accept his evidence.
82. Mr S is 29 years old. He lives with his partner and their two children in close proximity to the Sam family home.
83. In his statement Mr S described his relationship with Mr Sam as follows:

*Although my father is actually my stepfather, I consider him like the father I never had.*

*As outlined in my original supporting letter, it took me a fair while to warm up to my father...However, with the passing of time, my father proved to be an honourable, caring and dedicated family man.*

*My father worked hard for several years to assist the family unit at the family home...My father has always provided strong emotional and financial assistance to my mum, his son...my niece and other members of the extended family (such as his step-children and step-grandchildren) residing in Sydney.*

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<sup>25</sup> Exhibit A2 at 1.

<sup>26</sup> Exhibit A2.

<sup>27</sup> Exhibit A2 at 1.

<sup>28</sup> Exhibit A4.

...

*When I heard the news that my father was involved in the importation of drugs into Australia, I was in absolute shock. My father spent many years training in Buddhism in Cambodia and has provided voluntary assistance at the Cambodian temple in Sydney. Consequently, my father's criminal conduct is completely out-of-character and it was a complete surprise to me!*

...

*I understand that there is a real prospect that my father will be removed to Cambodia because of his criminal offending. If that was to occur, it would naturally break up the family unity in Sydney and be devastating to both the 'Sam' and [S] families.*

*Furthermore, if my father is removed to Cambodia, it would be difficult for my children to maintain a meaningful relationship with my father (given the distance and difficulties with electronic communication, especially noting the young ages of my children.<sup>29</sup>*

#### *Evidence of Mrs Sam*

84. Mrs Sam also gave evidence of the closeness of the family ties between Mr Sam and her children and grandchildren. He has acted as a father to all her children. He is respected by her extended family living in Australia. In her view, the deportation of Mr Sam to Cambodia would be devastating to her children and distressing to the whole family unit.<sup>30</sup> I accept this evidence.

#### *Discussion*

85. Having considered all of the evidence I am satisfied that Mr Sam has very close and strong ties to his wife, son, step-children and step-grandchildren, all of whom are Australian citizens living in Australia. I am satisfied also that should the cancellation of Mr Sam's visa not be revoked it will bring the family unit, as it presently exists, to an end. Mr and Mrs Sam and the two young children will be living in Cambodia while the remainder of the family continues to live in Australia, remote from those who have filled parental roles. Furthermore, those living in the family home will lose the financial support of both Mr and Mrs Sam in maintaining the home. It is reasonable to assume that it would be sold in view of the financial difficulties which have arisen in the past and the likelihood that Mr Sam would require funds in Cambodia.

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<sup>29</sup> Exhibit A4 at 1-3.

<sup>30</sup> Exhibit A3 at [9]-[10].

***Impact on Australian business interests***

86. I am satisfied that a decision not to revoke the cancellation of Mr Sam's visa will not have a relevant impact on Australian business interests.

***Impact on victims***

87. Fortunately for the wider Australian community, because Mr Sam's importation of heroin was intercepted at the Australian border, the victims of his criminal behaviour are his own family. The impact on his family has been considered elsewhere in these reasons.

***Extent of impediments Mr Sam may face if he is removed from Australia***

88. On the basis of the evidence of Mr Sam, I am satisfied that he will face significant impediments if he returns to Cambodia, notwithstanding that he was born in that country and lived there until he was 27 years old. He can read, write and speak the Khmer language.
89. The only immediate family members of Mr Sam living in Cambodia are his mother, step-father and half-sister. He has had limited contact with his mother and his relationship with his step-father is strained. He has not had contact with his half-sister recently.
90. I accept Mr Sam's evidence that it would be difficult for him to obtain accommodation for his family and he may not be able to readily find employment. Accommodation in the Buddhist Temple is restricted to single men. The extent of government support which would be available is unknown.

**PART G: THE BALANCING EXERCISE**

91. The seriousness of the offence of which Mr Sam has been convicted increases the need to protect the Australian community from the risk of further criminal or other serious conduct of Mr Sam and therefore weighs against the revocation of the cancellation decision. It also reduces the tolerance of the community to the risk of re-offending.
92. Added to the above considerations are the expectations of the Australian community as prescribed by Direction No. 65. Whilst I accept that Direction No. 65 mandates that the Australian community would expect that the cancellation of Mr Sam's visa not be revoked,

it does not say that the community has **no** tolerance for his serious offending. Paragraph 9.1.2 recognises that the community's tolerance becomes **lower** as the seriousness of the potential harm increases.

93. I have come to the conclusion that the Australian community, **fully informed of the facts of this matter**, would be tolerant of the low risk of harm posed by Mr Sam returning to live as part of that community.
94. As already set out, under the heading *General Guidance*, Direction No. 65 makes clear that it is necessary to determine “*whether the risk of future harm from a non-citizen is unacceptable*” [emphasis added].<sup>31</sup> In the circumstances of this matter I am satisfied that although there is a risk that Mr Sam will re-offend, the risk is low. In all the circumstances, including that Mr Sam has no other convictions, I have found that the risk is acceptable.
95. The strength, nature and duration of ties to Australia are of some weight in favour of revocation. Mr Sam has very strong ties to his immediate family in Australia, in particular to his wife, son and his granddaughter to whom he has been a father-figure for her entire life.
96. I also take into account that Mr Sam would suffer some impediments should he return to live in Cambodia. In particular, it is likely that he would find it more difficult to find employment in Cambodia than in Australia. He would also be faced with the necessity of finding suitable housing for his family and schools for two young children. It is unlikely that the same standard of healthcare as that in Australia would be available. However I do take into account that Mr Sam spent a considerable part of his life in Cambodia and can write and speak Khmer. On balance, this consideration favours revocation, but not heavily so.
97. The most compelling consideration in this matter, and the one which outweighs all others, is the best interests of the minor children involved – Mr Sam's son, his ten year-old step granddaughter and his remaining step-grandchildren.

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<sup>31</sup> Paragraph 6.2(1).

98. Having considered all of the evidence, I am satisfied that, notwithstanding his absence in prison for a lengthy time, Mr Sam has played a very important role in the lives of the children concerned and will continue to do so. He has shown a willingness to work to support his family and to improve their lives. He has assisted his family to obtain a family home and he has been able to make arrangements with his mortgagee to overcome financial difficulties which his family has experienced during his incarceration.
99. Of particular concern is the effect that the deportation of Mr Sam would have on his son and the step-granddaughter who has always been in the care of Mr and Mrs Sam. Although Counsel for the Minister raised the possibility that Mrs Sam may change her mind and not return to Cambodia with her husband, her evidence that she would do so was clear and largely unchallenged. I have had no hesitation in accepting it. She explained her reasons for her decision being her love for her husband and the mores of the culture in which she was born and raised. If Mrs Sam returns to Cambodia it is reasonable to expect that the two children, who have been in her full-time care all their lives, will accompany her. This is even more likely in the case of Mr Sam's young son with whom he shares a strong bond.
100. The two children would suffer very significant disadvantage should they be required to live in Cambodia. They will be removed from their current family situation and close contact with members of the extended family. They will have to establish themselves in an environment in which they cannot read, write or speak the language. They will need to settle into a new school and make new friends. The standard of their education, health care and accommodation is unlikely to be the equivalent of that to which they are accustomed.
101. Consideration of the effect on Mr Sam's immediate family, particularly the effect on Mrs Sam, adds weight to the case for revoking the mandatory cancellation. As I have found, deportation of Mr Sam would end the family as it presently exists and would have a detrimental effect on those family members remaining in Australia, as well as those living in Cambodia.
102. It has been necessary for Mrs Sam to make a distressing decision in determining that she will return to live in Cambodia if her husband is deported. If the mandatory cancellation is not set aside Mrs Sam will have to leave Australia where she has lived for 30 years and,

at the same time, end the close contact she has with her adult children and most of her grandchildren. If she remains in Australia she will be living apart from her husband. As she puts it, her marriage “*will effectively come to an end.*”<sup>32</sup>

103. **Weighing up all of the considerations, I have reached the conclusion that the interests of the minor children involved, the effect on Mr Sam’s immediate family and the impediments he would face in Cambodia, together provide a reason why the mandatory cancellation decision should be revoked.**
104. In reaching this conclusion, I have determined that these considerations outweigh the need to protect the Australian community and the expectation of the community that the cancellation of his visa not be revoked. I have made my decision on the basis that **the risk to the community that Mr Sam will re-offend is acceptably low.**

#### **PART H: CONCLUSION**

105. The reviewable decision made 26 October 2018, being the decision of a delegate of the Minister administering the *Migration Act 1958* not to revoke the cancellation of Mr Sam’s Class BC Subclass 100 Partner (Permanent) visa, will be set aside.
106. In substitution, it will be decided that the decision to cancel Mr Sam’s Class BC Subclass 100 Partner (Permanent) visa, made 26 June 2017, is revoked.

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<sup>32</sup> Transcript 11 January 2019.

*I certify that the preceding  
106 (one hundred and six)  
paragraphs are a true copy of  
the reasons for the decision  
herein of Deputy President J  
W Constance*



Associate

Dated: 18 January 2019

Date(s) of hearing:	<b>10 and 11 January 2019</b>
Counsel for the Applicant:	<b>Dr Donnelly</b>
Solicitors for the Applicant:	<b>Jack Rigg Solicitors</b>
Solicitors for the Respondent:	<b>Sparke Helmore Lawyers</b>

## ANNEXURE A

### Minister for Immigration and Border Protection (Cth), *Direction [No 65] – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under section 501CA, 22 December 2014*

#### PART C

##### 13. Primary considerations - revocation requests

- (1) Under subsection 501(3A) of the Act, the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c)) or paragraph (6)(e)) and the non-citizen 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. A non-citizen who has had his or her visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case
- (2) In deciding whether to revoke the mandatory cancellation of a non-citizen's visa, the following are primary considerations:
  - a) Protection of the Australian community from criminal or other serious conduct;
  - b) The best interests of minor children in Australia;
  - c) Expectations of the Australian community.

##### 13.1 Protection of the Australian community

- (1) When considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Remaining in Australia is a privilege that Australia confers on noncitizens 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. Mandatory cancellation without notice of certain non-citizen prisoners is consistent with this principle by ensuring that serious offenders remain in either criminal or immigration detention while their immigration status is resolved.
- (2) 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.

##### 13.1.1 The nature and seriousness of the conduct

- (1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to factors including:
  - a) The principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed very



- seriously;
- b) The principle that crimes committed against vulnerable members of the community (such as minors, the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties, are serious;
  - c) The sentence imposed by the courts for a crime or crimes;
  - d) The frequency of the non-citizen's offending and whether there is any trend of increasing seriousness;
  - e) The cumulative effect of repeated offending;
  - f) Whether the non-citizen has provided false or misleading information to the department, including by not disclosing prior criminal offending;
  - g) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour);
  - h) Where the non-citizen is in Australia, that a crime committed while the non-citizen was in immigration detention; during an escape from immigration detention; or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again is serious, as is an offence against section 197A of the Act;

**13.1.2** The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

- (1) In considering whether the non-citizen represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, decision-makers 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.  
Some conduct and the harm that would be caused if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.
- (2) In considering the risk to the Australian community, decision-makers must have regard to, cumulatively:
  - a) The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and
  - b) 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 re-offending (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

**13.2** Best interests of minor children in Australia affected by the decision

- (1) Decision-makers must make a determination about whether revocation is, or is not, in the best interests of the child.
- (2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to revoke or not revoke the mandatory cancellation decision is expected to be made.
- (3) If there are two or more relevant children, the best interests of each child should

- be given individual consideration to the extent that their interests may differ.
- (4) In considering the best interests of the child, the following factors must be considered where relevant:
- a) The nature and 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 is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);
  - b) The extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;
  - c) The impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;
  - d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child's or 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;
  - f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);
  - g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and
  - h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

### **13.3 Expectations of the Australian community**

- (1) The Australian community expects non-citizens to obey Australian 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.

### **14. Other considerations - revocation requests**

- (1) In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):
- 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.

#### 14.1 International non-refoulement obligations

- (1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act.
- (2) The existence of a non-refoulement obligation does not preclude non-revocation of the mandatory cancellation of a non-citizen's visa. This is because Australia will not remove a non-citizen, as a consequence of the cancellation of their visa, to the country in respect of which the non-refoulement obligation exists.
- (3) Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in a request to revoke under s501CA the mandatory cancellation of their visa, or can be clear from the facts of the case (such as where the non-citizen held a protection visa that was mandatorily cancelled).
- (4) 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.
- (5) If, however, the visa that was cancelled was a Protection visa, the person will be prevented from making an application for another visa, other than a Bridging R (Class WR) visa (section 501E of the Act and regulation 2.12A of the Regulations refers). The person will also be prevented by section 48 A of the Act from making a further application for a Protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them – sections 48A and 48B of the Act refer).
- (6) In these circumstances, decision-makers should seek an assessment of Australia's international treaty obligations. Any non-refoulement obligation should be weighed carefully against the seriousness of the non-citizen's criminal offending or other serious conduct in deciding whether or not the non-citizen should have their visa reinstated. Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's Protection visa remains cancelled, they would face the prospect of indefinite immigration detention.

#### 14.2 Strength, nature and duration of ties

- (1) The strength, nature and duration of ties to Australia. 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 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).

**14.3** Impact on Australian business interests

- (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 delivery of an important service in Australia.

**14.4** Impact on victims

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

**14.5** Extent of impediments if removed

- (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.