Administrative Appeals Tribunal

**DECISION AND REASONS FOR DECISION**

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| Division: | GENERAL DIVISION |
| File Number(s): | **2020/3159** |
| Re: | **HYMC** |
| | APPLICANT |
| And | **Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs** |
| | RESPONDENT |

**DECISION**

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| Tribunal: | **Mr Rob Reitano, Member** |
| Date: | **11 August 2020** |
| Place: | **Sydney** |

I have decided to set aside the decision refusing to revoke the mandatory cancellation of HYMC's Class XA Subclass 866 Protection Visa and substitute a decision revoking the decision to cancel that visa.

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

Mr Rob Reitano, Member

**CATCHWORDS**

*MIGRATION – mandatory visa cancellation – cancellation of Applicant's Class XA Subclass 866 Protection Visa – Applicant is a citizen of China – failure of the character test – whether there is another reason to revoke the visa cancellation – Direction No. 79 – protection of the Australian community – best interests of minor children in Australia – expectations of the Australian community – international non-refoulement obligations – strength, nature and duration of ties – extent of impediments if removed – decision under review set aside*

**LEGISLATION**

*Migration Act 1958 (Cth) ss 36, 65, 499, 500, 501, 501CA*

**CASES**

*FYBR v Minister for Home Affairs [2019] FCAFC 185*

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

*DMZZ and Minister for Immigration and Border Protection [2017] AATA 1217*

*Hood and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 539*

*FRVT and Minister for Immigration and Citizenship [2020] AATA 294*

*Lansdowne and Minister for Home Affairs [2019] AATA 2448*

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

*QTNZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 804*

*SCJD and Minister for Home Affairs [2018] AATA 4020*

*VPKY and Minister for Home Affairs [2019] AATA 352*

*Yu and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 1002*

*XRXL and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] AATA 5984*

*JC and The Secretary of State for the Home Department [2008] UKAIT 00036*

*YF and The Secretary of State for the Home Department [2011] UKUT 32*

**SECONDARY MATERIALS**

*Chinese Criminal Law*

*Direction No. 79 – Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA*

**REASONS FOR DECISION**

**Mr Rob Reitano, Member**

**11 August 2020**

1. HYMC is a citizen of the People's Republic of China (China) who arrived in Australia on 20 March 2006 and has lived in Australia ever since then. After 18 February 2010, he has lawfully been entitled to remain in Australia because he has held a Class XA Subclass 866 Protection Visa (Visa) under s.65 of the *Migration Act 1958* (Cth) (Act).

2. On 14 October 2015, HYMC was convicted and sentenced to 7 years imprisonment for the offence of conspiracy to import into Australia a commercial quantity of pseudoephedrine, an essential ingredient in the manufacture of methamphetamine (more commonly known as 'meth', 'ice' or 'crystal'), during the period 17 January 2012 and 21 March 2012 (offence). HYMC's sentence, as will be seen later in these reasons, gave him what is known to the Act, as a 'substantial criminal record'.

3. On 18 December 2018, the Minister was required under ss.501(3A) to cancel the Visa because he was satisfied that HYMC had a substantial criminal record.

4. On 14 January 2019, responding to the Minister's invitation, HYMC made representations under ss.501CA(4)(a) about why the Minister should exercise the power available to him under ss.501CA(4) to revoke the decision to cancel the Visa.

5. On 21 May 2020, a delegate of the Minister decided to refuse to revoke the mandatory cancellation of the Visa (Decision).

6. On 25 May 2020, HYMC applied to the Tribunal under ss.500(1)(ba) asking the Tribunal to set aside the Decision and instead substitute a decision revoking the mandatory cancellation of the Visa because he claims that is the correct or preferable decision.

7. I have decided to set aside the Decision and instead substitute a decision that revokes the Minister's decision to cancel the Visa and what follows are my reasons for that decision.

8. In these reasons I will refer to 'revocation of the mandatory cancellation of the Visa' as 'revocation' and I will refer to 'non-revocation of the mandatory cancellation of the Visa' as 'non-revocation'. I refer to HYMC's minor children using the anonyms Y, Z1 and Z2 and to his wife by the anonym 'Ms HYMC'. I refer to other witnesses associated with HYMC by anonyms using their initials.

**BACKGROUND**

9. HYMC is forty years of age. He is married to Ms HYMC. They have three children, Y a girl aged 13 years, and two boys Z1 who is 11 years of age and Z2 who is 9 years of age. Ms HYMC, Y, Z1 and Z2 are all Australian citizens.

10. On 20 March 2006, HYMC arrived in Australia by using a fake passport that he had dishonestly obtained. He remained in Australia on a tourist visa and, after that visa expired, continued to remain in Australia without lawful permission. The circumstances of his entry into, and remaining in, Australia came to light some years later.

11. On 11 February 2009, HYMC, his wife and his two oldest children made an application to the Department of Immigration and Citizenship (Department) for Protection (Class XA) visas. The application was unsuccessful. An application for a review of that decision was made to the Refugee Review Tribunal (RRT).

12. On 11 November 2009, the RRT was satisfied that Y and Z1 "*were persons to whom Australia has protection obligations*" under s.36(2)(a) of the Act and returned their matters to the Department for reconsideration. The two children were found to be refugees because they were members of a social group known in China as 'black children.' This is because they were born in contravention of China's family planning laws and, so it would seem, because they were born out of wedlock. The RRT was also satisfied that HYMC and his wife were *'members of the same family unit'* as Y and Z1 and therefore met the requirement in s.36(2)(b)(i) relating to protection visas, and so returned their applications to the Department for reconsideration. The Department then issued the Visa to HYMC and protection visas to Ms HYMC, Y and Z1.

13. In determining the matter, the RRT rejected HYMC's evidence about fear of persecution on religious grounds as '*not credible*'. It made several other observations about his evidence describing aspects of it as '*vague, evasive, inconsistent, and generally unsatisfactory*', '*implausible*', '*untrue*' and *'untruthful*'. The RRT had '*serious doubts about the credibility'* of HYMC. I will return to the importance of these observations later.

14. On 14 October 2015, HYMC was sentenced to 7 years imprisonment with a non-parole period of 4 and a half years for the offence. On the same day Ms HYMC, who was also found guilty as another of the known conspirators in the same offence, was sentenced to 5 years imprisonment with a non-parole period of 3 years. I will refer to some of the observations made by Judge Harbison in her sentencing remarks later in these reasons. Presently, it is only necessary to note that Judge Harbison expressly referred to '*lies*' told by HYMC when he was interviewed by the police.

15. I will deal with the other facts later in these reasons where they are relevant. A great deal of the factual material is not seriously in dispute, it is rather the consideration and weight to be afforded to those facts that is subject to competing contentions. It is only necessary to add that in determining any dispute or important factual matters, I have not given any significant weight to the evidence of HYMC unless it is corroborated. Even though some aspects of his evidence were credible, his general demeanour in giving evidence and history of dishonesty both when he arrived in Australia, when he gave evidence before the RRT and in relation to matters concerned with his criminal offending, give rise to the need to exercise considerable caution about accepting his word on anything important.

**ISSUES**

16. The issues in this review are defined by ss.501CA(4) of the Act which 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.*

17. The power to revoke a decision to mandatorily cancel a visa is only available if a person makes representations to the Minister about why the Minister should exercise the power in accordance with an invitation by the Minister to do so. It is then that a decision to revoke the mandatory cancellation can only be made if the Minister is satisfied that either the person making the representations passes what is known to the Act as '*the character test*'[1] or that there is '*another reason*' why the decision should be revoked.[2]

18. These are the issues that need to be considered although as will very quickly become obvious it is only the third of them that is in any way controversial.

**REPRESENTATIONS**

19. On 18 December 2018, the Minister wrote to HYMC and invited HYMC to make representations about revoking the decision to cancel the Visa. On 14 January 2019, in response to that invitation, HYMC made representations to the Minister about why the Minister should revoke the cancellation of the Visa.

20. I find that HYMC made representations in accordance with the Minister's invitation so that the requirement in ss.501CA(4)(a) is satisfied.

**THE CHARACTER TEST**

21. Sub-section 501(6)(a) provides that "*a person does not pass the character test*" if they have a '*substantial criminal record*'. Sub-section 501(7)(c) provides that a person has '*a substantial criminal record*' if they have been '*sentenced to a term of imprisonment of 12 months or more*'.

22. I find, because HYMC was sentenced on 14 October 2015 to a term of 7 years imprisonment, he does not pass the character test in ss.501CA(4)(b)(i).

[1] ss.501CA(4)(a).
[2] ss.501CA(4)(b).

## IS THERE ANOTHER REASON FOR REVOCATION?

23. The requirement in ss.501CA(4)(b)(ii) that the Minister be satisfied that '*there is another reason why the original decision should be revoked*' is informed by 'Direction No. 79 – Visa Refusal and Cancellation under s 501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA' (Ministerial Direction).

24. Section 499(2A) requires the Tribunal in exercising its functions and powers under the Act, to comply with any written directions given by the Minister under ss.499(1). The Ministerial Direction is such a written direction. The Ministerial Direction is relevant to the evaluative judgment created by the expression '*is satisfied*' in s.501CA(4)(b)(ii). The determination of the review is a power exercised by the Tribunal. It must exercise its powers in conformity with the Ministerial Direction.

25. It is necessary to deal briefly with some aspects of the Ministerial Direction so that the approach to resolution of the controversial issue about whether there is *'another reason'* why the mandatory cancellation of the Visa should be revoked is understood.

### The principles

26. The purpose of the Ministerial Direction is '*to guide decision-makers performing functions or exercising powers under section 501 of the Act…to revoke a mandatory visa cancellation under section 501CA of the Act*'.[3] It also provides '*a framework within which decision-makers should approach their task of deciding whether…to revoke a mandatory cancellation under section 501CA*' and it identifies '*relevant factors that must be considered in making a revocation decision*'.[4]

27. The Ministerial Direction contains both '*principles*' and '*relevant factors that must be considered*' that are required to be applied in a particular way. The principles and relevant factors lie at the core of the framework that is established by the Ministerial Direction.

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[3] Cl.6.1(4).
[4] Cl.6.2(3).

28. The principles '*inform*' a decision-maker about the matters that must be taken into account in determining whether the mandatory cancellation of a visa will be revoked.[5] The principles and the relevant factors regulate the evaluative judgment that a decision-maker, whether it be a delegate of the Minister or the Tribunal, is required to make under s.501CA(4)(b)(ii).

29. The first of the principles records the sovereign right of Australia to determine whether non-citizens of '*character concern*' are allowed to '*enter and/or remain in Australia'*.[6] It records the fact that being in Australia is a privilege that is conferred in the expectation that non-citizens are '*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'*. The principle is about the fact that it is Australia who decides who can be in Australia and that Australia permits people to be here on the express basis that they will abide by Australian law.

30. The second principle refers to the expectation of the Australian community that '*the Australian Government can and should refuse entry to non-citizens, or cancel their visa, if they commit serious crimes in Australia or elsewhere*'.[7] This principle is largely reiterated later in the factors that must be considered, but it is important that it is the '*expectation'* of the Australian community that is relevant here and not the general proposition that those who commit serious crimes in Australia or elsewhere should be refused entry or have their visa cancelled. That comes later in the principles.

31. The third principle refers to '*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 … forfeit the privilege of staying in, Australia*'.[8] The clause operates on the premise of a '*general'* expectation or rule and not one that is either to be applied in every case, or more importantly, in specific circumstances. The word '*generally'* suggests there may be circumstances where the general will, or might, give way to the specific. The other aspect of this principle is that it operates to defeat an expectation. A non-citizen who relies upon an expectation can be afforded no comfort at all that their expectation will be accorded any

[5] Cl.7.1.
[6] Cl.6.3(1).
[7] Cl.6.3(2).
[8] Cl. 6.3(3).

significance in the framework because of this principle; the logical extension of this is that a decision-maker should expressly act on the basis that there is no such expectation that can be afforded any relevance in the decision making process.

32. The fourth principle opens with the words '*In some circumstances*', indicating that there will be specific cases that attract its attention.[9] The '*some circumstances*' are those where '*criminal offending or other conduct'* is so serious *'that any risk of similar conduct in the future is unacceptable'* and, it is '*[i]n these circumstances*' that '*even other strong countervailing considerations may be insufficient to justify not cancelling…the visa*'. What is important is that the principle leaves open two possibilities relevant to not cancelling a visa: first, that where criminal offending or other conduct is not so serious '*strong countervailing considerations*', or, it would seem, even countervailing considerations alone, might justify not cancelling a visa; and second that '*strong countervailing considerations may be',* in any event, insufficient to justify not cancelling a visa. These arise because the principle leaves the door open to such outcomes. The expressions '*strong countervailing considerations*' and '*countervailing considerations*' are neither defined nor, so it would seem, restricted to the relevant factors identified in the Ministerial Direction. What might in a given case constitute '*countervailing considerations*' as well as what may be '*strong countervailing considerations*' is left, presumably, to the decisionmaker's discretion.

33. The fifth principle is that '*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*'.[10] Living in the Australian community for most of their life, or from a very young age, is not qualified by the words '*participating in, and contributing to*' as applies in the case with those who have only been in Australia for a short time. Although it is not expressed to be, these are likely to be amongst the '*countervailing considerations*' that are relevant to the fourth principle.

[9] Cl.6.3(4).
[10] Cl.6.3(5).

34. The sixth principle refers to Australia's '*low tolerance of any criminal or other serious conduct*' of those who hold a limited stay visa as they can have no expectation that they may remain here permanently.[11]

35. The seventh principle refers to the '*length of time a non-citizen has been making a positive contribution to the Australian community, and the consequence of a visa…cancellation for minor children…and family members in Australia are considerations*…'.[12] The use of the conjunction '*and'* and the plural '*considerations'* suggests that positive contribution is not relevant to the issue of consequences for minor children and family members so that, so far as consequences for '*minor children and family members*' are considered, time on its own is immaterial. Again, these matters seem logically to be amongst the countervailing considerations referred to in other principles.

36. None of the principles override or are given more importance than the others. On their face, they appear to be capable of harmonious application. It is true that applying the principles to the various matters that need to be considered in the decision making process requires emphasis to be given to one or more of them, in some cases because of the consideration or relevant factor that must be considered.

**The primary and other considerations**

37. The Ministerial Direction requires that the principles inform the decision-maker's consideration of the matters referred to, in this case, in Part C.[13]

38. Part C contains what are identified as '*primary considerations*' and '*other considerations*'. Both classes of considerations may weigh in favour of or against whether to revoke the mandatory cancellation of a visa.[14] Primary considerations should '*generally be given greater weight than the other considerations*'.[15] Again, the use of the word '*generally*' suggests that there may be circumstances where that is not so. The inquiry is '*whether one or more of the other considerations should be treated as being a primary consideration or*

[11] Cl.6.3(6).
[12] Cl.6.3(7).
[13] Cl.7(1)(b).
[14] Cl.8(3).
[15] Cl. 8(4).

*the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply'*.[16]

39. The '*primary considerations*' are identified as protection of the Australian community from criminal or other serious conduct,[17] the best interests of minor children in Australia[18] and the expectations of the Australian community.[19] The '*other considerations*' include, noting that the class of '*other considerations*' is not closed, international non-refoulment obligations,[20] strength, nature and duration of ties,[21] impact upon Australia business interests,[22] impact on victims[23] and the extent of impediments if a non-citizen is removed from Australia'.[24] In this case HYMC relied on 'other considerations' but arguably, they fitted within one or other of the identified '*other considerations*'. It is not important to the evaluation of those matters as to how they are labelled. What is important is that they are factors that the Ministerial Direction contemplates as matters that can be considered.

40. Many of the *'primary'* and '*other considerations*' identified in the Ministerial Direction set out factors or matters pertaining to each of them that decision-makers '*should give consideration to'*, *'must have regard to*' or '*take into account'*. Other of the considerations are articulated by reference to commentary about what they are and how they are to be '*considered*'. The injunction requiring consideration of matters and the commentary I have referred to have been customarily applied as being referable to the consideration that must be given to each factor with the necessary objective of determining its relative importance, usually referred to as weight, which it is to be given in the decision making process. But the question of what weight to be accorded to each of the considerations is, and remains, despite the Ministerial Direction, ultimately one for the decision-maker to determine.

41. It is necessary to consider each of the primary and other considerations informed by the principles that I have referred to earlier and the various factors and the commentary that informs them that I am required to have regard to. It is convenient to record, consider and

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[16] *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 at [23].
[17] Cl.13.1.
[18] Cl.13.2.
[19] Cl.13.3.
[20] Cl.14.1.
[21] Cl.14.2.
[22] Cl.14.3.
[23] Cl.14.4.
[24] Cl.14.5.

deal with each of the primary and other considerations in turn, dealing with the facts relevant to each of them as they are considered.

**Protection of the Australian community**

42. I am directed to give consideration to '*the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens';* that *'remaining in Australia is a privilege that Australia confers on non-citizens'* with the expectation that they will obey the law, will respect Australia's institutions and will not cause or threaten harm to individuals or the community.[25] Specifically, I must consider the nature and seriousness of the conduct and the risk to the Australian community should further offences or other serious conduct occur.[26] I am required to consider not simply HYMC's criminal offending, namely the offence, but also his '*conduct to date*' which includes his other misconduct whilst in Australia.

43. The Ministerial Direction catalogues nine factors that I must consider in assessing the nature and seriousness of the criminal offending and conduct to date 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;*

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[25] Cl.13.1(1).
[26] Cl.13.1(2).

*(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) when 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.*

The use of the word '*including*' in the introduction to the sub-paragraphs rather obviously suggests I may consider other matters.

44. The phrase '*nature and seriousness'* in the context of criminal offending is redolent of the matters that are routinely considered by sentencing judges when sentencing people who have committed criminal offences.

45. The first matter to consider is the offence. The sentence-imposed indicates that the offence is objectively a very serious one. HYMC was sentenced to 7 years imprisonment for an offence that carried with it a maximum term of imprisonment for 25 years. The offence was a long way off attracting the maximum penalty in terms of its seriousness: one can well imagine more serious offences of the same kind involving as they might larger quantities of prohibited drugs or the involvement of more people or more complex and sophisticated system of offending and so on. It was nonetheless a serious offence. The sentence imposed considered with the sentencing remarks of Judge Harbison identified that the offence was an objectively serious one.

46. The circumstances of the offence involved the recruitment of other people by HYMC who also participated in the commission of the offence, was committed over a period of about 2 months, concerned a conspiracy to import more than twice the commercial quantity of pseudoephedrine (a known precursor or ingredient in the manufacture of methamphetamine) and HYMC was identified as one of the principals in the organization of the conspiracy. The offence took place over a 2-month period. The offence was motivated by financial gain. HYMC's recruitment of others to participate in and help distance himself from the commission of the offence was an aggravating factor. HYMC was one of the principals in the conspiracy playing what Judge Harbison described as '*an essential and central role'*. Associated with the offence was the fact that HYMC lied to those investigating

its commission and that HYMC did not co-operate in the investigation that preceded his conviction and sentencing.

47. The offence was also very serious because of the inevitable consequences of its commission: ultimately the manufacture of methamphetamine for commercial distribution. The consequences of methamphetamine for its users are well documented in decisions of this Tribunal and elsewhere and hardly need to be recorded one more time: it is now notoriously known as a drug that ruins lives and devastates families, friends and others of those involved in its use. Its manufacture, distribution and use comes at a very considerable social cost.

48. I must have regard to, the offence did not involve violence, was not of a sexual nature and was not committed against women or children. The offence was not, at least in the sense I understand it is used in the Ministerial Direction, committed against 'vulnerable members of the community' but it did potentially have consequences for those members of the community who were dependent upon and abusing methamphetamine.

49. So far as the frequency of criminal offending was concerned, this was the only criminal offence committed by HYMC so there is no increase in the seriousness of offending or any trend towards more serious offending and nor can it be said that there is any cumulative effect identified because of the single offence itself. There is no issue associated with lying to the Department or the offence having been committed after a warning or that it was committed whilst in detention or in any way associated with detention. The absence of these matters does not at all detract from the seriousness of the offence. The absence of these factors perhaps makes the offence a little less serious, but not materially so.

50. There is other conduct to be considered: such as the *'false'* and *'misleading information'* provided to the Department by HYMC when he applied for visas to come to Australia twice in 2005 found by the RRT; the false information he gave when he arrived in Australia by reason of the fake passport he used and the false information he gave on the boarding pass about his name and the reason for his visit; his conduct between a greater part of the period from March 2006 to February 2009 which involved him being in Australia unlawfully; as well as his evidence before the RRT concerning his fear of persecution on religious grounds as being the reason why he claimed to require protection which was found to be not credible. These matters all demonstrate a consistent pattern of dishonesty in HYMC's dealing with

public officials and the Department. Although none of the matters attracted criminal sanction and none of them involved violence or damage to people or property, they were acts of dishonesty in respect of significant matters which disrespected Australian law and for that reason must be treated as important.

51. I find that the offence and HYMC's other conduct before entering Australia (by attempting to obtain a visa based on false information), when he entered Australia (by using a fake passport that he dishonestly obtained) and after his entry into Australia (by unlawfully remaining in Australia and giving false evidence to the RRT) are very serious matters that firmly weigh against revocation.

52. In considering the protection of the Australian community, I must also look at the risk to the Australian community. I am required to have regard to, '*cumulatively', 'the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct*'[27]; and '*the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen reoffending'*.[28]

53. There is little doubt that should HYMC offend again, the damage to individuals or members of the Australian community would be considerable. The decisions of the Tribunal are one voice in this respect.[29] HYMC referred to Judge Harbison's sentencing remarks where her Honour said that the introduction of unlawful drugs into the Australian community can have '*grave social consequences'* and that the importation of more than 2 kilograms was '*capable of wrecking significant damage on our community*'. There was really no issue between the parties in relation to assessing the likely harm should the offence be repeated. I find that the consequences of the offence being repeated are significant.

54. I do not, however, consider that the risk is unacceptable or, to use the words of the fourth of the principles to which I have referred earlier as *'so serious that any risk of similar conduct*

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[27] cl.13.1.2(a).
[28] cl.13.1.2(b).
[29] *DMZZ and Minister for Immigration and Border Protection* [2017] AATA 1217 at [50]; *Hood and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 539 at [71]; *SCJD and Minister for Home Affairs* [2018] AATA 4020 at [72]; *VPKY and Minister for Home Affairs* [2019] AATA 352 at [18] and [20]; *Lansdowne and Minister for Home Affairs* [2019] AATA 2448 at [107]-[109].

*in the future is unacceptable'.* The offence and the conduct is objectively serious, but if, for example, regard is had to the sentence imposed it was not the most serious offence of its kind with the sentence falling well short of the maximum sentence available. The word '*unacceptabl*e', imports an evaluative judgment that such a risk would be intolerable or unbearable. All offences, especially serious ones are noxious but that does not make the risk of their commission necessarily unacceptable. I do not consider that the offence here, albeit serious, is of such gravity that any risk of its repetition cannot be countenanced.

55. The more difficult issue concerns the likelihood of HYMC engaging in further or other serious conduct. In approaching this issue there are several matters that lend to the conclusion that the prospect of HYMC reoffending should not be considered high.

56. First, he is now a 40-year-old man who has one, albeit a serious one, criminal conviction to his name. He is not a repeat offender and he did not start his criminal career, if he has one, at a young age. That being older is associated with a decreased risk of re-offending was confirmed in the evidence of Mr Visser, a Clinical Psychologist who gave evidence about HYMC's prospects of re-offending. I will return to his evidence more generally in a moment.

57. Second, the sentence imposed was towards the higher end of the sentencing possibilities with Judge Harbison observing that '*I am satisfied that the disastrous effect on your family, and particularly on your children, of a long period of imprisonment will weigh heavily on you, and will be a significant deterrent against you being involved in criminal behaviour in the future*'. It remains to be seen whether that objective has been achieved but the purpose in the heavy sentence should not be ignored in assessing the risk of further criminal offending.

58. Third, there is a pattern in the various views of those concerned with HYMC and the issue of his prospects of repeat offending: Judge Harbison described the prospects of rehabilitation on the '*limited material'* then available as '*moderately good*';[30] Philip Gorrell, a psychologist who HYMC consulted in early 2019 expressed the opinion that '*[HYMC] provided no indication that he would ever again consider being involved in criminal activity'*[31] and otherwise agreed with Judge Harbison's assessment; and most recently, Mr Visser's opinion in his report of 17 July 2020 that HYMC '*presents a low to low-moderate risk of*

[30] G59.
[31] G161.

*recidivism'*[32] although, Mr Visser revised this in oral evidence when presented with some further facts to a '*low/moderate'* risk of recidivism.[33] I should add that the factors identified by Mr Gorrell that appear to have been particularly important in informing the opinions he expressed included: HYMC's 'model inmate' status; HYMC embracing opportunities whilst in custody to arm himself with skills to allow him to reside in Australia; and the support he will have from others, including his wife and his friends who provided accommodation and cared for his children for a period while he and his wife were serving their sentences.

59. Fourth, Mr Visser's opinion itself, which is the most recent professional opinion about HYMC's risk of reoffending, is that HYMC has a low to medium risk of re-offending. That opinion was informed by an assessment using the principles laid down by the Australian Institute of Criminology. I have already referred to his identification of age as being consistent with a low risk of recidivism. He referred to the type of offence, being drug related rather than one involving violence, as being indicative of a low risk of reoffending.[34] He also referred to the factors identified by Mr Gorrell, the support he will receive from his wife and friends as being important 'lifestyle factors' which suggested that HYMC was of lower rather than higher risk of reoffending. Mr Visser had available to him and reviewed all of the relevant documents that had been relied upon by the delegate.[35] I was impressed by Mr Visser's evidence both in its written form, it being well reasoned and easy to understand, and in its oral form which was given in a measured and straightforward manner. He gave evidence consistent with the obligation of any expert, that being to assist the Tribunal. Mr Visser expressed some confidence in the accuracy of his opinion describing his confidence in it as reasonably accurate.[36] I accept his evidence concerning the likely risk of HYMC reoffending. I have confidence in his opinion.

60. Fifthly, the risk of deportation should he offend again is a significant factor that will operate to condition the risk of HYMC reoffending. The fact that he will lose contact with his wife and children is likely to be a significant ameliorating factor in the prospect that he will at some time in the future re-offend.

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[32] Exh 7, line 56 and 315 to 320.
[33] Transcript 88.21.
[34] Exhibit 7 at 310 – 315.
[35] Exhibit 9.
[36] Transcript 91.10.

61. The Minister referred to HYMC's attempt *'to downplay his role in the conspiracy and to shift responsibility, and blame, onto others'* as being indicative that there was real risk that HYMC would reoffend in the future. The Minister referred to the representations made to him by HYMC and to the findings of Judge Harbison as demonstrating a lack of remorse and lack of rehabilitation. I note that these matters did not count against HYMC in the expert opinions of Mr Gorrell and, more importantly, Mr Visser. Mr Visser said in his evidence that the *'lack of acknowledgement*', which included '*a person downplaying or minimising their conduct'*[37] was a relevant factor in assessing the risk of recidivism but a '*relatively minor one overall*.'[38]

62. The Minister also referred to the circumstances that gave rise to the offence which did not appear to have been disputed. Those circumstances were of HYMC's family's '*parlous financial situation*' and the fact that he '*needed a job desperately*'. The Minister said that those circumstances were not materially different from those that will accompany HYMC in the event of revocation should his promised post detention employment not eventuate or terminate. Again, Mr Visser's evidence suggested that the increase in risk if HYMC lost his job and found himself in similar circumstances was likely to be slight.[39]

63. I find, consistent with Mr Visser's opinion, that the risk of HYMC re-offending is in the low to moderate range of such risk. I have already found that the nature of the harm to individuals and to the Australian community should HYMC re-offend to be significant.

64. The seriousness of the offence, the harm to the community if the kinds of conduct are repeated and the low to moderate risk of repeated misconduct of a serious kind lead me to conclude that protection of the Australian community is an important factor that counts in favour of non-revocation. I have come to this conclusion because whilst the offending and the likely harm to the community if it is repeated is serious, the likelihood of the conduct being repeated moderates the strong weight that might otherwise be given to this consideration.

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[37] Transcript 88.33.
[38] Transcript 86.12.
[39] Transcript 89.7 – 89.20.

**Best interests of minor children in Australia affected by the decision**

65. Next, I am required to consider the best interests of children who may be affected by the decision to either revoke or not revoke the mandatory cancellation of the Visa.

66. Clause 13.2(2) requires that I only consider minor children, that is children under the age of 18 years when I make my decision. Clause 13.2(3) requires that I consider the interests of any such children individually to the extent that their interests may differ.

67. Again, like with cl.13.1.1(1), cl.13.2(4) requires that in considering the best interests of minor children I consider a list of matters. Those matters 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.*

68. The minor children whose best interests I must consider are HYMC's children, namely Y, Z1 and Z2. The children are presently 13, 11 and 9 years of age.

69. I immediately put to one side as irrelevant the considerations in (g) and (h) as there is no evidence about those matters or even the slightest suggestion that they are relevant.

70. I will deal with the other relevant matters in turn. The relationship with each of the children is father and daughter and father and son. There is an existing relationship between each of the children and HYMC, although that is presently affected by HYMC being in detention. HYMC has had limited contact with them since he was incarcerated on 12 December 2014. The contact since then has been usually by way of telephone and 'WeChat', a social media messaging platform not dissimilar to FaceTime. The children have visited him during school holidays whilst he was incarcerated in Victoria and have visited him since he has been in detention. I do not think much can be made of the fact that has only been on 9 occasions given both the evidence about the almost daily contact by telephone and other ways, but also having regard to the fact that for much of that time, HYMC was incarcerated in a different State. HYMC's evidence that he has a close relationship with his children is corroborated by his wife who said he would telephone the family daily. His evidence that he has a close relationship with his children was also corroborated by LH, a friend of HYMC who has known him since his arrival in Australia in 2006. I accept that he has a close paternal relationship with each of the children.

71. I accept that HYMC would, having regard to his relationship with his children, before his incarceration, and since, be likely to play a positive role in their upbringing and each of them has a number of years before they are 18 years of age during which he can play that role.

72. None of the children gave evidence about their wishes. I am not prepared to draw any inference from that given their ages, what they have been through to date and given the nature of proceedings before the Tribunal. There is, in any event, evidence in Mr Gorrell's report of 27 March 2019 that each of the children have expressed the wish that their father would come home. Z1 said to Mr Gorrell '*I just really want to tell you I really miss dad and want him to come home soon'*. Z2 said '*If dada comes home it will be really good. I miss dad'*. Y said to him that she was sad and really misses her father. Ms HYMC also gave evidence, which I accept, that Y would be '*heartbroken and shattered'* if her father were deported. She spoke of her desire that HYMC be a role model for Z1 and Z2. She expressed the view that each of the children were close to their father. I consider that each of the children are old enough to express their view about the preference to have their father grow

up with them. The evidence is reasonably compelling that the children wish to have their father live with them, and I should add, for children of their ages, this is unsurprising.

73. I do not consider that any of HYMC's past conduct will necessarily have an impact on the upbringing of any of the children. It has had to date some impact given that they have not been with their father in a day to day relationship for some years. Ms HYMC gave evidence that the children have, to some extent, been sheltered from the reasons of why their father was incarcerated and is currently in detention.

74. It is not possible to make any finding about what impact the past conduct will have upon them. It is not possible to determine the likely future conduct of HYMC so I cannot determine what impact that may have on them. I have already indicated some doubts about accepting HYMC's evidence without corroboration. I incline to the view, having regard to his daily contact with his children whilst incarcerated and in detention and his relationship with his children before then, corroborated as it was by Ms HYMC's evidence, that there will be some effort on his part to make amends for his past such that his past conduct is unlikely to have a significant adverse effect on each of the children.

75. It would be possible for the children to remain in contact with HYMC by telephone and other visual platforms such as WeChat, if the mandatory cancellation were not revoked. It is nonetheless difficult to make any meaningful assessment of the impact that any separation in a physical sense would have on any of the children should their contact with their father be restricted in that way. In the view I take, limiting their contact with their father to telephone and WeChat is unlikely to be in their best interests.

76. It is true, as the Minister submitted, that the children have available to them Ms HYMC as their parent and mother, but as the Minister fairly acknowledged, Ms HYMC is not their father. It is also relevant that Ms HYMC suffers from her own challenges, suffering as she does from anxiety and depression for which she is on medication. That does not instil any confidence in concluding that with her alone the three children will have the level of parental support which would foster their best interests should non-revocation occur.

77. The evidence supports the almost inescapable conclusion that each of the children have experienced psychological and emotional instability and distress resulting from their separation from both their parents initially, and then more latterly, from their father. After

both of their parents were incarcerated, they were, for a short period of time, in foster care, then, for a period of two years, lived with HYMC's close friends, GZ and his wife and then, lived in China with Ms HYMC's parents for a year. Since her release from prison, they have lived with their mother. Their childhood has, to date, been far from ideal. In that context, it is hardly surprising that the expert opinions refer to the psychological issues the children have confronted and are likely to confront should HYMC be deported.

78. A report from Dr Jui-shan Chang, a psychotherapist and counsellor, of 8 January 2019 expressed the long-term adverse impacts that deportation of HYMC would have on each of the children. This was confirmed by Mr Gorrell who said that '*…it is apparent that his children are psychologically struggling. Deportation of [HYMC] will make the children's struggle worse. They have already experienced their parents' perceived abandonment and, the deportation of their father will raise those fears and psychological ramifications again'*.[40]

79. I find that revocation would be in the best interests of the children. In my opinion, having regard to the matters which I am required to give consideration to as well as the other matters I have identified, being the impact on the children to date, the best interests of the children are a powerful consideration favouring revocation.

**Expectations of the Australian community**

80. The third primary consideration is that found in cl.13.3 and says that:

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

81. The effect of this primary consideration is that it imputes to the Australian community the expectation that those who have permission to remain in Australia will obey Australian laws, that it may be appropriate not to revoke mandatory cancellation of a visa where that expectation has been breached or where there is an unacceptable risk of breach and that

[40] G160.

cancellation of a visa may be appropriate simply because of the concerns about character or the offences means that they should not hold a visa.

82. The question to be dealt with does not involve some excursion into consideration of what, or what not, the Australian community expects because that is normatively expressed in the terms of the consideration itself. Rather, the inquiry is whether '*it is appropriate to give more or less weight to a deemed community expectation of*' non-revocation of mandatory cancellation *'that might otherwise arise simply because of the nature of the non-citizen's character concerns or offences*'.[41] And of course, it may be possible that the consideration does not have any work to do at all because this case is in the class of case where it is not appropriate to ascribe any, or any significant weight, to the normative position. The answer is informed by the circumstances and the principles to which I have referred to earlier.

83. The first, second and sixth principles (and it does not seem that the sixth principle has relevance as it is confined to limited stay visas) in substance repeat the consideration I am addressing. The third principle points to the general proposition that a serious crime should result in non-revocation. I have already found that in terms of the fourth principle, I do not consider that the criminal and other conduct in this case is so serious that any risk of it being repeated is unacceptable, but its reference to the potential application of *'countervailing considerations*' is, as I observed earlier, important. The fifth principle is not engaged because HYMC has not lived in Australia for '*most of his life or from a very young age'*.

84. It is the seventh principle that is most relevant – the weight I am to ascribe to the '*expectations of the Australian communit*y' requires consideration of the length of time HYMC has been making a positive contribution to the Australian community and the consequences for minor children and other immediate family members of non-revocation. These are the countervailing considerations, or at least some of them, that are referred to as conceivably being relevant because of the reference to the phrase *'countervailing considerations'* in the fourth principle. I consider that the two matters referred to in the seventh principle are matters which moderate this consideration.

85. HYMC has been in Australia for 14 years. He has been incarcerated or in detention for nearly 6 of those years. Of the time he was not incarcerated or in detention, he positively

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[41] *FYBR v Minister for Home Affairs* [2019] FCAFC 185 at [77] (per Charlesworth J).

contributed to the Australian community by way of engagement in paid employment and more generally, participation in the community. His participation in his church, for example, is the kinds of thing that I consider are relevant to this aspect of this principle. Although relevant, I do not consider things like 'contributing to charities' to be of great significance in the consideration of this factor. What is important is what the person has done for the community whether it be by reference to the contribution to social groups defined by religion, sport, culture or participation in politics or whether it be defined in some less obvious but nonetheless identifiable way. There was not much evidence about any of these matters.

86. The consequences to HYMC's children and his wife are significant factors to be considered. In considering this matter, I am not confined to a consideration of the 'best interest of minor children', although that is obviously very relevant. I am required to pay heed to the interests of other family members whose interests would otherwise not be considered at all in the other primary considerations. So, in this case, the consequences more generally for HYMC's minor children and the consequences for his wife must be considered in determining the weight to be accorded to this primary consideration.

87. I have already found the best interests of Y, Z1 and Z2 strongly favour the revocation of the mandatory cancellation. For Ms HYMC, the consequence of non-revocation would be significant to her. Her evidence concerning her relationship with HYMC suggested that the personal consequences for her of HYMC being required to leave Australia would be significant. Ms HYMC said that she would be heartbroken and that she did not know how she would survive in the event of non-revocation. The evidence about that and the consequences to her of becoming a single mother raising three young children was consistent with what one would ordinarily expect to be the effect on her. The fact that there '*is not a single day'* when she and her husband do not communicate was also consistent with the picture she painted of a close relationship with her husband despite their respective periods of incarceration. The fact that Ms HYMC is suffering from a mental health condition and is taking medication for it means that there is likely to be additional consequences for her over and above the loss of her husband and her children's father.

88. In the absence of the consequences for Y, Z1, Z2 and Ms HYMC, I would have found the expectations of the Australian community having regard to the seriousness of the offence to be a fairly significant factor weighing against revocation. In the view I take and applying the principles, I consider that those expectations should be given less weight because of

the consequences for Y, Z1, Z2 and Ms HYMC. These are countervailing considerations that moderate what otherwise would be the expectations of the Australian community which would point to non-revocation. This consideration weighs in favour of non-revocation.

89. I turn next to deal with the 'other considerations' to which the Ministerial Direction turns my attention to.

**Australia's international refoulment obligations (or an 'other consideration')**

90. Clause 14.1 of the Ministerial Direction requires consideration of Australia's international treaty obligations not to forcibly return a person to a place where they will be at risk of specific harm arising from Australia's international obligations. HYMC also characterised his claim concerning these matters as an 'other consideration' under cl.14 of the Ministerial Direction if the Tribunal did not find that Australia's international obligations extended to the circumstances confronting HYMC.

91. Articles 7, 10 and 347 of the Chinese Criminal Law (CL) are foundational to the engagement of Australia's non-refoulment obligations. Those articles are plain enough in their meaning and effect. They provide:

> *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.*

92. It is plain enough that so far as China is concerned CL applies to Chinese citizens and their conduct beyond the territorial limits of China. The question of whether there is a risk of harm is not, however, answered by regard to theoretical possibilities concerning prosecution. The question is whether the risk is real and invites consideration of whether a citizen of China who has committed a criminal offence beyond the territorial limits of China would in fact be prosecuted upon return to China.

93. The most comprehensive consideration of the issue as it relates to non-refoulment obligations so far as China is concerned is found in the decision of the United Kingdom Asylum and Immigration Tribunal (UK Tribunal) in *JC and The Secretary of State for the Home Department* (*JC*).[42] This Tribunal has applied and followed *JC.* The approach and analysis in *JC* were based on what remains relatively contemporary information.[43] The analysis is compelling. Absent some sound reason not to do so it is appropriate to adopt it.

94. In *JC* the UK Tribunal was '*satisfied that there is a double jeopardy risk under Article 10 CL, but that absent particular aggravating factors, the risk falls well below the level required to engage international protection under the Refugee Convention, the ECHR, or humanitarian*

[42] [2008] UKAIT 00036.
[43] *Liang and Minister for Immigration and Citizenship* [2013] AATA 392 (*Liang*); *XRXL and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] AATA 5984 (*XRXL*); *FRVT and Minister for Immigration and Citizenship* [2020] AATA 294 (*FRVT*); *Yu and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 1002 (*Yu*). *QTNZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 804 (*QTNZ).*

*protection*' and that *'[m]erely to have committed a crime overseas, been sentenced and punished for it will not be enough to entail a prosecution under Article 10 CL; nor under Article 7 CL is it sufficient to have escaped punishment for an overseas offence*.'[44]

95. The ultimate conclusion in JC was that '*the risk of prosecution or re-prosecution will be a question of fact in individual cases but is more likely where: (a) there has been a substantial amount of adverse publicity within China about a case; (b) the proposed defendant has significantly embarrassed the Chinese authorities by their actions overseas; (c) where the offence is unusually serious. Generally, snakehead cases in China do not have the significance they have in the West and are regarded as ordinary (but serous) crimes requiring no special treatment; (d) political factors may increase the likelihood of prosecution or re-prosecution; (e) the Chinese Government is also particularly concerned about corruption of Chinese officialdom*'.[45] JC did not, as the words '*will be a question of fact in individual cases*', suggest at all that the matters which it identified were the limits of the circumstances in which there was a, or would be a higher, risk of prosecution or re-prosecution. It simply identified five circumstances where the risk would be more likely.

96. *YF and The Secretary of State for the Home Department (YF),*[46] decided only 2 years after *JC* reconsidered *JC. YF* confirmed *JC but* added parenthetically to the '*political factors*' that might be relevant to a decision the words '*(which may include the importance attached by the Chinese authorities to cracking down on drugs offenders)'.*

97. In *Liang* DP Forgie found, after reviewing the available material both from Australia and elsewhere, that there were no substantial grounds for believing that there was a real risk of Mr Liang suffering significant harm as a result of prosecution for *his conduct in Australia* for which he was found criminally liable in Australia.[47] This was because the Chinese Government appeared generally unconcerned about offences committed by Chinese citizens outside of China. So much was consistent with *JC. Liang* also involved conduct that happened in China. Mr Liang had in fact gone to China for the very purpose to *'put in place a source of supply on an ongoing basis'.* It was that conduct which raised the spectre of that part of Article 347 that refers to *'to take part in organized international drug activities*'. His

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[44] supra at [273] (17) – (18).
[45] supra at ]273] (19).
[46] [2011] UKUT 32.
[47] at [146].

conviction in Australia related to trafficking in cocaine and had nothing to do with his other activities in China.[48] DP Forgie observed that: '*[A]ll 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*…'. It was '*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'* that there was real risk of Mr Liang suffering significant harm. The analysis was faithful to the approach in *JC* treating the matter as a question of fact in the circumstances and giving credence to the political factor involving the Chinese authorities' crack down on drugs. There is not such that is surprising about the prospect of Mr Liang being re-prosecuted given what he got up to in China and the attitude of Chinese authorities to drugs.

98. Of course, even though *Laing* concerned facts that involved things done in China, the reasoning was not confined to the question of whether there was conduct by the non-citizen on Chinese soil that would attract the attention of the Chinese authorities. The approach is unremarkable when the kinds of things laid down by *JC* and re-affirmed in *YF* are considered. Also, *Liang* might be said not to be a genuine double jeopardy case at all as he had not been prosecuted before for his activities in China directed *'to put[ting] in place a source of supply on an ongoing basis'.* It was that conduct that attracted Article 347 so far as it refers to taking *'part in organized international drug activities'* grounding the real prospect of him being prosecuted upon return. *Liang* was consistent with *JC* so far as the *'activities having a connection with China'* might be regarded as aggravating and might reasonably seen as a political factor increasing the risk of prosecution.

99. In *FRVT* Member Eteuati dealt with a circumstance where FRVT's only activities involved importing ephedrine to Australia from China. Member Eteuati considered '*without more*' that may not have engaged Australia's non-refoulment obligations.[49] Again there is not much surprising about that, involving as it did a straightforward application of *JC*. It was the fact that the Chinese authorities discovered the consignment and alerted the Australian authorities to it happening that engaged the non-refoulment obligation. It was the '*special*

[48] *Liang* at [147].
[49] [2020] AATA 294 at [306].

*attention'* that had drawn the Chinese authorities' attention to FRVT that engaged the real possibility of re-prosecution. That knowledge and the political imperative to which *YF* referred activated the real prospect of a second prosecution. *XRXL* applied *JC* as identifying the factors that were likely to engage Article 10, noting that they were not present in that case. Again, in *Yu* the issue was considered once more, but there was no question of any territorial link between the criminal offences and China apart from the applicant's citizenship. In *QTNZ* there was no found or stated nexus between China and the offending: *'[t]he Applicant …was limited to acting as the receiving point in Australia for a package containing precursors. His offending did not involve any element of him travelling overseas to China (or anywhere else)'.*[50] All of these cases demonstrate a consistent pattern of the application of *JC.* There is no sound reason to depart from that approach.

100. Applying *JC* to this case HYMC was not convicted for anything he did in China by way of organizing the location and export from China of pseudoephedrine. His offence in Australia was solely related to his conduct in Australia of conspiring to import pseudoephedrine to Australia. It is difficult to see how his activities can be viewed as having a real connection with China or an obvious or overtly Chinese connection. The circumstances of HYMC's offending were not far removed from those considered in *QTNZ* and *FRVT*, although so far as the latter is concerned absent the involvement of the Chinese authorities. Unlike Mr Liang's offending HYMC had nothing additional for which he might be prosecuted in China. There is nothing 'in China' about HYMC's conduct.

101. There was no evidence other than the most general statements about anything that HYMC did in China. HYMC pointed to the findings of Judge Harbison '*…that, although there is no direct evidence of your guilt, it was an irresistible inference that each of you in collaboration with a person or persons in China, who could not be identified, had conspired to import those packages into Australia…*'.[51] HYMC was found to be one of *'the principals and organisers of the conspiracy from the Australian end, and that [he] played an essential and central role in that conspiracy*' and that the conspiracy was *'a serious, relatively sophisticated enterprise'*.[52] Reliance was also placed on the connection between China and Australia that followed from HYMC having liaised with his wife about aspects of the

[50] At [164].
[51] G 32 at [6].
[52] G36 at [32].

conspiracy whilst she was present in China and he was in Australia. None of these factors had anything that compelled a conclusion that HYMC as distinct from others was doing anything in particular in connection with someone in China to advance his offence.

102. That is not to deny that the offence in this case has a territorial nexus or connection with activities taking place in China where the other end of the conspiracy was being sorted out. There is, however, nothing that would suggest that there was anything more done by HYMC beyond the conspiracy itself for which he was convicted in Australia. There is nothing identified that he did in China, or with someone in China, that goes beyond the actual offence. It cannot be said, for example, that he played any role like Mr Liang in setting up a future supply network in China even if that did not involve going to China. There is nothing extraordinary that would involve the Chinese authorities like, for example, their intimate involvement in uncovering the conspiracy in China as was the case in *FRVT*. Although something more than a mere recipient at the Australian end, HYMC's involvement, so far as it related to China, discloses nothing beyond what he was convicted for in Australia.

103. There is no evidence to support the conclusion that the Chinese authorities have been embarrassed by anything that HYMC has done in Australia or that his case has attracted any publicity at all in China. There is nothing to suggest that the offence is *unusually* serious as distinct from being a very serious offence. The fact that the Australian Government considered the offence as serious does not make it *unusually* serious. There is nothing that attracts the prospect that political factors such as the Chinese authorities' crack down on drugs will increase the likelihood of re-prosecution in this case.

104. I do not consider that there is any basis upon which it can be soundly concluded that HYMC will be at risk of harm as a necessary and foreseeable consequence of him being removed from Australia. I do not give this consideration any weight.

**Strength, nature and duration of ties**

105. Clause 14.2 of the Ministerial Direction requires that attention be paid to the strength, nature and duration of ties in Australia. Clause 14.2(1)(a) requires me to address the issue of how long HYMC has resided in Australia, but giving 'less weight' where the offending started 'soon after' arrival in Australia and 'more weight' where 'time has been spent positively contributing to the Australia community'.

106. HYMC has been in Australia for about 14 years. His offence was committed about 6 years into his stay in Australia although, at least in one sense, his offending, if it refers to conduct other than criminal offending, started before he arrived in Australia or upon his arrival. In my opinion, the reference here is most probably to criminal offending, but in any event it is probably contextually referable to negative contributions to the community more than anything else. In that sense, the criminal offending is the starting point of his offending. It perhaps only marginally affects the weight that is given to this aspect of this consideration given that 6 years is a relatively short period of time in any event.

107. HYMC worked as a gyprocker in the construction industry for much of that time. He was involved in his church as a church goer. His work and involvement in his church as well as his place in the Australian community more generally suggest that he was, for much of the 6 years, contributing to the Australian community. It is not possible to make any significant findings about his contribution beyond what I have said. Those things carry weight, but it can hardly be regarded as significant in the scheme of things.

108. HYMC has family ties in Australia: his wife and children who are Australian citizens. The fact that they are Australian citizens is relevant.[53] He has ties with his children that have existed over their entire lives. He has a relationship of about 16 years with his wife who he married in 2017. Their relationship was described by her as 'very close and loving'. I accept her evidence about that. I have already dealt with the consequences for Ms HYMC and the children in the event of non-revocation. I have already said that I consider those consequences to be serious and significant.

109. The Minister fairly conceded the consequences to Ms HYMC and inferentially Y, Z1 and Z2 both emotionally, physically, and by reference to the likely financial hardship of non-revocation.

110. HYMC has close ties with GZ and his wife XZ. The strength of their ties is evidenced by the fact that while HYMC and his wife were incarcerated, they cared for Y, Z1 and Z2 for about 2 years. They are both permanent residents of Australia. That is relevant.[54] There is no

[53] Cl.14.2(b).
[54] Supra.

doubt that they will be affected by non-revocation, but it pales into insignificance so far as the consequences for Ms HYMC and the children are concerned.

111. Although the time during which HYMC has been making a positive contribution to the Australian community is relatively short, the second aspect of this consideration concerning his family and friendship ties, requires that I give it some weight in favour of revocation.

**The extent of impediments if removed**

112. Clause 14.5 requires me to consider the extent of any impediments that exist for a non-citizen in establishing and maintaining a basic living standard for themselves. I am required to consider age, health, language and cultural barriers and social, medical and economic support that may be available.

113. HMYC is 40 years of age. He takes medication for hepatitis B. He is suffering from Major Depressive Disorder with mild to moderate symptoms. Ms Lechner, a consultant psychologist who prepared a pre-sentence report for the sentence proceeding before Judge Harbison also diagnosed Major Depressive Disorder.[55] Mr Visser considered this would subsist if not get worse in the event of non-revocation. Mr Visser also expressed the opinion that he had '*relatively low cognitive functioning and the existence of symptoms of major depression'*.[56] There is no sound reason, let alone any reason, to underestimate the significance that HYMC's mental illness will have upon his capacity to re-establish his life in the event of non-revocation. Ms Lechner also said HYMC had *'short perceptual reasoning index [which] was in the mildly intellectually disabled range, and that overall [HYMC's] cognitive functioning was likely to be well below the average range*'.[57] Both HYMC's mental illness and his intellectual disability suggest that there will be impediments for him if he is relocated especially without the family and social support that he would have in Australia.

114. HYMC's first language is Mandarin which he speaks fluently. He does not speak English fluently and required an interpreter during the hearing. That would be something that would assist him in the event of non-revocation.

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[55] G57 [157].
[56] Exhibit 7 line 185.
[57] G56 [136].

115. There is some issue as to whether HYMC, if returned to China, would be entitled to social, medical and economic support in China. At present he has no such entitlement as he does not have a *hukou permit*. It is not clear if he would be granted a permit upon his return. The uncertainty posed by the evidence weighs in favour of revocation albeit not significantly so given that his parents and siblings are likely to be able to offer him some, even if limited, support.[58] The fact that his parents are elderly may impact upon their capacity to assist him as might the fact that his siblings have their own families to look after. It is difficult to accept that he would be left high and dry by his family in the event of his return.

116. HYMC's absence from China for more than a decade, his isolation from his wife and children, the doubts about his access to welfare services, his mild cognitive impairment and in particular, his present mental health condition, weigh in favour of revocation.

**Other 'other' considerations**

117. I have considered the matters referred to here as 'other' other considerations even though they quite probably fall within the category of 'impediments if removed'. As I observed earlier it matters little as to what the label might be that is placed upon their consideration. What is important is the weight, if any, that they are ascribed in the decision-making process.

118. HYMC referred to the COVID-19 pandemic which is likely to have several consequences for him in the event of non-revocation. They fell into three categories: the hardship he will suffer from the economic fallout in China, particularly in relation to obtaining employment; the prospect that he will be at greater risk of contracting the new coronavirus in China; and the prospect, given travel restrictions to China, that the outcome of non-revocation will be a prolonged period of time in detention. There was some debate as to the accuracy of some of the material concerning COVID-19's current effect in and on China. Perhaps the best that can be safely said is what was said by the World Bank in its East Asia and Pacific Economic Update April 2020: '*Due to the COVID-19 pandemic, economic circumstances within countries and regions are fluid and change on a day-by-day basis'*.[59] That was the position on 27 March 2020, but I doubt much has changed since then especially given recent Australian experience. These matters, like they did in *FRVT,* weigh in favour of revocation.[60]

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[58] See, also, *FRVT* and *Minister for Immigration and Citizenship* [2020] AAT 294 at [297].
[59] Exhibit 10 at 29.
[60] at [298] to [299].

119. HYMC also referred to the prospect of persecution because of his Christian beliefs. The evidence was a little equivocal about many of the matters asserted. There is no doubt that China has scrutinized Christianity more carefully in recent years although the level of scrutiny varies from province to province. The material concerning Fujian province, where HYMC is most likely to return, does not support the general proposition that those who practice Christianity at an individual level are likely to be subject to persecution. The DFAT country information describes the risk of persecution as low. I do not consider I should give any weight to this consideration mainly because I am not at all persuaded that HYMC will in fact be persecuted if he returns to China because he is a Christian.

120. These 'other' considerations weigh in favour of revocation.

**Impact on Australian business interests and impact on victims**

121. Both parties submitted that the factors had no relevance to this matter and having considered them, I consider that they have no relevance.

**CONCLUSION**

122. I have found that the protection of the Australian community weighs in favour of non-revocation. I consider that even though the nature and seriousness of HYMC's offending is a very weighty factor relevant to protection of the Australian community, it is moderated in a material way by the low to medium risk of HYMC offending again or engaging in other serious conduct. I have found that the expectations of the Australian community favour non-revocation, but those expectations are also to be moderated having regard to countervailing considerations, namely the consequences for Y, Z1 and Z2 and Ms HYMC of non-revocation. I have found that the best interests of Y, Z1 and Z2 weigh substantially in favour of revocation. The primary considerations when weighed against each other, slightly favour revocation because of the weight I have given to the best interests of Y, Z1 and Z2.

123. As to the other considerations, I have found that Australia's non-refoulement obligations should not be attributed any weight. I have found that the strength, nature and duration of HYMC's ties weighs in favour of revocation as do the impediments if he is removed. I also consider that the uncertainty associated with the COVID-19 pandemic, its fluid nature on a day to day basis and its significant economic and other effects on China to date weigh in favour of revocation.

124. Upon weighing all the considerations, I am satisfied that there is another reason in favour of revocation.

125. I set aside the decision to cancel HYMC's Class XA Subclass 866 Protection Visa and substitute a decision revoking the decision to cancel that visa.

*I certify that the preceding 125 (one hundred and twenty five) paragraphs are a true copy of the reasons for the decision herein of*

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

Associate

Dated: 11 August 2020

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| Date(s) of hearing: | **23 July 2020 and 24 July 2020** |
| Counsel for the Applicant: | **Dr J Donnelly** |
| Counsel for the Respondent: | **Mr N Swan** |