Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2020/3850**
Re:	**Ospina**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Tavoularis**
Date:	**14 September 2020**
Place:	**Brisbane**

The decision under review is affirmed.

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

Senior Member Tavoularis

CATCHWORDS

MIGRATION – Non-revocation of mandatory cancellation of a Partner (Class BS) (Subclass 801) visa – where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 79 – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth)

CASES

Afu v Minister for Home Affairs [2018] FCA 1311

ETWK and Minister for Immigration and Border Protection [2017] AATA 228

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, (2016) 153 ALD 337

Lee and Minister for Home Affairs (Migration) [2019] AATA 861

Marzano v Minister for Immigration and Border Protection [2017] FCAFC 66, (2017) 250 FCR 548

Minister for Home Affairs v Buadromo [2018] FCAFC 151

Stone and Minister for Immigration and Ethnic Affairs (1981) 3 ALN 81

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

Uelese v Minister for Immigration and Border Protection [2016] FCA 348

Waits and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 1336

YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

SECONDARY MATERIALS

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

Contents

REASONS FOR DECISION

Senior Member Tavoularis

14 September 2020

INTRODUCTION AND BACKGROUND

1. Mr Alexander Osorio Ospina ("the Applicant") is a 52 year old citizen of Colombia.[1] Movement records indicate that the Applicant arrived in Australia on 8 December 1997 and has not left Australia since that date.[2] The Applicant arrived into Australia on a Tourist (Subclass 676) visa. Subsequently, on 29 May 2007, the Applicant was granted a Partner (Class BS) (Subclass 801) visa ("the visa").[3]

2. The Applicant has a short but extremely serious criminal history in Australia. Uniquely in matters of this type, his offending history involves the commission of a single offence in

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1 Exhibit R1, Respondent's Statement of Facts, Issues and Contentions "SFIC", page 1, paragraph [3].
2 Exhibit G1, s501 G Documents, G10, page 69.
3 Exhibit R1, Respondent's SFIC, page 1, paragraph [4], and see Exhibit G1, s501 G Documents, G10, page 66.

Australia, comprising *Conspiracy to possess commercial quantity – unlawfully import border-controlled drugs.* This offending came before the District Court of New South Wales (held at Sydney) for sentencing on 10 July 2009. The Applicant was convicted and sentenced to a head custodial term of imprisonment for 20 years.

3. The custodial term commenced on 13 July 2007 and contained a non-parole period of 12 years. The non-parole period commenced on 13 July 2007 and expired on 12 July 2019. Upon serving his time in criminal custody, the Applicant was taken into immigration detention. He has therefore been removed from the Australian community on a continuous basis since 10 July 2009.

4. While serving the abovementioned term of imprisonment, a delegate of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ("the Minister" or "the Respondent"), pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ("the Act"), decided on 12 September 2018 to mandatorily cancel the Applicant's visa on the basis that he did not pass the character test.[4]

5. On 11 October 2018, the Minister's Department received correspondence from the Applicant requesting revocation of the decision to mandatorily cancel his visa.[5] The delegate of the Minister decided on 22 June 2020, pursuant to s 501CA(4) of the Act not to revoke the cancellation of the subject visa.[6]

6. The Applicant lodged an application with this Tribunal on 26 June 2020, seeking a review of the abovementioned decision dated 22 June 2020 not to revoke the cancellation of his visa.[7] The Tribunal has jurisdiction to review this decision pursuant to s 500(1)(ba) of the Act.[8]

7. The hearing of the instant application proceeded on 31 August 2020. The hearing received oral evidence from: (1) the Applicant; (2) the Applicant's wife; (3) the Applicant's

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4 Ibid, page 2, paragraph [6], see Exhibit G1, s501 G Documents, G9, pages 61-65.
5 Ibid, paragraph [7], see Exhibit G1, s501 G Documents, G12, pages 74-107.
6 Ibid, paragraph [8, see Exhibit G1, s501 G Documents, G1, page 10.
7 Exhibit G1, s501 G Documents, G1, pages 1-6.
8 For the Tribunal to have jurisdiction to review the decision, the Applicant must also have lodged the application for review with the Tribunal within nine days after the day on which he or she received notification of the decision – see s 500(6B) of the Act.

step-daughter; (4) the Applicant's biological daughter; and (5) a family friend/prospective employer of the Applicant, Ms LB.

8. The Tribunal also received written evidence. This written evidence was particularised into an exhibit list, a true and correct copy of which is attached to these Reasons and marked "**Annexure A**".

ISSUES

9. Revocation of the mandatory cancellation of visas is governed by s 501CA(4) of the Act. Relevantly, this provides that:

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

10. There is no question that the Applicant made the representations required by s 501CA(4)(a) of the Act. Thus, the issue is whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised. As a starting point, it is necessary to refer to the Full Court of the Federal Court of Australia's observations in *Minister for Home Affairs v Buadromo*:[9]

> *"…there has been some discussion in the authorities as to whether s 501CA(4) contains a residual discretion in the decision-maker by reason of the use of the word 'may' in the chapeau of the subsection, or whether the balancing of the factors favouring a refusal to revoke the cancellation is part of the one exercise of determining whether there is another reason the original decision should be revoked. The weight of authority in this Court favours the latter view…"*[10]

11. There are therefore two issues presently before the Tribunal:

- whether the Applicant passes the character test; and

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9 [2018] FCAFC 151.

10 Ibid, [21], citing, inter alia, *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166, (2016) 153 ALD 337, [38] (North ACJ); *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66, (2017) 250 FCR 548, [31] (Collier J, with whom Logan and Murphy JJ agreed).

- whether there is another reason why the decision to cancel the Applicant's visa should be revoked.

12. If the Applicant succeeds on either ground, the weight of authority indicates that the Tribunal must find that the cancellation of the Applicant's visa must be revoked.[11] I will address each of these grounds in turn.

DOES THE APPLICANT PASS THE CHARACTER TEST?

13. The character test is defined in s 501(6) of the Act. Under s 501(6)(a), a person will not pass the character test if they have "*a substantial criminal record*". This phrase, in turn, is relevantly defined in s 501(7)(c), which provides that a person will have a substantial criminal record if they have "*been sentenced to a term of imprisonment of 12 months or more*".

14. Having regard to the abovementioned summary of the Applicant's offending, with particular reference to the custodial term imposed on him involving 20 years of custodial time, it is beyond argument that the Applicant does not pass the character test by virtue of his *"substantial criminal record"* as that term is defined in s 501(7)(c) of the Act. He clearly does not pass the character test pursuant to s 501(6)(a) of the Act.

15. Prior to and at the hearing the Applicant's representative did not cavil with the contention that the Applicant did not pass the character test due to the application of s 501(7)(c) of the Act and its definition of a *"substantial criminal record"*. In his SFIC, the Applicant makes the following concession:

> *"10. As to the first issue, the Tribunal would not be satisfied that the applicant passes the character test in s501 of the Act. Concerning the applicant's conspiracy offence, the applicant received a head sentence of 20 years imprisonment with a non-parole period of 12 years.*
>
> *11. Given that the applicant received a head sentence of at least 12 months imprisonment, it follows that the applicant cannot pass the character test for present purposes. Accordingly, the first issue to be determined by the Tribunal is not contentious for these proceedings."*[12]

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11 Ibid.
12 Exhibit A1, Applicant's SFIC, page 3.

16. I am consequently satisfied that the Applicant does not pass the character test. The Applicant cannot rely on s 501CA(4)(b)(i) of the Act for the mandatory cancellation of his visa to be revoked.

IS THERE ANOTHER REASON FOR THE REVOCATION OF THE CANCELLATION OF THE APPLICANT'S VISA?

17. In considering whether to exercise the discretion in s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* ("the Direction" or "Direction 79") has application.[13] The Direction provides guidance for decision-makers on how to exercise the discretion. Relevantly, it states that:[14]

> *(1) …a decision maker:*
>
> *…*
>
> *b) must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked.*

18. The considerations relevant in the context of a revocation decision appear in Part C of the Direction. Paragraph 13 of the Direction provides the three Primary Considerations that the Tribunal must take into account:

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

19. Paragraph 8(1) of the Direction provides that decision-makers must take into account the Primary and Other Considerations relevant to the individual case.

20. The Other Considerations which must be taken into account are provided in a non-exhaustive list in paragraph 14 of the Direction. These considerations are:

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

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[13] On 28 February 2019, the former applicable direction, *Direction No 65 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 79.

[14] The Direction, sub-paragraph 7(1)(b).

c) *Impact on Australian business interests;*

d) *Impact on victims;*

e) *Extent of impediments if removed.*

21. I note and emphasise the importance of these considerations being "*other*" considerations, as opposed to "*secondary*" considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*:[15]

> *"…Direction 65 [now Direction 79] 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."*

22. Paragraph 6.3 of the Direction sets out a number of principles that should inform the decision-maker's consideration. Briefly stated, they 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;

(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 forfeit the privilege of, staying in Australia;

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15 [2018] FCA 594 at [23].

(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;

(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;

(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 be allowed to come to or remain permanently in Australia; and

(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 for determining whether to exercise the discretion.

23. I will now turn to addressing these considerations.

Primary Consideration A – Protection of the Australian Community

24. In considering this Primary Consideration A, paragraph 13.1(1) of the Direction compels decision-makers to have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. This paragraph stipulates that remaining in Australia is a privilege that this country confers on non-citizens. Further, this paragraph stipulates an expectation that those non-citizens are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.

25. In determining whether the mandatory cancellation of an Applicant's visa serves to protect the Australian community, this paragraph of the Direction points out to decision-makers that mandatory cancellation "*without notice of certain non-citizen prisoners is consistent*" with the abovementioned principle that: (a) it must be acknowledged that remaining in Australia is a privilege conferred on non-citizens in this country; and (b) that those non-citizens must

not abuse that privilege by breaking this country's laws or by otherwise disrespecting its important institutions.

26. In determining the weight applicable to this Primary Consideration A, paragraph 13.1(2) of the Direction requires decision-makers to 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

Summary of the Applicant's Criminal History

27. The nature of the Applicant's offending, albeit singular offending in this country, is such as to immediately attract the attention of the relevant Principles appearing at paragraph 6.3 of the Direction. Principle (1) refers to Australia's sovereign right to determine whether non-citizens who are of character concern are to be allowed to enter into and/or remain in Australia. Principle (2) refers to the Australian community's expectation that the Australian Government should cancel the visas of non-citizens if they commit serious crimes in Australia or elsewhere. Principle (4) mandates that in some circumstances the nature of a non-citizen's 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.

28. It is readily conceded in the Applicant's SFIC that:

> *"140. On 10 July 2009, the applicant was convicted in the District Court of New South Wales with conspiring with various co-offenders to possess cocaine (the substance having been unlawfully imported). The quantity to be possessed was a commercial quantity.*
>
> *141. It must be readily accepted that the applicant's conspiracy offence is very serious. The applicant's criminality occurred over three months. The total quantity of powder seized by the Commonwealth was 35.07 kilograms. The pure quantity of cocaine contained in the powder was 28.29 kilograms.*
> *…*

153. Considered in totality, cl 13.1.1 weighs heavily against the revocation of the mandatory cancellation decision."[16]

29. The factual circumstances surrounding the Applicant's commission of the subject offence are adequately particularised in the first six pages of the sentencing remarks of the learned sentencing Judge, His Honour Judge Marien SC of the District Court of New South Wales, when sentencing the Applicant on 10 July 2009.[17]

30. Suffice it to say that the Applicant's role in the conspiracy that of a co-conspirator offender for commercial gain. As noted by the learned sentencing Judge:

> "*The facts, as I have found them, disclose* ***the commission by the offender[18] of an offence of extreme seriousness. That is clearly reflected in the applicable maximum penalty, which, as I have said, is life imprisonment****. The offender, over a period of some three and a half months, actively participated in a conspiracy to obtain possession of a vast quantity of cocaine worth millions of dollars. At the suggestion of [a co-conspirator FG], the offender was recruited by [a co-conspirator S] to assist in obtaining possession of the cocaine. I find that the offender participated in the plan to represent himself as the new "owner" of the container. He leased the storage unit at Kennards at Auburn and I find that he took part in counter surveillance at SBI Shipping and Kennards, and that he followed the container when it was moved to Eastern Creek on 19 May.*
>
> *On 17 May in intercepted telephone calls, [a co-conspirator FG] spoke to the offender about the obtaining and suppling of drugs. As I have said, there was a clear available inference on the evidence that the drugs referred to was the cocaine in the container. Further, the offender remained in telephone contact with [a co-conspirator FG] arranging to meet with him after the unpacking of the pots on 12 July [2007]."*[19]
>
> *[My emphasis and underlining]*

31. The learned sentencing Judge applied the usual and necessary sentencing principles in determining the Applicant's culpability with particular reference to the comparative culpability of his co-offenders, specifically, [co-conspirator S]. Judge Marien SC noted:

> "*In assessing the nature and circumstances of an offence of this kind it is relevant to take into account the amount of the drug involved.* ***In this case the amount was substantial being more than fourteen times the commercial quantity. Further, I am satisfied beyond reasonable doubt that the accused knew that it was a***

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16 Exhibit A1, Applicant's SFIC, pages 50 and 52.
17 Exhibit G1, s501 G Documents, G6, see pages 42-56 (inclusive).
18 Note: the reference to "the offender" throughout Judge Marien SC's sentencing remarks quoted in this decision refers to the Applicant.
19 Exhibit G1, s501 G Documents, G6, pages 46-47.

substantial quantity. That is a significant matter in sentencing for offences of this kind…*"*[20]

[My emphasis and underlining]

32. In applying relevant sentencing principles, Judge Marien SC further noted:

> "*However, the amount of drug involved cannot be said to be the determinative factor in assessing the objective seriousness of such an offence;…It is also necessary in determining an offender's culpability to assess the level at which the offender operated in the criminal organisation…It is also necessary to bear in mind the principles applicable upon sentencing for an offence of conspiracy to which I earlier referred. I must also bear in mind that I can only pass a sentence of imprisonment if, having considered all other available sentences, I am satisfied that no other sentences are appropriate in all the circumstances…"*[21]

33. In applying the principle of parity in sentencing, Judge Marien SC made the following comparative remarks between the conduct of co-conspirator S compared to that of the Applicant:

> "*The [co-conspirator S] was sentenced…on 12 August 2008. He is the only co-conspirator to have been sentenced up to this time. [Co-conspirator S] pleaded guilty in the Local Court to the same charge brought against the offender. He was given a twenty five per cent reduction in his sentence by his Honour for his plea of guilty at the first available opportunity. [Co-conspirator S] was found by his Honour to have had no previous convictions other than a drink driving matter for which he received a fine…His Honour also said that [co-conspirator S]'s involvement in the conspiracy ended on about 22 May 2007 when he went overseas. His Honour found that [co-conspirator S]'s involvement in the conspiracy was limited to five to seven days in May 2007…As I previously stated, the evidence at trial here was that [co-conspirator S] recruited the offender into the conspiracy in early April 2007.*
>
> *In any event, the offender participated in the conspiracy for a longer period than [co-conspirator S] who, I find, left the conspiracy at the end of May. The offender continued in the conspiracy until his arrest on 13 July."*[22]

34. In referring to the sentence imposed on [co-conspirator S] for the purposes of the parity principle in the sentencing of the Applicant, Judge Marien SC noted:

> "*[Co-conspirator S] was sentenced…on the basis that he had provided considerable assistance to the authorities and had undertaken to give evidence against his co-conspirators including the offender before me. For both his plea of guilty and his assistance to the authorities, his Honour reduced [Co-conspirator S]'s sentence by forty percent of which five per cent was for his future assistance. His Honour, after taking into account a schedule of comparative sentences…, determined that a head*

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20 Ibid, page 49.
21 Ibid, pages 49-50.
22 Ibid, pages 50-51.

sentence of twenty years imprisonment was appropriate. However, following upon the reduction of the forty per cent to which his Honour referred, his Honour imposed a total sentence on [co-conspirator S] of twelve years imprisonment with a non-parole period of eight years and eight months imprisonment.

…

…There are, of course, significant differences between the subjective cases of the offender and [co-conspirator S]. [Co-conspirator S] pleaded guilty at the first reasonable opportunity and he gave considerable assistance to the authorities. The offender was found guilty after trial and he has given no assistance to the authorities, not of course that he is to be penalised in any way for taking the course that he did, to plead not guilty and that he determined not to provide assistance to the authorities. The other marked difference was that [co-conspirator S] was effectively sentenced on the basis that he was of prior good character, although of course as is well recognised in the authorities for offences of this kind, prior good character is given little weight by way of mitigation in the sentencing exercise."[23]

35. The nature and seriousness of the Applicant's offending can be readily gleaned with specific reference to the learned sentencing Judge's remarks on the question of parity:

> "*However, on the question of parity, the real issue is the respective criminal culpability of the offender and [co-conspirator S] in the commission of the offence…The Crown alleged at trial, and I so find, that the offender was recruited into the conspiracy by [co-conspirator S].* ***The Crown asserted, and I accept on the evidence, that the offender was to take on the role of the new owner of the container to give the enterprise an air of legitimacy. Mr Whitehead[24] concedes that the evidence establishes that the offender's role in the conspiracy was that of a facilitator who provided a legitimacy that the co-conspirators were not prepared or able to provide.*** *I would add to that that the conspirators would have been keen, I am sure, to ensure that by the offender representing himself as the new owner of the container, they would be kept at a safe distance from it…After [co-conspirator S] left the conspiracy at the end of May, the offender continued his participation in the conspiracy up to the time of his arrest on 13 July. Whilst neither [co-conspirator S] or the offender could be properly characterised as "principals" in the conspiracy, they both had important and significant roles to play in it. And as I have said, I find that whilst they were both parties to the conspiracy, [co-conspirator S]'s role was somewhat more important than that of the offender before me."*[25]
>
> *[My underlining and emphasis]*

36. In terms of ultimate findings prior to the imposition of the actual sentencing regime, Judge Marien SC noted the following:

> "*Taking into account the respective roles of the offender and [co-conspirator S] and taking into account that while he was a party to the conspiracy [co-conspirator S]*

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23 Ibid, pages 52-53.
24 The Applicant's Counsel at the sentencing hearing.
25 Exhibit G1, s501 G Documents, G6, pages 53-54.

played a more significant and active role than the offender, and further taking into account that the offender participated in the conspiracy over a longer period than [co-conspirator S] and also taking into account their respective subjective cases, I agree with the submission of the Crown that a sentence should be imposed on the offender comparable to the sentence imposed… on [co-conspirator S], absent his plea of guilty and assistance. In other words, in my view it is appropriate to impose comparable sentences on both offenders, the sentence being the sentence first arrived at by [the judicial sentencing officer who sentenced [co-conspirator S] with respect to [co-conspirator S] before he applied the discounts for the plea of guilty and the assistance given by [co-conspirator S].”[26]

[My underlining]

37. Having regard to the abovementioned well-made concessions on behalf of the Applicant, as well as the sentencing remarks of His Honour Judge Marien SC about the nature and seriousness of the Applicant's offending, I am of the view that this aspect of the analysis can be treated with relative brevity. Given the concessions, the extremely serious nature of the offending and the findings of the learned sentencing Judge, I do not consider it is necessary to embark on a lengthy and protracted discussion to demonstrate why the Applicant's offending should carry a label of either "very serious" or "extremely serious".

38. The following discussion about the nature and seriousness of the Applicant's offending will be predicated on an application of the relevant factors contained in Paragraph 13.1.1(1) of the Direction. I will further particularise how the Applicant's offending attracts operation of the relevant sub-paragraph(s) of the Direction in the assessment of the nature and seriousness of the Applicant's conduct.

Application of Factors in Paragraph 13.1.1(1) of the Direction

39. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 13.1.1(1) of the Direction specifies that decision-makers must have regard to a number of factors. Relevant (for present purposes), amongst those factors is:

(a) …

(b) …

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[26] Ibid, pages 54-55.

(c) …

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

(e) …

(f) …

(g) …

(h) …

(i) …

40. **Sub-paragraph (a)** of paragraph 13.1.1(1) of the Direction provides that crimes of a violent and/or sexual nature are viewed very seriously. The material does not disclose any instance of the Applicant committing violent or sexual crimes. The singular offence he committed was not committed in this realm of offending. This sub-paragraph (a) is not relevant to determination of this application.

41. **Sub-paragraph (b)** of paragraph 13.1.1(1) of the Direction provides that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed. The Applicant's history reveals no instances of violent conduct towards women or children. This sub-paragraph (b) is not relevant to determination of this application

42. **Sub-paragraph (c)** of paragraph 13.1.1(1) of the Direction provides that "*crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the positions they hold, or in the performance of their duties, are serious*." There is no evidence of such offending, and as a result, this sub-paragraph (c) is not relevant to determination of this application.

43. **Sub-paragraph (d)** of paragraph 13.1.1(1) of the Direction directs a decision-maker (subject to sub-paragraph (b) of paragraph 13.1.1(1) of the Direction) to the sentence(s) imposed by the Courts for a crime or crimes of a non-citizen/applicant. The imposition of a custodial term is regarded as the last resort in any reasonably and correctly applied sentencing process. Custodial terms are viewed as a reflection of the objective seriousness of a given offence committed by an applicant.

44. As mentioned earlier, the circumstances of the Applicant's offending are, for applications such as the instant one, relatively unique. He arrived in Australia in December 1997. In 2007, he committed his singular offence involving extremely serious offending relating to a *Conspiracy to possess a commercial quantity – unlawfully import border-controlled drugs*, which, if contemporary media reporting[27] is to be accepted, involved the unlawful importation of cocaine worth some $35 million. This conspiracy offence carries a maximum penalty of life imprisonment and/or a fine of $825,000.

45. There can be no favourable or less severe application of this sub-paragraph (d) against the Applicant on the basis of the length of his offending history being a short one. Such a contention is to be rejected. The "*single offence"* committed by this Applicant involved extremely serious drug offending. This Tribunal has previously found that even a single offence can constitute a substantial criminal record:

> *"The applicant claims that his criminal history cannot be said to be extensive or otherwise substantial. However, the Tribunal does not agree with the applicant's assessment, which appears to suggest that a determination of whether a criminal record is substantial is limited to the number of offences or their frequency. In the Tribunal's view, a criminal record may be substantial by reference to the nature of the offences and even a single significant offence can constitute a substantial criminal record."*[28]
>
> *[My underlining]*

46. Rather, this sub-paragraph (d) must be applied stringently against the Applicant on the basis of the extreme seriousness of the offence. As was made clear in the sentencing remarks of Judge Marien SC, the only "*discounts"* to be found or applied in any sentencing regime against the Applicant had nothing to do with the absence of any prior criminal offending by the Applicant. Instead, His Honour, with respect, rightly sought to find and/or apply any discounts on a comparative basis with such discounts afforded to [co-conspirator S].

47. In other words, Judge Marien SC looked for any early plea of guilty by the Applicant and found none. His Honour looked for any measure of assistance provided by the Applicant to prosecuting authorities and found none. Rather, the Applicant came before Judge Marien SC for sentencing at the conclusion of a fully ventilated jury trial, at the end of which the Applicant was found guilty by a jury of his peers. A head custodial term of 20 years was

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27 Ibid, G7, pages 57-59.
28 *Lee and Minister for Home Affairs (Migration)* [2019] AATA 861 at para [27] (per SM Raif)

imposed, with a non-parole period of actual time to be served of 12 years. The length of this sentence is extraordinary, especially for a first-time offender. By his 12th year in this country, the Applicant committed an offence of such extreme severity that his head custodial term amounted to his total time in this country to that sentencing point plus another eight years.

48. Put another way, his offending was sentenced by the imposition of a head custodial term representing approximately 165% of his 12-year period of time in this country to that sentencing point. The sentencing remarks of Judge Marien SC rendered the Applicant's offending to be "*extremely serious".* There can be no other finding, given that the offending involved a volume of unlawful drugs more than 14 times the commercial quantity.

49. Accordingly, for the purposes of this sub-paragraph (d), it surely cannot be denied that the sentencing regime imposed upon the Applicant by the New South Wales District Court on 10 July 2009 militates very strongly in favour of a finding that the subject sentence imposed for the Applicant's offence renders the totality of his offending as extremely serious.

50. **Sub-paragraph (e)** of paragraph 13.1.1(1) of the Direction points a decision-maker to the frequency of non-citizen's offending and whether there is any trend of increasing seriousness. This Applicant has committed a singular, albeit extremely serious, offence. As such, no level of frequency or trend of increasing seriousness can reasonably be found. This sub-paragraph (e) is not relevant to determination of this application.

51. **Sub-paragraph (f)** of paragraph 13.1.1(1) of the Direction concerns itself with an examination of the cumulative effect of an Applicant's repeated offending and how such an effect does or does not demonstrate the seriousness of that offending. I accept that this Applicant is not a repeat offender, and, on that basis alone, his offending does not attract application of this sub-paragraph (f).

52. That said, I most certainly am of the view that the Applicant's offending would have had, if not as a "cumulative effect", then, at the very least, a most certainly extremely serious and deleterious effect on the Australian community. I will record my comments on this aspect of the Applicant's extremely serious offending later in these Reasons when I discuss the nature of the harm that would be occasioned were he to re-offend.

53. **Sub-paragraph (g)** of paragraph 13.1.1(1) of the Direction points to an inquiry as to whether a non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending. The material does not disclose any instance of the Applicant providing false information either to the Respondent or to any other element of lawful authority. This sub-paragraph (g) is not relevant to determination of this application.

54. **Sub-paragraph (h)** of paragraph 13.1.1(1) of the Direction looks for evidence about whether the non-citizen has re-offended since being formally warned about the consequences of further offending in terms of the non-citizen's migration status. I am not able to glean any such letter or other communication containing any such formal warning from the Respondent or any other element of lawful authority. This sub-paragraph (h) is not relevant to determination of this application.

55. **Sub-paragraph (i)** of paragraph 13.1.1(1) of the Direction refers to a non-citizen who has committed a crime while in immigration detention in Australia. Subject to my following comments about the chapeau to paragraph 13.1.1 of the Direction, there is no evidence of this Applicant having committed a crime while in immigration detention in Australia. This sub-paragraph (i) is not relevant to determination of this application.

56. The chapeau to the factors at paragraph 13.1.1 of the Direction reads as follows:

> *"(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to factors including: …"*
> [My underlining]

57. There are several further aspects to the Applicant's conduct which, although not directly captured by the nine factors at paragraph 13.1.1(1) of the Direction, nevertheless constitute "*other conduct*" relevant to an assessment of the nature and seriousness of the Applicant's conduct.

58. The material reveals at least three instances involving adverse conduct attracting the attention of the jail administrators committed by the Applicant during his time in criminal custody. Those instances are described in the material as follows:

    (i) on 5 September 2007: "*Damage/destroy property – $30 compensation, and seven days off the television."*

(ii) on 21 December 2011: "*Possess/create prohibited goods – proven – dismissed";*

(iii) on 9 February 2014: "*Steal – reprimand and caution".*[29]

59. These three instances were put to the Applicant in his evidence in chief . He responded as follows:

> *"DR DONNELLY:*[30] *Yes, sir, sorry. So, thank you for that. Now, did you have any big problems in prison, or it was - it was a fairly unremarkable time?*
>
> *WITNESS: Like problem - like fighting, (indistinct)?*
>
> *DR DONNELLY: Yes.*
>
> *WITNESS: Look,* ***I have three charge in gaol****. In 2007 when I go inside they send me to - to Parklea. When you don't know yet because I go (indistinct) to my room with my cell mate. Is - my cell mate have (indistinct) TV. Inside to the - to the room is a small plastic bag. The (indistinct) go inside to the plastic bag. But the cable is outside to the plastic bag. So we move the TV, we (indistinct) the cable. After two days the officer he come, he say we damage this cable.*
>
> *DR DONNELLY: I see.*
>
> *WITNESS: So - yes, we say, 'No, we not damaged this.' Say, 'Yes, you damaged it.' We say, 'No, we - when we come to here the cable is outside so we put the TV there because the (indistinct) on the screen.' (Indistinct) when you come to here, if (indistinct) is damage you have to report (indistinct). If you not report you have to admit you are the person do the damage. If you not admit that, if you - you have to pay for (indistinct). Sixty dollar. So thirty dollar each person. If you not paying that, you lose your TV.* ***So we agree (indistinct) we pay*** *- - -*
>
> *DR DONNELLY: All right - - -*
>
> *WITNESS:* ***This is the - this is the first charge. The second charge*** *- when I working in Kempsey - you know, outside two year ago in the (indistinct) - in maximum security - (indistinct) you have to do - (indistinct). So when I working (indistinct) I working with a chief - with the chief officer (indistinct). We stick a lot of (indistinct) to the sticky tape in the paper to fix a lot of stuff. And the officer, he come to - for me - because I have to go to master. So I put the sticky tape in my pocket. And we run to master, when we go to master (indistinct) master normally they search you. So when they search me I say to the officer, 'Look, I have the sticky tape from the officer.' So the officer he say, 'Don't worry, it's nothing (indistinct) you go to your room.' So I go to my room. Two days later they say I tried to stealing the sticky tape by my chief officer (indistinct) he (indistinct) say, 'No, he's not stealing the sticky tape. It's a mistake.'* ***So they take out this charge. And after that when I go back to Nowra Correctional Centre, Nowra is only gaol in the system here they have all the electronic - you - they have TV, they have (indistinct) they have (indistinct) they have everything.*** *So all your property - they put it in the - in reception. Because everything is there, yes? And I working for - for the chief officer*

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29 See Exhibit G1, s501 G Documents, G5, page 41.

30 Dr Jason Donnelly of Counsel, representative of the Applicant.

> *in Nowra. We - this is our weekly time. I say to my officer, 'Look, my TV is damaged. The screen is damaged.' So, my officer he say, 'Look, you (indistinct) this TV on Monday - Monday you (indistinct) TV to here to (indistinct) this.' I say, 'Okay.' I take the TV, I put it in my room. Every Sunday in Nowra they do search (indistinct) - (indistinct) search, so (indistinct) and everything. So when they do the search, I put the TV under my pillow, yes? Because I don't want (indistinct) see I have another TV there. So when the officers (indistinct) he told me (indistinct) TV outside, it's – [prison officer's name redacted], he give me. He say (indistinct) this, (indistinct) I said to you before. I say he take the TV - in the afternoon they call me to the main office - they told me you trying to steal the TV. I say,* ***'Sir, I have my own TV in - reception - I have my own stuff in reception - I'm not trying to steal the TV. (Indistinct) my TV, (indistinct),' and you can - if you not believe me you can [prison officer's name redacted], the chief (indistinct). He say, 'All right, I wait until Monday to we come back.'*** *Monday, (indistinct) [prison officer's name redacted] (indistinct) had a confrontation. Everything is true, so the physical one from Nowra - he told me, 'Look, the officer, he (indistinct) to (indistinct) in the computer. So, don't worry, I just put it dismissed.' I say, 'Okay.'* ***This is the only three charge I have in gaol.***
>
> *DR DONNELLY: All right."*[31]

60. While I am of the view that the above-described conduct may constitute "*other conduct*" in the abovementioned chapeau to paragraph 13.1.1(1) of the Direction, I am of the further view that a very cautious and circumspect reading of the above-quoted portions of the Transcript are required prior to the allocation of any weight adverse to the Applicant. On the basis that the Applicant's evidence is to be accepted (and no contrary evidence was called by the Respondent), then the above "offences" are, in the main, little more than inadvertent transgressions or miscommunications by either or both of the Applicant and his fellow prisoners or the jail administrators.

61. With reference to the first offence, having regard to the Applicant's evidence, it is somewhat of a stretch to suggest that the Applicant deliberately set out to damage and destroy his cellmate's TV cable. Ultimately, the purported damage was duly rectified by payment of money to replace the cable and the Applicant readily agreed to do so and to otherwise have the circumstances of this incident put behind him. With reference to the second offence, it is similarly a stretch to suggest that the Applicant somehow intentionally wanted to improperly take and retain the subject packing tape. It is notable that the circumstances of this incident arose at a time when the Applicant was in a trusted position working outside the strict confines of his custodial arrangements. It would not be unfair to suggest, with

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[31] Transcript, 31 August 2020, page 13, lines 35-47, and page 14, lines 1-47, and page 15, lines 1-7.

respect, that perhaps those supervising him may have done a more thorough job of checking what was on the Applicant's person at the end of a work stint.

62. With reference to the third offence, while the Applicant's explanation of this offence may not be immediately clear from his words spoken in examination in chief, it is clear that the Applicant did not need to steal any TV because, as he said, he already had one "*in reception".* Ultimately, in the absence of any further justification or particularisation of the asserted offence, I am reluctant to find it is of any further moment – in terms of adverse weight to the Applicant - than the other two offences.

63. Taken in their totality, the three subject offences referred to in the material apparently committed while the Applicant was in criminal custody are not capable of characterisation as offences of any demonstrable significance or seriousness such as to attract weight as "*other conduct*" pursuant to the abovementioned chapeau. To summarise, while it may be conduct captured by the chapeau, it is not conduct that leads to any measurable weight against the Applicant.

64. The next "*conduct*" that can be captured as "*other conduct*" pursuant to the abovementioned chapeau comprises the Applicant's admission at his trial (for the extremely serious drug offending) of his previous involvement in the supply of a significant quantity of cannabis. Once again, the evidence surrounding this "*other conduct*" must be approached with caution. Such caution can be tempered on three bases. First, Counsel who represented the Applicant at the sentencing hearing did not cavil with Judge Marien SC's direct reference to this specific other offending while sentencing the Applicant. Second, Counsel for the Applicant made no submission to contend that the Applicant was previously a man of good character, presumably on the basis of the Applicant's admission at the trial regarding his past conduct relating to the supply of cannabis. Third, Judge Marien SC's conclusion that "*there was clear evidence in the trial"* of the Applicant's past conduct in relation to the supply of a significant amount of cannabis. The relevant portion of Judge Marien SC's sentencing remarks is as follows:

> *"Mr Whitehead of counsel who appears for the offender did not submit on sentence that I should find that he is a man previously of good character. That is understandable given the offender's admission at the trial that he was involved at least in the supply of a significant quantity of cannabis but also, as I have indicated,*

that there was clear evidence in the trial from the telephone intercepts both in May and June of 2007, that the offender was involved in the trafficking of other drugs."[32]

65. This specific passage of Judge Marien SC's sentencing remarks was put to the Applicant in cross-examination. His explanation was tepid and unconvincing. I sought to intervene in the cross-examination and suggested that the sentencing remarks are now some 11-12 years old, and it would be unfair on the Applicant to be now compelled to explain why those remarks were made or the basis upon which those remarks were made, without the opportunity to review the Transcript of his evidence at the trial. The following transpired during cross-examination:

> *"MS SAUNDERS:*[33] *In the third paragraph, it says, "Mr Whitehouse", who I understand was your counsel:*
>
> > *Did not submit on sentence that the Judge should find that you are a man previously of good character.*
>
> *And the Judge says:*
>
> > *That is understandable, given your admission at the trial that you were involved, at least in the supply of a significant quantity of Cannabis.*
>
> *WITNESS: I don't know what he talking about there.*
>
> *MS SAUNDERS: You don't know. So, you don't remember making that admission, is that what you're saying?*
>
> *WITNESS: Honesty, I don't know what is my counsel at this time talking about there.*
>
> *MS SAUNDERS: That's not the counsel, that's the Judge. So, the Judge has said that you admitted at trial that you were involved with at least the supply of a significant quantity of Cannabis.*
>
> *WITNESS: I cannot - I cannot (indistinct).*
>
> *MS SAUNDERS: Yes, okay, I can repeat that. It wasn't your Barrister who said that, it was the Judge. And so, what the Judge said was that during your trial, you had admitted that you were involved with at least the supply of a significant quantity of Cannabis.*
>
> *WITNESS: Honesty, this is 13 years ago, I cannot remember that. I don't know what he's talking about. I - I don't know, I can't (indistinct). Can't have my rights or not answer about that because that one is - he give me some possible (indistinct).*
>
> *SENIOR MEMBER: Ms Saunders, it just might be enough for the applicant to answer that he doesn't recall making or giving that evidence at his hearing. I think, in fairness, he can't really give any definitive or definitively reliable evidence on that specific question unless of course he's given a chance of reviewing the transcript of the proceeding. Asking him to remember what he might have said in evidence 13 years ago is a long way in the past. I think it's sufficient for present purposes and*

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32 Exhibit G1, s501 G Documents, G6, page 49.
33 Ms Charlotte Saunders, Senior Associate, Minter Ellison.

certainly for the direction that - and assessing the seriousness of the offending under the direction, that what you're asking about has been recorded by the learned sentencing Judge in the sentencing remarks. I think that's as far as we can go for direction 79 purposes."[34]

66. What can be said about this reference to the Applicant's past conduct involving "*…at least…the supply of a significant quantity of cannabis…"* is that he was sentenced on the basis of this admission being made at his trial and that the inclusion of this admission in the sentencing remarks was not challenged by the Applicant's Counsel who appeared for him at the sentencing hearing. Accordingly, a moderate measure of weight adverse to the Applicant arises from this "*other conduct*" in favour of a finding that the totality of his offending must be characterised as "*extremely serious*".

67. Having regard to the totality of the evidence to which the abovementioned relevant sub-paragraph (d) and the chapeau of paragraph 13.1.1(1) of the Direction are relevant, I am of the view that the Applicant's offending conduct can be readily characterised as "*extremely serious*".

The Risk to the Australian Community Should the Applicant Commit Further Offences or Engage in Other Serious Conduct

68. Paragraph 13.1.2(1) provides that in considering the risk to the Australian community, a decision-maker must have regard to the two following factors on a cumulative basis:

    (i) paragraph 13.1.2(1)(a) requires me to consider the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

    (ii) paragraph 13.1.2(1)(b) requires me to consider 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.

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[34] Transcript, 31 August 2020, page 26, lines 31-46, and page 27, lines 1-31.

The nature of the harm to individuals or the Australian community were the Applicant to engage in further criminal or other serious conduct

69. There was unanimity in the respective positions of the parties regarding the nature of the harm to the Australian community should the Applicant again offend in the realm of the extremely serious type of offending for which he was sentenced in 2009.

70. The Respondent contends in its SFIC that:

> *"25. Taking these in turn, the nature of the harm to the Australian community should the applicant commit similar offending is incredibly serious. Australia's National Drug Strategy 2017 – 2026 notes that the Australian community faces both direct and indirect harm from drugs, including mental health trauma, violence or other crimes, engagement with the criminal justice system more broadly, and healthcare and law enforcement costs. Specifically in respect of stimulants such as cocaine, it is reported that their use can result in mental illnesses, cognitive impairment, cardiovascular problems and overdose and furthermore. Accordingly, the Minister's contends that should the applicant engage in similar offending in the future which would contribute to the accessibility of illicit substances in the wider community, the nature of the harm the Australia community would face is very serious."*[35]

71. In his SFIC, the Applicant's representative said:

> *"155. As to cl 13.1.2(1)(a), on the hypothesis that the applicant was to commit the conspiracy offence in the future, and the impugned drugs were to find their way into the Australian community, this would likely cause emotional, financial and physical harm to relevant victims and their families. There can be no doubting that the possession and deemed supply of prohibited drugs has a destructive impact on the Australian community."*[36]

72. Paragraph 6.3(4) of the Direction stipulates that decision-makers should be guided by the principle that criminal offending 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. On the basis of this paragraph 6.3(4), I think the Respondent's abovementioned submission, as well as the Applicant's concession, is correctly made.

73. I find that, were the Applicant to re-offend in a similar way, the inevitable likelihood is that his offending will result in very significant and, quite conceivably, catastrophic harm to (1) individual consumers of such illicit substances; (2) those that end up caring for them in a

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35 Exhibit R1, Respondent's SFIC, page 5.
36 Exhibit A1, Applicant's SFIC, page 52.

rehabilitative sense; and (3) the Australian community's medical, law enforcement and judicial resources necessary to combat the scourge of illicit drugs impacting on that community.

74. It is therefore reasonable and safe to find that the potential consequences flowing from further similar or identical offending by this Applicant would be, at the very least, very serious to extremely serious. Were he to re-offend, I am of the view that its effect on a member or members of the Australian community – and indeed, the community as a whole - would be very serious to extremely serious and with, quite conceivably, catastrophic financial, physical and psychological consequences. The impact of the release of some $35 million worth of cocaine into the general community cannot be construed in any other way.

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

The Applicant's written submissions

75. It is contended on the Applicant's behalf that he is unlikely to engage in further criminal or other serious conduct in Australia. It is further contended (in the Applicant's SFIC) that "*…the risk of the applicant reoffending is sufficiently low as not to be unacceptable.*"[37] The following factors[38] are propounded in support of these contentions:

(1) some 13 years has elapsed since the Applicant committed his extremely serious offence in mid-2007;

(2) the imposition of a head custodial term of 20 years with a non-parole period of 12 years (duly served by the Applicant) has served as a significant deterrent against any future criminality by this Applicant in Australia;

(3) the Applicant's exposure to the rigours of the criminal justice system has caused him to never again want to be involved in such processes. In particular, it is noted

[37] Ibid, see page 57, paragraph [157].
[38] Ibid, see page 52, paragraph [156] to page 57, paragraph [158].

that the Applicant endured three criminal trials, the first two resulting in hung juries while the jury in the third trial eventually reached a guilty verdict;

(4) the Applicant remains married with two daughters, one biological daughter and one stepdaughter. The Applicant has reached a realisation that further offending in Australia will lead to his removal and the consequent dissolution of the family unit;

(5) the Applicant "*…has completed a notable number of educative, rehabilitative, and vocational courses…"* during his period of criminal incarceration. These courses have caused the Applicant to be "*…not the same person as when he committed the relevant conspiracy offence in 2007."*

(6) the Applicant has post-release plans in place upon any return to the Australian community. The relevant Pre-Release Report appearing in the material is dated 26 March 2019 and relevantly provides as follows:

> "***Post release plans***
>
> ***Accommodation***
>
> *If released to Parole, [the Applicant] will be placed in the custody of the Australian Border Force. He indicated that if deported back to Colombia he has no set accommodation to return to, however, his family continues to reside there.*
>
> *[The Applicant] has indicated that he has lodged an appeal against the cancellation of his Visa and if this appeal is successful he intends to return to his family home, with his partner and children at: [address redacted].*
>
> *A home visit was conducted by City Community Corrections and the address has been assessed as suitable.*
>
> *It is noted that [the Applicant] provided a letter from his employer confirming that when he is released he will work in a [name of employing entity redacted]. Attempts to contact his employer to further verify his employment details were not successful.*
>
> *…*
>
> - *Should [the Applicant] remain in Australia, he has adequate support networks in the community and has suitable post-release accommodation*
> - *There is an appropriate post-release plan to assist [the Applicant] address his criminogenic factors and reintegration to community life."*[39]

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[39] Exhibit G1, s501 G Documents, G38, pages 658 and 660.

(7) it is contended that the Applicant has expressed "*deep remorse*" for his extremely serious offending and has an appreciation of the adverse impact of his offending on members of the Australian community. Again, the abovementioned Pre-Release Report is cited in support of this contention. While it may be contended that "*the evidence of remorse is littered throughout the material in the G Docs,"* any such contention must be tempered with the stark reality of what else appears in the Pre-Release Report:

> "***Attitudes***
>
> *As highlighted in the Pre-Sentence Report, [the Applicant] continues to deny any knowledge of his offending behaviour. During interviews he continued to rationalise his offending behaviours, stating that he was innocent and naïve in terms of trusting his friends and wanting to help them to establish their own business.*
>
> *[The Applicant] reported that he accepted responsibility for his actions despite claiming his innocence. It is furthered that he was unable to explore alternative actions. Through the completion of the Practice Guide for Intervention exercise "offence mapping" [the Applicant] admitted that at some point he became suspicious of the package being illegal, however: "didn't think it was what it was or the quantity". He consistently minimised his offending behaviours stating that he "always helps others."*
>
> *Despite his failure to display insight into his offending behaviours and decision making, [the Applicant] was able to explore the impact his offending had on various aspects of his life and on potential victims. He highlighted that drug use destroys lives, families and the community through means of increased crime. He recalled his family being upset and "broken up" as a result of his offending behaviour. It is noted that he often expressed self-concern when exploring the impact of his decision."*[40]
>
> *[My underlining]*

It is, to my mind, very important to note that the above-quoted paragraphs make it clear that any remorse now purported to be expressed by the Applicant are conditioned by his continued denial of "*any knowledge of his offending behaviour,"* and his purported acceptance of responsibility for his actions "*despite claiming his innocence*." The Pre-Release Report actually refers to "*…his failure to display insight into his offending behaviours and decision making…"* Perhaps most significant is the reality that this Pre-Release Report is dated 26 March 2019 and is

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[40] Ibid, page 655.

one of the most proximate, if not the most proximate, independent assessment of the Applicant's level of insight and remorse.

(8) the Applicant contends that his rehabilitation can be demonstrated by using his extensive period in prison to advance his own life and because he (1) gave counsel to young offenders; (2) exercised; (3) participated in chapel initiatives (that benefitted others inmates); (4) remained positive; and (5) vigorously engaged in learning the English language.

(9) it is contended that "*There is an extensive range of expert evidence before the Tribunal that demonstrates that the applicant is no more than a low risk of reoffending in the Australian community."* A series of case note reports are cited to support this contention, each of which note the following:

- "*22 July 2010 SORC[41] REVIEW NOTE: CP and LSIR recently completed – maintain employment, acceptable correctional behaviour and engage in education. Low risk rating according to LSIR."*[42]
- *"22 July 2010 SORC REVIEW NOTE: CP and LSIR recently completed – maintain employment, acceptable correctional behaviour and engage in education. Low risk rating according to LSIR."*[43]
- *"30 April 2013 Inmate has low LSIr and is not suitable for any Compendium offence related programs."*[44]
- *"23 November 2016 Irrespective of Nationality, inmate has an LSIR score of 8 for education and is therefore low need and not a priority for programs."*[45]
- *"5 September 2017 LSI-R results: … Overall result: Raw score 8, rating low, test date 30-JUN-2010."*[46]
- *"22 January 2019*

  Risk assessment results

  Level of Service Inventory (LSI-R)

41 Serious Offenders Review Council.
42 Exhibit G1, s501 G Documents, G22, page 177.
43 Ibid, page 194.
44 Ibid, page 216.
45 Ibid, page 243.
46 Ibid, G23, page 284.

An LSI-R was administered to [the Applicant] by [name redacted] (Probation and Parole Officer, Kempsey Community Corrections) on 30 June 2010. He was placed in the Low risk/needs category.

An LSI-R was administered to [the Applicant] by [name redacted] (Probation and Parole Officer, Blacktown Community Corrections) on 3 June 2009. He was placed in the Low risk/needs category."[47]

- *"26 March 2019*

  [The Applicant] has been assessed at a Low risk of reoffending according to the Level of Service Inventory - Revised (LSI-R)."[48]

- *"12 September 2018*

  Immigration Risk Assessment

  LSI-R Score: 8 low

  There are no unusual circumstances having the potential to increase risk.

  RISK LEVEL is determined as Low after considering all points."[49]

- *"14 December 2017*

  [The Applicant]'s classification history between 23 July 2007 until 20 February 2017 demonstrates he graduated from a maximum-security prisoner (A2U rating) into a progressively lower or minimal security risk prisoner. This evolution of his security ratings went from A2U (23/7/2007), A2 (20/7/2009), B (1/3/2012), C1 (11/7/2015) to C2 (23/7/2016)."[50]

The contention about "*the applicant has been assessed as a low risk of reoffending on the LSI-R"* must be tempered against the reality that, as best as I understand the above references to the respective LSI-R score, that score is based on LSI-R testing conducted on two occasions, both of which occurred over a decade ago. As will be noted from the above, the first LSI-R test was conducted on 3 June 2009 and the second on 30 June 2010. As I further understood the above material, all subsequent references to the LSI-R score derive from either or both of the now greater than decade old tests conducted in 2009 and 2010 respectively.

- In its review dated 22 January 2019, the SORC further noted that:

  "*Upon entry into custody and since, this offender has not been identified as requiring any custodial based therapeutic intervention. He has continually and consistently undertaken*

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47 Ibid, G37, page 650.
48 Ibid, G38, page 658.
49 Ibid, G23, page 256.
50 Ibid, page 290.

education and employment and received positive reports in relation to his behaviour and attitude in custody."[51]

- Dr Rose Cantali is a Principal Psychologist whose report appears in the material and is dated 27 March 2020.[52] Dr Cantali conducted a mental state examination on the Applicant, which was unremarkable. She administered the Personality Assessment Inventory (PAI), which comprises a self-administered inventory that assesses psychopathological syndromes and provides information relevant for clinical diagnosis, treatment planning and screening for psychopathology. Dr Cantali's report noted the following:

    - *"Validity of Test Results:*

      The PAI provides a number of validity indices that are designed to provide an assessment of factors that could distort the results of testing…the respondent's elevated scores on these scales suggest some problems in understanding or attending appropriately to the PAI items. There appear to have been some idiosyncratic responses to particular items, and there were also some inconsistent responses to items with highly similar content….

      …

      With respect to positive impression management, the client's pattern of responses suggests that he tends to portray himself as being relatively free of common shortcomings to which most individuals will admit, and he appears somewhat reluctant to recognize minor faults in himself…

      With respect to negative impression management, there are subtle suggestions that the client attempted to portray himself in a negative or pathological manner in particular areas. Some concern about distortion of the clinical picture must be raised as a result; the respondent presents with certain patterns or combinations of features that are unusual or atypical in clinical populations but relatively common among individuals feigning a mental disorder…

    - ***Summary:***

      …The psychometric assessment and clinical mental health assessment of [the Applicant] shows no evidence of [the Applicant] causing further legal problems if he were to remain in Australia…This report has evaluated whether [the Applicant] poses a threat to the Australian community. It is my professional opinion that following a clinical assessment of

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51 Ibid, G37, page 652.
52 Ibid, G58, pages 722-730.

> *[the Applicant's] psychological profile, [the Applicant] demonstrates an in depth understanding of the consequences of his wrong doings….The PAI was administered to assess [the Applicant's] personality, mental health, and character. Whilst the results of the test were somewhat affected by language difficulties, the impression given indicated that [the Applicant] is unlikely to engage in antisocial or dangerous behaviours…Following my review of the PAI and clinical assessment, I am of the professional opinion to conclude no cause for concern regarding [the Applicant's] personality, mental health, and character in that he maybe (sic) a risk to community. Furthermore, [the Applicant's] reports of exemplary behaviour whilst serving his long sentence, and in the detention centre, further supports him as an individual who is reformed and unlikely to partake in criminal behaviours."*[53]
>
> *[My underlining]*

While Dr Cantali's report can be regarded as relatively current, dating from five months prior to the instant hearing, she was not called to give evidence in chief and thus neither her written nor oral evidence was subjected to testing under cross-examination. Accordingly, any weight to be allocated to the findings and opinions of Dr Cantali must be limited to a certain extent.

(10) the contention of a low risk of re-offending is sought to be further propounded on behalf of the Applicant by reference to a number of Case Note Reports in the material that "*…demonstrates that he is a changed man."* It is contended that the Applicant is a changed man and consequently at low risk of re-offending because the subject Case Note Reports tell us:

- he has maintained acceptable correctional behaviour in prison;
- he has been a model prisoner;
- he has engaged in counselling for psychological wellbeing;
- he does not have significant criminogenic needs;
- he has completed a relapse prevention program;
- he is a trusted inmate;
- he was assessed as having no alcohol dependence;
- he produced consistent negative results on random urinalysis exams;

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53 Ibid, pages 724, 725 and 729.

- his working standards are excellent;
- he has demonstrated a genuine want to learn and to move forward with his life;
- he is always willing to assist and show eagerness to learn;
- he was working well in public;
- he is a great role model to other inmates; and
- he has participated in the Kairos short course – a program dealing with choices, accountability, forgiveness and personal growth.

Commendable though these observed attributes of the Applicant while in criminal custody may be, I am not of the view that they are necessarily demonstrative of the level of his risk of re-offending. These notations and observations relate to the Applicant's observed behaviours while in the closed confines of criminal custody. The critical question is whether the positive and apparently therapeutic nature of these observations will be consistently maintained by the Applicant in the general community, as has occurred in the closed confines of criminal custody/immigration detention.

(11) it is further contended on the Applicant's behalf that he is apparently at a lower risk of re-offending due to his willingness to engage "*with psychology services for a short time for coping strategies."* This contention is predicated on the basis that, if the Applicant has so engaged while in the closed confines of criminal custody, he will be more likely disposed to engage with "*psychology services"* in the broader Australian community. While I accept the basis of the contention, it is tenuous, at best, to suggest that the Applicant's engagement with psychology services "*for a short time*" while in prison necessarily means that he will avail himself of such services in the broader community as a means of maintaining a low risk of recidivism.

(12) the following contention is, to my mind, perhaps the strongest factor militating against the Applicant re-engaging in extremely serious conduct of the type that has seen him removed from the Australian community for approximately 13 years. The specific contention is that were the Applicant to be released back into the Australian community, he will be at a low risk of re-offending because "*he will be the subject of*

strict supervision by Community Corrections." The relevant Pre-Release Report contains the following supervision plan:

> "***Supervision plan***
>
> *Should [the Applicant] remain in Australia, the following factors have been identified:*
>
> ***Associates****: monitor associates through third party checks and contact with Police, referral to Uplift Psychological or Wentworth Forensic Clinic for counselling around decision making and consequential thinking.*
>
> ***Drugs****: referral to Waverly Drug and Alcohol Service or Wentworth Forensic Clinic for assessment and counselling*
>
> *Practice Guide for Intervention modules focused on managing cravings, managing environment, achieving goals, managing impulsivity, self-awareness, problem solving and pro-social lifestyle.*
>
> ***Recommended additional conditions***
>
> *Should a Parole Order be made, it is respectfully requested that it contain conditions concerning non-association with co-offenders, as well as adhering to the supervision of Community Corrections should he remain in Australia."*[54]

(13) it is further contended on behalf of the Applicant that his risk of re-offending is tempered by him being the subject of extensive parole conditions. The Applicant's Parole Order is dated 25 September 2019 and was countersigned and accepted by the Applicant two days later on 27 September 2019.[55] The complete terms of this Parole Order appear in the material. Suffice it to say that it requires the Applicant to be of good behaviour and not violate any law and to not leave Australia for the duration of the parole period, unless with permission duly issued by the Commonwealth Attorney-General's Department. Item 3 of the Parole Order stipulates the specific conditions applicable to the Applicant. There are 13 specific conditions. For the purposes of brevity, I will refer to certain of those conditions:

> *"…*
>
> *b) You will be supervised by a parole officer until your supervision period ends on 12 July 2027.*
>
> *…*
>
> *d) You must report to your parole officer as requested by him or her.*

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54 Ibid, G37, page 659.
55 Ibid, G42, pages 672-673.

e) You must live in a place of which your parole officer approves…

f) Your employment, both paid and unpaid, must be approved by your parole officer…

g) You must not leave the state of New South Wales, without first obtaining the written permission…

h) You must not leave Australia without first obtaining the written permission…

…

k) You must be assessed for drug counselling, and you must attend drug counselling if it is recommended as a result of the assessment…

…

m) You must not contact, communicate or associate with your co-offenders, without the express prior approval of your parole officer.

Although you are being released on parole, you are still under sentence. If you commit an offence or breach any of the conditions of this parole order, it may be revoked and you may be returned to prison."[56]

(14) the immediately preceding contention about the supervision plan and the Parole Order segues into the further contention made about the Applicant's risk of re-offending, that is, that if the Applicant's migration/visa status is restored to him, and if he were to engage in future criminality, "*there is a real prospect that he will be the subject of future visa cancellation, detained in immigration detention, and ultimately deported from Australia."* In that event, the Applicant would be confronted with exactly the same issues as those with which he is confronted now. I think the contention is fairly made that "*the prospect of future visa cancellation and the adverse experiences the applicant has faced in the current immigration context will act as a significant deterrent against the applicant engaging in future criminality."*

76. As I understood these contentions put on behalf of the Applicant, it is consequently contended that the Applicant's risk of re-offending is of a sufficiently low level such as not to be unacceptable to the Australian community. It is contended that although this second component of Primary Consideration A (the risk to the Australian community should the Applicant re-offend) "*weighs against the revocation of the mandatory cancellation decision, it only does so marginally."*[57] Ultimately, with reference to allocable weight to the entirety of

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[56] Ibid.
[57] Exhibit A1, Applicant's SFIC, page 57, paragraph [157].

this Primary Consideration A, the Applicant says: "*it is conceded that the primary consideration of protection of the Australian community weighs against revocation."*[58]

The Applicant's evidence in chief

77. While a Spanish interpreter was available for the entirety of the Applicant's evidence (in chief, cross-examination and in reply) he elected to give his evidence in English without the intervention of the interpreter. Perhaps some of the import of the following evidence of the Applicant given in chief in response to the specific question about his risk of recidivism may not be immediately apparent due to certain linguistic reasons. The essence of what he sought to put across in his evidence in chief regarding his risk of recidivism is, to my mind, sufficiently clear from the following passage of the Transcript:

> *"DR DONNELLY: Yes. The tribunal has to make a determination about whether you will reoffend. Right? And whether you'll commit another offence, similar to or the same as your offence in the past. What do you want to say about that topic to the tribunal?*
>
> *…*
>
> *WITNESS: I can say - I can say - yes, I can say to the tribunal, to the Member and to the Australian community, I'm very, very sorry from the more deep of my heart for (indistinct) whatever (indistinct). I lose, I lose 13 years of my life with my daughters. I know I done something, something wrong, terrible. I say to the tribunal and I say to Australia, give me a second chance. I want - I want show to Australian community I am better person and a good man and I want living. And I want living under the law, of Australian law and Australian community and I can show you, you, and I'm 52 - I'm nearly 53-years-old person, I lose 13 years in jail. I don't want to go back to jail.*
>
> *I don't want see my daughters, my family, (indistinct) again (indistinct). I don't my daughters feeling the shame, my wife feeling the shame forever, because whatever (indistinct). I had to living with this shame in myself because I done something wrong 13 years ago. I don't want that come back. I don't want do anything wrong. I want show you to my daughters how beautiful is Australia and how good is Australia. I want show you to my daughters, they can be a very, very, very good womans in the future. They can finish his school, they can finish university. I want show you to Australia, I'm a good man and a good thinker.*
>
> *And I want (indistinct) to the community for (indistinct) I want to go there. I give you counsel, I say, "Whatever you done is wrong". Whatever you done is wrong (indistinct). Is many, many good things to do. You have the choice to do very good things. Unfortunately, 13 years ago, I done wrong choice. I don't want people - I don't want people pass for the same happen to me. I want people be honest, becoming a good person, becoming good Samaritans in this country. I want show*

[58] Ibid, paragraph [158].

you to Australia (indistinct) 13 years I'm working hard, I'm study hard, to becoming a good member, to becoming a good person, to becoming a person with good things.

A person with good morals. A person with good heart. A person can carry loving (indistinct) people. I show you to - I would show you to Australia, I want working and working hard. Helping the communities, do all, all, all, all I can do to everybody do the right thing."[59]

[My underlining]

The Applicant's evidence in cross-examination

78. The Applicant was asked about the circumstances of his offending, specifically, his contention about committing the offences due to his innocence and naïveté about the illegal enterprise in which he involved himself and due to his contended trust that he placed in his co-conspirators:

> *"MS SAUNDERS: Yes, I can ask you again. You previously stated that you were innocent and merely were just naïve for having trusted your co-conspirator. Is this still correct?*
>
> *WITNESS: Yes.*
>
> *MS SAUNDERS: Yes. So you still say that you are innocent and you weren't involved in the crime.*
>
> *WITNESS: (Indistinct). And I make my crime.*
>
> *MS SAUNDERS: What you're saying is that you did know what you were doing at the time and you were aware of the conspiracy to possess the Cocaine, is that right?*
>
> *WITNESS: Yes."*[60]

79. The Applicant was then taken to the time of his commission of the subject extremely serious offence. It was put to him that, despite his current contention that he would be dissuaded from committing any further offence because of his intention to protect the integrity of his family unit, he still committed the extremely serious offence while that family unit was nevertheless around him. This is what transpired in cross-examination:

> *"MS SAUNDERS: …I understand that at the time of your offending you were working full-time and living at home with your wife and children. Is that right?*
>
> *WITNESS: Yes, I was.*
>
> *MS SAUNDERS: Would you agree that there's nothing in the evidence that's before the tribunal which suggests that there was a trigger to your offending?*
>
> *WITNESS: That's a trigger to what?*

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59 Transcript, 31 August 2020, page 22, lines 36-39, and page 23, lines 1-35.
60 Ibid, page 25, lines 20-35.

MS SAUNDERS: To your offending? So - - -

WITNESS: Look, this is 13 years ago, I say to before. Maybe I'm selfish - yes, selfish, I'm greedy. Thirteen years ago, I'm thinking total different yes.

MS SAUNDERS: Would you say that you think the reason for your offending then was that you were greedy?

WITNESS: Yes, I believe.

MS SAUNDERS: You said in your evidence and again today, that you are a changed man and so, can you explain to me what has changed?

WITNESS: In everything. I'm not greedy person. I'm a common, normal person. A person, I have no character, a person that have better decision, a person who can look everything around, can thinking inside of the box and outside of the box. A person who can look more far away from (indistinct). Work (indistinct) he can have in the future. A person and understand. Greedy, not (indistinct) to you to (indistinct). Selfish not been to you, no way. A person, one, show it to my daughters and my family want to go start all the good things we have.

MS SAUNDERS: Noting that before when you did offend you had your wife and you had your children, how could the tribunal be satisfied that it would be different now?

WITNESS: All right. Now, Ms Saunders, when you go to a place that you cannot even have access to a (indistinct), you cannot even have access to a (indistinct), you cannot even have access to many, many, many things, you start thinking inside all these stuff outside because of you greedy, you forgot living there. I'm so happy just walking around to the park. I'm so happy just go, sit down and have a coffee and look the people. I'm happy (indistinct). I'm happy with my life, with the God-life he give me. I'm happy with all this small good thing that God can give to you. Nothing about material. I'm not a person material and I total different person."[61]

The evidence of Witness LB

80. Witness LB has known the Applicant since December 2010 and describes him as "*a good friend"* in her written Statement.[62] Witness LB is clearly an entrepreneurial and self-made woman. She runs a successful immigration business, a car detailing business and a real estate business. According to her oral evidence, she specialises in businesses with turnovers of $4 million and less, which she "*pump them up; so I build them up and sell them off."*[63]

61 Ibid, page 27, lines 33-45, and page 28, lines 1-33.
62 Exhibit A6, dated 27 July 2020.
63 Transcript, 31 August 2020, page 66, lines 32.

81. Witness LB is very appreciative for the emotional and other assistance provided by the Applicant to her brother during her brother's time in criminal custody. In her statement, she said:

> *"15. Given the significant emotional assistance [the Applicant] provided to my brother in prison, in conjunction with the development of our friendship, I have decided to offer [the Applicant] secure employment in my business. The broad terms of that employment offer are as follows:*
>
> *• Administrative assistant role.*
>
> *• Salary package of $80,000 per year (plus superannuation).*
>
> *• Forty hours per week of work, with the prospect of overtime and additional monies being earned.*
>
> *• The location of work is at [address of business redacted].*
>
> *16. [The Applicant] will be assisting with photocopying and scanning documents, answering phone calls, reviewing correspondence, general processing of enquiries, and undertaking other miscellaneous work at my direction. I am determined to assist [the Applicant] to start his life again in the Australian community.*
>
> *17. I have gotten to know [the Applicant] quite well over the years, and have complete trust in him. Furthermore, I know that my brother appreciates the assistance I am providing to [the Applicant]. Ultimately, however, the decision to offer [the Applicant] full-time paid employment has been made by me. I see potential in [the Applicant], and I know that he will be a good employee."*[64]

82. Although Witness LB's evidence was not the subject of cross-examination, I again refer to the above-quoted portion of the Applicant's evidence in cross-examination, where it was put to him that even when (1) he did have stable employment (or when he was operating his air conditioning business) while (2) living at home with his family, those specific factors did not prevent his commission of the extremely serious offence. While Witness LB's evidence was well-intended, I am of the view that very limited weight can be allocated to it in terms of its capacity to directly or indirectly ameliorate the Applicant's risk of recidivism.

Findings about the Applicant's risk of recidivism

83. My general impression of the evidence regarding the risk of recidivism is that neither the Applicant, nor any expert, has identified any specific triggers for the Applicant's offending. The Applicant's lay evidence is that his very lengthy term in criminal custody has served to rehabilitate him from whatever previously predisposed him to offend and has otherwise

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[64] Exhibit A6, page 3.

deterred him from further offending. The expert's evidence (Dr Cantali) seemed disposed more towards excluding possible or identifiable triggers behind the Applicant's offending, rather than identifying them.

84. The highest point reached by the evidence in terms of identifying any factor behind the offending involved a concession on behalf of the Applicant that his offending was motivated by greed and selfishness. The now-contended protective factors apparently militating against any further offending, such as his devotion to his family and his responsibilities towards legitimate employment (as now offered to the Applicant by Witness LB), were both present in his life at the time he committed the extremely serious offence. When he offended in 2007, his stepdaughter was aged around seven years, and his biological daughter was aged three years. He had been in a loving domestic relationship with his wife for the best part of a decade. Yet he still contrived to take an extraordinary, dangerous and potentially irreparable or fatal (in terms of his family unit and his migration status in this country) decision to participate in a criminal conspiracy involving him taking a leading role in the unlawful importation of $35 million worth of cocaine into Australia.

85. I have had regard to the lengthy, detailed and extensive SFIC filed on behalf of the Applicant, with particular reference to the specific items raised in support of the principal contention that the Applicant is at a low risk of re-offending. I have sought to comment upon each of the factors raised on behalf of the Applicant, and, with the exception of two contended items, each of the remaining contended items should be discounted or disregarded on the following bases. First, any measured level of risk (LSI-R) was conducted a decade ago in 2009/2010. Second, the Applicant's own evidence comprises the sole basis upon which a low level of recidivism is contended. Third, the expert's report from Dr Cantali makes broad statements about the Applicant's risk of recidivism, but, to my mind, those findings are not conclusively supported by adequate psychometric testing. In any event, Dr Cantali was not called to give oral evidence at the hearing, thus denying the Respondent the chance to test her evidence in cross-examination.

86. Fourth, items such as (1) the lengthy period of time since commission of the extremely serious offence; (2) the Applicant's claimed deterrence from offending; (3) the claimed positive effects he has experienced from educational and other rehabilitative courses he has undertaken while incarcerated; (4) his positive record of employment while in prison and (5) the various Case Note Reports purportedly demonstrating that "*he is a changed*

man", are all aspects of the evidence that have occurred in the closed, structured and isolated confines of criminal custody, and are yet to be tested in the broader Australian community.

87. Perhaps the two factors militating most strongly in favour of a finding of a low risk of recidivism in this Applicant derive from the abovementioned "Post-Release Plan" and "Supervision Plan" appearing in the Pre-Release Report dated 26 March 2019. The former plan makes clear that the Applicant will be safely received and accommodated by his family at the family home in suburban Sydney. The latter plan refers to arrangements for the independent supervision of the nature of his associations with third parties, any risk of him commencing a pattern of abusing illicit drugs and/or alcohol, as well as offering him guidance for intervention modules aimed at managing his impulsivity and raising his self-awareness against re-committing this type of extremely serious offence.

88. A further factor that militates in favour of a finding of a low risk of recidivism is to be found in the stark reality of a notional, but nevertheless very real, "Sword of Damocles" positioned above the Applicant's head, deriving from (1) parole reporting and compliance conditions to which he will be subject until 2027, breach of which could very well likely see him returned to criminal custody, and (2) that any future offending would very likely result in a future mandatory cancellation of his visa status to remain in this country.

89. Counterbalancing these two favourable militative factors in favour of a low risk of re-offending are the comments appearing in the abovementioned Pre-Release Report. As will be recalled, this particular report dates from 26 March 2019. It is, to my mind, concerning to note that the author of this report noted that the Applicant "*continues to deny any knowledge of his offending behaviour"* and that he "*accepted responsibility for his actions despite claiming his innocence"* and, further, that "*he was unable to explore alternative actions."* It is likewise difficult to glean any measure of convincing insight in the Applicant's disposition which, in itself, is somewhat extraordinary given that he has had over 12 years to develop such insight. As noted by the writer of this particular report (as recently as March 2019):

> "*…[The Applicant] admitted that at some point he became suspicious of the package being illegal, however; "didn't think it was what it was or the quantity". He consistently minimised his offending behaviours stating that he "always helps others".*

Despite his failure to display insight into his offending behaviours and decision making…

…During interviews he appeared to attempt to shift the blame to his co-offenders, consistently protesting his innocence."[65]

[My underlining]

90. While the Applicant only has the one conviction appearing in his criminal history, that conviction nevertheless involved significant planning, organisation and forethought. His involvement in the unlawful conspiracy was not the result of an impulsive decision. As I recall the evidence, the length of the offending was found to have run over a period of some three months. Consequently, it is difficult to accept that the Applicant was "*unaware"* of the nature and quantity of the illicit drug at the centre of the criminal conspiracy, particularly when one has regard to the reality that Judge Marien SC sentenced him on, inter alia, the following bases:

- After the removal of co-conspirator S from the enterprise, Judge Marien SC said "*The Crown asserted, and I accept on the evidence, that the offender [the Applicant] was to take on the role of the new owner of the container to give the enterprise an air of legitimacy."*;

- "*in assessing the nature and circumstances of an offence of this kind, it is relevant to take into account the amount of drug involved. In this case, the amount was substantial being more than fourteen times the commercial quantity."*;

- "*Further, I am satisfied beyond reasonable doubt that the accused knew that it was a substantial quantity."*

91. One also has misgivings about the Applicant's level of rehabilitation or insight into the need for ongoing intervention to minimise his risk of re-offending. The author of the abovementioned Pre-Release Report noted the following:

"***Responsivity***

Willingness to undertake intervention

[The Applicant] reported that he would be willing to undertake intervention deemed necessary by Community Corrections.

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65 Exhibit G1, s501 G Documents G37, page 655.

He was unable to indicate any interventions he believes he would need to engage in, suggesting that he could mentor others. He reported that he did not believe counselling necessary."[66]

92. I am mindful of the terms of the Principles contained in the Direction. Principle 6.3(2) provides that the Australian community has an expectation that the Australian Government should cancel the visas of persons who are involved in serious crimes. It is clear that the nature of this Applicant's extremely serious offending, without question, falls within the ambit of this Principle. I am also mindful of the terms of the Principle appearing at 6.3(4), namely, that, were this Applicant to repeat the nature of his past offending, the harm it would cause would be so serious that any risk of such conduct in the future would be unacceptable to the Australian community.

93. The Applicant arrived in Australia in 1997 aged 29 years. While his offending history is short in its length, I have found that his offending has been extremely serious. The severity and seriousness of the Applicant's offending conduct is reflected in the 20 year head custodial term (with a 12 year non-parole period) imposed upon the Applicant for his singular offence in this country.

94. I have had regard to the totality of the evidence in relation to the Applicant's risk of re-offending. I have reached the conclusion that his risk of re-offending upon any return to the Australian community remains undefined and uncertain. Consequently, I am of the view that the risk of this Applicant again being lured into the commission of similar or identical offending is now no different – specifically, no higher and no lower - than what it was at the time of his removal from the community in mid-2007.

95. I accept that he has a favourable record in both criminal custody and immigration detention. I also accept that he has completed certain rehabilitative courses and/or treatments while removed from the Australian community. However, the critical observation for present purposes is that any favourable record of conduct and/or seeking out and obtaining rehabilitative courses and treatment has occurred *outside* the community. One's time in criminal custody/immigration detention must, by its very nature, be very highly structured and extremely regulated. The Applicant's capacity to deal with stricture or exigency in his

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66 Ibid, G38, page 656.

life that has previously predisposed him to offend has only been tested within the closed confines of criminal custody/immigration detention. It remains untested and unproven in the broader community.

96. It is, to my mind, safe to find that the nature of the harm if the Applicant were to re-offend in the community in a similar way is extremely serious and could quite conceivably involve physical, psychological and financial harm – even to a catastrophic level. I am of the view (and I find) that the factual circumstances of this Applicant's offending is such that the nature and harm that may result from him re-offending is so serious that any eventuality of any such future risk of harm is unacceptable to the Australian community.

97. The inevitable conclusion to be reached about the Applicant's risk of re-offending is best informed by an application of Principles 6.3(3)-(4) and paragraph 13.1.2(1) of the Direction. The combined effect of those provisions is that the harm resulting from any return by the Applicant to his offending ways may very well be so serious such that any risk of similar conduct in the future is unacceptable. I so find.

98. I am also mindful of the comments made by a previous President of this Tribunal, His Honour Justice Davies, who said the following about the risk of re-offending:[67]

> *"The likelihood of recidivism is a strong factor in favour of the deportation when the Tribunal is not satisfied that the criminal is unlikely to offend again…And even if the risk of recidivism is not high, the risk will strongly support deportation when recidivism, if it does occur, may cause great harm."*

Conclusion: Primary Consideration A

99. The Applicant has a questionable level of insight into the circumstances and nature of his offending behaviour. In particular, his position of continued denial and obfuscation around how he found himself involved in such an extremely serious criminal conspiracy is a matter of genuine concern. While his propounding of him being a changed man who wants to re-start his life in the broader community is no doubt well-intended, most, if not all of the factors militating against him re-offending were present in his life well over a decade ago when he did so extremely seriously offend.

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[67] *Stone and Minister for Immigration and Ethnic Affairs* (1981) 3 ALN 81.

100. The totality of the evidence around recidivism is not convincingly suggestive or demonstrative that the Applicant's risk of committing similar or identical offences is any different now than what it was immediately prior to his removal from the Australian community. He continues to deny the precise nature and circumstances of his offending. He does not believe in any requirement for ongoing counselling or other intervention to monitor factors predisposing him to offend. Accordingly, the evidence before the Tribunal about the Applicant's risk of recidivism falls well short of convincing this Tribunal that his prospects of re-offending in the unregulated environment of the general community are any different to what they were immediately prior to his most recent removal from it.

101. I have had regard to the provisions of paragraphs 13.1.1 and 13.1.2 of the Direction and have also had regard to sub-paragraphs 6.3(3) and (4). I find that (1) the nature of the Applicant's offending conduct to date is extremely serious and (2) there is a strong and unresolved likelihood that he will engage in further very serious to extremely serious conduct if returned to the Australian community.

102. In consideration of all of the evidence and each of the relevant factors contained in the Direction, I find that Primary Consideration A weighs very heavily in favour of non-revocation.

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

103. Paragraph 13.2(1) of the Direction compels a decision-maker to make a determination about whether cancellation is or is not in the best interests of a child who may be affected by cancellation of the Applicant's visa. Paragraphs 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 cancel the subject visa is expected to be 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.

104. It is first necessary to identify the children actually or possibly relevant to this proceeding. In his evidence in chief, the Applicant was asked about his family, and responded as follows:

"DR DONNELLY: Could you describe briefly in your own words your family make-up in Australia?

WITNESS: I have a very loving family in Australia. I have my wife and two daughters. My daughter's name is [Child L] and [Child K]. My wife's name is [the Applicant's Wife].

…

DR DONNELLY: Now, your oldest daughter, what's her name again?

WITNESS: [Child K].

DR DONNELLY: Are you the biological father of [Child K]?

WITNESS: No, I'm not the biological father of [Child K]. [Child K], my relationship with my wife is start around 2099 (sic), 2000 when I start living with… my wife. She already have [Child K], so I treat [Child K] like - - -

DR DONNELLY: I'll just stop you there. How old was [Child K] when you first entered into a relationship with her mother?

WITNESS: [Child K] is around two, three years old.

DR DONNELLY: Two or three years of age. Okay. Sorry, go on?

WITNESS: Yes, after that I treat [Child K] like - [Child K] for me is my own daughter. Is my daughter. I love [Child K], I love - I love my daughters a lot. The relationship with [Child K] is very strong and I'm very, very, very emotional for because for me she's so far. She have college in progress now. She too far in city. She have a lot of problems."[68]

105. Child K is therefore a stepdaughter of the Applicant who was born in October 1996 and is currently 23 years of age. Child L is therefore a biological child of the Applicant who was born in July 2003 and is currently 17 years of age. As best as I understood the evidence, and pursuant to the provisions of paragraph 13.2(2) of the Direction, only Child L comes within the auspices of paragraph 13.2 of the Direction.

The Applicant's written evidence

106. In his "Statement"[69] dated 27 July 2020, the Applicant says the following:

"*7…Daily, usually in the evening, I call my two daughters and wife. This is perhaps the most important part of my day; being able to connect with my family (who I love very much).*

…

12. It is my respectful desire to work hard in Australia, support my wife and two daughters, and rebuild my life in this beautiful country. I owe my wife and daughters

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[68] Transcript, 31 August 2020, page 5, lines 41-44, page 6, lines 38-46, and page 7, lines 1-6.
[69] See Exhibit A2.

a lot, as I have missed out on a significant portion of their lives over more than a decade.

13…I continue to maintain a close and ongoing relationship with my immediate family in Australia. If I am permitted to remain in Australia, I would like to rebuild my marriage with my wife and create beautiful memories with my daughters."[70]

107. In his Personal Circumstances Form, the Applicant writes:

> *"**Please list your children who are aged 18 years and older in the <u>Family Details section</u>. Include all minor children in your life (including biological children, step-children, grandchildren, close nieces or nephews etc.). Attach copies of birth certificates if available.***
>
> *[The Applicant recorded the following particulars in tabulated form]*

Full name of child	*Sex (M/ F)*	*Date of birth*	*Nationality*	*Father's Name*	*Mother's Name*
Child L	*F*	*…July 2003*	*Australian*	*[The Applicant]*	*[The Applicant's Wife]*

> ***Does the child or children currently reside with you?***
>
> *[The Applicant ticked the box "No"]*
>
> ***Will the child/ren reside with you upon your release from prison/detention?***
>
> *[The Applicant ticked the box "Yes"]*
>
> *…*
>
> ***Are there any court orders that relate to your child/ren?***
>
> *[The Applicant ticked the box "No"]*
>
> ***Please describe your relationship with <u>each child</u> including when it began, how often you contact/see the child/ren and the role you play in their lives.***
>
> *Relationship is solid and we have lived together since she was born [presumably, Child L].*
>
> *There is an older child [presumably Child K] (19 yr) from [the Applicant's wife's] previous relationship.*
>
> ***Please describe the impact the cancellation of your visa would have, or has had, on the child/ren listed.***
>
> *They are a loving family and will devestate [sic] the family group if I am deported.*
>
> *…"*[71]
>
> *[Emphasis and underlining in original]*

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70 Ibid, pages 2-3.
71 Exhibit G1, s501G Documents, G13, pages 112-113.

The Applicant's SFIC

108. The Applicant's SFIC concurs with my finding that the only relevant child for the purposes of this Primary Consideration B is the Applicant's biological child, namely, Child L, currently aged 17 years.[72] The Applicant's SFIC goes on to say:

> *"Considered in totality, the overwhelming amount of evidence (both expert and lay witnesses) before the Tribunal speaks of a strong, ongoing and special relationship between the applicant and his minor daughter in Australia. If the applicant is deported to Colombia, this will have significant life-changing consequences for the applicant and [Child L]. The evidence demonstrates that if the applicant is deported from Australia, this will significantly strain the ongoing relationship between the applicant and his daughter."*[73]

The Applicant's evidence in chief

109. During his evidence in chief, the Applicant spoke of the impact of his possible removal from Australia upon all of his family and, in particular, Child L:

> *"DR DONNELLY: How long have you lived in Australia for now, sir, approximately?*
>
> *WITNESS: Around 23 years.*
>
> *DR DONNELLY: Twenty-three years. All right. Now, if you were to be deported to Colombia, in your evidence would that affect your family in Australia?*
>
> *WITNESS: Oh, oh, is very hard. If they send me to Colombia, they destroy my family. They separate me from my family. First, I can say my daughters, they are not speak Spanish so they cannot go to Colombia. Second one, my wife, losed(sic) his husband, loving husband and my daughter lose his - her loving husband (sic), so I can't know - I can't imagine how much damage can happen if they send me to Colombia, especially in this ... (inaudible) ... away from my two daughters, [Child L] and [Child K]. My family - my wife lose the support of the future, my support, physical - physical and financial, because my wife, she have a medical condition. My wife have a medical condition, so if I left to Columbia (sic) maybe (indistinct) his medical condition come engaged to more severity, yes?"*[74]

110. The Applicant spoke of the nature of his relationship with both of his daughters. He described the nature of this relationship prior to his incarceration and since his incarceration:

> *"DR DONNELLY: What kind of relationship do you have with your two daughters?*

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72 Exhibit A1, Applicant's SFIC, page 57, paragraph [159].
73 Ibid, page 61, paragraph [182].
74 Transcript, 31 August 2020, page 7, lines 28-43.

WITNESS: Very strong. Very strong. My daughters, they ask me all the time for questions, 'We miss you', 'How can I help you?'. Is call, anything they doing value basis, and are there all the time. Give you the best advice I can do. I give you all the time, the more love I can give to my daughters. They are very, very strong, loving relationship with my children.

DR DONNELLY: So it's common ground that you've spent about 12 years in prison. Is that right?

WITNESS: Yes, sir.

DR DONNELLY: So I just want you to describe briefly in your own words how you've been able to maintain your connection or relationship with your family in Australia, given that you've been in prison?

WITNESS: All right. From 2007 they did send me to the gaol every time, every week, every two weeks. They moved me to Kempsey. They going there because Kempsey is nearly four, five hours from here so the communication is becoming more telephone every day, every day, but when I've been in maximum security before ... (inaudible) ... afternoon, every day I call my daughters and my wife. On the weekend I call all the time my daughters and my wife. When I come back to minimum security I have more time so I can call my daughters around 5 o'clock. Before dinner I talk to my girls all the time. We saying ... (inaudible) ... each other. We saying we find many, many different things. When I come back to here to Villawood and they come every week to meet here in Villawood. Now they say pandemic causing everything. We have more communication face to face, telephone, text message. All this stuff."[75]

111. The Applicant also spoke of difficulties that would arise if, upon his removal from Australia, he was compelled to maintain contact with Child L other than on a face-to-face basis:

"WITNESS: After that, you broken apart a family, Australian family, so the dream of my wife and my daughters to be coming normal Australian family, gone, because I'm gone, because I'm going to - they send me to Colombia. The dreams of my daughters and my wife and to helping, to working, to the school, to helping to go to the university, to helping to becoming better, better person and becoming - finish university, everything kind of stop because the - because the fella he left. My wife and my daughters, they waiting for me for 13 years, 13 years, to go back to my home and take the lives I left 13 years ago. Their dad or their father, their dad or their loving father.

The (indistinct) my daughters come to me and ask me, "Dad, what can I do because of that?", or "Dad, what can I do because of this?". If I'm been in Colombia, it's not the same. Here I can have communication with my daughter or my wife for the phone for the technology, but it's not the same, it's not the same when you stay next to your family. It's not the same walking together with your daughter to the school. It's not the same when you daughter or your wife, they are sick, you come (indistinct) to trying to feeling good, to trying to helping to do something. It's not the same. Is

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[75] Ibid, page 6, lines 12-36.

the physical contact is total broken, total broken. To my daughters, go to Colombia, is very difficult, because first, they are not speak Spanish."[76]

<u>*Cross-examination of the Applicant*</u>

112. The Applicant was cross-examined about his relationship with both of his daughters. In particular, he spoke of the difficulties both he and both children had experienced as a result of his absence. He spoke of missed opportunities to assist both of his daughters with their education. He also spoke of missed social opportunities:

> *MS SAUNDERS: …If I could just move on, just to ask you some questions about your daughters. So I understand you have a daughter and a stepdaughter?*
>
> *WITNESS: Yes.*
>
> *MS SAUNDERS: And I can see that you've maintained a relationship with them during your incarceration.*
>
> *WITNESS: Yes.*
>
> *MS SAUNDERS: And how old were they when you were initially incarcerated?*
>
> *WITNESS: When I got to gaol, [Child K] around seven years old. Yes, seven years old. And [Child L] just only around three years old.*
>
> *MS SAUNDERS: Yes, okay. And so in what ways have you contributed to their upbringing during your incarceration?*
>
> *WITNESS: Sorry, can you - - -*
>
> *MS SAUNDERS: Yes. So in what ways have you contributed to their upbringing while you're been incarcerated?*
>
> *WITNESS: In the way of a loving father. I have to use the technology, telephone, and every time they go to visit me and I spend all the visits with my daughters. I do all with my daughters, I show you my (indistinct) and give you all the support. I can't now take my daughter to the school because I'm in gaol. I cannot helping to my daughter to the homework because I'm in gaol. But I give you the tapes, sometimes when she make (indistinct) school, she told me on the phone, and I say, 'You can say that, you can say that.' Yes. Before, with [Child K] I take [Child K] everywhere. I take [Child K] to the playground, I take [Child K] to my soccer games, I take [Child K] and [Child L] to my soccer games. Before I come to the gaol, before I come to the gaol, [Child K] just only seven years, [Child L] only three years … I take all the time my daughters and my sister-in-law to the park, to dinner, to have a coffee, to have a tea. All the time. Every week, every time. Every time we have time to spare, I take my family to have a (indistinct), to have something. This is when they – when the people say, when you are good person, when you (indistinct) the people is there. This is my – all the time my daughters and my family is there.*

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[76] Ibid, page 21, lines 45-47, and page 22, lines 1-17.

MS SAUNDERS: Yes, I understand from what you're saying. In relation to your daughter [Child L], it's been difficult to contribute to her schooling and extracurricular activities because of your incarceration, would that be right?

WITNESS: Yes. Is the more logic, because I been in physical out of the picture, yes?

MS SAUNDERS: Yes. Yes.

WITNESS: Been physical out of the picture, yes. So you know how many times is (indistinct). Yes, this my daughter. (Indistinct words) send me the copy. I can't not even there to give you half to your kid.

MS SAUNDERS: Yes.

WITNESS: Yes? That (indistinct words) are going to my soccer game tomorrow. You know how many times she asked me that, 'When will you go out (indistinct) to playing soccer?' That (indistinct) when you go out, help me with that. And I say many times, 'No, I'm very good with mathematics, I'm helping (indistinct) mathematics. I can't imagine – I give you this (indistinct) on the phone, how you good at mathematics. Is too difficult. Yes. I know being very physical I cannot say.

MS SAUNDERS: Yes.

WITNESS: (Indistinct words) kind of spiritual, I been there all the time with my daughters.

MS SAUNDERS: So it would be accurate to say that your parental contributions to [Child L] have been limited to what can be provided through technology?

WITNESS: Maybe yes. Because you – we (indistinct words) I been here – I not been with my daughter physical. Yes. I not been with my daughter physical for this (indistinct), yes? But I been with daughter all the time – every time he (sic) need me, I have in this moment I have a phone here so he (sic) can call me. But if my daughter have trouble with (indistinct) within the school, how can I go to the school?

MS SAUNDERS: Yes, that's a - - -

WITNESS: How can I go there?

MS SAUNDERS: That's understandable.

WITNESS: Yes. How can I go outside, I want to talk to the (indistinct) and I see my daughter has (indistinct) and my daughter, he's (sic) a sad thinking in that way. But my daughter he (sic) (indistinct). I can't know do that. I'm very honest. I'm very honest.

MS SAUNDERS: Yes.

WITNESS: I know. Yes? You – when you have – you kiss there, you know the patterns. You know how they – you know how when they look – I know when I see the love and she look at me, I know if she's sad, she's happy or she's something (indistinct words). The same [Child K] and the same [Child L]."[77]

<u>*The evidence of Child L*</u>

[77] Ibid, page 44, lines 38-47, page 45, lines 1-46, and page 46, lines 1-43.

113. Child L has provided a written statement.[78] Very courageously, she also provided oral evidence at the hearing. In her written statement, she says the following:

> *"**Introduction***
>
> *…*
>
> *5. I am currently a student in year 11 at school; however, shortly, I will start year 12 and the Higher School Certificate **(HSC)** program. I also hold a casual position of employment as a sales assistant at [Name of business redacted]. I have a fairly busy schedule daily.*
>
> ***Nature of Relationship***
>
> *6. I would describe my relationship with my father as very close. I am the daughter of [the Applicant] and share a close family connection. We keep in contact daily by telephone calls, messages, and FaceTime. My father is always interested to know how my day is going and to ensure that I am okay.*
>
> *7. I love my father very much. I know my father also loves me very much. We have a strong bond and an ongoing connection. I miss my father very much. As a result of COVID-19, I have not been able to see my father face-to-face at the immigration detention centre in Villawood.*
>
> *8. Now that I am older, I am generally aware of my father's criminal offending in Australia. I know that my father was involved in a conspiracy to import a substantial amount of drugs into Australia. I believe that my father is deeply remorseful and regretful for his criminal offending in Australia.*
> *…*
>
> ***Prospect of Deportation***
>
> *13. Perhaps the greatest aspect of this case, speaking for myself, is that I would be devastated if my father was deported to Colombia on account of his criminal history in Australia. It would affect me detrimentally, knowing that I would never be able to connect with my father in Australia.*
>
> *14. I am especially concerned, as I am about to go into my final year of high school (which I readily appreciate will occasion significant stress to me). If my father is deported to Colombia, I feel that my emotional distress will be exacerbated in combination with my current study situation.*
>
> *15. If my father was deported, I am extremely concerned that our relationship will deteriorate given the significant distance between Australia and Colombia. There can be no doubt that face-to-face contact is very different from electronic communications. I will be heartbroken to lose my father. If my father is deported, he will continue to miss the significant milestones in my life.*

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[78] Exhibit A5, Witness Statement, Child L, dated 28 July 2020.

16. The possibility of [the Applicant] being deported already, as an idea, has been very upsetting and stressful for me. I will also be very concerned about my father's ability to survive and live in Colombia. My father has lived in Australia for so many years. He would be returning to Colombia in very different circumstances. His children are in Australia. His wife is in Australia.

Recent Contact

17. I have had face-to-face prison visits with my father in the past. At present, I have kept in contact with my father through telephone calls, messages, and video calls. I understand that my father is currently being detained at the Villawood Immigration Detention Centre. I never could imagine that my father would end up at a place like this.

Conclusion

18. I respectfully believe that my father should be permitted to remain in Australia. If [the Applicant] is deported, it will inflict long-lasting emotional trauma upon me. I have been waiting for many years for my father to be released from prison. I have been waiting for the opportunity to spend significant quality time with my father in Australia. If [the Applicant] is deported, it will leave me with negative memories.

…

20. Now that my final senior year is about to be upon me, and the stress of having to do exceptionally well in my exams for the HSC, I do not know how I would cope if my father is deported. I believe that my father's potential deportation would act as a significant detriment to my well-being and ability to focus on my studies and do the best I can."[79]

114. As I mentioned earlier, Child L, very bravely in my respectful opinion, agreed to provide oral evidence for the hearing. This was clearly a traumatising experience for her, and I receive and accept her evidence in only one, and very convincing, way. Child L was not cross-examined. The following transpired in her evidence in chief following her confirmation of the contents of her abovementioned written statement:

"DR DONNELLY: Thank you. I understand you're the youngest daughter of [the Applicant]?

WITNESS: Yes, I am.

DR DONNELLY: Could you tell the tribunal what relationship you have with your father?

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[79] Ibid, pages 1-4.

WITNESS: Well father-daughter relationship, yes. I'm very close with him, I mean I talk with him daily. I talk with him about everything I do that day in school. All my accomplishments and everything like that. I consider him my father.

DR DONNELLY: All right, and what contact have you had with him when he was in prison?

WITNESS: I visited him, I guess. I sent letters to him, drawings, even when I was younger. And I think that's all, yes.

DR DONNELLY: When you say you sent letters to him, did he send letters back to you?

WITNESS: Yes, he did.

DR DONNELLY: Is there any particular letter that stands out, something that you would like to tell the tribunal about?

WITNESS: I guess he used to always ask me about my day constantly. He wanted me – he wanted – he communicated to me that he wanted to know what I did every day, and like – I guess. I told him everything, and it was – (indistinct) of the day, I guess. That's all I have to say, honestly. I don't really remember. I was pretty young and didn't send much letters when I was getting older.

DR DONNELLY: I noticed you're wearing a school uniform, so what year are you in school?

WITNESS: I'm in Year 11.

DR DONNELLY: And how long have you got left in Year 11?

WITNESS: I've got three weeks, and then I have a break and I'm onto Year 12.

DR DONNELLY: Right, and you're starting your HSC?

WITNESS: Yes. Right now I'm studying for my preliminary exams, and they're very important to me. They determine to teachers of my extent – or the extent of my abilities, if I can get into any extension subjects and anything like that, and I'm aiming to get into what's called history extension, and the exams are very important for that.

DR DONNELLY: And how would it feel to you if Dad got to come home?

WITNESS: It would feel amazing, I guess. More just the support and the feeling of him being there. Sorry.

DR DONNELLY: You don't need to apologise. I'm sorry to ask you this question, but it's an important question. How would you feel if Dad was – take your time. Did you want a moment? I'll give you – have a moment?

WITNESS: It's fine, yes.

DR DONNELLY: How would you feel if Dad was – had to live in Colombia?

WITNESS: I'd feel very sad, I guess, with him being over there. And being here with me and seeing everything that I've done, like my graduation and everything. And I won't be able to speak to him face to face about my accomplishments, that really I did for him as well. And it's not the same. It'll be very hard for me. And especially knowing that he left at such a young age, and I won't be able to (indistinct) I guess.

…

SENIOR MEMBER: All right, Mr Donnelly. Thank you, Dr Donnelly. Any cross-examination, Ms Saunders?

MS SAUNDERS: No, Senior Member.

SENIOR MEMBER: Thank you. Anything else that you would like to say, [Child L]?

WITNESS: I guess I would just really like him to come back home, so I can form that bond again with him. And I really miss him."[80]

The evidence of the Applicant's wife

115. The Applicant's wife has provided a written statement for these proceedings.[81] She also provided oral evidence at the hearing. Her written statement says the following about the impact upon Child L resulting from the Applicant's possible removal from Australia:

"Consequences of deportation

…

15. Deporting [the Applicant] will have devastating consequences not only for myself but particularly for our two daughters. [Child K] has suffered from troubling anxiety and depression as a result of [the Applicant] being in prison, immigration detention, and now, the real prospect of being forcefully deported back to Colombia. The pressure has been enormous for [Child K].

16. [Child L] has also struggled without her father being around. As [Child L] has grown, she has become more aware of her surroundings, feelings, and emotions. I am very worried that [Child L] would not cope if [the Applicant] were deported back to Colombia. [Child L] is going through an important period in her life, shortly about to start the Higher School Certificate (HSC) in Sydney.

17. If [the Applicant] is deported, I hold grave fears that [Child L]'s educational development concerning the HSC would be adversely impacted. Losing a father at any time is difficult, but especially during a pivotal period in the final year of high school. [Child L] is already struggling without her father in her life.

18. Although [Child K] and [Child L] would be able to keep in contact with [the Applicant] by electronic communications, that is not the same as face-to-face contact. Our daughters have been robbed of the opportunity to have meaningful physical contact for many years with [the Applicant].

…

20. Any decision that resulted in the deportation of [the Applicant] would have significant lifelong consequences for the immediate family in Australia…

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80 Transcript, 31 August 2020, page 63, lines 9-47, and page 64, lines 1-12 and 28-35.
81 Exhibit A3, Statement of the Applicant's Wife, dated 27 July 2020.

…

23. Although [the Applicant] has extended family in Colombia, they are not his immediate family. I am [the Applicant]'s wife. [The Applicant] has two daughters in Australia. [The Applicant]'s life is in Australia, not Colombia…"[82]

116. In her evidence in chief, the Applicant's wife spoke about the impacts upon Child L consequent upon any removal of the Applicant from Australia. She said the following:

"DR DONNELLY: What about the younger daughter, [Child L]?

WITNESS: [Child L]. [Child L], I was concerned with [Child L] early on in her early high school years because she was not doing well in the end of primary school and beginning of high school. But with our support, and [the Applicant] has – as I said, he's always tried to co-parent with me as best he can, raising her as much as he can and pushing her to do well, and she's very – she's very – she really uses that praise to push her along in her studies, and she's dragged herself to become surprisingly a very good student, and she's pretty much the top of all her classes right now. She's in Year 11 and she's doing very well. She's got her preliminary exams coming up this week, and we are crossing our fingers that she does as well as we expect her to, and onto HSC next year. So she's at a very crucial point in her studies at the moment. We're very proud of her, and we hope that she can continue.

…

DR DONNELLY: All right. Now if [the Applicant] was to be deported, do you have any concerns about [Child L]? You mentioned before that she is doing really well at school right now and she's going through a critical period?

WITNESS: Yes.

DR DONNELLY: Is there anything you want to say about that?

WITNESS: As I said before, [Child L] is very – I think that her reason for doing so well is that she wants us to be proud of her. She really loves showing [the Applicant] all her achievements and myself. [Child L]'s at a very stressful point with HSC and the COVID situation going on. She does need both parents there, and I feel like this would be a very emotional time for her if [the Applicant] were to be deported at this time, and I don't want her studies to suffer because of that. And on a personal level, [Child L] 's very close to her father, and I feel like emotionally, she would suffer greatly."[83]

The evidence of Dr Cantali

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82 Ibid, pages 3-4.

83 Transcript, 31 August 2020, page 53, lines 46-47, and page 54, lines 1-11 and lines 34-46.

117. The material contains a further psychological report from Dr Cantali.[84] It dates from 9 October 2018 and results from the Applicant's wife taking both Child K and Child L for a clinical interview with Dr Cantali on 3 October 2018. As noted by Dr Cantali:

> "*[The Applicant's wife] was concerned about her daughters' emotional state. The family had been recently notified [that the Applicant] will be deported to Colombia immediately after his parole release from jail in 2019. [The Applicant's wife] stated that since receiving this news, the girls have started experiencing periods of stress and anxiety. [The Applicant's wife] reported feeling concerned about the long-term psychological impact of their father being deported to Colombia especially as the girls had been planning and preparing for his release physically and emotionally."*[85]

118. In terms of her assessment of Child L, Dr Cantali noted the following:

> "*…[Child L] will be in year 10 when her father is due for parole release. It will be in the later part of year 10 where [Child L] will need to make decisions about subject choices for year 11 and 12. [Child L] reported feeling excited that her father will be present during that process and she can physically discuss her choices with both parents. [Child L] has reported feeling very motivated in achieving a high ATAR. It is evidence that [Child L] has already pictured herself as making a substantial positive contribution towards realizing the perfect family. If her father was to be deported, she will be psychologically shattered as since his imprisonment she has been encouraged to keep her father's presence alive by her family and by her father's letters and telephone calls. Psychological impact of her father's deportation this would be irreparable. [Child L] reported that she would not cope if her father was to be deported. She is worried that she would have emotional meltdown. Studies focused on deportation found that teenagers with parents who are deported are found disruptions in attachment, feelings of abandonment, and estrangement were evident."*[86]

119. In terms of a "*clinical opinion and summary",* Dr Cantali noted the following:

> "*Following the clinical interview with [Child L] and [Child K] it is evident that both girls struggled emotionally due to the incarceration of their father. However, it is evident that their father's ongoing support through letters and telephone calls has contributed to the development of their resilience. This resilience has developed through their vision and encouragement by both parents of regaining their family unit…My concerns are for [Child L] whose current age makes her emotionally vulnerable. In particular [Child L]'s thoughts of self-harm are concerning as this behaviour can escalate. The consequences of her father's deportation could cause [Child L] to experience significant emotional problems such mood swings, sense of hopelessness, problems concentrating, loss of appetite and somatic problems.*
>
> *…*

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84 Exhibit G1, s501 G Documents, G19, pages 165-169.
85 Ibid, page 166.
86 Ibid, page 167.

[Child K] and [Child L] have developed a strong relationship with their father. Research confirms that girls are more inclined to feel anxiety and depression throughout early and into late stage adolescence due to disruption in parental relationships, particularly the loss of the father role…

Currently [Child L] has an established stable and constant relationship with her father, she has been working on the assumption that her father will be returning to the nuclear family in 9 months' time. [Child L] is in a very vulnerable stage of her life being in the crucial stage of identity development…A major disruption in loss of her father and the ideal of becoming a family again could lead based upon longitude studies to negative psychological wellbeing outcomes for [Child L]…with increased likelihood of anxiety and depression. Additionally, [Child L] due to the encouragement and support of her father has been focusing on her school work and improved her educational outcomes. A major disruption to her family and the loss of her father at a pivotal stage of her education could have long lasting impacts of her educational outcomes and long-term socioeconomic status trajectory."[87]

[My underlining]

120. While I have sought to summarise as fulsomely as possible the findings and opinions of Dr Cantali relevant to Child L, I must mention, out of due fairness to the Respondent, that Dr Cantali was not called as a witness and the Respondent was thus denied the opportunity of testing her evidence in cross-examination. The weight allocable to Dr Cantali's evidence must thus be tempered accordingly.

Application of Factors in Paragraph 13.2(4) of the Direction

121. Paragraph 13.2(4) of the Direction provides a list of factors to be considered in determining the best interests of the abovementioned minor children. Those factors relevantly comprise for present purposes:

> *(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;*

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87 Ibid, pages 168-169.

(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.*

122. **Sub-paragraph (a)** of paragraph 13.2(4) of the Direction refers to the nature and duration of the relationship between the child/ren and the non-citizen. As a general proposition, less weight should be given to this factor where there have been long periods of absence or limited meaningful contact between the Applicant and the child/ren.

123. Due to his period of incarceration for his criminal offending, and now immigration detention, the Applicant has been physically removed from the life of Child L for well over a decade. There is a well-made acceptance on behalf of the Applicant that:

> *"161. Given the applicant's lengthy period of incarceration and time in immigration detention, it must be readily accepted that there has been limited meaningful contact between the applicant and his daughter. Plainly, given the applicant's incarceration, he has had limited physical contact with his daughter."*[88]

124. As against that, it is clear that despite his physical absence from her, there is a clearly discernible "*nature and duration"* in the relationship between the Applicant and Child L. This is clear from the Applicant's evidence, the evidence very bravely provided by Child L and the evidence of Dr Cantali. Were the Applicant's visa status to be restored to him, I am of the view that the nature and duration of the relationship between him and Child L is such that she would readily, gladly and without hesitation accept him as the father figure physically present in her life, which she obviously craves and, according to Dr Cantali, must have for the sake of her psychological wellbeing.

125. I have considered the totality of the evidence in relation to Child L and have formed a view about the strong level of the "*nature*" or "*duration*" of the relationship between her and the

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[88] Exhibit A1, Applicant's SFIC, page 57.

Applicant. Overall, the evidence points to the allocation of a strong measure of weight to this sub-paragraph (a) in favour of the Applicant.

126. **Sub-paragraph (b)** of paragraph 13.2(4) of the Direction requires a decision-maker to make an assessment of the extent to which the Applicant is likely to play a parental role in the future, taking into account the length of time there is until the child/ren turn 18. Any application of this sub-paragraph (b) is informed by the extent to which the Applicant has played any such role to date.

127. With reference to the Child L, the evidence makes it clear that despite his physical absence, the Applicant has played, to the extent he can, a positive parental role in her life thus far. I accept there are very strong prospects of the Applicant playing a positive parental role in Child L's life in the future. The only factor against militating the allocation of a strong measure of weight to this sub-paragraph (b) in favour of the Applicant is the reality that Child L has less than one year to go until she attains the age of 18 years. Otherwise, the application of this sub-paragraph (b) to Child L would automatically merit a strong measure of weight in favour of the Applicant.

128. That said, I am mindful of the findings and comments of Dr Cantali. Child L is in Year 11, heading into Year 12. She is at a critical phase of her academic and psychosocial development. In my view, even for the just under 12 months until she attains the age of 18 years, the Applicant would have a vital and very significant role to play in her life during this period. For this reason, I maintain an allocation of a strong measure of weight upon this sub-paragraph (b) (overall) in favour of a finding that it would be in the best interests of Child L that the Applicant's visa to remain here not be cancelled.

129. **Sub-paragraph (c)** of paragraph 13.2(4) of the Direction involves an assessment of any negative impact of the Applicant's prior conduct, and any likely future conduct, on Child L.

130. I have earlier, at some length, quoted Dr Cantali's findings. The negative impacts of the permanent physical removal of the Applicant from Child L's life are palpably clear from the abovementioned report of Dr Cantali. According to that report, there will be a range of impacts upon Child L such that:

- "*she will be psychologically shattered…"*

- *"Psychological impact of her father's deportation would be irreparable…"*
- *"[Child L]…would not cope if her father was deported"*
- *"[Child L]…would have emotional meltdown…"* if her father was deported;
- the age of Child L, according to Dr Cantali, "*makes her emotionally vulnerable"* were the Applicant to be permanently removed;
- were the Applicant to be permanently removed, "*[Child L]'s thoughts of self-harm are concerning as this behaviour can escalate"*
- the permanent physical removal of the Applicant from her life "*could cause [Child L] to experience significant emotional problems such mood swings, sense of helplessness, problems concentrating, loss of appetite and somatic problems."*
- the permanent physical removal of her father "*at a pivotal stage of her education could have long lasting impacts of her educational outcomes and long-term socioeconomic status trajectory."*

131. It is plain that the impact of the Applicant's prior offending has adversely affected Child L. Any automatic allocation of a strong measure of weight to this sub-paragraph (c) in favour of the Applicant must be tempered by my finding about the Applicant's risk of recidivism. This sub-paragraph (c) also refers to the impact of any "*future conduct*" on Child L. Having regard to my findings about the Applicant's risk of recidivism, I am of the view that any allocation of a strong measure of weight to this sub-paragraph must be brought back to a moderate measure of weight.

132. Accordingly, I am of the view that this sub-paragraph (c) merits a moderate allocation of weight in favour of a finding that non-cancellation of the Applicant's visa is in the best interests of Child L.

133. **Sub-paragraph (d)** of paragraph 13.2(4) of the Direction refers to an assessment of the likely effect that any separation of Child L from the Applicant would have on her, taking into account the Applicant's ability to maintain contact in other ways.

134. I am of the view that this sub-paragraph (d) is best approached by considering two aspects. First, as I have outlined for the immediately preceding sub-paragraph (c), there can be no argument with the reality that, were the Applicant to be physically separated from Child L's

life, there would be adverse consequences and outcomes for her. This much is made clear by Dr Cantali. Second, and as referred to in the evidence of the Applicant, we do live in an age of electronic communication and, in the event of the Applicant's removal to Colombia, there is little or nothing preventing him from maintaining contact with Child L by SMS and/or social media platforms. There has already been a measure of such contact between the Applicant and Child L. Upon his removal to Colombia, once such an electronic connection had been established, it could extend to the introduction and maintenance of visual and real-time contact with the relevant child via Skype and other digital platforms.

135. Accordingly, I am of the view that this sub-paragraph (d) is of moderate weight in favour of a finding that it is in the best interests of Child L for the Applicant's visa to not be cancelled.

136. **Sub-paragraph (e)** of paragraph 13.2(4) of the Direction asks whether there are other persons who already fulfil a parental role in relation to the children. Clearly, there are and, as a result of obvious necessity, there needed to have been. There can be no question that Child L is primarily cared for by her biological mother, the Applicant's wife. This undeniable primary caregiving arrangement for Child L by the Applicant's wife has been in place for the majority of Child L's life and certainly for at least the past 12-13 years while the Applicant has been in criminal custody and/or immigration detention.

137. Again, there is a readily made concession on behalf of the Applicant that:

> *"…other persons already fulfil a parental role concerning [Child L]. The evidence before the Tribunal is to the effect that [Child L's] mother is fulfilling a parental role for her daughter. The evidence shows that [Child L] and her mother enjoy a loving and ongoing relationship."*[89]

138. On this basis, this sub-paragraph (e) is of moderate weight in favour of the Applicant in assessing whether restoration of his visa status is in the best interests of the subject Child L.

139. **Sub-paragraph (f)** of paragraph 13.2(4) of the Direction requires the Tribunal to consider any known views of the children about their separation from the Applicant, having regard to their age and maturity. One need look no further than the bravely given evidence of Child L to understand her views about the physical removal of her father from her life. At 17 years

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[89] Ibid, page 60, paragraph [175].

of age, she is sufficiently mature to give such evidence and to do so reliably and convincingly.

140. Indeed, the lamentable trauma she experienced in providing oral evidence to the hearing is demonstrative of the trauma she will no doubt experience were her father to be removed to Colombia. I accept the findings of Dr Cantali in this regard. I likewise accept Child L's evidence when she speaks of any removal of her father "*will inflict long-lasting emotional trauma upon me.*"

141. There can be no other finding other than that this sub-paragraph (f) merits a strong measure of weight in favour of revocation of the mandatory cancellation decision such that the Applicant's visa status to remain in Australia be restored to him.

142. **Sub-paragraph (g)** of paragraph 13.2(4) of the Direction looks to evidence that the Applicant has abused or neglected the child/ren in any way, including physical, sexual, and/or mental abuse or neglect. There is no evidence of such abuse or neglect. This factor has no weight and is not determinative of any finding about Primary Consideration B.

143. **Sub-paragraph (h)** of paragraph 13.2(4) of the Direction looks for evidence that the child/ren have suffered or experienced any physical or emotional trauma arising from the Applicant's conduct. I am of the view that this sub-paragraph (h) is of no weight and is not determinative of any finding about this Primary Consideration B.

Conclusion: Primary Consideration B

144. Having regard to:

(a) the contention made on behalf of the Applicant that "*this primary consideration should be given significant weight in favour of the revocation of the mandatory cancellation decision.*"[90];

[90] Ibid, page 61, paragraph [183].

(b) the concession rightly made on behalf of the Respondent that "*it is in the best interests of [Child L] that the cancellation decision is revoked…"* and that this Primary Consideration B "*…should be given limited weight in favour of revocation."*[91]*;*

(c) the strong nature and duration of the relationship between Child L and the Applicant, both prior to and during his removal from the community;

(d) even though Child L is relatively close to turning 18, the Applicant can still be expected to nevertheless play a positive parental role in her future until she attains the age of 18 years;

(e) the clear and obvious impact of the Applicant's prior offending and subsequent very lengthy incarceration upon Child L. This must be tempered by my finding about the state of the evidence relating to the Applicant's risk of recidivism;

(f) the negative impacts, both current and contingent, upon Child L were the Applicant to be physically separated from her. This must be tempered against his capacity to remain in contact with her in other ways;

(g) the reality that Child L is cared for by another primary caregiver, specifically, her biological mother (the Applicant's wife);

(h) the known views of Child L as is redolent from (1) her own spoken and written evidence; (2) the observations and findings of Dr Cantali; and (3) the evidence of the Applicant's wife as Child L's primary caregiver;

(i) the written evidence of Dr Cantali was not the subject of any testing of cross-examination;

(j) in terms of any allocated weight in favour of the Applicant:

(i) the moderate level of weight I have attributed to factors (c), (d) and (e) of paragraph 13.2(4) of the Direction;

(ii) the strong level of weight I have attributed to factors (a), (b) and (f) of paragraph 13.2(4) of the Direction; and

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91 Exhibit R1, Respondent's SFIC, page 6, paragraph [32].

- I am of the view that the best interests of the Applicant's relevant minor Child L in Australia weighs strongly in favour of revocation of the mandatory cancellation of the subject visa. I qualify this finding by saying that the weight attributable to this Primary Consideration B, while of a strong level, does not, on its own, outweigh the very heavy weight I have attributed to Primary Consideration A.

PRIMARY CONSIDERATION C: THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

145. In making the assessment for weight to be allocated to Primary Consideration C, paragraph 13.3(1)[92] of the Direction provides that I should consider whether the Applicant has breached, or whether there is an unacceptable risk that he would breach, the trust of the Australian community. I must also have regard to (1) the Government's views in this respect and (2) any overarching principles and guidance provided by the Direction.[93] Paragraph 13.3(1) of the Direction directs a decision-maker to endorse non-revocation as an appropriate finding simply because the nature of an Applicant's offending is such that the Australian community would expect that he/she should not hold a visa.

Factual circumstances relevant to this Primary Consideration C

146. In assessing the weight allocable to this Primary Consideration C, I have regard to the following circumstances arising from this matter's factual matrix:

- the Applicant arrived in Australia in December 1997, at the age of 29 years. He is now 52 years of age;
- he has one biological child in Australia within the ambit of Primary Consideration B;
- he has committed one single offence in Australia. He committed the offence in 2007 and was sentenced for it in 2009;
- this singular offence has seen him removed from the Australian community on a continuous basis since about the middle of 2007;

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92 The terms of paragraph 13.3(1) of the new Direction 79 are identical to the terms of paragraph 13.3(1) of the now revoked Direction 65.

93 See the Direction, paragraphs 6.2(1) and 6.3(1)-(7).

- whilst his offending cannot be said to be frequent, I have found it to be extremely serious;
- were his extremely serious offending to be repeated, it could realistically have the potential for extremely serious financial, psychological or physical, and potentially catastrophic harm to members of the Australian community;
- there is no identified psychological or other causative factor(s) behind his offending. The high point of the evidence in this regard is that, according to the Applicant, he committed the extremely serious offence because of his greed and selfishness;
- in terms of recidivism, the now-contended protective factors against his further offending, such as (1) devotion to his family and (2) responsibilities to his legitimate employment/any future business interest – were both present in 2007 when he offended in such an extremely serious way;
- my finding that the risk of this Applicant again being lured into the commission of similar or identical extremely serious offending is now no different – specifically, no higher and no lower – than what it was at the time of his removal from the community in mid-2007;
- the adverse findings in the abovementioned Pre-Release Report about the Applicant's insight and remorse, including:
    - the Applicant's continued denial of any knowledge of his offending behaviour;
    - his continued obfuscation around the circumstances of the offending, saying he "*didn't think it was what it was or the quantity"* and how this is squarely at odds with the findings of the learned sentencing Judge Marien SC;
    - that "*during interviews he appeared to attempt to shift the blame to his co-offenders, consistently protesting his innocence";*
    - "*despite continuing to deny knowledge that the package contained illicit substances, [the Applicant] admitted that he had seen the package as an opportunity to make some additional money…";*[94]

[94] Exhibit G1, s501 G Documents, G38, pages 655-656.

- while apparently willing to undertake intervention deemed necessary by Community Corrections, the Applicant "*was unable to indicate any interventions he believes he would need to engage in, suggesting that he could mentor others. He reported that he did not believe counselling necessary,"*

- a head custodial sentence in the cumulative sum of 20 years has been imposed upon him with a non-parole period of 12 years. The seriousness of his offending is such that the head custodial term imposed for it represent 200% of the total time he was in the general community of Australia. Put another way, he was part of the Australian community for 10 years. His offending has caused him to be removed from it for 13 years;

- while his contributions to the Australian community – via his employment and business history – are acknowledged, the reality is that his life in Australia has been dominated by the consequences arising from his commission of the extremely serious offence in 2007;

- the state of the psychological/psychiatric evidence makes it unsafe for this Tribunal to reach any finding that this Applicant's risk of re-offending is, on any measurably definitive basis, different to what it was at the time of his removal from the Australian community in mid-2007; and

- while there is evidence of the Applicant's engagement with courses and treatment processes, they have occurred in the closed confines of criminal custody and immigration detention. Any rehabilitative or other positive effect now propounded by the Applicant remains to be tested in the broader community. Accordingly, it would be unsafe to make any finding other than that his risk of recidivism remains as it was at the time of his most recent removal from the Australian community in mid-2007.

The Evolution of the Australian Community's "Expectations"

147. In 2003, this Tribunal said that in considering weight attributable to this Primary Consideration C, one must look to the expectations of "*…the informed, reasonable member*

of the Australian community, rather than a member of the Australian community who is only prepared to consider the punitive aspects of the power under s 501."[95]

148. In 2017, Deputy President Forgie of this Tribunal considered that paragraph 13.3(1) of the Direction leads a decision-maker to:[96]

> *"102. …conclusions which are to the effect that a consideration of what the Australian community expects is now more circumscribed by what is said in the Direction than might have been the case in earlier times. Paragraph 13.3(1) is quite specific in its statement that the Australian community expects non-citizens to obey Australia's laws while in Australia but leaves open, for example, what is an 'unacceptable risk' that non-citizens will breach that expectation or when the nature of character concerns or offences are such that the Australian community would expect that the person should not continue to hold a visa…"*
>
> *[My underlining]*

149. This more circumspect nature of the Australian community's expectations also seems apparent in the decision of Justice Mortimer in *YNQY v Minister for Immigration and Border Protection* ("*YNQY*"):[97]

> *"In substance this consideration is adverse to any applicant…In particular, the last two sentences of para 13.3 of the Direction suggest the 'expectations' about which it speaks are expectations adverse to the position of any applicant who has failed the character test and has been convicted of serious crimes."*
>
> *[My underlining]*

150. The learned Justice Mortimer also thought the last two sentences of paragraph 13.3 of the Direction:

> *"…[are] not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government of which he or she is a member, wish to articulate community expectations, whether or not there is any objective basis for that belief. That is the structure of this part of the Direction.*
>
> *[77] I do not consider that even if the applicant is correct to submit that the Tribunal did not undertake the task required of it by the Direction in relation to this consideration, he was deprived of a different outcome because of that failure. It was*

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95 *Waits and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] AATA 1336 at [36] (per DP Block).
96 *ETWK and Minister for Immigration and Border Protection* [2017] AATA 228 at [102] and [103].
97 [2017] FCA 1466 at [76]-[77].

inevitable that this consideration would weigh against revocation: that is what it is intended to do…"

[My underlining]

151. In *Afu v Minister for Home Affairs* ("*Afu*"),[98] Justice Bromwich said:

> *"The concept of community expectations is not a matter to be measured as though it is a provable fact. It is an assessment of community values made on behalf of that community. That would be so even in the absence of the express terms of Direction 65. However, those express terms put the question beyond doubt. The norm is stipulated, inter alia, in Direction 65…The Tribunal was required to give effect to those norms which is precisely what it did."*
>
> *[My underlining]*

152. In *FYBR v Minister for Home Affairs* ("*FYBR*"),[99] Justice Perry observed that:

> *"It follows, in line with the authorities, that cl 11.3 of Direction 65[100] is a statement of the Government's view as to the expectations of the Australian community for the purposes of determining whether or not to refuse a visa. Contrary to the Applicant's submissions, 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. Rather, the Tribunal must give effect to the "norm" stipulated in cl 11(3) which will of its nature weigh in favour of refusal, at least in most cases..."*[101]
>
> *[My underlining]*

153. The single judge decision in *FYBR was* appealed to the Full Federal Court. On 25 October 2019, the Full Court upheld the single judge decision in *FYBR*, confirming Justice Perry's reasons and approach to the expectations of the Australian community.[102]

154. Thus, the Full Court's decision, along with the existing authorities of *YNQY* and *Afu* establish that:

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98 [2018] FCA 1311 at [85].
99 [2019] FCA 500.
100 Note: *FYBR* was concerned with a visa refusal. This means the relevant paragraph relating to expectations of the Australian community was paragraph 11.3 [et seq] of the Direction. The instant case is, of course, a matter relating to the non-revocation of a mandatory cancellation decision. In those latter circumstances, the relevant paragraph is 13.3 [et seq] of the Direction. Further, "the Direction" is now Direction 79 that took operative effect on and from 28 February 2019. The paragraph numbering in Direction 79 relating to "expectations of the Australian community" remains the same as per Direction 65 – that is, paragraph 11.3 for visa refusal matters and paragraph 13.3 for non-revocation matters.
101 *FYBR*, paragraph [42] (Perry J).
102 See *FYBR v Minister for Home Affairs* [2019] FCAFC 185.

(a) the "*expectations of the Australian community*" cannot be measured or determined as in the case of a provable fact. Rather, it is an assessment of community values made on behalf of that community.[103]

(b) it is not for the Tribunal to determine for itself what such "*expectations*" are by reference to the Applicant's circumstances or evidence about those expectations;[104]

(c) the Government's views in relation to community expectations are contained within the Direction. The Minister is entitled to make statements as to what the Government thinks the "*expectations of the Australian community*" are, and the Tribunal should have due regard of those statements, if made;[105]

(d) in assessing the weight attributable to this Primary Consideration C, decision-makers can have regard to the principles in paragraph 6.3 of the Direction, in particular, sub-paragraphs 6.3(5) and 6.3(7). The allocation of the weight attributable to this Primary Consideration is a matter for the decision-maker.[106]

Analysis – Allocation of Weight to this Primary Consideration C

155. The Applicant does have a solid work history in this country. In the Applicant's SFIC[107], it is made clear that between 1998 and 2007 (i.e. the pre-custody period) the Applicant worked extensively in the air conditioning industry. He was acknowledged by other business proprietors as a business owner and family man, dedicated to growing his mechanical air conditioning business, providing for his family and otherwise looking after his employees. Prior to his incarceration, it seems the Applicant had a successful business towards which others were pleased to contribute. He is acknowledged as making a contribution to the Australian community by providing others with employment opportunities.

156. In his post-incarceration period (i.e. from mid-2007 onwards), the Applicant's resumé appearing in the material[108] cites some 19 separate courses/qualifications/training

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103 *Afu* at paragraph [85].
104 *FYBR* at paragraph [42].
105 *FYBR v Minister for Home Affairs* [2019] FCAFC 185, paragraph [74] (Charlesworth J) citing *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348.
106 Ibid, paragraphs [77] (Charlesworth J) and [105] (Stewart J).
107 See exhibit A1, Applicant's SFIC, page 63, paragraph 192], third bullet point, and the quoted references appearing therein.
108 Exhibit G1, s501 G Documents, G32, pages 599-601.

undertakings he has pursued or obtained. These qualifications range from "*Construction, Plumbing and Service Training*" to "*health training*" to "*General Construction Induction training"* to "E*lectrical Test and tag Registration*" to "*Communication Skill"* to "*Remove Non-Fibre Asbestos"* to "*Operate Elevated Work Platforms under 11 metres*" to "*GMA Welding"* to "*Dogman Licence*" to "*Mobile Slew Crane Licence"* to "*Chemical Application Licence"*.[109]

157. The Applicant is clearly a motivated individual and, were he to be returned to the Australian community, it could not be said that he would rest on his laurels. His albeit self-serving statement in his resumé should, I think, be taken at face value:

> "*I am enthusiastic, reliable, accepting of challenges with an aptitude always eager to learn, nothing is ever to minute nor insignificant to overlook as a lesson and experience for my personal and profession development. I work well in a team environment while also being equally confident and capable of working on my own. I am a leader with initiative and also understand the importance listening. I am confident enough to seek advice and guidance from all those who are involved in the work place environment to ensure the best interest of the business is at the forefront."*[110]

158. In answering the question "***List positive contributions you have made to Australia for example, volunteer activities, participation in community and cultural activities, employment etc***", in his Personal Circumstances Form the Applicant said the following:

> "*Remained employed whilst in custody, joined Church groups (Kairos)"*[111]

159. The Applicant's singular but extremely serious offending episode in this country has seen him convicted and sentenced for a head custodial term of 20 years, being compelled to serve 12 years in actual custody. The offending involved a conspiracy to unlawfully import a border-controlled drug, namely cocaine comprising a total quantity of powder of 35.07 kilograms with a pure quantity of cocaine contained in that powder in the amount of 28.29 kilograms. According to contemporary press reporting, the street value of the cocaine amounted to approximately $35 million.

160. The Applicant's extremely serious offending has surely breached the expectations of the Australian community. It is clearly demonstrative of a significant failure to abide by the laws

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109 Ibid, page 599.
110 Ibid.
111 Ibid, G13, page 116.

of Australia. In ascertaining the weight attributable to this Primary Consideration C, I take into account the following factors and/or findings:

(a) as outlined above, the Applicant has made (and has the potential to make) positive contributions to the Australian community through his employment and business history, and his extensive number of qualifications and other self-improvement undertakings and achievements;[112]

(b) the Applicant lived in the mainstream Australian community for approximately 10 years prior to his removal in mid-2007;[113]

(c) the removal of the Applicant will have a strong negative impact on his minor child in Australia;[114]

(d) the extremely serious nature of the Applicant's offending to date;

(e) the inconclusive state of the psychological evidence surrounding the Applicant's risk of recidivism;

(f) my finding of a strong and unresolved likelihood that he will engage in further very serious to extremely serious conduct if returned to the Australian community; and

(g) my assessment of the quite significant and broad-ranging risk of substantial and potentially catastrophic harm to the Australian community were he to re-offend.

Conclusion: Primary Consideration C

161. I am of the view that the above factors, read as a whole in the context of this case, militate in favour of not revoking the cancellation of the Applicant's visa. I accordingly find that this Primary Consideration C is of very heavy weight in favour of affirming the non-revocation decision under review.

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112 The Direction, paragraph 6.3(7).
113 The Direction, paragraph 6.3(5).
114 The Direction, paragraph 6.3(7).

OTHER CONSIDERATIONS

162. It is necessary to look at the Other Considerations listed at paragraph 14 of the Direction. I will now consider each of the five stipulated sub-paragraphs (a), (b), (c), (d) and (e).

(a) International non-refoulement obligations

163. In his SFIC, the Applicant said:

> *"195. For these proceedings, the applicant does not make any 'non-refoulement' claims. It is to be readily appreciated that the applicant had different legal representation before the delegate. Given the benefit of a change in legal representation, the applicant no longer presses the risk of harm claim associated with potential harm from drug cartels in Colombia.*
>
> *196. Accordingly, the consideration reflected in cl 14.1 is inapplicable in this case."*[115]

164. The Applicant's position is paralleled by a similar position taken by the Respondent in its SFIC:

> "*37. The applicant no longer presses any claims in respect of international non-refoulement obligations and the Minister contends that, in any case, no international non-refoulement obligations arise in this matter…the Minister contends that there are no circumstances in the applicant's case which would give rise to Australia's non-refoulement obligations being enlivened. The Minister contends this consideration should be given neutral weight."* [116]

165. I sought to confirm the abovementioned respective positions of the parties at or near the conclusion of the instant hearing:

> *"SENIOR MEMBER: Okay. All right. Now, can I just check two final things with you for the record. Firstly, Dr Donnelly, there's nothing in the material that attracts operation of either consideration (a) non-refoulement obligations; that's right, isn't it?*
>
> *DR DONNELLY: No, that's right. Yes.*
>
> *SENIOR MEMBER: All right. And you agree with that, Ms Saunders?*
>
> *MS SAUNDERS: Yes, Member."*[117]

166. Accordingly, I allocate neutral weight to this Other Consideration (a).

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115 Exhibit A1, Applicant's SFIC, page 65.
116 Exhibit R1, Respondent's SFIC, page 7.
117 Transcript, 31 August 2020, page 101, lines 11-20.

(b) Strength, nature and duration of ties

167. There is the following limited concession made by the Respondent:

> *"39. The Minister contends that this consideration does not outweigh the primary considerations weighing in favour of non-revocation, particularly the protection of the Australian community and the expectations of the Australian community, and this consideration should accordingly be given limited weight in favour of revocation."*[118]

168. The Applicant first came to Australia in December 1997. He did not offend until about a decade after his arrival. Having regard to paragraph 14.2(1)(a)(i) of the Direction, I do not consider that the provisions of paragraph 14.2(1)(a)(i) are engaged. Clearly, the Applicant did not commit his extremely serious offence "*soon after arriving in Australia."* I am of the view that an application of paragraph 14.2(1)(a)(ii) merits the allocation of moderate weight in the Applicant's favour. He operated a successful air conditioning business in Australia that employed some 20 workers. The Applicant operated the subject business for a number of years.[119]

169. Regard must also be had to paragraph 14.2(1)(b) of the Direction which is concerned with the Applicant's strength, duration and nature of any family or social links with Australian citizens and/or people who can otherwise remain here indefinitely. It is clear from the evidence that the Applicant has significant ties with Australian citizens and/or people who have an indefinite right to remain in Australia. I will also take into account (and discuss) the effect of a non-revocation decision upon the Applicant's immediate family in Australia.

170. I have previously referred to the adverse impacts upon Child L were the Applicant to be removed from Australia. Those stated impacts (expressed by both Child L herself, Dr Cantali and the Applicant's wife) are repeated for the purposes of this paragraph 14.2(1)(b). I will now proceed to summarise the impact upon, respectively, the Applicant's 23 year old stepdaughter and his wife, were he to be permanently removed from Australia.

The evidence of Child K (stepdaughter)

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118 Exhibit R1, Respondent's SFIC, page 7.
119 Exhibit A1, Applicant's SFIC, page 65, paragraph [199].

171. As mentioned earlier, Child K was born in October 1996 and is currently 23 years of age. She has resided with the Applicant since approximately the year 2000, which is when the Applicant commenced his relationship with his now-wife. For the instant hearing, she provided both written[120] and oral evidence. In her written statement, Child K says the following:

> ***"Nature of Relationship***
>
> *6. Although [the Applicant] is not my biological father, I consider [the Applicant] to be my father. [The Applicant] and I are very close. From the beginning of his relationship with my mother, [the Applicant] has always treated me like his own daughter. I never felt like I lacked a father figure in my life when [the Applicant] was around.*
>
> *7. [The Applicant] showed me love daily. For example, Alex would spend quality time with me, take me to McDonald's for breakfast before going to school, or otherwise helped me with my homework in the evenings. There is no doubt that [the Applicant]'s incarceration has impacted our relationship. [The Applicant] has not been around physically given his ongoing imprisonment, and now time in immigration detention.*
>
> *8. Despite the preceding, given the mutual love and respect we have for each other, I do not doubt that [the Applicant] and I will reconnect even more closely if he is released into the Australian community.*
>
> *…*
>
> *11. I am aware that [the Applicant] was convicted of a very serious offence related to conspiracy to import drugs into Australia. I am also aware that [the Applicant] received a very heavy penalty of 20 years in prison, with a non-parole period of about 12 years.*
>
> *12. My father has served a sentence and lost a lifetime of opportunities with my mum, my younger sister, and myself…*
>
> *…*
>
> ***Future Hardship***
>
> *17. If [the Applicant] were to be deported back to Colombia, I would be inconsolable. I have already had to deal with losing the presence of my father in my daily life for the past 14 years or so. The financial stress of having to travel to Colombia to see my father is not something I should have to do.*
>
> *…*

[120] Exhibit A4, Witness Statement: Child K, dated 28 July 2020.

19. It has been very hard on the family unit with [the Applicant] in prison. No doubt, the financial and practical struggles of our family will continue if [the Applicant] is deported. Conversely, if [the Applicant] is permitted to remain in Australia, [the Applicant] can take paid employment and practically assist my mum, my sister, and me.

20. Concerning emotional hardship, just the thought of my father not walking me down the aisle or being present to see my children born brings me to tears. Every aspect of my life would be affected (even more than it already has). The hardship is real and significant.

Contact with Alex

21. Throughout his imprisonment, [the Applicant] and I kept in contact through letters, phone calls, and face-to-face visits at various prisons. Even when [the Applicant] was six hours away from our home in Sydney, we would drive to see him. We have visited the immigration detention centre as well.

…

My Health

23. My physical health is fine. However, my mental health has suffered since [the Applicant]'s incarceration. At about the age of 18, I was diagnosed with anxiety and depression by a psychiatrist. I have struggled to keep my mental health under control since the diagnosis.

Concluding Remarks

…

26. Deporting [the Applicant] to Colombia will have lifelong adverse consequences that will impact our family forever."[121]

172. In her evidence in chief, Child K was asked about the impact of the Applicant's permanent removal from Australia upon her:

"DR DONNELLY: And if your – sorry to ask you this question, but if your father was removed to Colombia?

WITNESS: Yes

DR DONNELLY: How would that make you feel?

WITNESS: I would be – I would be devastated. I have spent the last 14 or so years trying to keep hope that he would be released, he would be allowed to come back to us. We would be able to keep our relationship going like it used to be, and this would just be the worst case scenario for me, for my life. I've struggled a lot with dealing with this situation. It's – as you can imagine, I was 11 when this happened.

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[121] Ibid, pages 1-4.

So as a child, it's very hard, and now as an adult I'm dealing with the consequences of his actions, and how they've affected me emotionally, mentally. So it would be the worst possible thing.

DR DONNELLY: And just globally, how would you feel if your father got to come home?

WITNESS: I would feel like I got a second chance. I would feel like I can restart my life the way it was supposed to be if none of this had have happened. It's been very hard on me, seeing my little sister go through all of this, seeing my mum have to work so hard just to provide for us, and I want the opportunity to have the life that I deserve from the beginning, and for my family as well. I would be so happy."[122]

173. Child K was also asked about certain mental health symptoms she had developed subsequent to the Applicant's incarceration that occurred when she was 11 years of age:

"DR DONNELLY: Could I just ask you briefly to describe more precisely what you mean by that?

WITNESS: Yes. I would say immediately after [the Applicant's] incarceration, I was suffering. I was 11 when it happened. When I was 14, 15, I started showing symptoms, signs of anxiety and depression. I tried to deal with it as best as I could on my own. I didn't want to stress my mum out, and she already had a lot on her plate. When I was 18, I saw a psychiatrist and I was formally diagnosed with severe anxiety and depression. I was put on medication. She did – the psychiatrist indicated to me that this most likely was the result of the childhood trauma of losing my father, and it was – it was like losing my dad. So I've had to deal with that and try and, you know, keep it in check for years. Years, years. So right now I'm doing a bit better, and honestly, what helps me do better is knowing that when [the Applicant] gets out, I'm going to have someone else to support me emotionally, mentally. I feel like I need this. I need him to come back home so that I can really, truly be who I was meant to be. I wasn't meant to be this anxious, sad person, so I'm just hoping for his release so that I can start doing the work I need to do in regards to that situation."[123]

174. Child K was not cross-examined by the Respondent's representative.

The evidence of Dr Cantali

175. I have previously cited portions of the report of Dr Cantali dated 9 October 2018 in relation to Primary Consideration B as it relates to Child L. In this particular report, Dr Cantali also made certain comments and findings about Child K. As mentioned earlier, both Child K and Child L attended a clinical interview with Dr Cantali on 3 October 2018.

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[122] Transcript, 31 August 2020, page 60, lines 31-47, and page 31, lines 1-3.
[123] Ibid, lines 24-40.

176. With particular reference to Child K, Dr Cantali noted:

> *"[Child K] is a delightful 22-year-old who presented younger than her age…She reported [the Applicant] being the only father she has known and states that she loves him as he were her natural father. [Child K] recalls what she describes as the traumatic time when her father was charged and subsequently imprisoned. Since that time [Child K] has experienced significant psychological problems. The first year of her father's imprisonment, [Child K] reported behaviour problems at school and issues with mental health. [Child K] was regularly treated by a psychiatrist. [Child K] stated that her life since then has been a struggle and has been unsettled. It's only recent, since the beginning of 2017, that she and her sister had made a pact to work together to regain their family…She states that she is in constant communication with her father who has always supported her with encouraging letters during those "dark times". [Child K] expressed her excitement about her father's release but since being informed about the threat of her father's deportation has reported problems with sleep, panic attacks, irritability and low mood."*[124]
>
> *[My underlining]*

177. While I have sought to summarise Dr Cantali's findings about Child K as fulsomely as possible, it is necessary to mention, out of due fairness to the Respondent, that Dr Cantali was not called as a witness and the Respondent was thus denied the opportunity of testing her evidence in cross-examination. The weight allocable to Dr Cantali's evidence must thus be tempered accordingly.

The evidence of the Applicant's wife

178. The Applicant's wife provided both oral and written evidence.[125] I have earlier alluded to the relevant timeline in relation to the relationship between the Applicant and his wife. Suffice it to say that the relationship started in or around 1999-2000, when they began living together. They were married in 2004. The Applicant's wife brought Child K into the relationship from a previous marriage. Child K was born in October 1996 and, for all intents and purposes, the Applicant and his wife are the only parents Child K has known. The Applicant and his wife had their own biological child, Child L, in July 2003. For all intents and purposes, it cannot be denied that "*the family unit"* f has, at all material times, comprised the Applicant, his wife, Child K and Child L.

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[124] Exhibit G1, s501 G Documents, G19, page 167.
[125] See Exhibit A3, Statement of the Applicant's wife, dated 27 July 2020.

179. A deal of time was expended in cross-examination in trying to establish whether the relationship between the Applicant and his wife was still current and/or genuine. The Applicant's wife was taken to various aspects of the material having a tenuous or oblique reference to this specific issue, but to my mind, this questioning went nowhere. It went nowhere (and should go nowhere) for two main reasons: first, there is nothing in the material of any definitive or legal nature to demonstrate a lawful end to the marital relationship. Second, it would be absurdly unfair to the Applicant and his wife to suggest that their relationship has not suffered stresses and strains as a result of them being physically apart for 12-13 years. Most, if not all, relationships would suffer stress and strain if the protagonists were physically separated for that length of time. It does not automatically follow that a relationship would necessarily be at an end because of that.

180. On the contrary, the evidence of the Applicant's wife about her stoic and heroic efforts to do everything within her power to keep the family together – both emotionally and financially – during the extraordinary and prolonged absence of the Applicant, is to be praised and accepted at face value. It is unfair to now burden her with questioning about whether her relationship with the Applicant remains current. Of course, it does. Each of the two children and the Applicant's wife gave supportive and heartfelt evidence at the hearing. Their evidence, taken individually or collectively, can only be read in one way. For the purposes of the Applicant's wife, my finding about the relationship between him and her will follow paragraph [9] of her statement, which reads as follows:

> *"9. Given that [the Applicant] has spent more than a decade in prison, we have not been able to continue with a romantic relationship. However, I have remained married to [the Applicant]. There is the prospect, should [the Applicant] be returned to the Australian community, that we can recommence our marriage and start again. I know that [the Applicant] loves me very much. I also love [the Applicant]."*[126]

181. In her evidence in chief, the Applicant's wife was asked about the current state of her relationship with the Applicant. I found this evidence to be both genuine and convincing, and do not consider that any aspect of the cross-examination casts doubt upon it:

> *"DR DONNELLY: And what is your relationship to [the Applicant]?*
>
> *WITNESS: I'm his wife.*
>
> *DR DONNELLY: How long have you been married for?*

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[126] Exhibit A3, pages 1-2.

WITNESS: Since 2004.

DR DONNELLY: And when did you first enter into a relationship with [the Applicant]?

WITNESS: Would have been 2000, maybe, just before.

DR DONNELLY: Okay. At the present moment, how would you describe your relationship with [the Applicant]?

WITNESS: It's good. We co-parent the girls still. I speak to [the Applicant] every day on a daily basis. Telephone calls, texting, we're always in communication throughout the day. I love [the Applicant], and we've always functioned as a couple, pretty much, and as a family.

DR DONNELLY: And you're obviously aware that [the Applicant] spent 12 years in prison?

WITNESS: Of course, it's been really hard to manage to keep the relationship solid throughout that.

DR DONNELLY: Can I ask you, have you seen [the Applicant] while he's been in prison?

WITNESS: Yes, yes, we have. We visited him during his incarceration. We visited him at the detention centre also, and have kept in constant contact throughout the years.

DR DONNELLY: If you were to describe your relationship with [the Applicant] in three words, how would you describe it?

WITNESS: Loving, very honest, and just [the Applicant] is a good man. He's just – it's a good relationship."[127]

[My underlining]

182. The Applicant's wife also gave evidence about the Applicant providing emotional and mentoring-type support to the family, particularly the children, during his enforced period of physical absence from the family unit. Her evidence was very frank in the sense that she acknowledged that she had "fallback" support from her family that she could "*lean on"*, but she still spoke of the critically important role the Applicant has played over approximately the last decade and in terms of the role he would play were he returned to that family unit:

> *"DR DONNELLY: Now I'm sorry to ask you this next series of questions. They might seem like stupid questions, but they're important. If [the Applicant] was to be deported to Colombia, first of all, how would that make you feel?*
>
> *WITNESS: [The Applicant] has been a very strong moral support for me, for the girls. During his incarceration, it's been quite hard for me to bring them up to the point where they are, and simply with those types of setbacks, [Child K] with her anxiety and [Child L] struggling a little bit through school, I found it very hard. I mean I do have family that I can lean on, but it's not the same as a partner that is with you all the time and can help you when things happen at the moment. We miss [the*

[127] Transcript, 31 August 2020, page 52, lines 21-43.

Applicant] a lot. He was a very – he still is a very good father, a very good person. If he were to be deported, it would be just horribly sad for us. It's basically the end of our family. And it would really – my financial struggle would continue, with raising the girls, and I really would love to – you know, for [Child L] to go to uni and be able to support her and – in everything that she wants to do. Since she's doing so well, and I feel like she could really go far, and [the Applicant] would be a very big support for that.

DR DONNELLY: You mentioned – sorry, go on. Sorry, I apologise?

WITNESS: And definitely [Child K] as well, obviously, since [Child K] has had those setbacks as well that, you know, they need – they need him, and I need him."[128]

[My underlining]

183. The Applicant's wife was asked about where the Applicant would physically return and reside were he to be permitted to remain in Australia. The answer was clear, unequivocal and not at all indicative of any suggestion that the relationship between him and her is not current:

"DR DONNELLY: Thank you, and on the flipside, if [the Applicant] was able to stay in Australia, have you discussed accommodation, where he might live?

WITNESS: Where he might - - -

DR DONNELLY: Live, where [the Applicant] might live?

WITNESS: Where he might live.

DR DONNELLY: Yes?

WITNESS: Yes, definitely with us.

DR DONNELLY: When you say "with us", could you describe where that is, and who lives in the place?

WITNESS: Yes, [address redacted][129]*, myself and my daughters. He would be reunited with the family."*[130]

[My underlining]

184. With specific reference to this paragraph 14.2(1)(b), I find that the strength, nature and duration of the Applicant's relationships with each of his wife, Child K and Child L are very strong and palpable. He is the only father that Child K and Child L have known for all of their lives. He has been the partner/husband of his now-wife on a continuous basis since around 1999/2000. I specifically find that, were he to be released back into the Australian

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128 Ibid, page 54, lines 13-32.

129 To be clear, this redacted address is the same address in suburban Sydney that has comprised the family home throughout the relationship between the Applicant and his wife, including the time he has spent in criminal custody/immigration detention.

130 Transcript, 31 August 2020, page 55, lines 1-10.

community, he would return to the family home in suburban Sydney, where the family unit has always been located. With specific reference to his connection with the three immediate members of his family unit, I find that this paragraph 14.2(1)(b) weighs strongly in favour of a finding to restore the Applicant's visa status to remain in Australia.

185. Further, I find that the Applicant has significant ties to other members of the Australian community pursuant to this paragraph 14.2(1)(b). Those relationships are historical, very often having their genesis prior to the Applicant's incarceration. For example, there is evidence from lay witnesses that the Applicant has assisted people with their university entrance exams,[131] assisted people with providing employment opportunities[132] and has impressed on both regular citizens and a community leader his feelings of ongoing love and support for his immediate family unit and extended family.[133]

186. I have checked the Applicant's Personal Circumstances Form, and in terms of extended family, he has only inserted the names of his parents in that form, both of whom reside in Colombia.[134] I have had regard to the strength, duration and nature of ties between the Applicant and (1) the three members of his immediate family unit in Australia; (2) his social contacts/colleagues/friends in Australia; and (3) his extended family in Australia (i.e. that of the Applicant's wife). Given the significant level of the nature, strength and duration of the Applicant's family/social links with the people in these three categories, I find that a strong measure of weight is attributable to this Other Consideration (b) pursuant to paragraph 14.2(1)(b) of the Direction.

187. Accordingly, having regard to the totality of evidence relevant to this Other Consideration (b), I am of the view that it weighs strongly in favour of revocation, but is outweighed by Primary Considerations A and C, which favour non-revocation.

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131 Exhibit G1, s501 G Documents, G29, page 560, Statutory Declaration of Witness RP dated 10 October 2018.

132 Ibid, page 563, Statutory Declaration of Witness RO, dated 19 October 2018; see also page 562, Statutory Declaration of Witness DM, made on 16 October 2018.

133 Ibid, See Statutory Declaration of Witness JY, dated 19 October 2018, page 564; see also Statutory Declaration of Witness KY, dated 22 October 2018, page 565; and see also G30, Letter of Support from Reverend SK, dated 28 September 2018, pages 566-567.

134 Ibid, G13, page 114. Note: Child K is recorded by the Applicant on this particular page of his Personal Circumstances Form. I have discussed the Applicant's ties with Child K in earlier paragraphs of this discussion relating to paragraph 14.2(1) of the Direction.

(c) Impact on Australian business interests

188. In his SFIC, the Applicant makes the following concession:

> *"216. Clause 14.3 is inapplicable in this case. There is no material evidence that demonstrates that non-revocation of the mandatory cancellation decision would significantly compromise the delivery of a major project or delivery of important service in Australia."*[135]

189. Accordingly, there is no evidence before the Tribunal that cancellation of the Applicant's visa would have an impact on Australian business interests. This consideration is not relevant to determination of this application.

(d) Impact on victims

190. In his SFIC, the Applicant again makes the following concession:

> *"217. Clause 14.4(1) is inapplicable in this case. Given the circumstances of the conspiracy offence, no drugs were made or otherwise distributed unlawfully into the Australian community. Thankfully, in that context, there are no actual victims of the applicant's criminality associated with the conspiracy offence."*[136]

191. I find that there is no evidence before the Tribunal that the Applicant's remaining in Australia would have on any victims. This consideration is not relevant to determination of this application.

(e) Extent of impediments if removed

192. As a guide for exercising the discretion, paragraph 14.5(1) of the Direction directs a decision-maker to take into account any impediments that a non-citizen may face if removed to their country of origin and if required to re-establish themselves in that country. Relevant factors to be taken into account include:

(a) the non-citizen's age and health;

(b) whether there are any substantial language or cultural barriers; and

(c) any social, medical and/or economic support available to that non-citizen in that country.

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135 Exhibit A1, Applicant's SFIC, page 68.
136 Ibid, page 69.

193. The material contains a Personal Circumstances Form dated 4 October 2018.[137] The Applicant is a man of 52 years of age. In response to a question about "***Do you have any diagnosed medical or psychological conditions?***" the Applicant ticked the "*No*" box in his Personal Circumstances Form.[138] Further, he does not mention that he takes any medication for any condition, or that he is currently being treated by any doctor/health professional/counsellor.[139]

194. In his written Statement,[140] the Applicant refers to the following issue with his left knee and other orthopaedic issues:

> *"14. On 2 July 2020, I did an ultrasound on my left knee. Annexed hereto and marked **'A'** is a copy of the ultrasound from the I-MED Radiology Network, 2 July 2020. The report of the ultrasound shows:*
>
> *• Mild changes of the distal quadriceps.*
> *• Effusion at the suprapatellar recess.*
> *• Heterogeneous appearance of the MCL with associated hyperaemia.*
>
> *15. I have been having a lot of pain and swelling in the proximity of my left knee. I am still not sure what is the cause of the problem with my knee. Regardless, it has been annoying and painful. I have received limited treatment for this issue while in immigration detention."*[141]

195. The Respondent (in its SFIC) goes so far as to suggest that "*In the absence of any explanation of the ultrasound nor any diagnosis resulting from this imaging*[142]*… the applicant has a sprain which is an injury…unlikely to require ongoing medical treatment."*[143] I will make no definitive finding on whether this injury asserted by the Applicant will heal itself or whether further treatment is required. Suffice it to say, that to the extent the Applicant will require access to medical services for these issues in Colombia, there is nothing to suggest that he will not have access to those services to the same level as is generally available to other citizens of that country.

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137 Exhibit G1, s501 G Documents, G13, pages 108-118 (excluding attachments).
138 Ibid, page 117; see also Section 14.5(1)(a) of the Direction.
139 Ibid.
140 See Exhibit A2.
141 Ibid, page 4.
142 The Annexure A referred to in the Applicant's Statement, the relevant portion of which is quoted in the immediately preceding paragraph refers to a radiologist's report dated 2 July 2020, reporting on "ul*trasound left knee"* of the Applicant.
143 Exhibit R1, Respondent's SFIC, page 8, paragraph [43].

196. In his SFIC, the Applicant says that his mother, siblings and extended family reside in Colombia. The contention runs along the lines that, while there is some evidence that the Applicant's extended family would provide him with a level of emotional and practical support in Colombia, this evidence must now be tempered by the advent of the COVID-19 pandemic and its impact on Colombia. Stated shortly, the Applicant's evidence at the hearing was that the pandemic has adversely affected both the nation of Colombia and the capacity of the Applicant's family to receive and accommodate him. In cross-examination, the Applicant said the following:

> *"MS SAUNDERS…I understand you have your mother there and some siblings, is that right?*
>
> *WITNESS: Yes, it's right.*
>
> *MS SAUNDERS: And I understand that if you're returned to Colombia you would be able to stay with your family in Bogota, is that right?*
>
> *WITNESS: What can I say? Is – yes because on the family, the Colombian family or Latin family, yes, the (indistinct words).*
>
> *MS SAUNDERS: Yes. Okay*
>
> *WITNESS: They have one house and they living 20 people there. Everybody live there. The condition of the living is total different, yes? I understand – I understand, they understand. My family is not have economic (indistinct). My family is very poor. And this knowing, with this pandemic, the limitation is – is very big. We say before here, we - - -*
>
> *MS SAUNDERS: If I could just ask – sorry. If I could just ask what work does your family do? I think you were saying that your sister's no longer working, is that what you said before?*
>
> *WITNESS: Yes. Yes.*
>
> *MS SAUNDERS: And are your other family members working?*
>
> *WITNESS: My mother, she's 75 years old, she's not working. Yes? My mother sister, she's (indistinct words) she's not working, yes? So my – they – I know they living with – like, with the money they give you Centrelink, like in Colombia, yes? Is very limit amount, yes? And if I go to Colombia, I no (indistinct) to nothing.*
>
> *MS SAUNDERS: Yes, I saw that in your statement. So I - - -*
>
> *WITNESS: So – so this is - - -*
>
> *MS SAUNDERS: Sorry, you go ahead?*
>
> *WITNESS: If you understand, if you read a (indistinct), my family at this moment – they're just poor. They no have money, yes? They trying just only living with – with nothing, yes? They're trying to – to helping each other, how we can go out, yes?*
>
> *MS SAUNDERS: So I understand that one of your uncles owns a coffee farm. Is that right?*
>
> *WITNESS: It's my uncle, is own one of the coffee farms. He offered me job before, but we go back the same situation. We have the pandemic. The farm is not work*

at the moment. Yet my uncle, we say the same situation. My uncle have his own family too, yes? They – they – whatever, they marking, or whatever they are, is very limit. It's living nothing.

MS SAUNDERS: Sorry, it just broke up a little bit, so I just wanted to check what you were saying. So you're saying the farm is not working at the moment?

WITNESS: The farm at this moment is not working at the moment because you know the program of the coffee nothing. People cannot do nothing, yes? Their farm is a small farm of the coffee – of the coffee, sorry, of the coffee, and the – and the situation of the coffee is not the best at the moment, yes. So my uncle have his own family too. My uncle is forever, they trying to do – trying to survive it with his own family. So the opportunity, a job for me working with my uncle, it's nil, it's gone, because pandemic, because of many things?"[144]

197. I accept that the Applicant will have family to stay with upon his return to Colombia, but that such lodgings may be cramped or to an extent, overcrowded. I similarly accept that most, if not all of his family, are not doing well financially and may not be able to readily support him in a financial sense. I further accept that his uncle's coffee farm has been adversely affected by the global economic downturn resulting from the pandemic. Be that as it may, upon a return to Colombia, the Applicant nevertheless has (1) somewhere to stay; (2) the emotional support of family members around him; and (3) an uncle with a coffee farm that could reasonably be expected to improve (in terms of economic viability) as the pandemic continues to be gradually brought under control.

198. I accept he may face some short to medium term difficulties in re-establishing himself in Colombia. As against that, the Applicant has extended family in Colombia and an extensive and successful work and education/training history in Australia. There is nothing to suggest that he will not take this ethic and his work experience with him to Colombia. Taking these factors in total, I do not consider those short to medium term difficulties, while genuine, would be insurmountable. While I accept the vagaries and exigencies of Colombia's social security system, as a citizen of that country, he will have access to social, medical and/or economic support in the context of what is generally available to other citizens of Colombia.[145]

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[144] Transcript, 31 August 2020, page 47, lines 1-46, and page 48, lines 1-18.
[145] Paragraph 14.5(1)(c) of the Direction.

199. While the impact of the COVID-19 pandemic upon Colombia is propounded on behalf of the Applicant, I am of the view that the relative approach taken by the Respondent is a more realistic and reliable one for present purposes:

> *"44. In respect of the impact of COVID-19 in Colombia, the Minister notes that as of 11 August 2020 there were approximately 160,000 active cases, with almost 300,000 people having been infected to date. The Minister accepts that COVID-19 has had a significant impact on Colombia; however, this impact is being felt by all citizens of Colombia and is not something that will impact the applicant differently to the other citizens of Colombia. Accordingly, the Minister contends that little weight should be afforded to considerations of COVID-19 as it relates to potential impediments to the applicant if removed."*[146]

200. The Applicant arrived in Australia from Colombia aged 29 years. The Applicant contends that "*There are no substantial language barriers, although the applicant has indicated that he does not speak very fluent Spanish anymore."*[147] That contention should be received with caution, for two reasons. First, I do not accept that the Applicant is no longer fluent in Spanish, because "*he has been forced to speak English during the entirety of his prison sentence and time in immigration detention (which is a substantial period)."*[148] Second, he requested (and was provided) a Spanish interpreter for the totality of the hearing.[149] Accordingly, my finding is that there are no significant or substantial language or other cultural barriers to the Applicant's return and re-establishment in Colombia.[150]

201. As stated, the Applicant has a strong record of engaging in remunerative employment in this country. There is little or nothing precluding him from doing the same type of work in Colombia, as that which he has done in Australia in the past, were he compelled to return there. Having regard to the totality of the evidence relevant to this Other Consideration (e), I am thus of the view it, at best, weighs moderately in favour of revocation.

Findings: Other Considerations

202. With reference to these Other Considerations, to the extent that any of them may weigh in favour of revoking the mandatory visa cancellation decision, they are outweighed by Primary Considerations A and C, which respectively weigh very heavily in favour of

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146 Exhibit R1, Respondent's SFIC, page 8.
147 Exhibit A1, Applicant's SFIC, page 69, paragraph [219].
148 Ibid.
149 See paragraph [77] of these Reasons.
150 Paragraph 14.5(1)(b) of the Direction.

non-revocation. The application of the Other Considerations in the present matter can be summarised as follows:

- international non-refoulement obligations: of neutral weight;
- strength nature and duration of ties: strongly weighs in favour of revocation;
- impact on Australian business interests: not relevant;
- impact on victims: not relevant; and
- extent of impediments if removed: moderately weighs in favour of revocation.

CONCLUSION

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

203. Under s 501CA(4)(b) of the Act, there are two alternate conditions precedent to the exercise of the discretion to revoke the Applicant's visa: either the Applicant must be found to pass the character test; or I must be satisfied that there is another reason, pursuant to the Direction, to revoke the cancellation. As I have noted above, the Applicant does not pass the character test. Having reference to the Direction and to the totality of the evidence before me, there is not another reason for me to revoke the cancellation of the Applicant's visa.

204. In considering whether there is another reason to exercise the discretion afforded by s 501CA(4) of the Act to revoke the mandatory visa cancellation decision, I have had regard to the considerations referred to in the Direction. I find as follows:

- Primary Consideration A weighs very heavily in favour of non-revocation;
- Primary Consideration C weighs very heavily in favour of non-revocation;
- Primary Consideration B weighs strongly in favour of revocation;
- I have outlined the weight attributable to the Other Considerations. I do not consider that the totality of the weight attributable to the relevant Other Considerations (b) and (e) combined, even when conjoined with Primary Consideration B, outweigh the very significant, combined and determinative weight I have attributed to Primary Considerations A and C; and

- A holistic view of the considerations in the Direction therefore favours the non-revocation of the cancellation of the Applicant's visa.

205. Consequently, I cannot exercise the discretion to revoke the cancellation of the Applicant's visa.

DECISION

206. The decision under review is affirmed.

I certify that the preceding 206 (two hundred and six) paragraphs are a true copy of the reasons for the decision herein of Senior Member Tavoularis

……[SGD]……

Associate

Dated: 14 September 2020

Date of hearing:	**31 August 2020**
Advocate for the Applicant:	**Dr J Donnelly of Counsel**
Advocate for the Respondent:	**Ms C Saunders, Senior Associate**
Solicitors for the Respondent:	**Minter Ellison Lawyers**

ANNEXURE A

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED
G1	Section 501 G-Documents (4 Volumes, G1-70, paged 1 - 2287)	R	-	14.07.2020
R1	Respondent's Statement of Facts, Issues and Contentions (pages 1 to 8)	R	14.08.2020	14.08.2020
R2	Respondent's Supplementary Documents (S1-S2, paged 1 – 67)	R	-	27.08.2020
A1	Applicant's Statement of Facts, Issues and Contentions (pages 1-75)	A	28.07.2020	29.07.2020
A2	Witness Statement: The Applicant	A	27.07.2020	29.07.2020
A3	Witness Statement: The Applicant's Wife	A	27.07.2020	29.07.2020
A4	Witness Statement: Child K	A	28.07.2020	29.07.2020
A5	Witness Statement: Child L	A	28.07.2020	29.07.2020
A6	Witness Statement: Witness LB	A	27.07.2020	29.07.2020