Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL	)	
	)	No: 2018/7617
GENERAL DIVISION	)	

Re: Brendan Sun
Applicant

And: Minister for Home Affairs
Respondent

TRIBUNAL: The Hon. Dennis Cowdroy OAM QC, Deputy President

DATE: 19 February 2019

PLACE: Sydney

In accordance with subsection 42C(1) of the *Administrative Appeals Tribunal Act 1975*:

1. the parties have reached an agreement as to the terms of a decision of the Tribunal that is acceptable to the parties; and

2. the terms of the agreement have been reduced to writing, signed by or on behalf of the parties and lodged with the Tribunal; and

3. the Tribunal is satisfied that a decision consistent with those terms is within the powers of the Tribunal and is appropriate to make.

Pursuant to subsection 42C(2) of the *Administrative Appeals Tribunal Act 1975*, the Tribunal decides that:

1. The decision made by the delegate of the respondent on 13 December 2018 under subsection 501(2) of the *Migration Act 1958* (Cth) to cancel the applicant's Class BS Subclass 801 Partner visa be set aside and, in substitution for the decision so set aside, there be a decision not to cancel the applicant's Class BS Subclass 801 Partner visa.

.....[sgd].....
The Hon. Dennis Cowdroy OAM QC, Deputy President

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FACTS

1. On 9 January 2017, Brendan Sun **('the applicant')** received a Notice of Intention to Consider Cancellation of his Class BS (Subclass 801) Partner visa **('Notice')** in accordance with s 501(2) of the *Migration Act 1958* (Cth) **('the Act')**.[1]

2. On 30 January 2017, the applicant appointed registered migration agent (X) to provide 'immigration assistance' to the applicant in relation to the potential cancellation of his permanent partner visa.[2] Since that time, the applicant submitted to the Department of Home Affairs (and its predecessor in name) various material in response to the Notice.

3. On 13 December 2018, a delegate of the Minister for Home Affairs decided to cancel the applicant's partner visa under s 501(2) of the Act **('reviewable decision')**.[3]

4. The delegate concluded that with respect to an Interpol notice in relation to the applicant, it was reasonable to infer that the applicant would present a risk to the Australian community or a segment of that community.[4] Accordingly, the delegate concluded that the applicant failed the character test pursuant to s 501(6)(h) of the Act.[5]

5. Having found that the applicant failed the character test, the delegate ultimately found that the applicant posed an unacceptable risk of harm to the Australian community applying relevant considerations reflected in *Direction no. 65*.[6]

6. On 20 December 2018, the applicant was given formal notice of the reviewable decision made by the delegate on 13 December 2018.[7] Later on 20 December 2018, the applicant

[1] G Docs, 35-37.
[2] G Docs, 170-172.
[3] G Docs, 18.
[4] G Docs, 10-12.
[5] G Docs, 12.
[6] G Docs, 18.
[7] G Docs, 5-8.

lodged an application for review of the reviewable decision with the Administrative Appeals Tribunal **('Tribunal')**.[8]

7. The applicant is a citizen of the People's Republic of China **('China')**. The applicant was born on 22 December 1969 and is currently 49 years of age. The applicant is in a long-term de facto relationship with an Australian citizen and has three daughters in Australia who are all Australian citizens. The applicant has lived in Australia for about 17-18 years.

8. The applicant is the subject of an Interpol Red Notice requested by China and published on 22 December 2014 **('Red Notice')**.[9] The Red Notice provides a formal request for the provisional arrest of the applicant and the ultimate extradition of the applicant to China.[10] Despite that formal request, law enforcement authorities in Australia have neither arrested nor taken active steps to extradite the applicant to China.

9. The Red Notice alleges, *inter alia*, that between 8 November 2014 and 10 November 2014, the applicant both plotted and organised the kidnapping of two victims in China for the purposes of extortion. The Red Notice claims that the applicant employed a number of individuals to assist in undertaking the kidnapping activities. It is further alleged that the applicant unlawfully used a bankcard of one of the victims in China and withdrew the sum of 400,000 CNY. It is also claimed that the applicant made numerous telephone calls to the father of one of the victims and sought a ransom of 40 million CNY.[11]

10. In relation to the allegations reflected in the Red Notice, they are categorically denied by the applicant.

11. Significantly, despite the fact that the Red Notice was issued on 23 December 2014, the

[8] G Docs, 1-2.
[9] G Docs, 30-34.
[10] G Docs, 32.
[11] G Docs, 30-34.

applicant was not given notice of the allegations reflected in the Red Notice until 9 January 2017.[12] Despite the purported risk of harm the applicant was said to be to the Australian community, the applicant's permanent partner visa was not cancelled until 20 December 2018. Accordingly, the applicant had been residing in the Australian community for over four years since the original publication of the Red Notice without any adverse incidents.

12. The applicant has a minor criminal history in Australia related to domestic violence offences involving one of his daughters. With respect to that domestic violence offending, the applicant was sentenced on 15 October 2010 at Fairfield Local Court for common assault, destroy or damage property and stalk/intimidate intend fear physical etc harm.[13] With regard to the three offences, the applicant was sentenced to serve concurrent good behaviour bonds of 18 months and was convicted of the relevant crimes.[14]

13. The applicant has no other criminal history in Australia or elsewhere in the world.

ISSUES

14. The Tribunal has the statutory power to review the reviewable decision under s 500(1)(b) of the Act.

15. The issues to be determined in these proceedings are:

    (a) Whether the Tribunal is satisfied that the applicant does not pass the character test in accordance with s 501(6) of the Act **('Issue 1: Character Test')**;[15] and

    (b) If the Tribunal is not satisfied that the applicant passes the character test, whether the Tribunal is satisfied that the applicant poses an unacceptable risk of harm to the Australian community (such that the statutory discretion reflected in s 501(2) of the

[12] G Docs, 35-37.
[13] G Docs, 28.
[14] G Docs, 28.
[15] See the statutory effect of the *Migration Act 1958* (Cth), ss 501(2)(a)-(b).

Act should be exercised to cancel the applicant's visa) **('Issue 2: Exercise of Discretion')**.

16. In exercising the statutory power mandated by s 501(2) of the Act, the Tribunal is bound by *Direction no. 65*.

17. For the reasons that follow, the applicant contends that he passes the character test pursuant to s 501(6) of the Act. Even if the Tribunal is not satisfied that the applicant passes the character test, the applicant contends that he is not an unacceptable risk of harm to the Australian community - such that the statutory discretion mandated by s 501(2) of the Act should not be invoked to cancel his permanent partner visa.

18. Ultimately, the applicant contends that the *correct or preferable decision* is to set aside the reviewable decision under review.

CONTENTIONS

Issue 1: Character Test

19. The delegate to the Minister for Home Affairs found that the applicant did not pass the character test under s 501(6)(h) of the Act. That section reads as follows:

> (6) For the purposes of this section, a person does not pass the character test if:
>
> ……
>
> (h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

20. Accordingly, the applicant will not pass the character test pursuant to s 501(6)(h) of the Act when the following two criteria are met:

(a) An Interpol notice in relation to the person is in force; and

(b) It is reasonable to infer from the Interpol notice that the person would present a risk to the Australian community or a segment of that community.[16]

21. First, it is accepted that an Interpol notice in relation to the applicant is in force.[17] Notably, the Red Notice appears to remain active, as reflected on the official Interpol website at the time of writing (2 February 2019).[18]

22. Secondly, the applicant contends that it is not reasonable to infer from the Red Notice that the applicant would present a risk to the Australian community or a segment of that community. There are a substantial number of reasons in support of this contention:

(a) The Red Notice was published on 23 December 2014. The Red Notice made a formal request for the 'provisional arrest' of the applicant in Australia.[19] Despite investigations by the Australian Federal Police **('AFP')**, the applicant has never been arrested in Australia in relation to the alleged kidnapping offences in China.

(b) The Red Notice made a formal request that after the applicant was arrested, assurances were given that the Chinese authorities would seek the applicant's 'extradition' to China.[20] Tellingly, no Commonwealth Attorney-General in Australia has taken any steps to extradite the applicant to China in accordance with the Red Notice request.

(c) As outlined above, the Red Notice was published on 23 December 2014. Since the publication of the Red Notice, the applicant has remained in the Australian community without engaging in any criminality whatsoever - this plain fact provides *compelling evidence* [our emphasis] in support of the contention that the applicant is not a risk to the Australian community.

(d) In the 17-18 years that the applicant has resided in Australia, he has shown no propensity to engage in kidnapping and extortion like activities that would pose a threat to members of the Australian community.

[16] G Docs, 203.
[17] G Docs, 30-34.
[18] See https://www.interpol.int/notice/search/wanted/2014-78089
[19] G Docs, 32.
[20] G Docs, 32.

(e) The mere issuing of an Interpol Red Notice at the request of Chinese authorities does not automatically lead to the conclusion that the allegations in the notice are well-founded: *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [99], [111]-[112], [116]-[117] and [125]-[126] (Deputy President S A Forgie).

(f) The Red Notice reflected at pp. 30-34 of the G Docs assert mere allegations of serious criminality without any supporting evidence at all.[21]

(g) The Tribunal should give the Red Notice *little to no weight* for the following reasons:

- The Red Notice does not outline the steps the authorities took to investigate the kidnapping offence.[22]

- The Red Notice does not refer to any evidence that led them to identify the applicant as a suspect in the kidnapping offence.[23]

- There is no reference to any forensic evidence that places the applicant at the POS machine in Shenyang.[24]

- There is no fingerprint evidence linking the applicant to the alleged victim's credit card.[25]

- There is no photographic evidence demonstrating that the applicant left Shenyang to Kunming on 9 November 2014.

- There is no evidentiary material (e.g. related to confessions from suspects of the kidnapping offence) that implicate the applicant.[26]

- The Red Notice does not provide any background material that gives dimension to how the applicant became involved in the alleged offending or why the applicant would have committed the kidnapping offence.[27]

- The fact that the applicant had travelled to Australia shortly after the alleged

[21] Cf *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [116].
[22] Cf *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [111].
[23] Cf *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [111].
[24] Cf *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [111].
[25] Cf *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [111].
[26] Cf *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [112].
[27] Cf *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [116].

kidnapping took place should not be treated as evidence of the applicant being conscious of his having committed crimes and the need to escape.[28]

- The Red Notice provides no evidential material linking the applicant to the name 'Yuzhang Gao'.

- The Red Notice outlines that Chinese authorities are currently conducting an investigation into a kidnapping matter which took place on 8 November 2014.[29] Given that statement was made in December 2014, is not clear what stage the investigation is currently at (and what result(s) have been yielded) in 2019.

(h) The evidence before the Tribunal demonstrates that there are significant issues of corruption, unfairness and a lack of impartiality associated with the Chinese legal system.[30]

23. For the foregoing reasons, it is not reasonable to infer from the Interpol Red Notice that the applicant presents a risk to the Australian community or a segment of the community. As such, the Tribunal would be so satisfied that the applicant passes the character test pursuant to ss 501(2) and 501(6) of the Act.

Issue 2: Exercise of Discretion

Introduction

24. In the event that the Tribunal is not satisfied that the applicant passes the character test, the Tribunal must consider whether to exercise its statutory discretion to cancel the applicant's visa under s 501(2) of the Act. In undertaking that legal task, the Tribunal is bound to have regard to the considerations reflected in Part A of *Direction no. 65*.

Protection of the Australian community

25. On 15 October 2010, the applicant was convicted and sentenced for the following offences

[28] Cf *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [117].
[29] G Docs, 33.
[30] See the various annexures to the Statement of Brendan Sun, 30 January 2019.

at Fairfield Local Court: common assault; destroy or damage property; stalk/intimidate intend fear etc harm.[31] For each offence, the applicant was convicted and sentenced to a good behaviour bond of 18 months **('domestic violence offences')**.

26. The domestic violence offences occurred in circumstances where the applicant became both agitated and upset with his daughter. The applicant's daughter (aged 15 at the time) took a boyfriend contrary to the cultural expectations and norms of Chinese tradition. The applicant's daughter was receiving poor marks at school, had growing tension with the applicant's partner (X) and had shown growing disrespect in the family household.

27. After an altercation occurred between the applicant and his daughter at the family home, the applicant broke his daughter's mobile phone and physically assaulted her. The applicant's daughter became distressed and ultimately called the police, which arrested the applicant for his offending.

28. Plainly, at a broader level of abstraction, the applicant's engagement in the domestic violence offences would be considered serious. The victim would be viewed as a vulnerable member of the community, given that she was a minor at the time. Furthermore, the use of any physical violence would generally be regarded as serious.

29. In relation to the allegations of the applicant being involved in a kidnapping offence in China in November 2014, the applicant contends that the Tribunal would give this allegation little to no weight for the purposes of clause 9.1 of *Direction no. 65*. As outlined earlier in these contentions, the Red Notice provides a mere allegation of serious offending against the applicant without the provision of any supporting evidentiary material.

[31] G Docs, 28.

30. It is accepted that offences of kidnapping and extortion are very serious. However, as this Tribunal is aware, the applicant has not been convicted of the crime for which he is alleged to have committed. Furthermore, given the very serious nature of the allegations levied against the applicant, it is respectfully contended that the Tribunal would be guided by the principles espoused by Dixon J (as his Honour then was) in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 362, when considering the alleged kidnapping offence:

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

31. The applicant contends that the Tribunal would not be reasonably satisfied that the applicant was involved in the alleged kidnapping offence in China in 2014. As it presently stands, the Red Notice is an example of an 'inexact proof' and 'indefinite testimony'. The applicant has not been provided with any evidentiary material which supports the allegations levied in the Red Notice.

32. In *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155, Deputy President S A Forgie had to determine whether a non-citizen had committed a serious non-political crime outside Australia.[32] The Minister relied upon an Interpol Red Notice (requested by China) that alleged that the non-citizen was wanted for prosecution for kidnapping and murder.[33]

[32] *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [126].
[33] *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [138].

33. In concluding that there were not serious reasons for considering that the non-citizen had committed a serious non-political crime outside Australia,[34] Deputy President S A Forgie said this in *FTZK*:

> In summary, having regard to all of the material that I have, the only material that provides a connection between FTZK and the kidnapping and murder of V committed on 20 December 1996 in PRC is to be found in the confessions of ZHONG Weidong and WU Zhijun. I have already given my reasons for approaching the confessions of alleged accomplices who seek to implicate another. I have referred to the inconsistencies between them that cause me concern and to the lack of any evidence of a forensic nature linking him to the crimes. There are no witness statements of anybody who saw the Toyota HIACE at the scene of the kidnapping or of the person or persons who saw a white vehicle at the pond in the early hours of the morning. The two confessions do not give a consistent account of how or why FTZK came to be involved in the plan to kidnap and murder V.[35]

34. The Tribunal in this case would particularly note:

- Like *FTZK*, there is a lack of any evidence of a forensic nature linking the applicant to the kidnapping offence.
- Like *FTZK*, there are no witness statements annexed to the Red Notice implicating the applicant in the kidnapping offence.
- Unlike *FTZK*, there is not even any evidentiary material of confessions made by suspects implicating the applicant in the kidnapping offence in November 2014.
- Unlike *FTZK*, the Red Notice does not even describe the investigative steps authorities undertook in relation to the kidnapping offence and how the applicant is identified as being involved in the alleged criminality in China.

35. In relation to the applicant's domestic violence offences, the applicant was convicted of the three offences and placed on a good behaviour bond of 18 months for each offence

[34] *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [126].
[35] *FTZK and Minister for Immigration and Border Protection* [2015] AATA 155 [125].

respectively.[36] Given the sentences imposed on the applicant for the domestic violence offences, it is contended that the court considered the offences to be at the *lower end of the range of objective seriousness*. After all, the applicant did not receive a custodial sentence in relation to the domestic violence offences.

36. This is not a case where the non-citizen has an extensive criminal history. Apart from the applicant's domestic violence offences committed in 2010, the applicant has no other criminal history in Australia or elsewhere. As such, this is not a case where the consideration of 'cumulative effect of repeated offending' has any application.

37. In completing several Income Passenger Cards, it is accepted that the applicant neglected to disclose any prior criminal offending related to the 2010 domestic violence offences. That said, the non-disclosure by the applicant was <u>not intentional</u>. The applicant did not understand that the imposition of good behaviour bonds and convictions meant that he had a criminal record.

38. To *contextualise* the preceding position held by the applicant, the Tribunal would respectfully have regard to the fact that **1)** the applicant had never been before an Australian court before; **2)** the applicant has minimal command of the English language; **3)** there is no evidence to indicate any Chinese interpreter thoroughly explained the nature and extent of the applicant's criminal sentences in 2010 to him; and **4)** the applicant had no reason to intentionally mislead the Minister, given that the applicant's commission of the domestic violence offences did not lead to the Minister becoming interested in potentially cancelling the applicant's Australian visa on that basis.

39. The applicant has never been formally warned that his Australian visa may be cancelled if

[36] G Docs, 28.

he continued to engage in criminal conduct in Australia or elsewhere.

40. It is accepted that the alleged offence of kidnapping in China in 2014 is also classified as an offence in Australia. However, for reasons already given, the Tribunal would not be reasonably satisfied that the applicant was involved in the kidnapping offence in China.

41. In accordance with clause 9.1.2(1) of *Direction no. 65*, 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.

42. The applicant contends that the domestic violence offences committed by him in 2010 are not so serious that if they were to be repeated, the applicant would represent an unacceptable risk of harm to the Australian community. Further, clause 9.1.2(1) presupposes 'repetition' of offending which may lead to a conclusion that a non-citizen represents an unacceptable risk of harm to the Australian community. Given that there is insufficient evidence to demonstrate that the applicant has engaged in the alleged kidnapping offence, clause 9.1.2(1) has no application in relation to that alleged offending.

43. Should the applicant engage in further offending comparable to the domestic violence offences in 2010, such criminality may cause physical harm and emotional distress to the relevant victim. Given that the applicant denies committing the alleged kidnapping offence and that he is entitled to the presumption of innocence at this stage, clause 9.1.2(2)(a) of *Direction no. 65* has no application regarding the alleged kidnapping crime.

44. The applicant contends that the likelihood of him engaging in further criminal conduct is non-existent. Should the Tribunal reject this contention, the applicant's risk of re-

offending could be characterised as no more than negligible at best. In support of these contentions, the applicant respectfully draws the following matters to the Tribunal's attention:

(a) The applicant's last criminal offending was in 2010 (e.g. the domestic violence offences).

(b) The applicant has not engaged in any criminality since 2010.

(c) The applicant has shown an insight into his offending in relation to the domestic violence offences.[37] The applicant pleaded guilty to the domestic violence offences. The applicant accepted that his conduct "was wrong",[38] thus showing insight into his offending. The applicant outlined that he felt "very sad"[39] by the circumstances of his offending.

(d) The applicant has a supportive partner and two daughters which still reside at the family home in Sydney. Thus, the applicant has a strong foundation to avoid future criminality and continue to contribute to the Australian community (as a hard-working adult and family man).

(e) Despite the alleged kidnapping offence in 2014, the applicant has spent about four years in Australia without any adverse incidents at all. The Tribunal would give this significant weight in favour of the applicant.

45. For all of the foregoing reasons, the applicant contends that the primary consideration of protection of the Australian community weighs against cancellation of the applicant's visa.

Best interest of minor children in Australia affected by the decision

46. Decision-makers must make a determination about whether cancellation is, or is not, in the best interests of relevant children. The best interests of each child should be given individual consideration to the extent that the interests may differ. In considering the best

[37] Forensic Psychologist Report, Kathryn Wakely, G Docs, 133-142.
[38] G Docs, 139.
[39] G Docs, 139.

interest of the child, the Tribunal is required to have regard to relevant factors reflected in clause 9.2(4) of *Direction no. 65*.

47. The evidence in this case demonstrates that the applicant is the biological father of two children in Australia: X (aged 11); and X (aged 9). The evidence further demonstrates that the applicant maintains a strong and loving relationship with both of his biological daughters (who are Australian citizens). The applicant otherwise contends as follows.

48. First, the applicant has maintained a close relationship with both of his daughters since their birth. Although there were periods of absence in the relationship between the applicant and his daughters (e.g. when the applicant was subject to an apprehensive domestic violence order against his partner and time spent overseas), such periods of absence should not be characterised as substantial in nature.

49. Secondly, the evidence demonstrates that the applicant is likely to play a positive parental role in the future for both of his daughters. For example, the applicant is the breadwinner of the family unit and provides significant financial and emotional support to his daughters. The applicant is strongly supportive of the educative development of his daughters and is the primary cook in the family home.

50. Given that the applicant's daughters are fairly young, they still have many years to go before they turn 18. It follows that if the applicant is permitted to remain in Australia, he is likely to continue to play a substantial positive role in the lives of his daughters. The applicant's partner, X, strongly supports the applicant remaining in Australia to be with his daughters and her.

51. Thirdly, there is no evidence that the applicant's prior domestic violence offending in 2010 has had any direct adverse impact on his two daughters, X and XX. Furthermore, there is

no evidence that any future criminal conduct engaged in by the applicant would have a direct negative impact on his daughters.

52. Fourthly, if the applicant is removed to China, it is contended that the likely effect of separation between the applicant and his daughters in Australia would be substantial. For example, given the closeness of the relationship between the applicant and his daughters, the applicant's daughters would suffer substantial ongoing emotional distress.

53. Given that the applicant is the breadwinner of the family, the applicant's inability to provide financially for the family unit in Australia would have significant adverse consequences for his daughters (e.g. including the continued cessation of remedial classes outside of school, the likely need to move schools because the family will be unable to afford mortgage repayments on the Cherrybrook property and general disruption to the children's education and emotional development).

54. Furthermore, it is not even clear that the applicant would be able to maintain any contact with his daughters if he was removed to China. The applicant is currently the subject of the Red Notice, the effect of which means that the applicant will be arrested and detained immediately upon landing in China.

55. Given the evidence before the Tribunal regarding a 98-99% conviction rate in the criminal justice system for individuals charged with offences in China, there is a real prospect that the applicant will be imprisoned for a substantial period of time (potentially for the balance of his natural life). In those circumstances, it is far from clear that the applicant would be able to maintain any relationship with his daughters while incarcerated in a Chinese prison cell or in pre-trial detention.

56. Furthermore, the family unit is currently suffering significant financial stress as a result of

the fact that the applicant is in immigration detention (and thus unable to work and financially provide for the family). As such, if the applicant is removed to China, it is likely that the applicant's partner (X) and two daughters (X and XX) will not be in a financial position to travel to China to visit the applicant.

57. Fifthly, the available evidence demonstrates that the applicant's partner already fulfils a parental role in relation to the applicant's daughters. Despite that concession, the evidence demonstrates that the applicant's partner is struggling both financially and emotionally without the applicant's presence at the family home. Furthermore, the available evidence demonstrates that the applicant's partner is having to work long hours at present to support her children and satisfy legal fees in relation to the applicant's immigration case before the Tribunal. Such added pressures inevitably are having an adverse impact on the ability of the applicant's partner to fulfil a sufficient parental role in relation to her children.

58. Sixthly, in accordance with clause 9.2(4)(f) of *Direction no. 65*, this is a case where there are known views of a child. For example, in the Statement of X (23 January 2019), X adduces the following evidence:

> 4. I love my father very much. I wish that my father can get back his Australian visa and come home. I have been very upset since my father was taken away from the family. I am always thinking about my father. I cannot imagine celebrating Christmas and special occasions without my father.
>
> 5. My father is hardworking and always provides for our family. Without my father around, our family would not be able to live properly and go on holidays ever. Since my father has been in immigration detention, I have had to stop all tutoring because my parents cannot afford to pay the fees at present. My education is being impacted in a big way.

59. The evidence demonstrates that even when the applicant and his partner (X) separated in the past, the applicant provided financial support to his ex-partner and two daughters. It is clear, in those circumstances, that the applicant has always maintained a strong and

loving relationship with his daughters, X and XX.

60. In light of the preceding, the applicant contends that the primary consideration of best interests of minor children in Australia weighs against cancellation of the applicant's visa.

Expectations of the Australian Community

61. Clause 9.3 of *Direction no. 65* mandates that 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 cancel the visa held by such a person.

62. This primary consideration further makes plain that visa cancellation 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 continue to hold a visa. Decision-makers should have due regard to the Government's views in this respect.

63. This primary consideration has been the subject of various jurisprudence. In that context, before applying this primary consideration to the facts of this case, it is worth outlining, in summary, relevant jurisprudence with respect to 'expectations of the Australian community'.

64. In *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, Mortimer J said that this description of 'community expectation' in paragraph 13.3(1) [equivalent 9.3(1) in Part A] operates as a 'deeming provision' and is inevitably adverse to any applicant:

> [76] In substance this consideration is adverse to any applicant. As the Minister submits, it is inextricably linked to the other primary consideration of protection of the Australian community. In particular, the last two sentences of para 13.3 of the Direction suggest the "expectations" about which it speaks are expectations adverse to the position of any applicant who has failed the character test and been convicted of serious crimes. In this primary consideration as expressed (and despite the references earlier in the Direction to

> "tolerance") the Australian community's "expectations" are defined only in one particular way: namely, that the Australian community "expects" non-revocation where a person has been convicted of serious crimes of a certain nature. That is, this is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government of which he or she is member, wish to articulate community expectations, whether or not there is any objective basis for that belief. That is the structure of this part of the Direction.
>
> [77] ... It was inevitable that this consideration would weigh against revocation: that is what it is intended to do (see *Uelese* [2016] FCA 348; 248 FCR 296 at [64]- [66]).

65. A number of Tribunal decisions have questioned the assumption contained in Mortimer's J observations that community expectation will always dictate non-revocation of a cancellation decision.

66. In *Ayache and Minister for Immigration and Border Protection (Migration)* [2018] AATA 310 Deputy President Forgie said:

> [65] ...To assume that the expectations of the Australian community will always be a consideration that will weigh against a visa applicant who has failed to pass the good character test does not, I respectfully suggest, sit comfortably with the discretionary nature of the power given to the Minister. The Minister himself recognises in the Principles set out in paragraph 6.3 of Direction No. 65 that a discretion is involved. He talks in terms of what should generally be expected as in paragraph 6.3(3), of there being some circumstances in which the harm that would follow is so great as to be unacceptable even if there are other countervailing considerations paragraph 6.3(4). These are but two of the seven principles in paragraph 6.3 but each of the seven shows that what may be, and what may not be, acceptable to the Australian community is a matter of balance to be considered in each case.
>
> [66] It follows that I respectfully suggest that the statement made by Mortimer J in YNQY that "It was inevitable that this consideration [being that in [13.3]] would weigh against revocation; that is what it is intended to do ..." is too broadly stated. It may be that it has that effect in some cases but I respectfully suggest that the way in which it is framed overlooks that paragraph 13.3, and so paragraphs 11.3 and 13.3 are drafted in terms that recognise that a decision-maker has discretion to come to a conclusion about the

> expectations of the Australian community in a particular case. It requires the decision-maker to have regard to the Government's views but they are views that, as I said, allow regard to be had to the whole of the circumstances.

67. In *Murphy v Minister for Immigration and Border Protection (Migration)* [2018] AATA 750, Senior Member Taylor referred to what he described as the 'prescriptive nature of the concept of community expectation' in paragraph 13.3 (emphasised in Mortimer's J observations in *YNQY*) and suggested that when the paragraph is considered as a whole, 'it does not dictate an inflexible conclusion that community expectation will always call for non-revocation' (at [58]):

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

68. In *NBCM and Minister for Home Affairs (Migration)* [2018] AATA 2387 [90]-[91], Senior Member Kirk found that:

> Having regard to paragraph 9.3 and informed by the Principles in paragraph 6.3, the Tribunal must have regard to whether the offences for which the Applicant has been convicted would create a community expectation that the Applicant's visa be cancelled.
>
> An appropriate consideration of this Primary Consideration requires an objective analysis of the Applicant's offending with regard to his individual circumstances and the nature and consequences of his criminal offending. Of relevance are the Principles in paragraph 6.3 of the Direction:
>
> > the Australian community expects the Australian Government to cancel the visas of non-citizens who commit serious crimes (paragraph 6.3(2));
> >
> > non-citizens who commit serious crimes, including of a violent or sexual nature,

> should generally expect to forfeit the privilege of staying in Australia (paragraph 6.3(3));
>
> in some circumstances if the offence were to be repeated the consequences would be so serious that any risk of similar conduct is unacceptable (paragraph 6.3(4));
>
> a higher degree of tolerance of criminal or other serious conduct may be afforded to a long term non-resident (paragraph 6.3(5)); and
>
> the length of time a non-citizen has been making a positive contribution to the community (paragraph 6.3(7)).

69. In *Labi and Minister for Immigration and Border Protection (Migration)* [2016] AATA 316 at [60], Deputy President McCabe observed in relation to this primary consideration:

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

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

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

71. Deputy President McCabe in *Do and Minister for Immigration and Border Protection (Migration)* [2016] AATA 390 at [23] outlined the Tribunal's approach to determining the community's expectations:

> A decision-maker is, to some extent, required to guess at the community's expectations ... As I begin my deliberations, I assume the Australian community would be fair-minded and mature... The community would certainly not be vengeful. The applicant has already been punished for his offence, and the community would not want to see visa cancellation misused to inflict further punishment. I would also expect the community to be conscious

> of the length of time the applicant has lived in Australia and other circumstances which might assist the community to form a proper judgment about the individual and what should be done.

72. Deputy President Forgie in *Rabino and Minister for Immigration and Border Protection (Migration)* [2016] AATA 999 at [68] observed that "the Principles are directed to whether the Australian community is prepared to give the person another opportunity to remain in Australia." That assessment should be made on the basis of the individual circumstances of each case and considered in light of the purpose of the legislation.

73. In *The Trustee for the Fuzzy Events Unit Trust v Minister for Home Affairs* [2018] AATA 3273 [60], the Minister argued that the Tribunal was bound by the decision of Mortimer J in the Federal Court in *YNQY*. In rejecting the Minister's argument, Deputy President Justice Stevenson (e.g. a Chapter 3 Court Judge) refused to strictly follow *YNQY*:

> 64. In my view the wording of cl 11.3 of the Direction makes clear on its face that the decisionmaker has a discretion whether to refuse a visa application, taking into account inter alia the expectations of the Australian community. The words "may be appropriate to refuse a visa" appear in cl 11.3 and clearly indicate and authorise a discretionary approach.
>
> 65. It is my view that the Australian community would afford recognition to Mr Adenuga for his life changes since January 2016 and extend to him the "second chance" which he requests so as to undertake the proposed concert tour. I am of the view further that the Australian community would not expect our country to be the only one of twenty-five nations to deny entry to Mr Adenuga to enable Australian citizens to experience his recognised musical skills.

74. In light of the preceding, the applicant advances the following contentions with respect to this primary consideration.

75. First, the applicant was convicted of domestic violence offences in 2010. It is contended that these offences would <u>not</u> invoke an expectation by members of the Australian

community that the applicant's Australian visa should be cancelled. Indeed, despite the applicant's criminality in 2010, the Minister took no steps subsequently to cancel the applicant's visa. Rather, the applicant has been permitted to remain in the Australian community until his visa was cancelled on 13 December 2018.

76. Secondly, despite the serious nature of the allegations advanced in the Red Notice, the applicant contends that there is not an unacceptable risk that he will breach the trust reposed in him by members of the Australian community. Indeed, the Australian community would be cognisant of the fact that despite the Red Notice being issued on 23 December 2014, the applicant has lived peacefully and lawfully in the Australian community for a period of about four years.

77. Thirdly, the Australian community would have regard to the *individual circumstances related to the Red Notice* [own emphasis]. Significantly, it would not be an expectation of the Australian community to cancel the visa of a non-citizen merely on the basis of the issuing of a Red Notice. Moreover, members of the Australian community would pay particular regard to the fact that the Red Notice advances claims of serious misconduct without the provision of any evidentiary material in support of the claims made.

78. Members of the Australian community would be cognisant of the fact that despite Chinese authorities formally requesting the arrest and extradition of the applicant, law enforcement authorities in Australia have taken no steps to arrest the applicant. Furthermore, successive Commonwealth Attorney-Generals in Australia have also taken no steps to extradite the applicant to China in accordance with the *Extradition Act 1988* (Cth).

79. Fourthly, members of the Australian community would have regard to the consequences of any decision to cancel a non-citizen's visa. Members of the Australian community would hold an expectation that a non-citizen should not be removed to a country to participate

in a criminal trial in circumstances where that non-citizen faces a real prospect of not receiving a fair trial. It is an expectation of the Australian community, as a civilised country, that the rule of law should prevail.

80. The applicant respectfully contends that the Chinese legal system and judiciary is substantially devoid of the rule of law and certainly a promoter of injustice. Those submissions are not made lightly. Members of the Australian community would be cognisant of the following facts, supported by cogent evidence adduced by the applicant, in relation to the criminal justice system in China:

    - Conviction rates for criminal cases are close to 100 percent.
    - The UN Committee against Torture expressed serious concern over consistent reports indicating torture and ill-treatment was still deeply entrenched in China's criminal justice system.
    - There is both a lack of judicial or procuratorial oversight of criminal investigations.
    - There is a lack of transparency in China's legal system.
    - Chinese courts remain subject to a variety of internal and external controls that limit their engagement in independent decision-making.
    - The lack of separation of powers creates structural vulnerabilities within the judicial system.
    - Chinese courts remain institutions that breed injustice.
    - Officials can easily dictate the entire proceedings.
    - There is a lack of judicial independence and division of power in China.
    - There is deep-rooted flaws in China's party-dominated judicial system, which runs contrary to the rule of law.

- In cases where the defendant hasn't put forward enough exculpatory evidence, the court's judgement is basically a kind of process to affirm the conclusions of the investigators and prosecutors.

- The vast majority of criminal judges lean toward the side of prosecution and will do everything they can to avoid allowing a "guilty" defendant to escape justice.

- The vast majority of judges turn a blind eye to procedural violations of law made by police, procurators, and first-instance trial judges.

- CCP dominates the judicial system, with courts at all levels supervised by party political-legal committees that have influence over the appointment of judges, court operations, and verdicts and sentences.

- Criminal trials are frequently closed to the public.

- The judiciary does not, in fact, exercise judicial power independently. Judges regularly received political guidance on pending cases, including instructions on how to rule, from both the government and the CCP.

- The criminal justice system remained biased toward a presumption of guilt.

- Defense attorneys took part in less than 20 percent of criminal cases.

- Mechanisms allowing defendants to confront their accusers were inadequate. Only a small percentage of trials reportedly involved witnesses. Judges retained significant discretion over whether live witness testimony was required or even allowed. In most criminal trials, prosecutors read witness statements, which neither the defendants nor their lawyers had an opportunity to rebut through cross-examination.

81. Armed with the preceding information, members of the Australian community would:

(a) Give *little to no weight* to the Red Notice (particularly without any compelling evidentiary material in support of the allegations made); and

(b) Form the view that the applicant will not receive a fair trial in China.

82. Fifthly, clauses 6.3(2)-(3) of *Direction no. 65* mandates that non-citizens who commit serious crimes, including of a violent or sexual nature, should generally expect to forfeit the privilege of staying in Australia. Although the applicant's conviction for the domestic violence offences can be considered serious (given a minor was involved), it does not follow that the applicant should expect to forfeit the privilege of staying in Australia in the circumstances of this case: **1)** the applicant committed the domestic violence offences many years ago and no action was taken by the Minister to potentially cancel the applicant's visa on this basis; **2)** use of the words "generally expect" provide a level of discretion to the decision-maker; **3)** without the issue of the Red Notice, it is clear that the Minister would have taken no steps to cancel the applicant's visa under s 501(2) of the Act on the basis of the applicant's domestic violence offences in 2010.

83. Sixthly, members of the Australian community would afford the applicant a higher degree of tolerance of criminal or other serious conduct given that the applicant is a long-term non-resident in Australia (see clause 6.3(5) of *Direction no. 65*).[40] The applicant has resided in Australia for between 17-18 years.

84. Moreover, it would be an expectation of the Australian community to provide the applicant with a notable level of tolerance given his positive contribution to the Australian community (see clause 6.3(7) of *Direction no. 65*).[41] The available evidence indicates that the applicant has worked in Australia in various jobs for more than a decade. The evidence further demonstrates that the applicant has engaged in some voluntary and charitable activities (including donations to charities and undertaking voluntary work in schools).

[40] G Docs, 176.
[41] G Docs, 176.

85. Seventhly, it would not generally be an expectation of the Australian community that a family unit should be ripped apart. If the applicant is removed to China, the evidence establishes that the applicant's partner and daughters will remain in Australia. In effect, any decision to remove the applicant to China will have a devastating and long-lasting adverse effect on the family unit. As Murphy J made plain in *Pochi v Minister for Immigration and Ethnic Affairs and Another* (1982) 151 CLR 101, 115:

> Breaking-up families is generally regarded as inhumane and uncivilized. It was one of the worst aspects of slavery, and is a horrifying feature of literature about the American slave colonies and States, and the Queensland blackbirding and forced labour of "kanakas".
>
> …….
>
> Where, as here, an alien migrant has a family (spouse and children) living with him in Australia, exercising the power so as to break-up the family would be inhumane and uncivilized.

86. In the same case, Brennan J (as his Honour then was) said the following:

> it is certain that [his] deportation … would destroy or gravely damage a growing Australian family, and that would be a grave detriment not only to them but to Australia. His deportation, separating him from his Australian wife and children or requiring them to accompany him to a country that the children do not know, would be destructive of their prospects in life as well as his. … I am not persuaded that the applicant's deportation would be in the best interests of Australia." The breaking-up of a family (or forcing the spouse and children to leave their homeland) is incompatible with the way in which "a mature and civilized nation should act".[42]

87. In light of the preceding, the applicant contends that the primary consideration related to expectations of the Australian community weigh against cancellation of the applicant's visa.

Other Considerations

88. In deciding whether to cancel a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):

[42] *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 26 ALR 247, 275.

(a) International non-refoulement obligations;

(b) Strength, nature and duration of ties;

(c) Impact on Australian business interests;

(d) Impact on victims; and

(e) Extent of impediments if removed.

89. In light of the preceding, the applicant advances the following contentions.

90. First, the applicant's movement details at page 169 of the G Docs demonstrates that the applicant first arrived in Australia on 8 November 2001. Since that time, the applicant has largely resided in Australia (although spent short intermittent periods overseas). Accordingly, the applicant has resided in Australia for at least 17 years.

91. Notably, this is not a case where the applicant began committing criminal offences soon after arriving in Australia. The applicant's only criminal offending occurred in 2010 in relation to the domestic violence offences. Accordingly, the Tribunal should give substantial weight to the applicant's long-term presence in Australia.

92. Secondly, clause 10.2(1)(a)(ii) of *Direction no. 65* speaks of giving more weight to a non-citizen where that person has been contributing positively to the Australian community. The evidence before the Tribunal demonstrates that the applicant has worked for a substantial period of the 17 years that he has been in Australia (e.g. being employed for at least 14-15 years). Accordingly, substantial weight should be given to the applicant's extensive positive contribution to the Australian community by remaining in employment and contributing more broadly to the Australian economy by working.

93. Furthermore, the evidence demonstrates that the applicant has engaged in small amounts of voluntary and charitable work. For example, the applicant assisted as a cleaner at schools attended by his daughters (X and XX). Furthermore, the applicant has adduced evidence that he often makes voluntary donations in charity boxes when attending fast food restaurants (such as McDonald's).

94. Moreover, in December 2017, the applicant opened a business known as 'No 18 Dumpling House' in Crows Nest, Sydney. The applicant employed one person to assist with the running of the Chinese takeaway business. The applicant ran the takeaway business for a period of about six months before the business was closed. Accordingly, some weight should also be given to the fact that the applicant employed a member of the Australian community.

95. Thirdly, this is a case where the applicant has strong ties to the Australian community. The available evidence demonstrates that the applicant is in a de facto relationship with X and has three daughters living in Australia (X, XX and XXX). The evidence demonstrates that the applicant also maintains a close and ongoing relationship with X's parents, who live in south-western Sydney. Moreover, the evidence demonstrates that the applicant has established social ties with various members of the Australian community.

96. For example, the applicant's friend, X,[43] writes the following:

> If Brendan was removed to China, naturally my wife and I would be very distressed. I understand that Brendan's de facto partner and daughters would remain in Australia to maintain better life advancement. As such, any decision to remove Brendan to China will breakup the family unit and be heartbreaking for his immediate family in Australia.

97. By way of further example, X,[44] writes the following:

[43] See Statement of X, 19 January 2019.
[44] See Statement of X, 19 January 2019.

> If Brendan is deported to China, my husband and I would be distraught. Such a decision would largely destroy our ongoing good friendship with Brendan. Moreover, my husband and I are greatly concerned that Brendan's de facto partner and children in Australia will suffer substantial financial hardship and emotional distress if he is removed to China. We understand that Brendan's immediate family would remain in Australia if Brendan was removed to China.

98. X[45] confirms that he has enjoyed a friendship with the applicant since 2012. X speaks of the applicant as a "warm-hearted", "honest" and "sincere" friend. X also confirms that the applicant engaged in limited casual work with him on weekends to provide financial support for his family.

99. X[46] confirms that she is the sister of the applicant's partner, X. XXX provides evidence that:

> Brendan is a very good (de facto) husband and father. Every day, he cooked meals for his family and as soon as he was back home from work. He looked after his children carefully and patiently he is the major support for his whole family.
>
> [The applicant] is very friendly, kind-hearted and generous, never only minding his own interest. Once [the applicant] gathered his friends to help me to renovate and decorate my home.

100. X[47] confirms that she is the niece of the applicant. The writer provides the following important evidence:

> Uncle Brendan was my closest relatives (sic) in Australia. Whenever I saw my uncle love his two children so much, I would recall that he treated me the same way when I was a little kid. He worked very hard every day and cooked meals for family. The family only ate the meals that he cooked. He was a great father and a good partner to my aunt X. He always tried his best to provide a good quality life to his family.

[45] See Statement of X, 8 January 2019.
[46] See Statement of X, 14 January 2019.
[47] See Statement of X, 9 January 2019.

101. X[48] (a Justice of the Peace) confirms that he is a friend of the applicant. The writer provides the following important evidence:

> Mr Sun has a happy family in Australia. His wife, Ms. X and their two children, are all Australian citizens. Mr. Sun is a responsible father, caring and loving de facto husband and a very nice family man. He works at least six days a week and he has devoted all his efforts to the welfare of his family (e.g. his children's education), working hard and paying tax to the Australian government.
>
> My heart would feel extremely heavy and painful whenever I think of the consequences if Ms. X lost her de facto husband, and in particular, if Mr. Sun's two lovely kids lost their father. Removing Mr. Sun from Australia would break their family, destroy Ms. X and Mr. Sun. I sincerely hope that such a human and family tragedy would never befall this family.
>
> …….
>
> I am an Australian citizen……. If Mr. Sun is removed from Australia, I will be devastated personally by such a decision.

102. X[49] confirms that he is the de facto father-in-law of the applicant. Mr. X describes the applicant as a person of "honesty and integrity". The writer confirms that the applicant worked very hard, leaving home for work early in the morning and returning home very late each day. The writer gives evidence that the applicant is a very responsible family man who is the "family pillar supporting the whole family". Mr. X provides important evidence with respect to the role the applicant plays regarding himself and his elderly wife (who is the mother of X):

> We the two elders could not live our life on without him. He always tried his best to assist us in seeing the doctors or getting the medicines. For example, he accompanied us to the dental clinics many times and despite the long distance every time he would spare his time to get there with us. We are both nearly 80 years old and urgently need his help. He has been always taking good care of us, which reflect his great characters (sic).

[48] See Statement of X, 14 January 2019.
[49] See Statement of X, 9 January 2019.

103. Ultimately, if the applicant is removed to China, such a decision will have a significant impact not only on the applicant's immediate family unit (e.g. X, XX and XXX), but will have an impact on the applicant's extended family in Australia (including the applicant's de facto father-in-law and mother-in-law). In those circumstances, there are a notable number of Australians who will be significantly impacted by the applicant's lack of presence in Australia.

104. Given that the applicant has lived in Australia for about 17 years in combination with his various positions of employment, it is only natural that the applicant would have established strong ties to the Australian community. This consideration should be given substantial weight in favour of the applicant.

105. Fourthly, this is not a case where clause 10.3 of *Direction no. 65* has application. The applicant's Chinese takeaway business was closed in about June or July 2018. Accordingly, there is no evidence that the applicant's removal from Australia would significantly compromise Australian business interests.

106. Fifthly, clause 10.5 mandates that a decision-maker must have regard to 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 (having regard to the non-citizen's age and health, language or cultural barriers and any social, medical and/or economic support available to them in that country).

107. It is respectfully contended that the applicant will suffer substantial impediments if removed to China for the following reasons:

    (a) The applicant will suffer significant emotional distress, given that he will be away from his de facto partner (X) and several daughters in Australia.

(b) The evidence demonstrates that the applicant is currently the subject of a Red Notice. Consequently, the applicant will be arrested and detained in China upon setting foot in that country. The available evidence demonstrates that the applicant is unlikely to receive a fair criminal trial, will be the subject of gruelling detention and faces the real prospect of life imprisonment (despite the applicant strongly maintaining his innocence).

(c) The Department of Foreign Affairs and Trade **('DFAT')** makes plain that the Ministry of Public Security in China manages pre-trial detention procedures.[50] DFAT has reported that such procedures are not subject to judicial oversight. Security agencies can hold individuals for years while they progress through the charge, arrest, investigation, court hearing and sensing processes. DFAT further reports that individuals convicted of an offence do not move into the prison system until the case is finalised, including any appeal processes.[51] DFAT has reported that detention conditions can be overcrowded and detainees can be required to sleep on the floor and be denied regular exercise.[52] DFAT further reports that the nutritional quality of meals are poor and quantities are small. Furthermore, DFAT has reported that the conditions in administrative and pre-trial detention facilities are often worse than those in prison.[53]

(d) Although the applicant's father lives in China, this is, with respect, of little consequence. The evidence demonstrates that the applicant's father is old, without even moderate financial means and has significant health issues (including Alzheimer's). The applicant's biological mother is deceased. Furthermore, although the applicant's sister resides in China, the evidence demonstrates that she receives very little money and has to support her own family. In those circumstances, the applicant's extended family in China are not in a position to assist the applicant.

(e) The evidence demonstrates that only 20% of lawyers assist defendants in criminal cases in China.[54] Accordingly, there is a real prospect that the applicant will suffer significant impediments in attempting to defend the kidnapping charge currently against him in China.

[50] See Statement of Brendan Sun, 30 January 2019, 67.
[51] See Statement of Brendan Sun, 30 January 2019, 67.
[52] See Statement of Brendan Sun, 30 January 2019, 69.
[53] See Statement of Brendan Sun, 30 January 2019, 69.
[54] See Statement of Brendan Sun, 30 January 2019, 22.

108. The applicant is currently aged 49. The applicant is generally in good health, subject to ongoing gout issues for which he takes medication. It is accepted that there are no substantial language or cultural barriers, given that the applicant's native language is Chinese (e.g. the Mandarin dialect). It is also accepted that the applicant has useful work skills related to gyprocking and cooking. Despite these matters, it should be borne in mind that **1)** the applicant has become accustomed to an Australian way of life (living in Australia for over 17 years; **2)** it is unreasonable to suppose that the applicant will be able to obtain lawful employment upon return to China, because the applicant will be both arrested and detained upon landing in that country; **3)** is far from clear, in any event, whether the applicant would be entitled to any welfare payments from the Chinese government.

109. For all of the foregoing reasons, it is contended that the other considerations weigh against cancellation of the applicant's visa.

Conclusion

110. The applicant respectfully contends that the primary consideration of **protection of the Australian community** weighs moderately against cancellation of the applicant's visa. This conclusion is particularly advanced because the applicant poses no more than a negligible risk of re-offending (in relation to the domestic violence offences). The applicant further contends that the Tribunal would reject finding that the applicant poses an unacceptable risk of harm to the Australian community by reference to the kidnapping allegations. The applicant places particular emphasis on the fact that the Red Notice makes mere allegations without the provision of any supporting evidentiary material at all.

111. With respect to the primary consideration of **best interests of minor children in Australia affected by the decision**, the applicant contends that this consideration weighs heavily against cancellation of the applicant's visa. The evidence demonstrates that the applicant has a strong and ongoing relationship with his two daughters who reside at the

family home in Sydney. Significantly, any decision to remove the applicant from Australia will have a substantial adverse impact on the development and subsistence in life of the applicant's daughters (both of which are Australian citizens).

112. The applicant contends that the primary consideration related to **expectations of the Australian community** weighs heavily against cancellation of the applicant's visa. The Australian community would be cognisant of the fact that the applicant does not have a substantial criminal record. The Australian community would be cognisant of the fact that the applicant has been a hard-working and contributing member of the Australian community for many years. The Australian community would hold an expectation that the applicant would not be removed to a country where there is a real prospect he will not receive a fair trial. The Australian community would generally hold an expectation that the breaking up of the family unit is uncivilised and inhumane. The Australian community would hold an expectation that should the Minister seek to cancel a non-citizen's visa on the basis of an Interpol Red Notice, that *compelling evidentiary* material in support of the Red Notice would be provided to the non-citizen. The Australian community would hold an expectation that a person who has resided in the Australian community for almost two years (without any adverse issues) since the issue of a 'Notice of Intention to Consider Cancellation of their Australian Visa' would not represent an unacceptable risk of harm to members of the Australian community.

113. The applicant contends that the **'other considerations'** heavily weighs against cancellation of the applicant's Australian visa. The applicant has strong ties and links to members of the Australian community, including his immediate family, extended family and various friends he has established since residing in Australia over the last 17 years. The applicant has provided substantial positive contributions to the Australian community through his lawful employment, voluntary and charitable work and assisting members of his extended

family (including his de facto father-in-law and mother-in-law). The applicant will otherwise suffer substantial impediments if removed to China, primarily because he will be both arrested and detained upon arrival in that country. The applicant will be the subject of very difficult detention conditions, not face a fair criminal trial in relation to the kidnapping offence and be separated from his immediate and extended family in Australia. Ultimately, a substantial number of Australians will suffer should the applicant be removed to China.

114. For all of the foregoing reasons, the applicant respectfully contends that the reviewable decision under review should be set aside and a direction made that the statutory discretion in s 501(2) of the Act should *not* be exercised to cancel the applicant's visa.[55]

REBUTTAL OF DELEGATE'S FLAWED DECISION

115. Although the applicant appreciates that the appeal proceedings before the Tribunal are *de novo*, the applicant wishes to make a number of observations about the reviewable decision made on 13 December 2018. For the applicant, there are a number of fundamental errors with the reviewable decision.

116. First, the delegate found the following at paragraph [22] of the decision:[56]

> I note that the large amount of money involved in the allegation against [the applicant]. In my view, the nature of the alleged offending, coordinated kidnap for ransom, is indicative of a level of sophistication in the criminal conduct. A perpetrator of this type of organised offending has the capacity and may continue to have the motivation to repeat the conduct such that it cannot be said that there is no risk of reoffending to Australia.

117. The difficulty with the preceding findings are as follows:

[55] Acting on the assumption (which is not conceded) that the Tribunal finds that the applicant does not pass the character test in s 501(6) of the *Migration Act 1958* (Cth).
[56] G Docs, 12.

(a) The delegate gave no consideration to the fact that the applicant has resided in Australia for a period of about four years (without issue) after the issue of the Red Notice in December 2014.

(b) The delegate speaks of a "motivation to repeat" the criminality. This logic is flawed, because the delegate has not identified the *actual motive* for why the alleged kidnapping materialised in China in the first place.

(c) The delegate found that it "cannot be said that there is no risk of reoffending in Australia". However, that is not the statutory test to be considered by the decision-maker. Conversely, the question is whether it is reasonable to infer from the Interpol Red Notice that the non-citizen would present 'a risk' to the Australian community or a segment of that community.[57] The words 'a risk' are not defined in the Act. For the applicant, the words 'a risk' in s 501(6)(h) of the Act are co-extensive with an 'unacceptable risk of harm' (e.g. noting that the Australian community is open to tolerating a level of risk, as expressly recognised by clause 6.3 of *Direction no. 65*).[58]

118. Secondly, the delegate found the following at paragraph [23] of the decision:[59]

> I acknowledge that the allegations have not been proven. However, although [the applicant] was possibly not in China at the time of the offending, I cannot rule out that he planned the offending and made the ransom call.

119. The difficulties with these findings are as follows:

(a) The delegate found that he could not rule out that the applicant planned the kidnapping offence and made the ransom telephone calls. The question is not whether the decision-maker can 'rule out' that the applicant engaged in the criminal conduct alleged in the Interpol Red Notice. Conversely, the question is whether the allegations reflected in the Interpol Red Notice provide *probative evidence* that the applicant poses found an unacceptable risk of harm to the Australian community.

(b) The fundamental flaw in the delegates reasoning here is that the delegate has been prepared to act upon mere allegations against the applicant reflected in the Red Notice,

[57] *Migration Act 1958* (Cth), s 501(6)(h).
[58] G Docs, 175-176.
[59] G Docs, 12.

which are not supported by any evidentiary material (cf *FTZK*). For the applicant, the Interpol Red Notice does not, of itself, provide *probative evidence* suggestive that the applicant has a propensity to engage in kidnapping and extortion offences in Australia.

120. Thirdly, the delegate found at paragraph [24] of the decision:

> On balance I am of the view that there is a serious and substantial issue to be addressed and taken together with the possibility of reoffending, I infer that [the applicant] poses a risk to the Australian community.[60]

121. There are of significant difficulties with the preceding finding made by the delegate:

(a) The question is not whether there is a serious and substantial issue to be addressed overseas, as found by the delegate. The statutory test (e.g. s 501(6)(h) of the Act) looks to whether it is reasonable to infer from the Interpol Red Notice that the non-citizen's continued presence in Australia would pose an unacceptable risk of harm to the Australian community or a segment of that community.

(b) If the Minister's purpose in exercising power under s 501 was to bring the non-citizen to justice overseas, the exercise of such power for that purpose would be improper.[61] This appears to be exactly what the delegate did in this case, by so finding there is a serious and substantial issue to be addressed in China.

(c) Writing in the context of the alleged kidnapping offence, the delegate found that there was a 'possibility of reoffending' (see also [50] where the same finding was made). The inference to be drawn from these findings is that the decision-maker *implicitly found* that the applicant committed the kidnapping offence (since 're-offending' indicates the non-citizen has already engaged in previous offending). In tension with this implicit finding, the delegate found at paragraph [23] of the decision that it must be acknowledged "that the allegations have not been proven". Further, the delegate found at paragraph [81] that the applicant is entitled to a "presumption of innocence".[62] As such, the delegate's finding about a 'possibility of reoffending' is logically flawed and

[60] G Docs, 12.
[61] *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 719, 731 (Wilcox and French JJ). In *Schlieske* at pp. 731, a case concerned with the lawfulness of a Ministerial deportation order, their Honours said: "The golden rule is that the Australian authorities are entitled, notwithstanding their knowledge that a particular deportee is wanted in the country of destination, to do everything which is necessary for the enforcement of the Migration Act ... But they are not entitled to go beyond that, and in purported exercise of powers under that Act, to take steps whose only purpose is the bringing to justice of the deportee in a foreign country. At that stage the Australian authorities would not be exercising deportation powers; they would be involved in an unlawful extradition". See further *Applicant M 117 of 2007 v Minister for Immigration and Citizenship* [2008] FCA 1838 [47] (Kenny J).
[62] G Docs, 18.

fundamentally misplaced.

122. Fourthly, the delegate found (para [37]) that the psychological report also documented the events which led to [the applicant's] convictions on "15 October 2015".[63] This finding is plainly wrong: **1)** the psychological report clearly referred to the fact that the applicant's sentence was before Fairfield Local Court on "October 15, 2010";[64] **2)** the applicant was convicted of the domestic violence offences on 15 October 2010.[65] It is concerning that the delegate has failed to appreciate material dates in relation to a case that has significant and far-reaching consequences for the applicant and his family in Australia.

123. Fifthly, the delegate found (para [48]) that:[66]

> [The applicant's] breach of his visa conditions and his failure to declare his criminal convictions demonstrates disregard for the law and I find it indicative of [the applicant's] propensity to engage in criminal conduct.

124. There are a number of difficulties with these findings:

(a) The applicant's breach of his visa conditions in 2001 and failure to declare his criminal convictions on his Incoming Passenger Cards do not show a propensity to engage in criminal conduct. The applicant's contraventions of his immigration obligations are not criminal offences.

(b) The delegate found (para [47]) that the court would have ensured that the applicant understood the legal process, including providing him with an interpreter.[67] There are three difficulties with this finding: **1)** there is no positive evidence that the applicant understood the legal process; **2)** the applicant gave clear evidence that he did not understand he was convicted of domestic violence offences, noting that he had never been in trouble with the law before; and **3)** there is no evidence that applicant even had the benefit of an interpreter at the sentencing proceedings (and even if he did, it

[63] G Docs, 14.
[64] G Docs, 133.
[65] G Docs, 28.
[66] G Docs, 15.
[67] G Docs, 15.

does not follow that the interpreter would have explained the effect of complex sentencing principles in New South Wales to the applicant).

(c) The applicant's breach of his visa conditions, by overstaying his original visa in 2001, does not appear to have had any adverse immigration consequences for the applicant in the past (e.g. the applicant was lawfully granted subsequent Australian visas and not the subject of any exclusion periods from either remaining or coming to Australia).

125. Sixthly, the delegate found (para [49]): "I have been unable to rule out that [the applicant] was involved in the kidnapping and have found that there is a risk to the Australian community in that regard". This finding was made in the context of considering the 'discretionary limb' of s 501(2) of the Act.[68] Again, the question is not whether the decision-maker is able to 'rule out' whether the applicant was involved in the alleged kidnapping. The question is whether the applicant poses an 'unacceptable risk of harm' to the Australian community. As also outlined earlier, the Australian community does generally tolerate a level of risk[69] (as recognised throughout *Direction no. 65*).[70]

126. Seventhly, the delegate found (para [55]) that:

> While it has not been conclusively established that [the applicant] actually committed a crime, I consider that the Australian community would expect that a person facing serious charges return to the relevant country to resolve those matters.[71]

127. Contrary to the finding of the delegate, the Australian community would expect:

(a) If Australian law enforcement authorities have failed or otherwise refused to act on a formal request for the provisional arrest and extradition of a non-citizen in accordance with an Interpol Red Notice, that non-citizen should not be removed from Australia

[68] G Docs, 15.
[69] In *Haque and Minister for Home Affairs (Migration)* [2018] AATA 4305 (21 November 2018) [69], Senior Member Puplick AM cited with approval the decision of *KDSP and Minister for Immigration and Border Protection* [2017] AATA 2169 [36], where Senior Member M J McGrowdie said "The Australian community could not be said to be intolerant of any risk."
[70] See further the decision of *ToTK and Minister for Home Affairs (Migration)* [2018] AATA 4483 (3 December 2018), where Senior Member Taylor SC said: "As the Direction no. 65 Principles themselves implicitly suggest, considerations permissibly relevant to what "may be appropriate" in the assessment of "community expectation" include an appropriate degree of the tolerance having regard to the non-citizen's particular circumstances:- see for example *Rowe and Minister for Home Affairs (Migration)* [2018] AATA 2708 at [75]- [80]; *Ali and Minister for Home Affairs (Migration)* [2018] AATA 2512 at [96]- [109]".
[71] G Docs, 16.

on that basis.

(b) The Australian community would expect that a person, such as the applicant, is unlikely to receive a fair criminal trial in China. The Australian community would be cognisant of the corrupt and lack of independence associated with the Chinese legal system. The Australian community would further be cognisant of the 98-99% conviction rates, demonstrating the inequality in the Chinese criminal justice system.

(c) The Australian community would not expect a non-citizen's visa to be cancelled merely on the issuing of an Interpol Red Notice in circumstances where that instrument does not provide any supporting evidentiary material in relation to the claims of serious criminality.

(d) The Australian community would not expect the applicant's visa to be cancelled in circumstances where the Red Notice was issued in December 2014 and the applicant has resided in the Australian community for over four years between November 2014 and December 2018 without any issues at all.

128. Eighthly, the delegate found (para [74]):[72]

> I do not accept [the applicant's] representations that he will not receive a fair trial in China. I am confident that any alleged offending against [the applicant] by the Chinese authorities will be dealt with in a competent jurisdiction in that country.

129. It is difficult to see how the delegate could have 'confidence' that the applicant would be given a fair trial in China when there was no material before the decision-maker going to that issue at the time the decision was made. However, as explored earlier in these submissions, the Tribunal has the benefit of evidence which plainly demonstrates the inequality and lack of independence associated with the criminal justice system in China.

130. Contrary to the finding of the delegate, the applicant respectfully contends that the Tribunal would have little confidence that the applicant will receive a fair trial in China.

[72] G Docs, 17.

Various sources relied upon by the applicant make plain that there is a 98-99% conviction rate in criminal trials. The available inference is that anyone who is charged with a criminal offence in China is found guilty. The applicant has otherwise adduced evidence which demonstrates great unfairness in criminal trials in China more generally, with defendants often being without the benefit of legal representation to defend criminal charges. China is a communist country - where the judiciary are not independent of the government and do not operate consistent with Australian principles related to the rule of law and the separation of powers doctrine.

131. A fundamental deficiency in the delegate's analysis of the consideration related to 'extent of impediments if removed' is that the delegate failed to recognise that the applicant will be arrested and detained upon return to China. The applicant will not have the prospect of obtaining work and reintegrating into the Chinese community. Given the almost 100% criminal conviction rates in China, there is a real prospect that the applicant will spend a substantial period of his life in pre-trial detention and prison upon a return to China. For these reasons, the applicant will suffer significant and substantial impediments upon a return to China (a fact ignored by the delegate).

132. Finally, the delegate found (para [82]) that:[73]

> I find that the Australian community could be exposed to harm should [the applicant] conduct himself in a similar fashion to his alleged offending in the [Interpol Red Notice]. I could not rule out the possibility of offending by [the applicant]. The Australian community should not tolerate any further risk of harm.

133. The Red Notice was issued in December 2014. The applicant has resided in Australia since November 2014 without any adverse conduct at all. The Australian community would

[73] G Docs, 18.

tolerate the applicant's continued presence in the Australian community, since he has resided in the community for many years without any issues at all.

134. For the applicant, the substantial purpose in the respondent exercising the power under s 501(2) of the Act was to give effect to the Red Notice. However, the Red Notice sought a formal request for the arrest and extradition of the applicant to China. The appropriate statutory regime to give effect to that request is the *Extradition Act 1988* (Cth), not the *Migration Act 1958* (Cth).

135. It cannot be said that the applicant poses an unacceptable risk of harm to the Australian community.

Dr. Jason Donnelly

Barrister-at-Law
Registered Migration Agent (#1682742)
Latham Chambers
E: donnelly@lathamchambers.com.au
W: https://www.jdbarrister.com.au/

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