Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2019/8044**
Re:	**FRVT**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Member Eteuati**
Date:	**25 February 2020**
Place:	**Brisbane**

The decision under review is set aside and a decision in substitution is made revoking the original visa cancellation decision.

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

Member Eteuati

Catchwords

MIGRATION – Non-revocation of mandatory cancellation of Class XA Subclass 866 protection visa – applicability of BAL19 v Minister for Home Affairs [*2019] FCA 2189 Applicant does not pass character test — whether there is another reason why the mandatory cancellation of the Applicant's visa should be revoked – consideration and application of Ministerial Direction No 79 — decision under review set aside and substituted*

Legislation

Acts Interpretation Act 1901 (Cth)
Migration Act 1958 (Cth)
Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth) (No. 129, 2014)
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) (No. 135 of 2014)
Migration Regulations 1994 (Cth)

Cases

Afu v Minister for Home Affairs [2018] FCA 1311
Al-Kateb v Godwin [2004] HCA 37
Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia [1932] HCA 9
Australian Securities and Investments Commission v DB Management Pty Ltd (2000) 199 CLR 321
AXT19 v Minister for Home Affairs [2019] FCA 1423
BAL19 v Minister for Home Affairs [2019] FCA 2189
BDQ19 v Minister for Home Affairs [2019] FCA 163
Benrabah v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 4
CQBW and Minister for Home Affairs (Migration) [2019] AATA 5177
DFNM and Minister for Home Affairs (Migration) [2019] AATA 3769
DGI19 v Minister for Home Affairs [2019] FCA 1867
DMH16 v Minister for Immigration and Border Protection [2017] FCA 448

DOB18 v Minister for Home Affairs [2019] FCAFC 63

Ezegbe v Minister for Immigration and Border Protection [2019] FCA 216

FYBR v Minister for Home Affairs [2019] FCA 500

FYBR v Minister for Home Affairs [2019] FCAFC 185

Gaspar v Minister for Immigration and Border Protection [2016] FCA 1166

GBV18 v Minister for Home Affairs [2019] FCA 1132

GKQK v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 37

Goundar v Minister for Immigration and Border Protection [2016] FCA 1203

Lansdowne and Minister for Home Affairs [2019] AATA 2448

Liang and Minister for Immigration and Citizenship [2013] AATA 392

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

Minister for Home Affairs v Omar [2019] FCAFC 188

Minister for Immigration and Border Protection v Le [2016] FCAFC 120

Minister for Immigration and Border Protection v Maioha [2018] FCAFC 216

Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 240 CLR 611

Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom (2006) 228 CLR 566

Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh [1995] HCA 20

NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) [2004] FCAFC 263.

NAGC and NAGW 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 6

Ngo v The Queen [2017] WASCA 3

Omar v Minister for Home Affairs [2019] FCA 279

Patto v Minister for Immigration and Multicultural Affairs [2000] FCA 1554

Plaintiff M47/2012 v Director-General of Security [2012] HCA 46

PRHR and Minister for Immigration and Border Protection (Migration) [2017] AATA 2782

QQYJ and Minister for Home Affairs (Migration) [2019] AATA 770

Re Minister for Immigration and Multicultural Affairs; Ex parte Lam [2003] HCA 6

Re Salazar Arbelaez v Minister for Immigration and Ethnic Affairs (1977) 1 ALD 98

SCJD and Minister for Home Affairs (Migration) [2018] AATA 4020

Suleiman v Minister for Immigration and Border Protection [2018] FCA 594

Sullivan v Civil Aviation Safety Authority (2014) 226 FCR 555

SZOQQ v Minister for Immigration and Citizenship [2013] HCA 12

Trang and Minister for Home Affairs (Migration) [2019] AATA 4087
Uelese v Minister for Immigration and Border Protection [2016] FCA 348
VPKY and Minister for Home Affairs [2019] AATA 352
WKCG and Minister for Immigration and Citizenship [2009] AATA 512
YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

Secondary Materials

Commonwealth of Australia, Department of Health, National Drug Strategy 2017-2026
DFAT Country Information Report: People's Republic of China – 3 October 2019
Direction No 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA
Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)
Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth)
PAM3: Act - Compliance and Case Resolution - Case resolution - Minister's powers - Minister's detention intervention power
The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
The International Covenant on Civil and Political Rights and its Second Optional Protocol
The United Nations Convention and Protocol Relating to the Status of Refugees (1967)
Second reading speech to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (Cth)
Second reading speech to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)

REASONS FOR DECISION

Member Eteuati

25 February 2020

BACKGROUND

1. This is an application by FRVT ("the Applicant") for review of a decision made by the delegate of the Minister for Immigration, Citizenship, Migration Services and Multicultural Affairs ("the Minister" or "the Respondent') on 3 December 2019 to refuse to revoke, under section 501CA(4) of the *Migration Act 1958* (Cth) ("the Act"), the cancellation of the Applicant's Class XA Subclass 866 Protection visa ("Protection visa").[1]

2. The Applicant first arrived in Australia in 2008 as the holder of a Class TU Subclass 571 Student visa.[2] The applicant was 17 years old when he first arrived in Australia. The applicant's mother arrived with him as the holder of a Class TU Subclass 580 Student Guardian visa.

3. The Applicant's mother applied for a class XA protection Visa on 22 September 2009. That application was refused by the Minister's delegate on 21 December 2009. The applicant's mother applied for review of that decision in the refugee review Tribunal. On 29 March 2010 the Refugee Review Tribunal remitted the applicant's mother's protection visa application for reconsideration with the direction that she satisfied section 36(2)(a) of the Act "*being a person to whom Australia has protection obligations under the Refugees Convention*".

4. On 31 March 2010, the Applicant applied for a Protection visa on the basis that he did not have his own claims to be a refugee, but rather that he was part of a member of the family unit of his mother, who had claimed to be a refugee.

5. On 7 May 2010 the Applicant's mother and the Applicant were granted protection visas. It was the Applicant's Protection visa that was cancelled.

6. On 22 October 2015, the Applicant was convicted of importing a marketable quantity of border control drugs, being methamphetamine, and sentenced to five years and six months' imprisonment with a non-parole period of four years and two months.[3]

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[1] Exhibit G1, G-documents, G2.
[2] Ibid, G2, page 99.
[3] Ibid, G11, pages 316 – 317.

7. On the same day the Applicant was convicted of attempting to import a commercial quantity of border control precursors, being ephedrine, and sentenced to five years and six months imprisonment with a non-parole period of four years and two months. Six months of this will sentence was to be served cumulatively. Therefore, the total effective sentence was six years' imprisonment with a non-parole period of four years and two months. The sentence imposed was taken to commence on the day that the applicant was arrested, on 19 December 2013 and the Applicant was eligible for parole on 17 February 2018.[4]

8. On 28 June 2017, a delegate of the Minister cancelled the Applicant's Protection visa pursuant to section 501(3A) of the Act.

9. The Applicant's Protection visa was cancelled by the Minister on the basis that the Applicant did not pass the character test as set out in section 501(6)(a) of the Act (when read with section 501(7)(c)), as he had been sentenced to a term of imprisonment of more than 12 months and was serving a full-time term of imprisonment.

10. On 21 August 2017, the Applicant sought that the cancellation decision be revoked.

11. On 3 December 2019, the Minister refused to revoke the cancellation of the Applicant's Protection visa.

12. On 5 December 2019, the Applicant applied to Administrative Appeals Tribunal ("the Tribunal") for review of that decision.

13. The matter was heard on the 17 and 18 February 2020. For the reasons below, the Tribunal has decided to set aside the decision under review and for a decision in substitution to be made revoking the original visa cancellation decision. The Tribunal considers that this is the preferable decision in this case.

[4] Ibid, G10, page 313.

ISSUES

BAL19 v Minister for Home Affairs [2019] FCA 2189

14. The Applicant argues that the recent Federal Court decision of Rares J in *BAL19 v Minister for Home Affairs* [2019] FCA 2189 ("*BAL19*") is indistinguishable from the present case and binding on the Tribunal in this case. The Applicant argues that the result of *BAL19* is that section 501(3A) of the Act was not applicable to the Applicant and that the Minister had no power to cancel his visa under that provision.[5] The Applicant argues that in those circumstances the Tribunal must order that the cancellation decision be set aside. Alternatively, the Applicant argues that the non-revocation decision should be set aside and in substitution a decision be made to revoke the cancellation of the Applicants visa.

15. The Respondent's written submissions regarding this issue are as follow:

> *"22. On 24 December 2019 the Federal Court handed down its decision in BAL19 v Minister for Home Affairs [2019] FCA 2189 (**BAL19**) in which the Court found that s 36(1C) of the Act was inserted by Parliament to codify Australia's non-refoulement obligations for a protection visa applicant or holder who otherwise raised character issues and that the power to refuse or cancel such a visa could only be enlivened by relying on s 36(1C). Therefore, since that amendment, s 501(1) and its analogues could not be relied on as a basis to refuse to grant or to cancel a protection visa.*
>
> *23. The Minister submits that the decision in BAL19 is wrong. The Minister lodged an appeal of that decision to the Full Federal Court on 14 January 2020.*
>
> *24. In any event, the Minister submits for the reasons that follow, that BAL19 does not apply to mandatory cancellation decisions made under s 501(3A) of the Act and accordingly the Tribunal can proceed to review of the delegate's decision not to revoke the cancellation of the applicant's visa in the usual manner.*

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[5] Applicant's Statement of Facts, Issues and Contentions, dated 16 January 2020, at para [12].

25. First, a decision made under that s 501(3A) to mandatorily cancel a visa is not an 'analogue' of s 501(1), as referred to in BAL19. Rares J found at [61] of the judgment that (emphasis added): 7

> *[t]he criterion in s 36(1C) is both specific and substantively narrower than the discretions created by s 501 and its analogues in Pt 9 of the Act* ***under which the Minister has a variety of discretions to refuse to grant or to cancel a visa of a person who does not satisfy the Minister that he or she passes the character test*** *(as defined in s 501(6)). Hence, the discretionary power to refuse a visa under s 501(1) is unconstrained, except by the subject matter, scope and purpose of the Act, once the person has not satisfied the Minister that he or she passes the character test: cf. Reg v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd [1979] HCA 62; (1979) 144 CLR 45 at 49 per Stephen, Mason, Murphy, Aickin and Wilson JJ….*

25.1 His Honour, emphasised at [63] and [67] that s 36(1C) of the Act is not a discretionary power. Rather it prescribes a mandatory criterion to be satisfied which is in contrast to the discretionary nature of s 501(1). By contrast, the power in s 501(3A) requires that a visa must be cancelled where the Minister is satisfied that a person does not satisfy the character test and is currently serving a full time custodial sentence. Therefore, Justice Rares' reference to s 501(1) and its 'analogues' must be read as being confined to the relevant powers in Part 9 of the Migration Act which involve a discretion to refuse to grant or to cancel a visa. Mandatory cancellation under s 501(3A) is not such a power.

26. Second, in BAL19 Justice Rares did not declare that the power in the s 501(3A) is invalid to the extent that it applies to protection visas. It is submitted that unless and until there is judicial authority finding that the power in s 501(3A) is invalid in so far as it applies to protection visas, that section should be treated as valid and that it therefore requires the cancellation of visas where a person has a 'substantial criminal record' and is serving a full time custodial sentence."

16. *BAL19* involved an application for review in the Federal Court of a decision of the Minister to personally refuse to grant a Protection visa to an applicant pursuant to section 501 of the Act, having found that the applicant did not pass the character test pursuant to section 501(6)(d)(v) of the Act.

17. Section 501(6)(d)(v) of the Act provides that a person does not pass the character test if, in the event the person were allowed to enter or remain in Australia, "***there is a risk that the person would… represent a danger to the Australian community or to a segment of that community***, *whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way*".

    [Emphasis added]

18. The Minister accepted that the applicant was a "*person in respect of whom Australia has international non-refoulement obligations, and that removal of the applicant to Sri Lanka would breach those obligations*".

19. However, the Minister concluded that the:

    "…considerations in favour of refusal outweighed the countervailing considerations in [the applicant's] case, ***including the potential harm for [the applicant] if he is returned to Sri Lanka (which engages Australia's international non-refoulement obligations), the impact of his removal on his family members, the detrimental impact that continued detention would have on his mental health while he awaits removal from Australia, and the other concerns expressed by the AHRC and the WGAD regarding his detention****".* [Emphasis in original]

20. Justice Rares addressed three issues in his decision. The first issue was whether the Minister had failed to adequately consider the consequences of his decision for the applicant. The third issue was whether a criterion for the grant of a Protection visa contained in the Regulations was valid.

21. The second issue, which is the relevant issue for present purposes, was what his Honour referred to as the "*inconsistency issue*". In brief, that issue is whether the Minister can use the power in s 501(1) to refuse to grant a Protection visa, once an applicant has met the criteria for the grant of a visa in section 36(1C) of the Act.

22. Section 36 sets out criteria for a Protection visa. Section 36(1)(c) is a criterion for a Protection visa which prevents the grant of a protection visa to a person whom the Minister considers on reasonable grounds is a danger to Australia's security or, having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

23. Section 36(1C) of the Act provides:

> *"A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:*
>
> *(a) is a danger to Australia's security; or*
>
> *(b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community."*

24. Section 36(1C) was enacted to codify the effect of Article 33(2) of the *United Nations Convention relating to the Status of Refugees*, adopted in 1951, as amended by the 1967 *Protocol Relating to the Status of Refugees* ("Refugees Convention") so that a protection visa applicant would be ineligible for the grant of a Protection visa if they were a refugee who would have otherwise been excluded from the non-refoulement principle by Article 33(2) of the Refugees Convention.

25. Article 33(1) of the Refugees Convention provides that:

> *"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."*

26. Article 33(2) of the Refugees Convention provides that:

> *"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*

27. Justice Rares decided that since the amendments to the Act made by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No. 135 of 2014) ("the 2014 Protection Amendments"), which included the enactment of section 36(1C) of the Act, the Minister was precluded by section 36(1C) of the Act from using section 501(1) of the Act as a basis to refuse to grant a Protection visa.[6]

28. His Honour recognised that, prior to the 2014 amendments, in *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46 ("*M47*") the High Court had found that section 501(1) of the Act could be used to refuse the grant of a Protection visa relying on section 501(6)(d)(v) of the Act. Rares J also recognised that in *SZOQQ v Minister for Immigration and Citizenship* [2013] HCA 12 ("*SZOQQ*"), the High Court found that in determining whether a visa applicant was a person in respect of whom Australia had protection obligations under the Refugees Convention for the purposes of the criterion for a protection visa prescribed by section 36(2)(a) of the Act, Article 33(2) of the Refugees Convention is irrelevant to the determination.

29. Thus, prior to the 2014 amendments a Protection visa could be refused under section 501(1) of the Act relying on section 501(6)(d)(v) of the Act, but not under section 65 of the Act on the basis that they did not meet section 36(2)(a) by reason of Article 33(2) of the Refugees Convention.

30. The relevant issue in *M47* was whether a criterion for the grant of a Protection visa prescribed by regulation was inconsistent with the Act and therefore invalid. The plurality of the High Court decided that it was.[7]

31. At the time section 500(1)(c) of the Act provided a mechanism for review by the Tribunal of decisions to refuse to grant a Protection visa or to cancel a Protection visa "*relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2)*". However, there was no specific provision in the Act which provided expressly for refusal or cancellation of a Protection visa relying on Articles 1F, 32 or 33(2) of the Refugees Convention.

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[6] Schedule 5.

[7] See para [78].

32. In *M47* the High Court found that to give effect to section 500(1)(c) of the Act (and other sections which referred to it), the power to make such decisions must be found within existing grants of power under the Act or by implication from the terms of section 500(1)(c) of the Act (and other sections which referred to it). The High Court found that there was overlap between the disentitling provisions in Articles 32 and 33(2) of the Refugees Convention and section 501(6)(d)(v) of the Act, which provides that a person fails the character test if there is a risk that they represent a danger to the Australian community or to a segment of that community.

33. Therefore, section 501(1) of the Act provided that the Minister could refuse to grant a Protection visa to an applicant by the use of discretionary power once a person was found to have failed the character test pursuant to section 501(6)(d)(v) of the Act.

34. The High Court found that the prescription of criterion by a regulation which prevented the grant of a Protection visa, if an applicant was assessed by ASIO to be directly or indirectly a risk to security was invalid. This was because it was inconsistent with the Minister's discretion to refuse a Protection visa under section 501 of the Act relying on Articles 32 and 33 of the Refugees Convention. The criterion in the regulation, if met, prevented the grant of a visa. It prevented the Minister from use of the discretion in section 501(1) and a decision made on the basis of not meeting the criterion in the regulation was not reviewable in the Tribunal, whereas a decision by the Minister under section 501(1) relying upon the disentitling provisions in the Refugees Convention was available. Thus, the regulation was also inconsistent with the availability of review in the Tribunal of such a decision under the Act.

35. *In SZOQQ,* the High Court reaffirmed its previous decision in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, to the effect that Articles 32 and 33(2) of the Refugees Convention have no application in determining whether a visa applicant was a person in respect of whom Australia had protection obligations under the Refugees Convention for the purposes of section 36(2)(a) of the Act.

36. The 2014 Protection Amendments created, in the words of the then Minister, "…*a new, independent and self-contained statutory framework which articulates Australia's*

interpretation of its protection obligations under the Refugees Convention."[8] Whereas previously the determination of whether a person was a refugee was made in large part by direct reference to the Refugees Convention, the 2014 Protection Amendments introduced into the Act the legislative machinery to make that determination without having to rely directly on the Refugees Convention, or external interpretations of the Refugees Convention.

37. As discussed previously in these reasons, prior to the enactment of the 2014 Protection Amendments, Article 33(2) of the Refugees Convention had no part to play in determining, under section 36 of the Act, whether Australia had protection obligations in respect of a Protection visa applicant. The 2014 Protection Amendments inserted into the Act section 36(1C), which was intended to codify Article 33(2) of the Refugees Convention to prevent a refugee who would be caught by Article 33(2) of the Refugee Convention from being granted a Protection visa.

38. The Explanatory Memorandum to the 2014 Protection Amendments stated:

> *"The Government intends the codification of Article 33(2) of the Refugees Convention, which operates as an exception to the prohibition against refoulement, to make it clear that it is both appropriate and desirable for decision makers to consider this concept as part of the criteria for a protection visa. The statutory implementation of Article 33(2) of the Refugees Convention is through the new subsection 36(1C). Where a person is found to meet the definition of 'refugee' but does not meet the criterion under subsection 36(1C) they will be ineligible for grant of a Protection visa."*[9]

39. The 2014 Protection Amendments also introduced section 197C of the Act.

40. Section 198 of the Act relevantly provides that an officer must remove from Australia an unlawful non-citizen as soon as reasonably practicable.

41. Section 197C of the Act provides that for the purpose of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. Section 197C also provides that an officer's duty under section 198 arises irrespective of

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[8] Explanatory Memorandum to the 2014 Protection Amendments.

[9] Page 12.

whether there has been an assessment of Australia's non-refoulement obligations in respect of the non-citizen.

42. In *BAL19,* Rares J said the following at [36] about the purpose for which section 197C was enacted:

> *"The purpose for which the Parliament enacted s 197C appears to have been to prevent persons who had not been able, or perhaps not yet sought, to establish that Australia owed them non-refoulement obligations, subsequently invoking reliance on the possible, but unestablished, existence of those obligations after their protection claims or their other rights to seek a visa had been rejected and they were liable to removal from Australia as soon as reasonably practicable under s 198."*

43. While Rares J recognised that prior to the 2014 Protection Amendments a protection visa could be refused under section 501(1) of the Act relying on section 501(6)(d)(v) of the Act, his Honour found that after the 2014 Protection Amendments, section 501(1) of the Act could no longer be used to refuse a protection Visa.[10]

44. Relying in part on the Minister's second reading speech[11] in which the then Minister described the relevant amendments as creating an independent and self-contained statutory refugee framework, Rares J found that section 36(1C) of the Act exclusively codified the grounds upon which a Protection visa applicant could be refused a Protection visa on character or community protection grounds.[12] Rares J reasoned that if a protection visa applicant met the criteria in section 36(1C) of the Act and other non-character related criteria, the applicant was entitled to be granted a Protection visa under section 65 of the Act.[13]

45. His Honour indicated that this was so notwithstanding the criterion in section 65(1)(a)(iii) of the Act requiring Ministerial satisfaction that the grant of the visa was not prevented by section 501 of the Act.[14] His Honour reasoned that section 501 of the Act does not prevent the grant of a visa, but, rather provides the Minister with a discretionary power to refuse a visa in cases other than applications for Protection visas.

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[10] *BAL19*, at [88].
[11] Second reading speech to the 2014 Protection Amendments.
[12] *BAL19*, para [87].
[13] Ibid, paras [69] and [90].
[14] Ibid, para [69].

46. His Honour relied upon the principle enunciated by the High Court in *Anthony Hordern & Sons Ltd* v *Amalgamated Clothing and Allied Trades Union of Australia* [1932] HCA 9, where Gavan Duffy CJ and Dixon J said:

> *"When the Legislature explicitly gives a power by a particular provision which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power."*

47. The principle was discussed further in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* [2006] HCA 50. In that case Gummow and Hayne JJ said:

> *"Anthony Hordern and the subsequent authorities have employed different terms to identify the relevant general principle of construction. These have included whether the two powers are the "same power", or are with respect to the same subject-matter, or whether the general power encroaches upon the subject-matter exhaustively governed by the special power. However, what the cases reveal is that it must be possible to say that the statute in question confers only one power to take the relevant action, necessitating the confinement of the generality of another apparently applicable power by reference to the restrictions in the former power. In all the cases considered above, the ambit of the restricted power was ostensibly wholly within the ambit of a power which itself was not expressly subject to restrictions."*[15]
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> [References excluded]

48. Rares J found that the "*specific*" criteria in section 36(1C) of the Act applied to the exclusion of the exercise of the "*general*" power in section 501(1) to refuse the grant of a visa notwithstanding "*the pre-existing section 501H*" which provides:

> *"(1) A power under section 501, 501A, 501B or 501BA to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person, is in addition to any other power under this Act, as in force from time to time, to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person…*
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> *(2) A reference in Part 5 to a decision made under section 501 includes a reference to a decision made under section 501A, 501B, 501BA, 501C or 501F."*

49. Rares J noted that the character test prescribes criteria that could include those amounting to a "*particularly serious crime*" for the purposes of sections 36(1C) and 5M of the Act and gave the example of section 501(7)(c) and (d) of the Act which, when read with section 501(6)(a), provide that a person has a "*substantial criminal record*" and thus

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[15] At [59].

fails the character test if they have been sentenced to one or more terms of imprisonment totalling 12 months or more.

50. Rares J contrasted section 501(7)(c) and (d) of the Act with the relevant provision in the case before him, section 501(6)(d)(v) of the Act, which provides that a person fails the character test if there is a risk the person may present a danger to the Australian community or a segment of that community.

51. Rares J compared the exclusionary provisions in section 36(1C) of the Act with those in section 501(6)(d)(v) of the Act. He noted that the criterion in section 36(1C) of the Act require the Minister to find on reasonable grounds that, having been convicted of a particularly serious crime, the person was a danger to the Australian community. This was to be contrasted with section 501(6)(d)(v) of the Act where no conviction or crime was required merely a "*risk*" that a person would "*represent a danger*" to the Australian community or a segment of that community.

52. His Honour stated at [67]:

> *"There would be no intelligible statutory purpose for the mandatory criterion for a grant of a protection visa in s 36(1C), reflecting as it does the Parliament's interpretation of Art 33(2) of the Refugees Convention, if the Minister were free to apply a less stringent criterion under s 501(1) and its analogues, involving his exercising a very broad discretion, to refuse to grant the very same visa: Australian Securities and Investments Commission v DB Management Pty Ltd (2000) 199 CLR 321 at 338 [34]-[35] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ."*

53. His Honour reasoned that, if it were the intention of Parliament for a person who met section 36(1C) of the Act to nevertheless be able to be refused a Protection visa under section 501(1) of the Act, then [71]:

> *"…the specific and narrow criteria in s 36(1B) and (1C) that give statutory effect to Australia's non-refoulement obligations would have no useful function since these could be overridden in every protection visa application by the use of the general power in s 501(1), regardless that the different criteria in s 36(1B) and (1C) had been met. And, equally, s 197C could then apply to a person who actually met the criteria in s 36(1B) and (1C) that the Parliament specifically enacted as objective preconditions for the grant of a protection visa, if the Minister were free to use a different power with different and less stringent standards (namely, that in s 501(1) or an analogue) in a manner that would put Australia in breach of its international obligations under Arts 32 and 33(2) of the Refugees Convention."*

54. His Honour went on to state at [85]:

> *"…the 2014 Amendments carefully codified the criteria for a protection visa in ss 35A(6) and 36 in order to divorce other parts of the Act and the Refugees Convention. In my opinion, those criteria deal exhaustively with the criminal history and behaviours of an applicant for (or holder of) a protection visa so as now to exclude the availability or operation of s 501 and its analogues, including the pre-existing s 501H, as a basis to refuse to grant a protection visa: Nystrom 228 CLR at 571-572 [2]."*

55. Rares J concluded (at [88]):

> *"I am of opinion that, since the 2014 Amendments, s 501(1) is not, and is not intended or expressed to be, relevant to determining whether or not a person, in accordance with ss 35A(6) and 36, is entitled to (or may be refused) under s 65(1) a protection visa as a refugee (as now defined in the Act) or to whom Australia otherwise owes protection obligations. Rather, s 36(1C) is a specific criterion applicable only to an applicant for a protection visa and it precludes the Minister using s 501(1) or its analogues as a basis to refuse to grant a protection visa: Anthony Hordern 47 CLR at 7; Nystrom 228 CLR at 571-572 [2]."*

56. Is important to remember that the case before Rares J in *BAL19* involved the **refusal** of a Protection visa, to a person who was accepted as being a person in respect of whom Australia owed international non-refoulement obligations, on the basis of section 501(1) of the Act relying on section 501(6)(d)(v) of the Act. That is, the applicant was a refugee who was refused a Protection visa on the basis that, if the applicant remained in Australia, there was a risk that the applicant would present a danger to the Australian community or a segment of the Australian community. This was so notwithstanding that it did not appear that the applicant had ever been charged with, or convicted of, any offence.

57. The circumstances in the present case are very different from those in *BAL19*. In the present case, the Applicant was granted a Protection visa in 2010 (before the 2014 Protection Amendments) on the basis of his being a member of the family unit of his mother, who was found to be a refugee. As such, there has never been an assessment as to whether the Applicant is a refugee. This is so notwithstanding paragraphs 14.1(5) and (6) which provide that if the visa that was cancelled was a Protection visa, that the revocation decision-makers should seek an assessment of Australia's international treaty obligations.

58. The visa that was cancelled in the present case was a Protection visa. In his request for the revocation, the Applicant raised claims that he feared harm if he were to be returned to China and also relied on claims that he was a person in respect of whom Australia owed international non-refoulement obligations. Despite these claims, and that the visa

that the Applicant had held was a Protection visa, no assessment of Australia's international treaty obligations was completed in this case, contrary to *Direction No 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* ("the Direction").

59. The Respondent, by way of submission, indicated that such an assessment was commenced in June 2019 but was never completed. Instead, the Minister's delegate accepted that the Applicant was a person in respect of whom Australia had international non-refoulement obligations.[16] That position appeared to be maintained in the Minister's written contentions and conceded at the directions hearing. At that directions hearing the Tribunal asked the Respondent whether he would seek to tender a copy of the decision record and/or reasons for decision in relation to the grant of the Applicants protection visa. On 12 February 2020, less than three working days prior to the hearing, the Respondent's representative sought to resile from the Minister's previous position that the Applicant was a person in respect of whom Australia had non-refoulement obligations. It would seem that this was done on the basis that it later became clear that the documents the Tribunal had inquired about at the directions hearing demonstrated that the Applicant was granted a Protection visa on the basis that he was the member of his mother's family unit rather than on the basis that he was a refugee himself.

60. At the time that the applicant was granted a Protection visa he did not have to meet the criteria in section 36(1C) of the Act as it did not then exist. Further, it appears that he would not be able to be refused a visa at the time relying on Article 33(2) of the Refugees Convention because, the Applicant was not assessed as being a refugee, and, Article 33(2) only applied to refugees.

61. The Applicant committed his offences in 2013 before the 2014 Protection Amendments. However, he was only convicted of his offences in 2015, after the enactment of the 2014 Protection Amendments.

62. Critically, the Applicant in this case was not refused a Protection visa on the basis of section 501(6)(d)(v) of the Act specifically, or any provision of section 501(1) generally. Rather, the Applicant's visa was cancelled under the mandatory cancellation provision in

[16] The Respondent's Statement of Facts, Issues and Contentions, dated 10 February 2020, para [68].

section 501(3A) of the Act. The Applicant's visa was cancelled under that provision as the Minister was satisfied that the Applicant did not pass the character test because of the operation of section 501(6)(a) read with section 501(7)(c) of the Act. That is, the Applicant was found not to pass the character test as he had a "*substantial criminal record*" because he had been sentenced to a term of imprisonment of 12 months or more, and, at the time of cancellation was serving a full-time sentence of imprisonment.

63. The Applicant applied for revocation of the cancellation decision in 2017 and on 3 December 2019 the Respondent decided not to revoke the mandatory cancellation decision under section 501CA(4) of the Act.

64. The Tribunal accepts that it is bound by the decision in *BAL19* in the sense that if a decision refusing to grant a Protection visa on the basis of section 501(1) of the Act (and more particularly relying on section 501(6)(d)(v) of the Act) was sought to be reviewed by the Tribunal, the Tribunal would be bound to find that the Minister had no power to refuse the Protection visa application on that basis. However, this is not that case. The Tribunal does not consider that it is bound by *BAL19* to find that, the decision to mandatorily cancel the Applicant's Protection visa or the decision to refuse to revoke the cancellation decision, were ultra vires and invalid.

65. It is true as noted recently by Banks-Smith J in *GKQK v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 37, that there are comments in Rares J's decision which indicate that his reasoning extends to visa cancellation: for example see [85] and [87] of *BAL19*. Indeed, Rares J relied upon section 500(4)(c) of the Act to support his view that a Protection visa cannot be refused or cancelled under section 501 of the Act. I will return to this aspect of *BAL19* shortly.

66. However, while Rares J comments on the applicability of his reasons to cancellation decisions, the decision before him specifically dealt with refusal of a Protection visa under section 501(1) of the Act relying upon section 501(6)(d)(v) of the Act. Moreover, his Honour makes no mention of mandatory cancellation under section 501(3A) of the Act. In those circumstances, the Tribunal considers that *BAL19* is distinguishable from the present case.

67. The next question is whether the Tribunal should nonetheless apply the reasoning employed by Rares J in *BAL19* to reach the conclusion that the mandatory duty to cancel a visa under section 501(3A) of the Act in this case was not available.

68. For the following reasons, I have decided that I should not do so.

69. As Rares J stated, Heydon and Crennan JJ explained in *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 611 [144]-[147] that the special powers of the Minister to refuse or cancel a visa have existed since 1992. The current structure of the power involving the character test first became part of the Act in 1999. By contrast, the mandatory cancellation provision in section 501(3A) of the Act and the corresponding revocation power in section 501CA(4) of the Act were introduced by the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) (No. 129, 2014) ("2014 Character Amendments").

70. The 2014 Character Amendments were introduced into the House of Representatives on 24 September 2014 and the Bill was read for the second time on the same day.

71. The 2014 Protection Amendments were introduced into the House of Representatives the following day on 25 September 2014 and the Bill was read for the second time on that day.

72. Both Bills were introduced into the Senate on 28 October 2014.

73. The 2014 Character Amendments received Royal assent on 10 December 2014 and the relevant provisions came into effect the following day on 11 December 2014.

74. The 2014 Protection Amendments received Royal assent on 15 December 2014 and the relevant provisions came into effect the following day on 16 December 2014.

75. In his second reading speech regarding the 2014 Character Amendments the then Minister said the following in relation to mandatory cancellation:

> *"The third key measure this bill seeks to introduce is mandatory visa cancellation under section 501 of the act where a noncitizen is serving a full-time sentence of imprisonment in a custodial institution and they are found to objectively not pass the character test on the basis of, for example, having been convicted of an*

offence or offences and sentenced to a term of imprisonment of 12 months or more, or having been convicted of, or found to have been guilty of, or had a charge proved against them for a sexually based offence involving a child. Under this process, a noncitizen will have their visa mandatorily cancelled without prior notice of an intention to cancel a visa, with a notification of the cancellation decision provided after the fact. Upon notification, the noncitizen will be provided with the opportunity to seek revocation of the cancellation decision. Where a decision is taken by a delegate to not revoke the decision, the former visa holder will have access to merits review. This will be a streamlined process which will deliver the key benefit of providing a greater opportunity to ensure noncitizens who pose a risk to the community will remain in either criminal or immigration detention until they are removed or their immigration status is otherwise resolved."

76. There is nothing in the 2014 Character Amendments or the secondary material which indicates that mandatory cancellation would not apply to the holders of Protection visas. Similarly, there is nothing in the 2014 Protection Amendments or the secondary material which states that the effect of those amendments excludes the operation of the mandatory cancellation provisions, enacted less than a week before, for the holders of Protection visas. While the Tribunal accepts that the 2014 Protection Amendments were enacted five days after the 2014 Character Amendments, the Tribunal considers that it would be odd if the 2014 Protection Amendments were to alter the application of the new mandatory cancellation powers in respect of Protection visa holders without either the Act or the secondary materials making any mention of this effect. This is especially so given the pre-existence of section 501H of the Act, relevantly providing that the power under section 501 of the Act to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person, is in addition to any other power under the Act, as in force from time to time, to refuse to grant a visa to a person, or to cancel a visa that has been granted to a person.

77. Secondly, Rares J found that section 36(1C) of the Act and section 501(6)(d)(v) of the Act imposed fundamentally different tests as to the conduct or risk necessary to exclude a Protection visa applicant from been granted a Protection visa, and thus the two provisions could not operate in harmony: see [63] to [67] and [82] of *BAL19*. The Tribunal considers that the same may not be able to be said in relation to the conduct or risk necessary to exclude a Protection visa applicant under section 36(1C) of the Act and the conduct or risk envisaged to enliven the mandatory cancellation power under section 5013A of the Act.

78. A person will not meet the criteria for the grant of a Protection visa in section 36(1C)(b) of the Act if the Minister considers on reasonable grounds that, having been convicted by

final judgment of a particularly serious crime, the person is a danger to the Australian community.

79. In short, a person has been convicted of a particularly serious crime if the offence is of a particular nature and is punishable by at least three years imprisonment: see section 5M and the definitions of "*serious Australian offence*" and "*serious foreign offence*" in section 5 of the Act. The relevant nature involves violence against the person, a serious drug offence, serious damage to property or certain offences relating to immigration detention.

80. By comparison, section 501(3A) of the Act provides that the Minister must cancel a person's visa if the person does not pass the character test because the person has a substantial criminal record (on the basis of paragraphs 501(7)(a),(b) or (c) of the Act) or has been convicted or found guilty of one or more sexually based offences involving a child.

81. Section 501(7) of the Act relevantly provides that a person has a substantial criminal record if:

> (a) the person has been sentenced to death;
>
> (b) the person has been sentenced imprisonment for life; or
>
> (c) the person has been sentenced to a term of imprisonment of 12 months or more.

82. Essentially, a person's visa must be cancelled under section 5013A of the Act if the person is serving a full-time sentence of imprisonment and was sentenced to a term of at least 12 months imprisonment or was found guilty of one or more sexually based offences involving a child.

83. In a practical sense it is difficult (although perhaps not impossible) to identify circumstances in which a person was convicted and sentenced to a period of imprisonment of at least 12 months, or indeed was found guilty of one or more sexually based offences involving a child, where those offences would not be punishable by at least three years' imprisonment. For example, even the immigration detention related offences in section 197A and 197B of the Act are punishable by five years' imprisonment.

84. It is understood that the nature of the offence and the punishment which the offence attracts are only a prerequisite or precursor to the ultimate finding in relation to whether a person is a danger to the Australian community pursuant to section 36(1C)(b) of the Act.

85. In *DFNM* and *Minister for Home Affairs (Migration)* [2019] AATA 3769 Deputy President Forgie stated at [108] that:

> *"The qualification to the non-refoulement obligation set out in Art 33(2) finds expression in s 36(1C) when it recasts what is a qualification to a non-refoulement obligation in Art 33(2) into a protection criterion…"*

86. In relation to the question of whether a person constitutes a danger to the Australian community for the purposes of Article 33(2) to of the Refugees Convention, in *WKCG and Minister for Immigration and Citizenship* [2009] AATA 512 ("*WKCG"*) Deputy President Tamberlin stated at [25]-[27]:

> *"The question whether a person constitutes a danger to the Australian community is one of fact and degree. It is not necessary to paraphrase the language of Article 33(2) of the Refugee Convention because the words used are plain and simple English. In deciding the question, regard must be had to all the circumstances of each individual case.*
>
> *Some relevant considerations include the seriousness and nature of the crimes committed, the length of the sentence imposed, and any mitigating or aggravating circumstances. The extent of the criminal history is relevant as is the nature of the prior crimes, together with the period over which they took place. The risk of re-offending and recidivism and the likelihood of relapsing into crime is a primary consideration. The criminal record must be looked at as a whole and prospects of rehabilitation assessed. The assessment to be made goes to the future conduct of the person and this involves a consideration of character and the possibility or probability of any threat, which could be posed to a member or members of the Australian community.*
>
> *The person's previous general conduct and total criminal history are highly relevant to assessing the risk of recidivism. In Re Salazar Arbelaez v Minister for Immigration and Ethnic Affairs (1977) 6 1 ALD 98, Brennan J said at 100:*
>
> *...*
>
> *Rehabilitation is never certain. One cannot predict of an offender that he will not fall again whatever the circumstances. The duty of the Tribunal is to apprehend what is the acceptable level of risk and to assess whether a particular applicant in the particular circumstances of his case is at an unacceptable level of risk. …"*

87. In *DOB18 v Minister for Home Affairs* [2019] FCAFC 63 ("*DOB18"),* Logan J commented that he considered that it was inherently unlikely that it was intended that a person who was otherwise a refugee would be returned to a country where they may face persecution on the basis of nothing more than a risk. Rather, his Honour considered that, read in

context, "*danger*" in section 36(1C) means "present and serious risk". His Honour commented at [83] and [87]:

> *"In the context in which s 36(1C) of the Act and Art 33(2) of the Refugee Convention are found, it strikes me as inherently unlikely that it was intended that a person in respect of whom it is accepted a protection obligation is, prima facie, owed, because he is a refugee, might be returned to face persecution, perhaps death, on the basis of nothing more than a 'risk', perhaps small. In my view, read in context, 'danger' in s 36(1C) means present and serious risk. To the extent that what is stated in WKCG might be thought to suggest otherwise, I respectfully disagree with the observations made in that case about 'danger'. In my view, it carries a narrower and more restrictive meaning that just 'risk'.*
>
> *...*
>
> *Other difficulties about an uncritical acceptance of all that is stated in WKCG arise from that part of the passage quoted to which I have given emphasis. That there is a 'danger' is, necessarily in my view, a conclusion based on an assessment of the present 'level of risk'. But that does not mean that the word, 'danger' carries a meaning that differs from case to case. Its meaning is fixed, but whether it is present in respect of, materially, a person applying for a protection visa will depend on the circumstances of the given case. Further, the reference to 'a lesser degree of satisfaction than that required by the expression "probable"' antedate and are inconsistent with the observations made by Flick and Perry JJ about administrative fact finding in Sullivan v Civil Aviation Safety Authority (2014) 226 FCR 555. The state of satisfaction in respect of the subject to which s 36(1C)(b) of the Act is directed must be one reasonably open on the evidence before the Minister, not one which 'no rational or logical decision maker could arrive on the same evidence': Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; (2010) 240 CLR 611, at [130] per Crennan and Bell JJ. With respect, to use the word 'probable' in relation to administrative fact finding is to borrow 'from the universe of discourse which has civil litigation as its subject': Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259, at 282."*

88. While it is true that section 501(3A) of the Act itself neither requires not permits an assessment of the risk or danger that an applicant poses to the Australian community, if an applicant applies for the revocation of the cancellation decision under section 501CA(4) of the Act, the Direction ensures that there will necessarily be consideration of the risk that the applicant poses to the Australian community under the assessment of the primary consideration of the protection of the Australian community.

89. Indeed, many of the matters which Deputy President Tamberlin stated may be relevant to the consideration and determination of whether a person is a danger to the community have been adopted in the Direction and its predecessors.

90. It is accepted that the nature of the offences for which an applicant's visa may be cancelled under section 501(3A) is potentially wider than the nature of the offences contemplated to exclude applicant's under section 36(1C) of the Act.

91. The point that is being made is that unlike the difference in the level of risk or conduct necessary to refuse a Protection visa relying on section 36(1C) of the Act when compared to that necessary to refuse a visa relying on section 501(6)(d)(v) of the Act, there appears to be substantial "*overlap*" between the exclusionary criteria in section 36(1C) of the Act and those in section 501(3A) and 501CA(4) of the Act. In fact, it should be noted that there appears to be substantially more overlap between those provisions than that found by the High Court in *M47* to exist between section 501(6)(d)(v) of the Act and Articles 32 and 33(2) of the Refugees Convention.

92. Indeed, as mentioned previously, in *BAL19* Rares J noted that the character test prescribes criteria that could include those amounting to a particularly serious crime for the purposes of sections 36(1C) and 5M of the Act and gave the example of section 501(7)(c) where a person fails the character test if they are sentenced to a term of imprisonment of 12 months or more.

93. Thirdly, the reasoning of Rares J in *BAL19* is most easily understood to apply prospectively. That is, where a person applies for a Protection visa and that person meets the criterion in section 36(1C) of the Act, then, according to Rares J, following the 2014 Protection Amendments, there is no power under section 501(1) of the Act (and in particular under section 501(6)(d)(v) of the Act) for the Minister to refuse the visa.

94. Taking that reasoning further, if that same person then committed a particularly serious crime and was a danger to the Australian community, the person's Protection visa could be cancelled. However, according to Rares J there would be no power to cancel under section 501 of the Act. For Rares J, the power to cancel arises under section 36(1C) of the Act itself as he reasoned that sections 33(1) and (3) of the *Acts Interpretation Act 1901* (Cth) have the effect that a visa granted in circumstances where the applicant met section 36(1C) of the Act may be cancelled under section 36(1C) of the Act.

95. In reaching this conclusion, Rares J relied upon section 500(4)(c) of the Act which relevantly provides that a decision to cancel a Protection visa relying on section 36(1C) of the Act is not reviewable under Part 5 or 7 of the Act.

96. It is noted that following *M47*, the 2014 Protection Amendments removed from section 500(1)(c) reference to cancellation relying on, relevantly, Article 33(2) of the Refugees Convention. The Explanatory Memorandum for the 2014 Character Amendments relevantly provided:

> *"The effect of this amendment is to provide in paragraph 500(1)(c) of the Migration Act that applications may be made to the AAT for review of a decision, other than a decision to which a certificate under section 502 applies, to refuse under section 65 to grant a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or (b) of the Migration Act.* ***This amendment acknowledges that decisions to cancel a protection visa on the basis of Article 1F, 32 or 33(2) of the Refugees Convention would always be made under section 501*** *(refusal or cancellation of visa on character grounds) and are therefore already covered under paragraph 500(1)(b)."*
>
> [My emphasis]

97. Curiously, section 500(4)(c) of the Act, which relevantly provided that a decision to cancel a Protection visa relying on Article 33(2) of the Refugees Convention and subsequently section 36(1C) of the Act, continued to provide that a decision to cancel a visa relying on section 36(1C) of the Act was not reviewable under Part 5 or 7 of the Act. However, as just mentioned, there is no specific power to expressly cancel a Protection visa relying on section 36(1C) of the Act. It appears from the Explanatory Memorandum that it was presumed that decisions to cancel a protection visa on the basis of Article 1F, 32 or 33(2) of the Refugees Convention (and by extension section 36(1C) of the Act when enacted five days later, would always be made under section 501).

98. Rares J appears to reason that the absence of a specific power to cancel relying on section 36(1C) of the Act supports the view that there is no power to cancel under section 501 of the Act and that the only power to cancel a Protection visa lies in section 36(1C) of the Act itself when read with sections 33(1)(and (2) of the *Acts Interpretation Act 1901* (Cth).

99. Rares J's reliance on section 36(1C) of the Act as a cancellation power when read with sections 33(1) and (2) of the *Acts Interpretation Act 1901* (Cth), discloses a difficulty in applying the reasoning in *BAL19* to the current matter. First, on its face section 36(1C) of

the Act is not a power to cancel or refuse a visa. It is merely a criterion for the grant of a Protection visa. It is section 65 of the Act which provides the power to grant or refuse a Protection visa.

100. In the current matter, the applicant was granted a Protection visa under section 65 of the Act in 2010 on the basis that he was a member of his mother's family unit. He was not assessed to be a refugee. When he was granted the Protection visa, section 36(1C) of the Act had not been enacted. In addition, Article 33(2) of the Refugees Convention itself had no application to the Applicant as he had not been determined to be a refugee. It is difficult, in these circumstances, to see how section 36(1C) of the Act, which was enacted in 2014 and was irrelevant to the grant of the Applicant's visa, could be somehow re-exercised relying on sections 33(1) and (3) of the *Acts Interpretation Act 1901* (Cth) to cancel the Applicant's visa.

101. Further, it is one thing to look to the 2014 Protection Amendments and to reason, as Rares J has in *BAL19*, that section 36(1C) of the Act exclusively codified the risk or conduct which could be relied upon to refuse or cancel a Protection visa prospectively. It is quite another to reason that the 2014 Protection Amendments removed any pre-existing ability to cancel a Protection visa under section 501 of the Act in circumstances where the Protection visa holder had never been assessed as being a refugee, or assessed against either section 36(1C) of the Act or even Article 33(2) to of the Refugees Convention. There is simply too little textual support to confidently read that consequence as being intended by the 2014 Protection Amendments.

102. In addition, the Tribunal considers that there are viable alternative constructions of review provisions including section 500(4)(c) of the Act as they relate to the present case. If section 500(4)(c) of the Act is to be read as necessitating a separate and distinct review power, and if that in turn necessitates finding a cancellation power relying on section 36(1C), then following *M47* the most obvious location of that power is in the discretionary cancellation power section 501(2) of the Act read with sections 501(6)(a) and section 501(7)(c) of the Act. That is, there is probably sufficient overlap between section 36(1C), and 501(6)(a) and section 501(7)(c) of the Act for cancellation relying on section 36(1C) to be found in section 501(2).

103. In relation to mandatory cancellation under section 501(3A), section 500(4A)(c) of the Act is likely to prevent such a decision from being reviewed. However, it is at least theoretically possible, if section 500(4)(c) of the Act is to be read as necessitating finding a cancellation power relying on section 36(1C) that there is sufficient overlap between section 36(1C) and section 501(3A) of the Act read with section 501CA(4) of the Act to allow review of the ultimate section 501CA(4) decision.

104. Finally, in *Benrabah v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 4 (7 February 2020) ("*Benrabah*"), the Full Court of the Federal Court, Gleeson, Lee and Wheelahan JJ, dismissed an appeal from a decision of the Federal Court dismissing the applicant's application for review of a decision of the Tribunal, affirming the Minister's decision to refuse to revoke the cancellation of the applicant's Protection visa.

105. It is accepted that the appeal in *Benrabah* was heard on 21 November 2019, prior to *BAL19* being handed down on 24 December 2019. It also appears that the decision in *BAL19* was not specifically raised nor relied upon before the Full Court. However, *BAL19* was a significant decision which was handed down over a month before the Full Court's decision in *Benrabah.* If the effect of *BAL19* was that visa cancellation, including mandatory cancellation under section 501(3A) of the Act, was not available to cancel a Protection visa, then the power in section 501CA(4) of the Act to revoke cancellation never arose. Yet, the Full Court did not seek further submissions from the parties in relation to the applicability of *BAL19* and proceeded on the basis that section 501(3A) and section 501CA(4) were powers available to the Minister to cancel and revoke cancellation of the Applicant's Protection visa, respectively.

Does BAL19 prevent mandatory cancellation of a Protection visa under section 501(3A) of the Act?

106. The Tribunal has found that the current matter is distinguishable from *BAL19*. The Tribunal understands that *BAL19* is subject to an appeal in the Full Court of the Federal Court. That appeal is yet to be decided. In any event, that appeal may not decide the question currently before the Tribunal, that is, whether *BAL19* prevents mandatory cancellation of a Protection visa under section 501(3A) of the Act.

107. It may well be that in the future, perhaps in the near future, a Court will decide that the reasoning in *BAL19* applies equally to mandatory cancellation such that mandatory cancellation of a Protection visa under section 501(3A) is not available. However, there is currently no binding Court authority for that proposition.

108. For the reasons given above, the Tribunal considers that there is sufficient doubt, owing to the fundamental differences between the exercise of power to refuse and the operation of mandatory cancellation provisions, for the Tribunal not to extend the operation of *BAL19* to mandatory cancellation decisions in the circumstances of the present case. To do so and annunciate the law in such a way is firmly and properly within the function of Chapter III Courts, and without clearer judicial guidance, the Tribunal is unwilling to take that step itself.

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

109. Pursuant to section 501CA(4) of the Act, the Minister may revoke the decision made under section 501(3A) of the Act to cancel the Applicant's visa. Subsection 501CA(4) provides:

> *(4) The Minister may revoke the original decision if:*
>
> *(a) the person makes representations in accordance with the invitation; and*
>
> *(b) the Minister is satisfied:*
>
> *(i) that the person passes the character test (as defined by section 501); or*
>
> *(ii) that there is another reason why the original decision should be revoked.*

110. The Applicant was invited to make representations to the Minister about revocation of the cancellation of his visa and he made representations in accordance with the invitation. Thus, section 501CA(4)(a) of the Act is satisfied in this case.

111. The two remaining issues are:

(a) Whether the Applicant passes the character test as defined in section 501 of the Act; and

(b) Whether there is another reason why the decision to cancel the Applicant's visa should be revoked.

112. If the Tribunal finds that the Applicant passes the character test or that there is another reason why the decision to cancel the Applicant's visa should be revoked, the cancellation decision must be revoked.

113. The Tribunal considers that the meaning of "*another reason*" in subparagraph 501CA(4)(b)(ii) of the Act is a reason other than that the Applicant passes the character test. The Full Court of the Federal Court has found that there is no residual discretion to be exercised once the Minister (and in this case, the Tribunal) finds that the Applicant passes the character test or there is another reason why the cancellation decision should be revoked. The Full Court has also found that the "*reason*" in subparagraph 501CA(4)(b)(ii) of the Act does not mean "*any reason*" but rather the determinative reason for revocation arrived at after a balancing of factors both in favour and against revocation.

114. In *Marzano v Minister for Immigration & Border Protection* [2017] FCAFC 66 the Full Court of the Federal Court (Collier J, with whom Logan and Murphy JJ agreed), after citing with approval the reasons of North ACJ at paragraphs [38] and [39] of his decision in *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166, stated at [31] and [32]:

> *"I agree with this analysis. The primary Judge in these proceedings found, and the parties are ad idem, that s 501CA(4)(b) requires the Minister to revoke the cancellation if he or she is satisfied of relevant requirements. To that extent his Honour held that 'may' in s 501CA(4)(b) means 'must'. I consider that this is a correct construction of s 501CA(4)(b).*
>
> *In relation to the question whether s 501CA(4)(b)(ii) contemplates an evaluative process on the part of the Minister, I respectfully adopt the reasoning of North ACJ in Gaspar [2016] FCA 1166 at [38]- [39]. In so doing, I note that the section does not, for example, require the Minister to revoke a cancellation decision if the Minister finds 'any' reason why the cancellation decision 'could' be revoked'. The requirement that the Minister revoke a cancellation decision if he or she determines that there is* ***another*** *reason why the cancellation decision* ***should*** *be revoked, imports an assessment by the Minister of the propriety of a revocation decision, balancing factors both in favour and against revocation. This is the exercise upon which the Minister clearly embarked in this case. It follows that I respectfully agree with the view formed by his Honour at [52] and [53] of the primary Judgment."*
>
> [Emphasis in original]

115. If the Tribunal is satisfied that the Applicant passes the character test or that there is another reason why the cancellation decision should be revoked the Tribunal must find in the Applicant's favour. The appropriate decision in these circumstances would be for the decision refusing to revoke cancellation to be set aside and for a decision in substitution to be made revoking the cancellation decision.

EVIDENCE

116. The Tribunal has considered all of the evidence permissibly before it including the documents described in section 501G of the Act ("G Documents" or "G1"), the documents tendered into evidence by the Applicant and marked as exhibits A1 to A5 and the documents tendered into evidence by the Respondent and marked as exhibits R1 to R3. The evidence contained in these documents is discussed throughout this decision: see 'Annexure A' to this decision.

117. A summary of evidence of witnesses is provided below from paragraph 138 of these reasons.

DOES THE APPLICANT PASS THE CHARACTER TEST?

118. Section 501(6) relevantly provides:

> *(6) For the purposes of this section, a person does not pass the **character test** if:*
>
> *(a) the person has a substantial criminal record (as defined by subsection (7)); or*
>
> *…*

119. Section 501(7) relevantly provides:

> *(7) For the purposes of the character test, a person has a **substantial criminal record** if:*
>
> *…*
>
> *(c) the person has been sentenced to a term of imprisonment of 12 months or more; or*
>
> *…*

120. The Applicant will be taken to have a substantial criminal record, and thus not pass the character test, if he has been sentenced to a term of imprisonment of 12 months or more.

121. Section 501(12) of the Act provides that "imprisonment" includes any form of punitive detention in a facility or institution.

Offending history

122. On 22 October 2015, the Applicant was convicted of importing a marketable quantity of border control drugs, being methamphetamine, and sentenced to five years and six months imprisonment with a non-parole period of four years and two months.[17]

123. On the same day the Applicant was convicted of attempting to import a commercial quantity of border control precursors, being ephedrine, and sentenced to five years and six months imprisonment with a non-parole period of four years and two months. Six months of this sentence was to be served cumulatively. Therefore, the total effective sentence was six years imprisonment with a non-parole period of four years and two months. The sentence imposed was taken to commence on the day that the Applicant was arrested, that being 19 December 2013, and the Applicant was eligible for parole on 17 February 2018.

124. I am satisfied the Applicant has a substantial criminal record for the purposes of section 501(6)(a) when read with section 501(7)(c) of the Act, as the Applicant was sentenced to a term of imprisonment of more than 12 months.

125. Consequently, I am satisfied that the Applicant does not pass the character test.

126. The only remaining issue is whether there is another reason why the decision to cancel the Applicant's visa should be revoked.

IS THERE ANOTHER REASON WHY THE CANCELLATION OF THE APPLICANT'S VISA SHOULD BE REVOKED?

127. In considering whether there is another reason why the cancellation of the Applicant's visa should be revoked, the Tribunal must comply with any directions made by the Minister pursuant to section 499 of the Act. In this case *Direction No 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under*

[17] Exhibit G1, G-documents, G11, Applicant's National Police Certificate, pages 316 – 317.

s501CA (“the Direction”) applies. The Direction provides guidance for decision-makers in determining, relevantly, whether there is another reason why the cancellation of the Applicant’s visa should be revoked.

128. Paragraph 8(1) of the Direction provides that decision-makers must take into account the primary and other considerations relevant to the individual case.

129. The relevant considerations in relation to consideration of revocation of a cancellation decision are contained in Part C of the Direction.

130. Paragraph 13 of the Direction provides for three primary considerations. They 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.

131. Paragraph 14 of the Direction provides for other considerations. They include, but are not limited to:

(a) International non-refoulement obligations;

(b) Strength, nature and duration of ties;

(c) Impact on Australian business interests;

(d) Impact on victims; and

(e) Extent of impediments if removed.

132. Subparagraphs 8(3) to (5) of the Direction provide:

> *(3) Both primary and other considerations may weigh in favour of, or against, refusal, cancellation of the visa, or whether or not to revoke a mandatory cancellation of a visa.*
>
> *(4) Primary considerations should generally be given greater weight than the other considerations.*
>
> *(5) One or more primary considerations may outweigh other primary considerations.*

133. In *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 Colvin J stated 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."*

134. The Tribunal considers that Colvin J's assessment regarding the various considerations in Direction 65 apply equally to the considerations in the Direction.

135. The principles in paragraph 6.3 of the Direction reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable and are to inform the consideration of each of the primary and other considerations.

136. The principles in paragraph 6.3 provide a framework within which decision-makers should approach their task of deciding whether to revoke cancellation. The principles in paragraph 6.3 are as follows:

> *(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 women or children or vulnerable members of the community such as the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
>
> *(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of*

similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.

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

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

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

Summary of evidence of witnesses

137. The following is a summary of the evidence before the Tribunal including evidence of witnesses who appeared before the Tribunal. The evidence referred to below includes evidence provided in written statements submitted to the Department and the Tribunal and evidence given by the witnesses at the hearing in response to questions under cross-examination and from the Tribunal.

The Applicant

138. The Applicant is a 29 year old citizen of China. He has a partner who holds a temporary visa. The applicant met his partner in immigration detention in early 2018.[18] She has a seven year old son who has a relationship with the Applicant.[19] The Applicant's mother is an ailing 53 year old Australian citizen suffering from blood cancer among other ailments.[20]

139. The Applicant was born in 1990 in Fujian province in China and was raised there. The Applicant said that his father was an alcoholic who would drink every day. He said that his father and mother would often get into arguments. He said that he was about eight years

[18] Exhibit A4, Supplementary Statement of the Applicant's Partner, dated 14 January 2020, para [24].
[19] Applicant's Statement of Facts, Issues and Contentions, dated 16 January 2020, page 18.
[20] Ibid, page 42.

old in 1998, his mother left him and his father because of domestic violence that she had suffered at his father's hands.

140. The Applicant said that after his mother's departure he was cared for by his paternal grandparents. He said that in 2008 his mother made contact with him and that she had organised for them to travel to Australia so that the Applicant could study here.

141. The Applicant indicated that his mother had become a Christian in 2006. In her Protection visa claims, the Applicant's mother had indicated that she had left the relationship with her husband owing to domestic violence but that he had refused to allow her to divorce him. She said that after she left the Applicant's father she was working and living with a woman who was a devout member of an underground Catholic Church. She had said that the woman taught her about Christianity and that she became a Christian in 2006. She claimed that she had encouraged other woman in similar circumstances to convert to the underground Catholic Church. The Applicant's mother had claimed that after she arrived in Australia she had discovered that other woman in the underground Catholic Church to which she belonged had been arrested. She had claimed that her brother was detained and questioned because of her membership of that church.

142. It is important to note that the Applicant's mother became a Christian in China in 2006 when she was absent from the Applicant's life. The applicant said that he had never been to church with his mother in China and that he had only visited church on one occasion by himself prior to his arrival in Australia. The Applicant said that prior to his arrest in late 2013 he accompanied his mother to church on significant Christian occasions such as Christmas and Easter but was not a "*true Christian*". He said that he only became a "*true Christian*" after he was arrested in 2013. The Applicant indicated that he did not consider himself to be a member of any particular Catholic sect and described himself as a "*general Catholic*".

143. The Applicant arrived in Australia on a subclass 571 Visa to complete his high school studies in Australia. He said that after arrived in April 2008 he attended English language classes but did not complete the course. He said that he dropped out of the course owing to difficulties in paying for the course and that he was disinterested in studying.

144. Instead the Applicant secured casual work in the gyprock industry. The Applicant met Associate A, who was one of the two co-accused regarding the Applicant's drug importation convictions in 2009. The Applicant said that he met Associate A at work. He said that Associate A was from Fujian province where the Applicant was from. The Applicant said that he and Associate A became friends.

145. The Applicant said that he first took drugs on 2 December 2012. He said that he firmly remembered that because he had reflected upon his criminal behaviour and drug use extensively after his arrest in 2013. The Applicant said that Associate A and Associate B, the other co-accused for the offences for which the applicant was convicted, were using methamphetamine at his house and he decided to join them.

146. The Applicant indicated that after that time he would use methamphetamine two or three times a month and only when Associate A was present. He said that it was Associate A who would provide the drugs that they would use. The Applicant said that the last time he used any illicit drugs was just prior to his arrest in late 2013, meaning that he had been using drugs for almost exactly a year before his arrest.

147. The Applicant indicated that Associate A never asked him for money for the drugs that he provided the Applicant. He said that the two of them were friends and were on good terms. He said that sometimes Associate A would ask him to cover his gyprocking shift. The Applicant indicated that he would also gamble by playing the slot machines with Associate A. He said that Associate A would sometimes give him $50 or $100 with which to gamble.

148. The Applicant indicated that in 2013 he was not working very often. He said that this was a result of his drug consumption and that he was not willing to work at the time. The Applicant said that in 2013 Associate A had asked him to receive a package for Associate A. The Applicant was instructed that the package was to be sent to the Applicant at his mother's address. The Applicant said that Associate A provided him with a tracking number and asked the Applicant to track the package and to let Associate A know when the package arrived. The Applicant used his mother's mobile telephone to communicate with Associate A in relation to the importation of the drugs and precursors.

149. The Applicant said that Associate A had told him that the package contained illegal drugs. He said that with this first shipment he was not promised money or any other benefit by Associate A. He said that he agreed to receive the package because Associate A was his friend and he was not "*thinking straight*" at the time.

150. The Applicant said that in relation to his second offence of attempting to import a commercial quantity of border control precursors, the arrangement was similar to the arrangement of the two previous consignments constituting the first offence of importing a marketable quantity of border control drugs. However the Applicant said in relation to the second offence, Associate A had told the Applicant that he would be given some money.

151. The Applicant indicated that he was first arrested in late 2013 and was released on parole on 17 February 2018. The Applicant said that on that day he was detained in immigration detention where he has remained ever since.

152. The Applicant indicated that during his lengthy period of imprisonment and immigration detention he has had a great deal of time to reflect on his offences. He indicated that since his arrest he has become a true Christian and participated regularly in Christian activities in jail and in detention. He said that he currently attends services every Tuesday with a member of the Sydney Chinese Catholic community who visits the detention centre weekly.

153. The Applicant said that he will never reoffend. He says that he has become reformed and has gone through rehabilitation. He said that he attended a week-long course called "*Enough is Enough*", which was a rehabilitation course in relation to drug consumption and gambling. The Applicant said that he had applied to undertake a drug rehabilitation course in prison but this was not offered to him as he was deemed to present a low risk of reoffending. The Applicant indicated that he now realised the great harm that the importation of illicit drugs can have on the Australian community, and is greatly sorry that he was ever involved in such activity. The Applicant said that he now realised that he if he were to ever reoffend in a similar manner it would mean separation from his ailing mother, his partner and her child. The Applicant said that this would mean that he would never see his mother again as she could not travel to China as she would be persecuted there owing to her religious beliefs. Further he understood that his mother's affliction with blood cancer

meant that she could not travel by plane in any event. The Applicant indicated that these matters were a strong deterrent and disincentive for him from ever reoffending.

154. The Applicant said that he had cut all ties with Associates A and B. He said that he understood that they had both been detained in immigration detention and would shortly be removed from the country if they had not already been removed.

155. The Applicant indicated that both he and his mother would be heartbroken if he had to return to China. In addition to blood cancer his mother suffered from a problem with her right eye for which she had previously had surgery. She also suffers from acute depression. The Applicant indicated that he wished to remain in Australia and to help take care of his mother. The Applicant indicated that his mother had purchased a property in the city for the Applicant to reside in if he is allowed to remain in Australia. Further, he said that the love and support of his mother would ensure that he would never reoffend.

156. The Applicant indicated that he has a partner in Australia to whom he is engaged to be married. The Applicant indicated that he met his partner in immigration detention in February 2018. He said that the two of them entered into a relationship a week or two after they met. The Applicant indicated that his partner was released from detention in April 2018 and resided with his mother upon her release. The Applicant indicated that the couple became engaged to be married in June 2018. The Applicant indicated that his partner visited him in immigration detention almost every day.

157. The Applicant indicated that he also had a relationship with his partner's seven year old son. He said that his partner's son had visited him in detention on seven occasions. In addition he said that they would speak with each other over 'WeChat' and 'FaceTime', an Internet video conferencing application almost every evening.

158. The Applicant said that if he were to return to China it would be likely that his relationship with his partner would not continue. The Applicant indicated that his partner had indicated to him that if he were to return to China she would remain in Australia with her son. The Applicant indicated that this would mean that he would be permanently separated from his partner and her son which would cause all three of them to be very upset. The Applicant said that he wished to remain in Australia, to marry his partner and for the three of them to

live together as a family. The Applicant said that this would not be possible if his Protection visa remains cancelled.

159. The Applicant indicated that he feared returning to China. First, he said that he feared that if he returned he would be persecuted by the Chinese government owing to his religion of Catholicism. He claimed that he would also be persecuted because of his imputed political opinion or imputed religion because of his relationship with his mother. He said that he understood that the Chinese government was aware of his mother's membership of an underground Catholic Church and that she had been involved in proselytising and responsible for the conversion of others to the underground Catholic Church.

160. Further, the Applicant claimed that he feared that if he were to return to China he would be re-prosecuted for his offences, or the conduct resulting in the offences, for which he had been convicted in Australia. He said that his lawyer had told him that Chinese nationals who are convicted of serious offences overseas are re-prosecuted in China and that he may be executed by the Chinese government because of his criminal conduct in Australia.

161. The Applicant also claimed that he feared that he would become infected with the coronavirus if he were return to China.

Nature of the offences

162. The sentencing judge described the nature of the applicant's offending as follows:

> *"In terms of the first importation on 19 October 2013, the agreed facts which affect the offenders* [Associate A] *and* [the Applicant] *are that on that date, 19 October, Australian Customs detected a consignment from China bearing a Chinese consignee and a given address at West Ryde. The consignment was found to contain 240 grams of methamphetamine in barrels of electric hair curling irons. On 12 November 2013,* [Associate A] *received a text message from the phone number subscribed to* [the Applicant's] *mother, providing the consignment house airway bill number. Subsequent testing of that material indicated that there was 194.1 grams of methamphetamine, the average purity was 79%, and hence the weight of the pure drug 153.3 grams.*
>
> *A second consignment also involving* [the Applicant] *and* [Associate A] *apparently occurred on or about 22 October when Customs detected a consignment from China with consignee details showing a Chinese person at Croydon Park. The consignment was found to contain about 187.6 grams of methamphetamine. On 12 November 2013,* [Associate A] *received a text message from* [the Applicant's] *mother's phone providing that house airway bill number.* [Associate A's] *mobile*

phone disclosed a number of text messages on 18 November 2013. Although submissions were made by [the Applicant's lawyer]*, on behalf of* [the Applicant] *as to the relative degrees of power or hierarchy within the organisation, namely that* [the Applicant] *was under* [Associate A's] *control effectively, as best one can determine, the exchange appears to me to be at least between equals, if not* [the Applicant] *giving directions to* [Associate A]*. The substance which was then found was tested and weighed at 186.7 grams, on average purity of 79% and therefore a pure drug weight of 148.2 grams.*

…

On 8 December 2013 [Associate A] *transferred a little under $9,000 to a person in the Fujian District of China. He had remitted a little under $60,000 to that person between July and mid-November 2013. On 9 December 2013 the Australian Police (AFP) were advised by the National Narcotics Control Commission of China (NNCC) that that commission had seized consignment, nominating a person all in Lidcombe, New South Wales as consignee. The NNCC examined the consignment and found that it contained sets of Mahjong tiles. Concealed inside the tiles were approximately two kilograms of what was then thought to be methamphetamine. The drug was removed and the Mahjong sets reconstructed and repackaged. Local enquiries failed to disclose the consignee but the nominated address had been purchased by* [the Applicant's] *mother.*

The consignment arrived in Sydney on 10 December 2013 and was intercepted by the Australian Federal Police. On 18 December 2013 the Australian Federal Police conducted a controlled delivery of the consignment and [the Applicant] *accepted delivery, he saying that he was the consignee.* [The Applicant] *produced his New South Wales photo license ID and signed for the consignment. Shortly after 7pm* [Associate B] *entered the premises at Lidcombe, and about ten minutes later, so too did the other offender,* [Associate A]*.*

…

In sum total the material, the subject of the attempted importation charge, was 1707.2 grams of ephedrine at a purity of 80.3%, hence the quantity of pure drug was 1370.88 grams. The theoretical amount of methamphetamine which might be reduced from the precursor was a little over 1.5 kilograms or 1541 grams to be precise."[21]

Witness 1 – Mr Matthew Visser

163. Mr Visser, a clinical psychologist, was engaged by the Applicant to assess his risk of reoffending. Mr Visser completed a written report dated 15 January 2020 which was provided to the Tribunal by the Applicant.[22] Mr Visser was also called to give oral evidence by telephone at the hearing. He was the only expert witness called to give evidence.

164. Mr Visser's written report concludes as follows:

[21] Exhibit G1, G-documents, G2, Sentencing Remarks, District Court of New South Wales, pages 33 – 37.
[22] Exhibit A2, Report of Mr Visser, dated 15 January 2020.

"…

***His recidivism risk is low, both generally and for drug specific crime**. The most comprehensive guide in the Australian context was published by the Australian Institute of Criminology (Payne, 2007). Both in that report, and in all actuarial (statistical) based recidivism risk analyses (e.g. Static-99 - Harris, Phenix, Hanson, & Thornton, 2003; SVR-20 – Rettennerger, Boer, & Eher, 2011), the strongest predictor for recidivism is previous convictions. There is also an increase in likelihood of reoffence when the first offence occurs in adolescence. While his criminal charge is a significant one, having had no previous convictions reduces his risk, as does his age at first offence – having not been a juvenile at the time. Having been convicted of no violent crime at any time in his life also decreases his general recidivism risk.*

He does not appear to have any significant mental health issues, if any, and does not have a history of drug dependence. His history is moderately prosocial. His employment history as a factor is mixed, particularly as he gave financial incentive as the primary reason for his charge. He has some casual work, but remains without any specific trade or educational attainments that would provide employment opportunities. I would expect his language difficulties to be a significant hindrance to gainful employment in Australia. His intention is to move into construction work, which seems plausible. Being in a stable romantic relationship decreases his risk, although not having lived together makes this a marginal factor. The possibility of deportation to China and the possible outcomes I would also expect to be a significant deterrent to future crime. At this point there is little that can be done to further reduce his recidivism risk, other than assistance in gaining meaningful employment.

…"

[Emphasis added].

165. During the hearing Mr Visser was asked to explain how he came to the conclusion that the applicant presented a low risk of reoffending both generally and for drug specific crime. Mr Visser gave the following response:

> *"So, essentially looking at risk of recidivism, the most common factor in all statistical and actuarial assessments is previous convictions, but it's his first offence and it occurred while he was in his mid-20's, both reduce the risk of re-offense, as well as no violent crime, as I've described in that specific paragraph there and mental health issues, you know, if any (indistinct words) is indicative of lower risk, without a history of drug dependence, although obviously, there was drug use there. Employment history was a mixed factor, you know, which sort of, probably increases his risk slightly, enmeshed with the English difficulties, but it is a relatively minor factor overall and that he is in a stable romantic relationship decreases his risk, although it's a fairly minor (indistinct) overall."*[23]

[23] Transcript of proceedings, 17 February 2020, page 77, lines 27- 37.

Witness 2 – the Applicant's mother

166. A written statement from the Applicant's mother dated 14 January 2020 was tendered into evidence.[24] She also gave evidence under oath at the hearing. The Applicant's mother had also provided a number of written statements to the Department which the Tribunal has considered.[25]

167. The Applicant's mother said she felt responsible for the Applicant's offending. This was because she had left the Applicant to be raised by his father and grandparents when he was seven years old only to return 10 years later.

168. The Applicant's mother explained that she was suffering from a number of ailments including depression, post-traumatic stress disorder and blood cancer. She said that she needed the Applicant to remain in Australia to care for her. The Applicant's mother explained that she wished to care for the Applicant in the same way if he were to be allowed to remain in Australia. The Applicant's mother explained that the Applicant was her only family member in Australia.

169. The Applicant's mother indicated that she had siblings in China but that the Applicant did not know them as she had not seen them since she was very young.

170. The Applicant's mother indicated that if the Applicant had to return to China she would never see him again as she could not return to China as she feared persecution there because of her religious beliefs.

171. The Applicant's mother indicated that she truly believed that the Applicant would never reoffend. She indicated that he was young and immature when he committed his offences. She said that since that time he has become a devout Catholic and more thoughtful.

172. The Applicant's mother indicated that the Applicant was very remorseful for his criminal offending, that he has told her on numerous occasions that is past conduct was wrong and that he had demonstrated that he was regretful and remorseful for having committed his crimes.

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[24] Exhibit A5, Supplementary Statement of the Applicant's mother, dated 14 January 2020.
[25] Contained in Exhibit G1, the G-documents.

173. The Applicant's mother indicated that, in the event the Applicant was able to remain in Australia, that she would do everything that she could to support him. She indicated that she purchased a property in the city where she intended for her son, his partner and his partner's son to reside if he was allowed to remain in Australia.

Witness 3 – the Applicant's partner

174. A written statement from the Applicant's partner dated 14 January 2020 was tendered into evidence.[26] She also gave evidence under oath at the hearing. The Applicant's partner had also provided a written statement to the Department which the Tribunal has considered.[27]

175. The Applicant's mother indicated that she had met the Applicant while in immigration detention in February 2018. She indicated that they commenced a relationship shortly thereafter and that in June 2018 they became engaged to be married.

176. The Applicant's partner indicated that she had previously resided with the Applicant's mother in order to help care for her. She said that she was currently living in an apartment in the city owned by the Applicant's mother. She said that she was paying for the mortgage for that property.

177. The Applicant's partner indicated that she owns a business which provides a small amount of income. She indicated that she relied on extensive savings she had accumulated before arriving in Australia to pay for her expenses.

178. The Applicant's partner indicated that she held medical qualifications from universities in China and the United Kingdom and that prior to her arrival in Australia she was practising as a medical professional in China. She said that she had owned a number of medical clinics in China.

179. The Applicant's partner indicated that she last arrived in Australia in late 2017 on a Visitor visa. She said that this visa was cancelled and she entered immigration detention in February 2018. She said that she was granted a Criminal Justice Stay visa in April 2018

[26] Exhibit A4, Supplementary Statement of the Applicant's Partner, dated 14 January 2020.
[27] Exhibit G1, G-documents, G2, Statement of the Applicant's Partner, dated 7 March 2019, page 140.

allowing her to be released into the community. The Applicant's partner indicated that she was granted the Criminal Justice Stay visa as she had been charged with one or more criminal offences which she said related to "*medical negligence*" and was due to stand trial in August this year in relation to those charges.

180. It was put to the Applicant's partner that, given that she currently held a Criminal Justice Stay visa, which is a temporary visa, and that she had been charged with a criminal offence, there was no guarantee that she would be able to remain in Australia. The Applicant's partner said that she had been advised by a migration agent that if the charges against her were dismissed, that she would be able to apply for a Partner visa on the basis of her relationship with the Applicant. The Tribunal notes that, without expressing a concluded view, this appears unlikely because of the operation of section 161 of the Act, which prevents the holder or former holder of a criminal justice visa from applying for any visa other than a Protection visa.

181. The Applicant's partner indicated that she has a seven year old son. She said that her son had become quite close to the Applicant. She said that her son had moved to Australia from China in November 2019. Further, she said that he had visited Australia on a few occasions prior to that date. The Applicant's partner indicated that she had taken her son to visit the Applicant on separate occasions. She said that the Applicant and her son would speak with each other on most evenings over an Internet video application.

182. The Applicant's partner indicated that her son had begun his first year of school this year at a prestigious school in Sydney. She said that she had paid his school fees upfront for this year and next year. She expressed that she believed that education was very important and that she intended for her son to complete his primary and secondary schooling in Australia at the school where he was currently enrolled.

183. The Applicant's partner indicated that if the Applicant were not permitted to remain in Australia she and her son would remain here and the relationship would likely end. This was primarily because her son was her top priority and his education and well-being were more important than her relationship with the Applicant.

184. The Applicant's partner indicated that her current financial situation was "*not the best*" as her son's tuition fees were very expensive and she found it hard to meet their combined living expenses.

185. The applicant's partner indicated that the applicant was very remorseful for his criminal offending, that he has told her on numerous occasions that is past conduct was wrong and that he had demonstrated that he was regretful and remorseful for having committed his crimes.

186. The Applicant's partner indicated that she believed that the Applicant was a changed man and would never reoffend. She said that she wished dearly for the Applicant to be able to remain in Australia so they could be married and begin a life together in Australia as a family.

PRIMARY CONSIDERATION A: PROTECTION OF THE AUSTRALIAN COMMUNITY FROM CRIMINAL OR OTHER SERIOUS CONDUCT

187. The Tribunal must have regard to the protection of the Australian community from criminal or other serious conduct. Paragraph 13.1(2) of the Direction provides that decision-makers should 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.

The Nature and Seriousness of the Applicant's Conduct to Date

188. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, subparagraph 13.1.1(1) of the Direction specifies that decision-makers must have regard to a number of factors including:

> *(a) The principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed very seriously;*
>
> *(b) The principle that crimes 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 the elderly and the disabled), or government*

representatives or officials due to the position they hold, or in the performance of their duties, are serious;

(d) Subject to subparagraph (b) above, the sentence imposed by the courts for a crime or crimes;

(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 (noting that the absence of a warning should not be considered to be in the non-citizen's favour);

(i) Where the non-citizen is in Australia, that a crime committed while the non-citizen was in immigration detention; during an escape from immigration detention; or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again is serious, as is an offence against section 197A of the Act;

189. The offences committed by the Applicant cannot be described as violent or sexual crimes. The offences were not of a violent nature and were not committed against women or children. The offences were not committed directly against vulnerable members of society or Government officials or representatives.

190. It does not appear that the Applicant has provided false or misleading information to the Department, such as to justify any significant increase in an assessment of the seriousness of the offending or its nature.

191. The Applicant committed two offences in 2013 for which he was convicted and sentenced in October 2015. The Applicant's offences were not committed while the Applicant was in immigration detention or during an escape from immigration detention.

192. A total head sentence of six years imprisonment with a non-parole period of four years and two months was imposed. The Tribunal considers that the sentence imposed on the Applicant demonstrates the seriousness of his offending.

193. The first offence for which the Applicant was convicted involved the Applicant importing 301.5 grams of methamphetamine into Australia. That quantity was substantial and

amounted to 150 times the threshold marketable quantity of two grams. The combined street value concerning this offence was over $380,000, with a wholesale value of over $200,000.

194. The sentencing judge found that the Applicant's culpability for this offence to be substantial with the Applicant playing a significant role.

195. The second offence, which the Applicant was convicted, involved the Applicant attempting to import 1370.88 grams of ephedrine. That amount of ephedrine was over the threshold for a commercial quantity of 1200 grams. It was at the lower end of the range in terms of the threshold. The street value of the ephedrine was said to be about $1.38 million with a wholesale value of $400,000. The sentencing judge found that this offence was a serious offence.[28]

196. The sentencing judge found that the Applicant's offending was objectively serious and found that the operation was commercial and professional and the offenders were acting in combination. The sentencing judge found that the Applicant was an important intermediary in the importation and prospective dealing of drugs and precursors.

197. The sentencing judge found that the Applicant engaged in the relevant offending for financial gain.

198. The Applicant conceded that his criminality in Australia would be considered serious.

199. The Tribunal finds on the evidence before it that the Applicant's criminal conduct is very serious. In reaching this conclusion the Tribunal has considered the serious harm that offences such as those committed by the applicant can have on the community and on individuals: see discussion below at [205] and [206].

200. The nature of the Applicant's offending has been described above. It involved the Applicant importing a marketable quantity of border control drugs, being methamphetamine, and attempting to import a commercial quantity of border control precursors, being ephedrine.

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[28] Exhibit G1, G-documents, G2, Sentencing Remarks, District Court of New South Wales, page 53.

The risk to the Australian community should the Applicant commit further offences or engage in other serious conduct

201. Paragraph 13.1.2 of the Direction provides that in considering the risk to the Australian community presented by an Applicant, the Tribunal must have regard to the two sub-considerations listed in subparagraph 13.1.2(1) of the Direction cumulatively. They are:

(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 reoffending (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct

202. In many cases the harm to the Australian community or members of the Australian community should an Applicant reoffend in a similar manner will be obvious. This is especially so if an Applicant has previously committed violent offences. For example, if an Applicant had previously been convicted for assault occasioning actual bodily harm and they were to reoffend in a similar manner, the result would be that another member of the Australian community would be inflicted with actual bodily harm.

203. However, in a case such as the present it will not always be immediately apparent what the harm to the Australian community, or individual community members may be as a result of future offending. In such cases it will often be insufficient for the Respondent to simply assert harm in its written contentions without providing any evidence to support those assertions. Whereas, in some cases, harm to the community will be obvious, and in others it may be appropriate, although not ideal, for Tribunal members to, in effect, take judicial notice of commonly accepted matters. In cases such as this one, dealing with the potential impact of illicit drugs on the community, it is best practice for the Respondent to put on some readily available evidence of the deleterious effects of illicit drugs to individuals or the community. This is because decision-makers are required by subparagraph 13.1.2(1)(a) of the Direction to have regard to "*The nature of the harm to*

individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct…".

204. I note that I have made these comments previously: see for example *CQBW and Minister for Home Affairs (Migration)* [2019] AATA 5177; and *QQYJ and Minister for Home Affairs (Migration)* [2019] AATA 770.

205. In the present case however, there is no direct evidence of the harmful impact of illicit drugs on the community. However, the Applicant admirably conceded in his written contentions that if:

> *"…the applicant was to engage in further importation of drugs into Australia, the Australian community could be the subject of physical, psychological, emotional and financial harm.*
>
> *The unlawful importation of drugs can cause substantial harm to drug users, their families, the medical industry in terms of treating drug users, prosecuting authorities and the court system and dealing with offenders charged with drug and importation offences."*[29]

206. In *Trang and Minister for Home Affairs (Migration)* [2019] AATA 4087, Deputy President Boyle outlined a number of observations made by Judges and Members of the Tribunal regarding the deleterious effects of the drug trade. Deputy President Boyle stated at [65] to [67]:

> *"65. … the harm that would be caused if the applicant were to repeat his offending behaviour, in particular his drug dealing, is obvious and serious. The Tribunal adopts Groves DCJ's observation cited at [43] above that:*
>
> > *…exposing other people in the community to hard drugs, drugs ruining other people's lives just as you have ruined and wasted your own life by reason of your addiction to these drugs.*
>
> *and agrees with Stavrianou DCJ's observation cited at [48] above that:*
>
> > *Methylamphetamine is at the top of the tree in terms of prohibited drugs.*
>
> *66. A very thorough and useful analysis of the harm that is caused to individuals and to the community by drugs, in particular methylamphetamine, is contained in Senior Member Groom's decision in VPKY and Minister for Home Affairs [2019] AATA 352 at [18]-[20].*
>
> *67. Member Eteuati in Lansdowne and Minister for Home Affairs [2019] AATA 2448 at [107]-[109] observed:*

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[29] Applicant's Statement of Facts, Issues and Contentions, dated 16 January 2020, pages 15 – 16, paras [34] – [35].

107. The deleterious effects of drug trafficking on the community are well-known and often stated. Australia's National Drug Strategy 2017-2026, referred to by the Respondent, notes that:

> *"Over the last five years there has been an increase in the availability and purity of methamphetamine... As a consequence, states and territories are reporting an increase in the harms associated with its use including increased presentations to drug treatment services, ambulance attendances and presentations/admissions to Australian public hospitals."*

108. In Ngo v The Queen [2017] WASCA 3, the Court of Appeal of the Supreme Court of Western Australia (Buss P with whom Mazza JA agreed) stated that the victim of trafficking or attempted trafficking in illicit drugs was the Australian community generally and that:

> *"The illicit drug trade is a scourge. It inflicts very significant damage on the people who consume the drugs. Also, the deleterious effects of illicit drug consumption extend to the families, friends and associates of the consumers and society generally."*

109. The Respondent in his written submissions referred to the Tribunal's decision in SCJD and Minister for Home Affairs (Migration) [2018] AATA 4020 ("SCJD"). In SCJD, Senior Member Cameron stated the following in relation to the harmful effects of drug trafficking at [80] to [83]:

> *"The seriousness of drug trafficking is well known. It has been commented on by several of the trial judges before whom the Applicant has come.*
>
> *The corrupting effect of drug trafficking on the community has many facets. In many instances such as with overdosing on heroin it leads to death. The heroin toll in this country is almost as high as the road toll but rarely rates the same attention. It destroys families. Parent and children relationships frequently cease as a result of a person's drug dependency. There is a massive toll on the nation's mental health system caused by consumption of drugs. Frequently, this leads to the triggering of or early onset of a variety of mental health afflictions. These can include anxiety, psychosis, schizophrenia, bipolar disorders and paranoia. Tragically, drugs are all too frequently trafficked to young people including secondary school pupils. It leads to lives and potential careers being derailed, if not finished. It places demands on hospitals, health care systems, disability support networks and agencies, ambulance services, police, courts and other associated organisations and entities.*
>
> *In the course of ruining lives drug abuse leads to its victims often having to descend into crimes such as burglary, shoplifting and robbery (amongst others) to support their habit. Innocent people going about their lives can be the subject of robbery and attack by drug affected persons.*

> *There is also the organised crime element involved in drug trafficking. The insidious trade of drug trafficking generates vast amounts of cash upon which no tax is paid. This loss of the revenue which is enormous, means that society as a whole is deprived of income that could be provided towards and possibly improve essential public services such as schools, hospitals, police and emergency services."*
>
> [References omitted]

207. The Tribunal finds that if the Applicant were to re-engage in criminal conduct similar to his drug related offences, it is likely that the nature of the harm to victims would be that they would suffer from the harmful physical and mental effects of illicit drug use mentioned above and potentially of drug related crime.

The likelihood of the non-citizen engaging in further criminal or other serious conduct

208. Mr Visser was engaged by the Applicant to assess the risk that the Applicant would reoffend. His evidence was the only expert evidence before the Tribunal regarding the risk of the Applicant reoffending. As mentioned previously, Mr Visser's written report concludes as follows:[30]

> *"…*
>
> ***His recidivism risk is low, both generally and for drug specific crime**. The most comprehensive guide in the Australian context was published by the Australian Institute of Criminology (Payne, 2007). Both in that report, and in all actuarial (statistical) based recidivism risk analyses (e.g. Static-99 - Harris, Phenix, Hanson, & Thornton, 2003; SVR-20 – Rettennerger, Boer, & Eher, 2011), the strongest predictor for recidivism is previous convictions. There is also an increase in likelihood of reoffence when the first offence occurs in adolescence. While his criminal charge is a significant one, having had no previous convictions reduces his risk, as does his age at first offence – having not been a juvenile at the time. Having been convicted of no violent crime at any time in his life also decreases his general recidivism risk.*
>
> *He does not appear to have any significant mental health issues, if any, and does not have a history of drug dependence. His history is moderately prosocial. His employment history as a factor is mixed, particularly as he gave financial incentive as the primary reason for his charge. He has some casual work, but remains without any specific trade or educational attainments that would provide employment opportunities. I would expect his language difficulties to be a significant hindrance to gainful employment in Australia. His intention is to move into construction work, which seems plausible. Being in a stable romantic relationship decreases his risk, although not having lived together makes this a*

[30] Exhibit A2, Report of Mr Visser, dated 15 January 2020.

marginal factor. The possibility of deportation to China and the possible outcomes I would also expect to be a significant deterrent to future crime. At this point there is little that can be done to further reduce his recidivism risk, other than assistance in gaining meaningful employment.

…"

[Emphasis added].

209. The Applicant has undertaken a week-long rehabilitation course called "*Enough is Enough*". The Applicant indicated that the course addressed his issues with drug use and his gambling addiction.

210. The Tribunal has considered the statements in support of the Applicant provided by his partner, mother, a Catholic priest and a member of the Sydney Chinese Catholic community.

211. The Tribunal has also taken into account relevant remarks by the New South Wales District Court sentencing judge. These include that:

- the Applicant pleaded guilty at the earliest available opportunity;
- during the Applicant's period in custody the Applicant did not come under any adverse attention from authorities;
- he held various positions of employment and was described as a consistent and diligent worker during his period in custody;
- his mother remained supportive and confirmed stable post-release accommodation is available for the Applicant;
- before the Applicant's arrest the Applicant was employed on a casual basis for about three years in the gyprocking industry;
- the Applicant was not the principal of the drug hierarchy;
- the Applicant's pleas of guilty are indicative of his willingness to facilitate the course of justice and also evidence of contrition;
- the Applicant's productive work and an absence of adverse reports in custody bode well for the Applicant's rehabilitation;

- the Applicant was doing well in a custodial setting by taking courses and working, "*it is legitimate to accord some modest hope that when* [the Applicant] *is released* [his] *rehabilitation will proceed a foot*"; and
- the Applicant did not know the quantity or purity of the precursor before its receipt in Australia.

212. The Tribunal has also considered the sentencing judge's remarks from 2015 which indicated that the applicant had been assessed as a low to medium risk of reoffending. There is no indication of who made this assessment, or, whether that person was medically qualified. The basis for the assessment is not available to the Tribunal. In those circumstances the Tribunal prefers the expert evidence of Mr Visser in relation to the Applicant's risk of reoffending.

213. The Tribunal has considered the Respondent's submissions relating to the risk that the Applicant will reoffend, including that the Applicant has used methamphetamines in the past and also gambled in the past. The Tribunal has considered the Respondent's submissions that the Applicant was living with his mother for periods before his arrest and that this did not prevent him from offending. The Tribunal accepts the Respondent's submission that there is a risk that the Applicant could reoffend in the future. The question is what that risk of reoffending is and the significance of that risk.

214. After taking all these matters into account the Tribunal has decided to accept the only expert evidence before the Tribunal as to the risk of reoffending. That is the assessment by Mr Visser that the Applicant's "…*recidivism risk is low, both generally and for drug specific crime*."[31]

Conclusion: Primary Consideration A

215. The Tribunal has found that the Applicant's offending conduct is very serious. The nature of the Applicant's offending involves serious drug importation related conduct.

216. The Tribunal has found that if the Applicant were to reoffend in Australia, this could result in physical and psychological harm to members of the Australian community.

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[31] Exhibit A2, Report of Mr Visser, dated 15 January 2020.

217. The Tribunal has found there is low likelihood that the Applicant will reoffend if he is allowed to remain in Australia.

218. After giving thoughtful and thorough consideration to this primary consideration, the Tribunal concludes that the primary consideration of protection of the Australian community weighs against the revocation of the cancellation of the Applicant's visa. The Tribunal considers that the protection of the Australian community and its members are best served by the Applicant no longer being present in Australia.

219. However, given the Tribunal has found that there is only a low risk that the Applicant will reoffend and notwithstanding the Tribunal has found that the Applicant's crimes were very serious, the Tribunal attributes moderate weight against revocation of the cancellation of the Applicant's visa to the primary consideration of the protection of the Australian community.

PRIMARY CONSIDERATION B: THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA

220. Subparagraph 13.2(1) of the Direction compels a decision-maker to make a determination about whether revocation is, or is not, in the best interests of a child who may be affected by the cancellation of the Applicant's visa. Subparagraphs 13.2(2) and 13.2(3) respectively contain further stipulations. The former provides that, for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

221. Subparagraph 13.2(4) of the Direction provides a list of factors which must be considered under this consideration where relevant. These are:

(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.

222. The Applicant has no children of his own. However, he has a relationship with his partner's seven year old son. The Applicant has known his partner's son since sometime in 2018. His partner's son relocated to Australia in November last year. The Applicant's partner's son has visited the Applicant in immigration detention on seven or eight occasions. They speak most evenings over an Internet video application. For the most part they speak about things which are of interest to the young boy. The boy's mother said that her son does not fully understand why the Applicant has been detained.

223. The Applicant's partner's son is currently attending his first year of school.

224. The Applicant conceded that he does not have a parental type relationship with the boy. However, it was submitted that the relationship is nonetheless close and that there is a hope that the relationship will develop into a parental one if the Applicant is released.

225. As the Tribunal has found that the Applicant is unlikely to reoffend, the Tribunal finds that there is a good chance that if he is allowed to remain in Australia, and the child is allowed to remain in Australia that the Applicant could play a positive parental role in the child's life.

226. The Applicant's partner is the primary parental caregiver to her son. At the moment parental responsibilities appear to be shared with the Applicant's partner's mother who is currently living with the Applicant's partner and her son.

227. There is no evidence that the Applicant has ever abused the child in any way. There is no evidence that the child has suffered any trauma arising from the Applicant's conduct.

228. For the purposes of this matter, the Tribunal is willing to accept that it is in the best interests of the Applicant's partner's son for the Tribunal to revoke the cancellation of the Applicant's visa.

229. First, although the relationship between the Applicant and his partner's son is relatively new and currently developing, the Tribunal accepts that the relationship exists and that the child has regular and meaningful contact with the Applicant.

230. The Tribunal accepts that the child may be upset and distressed if the Applicant is removed from Australia, such that the child will no longer have any personal contact with the Applicant. Further, given the Applicant's partner's evidence that her relationship with the Applicant will cease if he is removed, this is likely to mean that eventually the Applicant and his partner's son will cease all contact if he is removed.

231. The Tribunal has also considered that the Applicant if released will be able to provide financial support to his partner and his son, which is in the child's interests. In addition, the Tribunal has considered that the Applicant's partner is likely to be devastated if the Applicant is removed from Australia. This in turn is likely to be detrimental to the child.

232. The Tribunal notes that the consideration of the best interests of the child is complicated in this matter as it appears that there is a real possibility that the Applicant's partner and her child will have to return to China after the Applicant's partner's trial is concluded. This possibility remains regardless of whether the Applicant is allowed to remain in Australia.

Conclusion: Primary Consideration B

233. Overall, the Tribunal accepts that it is in the best interests of the Applicant's partner's child to revoke the cancellation of the Applicant's visa. The Tribunal places low weight on this consideration in the Applicant's favour.

PRIMARY CONSIDERATION C: THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

234. Subparagraph 13.3(1) of the Direction states:

> *"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."*

How are those expectations determined?

235. The decisions of *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; *Afu v Minister for Home Affairs* [2018] FCA 1311; *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 and *FYBR v Minister for Home Affairs* [2019] FCA 500 establish that:

- the concept of community expectations is not a matter to be measured as though it is a provable fact. It is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is an assessment of community values made on behalf of that community;
- it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or evidence about those expectations; and
- the Government's views in relation to community expectations are to be found in the Direction itself. It is open to the Minister to make a statement of the Government's views as to the expectation of the Australian community, as it has in the Direction, and for the Tribunal to act on that statement.

236. These principles were confirmed very recently by the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 ("*FYBR*"). In *FYBR* the Full Court also established that the principles in paragraph 6.3 of the Direction, including the principles in subparagraph 6.3(5) and 6.3(7) of the Direction can inform the weight to be attributed to the expectations of the Australian community. The attribution of weight to this consideration is a matter for the relevant decision-maker.

237. In the present case, the Applicant failed to meet the expectation of the Australian community to abide by the law. This expectation was breached when the Applicant committed serious drug related offences in 2013.

238. The Tribunal has considered and taken into account:

- the principle that the Australian community expects that the Australian government should refuse entry to non-citizens if they commit serious crimes in Australia;
- that a non-citizen who has committed a serious crime should generally expect to be denied the privilege of staying in Australia; and
- that Australia has a low tolerance of any criminal conduct by visa applicants.

239. Against these factors, the Tribunal has considered that for some of the Applicant's time in Australia he has made a positive contribution to the Australian community through casual employment.

240. The Tribunal has also considered that the Applicant's family members in Australia, and in particular his mother, will be severely negatively affected if the Applicant's Protection visa remains cancelled.

Conclusion: Primary Consideration C

241. Overall, given the serious nature of the Applicant's conduct and notwithstanding the negative effects on the Applicant's family members in Australia if the Applicant's Protection visa remained cancelled, the Tribunal finds that the consideration of expectations of the Australian community weighs against revocation of the cancellation of the Applicant's visa.

242. The Tribunal places moderate weight on this consideration against revocation of the cancellation of the Applicant's visa.

OTHER CONSIDERATIONS

243. While the list of "*other*" considerations in the Direction is not exhaustive, there are five "*other considerations*" named in the Direction under subparagraph 14(1):

> *(a) International non-refoulement obligations;*
>
> *(b) Strength, nature and duration of ties;*
>
> *(c) Impact on Australian business interests;*
>
> *(d) Impact on victims;*
>
> *(e) Extent of impediments if removed.*

(a) International non-refoulement obligations (and claims of harm or hardship)

244. Paragraph 14.1 of the Direction provides:

> *"(1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act.*
>
> *(2) The existence of a non-refoulement obligation does not preclude non-revocation of the mandatory cancellation of a non-citizen's visa. This is because Australia will not remove a non-citizen, as a consequence of the cancellation of their visa, to the country in respect of which the non-refoulement obligation exists.*
>
> *(3) Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in a request to revoke under s501 CA the mandatory cancellation of their visa, or can be clear from the facts of the case (such as where the non-citizen held a Protection visa that was mandatorily cancelled).*
>
> *(4) Where a non-citizen makes claims which may give rise to international non-refoulement obligations and that non-citizen would be able to make a valid application for another visa if the mandatory cancellation is not revoked, it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purposes of determining whether the cancellation of their visa should be revoked.*
>
> *(5) If, however, the visa that was cancelled was a Protection visa, the person will be prevented from making an application for another visa, other than a Bridging R (Class W R) visa (section 501 E of the Act and regulation 2.12A of the Regulations refers). The person will also be prevented by section 48A of the Act from making a*

further application for a Protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them — sections 48A and 48B of the Act refer).

(6) In these circumstances, decision-makers should seek an assessment of Australia's international treaty obligations. Any non-refoulement obligation should be weighed carefully against the seriousness of the non-citizen's criminal offending or other serious conduct in deciding whether or not the non-citizen should have their visa reinstated. Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's Protection visa remains cancelled, they would face the prospect of indefinite immigration detention."

245. In order to understand what is required under this consideration, paragraph 14.1 of the Direction must be read carefully.

246. Subparagraph 14.1(1) of the Direction explains what a "*non-refoulement obligation*" is for the purposes of applying the consideration. Subparagraph 14.1(1) specifically states that Australia has non-refoulement obligations under the Refugees Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the CAT"); and the International Covenant on Civil and Political Rights and its Second Optional Protocol ("the ICCPR").

247. Subparagraph 14.1(1) of the Direction states that the Act reflects Australia's interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act.

248. Subparagraph 14.1(2) of the Direction provides that the existence of a non-refoulement obligation does not preclude non-revocation of the mandatory cancellation of a non-citizen's visa 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. This paragraph provides that even where Australia owes non-refoulement obligations in respect of an Applicant, this does not preclude a decision-maker deciding not to revoke a cancellation decision. This is *because* of the government's assurance that it will not, as a matter of policy and practice, 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. While the correctness of this position at law was doubted by Deputy President Forgie in *PRHR and Minister for Immigration and Border Protection* (Migration) [2017] AATA 2782 because she found that it was inconsistent with section 197C of the

Act, Kerr J in *BDQ19 v Minister for Home Affairs* [2019] FCA 163 ("BDQ19") found that no such inconsistency arose.

249. Subparagraph 14.1(3) of the Direction provides for the ways in which claims which may give rise to international non-refoulement obligations can arise. That is, they can be raised explicitly by an Applicant or they can be clear from the facts of the case. A specific example of this, which is relevant in this matter, is a situation where the non-citizen held a Protection visa that was mandatorily cancelled.

250. Subparagraph 14.1(4) of the Direction provides that where an Applicant is 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. Section 501E has the effect that the only types of visa that an Applicant could apply for in circumstances where their visa was cancelled under section 501 are a Protection visa or a Bridging R visa (a Bridging visa which can in some circumstances be granted to those applying for a Protection visa).

251. Thus, on its face, the Direction directs that, in a case like the present, where an applicant can apply for a Protection visa, 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.

252. Subparagraph 14.1(5) of the Direction outlines the effect of section 48A of the Act. That a person whose Protection visa is cancelled is prevented by section 48A from applying for another Protection visa onshore unless the Minister allows them to do so.

253. Subparagraph 14.1(6) of the Direction provides direction as to the course of action which should be taken by decision-makers where an applicant has had their Protection visa cancelled and is unable to apply for a further Protection visa. It provides that in these circumstances, decision-makers should seek an assessment of Australia's international treaty obligations.

254. Subparagraph 14.1(6) of the Direction also provides that any non-refoulement obligation found to be owed 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.

255. Finally, subparagraph 14.1(6) of the Direction further provides that, given Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of sections 189 and 196 of the Act means that, if the person's Protection visa remains cancelled, they would face the prospect of indefinite immigration detention.

256. This last sentence of subparagraph 14.1(6) was found to be invalid by Kerr J in *BDQ19* as section 197C of the Act is said to preclude the possibility of "*indefinite detention*" at law: see *DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448 (North ACJ).

257. The consideration of Australia's non-refoulement obligations appears to recognise that the risk of refoulement in breach of Australia's international obligations should be considered with other relevant considerations in determining whether there is another reason why an applicant's visa cancellation should be revoked.

258. While the case law in relation to this consideration is often directed to questions about whether an applicant can apply for a Protection visa or the likelihood of such a visa being granted, this consideration is not primarily directed to these matters (although obviously these matters may be relevant in a determination of whether Australia owes non-refoulement obligations in respect of an individual). Rather, the consideration appears to involve an assessment of the risk that a decision, in this case to refuse to revoke the cancellation of an applicant's visa, may result in Australia breaching its international non-refoulement obligations. That is, the consideration appears to involve an assessment of the risk that a decision not to revoke cancellation may result in a person in respect of whom non-refoulement obligations are owed, being returned to a country where there is a real chance that they may be harmed in the way contemplated by the Refugees Convention, the CAT or the ICCPR.

259. International non-refoulement obligations are not strictly owed by states to individuals. They are obligations which states have to each other as parties to international agreements. As such, Australia's international non-refoulement obligations arise under the terms of those agreements and not because of provisions of Australia's domestic law. The

obligation not to refoule a refugee is contained in Article 33(1) of the Refugees Convention. The obligation not to refoule a person who may be tortured arises under Article 3 of the CAT. The obligation not to refoule a person contrary to the ICCPR has been read into Articles 6 and 7 of the ICCPR which provide for the right to life and protection from the arbitrary deprivation of life and from torture, and cruel inhumane or degrading treatment or punishment. Australia's acceptance of non-refoulement obligations under the ICCPR regarding decisions made under section 501 and 501CA of the Act is evidenced by the reference to the obligations in subparagraph 14.1(1) of the Direction.

260. Under international law, a person does not become a refugee once they have been assessed as such by a state. Rather such an assessment by the state is declaratory in nature. That is, a person may be a refugee regardless of whether a state has assessed them to be a refugee and states have international non-refoulement obligations in respect of refugees regardless of whether they have been found to be refugees: see *Patto v Minister for Immigration and Multicultural Affairs* [2000] FCA 1554 (French J at [28]).

261. As just mentioned, this consideration is directed to Australia's non-refoulement obligations. It is directed to the risk that a decision not to revoke may result in Australia breaching those obligations. While consideration of potential harm which an applicant could be subjected to may determine whether non-refoulement obligations are owed by Australia, and that the ultimate goal of the obligations may be to avoid such potential harm, the consideration of non-refoulement obligations under the Direction is not primarily directed to the harm or hardship that an applicant may face if removed from Australia. It is directed at the risk of Australia breaching its non-refoulement obligations. Similarly, it could be said that a decision not to revoke a cancellation may, as a matter of fact, result in an applicant being detained for a prolonged period notwithstanding section 197C of the Act. Circumstances may arise in cases where, from a practical perspective, irrespective of any non-refoulement obligations, it is not possible or reasonably practicable to remove an applicant from Australia: see for example the circumstances in *Al-Kateb v Godwin* [2004] HCA 37. In circumstances where it is not reasonably practicable to remove a non-citizen, because, for example, the proposed receiving country will not accept the non-citizen, that person will not be able to be removed, not because of Australia's non-refoulement obligations, but because the proposed receiving country will not accept them.

262. In those circumstances an applicant may be granted a visa by the exercise of one of a number of discretionary powers exercisable by the Minister. If the applicant is not granted a visa, they may be detained for a prolonged period.

263. However, even in such a situation, the relevant task would be balancing the hardship or harm to an applicant in being detained for a prolonged period with the other considerations, including the protection of the Australian community, in determining whether there is another reason why the original decision should be revoked. In such a case, the hardship to an applicant which may result from a non-revocation decision is likely to be a matter relevant to the determination of whether there is another reason why the cancellation decision should be revoked.

264. However, without more, a decision which may result in an applicant being detained for a prolonged period would not be a decision which would place Australia in breach of its international non-refoulement obligations. That is, while harm or hardship may come to the applicant as a result of the decision, the harm or hardship that an applicant would face in being detained for a prolonged period would not be in breach of Australia's non-refoulement obligations.

265. Similarly, if the Tribunal found that a applicant may suffer hardship or harm if returned to their home country, but such hardship or harm was not of the severity contemplated in the Refugees Convention, the CAT or the ICCPR, or otherwise fell outside those agreements, returning an applicant to their home country may result in hardship or harm to an applicant, but it would not constitute a breach of Australia's non-refoulement obligations under those international agreements. That is not to say that a decision-maker should not give proper consideration to the claimed hardship or harm in determining whether there is another reason to revoke the cancellation of an aApplicant's visa. Indeed, a failure to properly consider these claims separately from any non-refoulement obligations Australia may have may constitute jurisdictional error: *Goundar v Minister for Immigration and Border Protection* [2016] FCA 1203 per Robertson J and *Ezegbe v Minister for Immigration and Border Protection* [2019] FCA 216 per Perram J.

266. If the Tribunal fails to make a finding on a substantial, clearly articulated argument relying upon the established facts, this can be both a failure to accord procedural fairness and a constructive failure to exercise jurisdiction: *NABE v Minister for Immigration and*

Multicultural and Indigenous Affairs (No 2) [2004] FCAFC 263. The Tribunal must have regard to the representations put as a matter of substance: *Minister for Immigration and Border Protection v Maioha* [2018] FCAFC 216 (Rares and Robertson JJ at [45]).

267. In *Omar v Minister for Home Affairs* [2019] FCA 279 ("*Omar*"), Mortimer J found that it will be a failure to carry out the task required under the Act if a decision-maker fails to give proper consideration to an Applicant's representation that he or she is a person in respect of whom Australia has non-refoulement obligations. Her Honour found that the decision-maker will fail to do so if the decision-maker considers that, where it is open to an applicant to apply for Protection visa, it is unnecessary to consider Australia's international non-refoulement obligations.

268. In *AXT19 v Minister for Home Affairs* [2019] FCA 1423 ("*AXT19"*) Logan J found that it will not be a jurisdictional error for a decision-maker to fail to consider whether Australia has non-refoulement obligations in respect of an applicant where it is open for the applicant to make an application for a Protection visa. His Honour found that the decision in *Omar* was inconsistent with the Full Court's decision in *Minister for Immigration and Border Protection v Le* [2016] FCAFC 120 ("*Le*") and was wrongly decided. His Honour stated at [27]:

> *"It is not possible, in my respectful view, to reconcile the observations quoted from Omar with the Full Court's judgment in Le, quite apart from the passing observation made in DOB18 at [193]. The effect of Le, in my view, which does not appear to have been cited, much less pressed in argument, before her Honour in Omar, is that Omar is clearly wrong…"*

269. In, *Le* the Full Court of the Federal Court (Allsop CJ, Griffiths and Wigney JJ) found that Australia's non-refoulement obligations are not a mandatory relevant consideration in the exercise of the discretion to cancel a visa under section 501(2) of the Act in circumstances where it remained open to an applicant to make an application in Australia for a Protection visa.

270. The weight of Federal Court authority at present supports the conclusions reached by Logan J in *AXT19.*[32] However, the reasoning of Mortimer J in *Omar* has found support in the recent decision of Moshinsky J in *DGI19 v Minister for Home Affairs* [2019] FCA 1867.

271. As matters stand, there are currently conflicting authorities in the Federal Court as to whether it will be an error for a decision-maker not to make an assessment as to whether an applicant is a person in respect of whom Australia has non-refoulement obligations in circumstances where it is open for an applicant to apply for a Protection visa. It was thought that this issue would be settled by a five-member bench of the appellate jurisdiction of the Federal Court in *Minister for Home Affairs v Omar* [2019] FCAFC 188 which was an appeal by the Minister from the decision of Mortimer J in *Omar*.

272. In the *Omar* appeal, a Full bench of the Full Court (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ) found that they did not need to decide the issue. However, the result of the Full Court decision appears to be that the answer to the question as to whether it will be an error for a decision-maker not to make an assessment as to whether an applicant is a person in respect of whom Australia has non-refoulement obligations in circumstances where it is open for an applicant to apply for a Protection visa, appears to be of less significance than may have previously been thought.

273. In short, this is because, relying on the cases cited above, the Full Court in *Omar* has found that a decision-maker must give meaningful consideration to clearly articulated claims of harm made by the applicant, including those claims, which if made out, would result in Australia owing non-refoulement obligations in respect of the applicant. This will include a decision-maker making findings of fact as to whether the feared harm is likely to eventuate by addressing the claims in the way they have been expressed by the applicant.

274. The Full Court emphasised the distinction between the harm, or the risk of harm and hardship that a person claims and the assessment of whether a person is one in respect of whom Australia owes non-refoulement obligations. The assessment of whether a person is one in respect of whom Australia owes non-refoulement obligations will depend

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[32] Anderson J discussed many of the recent Federal Court decisions which have considered this issue in *GBV18 v Minister for Home Affairs* [2019] FCA 1132.

on a decision-maker's findings in relation to the harm or hardship that an applicant may face if returned.

275. The Full Court found that a decision-maker must give meaningful consideration to a clearly articulated and substantial or significant representation on risk of harm claimed, independently of a claim concerning Australia's non-refoulement obligations. There has to be active intellectual engagement with the applicant's claims relating to the risk of harm. The significance of any particular matter raised in the representations is to be assessed by reference to the manner in which the matter is expressed.

276. The Full Court found that a decision-maker must do more than simply acknowledge or note that claims of harm that have been made. Depending on the nature and content of the representations, the decision-maker may be required to make specific findings of fact, including on whether the feared harm is likely to eventuate, by reference to relevant parts of the representations.

277. The Tribunal considers that the result of the Full Court decision in the *Omar* appeal is that decision-makers must engage properly with, and consider all claims of harm made by an applicant, including those claims which, if made out, would result in Australia owing non-refoulement obligations in respect of the applicant. Engaging properly with claims of harm made by an applicant may require a decision-maker to make specific findings of fact including, whether the feared harm is likely to eventuate. The claims of harm must be addressed in accordance with the way that they have been expressed by the applicant.

278. The Tribunal notes that question of whether it will be an error for a decision-maker not to make an assessment as to whether an applicant is a person in respect of whom Australia has non-refoulement obligations in circumstances where it is open for an applicant to apply for a Protection visa, is of even less significance in the current case. That is because, unless the Minister exercises his non-compellable discretion in section 48B of the Act, the applicant is prevented from applying for a Protection visa by section 48A(1B) of the Act.

279. For the reasons given by Rares J in *BAL19* at [42] to [46] the Tribunal considers that it is very unlikely that the Minister, having decided not to revoke the mandatory cancellation of the Applicant's Protection visa, will exercise any non-compellable discretions, including

those in sections 48B, 195A or 501J of the Act, in the Applicant's favour. This is especially so in the case of the Minister's broad discretion under section 195A of the Act to grant visas to persons in detention.

280. The Applicant provided to the Tribunal a ministerial policy document entitled *"PAM3: Act - Compliance and Case Resolution - Case resolution - Minister's powers - Minister's detention intervention power."*

281. That document explains the circumstances in which the Minister may wish to consider exercising his power under section 195A of the Act and when Department officers should refer a case to the Minister for consideration of the exercise of the discretion.

282. Under the heading "*Cases that should not be brought to my attention*" the document provides:

> *"I would generally not expect to have the following types of cases referred to me for my consideration of my detention intervention power:*
>
> *…*
>
> *people whose visa has been refused or cancelled under section 501 of the Act*
>
> *…"*

283. Under the heading "*Requests for the exercise of my detention intervention power*" the document provides:

> *"Requests that I consider exercising my detention intervention power may only be made and referred by the Department. Any requests must first be assessed by the Department against these guidelines and should only be referred to me if the case is assessed as having met these guidelines.*
>
> *This means that, as this power is non-compellable, I will not consider exercising it when requested directly by individuals or their representatives."*

284. In the present case the Applicant raises a number of claims that he will suffer harm or hardship if he is removed to China. At least some of those claims are said to give rise to international non-refoulement obligations.

285. The first claim is that the Applicant may be re-punished in China for his criminality in Australia. The Applicant submits that punishment could involve a sentence of imprisonment of 15 years, life imprisonment or the death penalty.

286. The second claim is that the Applicant would be persecuted in China for his Catholic faith, for his imputed political opinion or imputed religion because he is his mother's son, or that he is a relative of a dissident. In addition to these claims, the Applicant claims that he would be prevented from the free practice of his religion in China. A related claim is that, as the son of a person considered a dissident, the Applicant may not be issued with a Hukou identification card, preventing him from access to medical care, education and social services in China.

287. Finally, the Applicant claims that the outbreak of coronavirus in China also presents "*another reason*" why the mandatory cancellation decision should be revoked. The Applicant argued that if he is removed to China he faces the prospect of being infected with the coronavirus which may cause significant harm to his health, possibly leading to his death. The Applicant pointed to the current ban on arrivals from China and the advice of the Department of Foreign Affairs and Trade for Australians not to travel to China and for all Australians in China to leave China as soon as possible.

288. First, the Tribunal considers that there is a real chance that the Applicant would be excluded from protection under the Refugees Convention at international law on account of Article 33(2) of the Refugees Convention (which, as mentioned previously is now mirrored in section 36(1C) of the Act). However this is uncertain as, while the Applicant has been convicted of a particularly serious crime, because the Tribunal has found that there is a low risk that he will reoffend, he may not present a danger to the Australian community.

289. In any event, unlike the situation in the Refugees Convention, the non-refoulement obligation under the ICCPR and the CAT are absolute and without exception.

290. The Tribunal finds that apart from his first claim, none of the Applicants other claims give rise to Australia's international non-refoulement obligations. However, the Tribunal considers that each of the claims raises a risk that the Applicant would suffer some degree of hardship, potentially harm, if he were return to China.

291. Regarding the Applicant's claims in relation to a fear of religious persecution, the Tribunal does not consider that there is a real chance or a real risk that the Applicant will suffer

serious harm or significant harm owing to his religion, imputed religion or imputed political opinion.

292. According to the Applicant's mother, she only became a Christian in 2006. The circumstances in which she joined an underground Catholic church where that she was living and working with a woman who was a devout member of an underground Catholic church. This woman had been very good to the Applicant's mother. She had taken her in and given her work. The Applicant's mother became a Christian and began proselytising. She convinced other women to become members of the same church. It was only after she came to Australia that she said that she discovered that other members of the Church had been arrested and that her brother had been detained and questioned specifically about t her.

293. When the Applicant arrived in Australia he was not a devout Catholic. Indeed he said that he was not a true Christian. He said that the extent of his Christianity was that he would accompany his mother to church during significant Christian celebrations such as Easter and Christmas. It was only after the Applicant was imprisoned that he considers that he became a true Christian.

294. The Applicant has never expressed an interest in being a member of an underground Catholic church. He described himself as a general Catholic. The Tribunal accepts that the Applicant's religious practices in China would be more restricted than in Australia. The Tribunal notes that the Applicant's religious practice in Australia has been restricted by his imprisonment and detention. The Tribunal finds that the Applicant would be unlikely to join an underground Christian church if he were to return to China. The Tribunal considers it is unlikely that the Applicant would proselytise or try to convince others to join an underground church.

295. The Tribunal does not accept that the Chinese authorities would have any particular interest in the Applicant owing to his mother's previous religious activities in China. Even if they did, the Tribunal considers that the interest would probably manifest in the Applicant being questioned by authorities about his mother. This appears to be the extent to which the Applicant's mother's brother suffered any inconvenience at the hands of the Chinese authorities. Indeed at the hearing the Applicant's mother indicated that she had not

received any information that her mother or any other siblings had been harmed by Chinese authorities because of her previous religious activity in China.

296. The Tribunal accepts that there remains a risk, although remote, that the Applicant's religious activities in China in the future could give rise to some degree of hardship to the Applicant. The Tribunal also accepts that the Applicant may not be able to practice his religion with the same degree of freedom as he would in Australia. While this could be described as a hardship, the Tribunal does not consider that this hardship would amount to serious harm or significant harm such as to invoke Australia's international non-refoulement obligations. However, the Tribunal does consider that the restriction on the practice of his religion is a hardship which weighs in the Applicant's favour in this case.

297. The Tribunal considers that the Applicant may have some difficulty in acquiring a Hukou identification card entitling him to certain health education and other social services. However, the Tribunal considers that it would be like unlikely that this would be owing to his association with his mother. The country information provided to the Tribunal indicates that acquiring a Hukou can be difficult for vast numbers of the Chinese populous, especially those who relocate from rural areas to urban areas. Again, while the Tribunal does not accept that any difficulty in obtaining a Hukou would give rise to Australia's international non-refoulement obligations, the potential difficulty in obtaining a Hukou is a potential hardship which weighs in the Applicant's favour.

298. In relation to the Applicant's claims of fearing being infected by the coronavirus, again the Tribunal considers that this claim is unlikely to invoke Australia's international non-refoulement obligations. While it is accepted that, as a general proposition, the risk of coronavirus infection for people in China is much higher than for people in Australia, the number of people who have been infected by coronavirus in China compared to the greater population itself is relatively small. In addition, the Applicant is from Fujian City in Fujian Province which is hundreds of kilometres away from the epicentre of the virus in Hubei province. Further, according to the material provided by the Applicant, the Chinese government is taking drastic steps to reduce the spread of the virus including restricting travel in and out of Wuhan city. China is also working to quarantine those who contracted the virus, built medical facilities for the treatment of those with the virus, has developed kits for faster diagnosis of the virus and is expediting efforts to produce a vaccine.

299. In any event, given the travel restrictions imposed by the Australian government on travel from China and its advice that Australians should not travel to China, it is doubtful whether it would currently be reasonably practicable to remove the Applicant from Australia to China. This may result in prolonged but not indefinite detention for the Applicant until the risk presented by the virus in China subsides. Judging by previous viral outbreaks in China that should be a matter of months, not years. Nonetheless, the Tribunal accepts that a non-revocation decision may result in prolonged detention for the Applicant in Australia. There is also the possibility that the Applicant may be removed to China while there is still a not insignificant risk that he will contract the virus. In addition, according to the material provided by the Applicant the coronavirus is having a serious negative impact on the Chinese economy. This may result in it being more difficult for the Applicant to gain employment if he is returned to China.

300. While the Tribunal does not consider that the Applicant's claims in relation to the coronavirus invoke Australia's international non-refoulement obligations, they still present risks of harm and hardship which the Tribunal has taken into account and ultimately weigh in the Applicant's favour.

301. The Tribunal has carefully considered the Applicant's claim that he may be re-punished in China for his criminality in Australia.

302. The Tribunal has been provided with a copy of a report produced by the Department of Foreign Affairs and Trade entitled: "*DFAT Country Information Report: People's Republic of China – 3 October 2019*" ("the DFAT report"). Paragraph 5.46 of that report states:

> *"Articles eight to 12 of the Criminal Law outline provisions against double jeopardy. In practice, Chinese citizens convicted and punished for offences abroad may face punishment for the same offence on return to China. Authorities are less likely to pursue those who have committed offences overseas carrying a sentence in China of three years or less. Those convicted of offences that are more serious are more likely to be re-sentenced on return, depending on the offence and the severity of punishment served overseas: more severe punishment overseas would likely attract a lesser punishment on return. Authorities have also pursued individuals for crimes for which they were acquitted abroad. In April 2017, the Kenyan government (which recognises the PRC) deported a group of Taiwanese and Chinese passport-holders in contravention of a Kenyan court order, which also confirmed their acquittal of financial crimes. While the incident in part reflects political considerations in cross-strait relations (with Taiwan), the fact that mainland Chinese passport-holders were part of the group suggests that double jeopardy can apply to Chinese citizens who are acquitted abroad."*

303. Paragraphs 4.9, 4.10 and 4.13 of the DFAT report provide the following information in relation to the death sentence in China:

> *"China retains the death penalty for 46 offences. The number of offences attracting the death penalty was reduced from 55 in November 2015 following an amendment to the Criminal Law. Capital offences include a number of economic and non-violent crimes such as corruption and drug-related offences. Capital crimes include; 'endangering public security' (such as arson, hijacking or the selling or producing of fake medicines)and 'infringing upon citizens' right of the person and democratic rights' (including homicide, rape, and trafficking).*
>
> *According to Articles 347, 348 and 357 of the Criminal Law (1979; Amended 2015), individuals found guilty of smuggling, trafficking, transporting, manufacturing and illegally possessing narcotics (opium, heroin, ice, morphine, marijuana, cocaine, and 'other' addictive narcotics and 'drugs for mental sickness' under the state's control), regardless of the quantity, shall be investigated and punished. Cases of smuggling, trafficking, transporting and manufacturing opium with a quantity of more than 1000 grams, heroin or methylaniline of more than 50 grams, or 'other drugs' with a 'large' quantity are subject to punishment including 15 years' imprisonment, life imprisonment, or the death penalty. A Supreme People's Court Judicial Interpretation issued in June 2016, 'Several Issues concerning the Application of Law in the Trial of Drug-Related Criminal Cases,' provides more detailed guidance regarding the specific types and amounts of narcotics determined to meet the condition of 'a large amount of any other drug' as stated in Article 347 and 348 of the Criminal Law(1979; amended 2015). Cases involving lower quantities of narcotics do not attract the death penalty, and instead attract punishments ranging from more than seven years to less than three years imprisonment, detention or control, and a fine."*
>
> *…*
>
> *Amnesty International claims China has the highest rate of executions in the world. However, DFAT notes the number of executions in China remains a state secret: Duihua estimates 2,000 people were executed in 2016 (latest data; compared to 2,400 in 2013)."*

304. In *Liang and Minister for Immigration and Citizenship* [2013] AATA 392 ("*Liang*"), Deputy President Forgie cited at [123] the following provisions of the Chinese Criminal Law:

> ***"Article 7***
>
> *This Law applies where a citizen of the People's Republic of China commits a crime set forth by this Law outside the territory of the People's Republic of China; where, however, subject to the provisions of this Law, the maximum punishment of fixed-term imprisonment for his crime is not more than three years, he may be exempt from investigation.*

This Law applies where a public servant or serviceman of the People's Republic of China commits a crime set forth by this Law outside the territory of the People's Republic of China."

Article 10

"A person shall bear criminal responsibility according to this Law for his crime committed outside the territory of the People's Republic of China may still be investigated according to this Law, even if he has already been tried in a foreign country. Where, however, he has already received criminal punishment in a foreign country, he may be exempt from punishment or given a mitigated punishment."

Article 347

"A person who smuggles, traffics in, transports or produces drugs, regardless of the quantity, shall be demanded for criminal responsibility and imposed criminal punishment. A person who under any of the following circumstances, smuggles, traffics in, transports or produces drugs shall be sentenced to fixed-term imprisonment of fifteen years, life imprisonment or death and concurrently to confiscation of property.

1. to smuggle, traffic in, transport or produce opium of not less than 1,000 grams of heroin or methyl benzedrine of not less than 50 grams or any other drug of large quantity;

2. to be a ringleader of a gang engaged in smuggling, trafficking in, transporting or producing of drugs;

3. ...

4. ...

5. to take part in organized international drug activities.

A person who smuggles, traffics [sic] in, transports or produces opium of not less than 200 grams and not more than 1,000 grams or heroin or methyl Benzedrine of not less than 10 grams and not more than 50 grams or any other drug or relatively huge quantity shall be sentenced to a fixed-term of imprisonment of not less than seven years and concurrently to a fine.

..."

305. In *Liang* Deputy President Forgie was satisfied that there was a real risk that the applicant in that case would suffer significant harm as a consequence of being removed from Australia to China. Deputy President Forgie was not satisfied that the there was a real risk that the applicant would be reprosecuted in China under sections 7 and 10 of the relevant Chinese criminal law for offences which had taken place completely externally from China. However, Deputy President Forgie pointed out that the applicant has undertaken what appeared to be criminal activity in China itself and she found that there was a real risk that the applicant would suffer significant harm if returned to China on the basis that the

applicant may be prosecuted for offences committed in China. Deputy President Forgie concluded at [147] and [148]:

> *"That is not an end of the matter. The offences for which Mr Liang was convicted had an overseas context but he was not convicted in relation to events that happened overseas. At the same time, the sentencing remarks and the judgment of the Court of Appeal in relation to his sentence on the first indictment relating to cocaine make it clear that Mr Liang travelled to China and negotiated for the supply of drugs on Chinese soil. He was convicted of trafficking a marketable quantity which was an amount of 264.2 grams of pure cocaine. Article 347 speaks of a "drug of large quantity" and I have no material on which to determine whether an amount regarded as a traffickable amount of cocaine in Australia would fit the description. That is not the end of the matter, though. That amount was the amount in relation to which Mr Liang was charged in Australia but the Court of Appeal's judgment makes it clear that his visit to China was not simply for the purchase of that amount of cocaine. The purpose of the visit to China was to put in place a source of supply on an ongoing basis. That raises the reference in Article 347 to taking "... part in organized international drug activities". Just as a conviction for dealing in a drug of large quantity would expose Mr Liang to a "fixed-term imprisonment of fifteen years, life imprisonment or death and concurrently to confiscation of property", so too would a conviction for his taking part in organised drug activities.*
>
> *All but one of the cases to which reference has been made by the UK Tribunal are cases in which the PRC authorities have prosecuted Chinese nationals on their return to China for activities that have a connection with activities taking place in China or, in the case of a ship registered in China, deemed to part of that country. The only exception is that of the conviction in Kuwait. Given this information, the PRC's increased focus on pursuing drug offenders and the fact that Mr Liang's activities in China in relation to drug trafficking are documented and publicly available by means of the various judgments, I have reached the view that there are substantial grounds for believing that there is a real risk of Mr Liang's suffering significant harm. That real risk will be as a necessary and foreseeable risk of his being removed from Australia."*

306. The Tribunal considers that there is a real risk that the Applicant will suffer significant harm as a necessary and foreseeable consequence of being removed from Australia. The Applicant was convicted of offences which occurred within the territorial jurisdiction of Australia, that is importing illicit drugs, and attempting to import illicit precursors. However, it is clear that the activity that led to the final convictions in Australia included activity within the territorial jurisdiction of China. The drugs and the precursors were organised to be sent from China to Australia. Therefore, part of the activity in which the Applicant was involved in occurred in China and the Applicant is a Chinese national. Without more, the Tribunal may not have found that the circumstances in this case invoke Australia's international non-refoulement obligations.

307. However, a matter that is of particular significance is that in relation to the attempt to import ephedrine from China, it was the Chinese authorities that discovered the ephedrine consignment in China and alerted the Australian authorities. The consignment involved a large amount of ephedrine which according to the sentencing judge, could have produced over 1.5 kg of pure methamphetamine. Significantly, the shipment was addressed to the Applicant's mother's house. Further, the Applicant was the consignee for the shipment. There is a very good chance the Chinese authorities knew that the Applicant was involved in exporting from China a commercial quantity of ephedrine. If the Chinese authorities did not know from this information the identity of the Applicant, his subsequent conviction which has been documented and publicly available in the sentencing Court's judgement, make it very likely that the Chinese authorities now know the identity of the Applicant. If they do not, it is likely that it would take very little effort to link the Applicant to the export of a commercial quantity of ephedrine.

308. In those circumstances, the Tribunal considers that, in addition to a risk that he will be re-prosecuted for his Australian offences, there is a heightened and real risk that the Applicant will be prosecuted in China for serious drug related offences that relate to the territorial jurisdiction of China. From the material available, it appears that there is a real risk that the Applicant could receive the death sentence for such offences.

309. The UN Human Rights Committee has stated that, in accordance with ICCPR obligations, countries that have abolished the death penalty are obliged not to remove a person to another country, under either immigration processes or by way of extradition, if it may reasonably be anticipated that the person will be sentenced to death, without ensuring that the death sentence will not be carried out.

310. Australia has enacted laws consisted with this principle. For example, under the *Extradition Act 1988,* the Attorney General may not surrender a person to another country where the penalty of death might be imposed unless satisfied, on the basis of an undertaking from that country, that the person will not be tried, the death sentence will not be imposed or, if the death sentence is imposed that it won't be carried out: section 22(3)(c) of the *Extradition Act 1988.*

311. Of course, the Tribunal understands that there is no existing extradition request from China and, as far as we know, no existing charges against the applicant in China.

However, for the reasons given above, the Tribunal considers that a real risk of significant harm for the Applicant still exists in this case.

312. As the Applicant cannot apply for another substantive visa in Australia, and it is highly unlikely that the Minister will exercise any discretion to allow him to remain here, the Tribunal considers that there is a real risk that the Applicant will be returned to China in breach of Australia's international non-refoulement obligations.

313. The Tribunal finds that the consideration of Australia's international non-refoulement obligations and hardship/harm to the Applicant if returned to China weigh in favour of revocation of the cancellation decision. The Tribunal has placed significant weight on these considerations.

(b) Strength, nature and duration of ties

314. Paragraph 14.2 of the Direction provides:

> *… Reflecting the principles at 6.3, decision-makers must have regard to:*
>
> *(a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:*
>
> *(i) less weight should be given where the non-citizen began offending soon after arriving in Australia; and*
>
> *(ii) more weight should be given to time the non-citizen has spent contributing positively to the Australian community.*
>
> *(b) The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of cancellation 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).*

315. The Applicant first arrived in Australia in 2008 as a 17 year old. Prior to his arrest in late 2013 the Applicant had been contributing positively to the community through casual paid employment. The Applicant's first criminal offence occurred in 2013, some five years after he arrived in Australia. The two offences that he committed in 2013 are the only offences that the Applicant has committed.

316. The Tribunal has taken into account the Applicant's statement and the statements provided by his family and acquaintances as being relevant to his ties to Australia.

317. The Tribunal accepts that for over half the time that the Applicant has been in Australia he has been imprisoned or detained in immigration detention.

318. The Tribunal has taken into account that the removal of the Applicant from Australia will have a devastating impact on the Applicant's mother who is an Australian citizen. In all likelihood she will never see her son again if he is removed. She cannot visit China owing to her fear of persecution by the Chinese government and it appears that she is unable to travel by air altogether owing to her various ailments.

319. The Tribunal has considered the impact of the Applicant's removal on his partner under this consideration despite that she does not appear to have a right to remain permanently in Australia. If I had not, I would have considered this matter separately as an "other consideration". It appears that his partner holds a temporary visa being a Criminal Justice Stay visa which she will hold pending the outcome of criminal proceedings against her. As mentioned previously, given her circumstances and the effect of section 161 of the Act, there is a real possibility that the Applicant's partner will not be able to remain in Australia regardless of the outcome of the criminal proceedings. It appears likely that if the Applicant's partner is not allowed to remain in Australia that her son will also return with her to China. It is not clear what visa the Applicant's partner's son currently holds. In a statement to the Tribunal the Applicant's partner indicated that her son has applied for a Student visa. The Tribunal finds that if the Applicant's partner is allowed to remain in Australia, that the removal of the Applicant will have a significant adverse effect on his partner.

320. While the Tribunal accepts that the Applicant has strong ties to his mother, partner and her son, and spent some time in casual employment prior to his arrest, he does not otherwise appear to have particularly strong ties to Australia or the Australian community. This is not surprising seeing that he has spent over seven years in criminal custody or immigration detention.

321. The Tribunal finds that this consideration weighs in favour of the revocation of the decision to cancel the Applicant's Protection visa. The Tribunal places moderate weight on this consideration in the Applicant's favour.

(c) Impact on Australian business interests

322. This consideration is not relevant in this matter and the Tribunal places no weight on this consideration.

(d) Impact on victims

323. Subparagraph 14.4(1) of the Direction 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."*

324. There is no direct evidence of the impact of a decision not to revoke on members of the Australian community. Illegal drugs, and particularly methamphetamine have a significant negative impact on the Australian community in terms of both the health and criminal consequences. However, the Tribunal notes that it can be said that, as the drugs which the Applicant was involved in importing and the precursors he sought to import were intercepted by Australian or Chinese authorities, there are no specific victims of the Applicant's criminal behaviour. In any event, the Tribunal considers that the prudent course in the absence of direct evidence of the impact of a decision to grant the Applicant a visa is to place no weight on this consideration. In these circumstances the Tribunal places no weight on this consideration.

(e) Extent of impediments if removed

325. Paragraph 14.5 of the Direction provides:

> *(1) The extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:*
>
> *(a) The non-citizen's age and health;*
>
> *(b) Whether there are substantial language or cultural barriers; and*
>
> *(c) Any social, medical and/or economic support available to them in that country.*

326. The Applicant is now 29 years of age and indicated during the hearing that he does not suffer from any medical conditions. It does not appear that there are any language or cultural barriers which would act as impediments to the Applicant establishing himself in

China although the Tribunal appreciates that the Applicant has been living in Australia for over a decade and it may be difficult to readjust to life in China. As a citizen of China, the Applicant will be entitled to any social, medical and economic support available to Chinese citizens in China.

327. The Applicant has some casual work experience in the gyprocking industry in Australia and the Tribunal considers that this work experience will assist in the Applicant securing employment in China. However, the Tribunal finds that he may find it difficult to gain employment in China owing to limited education, limited assets, and lack of social support.

328. The Tribunal finds that the Applicant will face difficulty in re-establishing himself in China and accepts that the Applicant may face difficulties in securing employment there. He has lived in Australia for over a decade and has never been employed in China. It appears that he has only completed 10 years of education there. Despite being in Australia for over a decade the Tribunal accepts that the Applicant's English language skills remain poor. The Tribunal accepts that the Applicant would be very upset if he were permanently removed from Australia.

329. The Tribunal finds that this consideration weighs against cancellation of the Applicant's visa. The Tribunal attributes moderate weight to this consideration in the Applicant's favour.

Conclusion: Is there Another Reason to Revoke the Cancellation of the Applicant's Visa?

330. The Tribunal has found that the primary consideration of the protection of the Australian community weighs moderately against revocation of visa cancellation. Similarly, the Tribunal has found that the primary consideration of the expectations of the Australian community weighs moderately against revocation of visa cancellation. The Tribunal has found that the Applicant's offences are very serious, that there could be great harm to Australian citizen's and residents if they were repeated but that there is only a low risk that the Applicant will reoffend.

331. The Tribunal has found that it is in the best interests of the Applicant's partner's son for the Applicant to remain in Australia. The Tribunal has given this consideration low weight.

332. The Tribunal has found that the consideration of Australia's international non-refoulement obligations and the consideration of harm or hardship to the Applicant weigh significantly in favour of revocation of the cancellation decision.

333. The Tribunal has found that the consideration of the strength, nature and duration of ties of the Applicant to Australia weighs in favour of revocation of the cancellation decision and attributed moderate weight to this consideration. The Tribunal has also found that if the Applicant's partner is allowed to remain in Australia, the Applicant's removal from Australia will result in the Applicant's partner being significantly adversely affected. The Tribunal has given this consideration moderate weight.

334. Finally, the Tribunal has found that the consideration of the extent of impediments if removed weighs in favour of revocation of the cancellation decision and attributed moderate weight to this consideration.

335. After considering all of the relevant considerations in this matter and the weight that I have attributed to them, informed by the principles in paragraph 6.3 of the Direction, I have decided that the primary considerations of the protection of the Australian community and the expectations of the Australian community are outweighed by the primary consideration of the best interests of minor children in Australia and all the other relevant considerations.

336. The Tribunal has found that the Applicant does not pass the character test but has found that there is another reason why the original decision should be revoked.

337. The Tribunal has decided to set aside the decision under review and for a decision in substitution to be made revoking the cancellation decision. The Tribunal considers that this is the preferable decision in this case.

DECISION

338. The decision under review is set aside and a decision in substitution is made revoking the original cancellation decision.

I certify that the preceding 338 (three hundred and thirty-eight) paragraphs are a true copy of the reasons for the decision herein of Member Tigiilagi Eteuati

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

Associate

Dated: 25 February 2020

Date of hearing:	**17 and 18 February 2020**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitor for the Respondent:	**Clayton Utz, Mr N Cuthbert**

Attachment A

EXHIBIT REGISTER

File No 2019/8044.....

Between **FRVT** .....(Applicant)

And **Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs** ..... (Respondent)

Heard on 17 and 18 February 2020

At Sydney .....

Exhibit Number	Description of Evidence
A1	Applicant's Reply Contentions, dated 12 February 2020, including Annexures A – C
A2	Report of Mr Visser, dated 15 January 2020
A3	Applicant's Supplementary Statement, dated 15 January 2020, including Annexures A – B
A4	Supplementary Statement of the Applicant's Partner, dated 14 January 2020
A5	Supplementary Statement of the Applicant's Mother, dated 14 January 2020
G1	S 501G Documents
R1	RRT Decision Record for the Applicant's Mother, dated 29 March 2010
R2	Letter and attached Application from Pricilla International Co Pty Ltd, dated 31 March 2010
R3	Letter from the Department of Immigration and Citizenship to the Applicant, dated 7 May 2010