



**Mukiza and Minister for Home Affairs (Migration) [2019] AATA 4445 (1  
November 2019)**

Division: GENERAL DIVISION

File Number(s): **2019/5130**

Re: **Thierry Mukiza**

APPLICANT

And **Minister for Home Affairs**

RESPONDENT

**DECISION**

Tribunal: **Senior Member M Griffin QC**

Date: **1 November 2019**

Place: **Sydney**

The reviewable decision of the delegate of the Minister for Home Affairs, dated 12 August 2019, not to revoke the mandatory cancellation of the Applicant's Class BS Subclass 801 Spouse visa is set aside. In substitution, the Tribunal decides that the cancellation of the Applicant's Class BS Subclass 801 Spouse visa is revoked.

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

Senior Member M Griffin QC

## **CATCHWORDS**

*MIGRATION – mandatory cancellation of the Applicant's Class BS Subclass 801 Spouse visa – s 501(3A) – s 501CA – Applicant failed to pass the character test – sentenced to a term of imprisonment for 12 months or more – whether there is another reasons why the cancellation should be revoked – application of Ministerial Direction No 79 – causal connection between mental illness and offending – schizophrenia – risk to Australian community is at a low level – decision set aside and substituted*

## **LEGISLATION**

*Migration Act 1958 (Cth) ss 499, 500, 501, 501CA*

## **CASES**

FYBR v Minister for Home Affairs [2019] FCAFC 185

R v Hemsley [2004] NSWCCA 228

## **SECONDARY MATERIALS**

*Direction No 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*

## **REASONS FOR DECISION**

**Senior Member M Griffin QC**

**1 November 2019**

1. The Applicant requests review of a decision by a delegate of the Minister for Home Affairs made on 12 August 2019 not to exercise the discretion in s 501CA(4) of the *Migration Act 1958* (Cth) (**Migration Act / the Act**) to revoke the original decision made under s 501(3A) of the Migration Act to cancel the Applicant's Class BS Subclass 801 Spouse visa.

2. The hearing was due to commence on 23 October 2019 at 10:00am. The hearing was not able to commence at the appointed time because the Applicant had not been delivered from Villawood Detention Centre. The Tribunal was told that the requirement for his presence had been communicated by various means to that detention centre by his legal representatives in the days prior to the hearing. These types of matters are particularly time-sensitive, having regard to the necessity for a decision to be made by the 84<sup>th</sup> day after the Applicant was advised of the original decision.
3. The Tribunal sought an explanation. One explanation was provided informally to my associate by an officer of the detention centre; another was provided formally in the hearing by the Respondent's representative. Both were to the same effect, that is, that the Applicant had been woken about 7:00am and he was not ready to come until later because apparently, he had slept in. I note that the Applicant denied this.
4. The explanation offered on behalf of the Villawood Detention Centre is risible. Those who are the custodians of people in detention have a range of absolute responsibilities, not least of which is to ensure that their charges are presented to this Tribunal on time. Villawood Detention Centre has absolute responsibility and control for their charges in all aspects of their lives. That goes without saying. To suggest that those responsible for this Applicant were incapable of ensuring his attendance on time is in fact not only risible, but the Tribunal considers, an explanation offered impudently.
5. I have further been informed that in the weeks preceding this hearing, a number of other Applicants were also produced late for their scheduled hearings.
6. This state of affairs is thoroughly unacceptable and the Minister responsible should be informed of the situation.

## **BACKGROUND**

7. The Applicant was born in Rwanda in 1992, and in 2003 the Applicant moved to Canada. In 2009, the Applicant arrived in Australia. On 20 March 2013, the Applicant was granted a Class BS Subclass 801 Spouse visa on account of his mother.

8. The Applicant, according to health and hospital records, has been treated for schizophrenia since his teenage years. It is not coincidental that the Applicant's offending and mental health condition occurred effectively contemporaneously.
9. On 22 November 2018, the Department cancelled the Applicant's visa. On 29 November 2018, the Applicant submitted a request for revocation of a mandatory visa cancellation. On 12 August 2019, a delegate of the Minister decided not to revoke the original decision. On 21 August 2019, the Applicant applied to the Tribunal for review.

## **ISSUES**

10. The issue in this review is whether the original decision to cancel the Applicant's visa should be revoked pursuant to section 501 of the Act. The Tribunal may revoke the original decision if the Tribunal is satisfied:
  - (a) That the Applicant passes the character test as defined by section 501 of the Act;  
or
  - (b) There is another reason why the original decision should be revoked (s 501CA(4)(b)).
11. The Applicant does not pass the character test because he has a substantial criminal record by virtue of having been sentenced to a term of imprisonment of 12 months or more: sections 501(6)(a) and (7)(c) of the Act. A table showing a summary of the Applicant's criminal history is at Appendix A to this decision.
12. The sole issue is whether there is another reason why the original decision should be revoked. s 501CA(4)(b)(ii) of the Act.

## **RELEVANT LEGISLATION AND POLICY**

13. Section 501CA of the Act applies if the Minister makes a decision under s 501(3A) to cancel a visa that has been granted to a person: see s 501CA(1).
14. Subsection 501CA(4) provides that:

4 *The Minister may revoke the original decision if:*

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

15. Subsection 501(6)(a) relevantly provides that a person does not pass the "*character test*" if the person has "*a substantial criminal record*". Relevantly, a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more: s 501(7)(c).
16. Subsection 500(1)(ba) of the Act provides that applications may be made to the Tribunal for review of decisions of a delegate of the Minister under s 501CA(4) not to revoke a decision to cancel a visa.
17. The Minister has made written directions pursuant to s 499 of the Act to guide decision-makers in the exercise of the power in s 501CA(4) (**Ministerial Direction No. 79**). The relevant paragraphs of which are set out below and describe the framework within which the Tribunal's discretion is to be exercised.
18. The Preamble of Direction No 79 at 6.2 and 6.3 sets out preliminary matters, including general guidance and principles for decision-makers, which relevantly include that:
  - (a) the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens;
  - (b) the Australian community expects that the Australian Government can and should cancel the visas of non-citizens if they commit serious crimes in Australia or elsewhere;
  - (c) a non-citizen who has committed a serious crime, including of a violent nature, and particularly against vulnerable members of the community such as minors, should generally expect to forfeit the privilege of staying in Australia;
  - (d) 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;

- (e) while 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 for only a short period time, 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; and
  - (f) the length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled.
19. Part C of Direction 79 identifies the considerations relevant to former visa holders in determining whether to exercise the discretion to revoke the mandatory cancellation of a non-citizen's visa. It comprises three "primary considerations" and several specified, but non-exhaustive, "other considerations", which must be taken into account.
20. Pursuant to Part C of Direction 79, the Tribunal must, to the extent that they are relevant to this case, take into account three primary considerations and other considerations. Primary considerations should generally be given greater weight than the other considerations and one or more primary considerations may outweigh other primary considerations. These principles are of course dependent upon the facts and circumstances of each case.
21. The three primary considerations are:
- (a) Protection of the Australian community from criminal or other serious conduct;
  - (b) The best interests of minor children in Australia;
  - (c) Expectations of the Australian community.

## Primary Consideration 1 – Protection of the Australian community

22. Paragraph 13.1 of Direction 79 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 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.*

23. The two limbs of paragraph 13.1(2) that the Tribunal must consider when assessing the protection of the Australian community are set out below.

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

24. Sub-paragraph 13.1.1 of Direction 79 provides a list of factors to be considered in determining the nature and seriousness of a person's criminal offending or other conduct to date, which includes, in summary:

- (a) the principle that violent and/or sexual crimes are viewed very seriously;
- (b) the principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed;
- (c) the principle that crimes committed against vulnerable members of the community (such as minors, the elderly and the disabled), government representatives or officials due to the position they hold, or in the performance of their duties, are serious;
- (d) the sentence imposed by the courts for a crime or crimes, subject to (b) above;
- (e) the frequency of the non-citizen's offending and whether there is any trend of increasing seriousness;

- (f) the cumulative effect of repeated offending;
- (g) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;
- (h) whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status; and
- (i) where the non-citizen is in Australia, that a crime committed while the non-citizen was in immigration detention is serious.

***The risk to the Australian community***

25. Paragraph 13.1.2 of Direction 79 states that decision-makers must have regard, cumulatively, to the following:
- (a) The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and
  - (b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen re-offending.

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

26. Decision-makers must make a determination in respect of each relevant child under 18 years about whether revocation is in the best interests of that child.
27. In considering the best interests of the child, the following factors must be considered where relevant:
- (a) The nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);



- (b) The extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;
- (c) The impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;
- (d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;
- (e) Whether there are other persons who already fulfil a parental role in relation to the child;
- (f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);
- (g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and
- (h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

### **Primary Consideration 3 – Expectations of the Australian community**

28. Paragraph 13.3 of Direction 79 provides:

- 1 *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the mandatory visa cancellation of such a person. Non-revocation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not hold a visa. Decision-makers should have due regard to the Government's views in this respect.*

29. The principles to be applied, as set out in paragraph 6.3 of Direction 79, state that the right of a non-citizen to remain in Australia is a privilege conferred in the expectation that he or she will be law-abiding, will respect important institutions and will not cause or threaten harm to individuals or the Australia community. It is also the expectation of the

Australian community that a visa should be cancelled if the holder commits serious crimes.

30. The length of time a non-citizen has been making a positive contribution to the Australian community and the consequences of the visa refusal or cancellation for minor children and other immediate family members in Australia are relevant considerations.

### **Other Considerations**

31. The Tribunal must also take into account other considerations insofar as they are relevant. These considerations include (but are not limited to):
- (a) International non-refoulement obligations;
  - (b) Strength, nature and duration of ties to Australia;
  - (c) Impact on Australian business interests;
  - (d) Impact on victims;
  - (e) Extent of impediments if removed.

### ***International non-refoulement obligations***

32. The considerations at para 14.1 of Direction 79 include (but are not limited to):
- (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. Australia has Convention and Protocol non-refoulement obligations;
  - (b) The existence of a non-refoulement obligation does not preclude non-revocation of the mandatory cancellation of a non-citizen's visa;
  - (c) Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in a request to revoke under s501CA the mandatory cancellation of their visa, or can be clear from the facts of the case (such as where the non-citizen held a protection visa that was mandatorily cancelled);

- (d) Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked;
- (e) Any non-refoulement obligation should be weighed carefully against the seriousness of the non-citizen's criminal offending or other serious conduct in deciding whether or not the non-citizen should have their visa reinstated.

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

33. The considerations at para 14.2 include:
- (a) how long the non-citizen has resided in Australia, including the age of arrival in Australia, the period of offending and positive contributions to the Australian community;
  - (b) the strength, duration and nature of any family or social links with Australian citizens, including the effect of non-revocation on the non-citizen's immediate family.

***Impact on Australian business interests***

34. Direction 79 notes an employment link would generally only be given weight where non-revocation would significantly compromise the delivery of a major project, or delivery of an important service in Australia (para 14.3(1)).

***Impact on victims***

35. Paragraph 14.4 of Direction 79 provides:
- 'Impact of a decision not to revoke on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims where that information is available and the non-citizen being considered for revocation has been afforded procedural fairness.'*

### ***Extent of impediments if removed***

36. The extent of impediments if removed requires consideration of the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account: age and health; whether there are substantial language or cultural barriers; and the availability of any social, medical and/or economic support.

## **DISCUSSION**

### **Character Test**

37. It is clear according to the Act that because the Applicant has a 'substantial criminal record' (s 501(6)(a)) he does not pass the character test.
38. The question for the Tribunal is whether it is satisfied that there exists another reason for revoking the cancellation decision.

### **Protection of the Australian community (past conduct and future risk)**

39. The Applicant has a criminal history which is properly identified as substantial and serious. That criminal history is contained in the G documents (Vol. 1, page 48). The Applicant agrees that the concise form of criminal history expressed in the Respondent's outline is correct. It is sufficient to refer to that for the purposes of this decision (Appendix A).
40. Although the Applicant's criminal history is of moderate length, it is nonetheless, relevant to analyse that history rather more carefully. It is serious according to the relevant legislation, however, an assessment of the criminal history discloses there are few offences that can realistically be described as serious in the accepted terms of criminal proceedings. The Applicant committed breaches of Court Orders and traffic offences which demonstrate generally, a lack of respect for the law.
41. It may be accepted that since first committing offences, the Applicant's criminal offending has increased in significance. It is, however, the overall view of the Tribunal that his history is not a particularly serious one except for the offences dealt with on 1 June 2018,

relating to stealing of a motor vehicle and the consequential police chase and reckless driving.

42. The Applicant submitted, in effect, the offences were victimless. The Tribunal does not accept that submission. It is relevant, however, to consider the totality of the Applicant's offending but more importantly, the circumstances in which the offences were committed.
43. The Tribunal accepts the evidence of an expert clinical psychologist, Mr Visser, that the Applicant has suffered for some considerable time (probably since his late teenage years) from schizophrenia, exacerbated by the use of illicit drugs. The Tribunal also accepts that the Applicant's drug use has played a part in his criminal offending and furthermore as the psychologist opined, based upon a considerable weight of official health records, it was not possible to extricate the mental health element from the offending behaviour caused by drug addiction. On all the evidence, the Tribunal is satisfied to conclude the entirety of the Applicant's offending had its foundation in the Applicant's schizophrenia.
44. On that basis, it is proper to conclude, in accordance with well accepted principles of criminal justice, the criminal behaviour of a person who is affected by mental illness and whose mental health contributed to his offending in a material way, should be regarded as less culpable than an ordinary person so unaffected: *R. v Hemsley* [2004] NSWCCA 228 at [33] per Sperling J. The Tribunal takes the view that this is the proper approach to take when considering the seriousness of the Applicant's offending.
45. In this regard, the Tribunal, overall, considers the seriousness of the Applicant's offending should be regarded as considerably diminished for that reason. That is to say, the mental health condition contributed to his offending. Furthermore, the Tribunal considers the offences suggest behaviour that was largely personal to the Applicant rather than offending which involved and affected other people at large. For example, it was not suggested the Applicant was a drug dealer. He gave evidence denying to that effect and the Tribunal is satisfied that evidence was correct.
46. As to the second limb of this consideration, it is almost irresistible to conclude that, having regard to the Applicant's offending history, he will likely offend again.

47. However, having listened to the evidence given by both the Applicant and his mother, and having had the advantage of assessing the credibility of those two witnesses, the Tribunal is thoroughly satisfied the Applicant now appreciates the consequences of future offending. Furthermore, the Tribunal is satisfied the mother of the Applicant is both in a position to assist the Applicant and assist him to refrain from the commission of any future criminal offending.
48. The Tribunal assesses the likelihood of risk to the Australian community as a low category of risk relative to the past type of offending in which the Applicant has indulged. Overall, the Tribunal concludes that in terms of the risk element of this consideration, the risk as it is described is low.
49. Overall, in the assessment of this consideration, even although the Applicant has committed offences in the past, the Tribunal concludes that this consideration should not be accorded any substantial weight.

#### **Best interests of minor children in Australia**

50. This consideration is irrelevant to these proceedings.

#### **Expectations of the Australian Community**

51. Since the hearing of this matter, the decision of *FYBR v Minister for Home Affairs* [2019] FCAFC 185 was handed down by the Full Court of the Federal Court. It is not easy to discern a unilateral ratio. However, some relevant conclusions may be drawn:
- It is not for the Tribunal to substitute its own view for the Australian public's expectations as expressed by the Government;
  - Consideration 3 operates as a "deeming statement" by the Government as to the "norm" of what the Australian community's expectations to offending will be;
  - The expression of that "deeming statement" is not determinative of the ultimate discretionary decision (See: Charlesworth J. [75]; Stewart J. [89]);
  - Not every factor relevant to the decision will inform the content of community expectations; and
  - The ultimate decision may differ from the community expectations.

52. This consideration is merely one of a number of primary and other considerations to be taken into account.

53. In this case, in accordance with the views expressed in the majority decisions, the Tribunal concludes that because of the Applicant's offending, this consideration weighs against the Applicant despite the circumstances in which the Applicant committed the offences (that is, his mental health issues). The Tribunal concludes this consideration therefore weighs against the Applicant.

### **Other considerations**

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

54. The Applicant has lived in Australia since 2009.

55. The Applicant does not have any children, and his only relative in Australia is his mother who is now an Australian Citizen. The Respondent acknowledges the cancellation of the Applicant's visa would have an impact on his mother. The removal of the Applicant having regard to the supportive relationship of the mother which the Tribunal is satisfied exists on the evidence, would be a matter devastating to both the Applicant and his mother, particularly having regard to his mental ill-health.

56. The evidence before the Tribunal indicates the Applicant has made a modest contribution to the Australian community by virtue of some limited work. The Applicant's state of mental health is a relevant background feature in this overall consideration.

57. Given the Applicant's strong family ties with his mother, and taking into account her ability to provide support for his mental condition, this consideration weighs strongly in the Applicant's favour.

#### ***Impact on victims***

58. The Respondent, at hearing, corrected the submission originally made as to this consideration and submitted that the position ultimately was a neutral one in terms of whether this consideration was unfavourable to the Applicant. The Respondent submitted

there was no specific evidence to indicate the impact of a decision not to revoke the original decision on the victim(s) of the Applicant's criminal offending. The Tribunal is, contrary to the Respondent's submissions, satisfied that as there is no specific evidence in this case as to the "impact on victims", this consideration has no application in the present proceedings.

***Extent of impediments if removed***

59. The Applicant is now 27 years of age. He moved to Canada with his mother at approximately 10 years of age and left Canada for Australia at approximately 17 years of age. That is the only association he has had with Canada. The largest part of his life has been spent living in Australia.
60. It may be assumed in terms of the level of standard of living, welfare, healthcare and associated matters that Canada has an equivalent standard to Australia.
61. The Tribunal is, however, satisfied that it is relevant in this matter to consider the Applicant's mental health. The Tribunal considers, accepting the evidence of Mr Visser on this point, it would be dislocating and therefore contrary to the Applicant's welfare to remove him to a place where he had no support from relations and had to effectively "make his own way" in circumstances where he suffers from schizophrenia.
62. The Tribunal has found the Applicant's mother, who is an Australian citizen, is prepared to stay in Australia and provide him with support. It should be said this view was based not only upon the evidence of the mother as to her relationship with her son and her intention to care for him but also the Tribunal was also satisfied she was genuine in these assertions.
63. Should the Applicant be removed to Canada he would be required to effectively start from scratch in establishing clinical relationships with those who would assist him in his mental health. The Tribunal considers this to be quite undesirable, disruptive and potentially dangerous to his health.
64. In all the circumstances in relation to this consideration, the Tribunal considers that this weighs heavily in favour of the Applicant.



### ***Mental Health Consideration***

65. To the extent that it is necessary to consider the mental health of the Applicant as a separate and relevant consideration within Direction No 79, the Tribunal is satisfied the Applicant's diagnosis of schizophrenia may be accepted as correct.
66. Reference has also been made in other considerations to the Applicant's mental condition. The Tribunal finds:
- the mental condition has existed since early adulthood;
  - it is a continuing condition which is capable of satisfactory control by medication;
  - the Applicant, when taking medication, is capable of behaving in a law-abiding way;
  - it is relevant that during the Applicant's period in immigration detention, the Tribunal accepts that he has been drug-free;
  - the Applicant's mother is prepared and willing and will, in fact, remain in Australia and offer assistance, help and support for her son;
  - importantly, there is a relationship between the Applicant's mental health and his offending, that is to say, there is a causal connection between his mental health and his offending, which leads to the conclusion that he should be regarded as less criminally responsible for his past offences.
67. The Tribunal also concludes, in terms of risk (to which reference has already been made) that although there is some possible risk to the Australian community (Report: Mr Visser) nonetheless, it is in the Tribunal's opinion, risk at a low level and not of a type which would likely involve offences of violence. This is so by reference to the Applicant's past non-violent conduct.
68. Taking these matters into account, the Tribunal is of the view that this is a very powerful consideration given the reduction in criminal responsibility that the Tribunal considers appropriate. This consideration weighs heavily in favour of the Applicant. The Tribunal does not accept the Respondent's submissions to the contrary in this regard.

**CONCLUSION**

- 69. The Tribunal considers that a fundamental issue in the exercise of its discretion in this case is the acceptable evidence of the Applicant’s mental health condition, diagnosed as schizophrenia. The Tribunal recognises that that condition may have been exacerbated by drug use.
- 70. Nonetheless, the Tribunal has concluded the condition of schizophrenia is inextricably associated with the Applicant’s offending in a material and causal way. The Tribunal considers, because the risk of re-offending is low, and because on the evidence, there are sufficient measures in place to ensure public safety, the weight of all considerations favourable to the Applicant leads to a conclusion that there is another reason why the mandatory cancellation should be reversed.
- 71. In this regard, the Tribunal has had regard to all of the evidence relied upon by the Respondent to suggest otherwise including the weight of Consideration 3, which is against the Applicant.

**DECISION**

- 72. The Tribunal sets aside the reviewable decision of the delegate of the Minister dated 12 August 2019 not to revoke the mandatory cancellation of the Applicant’s Class BS Subclass 801 Spouse visa. In substitution, the Tribunal decides that the cancellation of the Applicant’s Class BS Subclass 801 Spouse visa is revoked.

*I certify that the preceding 72 (seventy -two) paragraphs are a true copy of the reasons for the decision herein of Senior Member M Griffin QC*

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

Associate

Dated: 1 November 2019

Date(s) of hearing: **23 October 2019**

Date final submissions received: **24 October 2019**

Counsel for the Applicant: **Mr J Donnelly**

Solicitors for the Applicant: **Prudential Legal Solutions**

Solicitors for the Respondent: **Clayton Utz**

## APPENDIX A: SUMMARY OF APPLICANT'S CRIMINAL HISTORY

Date	Event	Sentence / Comment
11 May 2012	<p>The Applicant appeared before the ACT Magistrates Court charged with:</p> <ol style="list-style-type: none"> <li>1. Minor theft (replacement value \$2,000 or less)</li> <li>2. Possess prohibited substance (Cannabis 50G or less) (two offences)</li> <li>3. Possess prohibited substance (Cannabis 50G or less) (two offences)</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Released on entering a bond of good behaviour for 9 months.</li> <li>2. Convicted. Released on entering a bond of good behaviour for 9 months.</li> <li>3. Convicted. Released on entering a bond of good behaviour for 9 months.</li> </ol>
24 May 2012	<p>The Applicant appeared before the ACT Magistrates Court charged with:</p> <ol style="list-style-type: none"> <li>1. Minor theft (replacement value \$2,000 or less)</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Released on entering a bond of good behaviour for 12 months. Probation 12 months.</li> </ol>
23 May 2013	<p>The Applicant appeared before the ACT Magistrates Court charged with:</p> <ol style="list-style-type: none"> <li>1. Trespass on premises</li> <li>2. Trespass on premises</li> <li>3. Possess prohibited substance (Cannabis 50G or less) (two offences)</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Released on entering a bond of good behaviour for 12 months. Probation 12 months.</li> <li>2. Breach: 23 Oct 2014, ACT Magistrates Court. Proved – no further action. Convicted. Released on entering a bond of good behaviour for 12 months. Probation 12 months.</li> <li>3. Breach: 23 Oct 2014, ACT Magistrates Court. Proved – no further action. Convicted. Released on entering a bond of good behaviour for 12 months. Probation 12 months.</li> <li>4. Breach: 23 Oct 2014, ACT Magistrates Court. Proved – no further action. Breach: 30 Nov 2015, ACT Magistrates Court. Proved – no further action.</li> </ol>
22 December 2014	<p>The Applicant appeared before the ACT Magistrates Court charged with:</p> <ol style="list-style-type: none"> <li>1. Minor theft (replacement value \$2,000 or less)</li> <li>2. Obtain property by deception</li> <li>3. Obtain property by deception</li> <li>4. Obtain property by deception</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Imprisonment 1 month to be served as full time detention. The sentence is to start from 16 December 2014. The sentence is to end on 15 Jan 2015.</li> <li>2. Imprisonment 2 months to be served as full time detention. The sentence is to start from 16 December 2014. The sentence is to end on 15 Feb 2015.</li> </ol>

Date	Event	Sentence / Comment
	<ol style="list-style-type: none"> <li>5. Obtain property by deception</li> <li>6. Obtain financial advantage by deception</li> <li>7. Obtain financial advantage by deception</li> </ol>	<ol style="list-style-type: none"> <li>3. Imprisonment 2 months to be served as full time detention. The sentence is to start from 16 December 2014. The sentence is to end on 15 Feb 2015.</li> <li>4. Convicted. Imprisonment 2 months suspended and released on entering bond to be of good behaviour for 12 months. Probation 18 months.  Breach: 30 November 2015, ACT Magistrates Court. Good behaviour order cancelled.  Convicted. Imprisonment 2 months to be served as full time detention. The sentence is to start from 16 December 2014. The sentence is to end on 15 February 2015.</li> <li>5. Convicted. Imprisonment 2 months to be served as full time detention. The sentence is to start from 16 December 2014. The sentence is to end on 15 Jan 2015.</li> <li>6. Imprisonment 1 month to be served as full time detention. The sentence is to start from 16 December 2014. The sentence is to end on 15 Jan 2015.</li> <li>7. Convicted. Imprisonment 1 month to be served as full time detention. The sentence is to start from 16 December 2014. The sentence is to end on 15 Jan 2015.</li> </ol>
7 July 2015	<p>The Applicant appeared before the ACT Magistrates Court charged with:</p> <ol style="list-style-type: none"> <li>1. Theft</li> <li>2. Fail to appear after bail undertaking</li> <li>3. Fail to appear after bail undertaking</li> <li>4. Possess offensive weapon with intent</li> <li>5. Fail to appear after bail undertaking</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Imprisonment 10 months suspended and released immediately on entering bond to be of good behaviour for 15 months. Probation 12 months.  Breach: 5 July 2016, ACT Magistrates Court. Good behaviour order cancelled. Suspended sentence imposed, sentenced to a total term of imprisonment of 10 months to be served as full time detention. The sentence is to start from 1 May 2016. The sentence is to end on 28 Feb 2017.</li> <li>2. Convicted. Imprisonment 2 months to be served as full time detention. To commence on 8 Jun 2015 and</li> </ol>

Date	Event	Sentence / Comment
		<p>conclude on 7 August 2015.</p> <p>3. Convicted. Imprisonment 3 months to be served as full time detention. To commence on 8 Jun 2015 and conclude on 7 Sep 2015.</p> <p>4. Convicted. Imprisonment 2 months to be served as full time detention. To commence on 8 Jun 2015 and conclude on 7 August 2015.</p> <p>5. Convicted. Imprisonment 3 months to be served as full time detention. To commence on 8 Jun 2015 and conclude on 7 Sep 2015.</p>
30 November 2015	<p>The Applicant appeared before the ACT Magistrates Court charged with:</p> <ol style="list-style-type: none"> <li>1. Drive while licence suspended by law</li> <li>2. Drive while licence suspended by law</li> <li>3. Drive while licence suspended by law</li> <li>4. Driver/Driver trainer prescribed drug in oral fluid/blood</li> <li>5. Drive while licence suspended by law</li> <li>6. Minor theft (replacement value \$2,000 or less)</li> <li>7. Burglary</li> <li>8. Not obey direction of police/authorised person</li> <li>9. Aggravated furious/reckless/dangerous driving</li> <li>10. Drive while licence suspended by law</li> <li>11. Not obey direction of police/authorised person</li> <li>12. Obstruct Territory public official (knowingly)</li> <li>13. Aggravated furious/reckless/dangerous driving</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Fined \$300. Licence disqualified for 3 months.</li> <li>2. Convicted. Fined \$500. Licence disqualified for 3 months.</li> <li>3. Convicted. Fined \$750. Licence disqualified for 3 months, of which 2 months to be served concurrent.</li> <li>4. Convicted. Fined \$300. Licence disqualified for 6 months.</li> <li>5. Convicted. Fined \$1,000. Licence disqualified for 3 months.</li> <li>6. Convicted. Imprisonment 3 months to be served as full time detention. The sentence is to start from 23 May 2015. The sentence is to end on 22 Aug 2015.</li> <li>7. Convicted. Imprisonment 8 months to be served as full time detention. The sentence is to start from 23 May 2015. The sentence is to end on 22 Jan 2016.</li> <li>8. Convicted. No further penalty.</li> <li>9. Convicted. Fined \$1,000. Licence disqualified for 6 months.</li> <li>10. Convicted. Fined \$1,000. Licence disqualified for 3 months commencing 30 Nov 2015.</li> <li>11. Convicted – no further penalty.</li> <li>12. Convicted. Fined \$400.</li> <li>13. Convicted. Imprisonment 3 months to be suspended and released on entering bond to be of good behaviour for 18 months commencing 22 Jan 2016 and concluding 21 Jul 2017. Probation</li> </ol>

Date	Event	Sentence / Comment
	<p>14. Drive while licence suspended by law</p>	<p>12 months. Licence disqualified for 12 months. Breach: 5 Jul 2016, ACT Magistrates Court. Good behaviour bond order cancelled. Suspended sentence imposed Imprisonment 3 months to be served as full time detention. The sentence is to start from 1 May 2016. The sentence is to end on 31 Jul 2016</p> <p>14. Convicted. Imprisonment 2 months to be suspended and released on entering bond to be of good behaviour for 18 months commencing 22 Jan 2016 and concluding 21 Jul 2017. Probation 12 months. Licence disqualified for 3 months. Breach: 5 Jul 2016, ACT Magistrates Court. Good behaviour bond order cancelled. Suspended sentence imposed. Imprisonment 2 months to be served as full time detention. The sentence is to start from 1 Aug 2016. The sentence is to end on 30 Sep 2016.</p>
<p>5 July 2016</p>	<p>The Applicant appeared before the ACT Magistrates Court, charged with:</p> <ol style="list-style-type: none"> <li>1. Driver – seatbelt not adjusted and fastened properly</li> <li>2. Use unregistered/suspended vehicle</li> <li>3. Use uninsured vehicle</li> <li>4. Number plate/regro not properly issued/issued for another vehicle</li> <li>5. Drive while disqualified</li> <li>6. Fail to appear after bail undertaking</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Fined \$100.</li> <li>2. Convicted. Fined \$400.</li> <li>3. Convicted. Fined \$400.</li> <li>4. Convicted. Fined \$500.</li> <li>5. Convicted. Imprisonment 2 months to be served as full time detention. The sentence is to start from 1 Apr 2017. The sentence is to end on 31 May 2017.</li> <li>6. Convicted. Imprisonment 3 months to be served as full time detention. The sentence is to start from 31 Jan 2017. The sentence is to end on 30 Apr 2017.</li> </ol>
<p>9 February 2017</p>	<p>The Applicant appeared before the ACT Magistrates Court charged with:</p> <ol style="list-style-type: none"> <li>1. Drive while disqualified.</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Imprisonment 3 months to be served as full time detention. The sentence is to start from 7 November 2017 and is to end on 6 Feb 2018. Licence disqualified for 24 months.</li> </ol>

Date	Event	Sentence / Comment
9 February 2018	<p>The Applicant appeared before the ACT Magistrates Court charged with:</p> <ol style="list-style-type: none"> <li>1. Fail to stop motor vehicle for police</li> <li>2. Use unregistered/suspended vehicle</li> <li>3. Driver/driver trainer prescribed drug in oral fluid/blood</li> <li>4. Use uninsured vehicle</li> <li>5. Fail to stop motor vehicle for police</li> </ol>	<ol style="list-style-type: none"> <li>1. Convicted. Imprisonment 2 months to be served as full time detention. The sentence is to start from 10 Dec 2017 and is to end on 9 Feb 2018.</li> <li>2. Convicted. Fined \$250.</li> <li>3. Convicted. Released on entering bond to be of good behaviour for 12 months. Licence disqualified for 24 months (methylamphetamine)</li> <li>4. Convicted. Fined \$250.</li> <li>5. Convicted. Imprisonment 3 months to be served as full time detention. The sentence is to start from 7 Sep 2017 and is to end on 6 Dec 2017.</li> </ol>
1 June 2018	<p>The Applicant appeared in the Queanbeyan Local Court charged with:</p> <ol style="list-style-type: none"> <li>1. Class A m/v exceed speed &gt; 45km/h – estimated</li> <li>2. Police pursuit – not stop – drive recklessly – 1st off-T2</li> <li>3. Drive motor vehicle during disqualification period – 2nd+off</li> <li>4. Steal motor vehicle-T1</li> </ol>	<ol style="list-style-type: none"> <li>1. S10A conviction with no other penalty: disqualification – driver: 6 months commencing 01/06/2018 concluding 30/11/2018.</li> <li>2. Imprisonment: 18 months commencing 06/06/2018 concluding 05/12/2019. Non parole period: 12 months commencing 06/06/2018 concluding 05/06/2019. Disqualification – driver: 3 years commencing 01/06/2018 concluding 31/05/2021. Severity appeal lodged.</li> <li>3. Imprisonment: 7 months commencing 01/06/2018 concluding 31/12/2018. Disqualification – driver: 12 months commencing 01/06/2018 concluding 31/05/2019. Severity appeal lodged.</li> <li>4. Imprisonment: 9 months commencing 06/04/2018 concluding 05/10/2018. Severity appeal lodged.</li> </ol>
26 July 2018	<p>The Applicant appeared before the Queanbeyan District Court to appeal the sentences of 1 June 2018 including for the offences of:</p> <ol style="list-style-type: none"> <li>1. Police pursuit – not stop – drive recklessly – 1st off-T2</li> <li>2. Drive motor vehicle during disqualification period – 2nd+off</li> <li>3. Steal motor vehicle-T1</li> </ol>	<ol style="list-style-type: none"> <li>1. Order varied: Imprisonment, 18 Months. Non parole period: 9 months. Disqualification, 3 years.</li> <li>2. Order varied: Imprisonment, 6 months. Disqualification, 12 months.</li> <li>3. Order varied: Imprisonment, 6 months.</li> </ol>



Date	Event	Sentence / Comment
21 November 2018	<p>The Applicant appeared before the Cooma Local Court charged with:</p> <ol style="list-style-type: none"> <li>1. Drive vehicle under the influence of drugs – 1st off</li> </ol>	<ol style="list-style-type: none"> <li>1. Community correction order: 9 months commencing 21/11/2018 concluding 20/08/2019. Disqualification – driver: 2 years commencing 06/06/2018.</li> </ol>