Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Z and Minister for Home Affairs (Migration) [2019] AATA 87 (4 February 2019)

Division: GENERAL DIVISION

File Number(s): **2018/6686**

Re: **Z**

APPLICANT

And **Minister for Home Affairs**

RESPONDENT

DECISION

Tribunal: **Senior Member A Poljak**

Date: **4 February 2019**

Place: **Sydney**

The decision under review is affirmed.

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

Senior Member A Poljak

CATCHWORDS

MIGRATION – mandatory visa cancellation – character test – substantial criminal record – Direction No. 65 – protection of Australian community – seriousness and nature of the relevant conduct – offending very serious in nature – risk conduct may be repeated – real risk of re-offending – best interests of minor children – expectations of Australian community – decision affirmed

LEGISLATION

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

CASES

Afu v Minister for Home Affairs [2018] FCA 1311
YNQY v Minister for immigration and Border Protection [2017] FCA 1466

SECONDARY MATERIALS

Department of Foreign Affairs and Trade, Country Information Report – Iraq, 9 October 2018
Direction No. 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA
Direction No. 75 – Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b)

REASONS FOR DECISION

Senior Member A Poljak

4 February 2019

1. The applicant, Z, is a citizen of Iraq and first arrived in Australia on 4 March 1993 when he was 15 years of age. He was the holder of a Class BF Transitional (permanent) visa ("**visa**").

2. On 4 August 2017, the applicant's visa was cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) ("the **Act**") on character grounds. The applicant made representations to the Minister for Home Affairs ("**Minister**") to have the cancellation revoked under section 501CA of the Act. On 9 November 2018, a delegate of the Minister found that the discretion under subsection 501CA(4) of the Act to revoke the cancellation of the applicant's visa was not enlivened. This is the decision under review in these proceedings ("the **reviewable decision**").

3. The issue before the Tribunal in these proceedings is whether the decision to cancel the applicant's visa should be revoked under subsection 501CA(4) of the Act.

RELEVANT LEGISLATIVE PROVISIONS

4. Subsection 501(3A) of the Act provides that the Minister **must** cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of subsections 501(6) and 501(7).

5. Subsection 501(6) defines the character test. Relevantly, a person does not pass the character test if the person has a "*substantial criminal record*" as defined by subsection 501(7). Paragraph 501(7)(c) provides that for the purposes of the character test, a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

6. Subsection 501CA(4) of the Act provides that the Minister may revoke the original decision if the Minister is satisfied that the person passes the character test as defined by section 501; or that there is another reason why the original decision should be revoked. This is a discretionary power.

7. The power of the Tribunal to review the decision to cancel the applicant's visa is provided by section 500. Under subsection 499(1) the Minister has given written directions as to the exercise of the power to review the decision. Subsection 499(2A) provides that these directions must be complied with. The relevant direction is *Direction No. 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA,* which commenced on 23 December 2014 ("the **Direction**").

CHARACTER TEST

8. The applicant fails the character test as a matter of law. He has a "*substantial criminal record*" in accordance with subsection 501(7) of the Act as he has been sentenced to a term of imprisonment for a period of over 12 months. As such, the applicant fails the character test in paragraph 501(6)(a) of the Act.

DIRECTION NO. 65

9. Paragraph 7 of the Direction sets out how the discretion is to be exercised. "*Informed by*" the principles in paragraph 6.3, I must "*take into account*" the considerations in Part C, in order to determine whether to revoke the mandatory cancellation of the applicant's visa.

10. Under the heading *General Guidance (paragraph 6.2),* the Direction provides in part:

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

11. In paragraph 6.3 the Minister sets out the principles that provide the framework within which the task of exercising the discretion should be approached. These principles are:

> *1 Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *2 The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.*
>
> *3 A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
>
> *4 In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances,*

even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.

5 Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.

6 Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.

7 The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether a non-citizen's visa should be cancelled, or their visa application refused.

12. The Direction at paragraph 8 requires the decision-maker to take into account the primary and other considerations relevant to the individual case. Primary considerations should generally be given greater weight than the other considerations and one or more primary considerations may outweigh other primary considerations.

13. The three primary considerations which the Tribunal must take into account are set out in paragraph 13(2) of the Direction as follows:

(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.

PRIMARY CONSIDERATION (A) – PROTECTION OF THE AUSTRALIAN COMMUNITY FROM CRIMINAL OR OTHER SERIOUS CONDUCT

14. In determining this primary consideration, I note that I must have regard to matters set out in paragraph 13.1 of the Direction, namely:

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…

2 Decision-makers should also give consideration to:

(a) The nature and seriousness of the non-citizen's conduct to date; and

(b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

(a) The nature and seriousness of the applicant's conduct to date

15. The nature and seriousness of the applicant's conduct are relevant considerations when assessing the risk to the Australian community should the applicant commit further offences or engage in other serious conduct. Paragraph 13.1.1(1) of the Direction provides:

(a) that violent and/or sexual crimes are viewed seriously;

(b) the principle that crimes committed against vulnerable members of the community, such as minors, are serious;

(c) The sentence imposed by the courts for a crime or crimes;

(d) The frequency of the applicant's offending and whether there is any trend of increasing seriousness; and

(e) The cumulative effect of repeated offending.

16. The extent of the applicant's criminal offending is detailed in his National Police Certificate dated 19 February 2018 ("**National Police Certificate**"). The applicant has a lengthy and considerable criminal history dating back to 1999 and includes convictions for contraventions of an apprehended domestic violence order, dishonestly obtaining property and money by deception, stalk/intimidate intend fear physical harm, drive vehicle with illicit drug present in blood, aggravated break and enter and enter and commit serious indictable offence in company, common assault, possess or use prohibited weapon without permit and demand property in company with menaces with intent to steal. He has been sentenced to multiple terms of imprisonment.

17. The National Police certificate reveals that the applicant has been the subject of a number of AVO's. Most recently on 31 May 2017 and 22 January 2018, the applicant was convicted of "*contravene prohibition/restriction in AVO (domestic)*". The circumstances of these offences are detailed below.

18. The Police records show that on 24 March 2017, a provisional AVO was applied for by the New South Wales Police Child Abuse Squad on behalf of a young person. The basis for the AVO was that the applicant was having sexual intercourse with a 14 year old girl ("**X**") who is under the care of the minister and has resided in a number of youth refuges. X

disclosed to her youth worker and the police that she was having sex with the applicant and that he was supplying her with a large amount of the drug ICE. The Police note in their records that X spoke freely, however she was unwilling to provide a formal police interview or any form of statement. As a result of the information, the police note that "*further statements have been obtained and further enquires made…"* As a result of this information the Police applied for the AVO because they held the view that the applicant was placing X at imminent risk of harm.

19. The applicant breached the AVO. The details are contained in the transcript of proceedings before Magistrate Bugden of the Fairfield Local Court on 31 May 2017. In those proceedings the legal representative for the applicant advised the Court that the applicant was fully aware of his obligations under the AVO however, "*against his better judgement"*, he drove to Merrylands and picked X up near the train station, took her home and gave her a meal.

20. In the sentencing remarks Magistrate Bugden stated:

> *"I will note- endorse that on the papers. In these proceedings [the applicant], who is in custody and has been in custody since 1 May, has pleaded guilty to one count of contravening an apprehended domestic violence order. The background to the material is that the victim in the proceedings is a ward of the state. She is a 14-year-old ward of the state. He's a 39-year-old man. And a provisional domestic violence order issued some little time ago and the date was 24 March 2017. The basis of that, according to the facts in front of me, was that the defendant was having sexual intercourse with this 14 year old on a number of occasions and in return the young person was supplied with ice."*

21. The applicant was sentenced to 16 months imprisonment with a non-parole period of 12 months. The applicant appealed the sentence and, on 27 July 2017, the District Court of New South Wales varied the applicant's non-parole period to nine months.

22. While in custody, the applicant again contravened the AVO by contacting X on more than 60 occasions. The NSW Police Facts Sheet state:

> *"The victim in this matter is under the care of the Minister and has experienced significant trauma in her life and is highly vulnerable.*
>
> *…*
>
> *On the 14th of August 2017 Detectives attached to the Child Abuse Squad attended Silverwater Correctional Facility and identified through recorded phone calls that the Accused had made in excess of 60 connected phone calls to the PINOP. [X] whilst being in the custody of NSW Corrective Services. The first*

phone call was made on the 5th of June 2017 and the last on 15 August 2017. These calls generally last 6 minutes which is the maximum call time and the content has all been electronically recorded.

The calls among other things, consist of the Accused asking [X] to put money into his goal account and planning on 'being' with [X] when he gets out of goal…"

23. Magistrate Bugden sentenced the applicant to a term of imprisonment for 12 months with a non-parole period of six months. The AVO was extended for five years.

24. I note that the applicant denies ever having a sexual relationship with X. However, the circumstances surrounding the issuing of the AVO and the subsequent contact between the applicant and X raise very serious concerns about their relationship. X is a vulnerable person. She is a minor and a ward of the State. The explanation provided by the applicant at hearing regarding his contact with X is baffling and he was unable to provide a plausible explanation about how and why he formed a relationship with the minor. I view this conduct and the breaches of the AVO relating to the same victim as very serious, particularly as they are crimes committed against a vulnerable minor. The Courts have also found the behaviour and relationship between the applicant and X equally as troubling and this is evident from the severity of sentences imposed on the applicant for his blatant breaches of the AVO relating to the minor. Sentences involving terms of imprisonment are a last resort in the sentencing hierarchy and, accordingly, any such sentence must be viewed as a reflection of the seriousness of the offence involved.

25. Having regard to the circumstances of the applicant's criminal behaviour and the nature of his offences, I find that the applicant's conduct is to be viewed very seriously. The applicant's history of criminal offending spans nearly 20 years and appears to be well entrenched. The significant extent of the applicant's criminal offending over many years and his repeated disregard for the law is alarming. I find that the nature and seriousness of the applicant's criminal conduct should be viewed very seriously.

(b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

26. In assessing whether the applicant represents an unacceptable risk of harm to the Australian community, regard must be had to paragraph 13.1.2 of the Direction. This paragraph provides that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. I must have regard to,

cumulatively, the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the applicant re-offending.

27. In regards to reform, I acknowledge that the applicant has undertaken some courses while incarcerated. On 22 September 2010 he received a Certificate of Achievement in recognition of completing the "*Pathway to Employment and Education*" and a Statement of Attendance from TAFE NSW for the course "*Pathways to Education, Employment and Training*". He undertook the course "*A Respected Leader in Breaking the Cycle of Re-Offending*" while incarcerated on 5 May 2017 and 8 May 2017.

28. At hearing the applicant discussed his history with drug abuse. He said that he started taking drugs, specifically crystal methamphetamine (**ICE**), in 2006. The applicant stated that he undertook court ordered drug counselling in 2013 and as a result he stopped using ICE for approximately 3-4 months but was then again '*back on it'* until April 2017. In 2016, the applicant attended on Mr Sam Borenstein, clinical psychologist, for five sessions. Mr Borenstein, in a report dated 5 July 2016, diagnosed the applicant with chronic post-traumatic stress disorder ("**PTSD"**) with co-morbid substance dependency to ICE. At hearing, the applicant advised that he continued to use ICE during the time he was receiving treatment from Mr Borenstein. The applicant's drug abuse escalated in 2016-2017 to the point where he was living on the streets. The applicant stated at hearing that his drug use then reduced in early 2017 leading up to his most recent arrest and incarceration. He claims that he has now been drug free for 21 months. At hearing the applicant described how despite having drugs freely available to him in prison and immigration detention (a claim not substantiated on the evidence), he has abstained from drug use. It appears that he attributes this reform to praying every day and going to church regularly.

29. On the available evidence, I am not satisfied that the applicant has adequately addressed his substance abuse issues. Despite having counselling in the past, the applicant has continued to abuse drugs. Without the benefit of medical assistance I find it implausible that the applicant would be able to simply cease his drug habit after such an extended period of drug abuse, namely, since 2006. Further, there has been limited opportunity to

test the applicant's claims of rehabilitation given that since early 2017 the applicant has been in custody or immigration detention.

30. In addition to drug abuse, the applicant's mental health issues have potentially played a role in his criminal offending. It appears from the applicant's National Police Certificate and other medical evidence that the applicant has suffered from and continues to suffer from permanent mental health issues, namely PTSD. This has been accepted and taken into consideration by the Courts previously. On 26 March 2013, the applicant was convicted of "*aggravated break and enter and commit serious indictable offence in company*". There is no evidence before me regarding the details of this offence however the National Police Certificate records that the applicant was sentenced to a two years suspended sentence on entering a section 12 bond. This conviction was called up on 7 August 2015 for breaching the suspended sentence. The applicant was sentenced to serve the two year period of imprisonment with a non-parole period of eight weeks; however, he was released subject to supervision particularly as to treatment for his mental health condition. At the hearing in these proceedings, the applicant's counsel advised that there was no evidence that the applicant undertook any treatment for his mental health condition following his release.

31. The cumulative effect of the applicant's repeated offending over nearly two decades leads me to the conclusion that his offending days are far from over and that the sentences imposed upon him to date have not caused him to learn any lesson or to change his ways. Most recently, the applicant repeatedly and deceptively contravened an AVO while in prison for the same offence.

32. I have had regard to the totality of the evidence referable to the relevant sub-paragraphs of paragraph 13.1.1(1) of the Direction. I have reached the conclusion that the applicant's conduct is "*very serious*". I have considered the applicant's criminal history as a whole, particularly in the context of his unresolved issues with ICE. I take a very dim view of the applicant's prospects of rehabilitation particularly since the applicant has not demonstrated a capacity to positively behave in the community for any meaningful period of time and there is nothing from any independent or expert medical or similar practitioner detailing a treatment plan and ongoing management of the factors arising from the applicant's drug dependence on ICE and his mental health issues; which are likely a primary motivator behind his very serious offending to date.

33. The applicant is a serious repeat offender with lengthy criminal history in Australia. The nature of the harm to victims should the applicant reoffend in the future is serious and could involve psychological harm to victims; physical harm; and financial cost to the community arising from the need for the police and criminal justice system to respond to the applicant's offending.

34. Overall, on the evidence before me, I find that there remains a real risk of the applicant re-offending. I have very little faith in his prospects of rehabilitation. I am not convinced that any risk is an acceptable risk in this case, particularly in regards to criminal conduct involving a minor who is also a vulnerable victim. As such this primary consideration weighs heavily against a decision to restore the applicant's visa status.

PRIMARY CONSIDERATION (B) – THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA

35. Paragraph 13.2 of the Direction provides that decision-makers must make a determination about whether cancellation is, or is not, in the best interests of minor children in Australia affected by the decision. This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to cancel the visa is expected to be made.

36. The applicant has identified a number of minor children affected by his visa cancellation. Namely, his nieces and nephews who are all under the age of 18. The applicant claims that although he doesn't play a parental role in the children's lives, he is very close to them. This however is not established on the available evidence. The applicant's own evidence at hearing was that during the period 2013 to August 2016, he was frequently taking drugs and had very little to do with his family. The applicant has also been in prison and immigration detention from May 2017 to the present. Despite the applicant's extended absence from the family as a result of his drug use and incarceration, he claims that he wants to have a close relationship his nieces and nephews. This consideration does weigh in favour of revocation however it is significantly outweighed by the other primary considerations.

PRIMARY CONSIDERATION (C) – EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

37. Paragraph 13.3(1) of the Direction provides:

> *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.*

38. In making the Direction, the Minister has made it clear 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*" (at paragraph 13.1(1)). The principles to be applied, as set out in paragraph 6.3 ("the **Principles**"), state that the right of a non-citizen to be able to come to or remain in Australia is a privilege conferred in the expectation that he or she is and will be law-abiding.

39. Relevant to this matter, I have had particular regard to clause 6.3(5) of the Direction that states in part: *"...Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life*." The applicant arrived in Australia at 15 years of age and has resided continuously in Australia since that date; however he started offending in his early twenties in 1999 and has continued to offend up until 2018. I do note that the applicant has engaged in some employment over the years and has contributed to the community through collecting funds for the Children's Hospital and undertaking work voluntarily for his family (immediate and extended).

40. In *YNQY v Minister for immigration and Border Protection* [2017] FCA 1466, Mortimer J said at [76]:

> *[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.*

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

> *[85] … 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. That would be so even in the absence of the express terms of Direction 65. However, those express terms put the question beyond doubt. The norm is stipulated, inter alia, in Direction 65 … The Tribunal was required to give effect to those norms, which is precisely what it did.*

42. The applicant submits that there would be an expectation by the Australian community to provide the applicant with a significant degree of compassion and mercy given the applicant's disadvantaged upbringing in war-torn Iraq and that a non-citizen should not be removed to a country where he or she faces a real prospect of substantial harm for whatever reason. The applicant further submits that the Australian community would appreciate that a person who has had a substantially disadvantaged background may be adversely impacted for life. This may be so, however, the applicant has clearly not met the community expectation that as a non-citizen he will obey the laws of this country. He has repeatedly committed criminal offences over nearly two decades and most recently his offences involved a vulnerable victim; a minor who allegedly engaged in a sexual relationship with the applicant at the age of 14 and who is a ward of the state. I do not expect the Australian community to have any tolerance for this type of offending, irrespective of the applicant's disadvantaged upbringing.

43. Given the "*nature and character*" of the applicant's criminal offending, I'm satisfied that the community would expect that the applicant would be denied the opportunity to remain in Australia. He would no doubt have exhausted the trust and patience of the Australian community who would now expect that it is no longer appropriate for it to bear the cost of the resources expended in criminal justice and corrections involved in responding to the applicant's offending and as stated above, I am not convinced that the applicant has rehabilitated. While the Australian community has greater tolerance for people who have resided in Australia for a long time and from a young age, given the applicant's long history of offending and the nature of his offences, the tolerance of the Australian community has surely run out. This primary consideration weighs strongly in favour of non-revocation.

OTHER RELEVANT CONSIDERATIONS SET OUT IN DIRECION NO. 65

44. Paragraph 14 of the Direction provides for other considerations relevant to deciding whether the cancellation of the applicant's visa should be revoked include the strength, nature and duration of his ties to Australia; international non-refoulement obligations; the extent of impediments if the applicant were removed from Australia; and impact on victims.

Strength, nature and duration of ties to Australia

45. Paragraph 14.2(1) of the Direction sets out two main factors to be considered in assessing the strength, nature and duration of a person's ties to Australia:

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

46. The applicant has resided in Australia for the majority of his life, having arrived in Australia at the age of 15. However, less weight is given to this consideration because the applicant started criminally offending in his early 20s and has continued to commit criminal offences since that time. He has been criminally offending in Australia for most of his adult life.

47. The applicant says that he is close to his mother, father, siblings and nieces and nephews, who all reside in Australia and all of whom are Australia citizens. There is evidence before me from the applicant's parents and siblings as to the nature and strength of his relationships, which I have taken into consideration. They claim that the family has maintained a strong an ongoing relationship however this is somewhat clouded by the evidence. The applicant himself stated at hearing that between 2013 and 2016 he had very little to do with anyone and I also note that in the Police records there are a number of domestic violence incidents between the applicant and his family and, in 2014,

a provisional AVO was applied for and issued to the applicant in regards to his parents and sister. Despite this history, the applicant's family members were present at the hearing to support him and it is reasonable to assume that they will be impacted in some way if the applicant is deported. In any event, there is no evidence to suggest that, should the applicant be removed to Iraq, he will not be able to maintain contact with his Australian based family.

48. There applicant's employment history demonstrates a limited contribution to the Australian community. He has worked for periods for time while in Australia but usually on a casual and intermittent basis. I also acknowledge that the applicant has positively contributed to the community by engaging in fundraising and providing support to his family. While the applicant's strength, nature and duration of ties to Australia favours the applicant, this consideration is significantly outweighed by the relevant primary considerations of the risk to the Australian community and the community expectations.

International Non-refoulement Obligations

49. The applicant has made claims that may give rise to non-refoulement obligations as he claims to have fear of persecution if he is returned to Iraq on account of him being a Christian.

50. Paragraph 14.1 of the Direction relevantly provides:

(a) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm ([14.1(1)])

(b) The existence of a non-refoulement obligation does not preclude non-revocation of the mandatory cancellation of a non-citizen's visa. This is because Australia will not remove a non-citizen, as a consequence of the cancellation of their visa, to the country in respect of which the non-refoulement obligation exists ([14.1(2)]).

(c) Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary to determine whether the non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked ([14.1(4)]).

51. It is open to the applicant to apply for a protection visa. In making that determination, the decision-maker would be bound by *Direction No. 75 – Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b)* ("**Direction 75**"), and so would have to make an assessment of the applicant's refugee and complementary protection claims before assessing any character or suitability concerns that may exist. Direction 75, made by the Minister under section 499 of the Act, establishes the order for factors relevant to an application for a protection visa to be considered when assessing the application. At Part 2 of Direction 75, decision-makers are directed to assess individuals' refugee and complementary protection claims "*before considering any character or security concerns*". The effect of Direction 75 and subsequent Federal Court decisions is such that the applicant will have further avenues through which he can pursue his protection status in Australia. In those processes, Australia's non-refoulement obligations to the applicant will be assessed in a fulsome manner. Accordingly, I do not find that it is necessary in these proceedings to undertake an assessment of the applicant's claims regarding possible harm he could face if he were to be returned to Iraq.

52. For completeness, in the event that I did find that it was necessary to consider the applicant's claims, there would be significant difficulty. The evidence available is insufficient to establish that the applicant would be owed any non-refoulement obligations. As already noted, the applicant's claim in relation to his need for protection arises out of his claimed status as a Christian. The latest information in the *Australian Government – Department of Foreign Affairs and Trade Country Information Report – Iraq* ("**Iraq Country Information**") provides:

    (a) Five seats in the Council of Representatives, Iraq's unicameral legislature, are guaranteed Christians;

    (b) The Constitution prohibits discrimination on the basis of religion, sect or belief, and guarantees the freedom of religious belief explicitly for Christians;

    (c) "*The Constitution explicitly protects Christians' freedom of belief and practice*";

    (d) "*Violence against Christians in the Kurdistan Region is less common, but Christians in the region continue to face discrimination in the form of intimidation and denial of access to services*";

(e) Political and religious leaders in Iraq have provided symbolic support to the Christian community in Iraq which DFAT assesses to indicate that "*the government values Iraq's Christian community and is willing to provide protection where it has the capacity to do so*"; and

(f) DFAT assesses that Christians in Iraq "*face low levels of official discrimination'* and that '*moderate levels of societal discrimination and violence"* (rather than severe levels of societal discrimination and violence).

53. Having regard to the above, I find that this other consideration does not weigh in favour of revoking the cancellation decision.

Extent of impediments if removed

54. While the respondent acknowledges that the applicant may face some hardship upon returning to Iraq I do not agree with the applicant that the hardship potentially faced by the applicant is insurmountable. This consideration needs to be considered in context and based on the available evidence. Namely:

(a) The applicant lived in Iraq until the age of 15. There is no substantial language or cultural barriers facing the applicant were he to be returned to Iraq. I do acknowledge however that Australia does warn against travelling to Iraq and that severe crimes are prevalent. As a "*returnee to Iraq*" He will likely face difficulties establishing himself;

(b) As already touched upon under the consideration of non-refoulement obligations, the applicant's main concern appears to be that he will be persecuted and discriminated against due to his Christian faith. In this regard I again note the insufficiency of the available evidence in support and what is contained in the Iraq Country Information;

(c) The applicant claims that he suffers from significant health concerns, specifically back and neck problems, substance abuse issues and mental health issues. There is no evidence before me that the applicant requires ongoing medical treatment for his back and neck concerns. In regards to his drug abuse and mental health issues, I find it significant that these issues have been longstanding. The applicant has not actively sought any treatment for these conditions while in Australia since

2006 (other than short-term counselling ordered by the Courts). I have no basis to find that he would seek out such treatments in Iraq and as a result I find that the evidence regarding mental health services in Iraq is of little relevance. In any event, I note that although the services are not of the same standard as in Australia, there are some mental health services available in Iraq should the applicant need to seek out treatment;

(d) I also note that the applicant suffers from a disability and has no specified skill set. This may pose some hardship on the applicant in regards to finding employment in Iraq. However, The Iraq Country Information notes that "*under Iraqi legislation five percent of public sector jobs are reserved for people with disabilities*" and "*DFAT assesses that people with a physical disability are at low risk of official or societal discrimination. People with psychological or intellectual disabilities face a low risk of official discrimination and a moderate risk of societal discrimination*".

55. Overall, this factor favours revocation of the cancellation decision; however it is significantly outweighed by the primary considerations of the risk to the Australian community and the community expectations.

Impact on Victims

56. There is nothing before me in the form of victim impact statements (or equivalent). In the absence of any evidence of the impact of the applicant's continued presence in Australia on his victims, it would be an exercise in mere conjecture for me to form a concluded view about the effect his continued presence in this country would have on his victims.

57. The applicant's counsel submits that the applicant's family members should be considered *"victims"* and that the impact of the applicant's removal from Australia on them should be considered. I do not agree with that submission as the applicant's family members are not '*victims*' of the applicant's crimes. I have taken into account the impact on the applicant's family under the consideration of the applicant's "*strength and nature of ties to Australia*".

58. This consideration does not attract any weight either in favour of, or against, the revocation of the applicant's visa. This consideration is therefore neutral.

CONCLUSION

59. The reasons outlined above, the Principles and the two primary considerations of the protection of the Australian community and the expectations of the Australian community, weigh heavily against revocation of the mandatory cancellation of the applicant's visa. Those Principles and considerations significantly outweigh the other considerations in favour of revocation.

60. The decision under review is affirmed.

I certify that the preceding 60 (sixty) paragraphs are a true copy of the reasons for the decision herein of Senior Member A Poljak

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

Associate

Dated: 4 February 2019

Date(s) of hearing:	**24 January 2019**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Respondent:	**Mr W Sharpe, Minter Ellison**