Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

TRAN and Minister for Immigration and Border Protection (Migration) [2019] AATA 2338 (29 July 2019)

Division: GENERAL DIVISION

File Number: **2018/1873**

Re: **Thi Hong Nhung TRAN**

APPLICANT

And **Minister for Immigration and Border Protection**

RESPONDENT

DECISION

Tribunal: **Senior Member K Raif**

Date: **29 July 2019**

Place: **Sydney**

The decision of the respondent made on 5 April 2018, being the decision of a delegate of the Minister for Home Affairs and Minister for Immigration and Border Protection not to revoke the cancellation of the applicant's Class BC Subclass 100 Partner (Migrant) visa under s 501(3A) of the *Migration Act 1958* (Cth), is set aside.

In substitution, the decision to cancel the applicant's Class BC Subclass 100 Partner (Migrant) visa is revoked.

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

Senior Member K Raif

CATCHWORDS

MIGRATION – Class BC Subclass 100 Partner (Migrant) visa – mandatory cancellation – failure to pass the character test – criminal convictions – whether there is another reason why the original cancellation decision should be revoked pursuant to section 501CA(4)(b)(ii) of the Migration Act 1958 – Ministerial Direction No. 79 – primary considerations – protection of the Australian community – the best interests of minor children in Australia affected by the decision – expectations of the Australian community – other considerations – strength, nature and duration of ties – extent of impediments if removed – decision under review set aside and substituted

LEGISLATION

Migration Act 1958 (Cth) ss 499, 501, 501CA

CASES

Afu v Minister for Home Affairs [2018] FCA 1311
DKXY v Minister for Home Affairs [2019] FCA 495
Do and Minister for Immigration and Border Protection [2016] AATA 390
R v Leroy (1984) 55 ALR 338
Suleiman v Minister for Immigration and Border Protection [2018] FCA 594
Waits and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 1336
YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

SECONDARY MATERIALS

Direction 79 – Visa refusal and cancellation under s. 501 and revocation of a mandatory cancellation of a visa under s. 501CA

Kate Jenkins, 'Unleashing the power of gender equality' (Report, Australian Human Rights Commission, 2017)

REASONS FOR DECISION

Senior Member K Raif

29 July 2019

BACKGROUND

1. This is an application for review of a decision of the delegate of the Minister for Home Affairs not to revoke the cancelation of a Class BC Subclass 100 Partner (Migrant) visa held by the applicant.

2. Ms Thi Hong Nhung Tran ('the applicant') is a national of Vietnam, born in October 1988. She first travelled to Australia in October 2012, holding a Partner visa.

3. In April 2017, the applicant was convicted of supplying a prohibited drug (indictable quantity) and was sentenced to 2 years imprisonment. On 2 May 2017 the applicant's Class BC Subclass 100 Partner (Migrant) visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) ('the Act') because it was determined that the applicant did not pass the character test. The applicant was invited, and made representations about the revocation of the decision to cancel her visa. On 5 April 2018 a decision was made under s 501CA(4) not to revoke the mandatory cancellation decision. q

4. The applicant sought review of that decision. On 28 June 2018 the Tribunal affirmed the decision under review. On 11 December 2018 Burley J of the Federal Court ordered that the decision be set aside and remitted to the Tribunal for reconsideration. The matter is now before the Tribunal pursuant to the order of the Court.

5. The issues before the Tribunal are:

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

   (b) Is there another reason why the original decision should be revoked?

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

RELEVANT LAW

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

> *The Minister must cancel a visa that has been granted to a person if:*
>
> *(a) the Minister is satisfied that the person does not pass the character test because of the operation of:*
> *(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or*
> *(ii) (paragraph (6)(e) (sexually based offences involving a child); and*
> *(b) the person is serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.*

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

9. Section 501CA(4) allows for a revocation of a decision under s 501(3A) and relevantly states as follows:

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

10. Section 501CA(4)(b)(ii) of the Act requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision. If the Tribunal is satisfied that the

cancellation should be revoked following that evaluative exercise, the Tribunal must revoke the original visa cancellation decision.

11. On 20 December 2018 the Minister issued *Direction 79 – Visa refusal and cancellation under s. 501 and revocation of a mandatory cancellation of a visa under s. 501CA* ('Direction 79') under s 499 of the Act. Direction 79 is binding on the Tribunal in performing its functions, or exercising powers under s 501 of the Act. Direction 79 sets out the principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to refuse to grant a visa or revoke mandatory cancellation decisions. These principles include (see para 6.3 of Direction 79):

> *...Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions... and will not cause or threaten harm to individuals or the Australian community.*[1]
>
> *A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against women or children or vulnerable members of the community… should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*[2]

12. The General Guidance at paragraph 6.2(1) of Direction 79 states 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.*

13. The primary considerations which are set out in paragraph 13(2) of Part C of Direction 79 are:

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

14. The other considerations which are set out of paragraph 14(1) in Direction 79 are:

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

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[1] Paragraph 6.3(1) of Direction 79.

[2] Paragraph 6.3(3) of Direction 79.

c) Impact on Australian business interests;
d) Impact on victims; and
e) Extent of impediment if removed.

15. Decision-makers should 'generally' give greater weight to primary considerations than other considerations. Further, one primary consideration may outweigh other primary considerations: paragraph 8(4) and paragraph 8(5) of Direction 79. However, as observed by Colvin J in *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 at [23]:

> *…….Direction 65 makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.*

16. As such, the other considerations referred to in Direction 79 'may be afforded equal or greater weight than primary considerations in an appropriate case'.[3]

DOES THE APPLICANT PASS THE CHARACTER TEST?

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

[3] Colvin J at [26].

18. The applicant's National Criminal History Check certificate shows that the applicant has been convicted of an offence "supply prohibited drug > indictable quantity (not cannabis)". The applicant was found guilty and imprisoned for 2 years commencing in May 2016.

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

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

20. The applicant made a request for revocation of the cancellation decision in May 2017. The Tribunal has considered the applicant's comments, in addition to the evidence subsequently provided to the Tribunal by the applicant and the respondent. The Tribunal's considerations are set out below with regard to Direction 79.

Primary considerations

Protection of the Australian Community

21. Paragraph 13.1 of the Direction sets out the first of the primary considerations the Tribunal should have regard to, and provides:

> *(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 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. 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 the 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.

22. In her revocation request the applicant states that she had never committed any offence before and this was the first and the last time she committed a criminal offence. The applicant states that her level of involvement was very low, she did not cause any problems while in custody and that she is remorseful for what she did.

23. There is before the Tribunal the submission of Thanh Nguyen, who outlines the applicant's background and the circumstances of the offence, and relies on the psychological assessment of Mr Jones, a psychologist. Mr Jones states that the applicant and her husband planned to start a family, but due to the difficulty of falling pregnant, Mr Nguyen engaged in the use of drugs resulting in drug supply activities. The applicant felt guilty and responsible for her inability to fall pregnant, and while she did not agree with her husband's use of drugs, she felt responsible and guilty and obliged to assist her husband, and engaged in the offending behaviour. Mr Jones refers to the applicant experiencing intermittent periods of depressed mood over the past three years and states that her inability to fall pregnant has been the single most important trigger for the depression. The miscarriage that occurred shortly after her incarceration increased her sense of hopelessness and depression. (The Tribunal is mindful that there is no established link between the miscarriage and the applicant's imprisonment or mental state). Mr Jones states that the applicant's offending behaviour is not directly attributable to any psychological disorder or illness but notes the cultural expectations associated with having a child. Mr Jones states that the applicant's cultural beliefs and sense of obligation and responsibility played a role in her acquiescence in offending and compromised her psychological functioning. With respect to the risk assessment, Mr Jones states that the applicant is at low risk of re-offending.

24. The Tribunal is mindful that Mr Jones' observations appear to be based on the erroneous determination that the applicant's partner did not have children. He has two children from his previous marriage. While this determination may have played a role in Mr Jones' assessment of the applicant's circumstances leading to the offending, the Tribunal accepts the professional opinion expressed in the report.

25. The Tribunal has considered the sentencing remarks of Sweeney J of the District Court of NSW. It indicates that the applicant accepted that between 11 March and 4 May 2016 she

knew that her spouse was supplying heroin and knowingly took part in the supply of prohibited drugs by assisting her partner, by answering the phone on his behalf when he was not available, and bringing drugs to the car for him when requested. Her Honour accepted that the relationship between the applicant and her husband made a contribution to her becoming involved in the offending, consistent with the finding that she was assisting her husband in a 'subsidiary role'. Her Honour noted that the applicant was assisting her husband in a busy enterprise, but it did appear that she was making decisions about the extent of the enterprise. Her Honour found the offending to be at the low level for offences of its kind.

26. The Tribunal considers offences relating to the supply of drugs to be of a very serious nature. Such offences are likely to cause harm to those using drugs and people around them. The maximum sentences available for such offences are very significant. While the Tribunal acknowledges that the applicant was given a two year sentence with a one year non-parole period, which is well below the maximum sentence, and while the Tribunal also acknowledges that the sentencing judge referred to her conduct as being at the lower level of criminal offending, the Tribunal is of the view that the custodial sentence given to the applicant does reflect the seriousness of the crime. Paragraph 13.1.1(1)(d) of the Direction directs the Tribunal to consider the sentence imposed by the courts for a crime or crimes when considering the nature and seriousness of the criminal offending.

27. The Tribunal also acknowledges the various submissions that the applicant engaged in the criminal conduct out of a sense of guilt or obligation towards her husband due to her inability to conceive a child. However, she did so willingly and, in all likelihood, realising that her conduct was contrary to the laws of Australia. The applicant claims that her husband became involved in the sale of drugs because he had a debt to the drug distributor, but she also told the Tribunal that she believed the debt had been repaid before her husband was imprisoned. In her written statement of 12 May 2019 the applicant also states that the profits from the supply of drugs were used to support her husband's drug habit and pay rent, while the husband's oral evidence to the Tribunal is that he wished to continue with the sale of drugs in order to earn money to support his children's future. It seems that at least part of the couple's motivations for engaging in the sale of drugs was for financial gain, even if it was to pay for the IVF treatment and daily expenses rather than a lavish lifestyle. The Tribunal finds that the nature and seriousness

of the applicant's offending, having regard to the factors set out in paragraph 13.1.1, was serious and weighs against revocation.

28. The Tribunal has considered the risk to the Australian community should the applicant re-offend. The Tribunal acknowledges that Mr Jones, who provided a psychological assessment for the applicant, has assessed her risk of re-offending as being low. The applicant has pleaded guilty and expressed remorse for her actions and that there is no evidence of any prior offending. The Tribunal also acknowledges the applicant's evidence in her written statement of 12 May 2019, as well as her oral evidence to the Tribunal, where the applicant expressed remorse for her offending and has demonstrated insight into her conduct. The Tribunal accepts that the applicant had engaged in various programs while in detention and there are several certificates and other documents before the Tribunal relating to the applicant's involvement in, and completion of, a number of courses. The applicant's evidence to the Tribunal is that she continues to study while in detention.

29. The applicant argues that the offence was her first one, that she was affected by certain personal circumstances, that she pleaded guilty and has 'learned a lesson' from the subsequent incarceration. The Tribunal acknowledges that the applicant does not have a history of offending and accepts that her involvement in the crime was at the lower end of the scale. The Tribunal is mindful of the comments made by the New South Wales Court of Criminal Appeal *R v Leroy* (1984) 13 A Crim R 469:

> *This court and other criminal courts have said on many occasions that, in the drug trafficking in particular, the circumstances that the accused person has a clear earlier record will have less significance than in other fields of crime. Very frequently, those selected to play some part in the chain of drug trafficking, as the appellant plainly enough was, are selected because their records, their past and their lifestyles are not such as to attract suspicion. It is this in particular which has led the courts to take in the case of drug trafficking a view which does not involve the same degree of leniency being extended to first offenders.*

30. On her own evidence, the applicant became involved in criminal conduct because she felt obliged to assist her husband. Her relationship with her husband continues to exist. The Tribunal accepts the evidence that she was not the decision-maker in the enterprise and that her involvement was low and also that the money received was not used to fund a lavish lifestyle. The Tribunal accepts that this is so, however, in the Tribunal's view, such matters do not detract from the fact that the applicant did engage in serious criminal

conduct and did so knowingly and willingly, with the appreciation that her conduct was contrary to the Australian laws. The applicant herself concedes that the offence was a serious one. In the Tribunal's view, there is no justification for the distinction as to whether the conduct was engaged in for 'financial greed', or to fund other needs such as her husband's drug habit, the IVF treatment, or general living expenses. The conduct was engaged in for financial gain, to a significant extent, whatever purpose the funds were used for.

31. The husband's influence on the applicant's decision to engage in criminal conduct continues to be of significant concern to the Tribunal. The applicant claims that her husband will not re-offend again. She claims that they have both learned a big lesson from their detention and the conduct will not be repeated. Both the applicant and her partner, Mr Nguyen gave evidence about Mr Nguyen's present circumstances: they claim Mr Nguyen has participated in a rehabilitation program (there is a statement from his parole officer before the Tribunal), he has been living in the community for a little over six months since his release from prison and has not re-offended. Mr Nguyen told the Tribunal that the conditions of his parole have been eased because he was assessed as having a low risk of re-offending. He states that he has been employed on a full-time basis, has re-established relationships with his family and would not wish to lose that through re-offending.

32. However, the Tribunal found some aspects of the applicant's evidence problematic. The applicant was not sure whether her husband's drug debt had been repaid (she believes it has been), and she told the Tribunal that her husband had stopped taking drugs before, but had gone back to his drug habit. The Tribunal is prepared to accept that at present Mr Nguyen does not use drugs and there is no evidence that he has engaged in any criminal conduct. However, given the fairly short period of time since his release, the Tribunal acknowledges that his conduct may at present be affected by his parole conditions and the fact that he had returned to the use of drugs in the past. The Tribunal is of the view that Mr Nguyen's involvement with drugs in the future cannot be completely ruled out. This is particularly so if the family continues to experience significant stress, for example, due to the unsuccessful IVF attempts.

33. The Tribunal accepts the applicant's acknowledgement and appreciation of her conduct and expression of remorse, the fact that there has been no other offending, and that the

applicant herself has no addiction to drugs and that she has been of good behaviour while in prison. The Tribunal also acknowledges the applicant's evidence that the repercussions of her conduct, including criminal and immigration detention, as well as the risk of having her visa cancelled, would have a significant deterrent effect on her future conduct. The applicant's evidence to the Tribunal is that she would never engage in the same conduct again because she has never been in prison before and because of the serious repercussions to her future and her visa; she also said that if her husband pressures her to engage in the same conduct, she may leave her husband. The applicant claims she has learned a 'big experience'.

34. The Tribunal accepts that the risk of re-offending is low. However, the Tribunal does not accept such a risk has been entirely removed. In particular, the Tribunal notes that there has been little opportunity to test the applicant's conduct since the conviction. The applicant contends – and this was accepted by the sentencing judge – that her relationship with her husband was the primary motivator for her involvement in criminal conduct. The Tribunal is concerned that should the applicant's husband again engage in criminal conduct involving the distribution of drugs, the applicant may wish to assist him in order to maintain the relationship or because she feels obliged to support her husband. The Tribunal has formed the view that the risk of re-offending continues to exist, albeit it is a low risk.

35. The Tribunal has formed the view that the protection of the Australian community weighs against revocation.

Best interests of minor children in Australia affected by the decision

36. The applicant refers to her relationship with her step-son, who was born in November 2001 and is a minor. In her recent Statement of Facts, Issues and Contentions (SFIC), the applicant states that she has developed a close relationship with the child since December 2012. She is also a step-grandmother to another child and has had close physical contact with the child on numerous occasions while in immigration detention. The applicant claims that the nature of her relationship with her step-son is close and continuing, they have known each other for many years and developed a bond and he has visited her in detention. The applicant also refers to the relationship with her step-grandson as developing and ongoing. The applicant acknowledges that her relationship

with her step-grandson has been affected by her circumstances as he was born while she was in detention, but she has had face to face contact with the child when the family visited her in detention.

37. The Tribunal has considered the applicant's evidence, as well as the evidence of Mr Nguyen's two children and his daughter in law. The Tribunal accepts, having regard to that evidence, that the applicant has developed a relationship with both of her husband's children, one of whom is a minor. The Tribunal accepts that the applicant has played a meaningful role in the family and that Mr Nguyen's children rely on the applicant, to an extent, for emotional support and comfort, and also provide her with such support in return.

38. The Tribunal also acknowledges that the applicant has had contact with her step-grandchild, but the Tribunal is not satisfied there is a close or a meaningful relationship between them. While there has been some contact between them, it was necessarily limited due to the applicant's ongoing detention. The Tribunal is mindful that this child is in the care of his biological parents and there is little evidence of the applicant providing any meaningful support or care to this child. The Tribunal acknowledges the applicant's evidence that she had made inquiries about the child's development and well-being with his parents, but in the Tribunal's view this can be done irrespective of the applicant's visa status.

39. The evidence of Mr Nguyen's son and daughter-in-law is that they have explored the possibility of the applicant living with them and providing their child with daily care. There is evidence that the child has special needs and the child's parents prefer that their child is cared for by a member of their family. However, in the Tribunal's view, such matters are purely aspirational. There is no evidence that the applicant has provided such care to the child, nor that she will provide such care in the future. It may or may not occur, even if the applicant expresses her desire to care for the child at present.

40. Overall, the Tribunal accepts that the applicant has a close relationship with her minor step-son and grandson, as well as other members of the husband's family. The Tribunal finds that the best interests of these children favour the revocation of the cancellation.

Expectations of the Australian community

41. Paragraph 13.3 of Direction 79 states that:

> *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.*

42. Consideration of the expectations of the Australian community must be made by reference to the community that is 'fair-minded and mature' (*Do and Minister for Immigration and Border Protection* [2016] AATA 390 at [23]) and an 'informed, reasonable member of the Australian community rather than a member of the Australian community who is only prepared to consider the punitive aspects of the power' (*Waits and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] AATA 1336 at [36]).

43. The Tribunal has considered the decision of Mortimer J in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [76]:

> *In particular, the last two sentences of para 13.3 of the Direction.. [are] 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 a 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.*

44. This judgment was recently addressed in *DKXY v Minister for Home Affairs* [2019] FCA 495 at para [31]:

> *Undoubtedly, decision-makers who are bound to give effect to the Direction are required to have due regard to the Government's view regarding community values, standards and expectations… but nothing in the Direction indicates that community expectations will always favour non-revocation. Indeed, the totality of the relevant circumstances which bear upon the assessment and weighing of all three primary considerations and other considerations need to be considered.*

45. And further at para [33]:

> *What amounts to "due regard" will necessarily require attention to be given to all relevant circumstances in the particular case which bear upon a general assessment of Australian community expectations.*

46. In *Afu v Minister for Home Affairs* [2018] FCA 1311 at [85] Bromwich J said:

> *The concept of community expectations is not a matter to be measured as though it is a provable fact. It is an assessment of community values made on behalf of that community.*

47. The Tribunal accepts that Direction 79 allows for consideration of a broad range of the non-citizen's circumstances when assessing the expectations of the community. The Tribunal has considered the totality of the applicant's circumstances.

48. The applicant has been living in Australia as a temporary resident from October 2012, with the exception of about six months that she had spent in Vietnam. Her residence in Australia has been for a period of over six years, although the applicant has spent a considerable proportion of that time in detention.

49. The applicant was granted an Australian visa because of her relationship with her partner, and the evidence before the Tribunal is that the relationship is ongoing and that her partner, Mr Nguyen, is supportive of the applicant, as is his immediate family.

50. The applicant has strong family links in Australia, including her spouse, her step-sons and step-grandson, and their respective families. She also has significant links to Vietnam as the applicant stated in the revocation request that her parents and brother live in Vietnam. The applicant claims that the Australian community would not expect a family to be broken up, and the Tribunal acknowledges that the family and social links in Australia form a factor in favour of the applicant.

51. The applicant argues that she does not have a substantial criminal history and has only one offence on her criminal record. The Tribunal accepts that this is so, but is mindful that an offence involving the sale of drugs is a serious one and one which, in the Tribunal's view, the community would not tolerate.

52. The applicant refers to her contribution to the community through limited employment. There is very little evidence before the Tribunal relating to the applicant's employment or how such employment contributed to the community. There is no evidence of tax payments. The Tribunal is therefore not satisfied that the applicant contributed to the community through employment.

53. The Tribunal accepts that the applicant's links to Australia may foster a community expectation that she should be allowed to remain in Australia, but in the Tribunal's view, the nature and the seriousness of the offence, the risk to the community arising from the distribution of drugs and the applicant's voluntary engagement in such an activity, would be contrary to community expectations.

54. The Tribunal has formed the view that there are factors that favour the applicant, including the presence of her partner and his family in Australia, her residence in Australia for close to seven years and, in particular, her connections with the children. However, the Tribunal is of the view that the nature and seriousness of the applicant's offending and the potential harm to the community that the distribution of drugs entails, outweigh such considerations, even when the particular circumstances of the offence are taken into account. The Tribunal has formed the view that the nature and the seriousness of the offence, and the potential harm to the community arising from the offences – even acknowledging that the risk of reoffending is low - are such that the Australian community would expect that the applicant should not hold a visa. The Tribunal finds that the community expectations would weigh against revocation.

Other considerations

International non-refoulement obligations

55. The applicant stated in her submissions to the delegate that she may be prosecuted in Vietnam for committing an offence in Australia and that any punishment would be severe as drug offences attract a death penalty. The respondent submits, by reference to a Department of Foreign Affairs and Trade Country Information Report for Vietnam (21 June 2017) ('DFAT Report'), that the law of double jeopardy applies in Vietnam and that the applicant would not be prosecuted in Vietnam on that basis. The respondent notes that the applicant's claims are vague and lacking in detail, noting also that the applicant may make an application for a protection visa.

56. The applicant did not pursue this claim before the first Tribunal and also abandoned this claim before the present Tribunal. The applicant expressly confirmed to the present Tribunal that the non-refoulement obligations do not arise in this case.

Strength, nature and duration of ties

57. The applicant has been living in Australia since late 2012. In that period, she travelled overseas for about six months between July 2015 and January 2016 and has been in detention since 2016.

58. As noted above, the applicant has strong family connections in Australia, including her partner, two step-children, a step-grandchild and their families. The applicant claims to have enriched the lives of these Australian citizens by providing them with emotional and financial support. The Tribunal is prepared to accept this evidence. The applicant also refers to her employment.

59. The Tribunal has considered the evidence of the applicant and her spouse, as well as statements from other family members and third parties. For the purpose of this review, the Tribunal accepts that the applicant is in a long term relationship with an Australian citizen and also that she has connections with her husband's family, who are Australian citizens. There are several statements from third parties before the Tribunal, as well as oral evidence, and the Tribunal accepts that the applicant has formed significant social relationships in this country and that such relationships may be affected by the cancellation of the applicant's visa. The Tribunal accepts that if the visa remains cancelled, and if the applicant is removed from Australia, it may have significant adverse effects on Australian citizens, including minor children. The Tribunal accepts that the applicant has significant ties in Australia which are of lengthy duration.

Impact on Australian business interests

60. There is no evidence before the Tribunal concerning any impact on Australian business interests.

Impact on Victims

61. There is no evidence before the Tribunal concerning any impact on victims.

Extent of impediments if removed

62. The applicant claims in her SFIC that although she had spent most of her life in Vietnam, she would face substantial impediments re-establishing herself in Vietnam and maintaining basic living standards, as the current circumstances in her home country would be different to when she left the country. The applicant claims that her removal and separation from her husband may harm their relationship, and she would be in Vietnam without a husband. Even if that was the case, the Tribunal does not accept that being in Vietnam without a husband (or without a particular husband) would prevent the applicant from re-establishing herself in her home country.

63. The applicant refers to the DFAT Report and states that wages and promotion rates for women are lower than for men in Vietnam and she claims that she would face sex discrimination if she secures employment in Vietnam which would be a significant impediment for her subsistence and advancement in life. The Tribunal does not accept this evidence.

64. Firstly, the same argument can be made with respect to Australia where gender discrimination and inequality have been well documented.[4] The applicant does not appear to suggest that gender inequality in Australia would preclude her ability to sustain herself or advance in life, and the Tribunal does not consider that would be the case in Vietnam. At its highest, it may be that the applicant will not have access to certain opportunities in her home country, but that does not in any way suggest that there would be an impediment to her subsistence and advancement in life. The Tribunal notes that in Mr Jones' report, the applicant reported having a happy childhood, having attended 12 years of schooling, and having obtained a job in sales in a jewellery store. The applicant told the Tribunal that she worked as a sales assistant for two companies in Vietnam before travelling to Australia. There is nothing in the applicant's background or past experience to suggest that she experienced discrimination or was precluded from engaging in social activities, including employment, in Vietnam.

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4 See, for example, Kate Jenkins, 'Unleashing the power of gender equality' (Report, Australian Human Rights Commission, 2017).

65. Secondly, the issue here is not whether the applicant would be paid less than another person. The issue is whether she would be able to find a job and earn sufficient money to support herself. The applicant has not established that she would be unable to find gainful employment that would meet her needs.

66. The applicant states that if she were to disclose her Australian conviction when applying for employment in Vietnam, this may impact on her ability to obtain employment, which would be an additional impediment. The Tribunal is mindful that this claim is unsupported by any probative evidence, and the Tribunal is not prepared to accept that the applicant would be unable to secure employment in Vietnam due to her criminal conviction. The applicant told the Tribunal that her salary in Vietnam was very low. She stated that her salary would be sufficient to cover her needs during some months but not all the time and in that case she would rely on friends.

67. The applicant states that there is no evidence that her family in Vietnam would be in a position to provide her with financial assistance. In her statement dated 12 May 2019 the applicant states that her father is retired, her brother has his own family and a young child, and her parents support each other. Similarly, the applicant told the Tribunal that her parents have retired and her brother has his own family to support. However, if the applicant claims that they would be unable to provide financial support, it is for the applicant to present such evidence. There are no financial records before the Tribunal, for example, in the form of bank statements, income statements, evidence of savings or other records relating to her family in Vietnam. The applicant has not established that her family would be unable or unwilling to provide her with financial support and, in any case, the Tribunal is not satisfied that such support would be needed because the Tribunal is not satisfied that the applicant would be unable to find gainful employment in Vietnam.

68. The applicant states that her best prospect of rehabilitation would occur in close proximity to her husband and extended family, and if she is removed from Vietnam she will not have the close emotional and financial support that she has in Australia. The Tribunal does not accept that evidence. The applicant's evidence is that her husband, and her feeling of guilt in relation to her husband, that resulted in her engaging in criminal behaviour. That is, she would not have engaged in criminal conduct if it was not for her husband. The applicant states that her husband is a 'changed man' and has been able to secure employment and has been supportive, but given the past history of the relationship and the causes of the

applicant's conduct, the Tribunal does not consider that the applicant's best prospect of rehabilitation would be in close proximity with her husband.

69. As for the emotional and financial support the applicant receives from her husband and extended family in Australia, the Tribunal does not consider that such support can only be provided if the parties reside in close physical proximity to each other. It is not uncommon for such support to be provided where partners live in different countries. The applicant claims her relationship with her husband started in 2011, and she entered Australia at the end of 2012. There is nothing to suggest that in the period before the parties established cohabitation in Australia, they were unable to provide each other with emotional or financial support. The Tribunal does not consider that such support would necessarily be withdrawn if the applicant were to leave Australia.

70. The applicant refers to her health condition and infertility and the fact that she had undertaken IVF treatment. There is little evidence before the Tribunal as to whether fertility treatment would be available to the applicant in Vietnam and the applicant appears to suggest that if she was removed to Vietnam, her relationship with her husband will not continue and there will be no further IVF treatment. The Tribunal accepts that future IVF treatment may be jeopardised unless the applicant and the sponsor are in the same country, at least for a period of time. The Tribunal also accepts that if the applicant is removed from Australia, the possibility of implanting the existing embryo would be reduced or removed.

71. The applicant states that if she is removed from Australia this would result in the breakdown of her marriage, as her husband does not intend to travel to Vietnam and is not able to do so due to his parole conditions and health issues. The applicant also states that she would lose the support of her extended family. There are statements from the family members of the applicant's husband, in addition to the oral evidence, and the Tribunal accepts that there is a close relationship between them. The Tribunal also accepts that the family have considered for the applicant and her spouse to take care of the applicant's step-grandchild, and that opportunity may not exist if the applicant was to leave Australia.

72. If permitted to remain in Australia, the applicant states that she intends to pursue IVF and have a child, find employment and engage in educational courses, contribute to the

community and develop friendships. The Tribunal accepts this evidence. The Tribunal accepts, having regard to the various statements and evidence from third parties, that the applicant has formed close ties with her extended family in Australia and also has close friends in this country. The Tribunal accepts that these relationships may be jeopardised if the applicant is removed from Australia and that this may not only have an adverse effect on the applicant but also on those in Australia.

73. The Tribunal accepts that there may be significant impediment to the applicant, and her relatives in Australia, if she is removed from Australia. This weighs in favour of revocation.

CONCLUSION

74. The Tribunal has formed the view that the applicant has a substantial criminal record and that she does not pass the character test. The Tribunal has considered if there is another reason why the original decision should be revoked.

75. The Tribunal has formed the view that the offence of distribution of drugs was serious and had the potential to cause harm to the community. The Tribunal acknowledges the applicant's evidence of rehabilitation and her undertaking not to engage in criminal conduct in the future. The Tribunal accepts that the applicant has expressed remorse and is cognisant of her past mistakes, but the Tribunal continues to be concerned about the influence that her husband has on the applicant's conduct and whether it may lead to re-offending in the future. The Tribunal has formed the view that the protection of the Australian community would be in favour of the cancellation.

76. Nevertheless, the Tribunal has also given significant weight to the circumstances of the applicant's offending. Despite it being a serious offence, the applicant pleaded guilty and the sentencing judge recognised that the offending was at the lower scale. It is not in dispute that the applicant played a secondary role in the enterprise which was organised and managed by her husband, and she appears to be genuinely remorseful for her conduct. The Tribunal also accepts the applicant's evidence that the punishment for the offence – which involved imprisonment for the first time and a lengthy period of immigration detention – may act as an incentive for the applicant to avoid criminal conduct in the future. The Tribunal has formed the view that the risk of re-offending is low.

77. The Tribunal has formed the view that the expectations of the Australian community would be against the revocation. While the community may empathise with the applicant's circumstances leading to the offending conduct, and the applicant's present circumstances, the Tribunal finds that the community would have little empathy, given the nature of the offences and the risk the distribution of drugs could bring to the community.

78. The Tribunal has accepted the applicant's evidence that she has a close relationship with her husband's minor son and grandson, as well as other members of his family. The evidence of third parties indicates that these relatives rely on the applicant for her support and companionship. The Tribunal has formed the view that the best interests of these minor children require the applicant's presence in Australia and these favour revocation of the cancellation decision.

79. The Tribunal accepts that the applicant has significant ties in Australia, in particular her husband's family and other friends. The Tribunal acknowledges that the applicant has been living in Australia for over six years. The Tribunal also accepts that there will be some impediment if the applicant is removed from Australia, most notably resulting in the breakdown of familial relationships that have been formed in Australia, although the Tribunal has found some of the applicant's evidence – in particular relating to lack of employment and future financial hardship – to be exaggerated. The Tribunal accepts that the significant impediments if the applicant is removed from Australia would strongly favour revocation.

80. Overall, the Tribunal acknowledges the seriousness of the applicant's conduct and considers that there are circumstances that favour the cancellation. However, in the particular circumstances of this case, the Tribunal has determined that the best interests of the children, the strength and nature of the applicant's ties to Australia, and the impediments if removed, outweigh other considerations. The Tribunal determines that the cancellation should be revoked. The Tribunal acknowledges that should the applicant be convicted of any offences in the future, consideration may again be given to the cancellation of her visa.

DECISION

81. The Tribunal sets aside the reviewable decision and substitutes a decision that the mandatory cancellation of the Class BC Subclass 100 Partner (Migrant) visa is revoked.

I certify that the preceding 81 (eighty-one) paragraphs are a true copy of the reasons for the decision herein of Senior Member K Raif

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

Associate

Dated: 29 July 2019

Date(s) of hearing:	**22 July 2019**
Counsel for the Applicant:	**Dr J Donnelly, Latham Chambers**
Solicitors for the Respondent:	**Ms L Crick, Clayton Utz**