Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2019/0216**
Re:	**Langiila Uasi**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Deputy President Britten-Jones**
Date:	**8 September 2020**
Place:	**Adelaide**

The decision of the Tribunal is to set aside the decision under review and substitute a decision revoking the mandatory cancellation of the applicant's visa made on 10 March 2017.

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Deputy President Britten-Jones

Catchwords

MIGRATION – mandatory cancellation of applicant's visa – applicant has substantial criminal record – whether discretion to revoke mandatory cancellation should be exercised – primary considerations of protection and expectations of the Australian community are outweighed by the best interests of minor children and the strength, nature and duration of ties with Australia - decision set aside

Legislation

Migration Act 1958 (Cth)

Cases

Secondary Materials

Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA, 20 December 2018

REASONS FOR DECISION

Deputy President Britten-Jones

8 September 2020

INTRODUCTION

1. This is a draft of my reasons given on the day that the hearing concluded. If requested to give written reasons I may wish to add to or amend these reasons but my decision will remain.

2. This hearing arises from orders made by the Full Court of the Federal Court on 21 May 2020 which set aside a decision of a single Judge and quashed and remitted the decision

of the Tribunal made on 2 April 2019 not to revoke a mandatory cancellation of the applicant's visa under s 501(3A) of the *Migration Act 1958* (**the Act**).[1]

THE DECISION TO CANCEL THE VISA

3. On 10 March 2017, the applicant's Class BB Subclass 155 Five Year Resident Return (Permanent) visa (**the visa**) was mandatorily cancelled (**the cancellation decision**) by a delegate of the Minister under s 501(3A) on character grounds due to his substantial criminal record and because he was serving a sentence of imprisonment.

4. On 7 April 2017, the applicant made representations seeking revocation of the cancellation decision. The applicant's submissions included that:

   (a) He had strong support from his wife who would struggle financially and emotionally if he were returned to Tonga;

   (b) He has a step daughter to whom he has acted as a father since she was in kindergarten;

   (c) He has two biological children with his wife who were two years old and nine months old respectively when he went to prison but he has a strong relationship with them and they would suffer if he were returned to Tonga;

   (d) He has uncles/aunts, nieces/nephews and cousins in Australia as well as his parents-in-law;

   (e) He was in debt when he committed the kava offences, but he has learnt from his time in gaol to become a better person;

   (f) Being in gaol was devastating and made him realise how important his family is and he can support his family once in the community;

[1] All references to legislation are to the Migration Act unless otherwise stated.

(g) He studied numerous courses whilst in gaol because that is the way for him to not re-offend;

(h) He attended weekly bible studies in prison;

(i) He has a strong history of employment and volunteering;

(j) He is concerned about his wife and three children if he is returned to Tonga and wants to be a father;

(k) whilst in prison he worked as a mechanical trades assistant and as a bus driver for the Department of Correctional Services who provided a very positive reference about him.

5. On 4 January 2019, after taking into account the representations made by the applicant, a delegate of the Minister for Home Affairs decided under s 501CA(4) not to revoke the cancellation decision (**the delegate's decision**). The delegate's findings were on the basis that the applicant represents an unacceptable risk to the Australian community and that this outweighed the best interests of children and any other consideration.

6. On 14 January 2019, the applicant applied to the Tribunal for a review of the delegate's decision.

ISSUES BEFORE THE TRIBUNAL

7. The applicant does not pass the character test prescribed under s 501(6)(a) as he has been sentenced to a term of imprisonment of 12 months or more, and therefore has 'a substantial criminal record' as defined under s 501(7). The applicant concedes the same.

8. The only issue for the Tribunal to determine is whether, having regard to Ministerial Direction No. 79 (**Direction 79**), there is another reason why the cancellation decision should be revoked. Section 501CA(4)(b)(ii) requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision. If the Tribunal is satisfied that the

cancellation decision should be revoked following that evaluative exercise, the Tribunal must decide to revoke the decision.[2]

THE OFFENDING

9. On 13 April 2016, the applicant was sentenced to 4 years imprisonment in the Darwin Supreme Court for supplying a commercial quantity of kava and breaching his suspended sentence. In June 2014 he was given a suspended sentence for possessing and supplying a commercial quantity of kava. In the period from 2005 to 2010 he was convicted in a local Court of numerous traffic and licence offences. In 2012 he was convicted of using a carriage service to menace or harass or offend and was fined $1200. His offending took place over a 10-year period.

EVIDENCE

10. The applicant gave oral and written evidence as follows. He is a citizen of Tonga who came to Australia in 2004 aged 27 years old. He is currently 43 years old. He is still married although currently separated due to the pressure of his custodial sentence and period in immigration detention. He hopes to take practical steps to reconcile with his wife if released back into the community. He is the father of three children aged five, seven and 21. He has an excellent relationship with his three children, and he speaks to the younger ones daily. The most important reason for wishing to stay in Australia is to be with his children.

11. He is determined to make his life better by working and supporting his wife and children. Whilst in detention he has assumed a role as the representative of the detainees at meetings with the Australian Border Force. He has also been working in the coffee shop.

12. He accepts his criminal history which he acknowledges is serious and has caused harm to members of the Australian community. He is sorry and takes responsibility for his offending. He believes that he will not commit any further criminal offences because he has rehabilitated himself during the three years in prison and does not wish to go back again, he has learned that crime does not pay, the prospect of future visa cancellation will act as a deterrent and he does not wish to be away from his three children again.

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[2] *Gasper v Minister for Immigration and Border Protection* [2016] FCA 1166 at [38].

13. The applicant also has two brothers and their wives and children and two uncles and two aunties and approximately 18 cousins are in Australia. He has a good ongoing relationship with his two brothers and a positive relationship with the balance of his extended family.

14. If deported to Tonga he believes that he will suffer notable impediments because he will not receive any real financial or practical assistance from his parents or sisters who are there and he would be emotionally distraught and heartbroken by being deported and away from his wife and three children and he is concerned that he will not be able to find paid and stable employment.

15. His plans if released are to reside with a friend and take up an offer of employment in the concrete industry. He wants to continue to build his relationship with his children and to see whether he can rebuild his marriage. He will not reoffend because he has already lost five years of his life in prison and immigration detention and has learned his lesson. He wants to work hard and contribute to the Australian community and spend valuable time with his children and start a new positive chapter in Australia.

16. During his oral evidence the applicant expressed his remorse and said that he realises now that crime does not pay. When working as a bus driver and mechanic during his term of imprisonment in Darwin he was largely un-supervised except for a GPS tracker on the bus that he drove. His future plans are to work as a concreter and to look after his children. He is concerned for his wife and children if he is returned to Tonga. He has a good relationship with his in-laws and his wife. Whilst he did not attend any specific rehabilitation programs he did work for up to 6 days a week and engaged in numerous courses. Whilst in the Australian community he volunteered by training the under six football team and through his church by helping the homeless and less fortunate youth. He provided financial assistance to his parents back in Tonga. He acknowledged that it was wrong to provide inaccurate information in the passenger card on three separate occasions. He understands that his offending caused hurt to the aboriginal community and that what he did was wrong.

17. The 19-year-old stepdaughter gave evidence and described the applicant as like any other father who had a huge role in her life from when she was about five years old. She said that she would be completely broken if he were deported and that her family was struggling in his absence. She confirmed that he had a good relationship with his wife (her mother) and his in-laws (her grand-parents) and his own children. She said that he is a hard worker who

has always supported the family and she thinks that he will continue to support the family in the future. She is hopeful that this will allow her to study which she is unable to currently do working full-time to help support her family.

18. The father in law gave oral evidence and said that he has a very close relationship with the applicant and that he had been a good father. He confirmed his role as a trainer of children in football and his assistance to youth and the homeless through the church. He said he had spoken to the applicant about his criminality and that the applicant recognised it was a big mistake. He would be sad if the applicant were deported especially for the sake of the children. He said that life in Tonga would be very hard. He said that the applicant loves work and that his children would miss their father if he were returned to Tonga.

19. The mother-in-law gave oral evidence and confirmed that the applicant calls his wife and children every morning and afternoon and helps his son with homework. She confirmed his volunteer activities through sport and the church. The effect of her evidence was that she would be freed up if he were released because he could look after the children and help support his wife. She said that she would be sad if he were deported particularly for children.

20. The officer from correctional services with whom the applicant worked gave oral evidence and also provided a written statement of support. He provided a glowing reference and said that the applicant was trustworthy, reliable and a friend. He was aware how the applicant had built up respect during his time in prison so as to graduate to open security so he could work in the community relatively unsupervised. He said that the role of the bus driver is only given to trustworthy and reliable prisoners. He said that the applicant had an excellent rapport with prison staff and handled himself professionally and respectfully.

21. The wife of the applicant gave oral evidence and explained that though separated they were still married and had a good relationship. She said that the applicant had provided for them in the past and that she needs his help and wants him to be able to be a father for her children. If deported she said “I would be so crushed” and she said that the children miss him.

22. The brother of the applicant gave oral evidence and said he had a close relationship with him and that he missed him. He said that the applicant is the oldest member of the family

supported all the family unit. He was worried about how the applicant's children would suffer if he were deported.

23. The prospective employer of the applicant gave evidence in writing and orally that he could offer the applicant a job as a concrete contractor for 40 hours a week at $60 per hour with overtime available. He said that he was keen to support the applicant.

LEGISLATIVE FRAMEWORK

24. Under s 501(3A), the Minister must cancel a visa that has been granted to a person if:

    (l) the Minister is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); and

    (m) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

25. The character test referred to in s 501(3A) is outlined in s 501(6). Relevantly, s 501(6) provides that a person does not pass the character test if the person has a substantial criminal record (as defined by subsection (7)).

26. For the purposes of subsection (6)(a), and relevant to this matter, a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.[3]

27. Where a visa has been cancelled under s 501(3A), the Minister has a power to revoke the cancellation decision if satisfied that the visa holder passes the character test, or that there is another reason why the original decision should be revoked.[4] The discretion to revoke the cancellation on the grounds that 'the Minister is satisfied that there is another reason why the original decision should be revoked' is a broad one.

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[3] *Migration Act 1958* (Cth) s 501(7)(c).

[4] Ibid s 501CA(4).

28. Where the cancellation decision is not revoked, the right to have that decision reviewed by the Tribunal is enlivened.

IS THERE ANOTHER REASON WHY THE ORIGINAL DECISION SHOULD BE REVOKED?

29. When considering whether to revoke the delegate's decision, the Tribunal must have regard to Direction 79. The objective of Direction 79 is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.[5]

30. The guiding principles in Direction 79 that the Tribunal must apply in determining whether or not to revoke a visa cancellation include:

- Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to remain in Australia bearing in mind that being allowed to remain in Australia is a privilege conferred on non-citizens in the expectation that they are, and have been, law abiding.
- The Australian community expects that the Australian Government can and should cancel a non-citizen's visa if they commit serious crimes in Australia or elsewhere.
- 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 have to forfeit the privilege of staying in Australia.
- Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.
- The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled.

[5] Direction 79 at 6.1.

31. Keeping those guiding principles in mind, I turn my mind to the primary considerations and other considerations set out in Part C of Direction 79:

- Primary considerations:
    - Protection of the Australian community
    - The best interests of minor children in Australia
    - Expectations of the Australian community
- Other considerations include (but are not limited to):
    - International non-refoulement obligations
    - Strength, nature and duration of ties
    - Impact on Australian business interests
    - Impact on victims
    - Extent of impediments if removed

Protection of the Australian community – 13.1 of Direction 79

32. When considering the protection of the Australian community, I have regard to the principle that the government is committed to protecting the Australian community from harm as a result of criminal activity. I give consideration to:

- the nature and seriousness of the non-citizen's conduct to date; and
- 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 non-citizen's conduct – 13.1.1 of Direction 79

33. Factors that I must have regard to under paragraph 13.1.1 include:

- the principle that violent and/or sexual crimes are viewed very seriously;
- the principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed; and
- the sentence imposed by the courts for a crime or crimes (subject to the preceding dot point);

- the frequency of the non-citizen's offending and whether there is any trend of increasing seriousness.

34. The cumulative effect of the offending by the applicant is serious. He committed an assault occasioning actual bodily harm in 2008 and was convicted of sending menacing text messages to his wife in 2012. The offences involving the possession and supply of kava are very serious. The sentences he received for these offences of two years suspended then four years imprisonment reflects the seriousness of these offences. In the sentencing remarks from April 2016 the judge said that the applicant was the principal member of a known criminal network involving the large-scale sourcing and supply of kava to remote indigenous communities in the Northern Territory. There was a total quantity seized of 219.63 kg which is almost 10 times the commercial quantity of kava. The offending was described as serious:

> *The offender is the principal of a criminal network engaged in the distribution of large quantities of kava. He recruits aboriginal people to supply the kava and the kava is sold in remote aboriginal communities. Kava sold in those communities is a serious deleterious effect on the health of aboriginal people in those communities and creates social and economic problems which are now well established. Critically, it also removes significant amounts of money from poor communities.*

35. I take into account that this offending was committed against vulnerable members of the community and that it caused significant harm to them. I also note that the applicant's offending was frequent and that there was a trend of increasing seriousness starting with traffic offences, followed by property damage offences, the menacing text messages and then the possession and supply of a commercial quantity of kava. I also take into account that the applicant failed to disclose his criminal offending on three separate occasions when filling out a passenger card for overseas travel. His explanation that he was not aware that he had to disclose his earlier convictions is not acceptable. There were 13 offences over a 10 year period so the cumulative effect of his offending was serious.

36. The seriousness of the offending is reflected in the sentence of 4 years imprisonment with a non-parole period of 3 years.

The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct – 13.1.2 of Direction 79

37. In considering whether the applicant represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, I have regard to the principle that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. I also have regard to:

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

Nature of harm if further criminal conduct

38. If the applicant were to engage in further similar offending the harm to the Australian community would be serious.

Likelihood of further criminal or other serious conduct

39. The respondent contends that the risk that the applicant will reoffend is high. In support of this contention the respondent says that the applicant has failed to demonstrate insight into his offending because he merely expressed remorse and said that he was sorry without expanding or explaining why. Further, the incentive to commit a crime for financial benefit would still exist if he were released into the community and was supporting his three children.

40. I accept the remorse and contrition expressed by the applicant as being genuine. When asked about his offending he described the aboriginal communities as being like his family and that he had caused hurt to them in the same way as he had hurt his own family. I consider that this shows an understanding of his offending. Further, I accept the applicant when he said that being away from his children was devastating for him and that he had learnt a lesson from his time in gaol and in detention. There is a real incentive for the applicant to not reoffend because otherwise he will be put back into gaol and not be with his family. I accept that there will exist a financial incentive to commit a crime such as supplying kava but I consider that the applicant, as he said, has learnt that crime does not

pay. Whilst the applicant has not completed any specific courses of rehabilitation whilst incarcerated he has taken steps to improve himself by engaging in numerous courses and in Bible studies and most particularly by offering his services as a mechanical assistant and a bus driver. I accept the evidence of the correctional services officer, and it would be open to me to infer, that he would not have been given this position of responsibility unless he had shown himself to be a reliable and trustworthy prisoner. That is strong evidence of his rehabilitation and, with the very real deterrent of a further prison sentence or losing his visa, I consider that there is a low risk of reoffending.

Conclusion as to protection of the Australian community

41. The government is committed to protecting the Australian community from harm as a result of criminal activity by non-citizens.[6] In this case the applicant committed serious offences taking advantage of the vulnerable in our community but the offending is not so serious so as to be unacceptable in all of the circumstances. This is a factor that weighs in favour of non-revocation but only moderately so.

Best interests of minor children – 13.2 of Direction 79

42. In making a determination about the revocation of a visa cancellation, I must take into consideration the best interests of any children in Australia that are under the age of 18 years. Each child's interests are to be considered individually to the extent that their interests may differ.

43. The following factors that I must consider and are relevant to this application include:

- the nature and duration of the relationship between the child and the applicant. 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;
- the extent to which the applicant is likely to play a positive parental role in the future;
- the impact of the applicant's prior conduct and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

[6] Direction 79 at 13.1(1).

- the likely effect that any separation from the applicant would have on a child, taking into account ability to maintain contact in other ways;
- whether there are other persons who already fulfil a parental role in relation to the child; and
- any known views of the child (with those views being given due weight in accordance with the age and maturity of the child).

44. The applicant has two children with his wife aged five and seven years old. The evidence from the applicant, his wife, his parents-in-laws and his brother all support the contention that he has been a good father upon whom the family could rely to support them when he was in the community. I find that the nature of the relationship between the applicant and his two minor children is loving and strong. He speaks to his children on the telephone morning and night from detention and assists his son with his homework. If released he would play a positive parental role for many years until the children turn 18. The applicant's wife and parents-in-law have described the devastating impact on the children if he were returned to Tonga and was unable to support them financially, emotionally and be a father to them. I accept that the parents in law of the applicant are undertaking a parental role with the children but they have expressed that this is a struggle and they see it only as being temporary.

45. This is a factor that is overwhelmingly in favour of revocation of the cancellation decision.

Expectations of the Australian community – 13.3 of Direction 79

46. Clause 13.3(1) provides:

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

47. In *YNQY v Minister for Immigration and Border Protection,*[7] Mortimer J held that the expectations of the Australian community was inextricably linked to the other primary consideration about the protection of the Australian community, and that the expectations referred to in Direction 79 were those espoused in clause 13.3(1), rather than any objective expectations put forward by an applicant. This position has been affirmed by the Full Court of the Federal Court in *FYBR v Minister for Home Affairs.*[8]

48. The expectations of the Australian community are a primary consideration which must be taken into account when determining whether a cancellation decision should be revoked. Those expectations are expressed in clause 13.3(1) and they reflect the government's views. It is not for me as a decision maker to make my own assessment of the expectations of the community. In that sense, those expectations have been 'deemed' by clause 13.3(1).[9]

49. This is a case where the applicant has committed serious crimes in breach of the Australian community's expectation that non-citizens obey Australian laws while in Australia. As Stewart J says in *FYBR*:[10]

> *It is difficult to conceive of a case where an unfavourable character assessment, whether on the basis of the commission of an offence or the risk that an offence will be committed, will be other than against the grant of a visa.*

50. However, the reasoning of the majority in *FYBR* makes it clear that despite the expectations of the Australian community weighing in favour of non-revocation, the applicant may ultimately succeed and have the cancellation decision revoked.[11] As Stewart J says:[12]

> *Thus, the character assessment, even through the prism of community expectations, may not be decisively against the applicant. In many cases it will not be.*

51. It is important to give separate consideration to, first, the expectations of the Australian community in so far as it applies to the applicant's particular circumstances and, second,

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[7] [2017] FCA 1466.
[8] [2019] FCAFC 185.
[9] *FYBR v Minister for Home Affairs* [2019] FCAFC 185 at [67] and [101].
[10] Ibid [102].
[11] Ibid [73] and [97].
[12] Ibid [102].

the ultimate exercise of discretion weighing up the factors for and against revoking the cancellation decision.

52. With respect to the consideration of the expectations of the Australian community in clause 13.3(1), I give due regard to what the Government has stated in Direction 79 as to its views on what the expectations of the Australian community are.[13] The applicant has failed to act in accordance with the expectation of obeying Australian laws. Further, the Australian community expects that the Australian government should cancel a non-citizen's visa if a serious crime is committed.[14]

53. However, I do not consider that the applicant's criminal offending, and the harm that would be caused if it were to be repeated, is so serious that any risk of similar conduct in the future is unacceptable.[15] The principle in Direction 79 at 6.3(7) is relevant because this is a case where the applicant has been making a positive contribution to the Australian community and where the consequences of a visa cancellation for the minor children and other immediate family members in Australia are devastating.

54. I conclude that the expectations of the Australian community weigh in favour of non-revocation of the cancellation decision but only moderately so.

Other considerations

55. In deciding whether to revoke the cancellation of the applicant's visa, I must take into account the other considerations listed in Direction No. 79.

International non-refoulement obligations

56. The applicant did not submit that non-refoulement obligations were owed. This consideration is not relevant to the determination of this matter.

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[13] Ibid [99].
[14] Direction 79 at 6.3(2).
[15] Direction 79 at 6.3(4).

Strength, nature and duration of ties

57. In making my decision, Direction 79 requires that I consider the following factors:

- how long the applicant has resided in Australia, including whether the applicant arrived as a young child (noting that less weight should be given where the applicant began offending soon after arriving in Australia, and more weight should be given to time the applicant has spent contributing positively to the Australian community); and
- the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.

58. The applicant arrived in Australia in 2004 and was in the community until sentenced in 2016. For those 12 years the applicant made a positive contribution to the Australian community through his involvement as a volunteer in sport and the church helping youth and the homeless. The applicant has now been in Australia for 16 years which represents a significant proportion of his life given that he is 43 years old. The numerous witnesses who were called by the applicant all said that they had a good relationship with him and that he was a hard worker and a good father. He has built up considerable ties with his parents in law and continues to have a good relationship with his wife and his brothers who live in Canberra. He has also built up important social links with his church and the sporting community.

59. He has a very strong, loving and caring relationship with his stepdaughter who is 19 years old. I was particularly impressed with her evidence about the loving support that the applicant had provided her since she was a small child and how she would be so devastated if he were returned to Tonga. I accept her evidence that she is relying on support from her father if released so that she can take on studies as a mechanic.

60. This consideration weighs heavily in favour of revocation of the cancellation decision. I have slightly discounted the weight given to this consideration because he did commence offending soon after his arrival in Australia but his serious offending involving the kava took place many years after his arrival. His early offending was less serious and involved mainly traffic and licence offences.

Impact on Australian business interests

61. No evidence or argument was advanced with respect to any impact on Australian business interests.

Impact on victims

62. Paragraph 14.4(1) of Direction 79 provides that I must consider the impact of a decision not to revoke on members of the Australian community, including victims of the applicant's criminal behaviour, and the family members of the victim or victims where that information is available. No evidence or argument was advanced with respect to any impact on victims.

Extent of impediments if removed to home country

63. Direction 79 requires that I consider the extent of any impediments that the applicant may face if removed from Australia to South Sudan, in establishing himself and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

- the applicant's age and health;
- whether there are substantial language or cultural barriers; and
- any social, medical and/or economic support available to them in that country.

64. The applicant is a 43-year-old man who is in good physical and mental health. There would be no language or cultural barriers if he were returned to Tonga. I accept that the economic conditions in Tonga means that his prospects of employment are not as good as in Australia but he is a well qualified and resourceful person and I have no doubt that those slight impediments would not be insurmountable even without support from his family who are there. The applicant grew up in Tonga and spent three years in the Army there and obtained qualifications as a marine engineer. He came to Australia aged 27. In all of these circumstances I do not consider that there would be any significant impediments if he were removed to Tonga. I do not consider that this factor weighs either for or against revocation of the cancellation decision.

Conclusion as to whether there is another reason to revoke the original decision

65. I have considered the specific circumstances relating to the applicant as part of my consideration whether to revoke the cancellation decision. I am now required to weigh up those considerations.

66. The primary considerations relating to the protection of the Australian community and the expectations of the Australian community favour non-revocation of the cancellation decision. Whilst the Australian community expects non-citizens to obey the law and their visas to be cancelled if they commit serious crimes, I consider it appropriate that the cancellation decision is revoked because of the presence of significant countervailing factors. Those factors include the strength, nature and duration of ties that the applicant has with Australia and the best interests of minor children.

67. Clause 6(4) of Direction 79 refers to a circumstance where the offending is so serious that even other strong countervailing considerations may be insufficient to justify not cancelling the visa. This is not such a circumstance. The applicant's offending is not so serious as to be decisive when all of the circumstances are considered. The applicant's more serious offending appeared to be financially motivated but the applicant now realises that he has too much to lose if he reoffends. Further, the applicant has been offered a well-paid and secure job which he intends taking up, so the incentive to supplement his income through crime is not as significant as it was when he found himself in a financially precarious position due to the failure of his business in the meat industry.

68. The applicant has the support of his family who have all expressed how sad they would be if he were returned to Tonga. The applicant has shown himself to be a very hard-working and resourceful person and I have no doubt about the genuineness of his desire to spend time with and support his three children and his wife. The time that the applicant has spent in prison and in detention has had a significant impact and has made the applicant realise that crime does not pay.

69. In weighing the considerations for and against revocation of the cancellation decision, I give great weight to the best interests of the applicant's children.

70. I also give significant weight to the strength, nature and duration of ties that the applicant has with Australia.

71. I consider that the primary consideration of the best interests of minor children and the other consideration of the strength, nature and duration of ties to Australia together outweigh the primary considerations of the protection and expectations of the Australian community.

72. It follows that I am satisfied that there is another reason why the cancellation decision should be revoked.

Decision of the Tribunal

73. The decision of the Tribunal is to set aside the decision under review and substitute a decision revoking the mandatory cancellation of the applicant's visa made on 10 March 2017.

I certify that the preceding seventy three [73] paragraphs are a true copy of the reasons for the decision herein of Deputy President Britten-Jones.

.....[Sgnd].....
Administrative Assistant Legal

Dated 8 September 2020