



Administrative  
Appeals Tribunal

DECISION AND  
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2020/5124**

Re: **Pratish Shrestha**

APPLICANT

And **Minister for Immigration, Citizenship, Migrant Services and  
Multicultural Affairs**

RESPONDENT

**DECISION**

Tribunal: **Member W Frost**

Date: **10 November 2020**

Place: **Canberra**

The Tribunal affirms the decision made by a delegate of the Minister on 17 August 2020 to refuse to grant the Applicant a Skilled (Residence) (Class VB) visa under section 501(1) of the *Migration Act 1958* (Cth).

Member W Frost



### *Catchwords*

*MIGRATION – decision of the delegate to refuse to grant the applicant a visa pursuant to subsection 501(1) of the Migration Act 1958 – whether the applicant passes the character test – where the applicant has a substantial criminal record pursuant to subsection 501(7) of the Migration Act 1958 – applicant does not pass the character test – whether the discretion to refuse to grant the applicant a visa should be exercised – application of Direction No 79 – protection of the Australian community – best interests of minor children – expectations of the Australian community – contribution by way of employment history and volunteer work – ties to Australian community – whether the applicant will face financial hardship or emotional distress if removed – whether the other considerations outweigh the primary considerations – other considerations do not outweigh primary considerations – discretion to refuse to grant the applicant a visa exercised – decision under review affirmed*

### *Legislation*

*Administrative Appeals Tribunal Act 1975*

*Migration Act 1958*

### *Cases*

*Ali v Minister for Home Affairs* [2019] FCAFC 93

*Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113

*Cameron v The Queen* (2002) 209 CLR 339

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

*Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158

*Pavey and Minister for Home Affairs* [2019] AATA 4198

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

*Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177

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

### *Secondary Materials*

*Minister for Immigration, Citizenship and Multicultural Affairs, Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA (20 December 2018)*

## REASONS FOR DECISION

Member W Frost

10 November 2020

### INTRODUCTION

1. This proceeding concerns a decision by a delegate of the Respondent, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**Minister**), to refuse to grant the Applicant, Mr Pratish Shrestha, a Skilled (Residence) (Class VB) visa (**Visa**).
2. In August 2020, Mr Shrestha's 2017 application for the Visa was refused under subsection 501(1) of the *Migration Act 1958 (Act)*, because a delegate of the Minister was not satisfied that Mr Shrestha passed the character test under the Act due to having a 'substantial criminal record', in circumstances where he had been 'sentenced to a term of imprisonment of 12 months or more'. In this regard, in 2016, Mr Shrestha was sentenced in the Local Court in Dubbo, New South Wales (**NSW**), to a term of imprisonment of 18 months for each of two offences to be served concurrently. This 18 month sentence was subsequently confirmed by the District Court of NSW, however Mr Shrestha's imprisonment was suspended on condition that he enter a good behaviour bond for the equivalent period of time. Mr Shrestha has remained in the community since the commission of the offences in 2015.
3. This year, Mr Shrestha applied to the Administrative Appeals Tribunal (**Tribunal**) for review of the decision to refuse his application for the Visa. On 26 October 2020, a hearing by the Tribunal was held using video conferencing technology in circumstances where the Tribunal had determined that all in-person hearings at registries of the Tribunal across Australia were to cease in response to the COVID-19 pandemic, unless there were exceptional circumstances. The Tribunal is satisfied that the parties were given a reasonable opportunity to give evidence and present their arguments at the hearing, noting sections 33A and 39 of the *Administrative Appeals Tribunal Act 1975 (AAT Act)*.
4. The Tribunal has considered all documents in the bundle of documents filed in this proceeding on 8 September 2020, pursuant to section 501G of the Act,<sup>1</sup> together with the

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<sup>1</sup> Exhibit R1, known as the 'G-Documents'.

parties' respective Statement of Facts, Issues and Contentions,<sup>2</sup> and the following additional documents filed by the parties:

- (i) Witness Statement of Mr Shrestha;<sup>3</sup>
- (ii) Statutory Declaration of Ms Krishlyn Chetty dated 6 October 2020 with attachments A - D;<sup>4</sup>
- (iii) Statement of Mr Umesh Napit dated 1 October 2020;<sup>5</sup>
- (iv) Statement of Mr Rabin Manandhar dated 28 September 2020;<sup>6</sup>
- (v) Statement of Mr Anish Dev Panthee dated 27 September 2020;<sup>7</sup>
- (vi) Reference Letter of Ms Tenelle Bond dated 24 September 2020;<sup>8</sup>
- (vii) Reference Letter of Mr Jeremy Norris dated 21 September 2020;<sup>9</sup>
- (viii) Letter comprising a supplementary report of Dr Susan Pulman dated 15 July 2020, also attaching her report of 15 July 2020;<sup>10</sup>
- (ix) Victim Impact Statement dated 13 June 2016;<sup>11</sup>
- (x) Agreed Facts dated 18 May 2016.<sup>12</sup>

## **BACKGROUND**

5. Mr Shrestha is a 35 year old citizen of Nepal.<sup>13</sup>

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<sup>2</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020 and Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020.

<sup>3</sup> Exhibit A1.

<sup>4</sup> Exhibit A2.

<sup>5</sup> Exhibit A3.

<sup>6</sup> Exhibit A4.

<sup>7</sup> Exhibit A5.

<sup>8</sup> Exhibit A6.

<sup>9</sup> Exhibit A7.

<sup>10</sup> Exhibit A8. Dr Pulman's report of 15 July 2020 was also contained in Exhibit R1, 'G' Document number 'G22', pages 108-113.

<sup>11</sup> Exhibit R2.

<sup>12</sup> Exhibit R3.

<sup>13</sup> Exhibit R1, G7, page 37.

6. On 16 October 2006, Mr Shrestha arrived in Australia on a Student (Class TU) (subclass 573) visa.<sup>14</sup> Mr Shrestha has resided in Australia for 14 years and has not left Australia since arriving in 2006.<sup>15</sup>
7. Between January 2007 and March 2015, Mr Shrestha resided in Sydney, NSW.<sup>16</sup>
8. In March 2015, Mr Shrestha relocated to Dubbo, NSW.<sup>17</sup>
9. On 19 December 2015, Mr Shrestha committed the offences of 'Enter Building/Land with Intent Commit Indictable Offence' and 'Assault with Act of Indecency' (**Offences**).<sup>18</sup> The Offences involved Mr Shrestha, after a street Christmas party in Dubbo, entering the unlocked front door of a woman's family home without consent and indecently assaulting her as she lay in bed. This included touching 'the outside of her underwear and the vaginal area and to her bottom'.<sup>19</sup> The victim 'kicked out at Mr Shrestha and demanded, "What are you doing here?"'<sup>20</sup> The Dubbo Local Court found that the indecent assault was not the result of any invitation, behaviour or conduct by the victim such that Mr Shrestha could misguidedly justify what he did.<sup>21</sup> Mr Shrestha was highly intoxicated as a result of his drinking at the party and cannot recall committing the Offences.<sup>22</sup>
10. On 4 July 2016, the NSW Community Corrections Office in Dubbo (**Community Corrections**) prepared a Pre-Sentence Report in relation to Mr Shrestha for the Dubbo Local Court.<sup>23</sup> This Pre-Sentence Report relevantly stated that:

**Substance use**

*Mr Shrestha described himself as being a social drinker, denying any regular drinking pattern prior to the commission of the aforementioned offences. In the past Mr Shrestha reported that he predominantly consumed alcohol on special occasions, reporting to consume a*

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<sup>14</sup> Exhibit R1, G8, page 38.

<sup>15</sup> *ibid.*

<sup>16</sup> Exhibit R1, G10, pages 43-56.

<sup>17</sup> *ibid.*

<sup>18</sup> Exhibit R1, G5, pages 17-19.

<sup>19</sup> Exhibit R1, G6, page 32.

<sup>20</sup> Exhibit R3.

<sup>21</sup> Exhibit R1, G6, page 32.

<sup>22</sup> Exhibit R1, G18, pages 99-101; Transcript of Proceedings, pages 12-14.

<sup>23</sup> Exhibit R1, G18, pages 99-101.

maximum of 3 standard drinks on any occasion. It is noted that Mr Shrestha had consumed an excessive amount of alcohol at the time of offence, reporting to have consumed approximately 12 full strength beers and approximately 4 shots of whiskey within a five minute period leading up to the offence.

Since being convicted of the aforementioned offences, Mr Shrestha reported to have ceased all alcohol consumption. Accordingly, it was suggested that he contact Drug and Alcohol Services to participate in an assessment and to acquire information surrounding the responsible consumption of alcohol. Enquiries were conducted with Community Drug and Alcohol Services who confirmed that Mr Shrestha contacted their Service as suggested, however advised Mr Shrestha is ineligible to participate in an assessment due to his temporary residency and not being covered by either Medicare or private health insurance.

### **Sex offending**

During the adjournment Mr Shrestha attended a Pre-Sentence consultation with a CSNSW Senior Psychologist on 29<sup>th</sup> June 2016. The purpose of this consultation was to provide a risk assessment of Mr Shrestha's suitability for and access to sex offender treatment programs. In addition, such assessment is able to assist this Service to identify risk factors with the purpose of defining case management/planning strategies, regardless of whether he is sentenced to a custodial or community based sentence.

Perusal of the resultant report and discussion with the CSNSW Senior Psychologist indicated that a Static-99 assessment was undertaken with Mr Shrestha, resulting in a score which placed him in the moderate to low risk category for sexual re-offence.

### **Attitude to offending**

The Police facts pertaining to the offences were discussed with Mr Shrestha where he reported to have had no recollection of his offending behaviour...A comprehensive discussion was undertaken with Mr Shrestha regarding the offences where he expressed attitudes that would reflect that he regrets his behaviour, expressing shame and remorse, acknowledging that his behaviour was inappropriate and unacceptable. Mr Shrestha also expressed concern surrounding his criminal convictions and how they may jeopardise his professional future in Australia.

### **RISK LEVEL AND CRIMINOGENIC NEEDS**

According to the Level of Service Inventory – Revised actuarial risks/needs assessment tool, the offender is assessed as a **low** risk of re-offending.

The identified criminogenic needs are:

- Alcohol/drug problems
- Sex offending

### **ASSESSMENT AND COMMUNITY BASED SENTENCING OPTIONS**

#### **Assessment**

Mr Shrestha has had no prior contact with Community Corrections. Mr Shrestha described his past relationship with alcohol as being minimal, however alleged to have engaged in

*excessive alcohol consumption in company of his colleagues at a social gathering. Throughout the assessment period Mr Shrestha claimed to have had no recollection of the events leading up to the offence due to his level of intoxication, however expressed regret and verbalised significant concern surrounding how his sentence could now impact his professional career plans and permanent residency in Australia. Enquiries and assessments conducted through the term of the adjournment period indicated that Mr Shrestha's risk of re-offence maybe [sic] managed via psychological intervention and/or sex offender programs. In the event that the offender is sentenced to a community based order the supervision would focus on external monitoring and risk management in the Community.*

### **Supervision by Community Corrections**

*It is considered the offender would benefit from a period of supervision by Community Corrections. Case management strategies would include;*

- *Consultation with the CSNSW Senior Psychologist for appropriate sexual offending treatment options/recommendations in the local area.*
- *Referral to Drug and Alcohol Services or programs to access expert assistance around safe levels of alcohol consumption.*
- *Monitoring compliance with Order conditions.*

### **Community service order assessment – suitable**

*The offender has been assessed as suitable for a community service order as per the requirements of s86(1) of the Crimes (Sentencing Procedure) Act 1999 and has signed an undertaking as required by s86(5). If a community service order is made, he is to report to Dubbo Community Corrections within 7 days. [emphasis in original]*

11. On 7 July 2016, the Dubbo Local Court sentenced Mr Shrestha to 18 months imprisonment for each of the two Offences, to be served concurrently, with a non-parole period of 12 months.<sup>24</sup> In the course of the Local Court proceedings, Magistrate Stewart relevantly stated that:<sup>25</sup>

*On 19 December 2015, the offender was invited to a street Christmas party, consumed eight or nine full strength beers and three or four shots of whiskey. The victim left the party around 3am and went to bed. She carried an esky from her neighbours to the front door, assisted by the offender. She went inside and closed the door, she did not lock the door as her husband was still at a nearby party.*

*The offender later entered through the front door, went to the bedroom and indecently assaulted the victim as she lay in her bed. The victim thought it was her husband, but opened her eyes and saw the offender. The ensuite light came on and she saw the offender lay down on the floor at the foot of the bed, then get up and walk out of the room.*

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<sup>24</sup> Exhibit R1, G5, pages 17-19; G6, pages 20-36.

<sup>25</sup> Exhibit R1, G6, pages 20-36.

*The offender was challenged by the victim's husband. The offender left the house, but was detained nearby and police were called. He took part in an interview with police. He admitted his presence at the party, but denied being in the house of the victim, or assaulting her.*

*Assessment of criminality. The guilty plea to the enter building with intent, is an admission of an intention to assault the victim, and an admission to committing an act of indecency upon her. The indecent assault need not have occurred in the complainant's home, it could for example or for instances, have occurred at the party. It is the overall conduct which must be examined to determine the objective seriousness of each matter by entering the complainant's home with the admitted intention of assaulting her. The aggravated feature of the offence occurring within the victim's home is present pursuant to s 21(2)(e)(b) of the Crimes (Sentencing Procedure) Act.*

*That aggravating feature exists in relation to both offences, entering a building with intent need not be the home of a victim and it is therefore not double counting to take into account that factor.*

*The indecent nature of the assault was not in anyway, shape or form the result of behaviour or invitation, or conduct by the victim, there is nothing to suggest any perception of familiarity by the offender, where he could by some misguided thought process justify what he did. The touching of the victim commenced at her knee and moved to the inside of her leg, the outside of her underwear and the vaginal area and to her bottom. Although the touching involved the outside of under garments, the contextual basis of the offending elevates it for both charges to around mid level.*

...

*The prospects of reoffending are assessed by Corrective Services New South Wales senior psychologist as moderate to low risk category for sexual reoffence. Another form of assessment on the same PSR report indicated a low risk of offending.*

*Mr Shrestha works as a labourer at a local abattoir and earns \$635 a week. He has no criminal history which is a mitigating factor under 21A(3)(e) of the Crimes (Sentencing Procedure) Act. Is a single man with no family in Australia, although he does have a cousin at least living in Sydney, by virtue of the documents tendered on his behalf. He is an accounting graduate. I accept that the offence is out of character. He has expressed remorse through a letter of apology and through a number of testimonials tendered by consent.*

*He says that he is thankful that no one was hurt. Such wording may simply be an inappropriate use of words. Clearly the victim was, and remains significantly traumatised, as evidenced by the victim impact statement, which she stoically read to the Court.*

*I note in the pre-sentence report that the offender claims that he had "no recollection of the events leading up to the offence" due to his level of intoxication. I reject that suggestion. The facts indicate that he took part in an interview with police, admitted his presence at the party, but denied being in the victim's house or assaulting her. Where there is some information at sentencing which deviates from the agreed facts I shall proceed to sentence on the agreed facts, per the CCA decision of Khanwaiz.*

*I have regard to s 3A and 5 of the Crimes (Sentencing Procedure) Act, including the need for both general and specific deterrence and to make Mr Shrestha accountable for his actions, there is a strong need in this case for specific and general deterrence. Sentencing*

*purposes also include the need to recognise the harm done to the victim of a crime and to protect the community from the offender.*

*I am firmly of the opinion that no other sentence other than one of imprisonment is warranted...Applying the discount for the plea, the sentence for enter building with intent is 18 months. An identical term is appropriate for the indecent assault...Notwithstanding the offender's lack of criminal antecedents, age and other factors, I am not of the opinion that it is appropriate to suspend the sentence or to order an ICO assessment. Stand up please Mr Shrestha.*

*MR SHRESTHA YOU ARE SENTENCED TO A TERM OF IMPRISONMENT OF 18 MONTHS. I MAKE A FINDING OF SPECIAL CIRCUMSTANCES, NOTING THAT IT IS YOUR FIRST TIME IN CUSTODY AND A NEED FOR ALCOHOL REHABILITATION.*

*THE NON-PAROLE PERIOD IS 12 MONTHS, COMMENCING TODAY 7 JULY 2016. YOU ARE TO BE RELEASED TO PAROLE ON 6 JULY 2017. PAROLE IS TO BE SUPERVISED AND I RECOMMEND THAT YOU TAKE PART IN A SEX OFFENDER'S COURSE.*

...

*BAIL IS MADE PENDING APPEAL TO THE DISTRICT COURT HAVING BEEN SENTENCED TO A PERIOD OF IMPRISONMENT EARLIER TODAY. THE DPP ARE NOT OPPOSED TO BAIL PROVIDING APPROPRIATE CONDITIONS ARE IMPOSED.*

12. On 25 August 2016, the District Court of NSW confirmed Mr Shrestha's conviction for the Offences, but varied the sentence imposed by the Local Court. The District Court sentenced Mr Shrestha to 18 months imprisonment, to be suspended on Mr Shrestha entering a bond to be of good behaviour for that period of time, concluding on 24 February 2018.<sup>26</sup>
13. In July 2017, Community Corrections relevantly wrote as follows:<sup>27</sup>

*Mr Shrestha has been under Community Corrections supervision pursuant to a Section 12 Good Behaviour Bond since August 25<sup>th</sup> 2016. Mr Shrestha is currently being case managed as a low risk client, and during his time under supervision he has maintained stable accommodation and employment there are presently no concerns in regards to his stability, or community behaviours. At this juncture it is anticipated Mr Shrestha will successfully complete his Order upon its expiry on February 24<sup>th</sup> 2018.*

14. In October 2017, Community Corrections wrote to Mr Shrestha that:<sup>28</sup>

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<sup>26</sup> Exhibit R1, G5, pages 17-19.

<sup>27</sup> Exhibit R1, G15, page 90.

<sup>28</sup> Exhibit R1, G16, page 91.

*As from 23 October 2017, you are no longer obliged to report to this Service as the early termination proviso on your Good Behaviour Bond has been approved.*

*It should be noted, however, that you are still bound by all conditions of the bond until 24 February 2018.*

15. On 12 September 2017, while subject to the 18 month good behaviour bond,<sup>29</sup> Mr Shrestha applied to the then Department of Immigration and Border Protection for the Visa,<sup>30</sup> being a Skilled (Residence) (Class VB) visa, which is a permanent visa allowing a person to remain in Australia indefinitely.<sup>31</sup> From this date, and as a result of this Visa application, Mr Shrestha was granted a Bridging A (Class WA) visa.<sup>32</sup>
16. On 18 February 2020, the Minister's Department sent Mr Shrestha a 'Notice of intention to consider refusal of your visa application under section 501(1) of the *Migration Act 1958*', because of information indicating that he did not pass the 'character test'.<sup>33</sup> Mr Shrestha was invited to comment on the information and provide reasons why his application for the Visa should not be refused.
17. In March and April 2020, Mr Shrestha's representative provided a written statement and supporting evidence in response to the Department's notice of February 2020.<sup>34</sup>
18. On 17 August 2020, a delegate of the Minister decided to refuse Mr Shrestha's application for the Visa under section 501(1) of the Act.<sup>35</sup> On 19 August 2020, Mr Shrestha's representative was notified of the decision by letter of the same date.<sup>36</sup> The letter notifying Mr Shrestha of this decision also confirmed that his Bridging A (Class WA) visa granted in September 2017 'has been cancelled by operation of law'.<sup>37</sup> As a result, Counsel for Mr Shrestha told the Tribunal that his client was currently an 'unlawful non-citizen' in

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<sup>29</sup> Exhibit R1, G5, pages 17-18; G15, page 90; G16, page 91; Exhibit A1, page 3.

<sup>30</sup> Exhibit R1, G10, pages 43-56.

<sup>31</sup> <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/skilled-regional-887#Overview>, accessed on 27 October 2020.

<sup>32</sup> Exhibit R1, G2, page 7.

<sup>33</sup> Exhibit R1, G9, pages 39-42.

<sup>34</sup> Exhibit R1, G2, page 7; G10-G22, pages 43-113.

<sup>35</sup> Exhibit R1, G2, pages 7-9; G3, page 11; G4, pages 12-16.

<sup>36</sup> Exhibit R1, G2, pages 7-9.

<sup>37</sup> *ibid.*, page 7.

Australia.<sup>38</sup> However, Mr Shrestha has not been in immigration detention since this time, despite efforts by his representative to engage with the Minister's Department to arrange for him to be taken into detention and Mr Shrestha's stated willingness to comply with Australian immigration laws.<sup>39</sup>

19. On 24 August 2020, Mr Shrestha applied to this Tribunal for merits review of the delegate's Visa refusal decision.<sup>40</sup>

## LEGISLATION & POLICY

### The Act

20. Section 501 of the Act relevantly provides that:

*(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.*

...

*(6) For the purposes of this section, a person does not pass the **character test** if:*

*(a) the person has a substantial criminal record (as defined by subsection (7));*

...

*(7) For the purposes of the character test, a person has a **substantial criminal record** if:*

...

*(c) the person has been sentenced to a term of imprisonment of 12 months or more;...  
[emphasis in original]*

21. Section 500 of the Act provides that applications may be made to the Tribunal for review of decisions of a delegate of the Minister under section 501 of the Act.

### The Direction

22. Under section 499 of the Act, the Minister may give written directions to a person or body having functions or powers under that Act, provided the directions are about the performance of those functions or the exercise of those powers (subsection 499(1)) and are not inconsistent with the Act or the Regulations made under it (subsection 499(2)). The

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<sup>38</sup> Transcript of Proceedings, page 11.

<sup>39</sup> Exhibit A2.

<sup>40</sup> Exhibit R1, G1, pages 1-6.

person or body to whom the directions are given must comply with them (subsection 499(2A)).

23. The Minister has made a direction under section 499 of the Act for the purposes of decisions made under, among others, section 501 of the Act, being Direction 79 titled, *Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s501CA (Direction 79)*, which applies to a decision made in relation to the application for the Visa made by Mr Shrestha.
  
24. The Preamble to Direction 79 sets out its objectives, general guidance and principles, relevantly including:
  - (a) under subsection 501(1) of the Act, a non-citizen may be refused a visa if the non-citizen does not satisfy the decision-maker that they pass the character test (paragraph 6.1(2));
  - (b) where the discretion to refuse to grant or to cancel a visa is enlivened, the decision-maker must consider whether to exercise the discretion to refuse the visa given the specific circumstances of the case (paragraph 6.1(2));
  - (c) the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens (paragraph 6.2(1));
  - (d) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community (paragraph 6.3(1));
  - (e) the Australian community expects that the Australian Government can and should refuse entry to non-citizens if they commit serious crimes in Australia or elsewhere (paragraph 6.3(2));

- (f) a non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against women or children, should generally expect to forfeit the privilege of staying in Australia (paragraph 6.3(3));
  - (g) in some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify refusing the visa (paragraph 6.3(4));
  - (h) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, or contributing to, the Australian community for only 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 (paragraph 6.3(5));
  - (i) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia (paragraph 6.3(6));
  - (j) the length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa application should be refused (paragraph 6.3(7)).
25. Paragraph 7(1) of Direction 79 provides that a decision-maker must take into account the considerations in Part B to determine whether a non-citizen will forfeit the privilege of being granted a visa. That is, Part B of Direction 79 relates to visa applicants.
26. Part B of Direction 79 identifies the considerations relevant to deciding whether to refuse a non-citizen's visa. It comprises three 'primary considerations' and four specified, but non-exhaustive, 'other considerations' which must be taken into account in relation visa applicants. Paragraph 11(1) in Direction 79 sets out the three 'primary considerations' as follows:

- (a) Protection of the Australian community from criminal or other serious conduct (**Primary Consideration 1**);
  - (b) The best interests of minor children in Australia (**Primary Consideration 2**); and
  - (c) Expectations of the Australian community (**Primary Consideration 3**).
27. Paragraph 12(1) in Direction 79 lists the following four 'other considerations' that must be taken into account where relevant:
- (a) International non-refoulement obligations;
  - (b) Impact on family members;
  - (c) Impact on victims; and
  - (d) Impact on Australian business interests.
28. Paragraph 8 of Direction 79 states that:
- (1) *Decision-makers must take into account the primary and other considerations relevant to the individual case. There are differing considerations depending on whether a delegate is considering whether to refuse to grant a visa to a visa applicant, cancel the visa of a visa holder, or revoke the mandatory cancellation of a visa. These different considerations are articulated in Parts A, B and C. Separating the considerations for visa holders and visa applicants recognises that non-citizens holding a substantive visa will generally have an expectation that they will be permitted to remain in Australia for the duration of that visa, whereas a visa applicant should have no expectation that a visa application will be approved.*
  - (2) *In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.*
  - (3) *Both primary and other considerations may weigh in favour of, or against, refusal, cancellation of the visa, or whether or not to revoke a mandatory cancellation of a visa.*
  - (4) *Primary considerations should generally be given greater weight than the other considerations.*
  - (5) *One or more primary considerations may outweigh other primary considerations.*

## **ISSUES**

29. The issues for the Tribunal in this proceeding are:
- (a) whether Mr Shrestha passes the character test under subsection 501(6) of the Act; and

- (b) if not, whether the Tribunal should exercise the discretion in subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa.

## EVIDENCE

### Mr Shrestha

30. Mr Shrestha filed a written statement dated 27 September 2020 in support of his application to the Tribunal, which relevantly said:<sup>41</sup>

#### *Family*

*I am currently single.*

*I want to get married and settled down. However, given my current immigration situation, I will have to wait until my migration status is settled. My parents also have a desire for me to get married.*

*I have a cousin named Arbin Shrestha that resides in Australia. In particular, my cousin resides in Auburn, New South Wales. Arbin works as a Data Analyst at Job Ready Solutions. Arbin is about six months older than me. Arbin and I grew up together since childhood. In that context, we enjoy a continuing and close relationship.*

*Arbin stayed with me for several weeks when he first arrived in Australia in about 2009. We would meet at least once a month when I was residing in Sydney. However, after I moved to Dubbo, we stayed in touch via telephone. That said, I still consider myself close to Arbin. He is family.*

#### *Criminality*

*I wholeheartedly acknowledge that I committed the offences of entering building/land with intent to commit an indictable offence and commit an assault with an act of indecency (**the offences**). At the time, I was about 30 years of age while living alone in Dubbo. At that time, I was working full-time at a local abattoir and as a labourer at Fletcher International Experts [sic].*

*I worked Monday to Friday. Every weekend, I would play cricket in Dubbo with other members of the Australian community. I enjoyed playing cricket, keeping active, and connecting with other residents of Australia.*

*The background of the offences is as follows. On a Saturday afternoon, I was busy playing cricket. I missed a few phone calls from Earl Andrews (a workmate at the local abattoir). I subsequently telephoned Earl after the game and was invited to his house to socialise and have a few drinks.*

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<sup>41</sup> Exhibit A1.

*Originally, I did not want to go to Earl's place. However, Earl mentioned other work colleagues (including our supervisor) would be coming over to his house. Accordingly, I changed my mind and thought it would be a good opportunity to socialise with my work colleagues.*

*I drove to Earl's house with a six-pack of beer (which would be shared between work colleagues). Upon reaching Earl's house, I saw many people and was informed that there was a street party being held in conjunction with the neighbours.*

*After consuming a couple of beers, Earl offered me to stay at his place that evening. Subsequently, after agreeing to stay at Earl's place, we started playing a drinking game (where the loser had to skull a drink). I lost the game a few times. I consumed beers and about five to seven whiskey shots.*

*I became very heavily intoxicated. Subsequently, I committed the offences that are under close consideration by this Tribunal.*

### **Remorse**

*Independent of the offences, I have no other criminal history in Australia. I am very remorseful and ashamed about the way I behaved concerning the offences. I deeply regret the hurt that I caused the victim, her family, and my work colleagues in Australia.*

*I will never again commit any further criminal offences in Australia. I am deeply regretful for my conduct concerning the offences.*

### **Criminal Penalty**

*Concerning the offences, my 18-month sentence of imprisonment was fully suspended on entering a 'section 12' good behaviour bond between 25 August 2016 and 24 February 2018. I had to visit Dubbo Community Corrections every fortnight, which subsequently changed to once a month.*

*On or about 23 October 2017, I got early termination on my good behaviour and did not have to report to Dubbo Community Corrections any longer. During this time, I continued working as a labourer/cleaner at an abattoir until September 2017. Subsequently, I also commenced working at Hogs [sic] Breath Cafe as a bar attendant and got promoted to a restaurant supervisor.*

### **Effect of Temporary Visa**

*At the relevant time, I was on a temporary visa and not eligible to take courses with Community Drug and Alcohol Services. When I was under supervision, I learned about the harmful effects of alcohol and ways to stay away from alcohol abuse. I discussed the same with officers associated with community corrections.*

*I understand the negative impact that alcohol has on society and the destructive impact that alcohol abuse has on the Australian community. My own experience of being sentenced to a term of imprisonment, having my visa application refused, and my future in Australia placed in grave jeopardy have all taught me that alcohol abuse leads to adverse consequences.*

*I have read many self-development books and watched motivational videos to assist in my rehabilitation and advancement in life.*

### **Consequences of Deportation**

*In circumstances where I am unsuccessful in my appeal proceedings before the Tribunal, I will face financial hardship in Nepal. Both my parents are retired.*

*My parents borrowed money to send me to Australia for my education. I have financial debts myself.*

*If I have to return to Nepal, this will have devastating consequences for my family. I will not be able to earn an Australian income to support my family in Nepal. If I return to Nepal in the circumstances in which I face, my family will likely face great criticism from other members of the community in Nepal.*

*Nepalese society is generally conservative. The neighbours of my parents and other associates will likely criticise my family and me for being deported from Australia. Although I readily appreciate that I committed very serious offending in Australia, I have paid my penalty and sought to contribute to the Australian community.*

### **Current Health**

*After my visa got refused, it was very hard for me to sleep and focus properly. I had been busy working and suddenly had to resign from my jobs due to my current visa situation. I have had no option but otherwise to stay in my room (which is very hard).*

*I am very stressed at the moment as a result of my immigration troubles. I hope that my life can go back to normal.*

### **Education in Australia**

*I have a strong educational history in Australia:*

- *Holmes Institute Sydney. Bachelor of Professional Accounting (2012).*
- *Global College Sydney. Diploma of Accounting (2007).*
- *Tactical Training Group Sydney. Certificate III in Hospitality (2009).*

*The relevant educational courses I undertook in Australia cost a substantial sum of money.*

### **Employment**

*I also have a very strong employment history in Australia:*

- *Jimmy Barnett Espresso Bar, Dubbo. Cafe Manager (i.e. job offered subject to a lawful visa being granted).*

- *The Establishment Bar, Dubbo. Bartender (1 January 2019 – present). Currently on personal leave due to the current visa situation.*
- *Hogs Breath Café, Dubbo. Bartender (August 2019 to March 2020).*
- *BP Dubbo. Head Barista (June 2008 to August 2020).*
- *Hogs Breath Café, Dubbo. Restaurant supervisor (September 2017 to January 2019).*
- *Fletcher International Export, Dubbo. Labourer and cleaner (March 2015 to September 2017).*
- *Searock Bar and Grill, Sydney. Bar staff (December 2014 to March 2015).*
- *Bondi Pizza, Sydney. Bar staff (June 2014 to May 2015).*
- *Zenobia Restaurant Sydney. Bar Staff (April 2014 to May 2014).*
- *The World Bar, Sydney. Floor supervisor and bar staff (March 2008 to March 2014).*
- *External Cleaning Services, Sydney. Cleaner (January 2007 to February 2008).*

### **Miscellaneous Matters**

*I have considered Australia my home for the last 14 years. My extremely poor decision of getting very badly intoxicated and committing the offences has caused me great sadness. I take full responsibility for my offending and my actions on the evening in question.*

*I have always helped small businesses and provided my knowledge, skills, and services to advance Australian businesses. For example, I resigned as a restaurant supervisor and went to help the owners opening a new bar in Dubbo. Recently, I resigned from BP and decided to help a new cafe opening in Dubbo.*

*All the people that I have worked with in the past have been very happy with my employment services. They will also be happy to hire me again in the future. I am reliable, hard-working, dedicated to my employment (when working), and assisting Australian businesses.*

*I have always donated my clothes to the Salvation Army. After my visa got refused, and before moving to Sydney, I donated some of my beloved clothes to charity as well. I have always participated and volunteered in Australian Nepalese community-based activities in both Sydney and Dubbo.*

*If my visa is granted, I plan to return to the Dubbo community and contribute actively. I will avoid alcohol (as I have done for a long time now). This whole nightmare experience has taught me various lessons. I am truly sorry. Please give me a second chance at life in Australia.*

### ***Examination-in-Chief***

31. Mr Shrestha gave evidence to the Tribunal by video from Sydney. Mr Shrestha told the Tribunal that he had recently arrived from Dubbo to have the moral support of his friend for the hearing.
32. Mr Shrestha was referred by his Counsel to his aforementioned written statement and he confirmed that it was true and correct to the best of his knowledge.
33. The Tribunal was told by Mr Shrestha that he could recall part of the evening when the Offences occurred in 2015.<sup>42</sup> Mr Shrestha said he was 'very ashamed' of the Offences, because he had 'hurt someone', being the victim, but this also included his work colleagues. Mr Shrestha said that he had 'ruined' his career as a result of the Offences and 'did things I shouldn't have done'.<sup>43</sup> Mr Shrestha acknowledged that alcohol was involved in his offending, but denied drinking alcohol since the offending.<sup>44</sup>
34. Mr Shrestha said that he did 'not really' have a support network in Australia, but had friends in Australia, Mr Umesh Napit based in Sydney and Mr Rabin Manandhar based in Adelaide, both of whom gave evidence to the Tribunal (which is set out below in these reasons).<sup>45</sup> Mr Shrestha confirmed that he had a relationship with Mr Manandhar's six year old son and he was 'like his uncle'. Mr Shrestha said that 'every now and then' he and Mr Manandhar's child converse via FaceTime. Mr Shrestha also confirmed that Mr Manandhar has a wife in Australia.<sup>46</sup>
35. Mr Shrestha was asked about the day of the incident which led to the Offences. Mr Shrestha told the Tribunal that he was playing cricket as he always did on a Saturday in Dubbo. He was invited to a party by a work colleague, although he was reluctant to attend, but he did so because his work supervisor and other colleagues were attending. Mr Shrestha thought it 'might be a good opportunity to get to know each other outside of work'. Mr Shrestha recalled driving to the party and bringing a 'six-pack' of beer with the intention of consuming

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<sup>42</sup> Transcript of Proceedings, pages 12-14.

<sup>43</sup> *ibid.*, page 12.

<sup>44</sup> *ibid.*, pages 12-13.

<sup>45</sup> *ibid.*, page 13.

<sup>46</sup> *ibid.*

only one or two. Mr Shrestha said he played drinking games involving shots of whiskey and drinking full glasses of beer. Mr Shrestha said he recalled playing cricket in the street with the victim's children, but all he could remember after that point in the evening was the victim's husband coming at him with a bat 'to hit me'.<sup>47</sup>

36. Mr Shrestha told the Tribunal that he could not remember how he got inside the victim's house and did not have any recollection of his offending.<sup>48</sup>
37. Mr Shrestha said the experience had taught him not to break or go against the law. He was 'highly intoxicated' at the time and had 'not really' been intoxicated like that previously. Mr Shrestha said at the time he 'just wouldn't say no to the new people'.<sup>49</sup> Mr Shrestha said that if he obtained a visa to remain in Australia, he had a job waiting for him in Dubbo as a Café Manager. Mr Shrestha told the Tribunal that he 'wouldn't drink' and had learnt how to say 'no to people' if he were again invited to a party with work colleagues. He now drives everywhere to avoid drinking alcohol because he does not 'want to be in trouble anymore'.<sup>50</sup>
38. Mr Shrestha confirmed that he had lived in Australia for 14 years. Mr Shrestha confirmed that he was a Nepalese citizen and has two parents and an older brother in that country. His parents live in Kathmandu and his brother lives in another town.<sup>51</sup>
39. Mr Shrestha said he came to Australia for better educational opportunities and a career in accounting. However, because of his police record he has not been able to find employment in this field. As a result, he works in the hospitality industry. Mr Shrestha told the Tribunal that he had been financially supporting himself while in Australia and also 'sometimes' had the support of friends. Mr Shrestha's parents had assisted him initially with a bank loan for his studies in Australia. However, Mr Shrestha said he would now have to support his parents as they are both retired. The income of Mr Shrestha's brother was said to be 'not that strong'. The main reason Mr Shrestha remains in Australia is for his career and to repay his parents the bank loan for his studies. In this regard, Mr Shrestha confirmed that his studies in Australia took approximately 5 to 6 years to complete and included a Bachelor of

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<sup>47</sup> *ibid.*, page 14.

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*, page 15.

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.*, pages 15-16.

Professional Accounting. Mr Shrestha was again asked about why he could not secure an accounting job and he stated that prospective employers ask for a national police record check, which identifies the Offences, and also because he was now more experienced in the hospitality sector.<sup>52</sup>

40. Mr Shrestha was also asked what would happen if he returned to Nepal and he told the Tribunal that 'it's going to be very hard for me, for my parents'. He said that if he went back without Australian permanent residency, other relatives and neighbours would be critical and his parents would also have to face this criticism. Mr Shrestha told the Tribunal that it would be 'hard' to work in Nepal because the education system is different, including in relation to accounting.<sup>53</sup>
41. Mr Shrestha confirmed that he is single and has one cousin in Australia, whom he speaks to on the telephone and meets in person when he is in Sydney. Mr Shrestha was asked what he tells his friends about the incident and he said that he tells them what he can 'recall'. Counsel for Mr Shrestha further asked him what makes him sorry if he does not remember the incident that led to the Offences and he replied that it was 'when I saw the victim in the court, it made me emotional', after he had pled guilty. Mr Shrestha confirmed that there was no criminal trial regarding the Offences due to his guilty plea. Mr Shrestha told the Tribunal that he considered the sentence to be 'very harsh' but had to accept it.<sup>54</sup>
42. Mr Shrestha stated that he met with community justice officers and talked about his daily life. He met them once before he was sentenced and then during the 18 month period of his good behaviour bond. This occurred every fortnight for the first 3 months and then once a month until Mr Shrestha had 5 or 6 months remaining on his good behaviour bond and was told he was no longer required to attend because of his good behaviour.<sup>55</sup>
43. Mr Shrestha was asked about his voluntary and community work in Australia and told the Tribunal that he helped his friend Mr Umesh Napit in relation to his involvement with 'Guthi Australia', a Nepalese cultural association. Mr Shrestha assisted 'every now and then' with

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<sup>52</sup> *ibid.*, pages 16-17.

<sup>53</sup> *ibid.*, page 17.

<sup>54</sup> *ibid.*, page 18.

<sup>55</sup> *ibid.*, page 19.

setting up tents, chairs, cleaning and doing 'whatever' was required. The purpose of Guthi Australia was to 'save the Nepalese culture in Australia' amongst the Nepalese community.<sup>56</sup>

44. Mr Shrestha told the Tribunal that if he were granted the visa he planned to return to Dubbo where he had a job offer as a Café Manager. Mr Shrestha said he would be focused on working to clear his debt with his parents, on his credit card and personal loans, which includes legal fees.<sup>57</sup> Finally, Mr Shrestha was asked by his Counsel why he wanted to get his visa. Mr Shrestha said that his 'career is in Australia' and he considers Australia his 'homeland'. He said a return to Nepal would be 'hard' for himself and his parents and that there were more opportunities in Australia. Mr Shrestha told the Tribunal that at the time of his offending he was intoxicated and was 'very remorseful' for that offending. He said that he had committed no minor crime after the Offences and he would never again commit an offence. Mr Shrestha again said he was worried about his parents.<sup>58</sup>

### ***Cross-examination***

45. By way of cross-examination, Mr Shrestha was taken to the report of Dr Susan Pulman which stated that he had 'described himself as a social drinker and reportedly does not drink at home'.<sup>59</sup> Mr Shrestha was asked to clarify whether he still drank alcohol and he stated that he was 'not drinking at the moment'. Mr Shrestha went on to say that he worked at a cocktail bar in Dubbo and was 'sometimes' required to taste test certain cocktails that he had mixed. However, Mr Shrestha stated that he always drove home following his shift at the bar.<sup>60</sup>
46. Mr Shrestha confirmed that he had read the risk management recommendations made by Dr Pulman regarding drug and alcohol counselling and stated that without permanent residency he could not access these services. The Minister's representative noted that there was no obligation on him from a court to undertake rehabilitation, but that it was a recommendation made by Dr Pulman in July this year. Mr Shrestha confirmed that he had

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<sup>56</sup> *ibid.*, page 19.

<sup>57</sup> *ibid.*, page 20.

<sup>58</sup> *ibid.*

<sup>59</sup> Exhibit R1, G22, pages 101-113.

<sup>60</sup> Transcript of Proceedings, page 21.

not sought to access counselling services following Dr Pulman's report because in 2016 he was told that he was ineligible for these services without permanent residency.<sup>61</sup>

47. Mr Shrestha was further referred to Dr Pulman's risk management recommendations and asked whether he had taken any steps to engage a counsellor regarding his Offences. Mr Shrestha confirmed that he had not and said that he considered the outcome would be the same; that he could not access counselling services because he was not a permanent resident of Australia. However, Mr Shrestha also confirmed that he had not made any enquiries regarding his ability to access these services.<sup>62</sup>
48. Mr Shrestha was taken to sentencing remarks from the Magistrate in the Dubbo Local Court in which it was noted that '[h]e says that he is thankful that no one was hurt. Such wording may simply be an inappropriate use of words. Clearly the victim was, and remains, significantly traumatised, as evidenced by the victim impact statement, which she stoically read to the Court'.<sup>63</sup> Mr Shrestha was also referred to a Letter of Apology that he wrote in February 2018, which did not mention the victim of the Offences. Mr Shrestha was asked what changed so that he now felt sorry for the victim and he again told the Tribunal that it occurred when he saw the victim at the Local Court in 2016 and after her reading of the victim impact statement following which Mr Shrestha said he 'just felt really bad' because he had assaulted her. Mr Shrestha also said that in his Letter of Apology he had meant that he was glad no one was physically hurt.<sup>64</sup>
49. Mr Shrestha was again asked why he had not undertaken any counselling and he stated that it was because he was not allowed due to his visa status in Australia, although he had not thought of accessing a private counselling service.<sup>65</sup>
50. There was no re-examination of Mr Shrestha by his Counsel, although the Tribunal asked Mr Shrestha about the employment status of his parents, especially his father, in circumstances where there were inconsistencies between what Mr Shrestha had told Dr Pulman (she reported that his parents 'continue to live and work in Nepal' and that his father

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<sup>61</sup> *ibid.*, pages 21-22.

<sup>62</sup> *ibid.*, page 23.

<sup>63</sup> Exhibit R1, G6, page 32.

<sup>64</sup> Transcript of Proceedings, pages 23-24.

<sup>65</sup> *ibid.*, page 24.

'is employed in the banking industry') and what he had told the Tribunal. Mr Shrestha confirmed that his statement recorded by Dr Pulman was incorrect and that both his parents are retired, including his father for ten years.<sup>66</sup>

51. Mr Shrestha also confirmed that his statement in the Letter of Apology from 2018 that he had 'undertaken psychological counselling, which has taught me the harmful effects of alcohol', was a reference to one counselling session he attended before he was sentenced for the Offences in July 2016. Mr Shrestha said that 'they told me if you have to come back again, I will call you, but they never call me'.<sup>67</sup>

### **Mr Anish Dev Panthee**

52. Mr Panthee, a friend and former colleague of Mr Shrestha on a student visa in Australia, provided a written statement dated 27 September 2020 in support of Mr Shrestha's application before the Tribunal, which relevantly stated that:<sup>68</sup>

*In my dealings with Pratish, he is a genuine and humble person. Pratish has helped people in need, especially newcomers to the area of Dubbo. If Pratish is removed from Australia, I believe this would be a great loss for the local community of Dubbo.*

*On a personal level, I will also be disappointed and upset to see Pratish removed from Australia.*

*If Pratish is granted a visa and permitted to remain in Australia, I would be glad to have him hired again at my workplace. Independent of Pratish being a disciplined and hard worker, Pratish is a good and kind-hearted person. Pratish makes people around him happy and motivated.*

*I am aware that Pratish committed an act of indecency against a woman, and unlawfully entered her place of residence. I am also aware that Pratish was sentenced to imprisonment (suspended on being of good behaviour in the Australian community).*

*In my respectful opinion, the criminal conduct undertaken by Pratish was entirely out of character. Pratish is a trustworthy member of the Australian community. Pratish strikes me as a sensible and well put together person.*

*At present, I have kept in contact with Pratish over the telephone and via text messages.*

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<sup>66</sup> *ibid.*

<sup>67</sup> *ibid.*, page 25.

<sup>68</sup> Exhibit A5 (subheadings have been removed from the extracted text in these reasons).

*In my dealings with Pratish, he is remorseful for his prior offending in Australia. Pratish accepts his wrongdoing in the past. I genuinely believe that Pratish would not engage in further criminal conduct in Australia. Pratish is focused on being the best version of himself in Australia.*

*Since I have known Pratish, he had been dedicated to his employment and behaving himself. He was one of my best employees (who stayed back when needed).*

*Pratish is a man of virtue. For example, Pratish has assisted newcomers in Dubbo with accommodation, food, and helping them to get a job. The assistance provided by Pratish, in this regard, shows that he is a genuine and kind-hearted person.*

*When Pratish stopped working at my workplace, this was very painful. If Pratish is permitted to get back his visa, he will have employment with me straightaway. He is an asset to any business and a pleasure to know in a personal capacity. If Pratish is removed from Australia, I am afraid this will significantly compromise our ongoing connection. I have no plans to return to Nepal. I see my future in Australia.*

53. Mr Panthee gave evidence at the hearing by telephone and confirmed to the Tribunal that his statement was true and correct to the best of his knowledge.<sup>69</sup>
54. The Minister's representative asked Mr Panthee, by way of cross-examination, what Mr Shrestha had told him of the incident which led to the Offences. Mr Panthee told the Tribunal that Mr Shrestha had told him that he had unlawfully entered the premises of a woman and was sentenced to imprisonment, which sentence was suspended with good behaviour. Mr Panthee said that because Mr Shrestha was 'so remorseful' about his offending, Mr Panthee he did not enquire about it in great detail because he 'was already being a good person, helping everyone around, so I just wanted him to be himself, and then do what good he does'.<sup>70</sup>
55. Despite Mr Shrestha's Offences, Mr Panthee maintained that he was 'a very kind hearted person', stating that he was 'very remorseful', although he 'can't figure out what happened' because he was 'out of his mind on that day'. Mr Shrestha was said to be a 'very good and genuine person', although Mr Panthee confirmed that he had known Mr Shrestha for a 'short time', having met him in late June 2020.<sup>71</sup>

### **Mr Rabin Manandhar**

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<sup>69</sup> Transcript of Proceedings, page 26.

<sup>70</sup> *ibid.*, page 27.

<sup>71</sup> *ibid.*

56. Mr Manandhar, a childhood friend of Mr Shrestha and Australian citizen, provided a written statement dated 28 September 2020 in support of Mr Shrestha's application before the Tribunal, which relevantly stated that Mr Manandhar has a six year old child in Australia and:<sup>72</sup>

*I consider Pratish to be like an uncle to my son. Although Pratish and my son have never met in person, they often talk on Facetime (when I am otherwise communicating with Pratish).*

*As such, my son does have some relationship with Pratish. My son enjoys talking to Pratish on the telephone.*

*I also know the family of Pratish in Nepal (noting that I have known Pratish since childhood). Equally, Pratish knows my family fairly well also. We share a warm and ongoing relationship. I consider Pratish like my brother. I have known Pratish since 1998 (i.e. 22 years).*

*When I first came to Australia, Pratish provided me with some financial support. If Pratish needs my financial assistance in Australia, I will do my best to help him in the future. As I said, I consider Pratish like a brother to me. I respect him very much. We previously helped each other out with educational fees.*

*I understand that if Pratish is unsuccessful in his current appeal proceedings before the Tribunal, he will be removed from Australia to Nepal. In my respectful opinion, I believe Pratish should be permitted to remain in Australia. As I know Pratish, he is a good friend and a genuine person.*

*I also know that Pratish will be very sad to be removed permanently from Australia. Pratish has built a life for himself in this country, studied hard, and worked even harder. Pratish saw his future in Australia and contributing to this beautiful country. Pratish will be heartbroken and considerably impacted in an emotional sense if removed from Australia.*

*I am aware that Pratish committed an act of indecency against a woman, and unlawfully entered her place of residence without consent. I understand that Pratish was heavily intoxicated when these offences were committed, after earlier drinking in excess at a social party.*

*Pratish has informed me that he was sentenced to imprisonment for these offences; however, the sentence was wholly suspended on him being of good behaviour in the Australian community. I also understand that Pratish completed his sentence without incident in the Australian community.*

*If Pratish is granted a visa to remain in the Australian community, I will support him as best I can with whatever he needs. I understand that Pratish had to quit his job as a result of his current immigration problems. If Pratish wishes to move to Adelaide, I would be happy to accommodate him until he gets back on his feet.*

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<sup>72</sup> Exhibit A4 (subheadings have been removed from the extracted text in these reasons).

*Pratish and I are like family - we talk very often. Both my wife and son know Pratish very well. We keep in contact by telephone, through the Internet, and text messages. Although we currently live in different cities, we try to catch up whenever we can.*

*I believe that Pratish is remorseful for his offending in Australia. Since I have known Pratish, he has never been intoxicated or under the influence of drugs. Pratish has displayed characteristics of maturity and being sensible in all my dealings with him.*

*When I heard the news of Pratish's criminal offending, it was the biggest surprise to me (as it is not like Pratish's character at all). I understand that Pratish has behaved himself since committing the serious offences and has tried to move forward positively with his life.*

*Given that Pratish and I derive from the same country and the same cultural background, we are more like brothers than friends. Pratish is a good person. In all the years I have known Pratish, he has been a genuine and good person in the community.*

*Pratish is hard-working and would be an asset to the Australian community. Pratish derives from a culture that teaches us always to respect our elders and help the young. If Pratish is deported to Nepal, he will face considerable financial and emotional hardship in that country.*

*Pratish has the pressure of taking care of his elderly parents. Furthermore, any decision that resulted in Pratish being removed would be life-changing and have significant consequences for his life. I hope that Pratish is given another chance at life in Australia.*

*Pratish made a terrible mistake. However, Pratish has worked hard to put his life back together and move forward positively. It makes little sense that Pratish should be deported from Australia so many years after the offences occurred. I hope some degree of level of compassion and mercy is shown to Pratish.*

57. Mr Manandhar also gave evidence at the hearing by telephone and confirmed adherence to his written statement.<sup>73</sup>
58. Under cross-examination, Mr Manandhar was asked what Mr Shrestha had told him about the Offences and he replied that Mr Shrestha was 'highly intoxicated' and 'didn't know anything about the incident'; he was not a 'heavy drinker' and probably had a 'couple of extra drinks' that day. Mr Manandhar was further asked about what he was told of the incident and he stated that Mr Shrestha 'went to someone's property' and attempted 'sexual, like, touching or something like that to a lady of that property'. Mr Manandhar said that Mr Shrestha was 'not guilty' of the Offences because they were not 'on his consciousness' due to his state of intoxication and inability to recall what had occurred. Despite this, Mr Shrestha was said to be remorseful.<sup>74</sup>

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<sup>73</sup> Transcript of Proceedings, page 29.

<sup>74</sup> *ibid.*, pages 29-31.

59. Mr Manandhar confirmed that he was aware that Mr Shrestha had pled guilty for the Offences and had received a conviction. Mr Manandhar stood by his written statement, despite knowing of Mr Shrestha's Offences, and told the Tribunal Mr Shrestha was 'not that kind of a person'.<sup>75</sup>
60. Following the completion of cross-examination, the Tribunal asked Mr Manandhar about the relationship between his six year old son and Mr Shrestha. Mr Manandhar said that he considered Mr Shrestha to be like family and that Mr Manandhar's son and Mr Shrestha correspond via technological means such as FaceTime and social media in circumstances where the former resides in Adelaide and the latter has, until recently, lived in Dubbo.<sup>76</sup>

### **Mr Umesh Napit**

61. Mr Napit, a long-time friend of Mr Shrestha and Australian citizen, provided a written statement dated 1 October 2020 in support of Mr Shrestha's application before the Tribunal, which relevantly stated that they 'mutually assist each other when needed' and:<sup>77</sup>

*If Pratish were removed from Australia, I would feel very sad and distressed. I consider Pratish to be a close friend. Various of my family members and family friends also know Pratish. At small and big family gatherings, Pratish has regularly been invited to attend as an extended close family friend.*

*My family respects Pratish. Pratish has a positive attitude, is nice, and is otherwise helpful. Pratish is quite popular with my family, particularly with his encouragement to read books and share knowledge.*

*If Pratish is removed from Australia, given the significant physical distance between Australia and Nepal, this would likely impact our friendship. I have no plans to move to Nepal. I am married and have a good family here in Australia. I am also in the process of purchasing a property in Australia.*

*I am generally aware of the criminal charges brought against Pratish. I attended the hearing of Pratish at the District Court of New South Wales in Dubbo. I attended this hearing to provide him with moral support. I recall that the Court fully suspended the term of imprisonment imposed upon Pratish.*

*If Pratish is permitted to remain in the Australian community, I will support him in all aspects of his life. As outlined earlier in my statement, Pratish has become like a family member to*

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<sup>75</sup> *ibid.*, page 31.

<sup>76</sup> *ibid.*, page 32.

<sup>77</sup> Exhibit A3 (subheadings have been removed from the extracted text in these reasons).

*me in Australia. Every time Pratish comes to Sydney, he would usually reside at my place of residence.*

*I keep in contact with Pratish by telephone, and we speak about two or three times a week. The nature of our conversations is generally about family, friends, daily activities undertaken, and our plans. In that context, I know that Pratish wants to stay in Australia and advance his career in this country.*

*When Pratish informed me about his criminal charges, I was extremely surprised. I was also shocked to hear the news that he was highly intoxicated when he committed the act of indecency on the victim. In all my dealings with Pratish, he has not abused alcohol.*

*Having spoken with Pratish about his offending, it seemed to me that Pratish was embarrassed and remorseful for his offending in Australia. I sincerely believe Pratish acted completely out of character on account of being highly intoxicated at the relevant time. Pratish struck me as being truly sorry for his offending. I believe Pratish is remorseful.*

*Pratish has a very positive attitude. Pratish is a good influence on his friends in Australia. I currently volunteer as a treasurer for a not-for-profit organisation known as Guthi Australia (based in Sydney). Pratish had actively volunteered in some of our community programs organised by Guthi Australia.*

*Pratish undertook voluntary activities for our charitable organisation before he moved to Dubbo. Pratish has always been a person who gives significant moral support to others when they go through a difficult time in their life. For example, Pratish had provided strong support to friends and community members when they first arrived in Australia to find work and accommodation.*

*I hope Pratish gets to stay in Australia. In my respectful opinion, Pratish will not commit any further offences in Australia. Pratish has a good heart.*

62. Mr Napit gave evidence at the hearing by telephone and confirmed his statement was true and correct to the best of his knowledge.<sup>78</sup>
63. Under cross-examination, Mr Napit told the Tribunal that he was 'fully aware' of the charges brought against Mr Shrestha in relation to the Offences, including the specific details, because of Mr Napit's attendance at the District Court hearing in Dubbo, which varied the sentence to be non-custodial but subject to the 18 month good behaviour bond. Mr Napit said he was 'totally surprised' at Mr Shrestha's Offences and that was partly what motivated him to attend the District Court hearing, together with supporting Mr Shrestha.<sup>79</sup>

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<sup>78</sup> Transcript of Proceedings, page 33.

<sup>79</sup> *ibid.*, page 34.

## **Expert Evidence**

64. Dr Susan Pulman, Forensic Psychologist and Clinical Neuropsychologist, gave evidence to the Tribunal by written report and by telephone at the hearing.
65. Dr Pulman's forensic psychological assessment report of 15 July 2020 relevantly stated that:<sup>80</sup>

*Mr Shrestha was interviewed by AVL on 8 April 2020. He presented as a Nepalese man of stated age. He appeared well groomed. His speed was of normal rate, tone and volume. His mood was euthymic and affect reactive. There was no evidence of any formal thought disorder. He had good insight into his situation. The recommended treatment plan is designed to address these concerns.*

...

### **Alcohol and Substance Use**

*Mr Shrestha described himself as a social drinker and reportedly does not drink at home. He drinks beer when attending clubs or parties with his friends and will occasionally drink to the level of intoxication. He denied problematic alcoholic consumption. He stated that he does not smoke and has not experimented with any illicit substances.*

### **Medical History**

*Mr Shrestha denied any history of serious illness or injury. He does not take any prescribed medication and described himself as being in good physical health.*

### **Mental Health**

*Mr Shrestha reported having been diagnosed with depression when he moved from Sydney to Dubbo. He reported that he found it difficult to obtain work in Dubbo and had no supportive network available at the time. He said he was experiencing financial stressors and although his parents had assisted him with university fees he had accrued credit card debt and with limitations on the number of hours he was permitted to work, found it difficult to manage. He denied having consulted a psychologist or counsellor to address his symptoms.*

### **Forensic History**

*Mr Shrestha denied any prior criminal history in Australia or overseas.*

### **Account of Index Offence/s in 2016**

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<sup>80</sup> Exhibit R1, G22, pages 108-113.

Mr Shrestha was asked to provide an account of his version of events leading up to commission of the index offences for which he was sentenced. Mr Shrestha reported that he recalled he was playing cricket and had several missed calls on his phone from a colleague at the factory where he had been working at the time. He said he hadn't really felt like attending a social gathering however his colleague sent him further text messages encouraging him to attend and telling him his supervisor would be there. He said he thought he should go because his boss was coming and he wanted to appear to be friendly and sociable. He said he purchased a six pack of beer and drove to the party thinking he would have a couple of beers and then go home.

He said he had thought the party was at his colleague's house but when he arrived it appeared to be a street party as there was a gathering of people in the street including a few of his colleague's neighbours. He said his supervisor had said he was going to stay overnight at the house as they had consumed too much alcohol to drive home. Mr Shrestha therefore considered it would be OK for him to have a few more drinks and then also stay as a guest at his colleague's house. He said he can recall that they started to play a few games and the person who lost, had to "skull it" down. He said, "I lost a few times and had to skull the drink". He said, "next they were downing whisky shots, and I had three or four of them, we were all doing it". He said, "the next thing I remember my supervisor had passed out, everyone had been looking for him and he passed out in his car". He said "we were still having a few beers, then the next thing I remember is the guy coming to hit me outside, I don't know how I got in there, I rang the police, they were hitting me, the police arrived later on. All I remember then is being at the police station and they were saying something like 'we are detectives and are going to take the interview'. He said he was then charged. He said it was Christmas time, "I was told to get a lawyer. I started looking and found a lawyer in Sydney. They told to me that if I pled guilty, I would get less than three years but if I plead not guilty, I could get up to seven years. I really had no choice".

Mr Shrestha's offences were committed while under the influence of alcohol. He reportedly drank to the level of intoxication. He reported that he is not a regular drinker and claims not to have consumed alcohol to the level of intoxication since the offence. He denied any prior problematic alcohol use.

## **FORENSIC RISK ASSESSMENT**

The Violence Risk Assessment Appraisal Guide (VRAG) and the Sex Offender Risk Appraisal (SORA) are 12 and 14 item actuarial tools that assess the risk of further violence or sexual violence among men or women who have already committed a violent or sexually violent offence. It is one of the most empirically supported actuarial methods for the assessment of violent risk in forensic populations. Harris et al. (2002) found that the VRAG and SOAG are accurate predictors of violence recidivism.

On both the VRAG and the SOAG Mr Shrestha risk of further violence or sexual offending scored in the Low risk category.

Mr Shrestha risk was also assessed using a structured professional judgement tool, the Historical Clinical Risk-20 Version 3. On this instrument, Mr Shrestha also scored in the low range on static/historical risk factors related to violence or reoffending. There is no history of violent or antisocial behaviour during childhood, or difficulties in relationships or employment. Mr Shrestha has no history of major mental disorder, personality disorder or traumatic experiences and there is no evidence of violent attitudes or poor response to community supervision such as parole. Although the index offences were committed whilst intoxicated there is no prior history of alcohol or illicit substance dependence or abuse.

*Similar to the historical scale, dynamic/clinical predictors of risk fall in the low range. There is no indication of current symptoms of a major mental disorder requiring treatment and he has good insight into fluctuating environmental stressors such as financial constraints operating within the current covid-19 situation. He has good insight into the issues surrounding his consumption of alcohol leading to the commission of the index offences and does not engage in problematic alcohol consumption. His mood is stable, and he does not engage in any violent or criminogenic ideation or intent.*

*In summary, Mr Shrestha's scores within the low risk of future offending based on the HCR-20 V3.*

### **Opinion**

*Mr Shrestha has no prior criminal history and has maintained stable employment. He has a university education and there is no indication of any cognitive deficits which would impact his level of insight and decision making abilities. He has stable accommodation, employment and a supportive network available. There is no history of mental illness, or substance dependence or illicit substance use. He does not associate with antisocial peers and has not committed any further offences since the index offences in 2016.*

### **Risk Management Recommendation**

*Although Mr Shrestha has a low risk of further offending, he indicated a willingness to engage in drug and alcohol rehabilitation. He is therefore encouraged to meet with a drug and alcohol rehabilitation counsellor to discuss strategies to avoid any future relapse into alcohol consumption.*

*Mr Shrestha's sentencing report indicated he was not eligible for the Community Sex Offender program because he did not have permanent residency status. Although the index offence occurred almost five years ago, it is recommended that he contact a counsellor within the Dubbo regional district for an initial consultation regarding his past forensic history. [emphasis in original]*

66. In advance of the hearing, an updated report of Dr Pulman dated 20 October 2020 was provided to the Tribunal which relevantly noted that:<sup>81</sup>

*I am unaware of any change in Mr Shrestha's circumstances and based on information available, there is no evidence of any reoffending or change in his risk factors.*

*On this basis, I did not undertake a further review of Mr Pratish and the opinion outlined in my report remains unchanged.*

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<sup>81</sup> Exhibit A8.

67. By way of examination-in-chief at the hearing, Dr Pulman confirmed that she had prepared reports dated 15 July 2020 and 20 October 2020 in relation to Mr Shrestha, whom she interviewed for approximately 90 minutes in April this year.<sup>82</sup>
68. Dr Pulman could not ascribe a percentage figure for her classification of Mr Shrestha as being in the 'low risk' category for reoffending, but said that he 'certainly sits well at the lower end' and was 'without doubt within the low risk' category.<sup>83</sup>
69. Dr Pulman was asked why she had reported that Mr Shrestha had a good insight in relation to alcohol to which she replied that it was based on her over 20 years' experience conducting similar assessments with convicted sex offenders in the corrections system. Dr Pulman added that Mr Shrestha recognised he had consumed too much alcohol; he was said to be remorseful and 'should never have done what he did'. This contrasted with the level of insight of other offenders Dr Pulman had assessed where they either do not talk about or recognise their behaviour as an issue. For example, Dr Pulman said that some offenders do not identify the significance of drinking alcohol to their behaviour and seek to change.<sup>84</sup>
70. Dr Pulman told the Tribunal that she considered Mr Shrestha was 'ashamed' and 'remorseful as to what he'd done' and that this was a genuine disclosure, which again was based on her experience assessing offenders of sexually based crimes. Dr Pulman's conclusion was that Mr Shrestha was 'genuinely remorseful'.<sup>85</sup>
71. Dr Pulman was referred to the Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, in which it was stated that 'there is no evidence beyond the applicant's own claims to suggest that he has adequately addressed the underlying cause of his offending behaviour'.<sup>86</sup> In this regard, Dr Pulman agreed that a program 'would be of benefit' in circumstances where alcohol was a 'major contributing factor' to the Offences, including because Mr Shrestha had no other criminal history.<sup>87</sup>

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<sup>82</sup> Transcript of Proceedings, page 37.

<sup>83</sup> *ibid.*

<sup>84</sup> *ibid.*, page 38.

<sup>85</sup> *ibid.*

<sup>86</sup> Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, page 5.

<sup>87</sup> Transcript of Proceedings, page 38.

72. In relation to the sexual offending, Dr Pulman told the Tribunal that if Mr Shrestha was to participate in a program this 'would certainly be beneficial'.<sup>88</sup>
73. Dr Pulman was asked whether Mr Shrestha had addressed all the factors that had contributed to the Offences, to which she stated that she understood he was not drinking to the extent that occurred in advance of the Offences and still regarded him as being a low risk of reoffending.<sup>89</sup>
74. Dr Pulman was again asked by Mr Shrestha's Counsel whether she had taken account of his level of insight into an assessment of his likelihood of reoffending. Dr Pulman confirmed that she had and that a majority of offenders do not have the same level of education attained by Mr Shrestha which limits their insight. In this regard, Mr Shrestha's education was said to assist in him understanding the Offences and the risk factors, such as alcohol consumption.<sup>90</sup>
75. By way of cross-examination, Dr Pulman was asked about the reference in her first written report to Mr Shrestha describing himself as a 'social drinker'. Dr Pulman confirmed that Mr Shrestha had told her during their interview in April 2020 that he was a social drinker, but that he was 'much more aware' of the risks involved in heavy drinking. Dr Pulman was unable to answer whether Mr Shrestha was currently socially drinking alcohol.<sup>91</sup>
76. Dr Pulman stated that Mr Shrestha was 'very embarrassed at what had happened'; after the incident in December 2015 he had 'stopped drinking' and had realised that what happened should not have occurred. As a result, Dr Pulman said that Mr Shrestha told her that he 'doesn't get drunk' and was 'really sorry about what happened'.<sup>92</sup>
77. In relation to Dr Pulman's risk management recommendations in her report of July 2020, she told the Tribunal that she was 'trying to cover all the possible scenarios that could be addressed'. Dr Pulman said that Mr Shrestha's offending had occurred while he was intoxicated, but there were other contributing factors, such as it being a social situation with

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<sup>88</sup> *ibid.*

<sup>89</sup> *ibid.*, pages 38-39.

<sup>90</sup> *ibid.*, page 39.

<sup>91</sup> *ibid.*, pages 39-40.

<sup>92</sup> *ibid.*, page 40.

work colleagues and he 'really didn't want to go', but felt that he should because he didn't want to say no and not be part of the team. In this regard, Dr Pulman said the situation was not one where Mr Shrestha was regularly a heavy consumer of alcohol and was 'not necessarily reflective of an alcohol dependence disorder'. Mr Shrestha was said to realise that the social situation, including the drinking games at the party, contributed to his behaviour. This insight was again said to be 'different to a number of other offenders'.<sup>93</sup>

78. Dr Pulman told the Tribunal that she thought it would be 'ideal' for Mr Shrestha to discuss strategies to assert himself in social situations, and identifying risks and behaviours. Dr Pulman said it would be 'beneficial' for Mr Shrestha to speak with a counsellor, however considered he was probably 'scared off' and was unlikely to engage in social situations where he would become intoxicated. Despite this, Dr Pulman said that she would encourage Mr Shrestha to 'speak to someone'.<sup>94</sup>

## **CONTENTIONS**

79. It was common ground between the parties that Mr Shrestha does not pass the character test under subsection 501(6)(a) of the Act because of his 'substantial criminal record', in circumstances where he was sentenced to a term of imprisonment of 18 months. Accordingly, the parties made submissions on whether the Tribunal should exercise the discretion under subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa because he does not pass the character test.
80. Mr Shrestha contended that the Tribunal should set aside the decision under review and, although he does not pass the character test, not exercise the discretion under subsection 501(1) of the Act to refuse Mr Shrestha the Visa. It was submitted by Mr Shrestha that Primary Consideration 1, the protection of the Australian community, weighs moderately against the grant of the Visa, because of the unlikelihood of Mr Shrestha reoffending and him not representing an unacceptable risk of harm to the Australian community. In relation to Primary Consideration 2, the best interests of minor children in Australia, Mr Shrestha submitted that this weighed marginally in favour of granting him the Visa, despite the nature of his relationship with the six year old child of his friend, Mr Manandhar, being non-parental

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<sup>93</sup> *ibid.*, pages 40-41.

<sup>94</sup> *ibid.*, page 41.

and conducted exclusively through electronic communication. Mr Shrestha submitted that Primary Consideration 3, the expectations of the Australian community, weighed moderately against the grant of the Visa by reference to his lengthy residence in Australia and extensive work history.

81. Mr Shrestha submitted that the four listed 'other considerations' in Part B of Direction 79 were inapplicable to his application before the Tribunal. However, in circumstances where the 'other considerations' are non-exhaustive or not limited to the four 'other considerations' set out in Part B of Direction 79, Mr Shrestha advanced the following 'other considerations' in support of his application:<sup>95</sup>

- (a) the positive contribution he has made to the Australian community through a 12 year employment history;<sup>96</sup>
- (b) his positive contribution to the Australian community by undertaking volunteer work with Australian businesses and a Nepalese cultural association;<sup>97</sup>
- (c) support from members of the Australian community for Mr Shrestha to be given a 'second chance at life in Australia';<sup>98</sup>
- (d) Mr Shrestha having developed 'respective ties to Australia and its people', evidenced by him residing in this country for 14 years and developing professional and social ties to members of the Australian community;<sup>99</sup>
- (e) Mr Shrestha will face financial hardship if removed from Australia in circumstances where he has 'better employment and career prospects' in Australia compared to Nepal, including because he holds Australian educational qualifications and has established 'important business relationships with various Australian businesses';<sup>100</sup>

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<sup>95</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020, pages 15-16.

<sup>96</sup> Exhibit R1, G19, pages 102-105; G20, page 106; G21, page 107; G22, page 110.

<sup>97</sup> Exhibit R1, G14, pages 86-87 and 89; Exhibit A3.

<sup>98</sup> Exhibit R1, G14, pages 86-89.

<sup>99</sup> Exhibit R1, G14, pages 86-89; G17, pages 96-98; G22, pages 108-113.

<sup>100</sup> Exhibit R1, G17, pages 96-98.

- (f) the emotional distress in being removed from Australia given Mr Shrestha 'has built a life for himself' over 14 years and 'had no plans to return to Nepal';<sup>101</sup> and
- (g) despite Mr Shrestha's one-off criminal offending, he has 'continued to reside in the Australian community (without adverse incident) for almost five years' and proven that he does not pose an unacceptable risk of harm. In this regard, these 'peculiar circumstances' place Mr Shrestha in a position outside the normal applicable circumstances in that 'it is rather odd that the applicant's continued residence in Australia should be stopped based on a character matter that occurred about five years ago'.<sup>102</sup>
82. Mr Shrestha contended that the abovementioned 'other considerations', considered in totality, should be afforded the greatest weight in the particular circumstances of this case because it is outside the circumstances that generally apply.<sup>103</sup> As a result, Mr Shrestha submitted, Primary Consideration 1 and Primary Consideration 3 are outweighed by the other considerations and the Tribunal should not exercise the discretion under subsection 501(1) of the Act to refuse the Visa.
83. The Minister submitted that the protection of the Australian community (Primary Consideration 1) and the expectations of the Australian community (Primary Consideration 3) weigh heavily in favour of exercising the discretion to refuse to grant Mr Shrestha the Visa. Furthermore, the Minister argued that these two primary considerations are not outweighed by the best interests of minor children in Australia (Primary Consideration 2), which should be given no weight or, if any, marginal weight in favour of not exercising the discretion to refuse the Visa, because the relationship between Mr Shrestha and the six year old child of his friend, Mr Manandhar, is non-parental and they only communicate via technological means, with no evidence this could not continue if Mr Shrestha were in Nepal.
84. In relation to the 'other considerations' advanced by Mr Shrestha, the Minister said these should only be given marginal weight by the Tribunal and they do not outweigh Primary Consideration 1 and Primary Consideration 3 weighing against the grant of the Visa to Mr

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<sup>101</sup> *ibid.*

<sup>102</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020, page 16.

<sup>103</sup> *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 at [23].

Shrestha. Accordingly, the Minister contended that the Tribunal should affirm the decision to exercise the discretion in subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa.

## CONSIDERATION

### Does Mr Shrestha pass the character test under the Act?

85. Subsection 501(1) of the Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that he or she passes the 'character test'.
86. Under subsection 501(6)(a) of the Act, a person does not pass the character test if the person has a 'substantial criminal record', as defined by subsection 501(7) of the Act. Pursuant to subsection 501(7)(c) of the Act, a person has a substantial criminal record if the person has been 'sentenced to a term of imprisonment of 12 months or more'.
87. In July 2016, the Dubbo Local Court sentenced Mr Shrestha to 18 months imprisonment for each of the two Offences, to be served concurrently. In August 2016, the District Court of NSW confirmed Mr Shrestha's conviction and sentence, but suspended the term of imprisonment on condition that Mr Shrestha enter a good behaviour bond for 18 months.
88. As the Full Court of the Federal Court of Australia said in *Ali v Minister for Home Affairs*:<sup>104</sup>

*if an applicant is sentenced to a term of imprisonment of 12 months or more, such a sentence, even if suspended, amounts to a "substantial criminal record" for the purposes of s 501(7)(c) of the Act.*

89. In addition, the Full Court in *Minister for Immigration and Border Protection v Eden*,<sup>105</sup> stated that:

*A sentence of imprisonment which is fully suspended is nonetheless a sentence of imprisonment and is regarded as a "very serious form of punishment": Brown v Minister for Immigration and Citizenship [2010] FCAFC 33; (2010) 183 FCR 113 at [4].*

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<sup>104</sup> [2019] FCAFC 93 at [20]. Citing, with approval, *Brown v Minister for Immigration and Citizenship* [2010] FCAFC 33; 183 FCR 113 at [114].

<sup>105</sup> [2016] FCAFC 28; 240 FCR 158 at [73]. Quoted, with approval, by the Full Court in *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177; 246 FCR 146 at [184].

90. As a result, in circumstances where Mr Shrestha was sentenced to a term of imprisonment of 12 months or more, and despite his 18 month custodial sentence being suspended, the Tribunal finds that he has a 'substantial criminal record' pursuant to subsection 501(7)(c) of the Act. Accordingly, the Tribunal finds that Mr Shrestha does not pass the character test as defined under subsection 501(6)(a) of the Act.

**Should the Tribunal exercise the discretion in subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa?**

91. Pursuant to subsection 499(2A) of the Act, in exercising the discretion in section 501 of the Act, the Tribunal must comply with Direction 79. Paragraph 6.1(4) of Direction 79 provides that Direction 79 is to guide decision-makers performing functions or exercising powers under section 501 of the Act, including to refuse to grant a visa to a non-citizen who does not satisfy the decision-maker that the non-citizen passes the character test. Accordingly, set out below is the Tribunal's evaluation of Mr Shrestha's circumstances against the criteria set out in Part B of Direction 79 regarding visa applicants.

**Primary Consideration 1**

92. Paragraph 11.1(1) in Part B of Direction 79, regarding Primary Consideration 1, states that:

*When considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. There is a low tolerance for visa applicants who have previously engaged in criminal or other serious conduct. Decision-makers should also give consideration to:*

- a) The nature and seriousness of the non-citizen's conduct to date; and*
- b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.*

***The nature and seriousness of Mr Shrestha's conduct***

93. Paragraph 11.1.1 of Direction 79 sets out a list of factors that must be considered by a decision-maker in considering the nature and seriousness of the non-citizen's criminal offending or other serious conduct to date, which relevantly includes:

- a) The principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed seriously;*
- b) The principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed;*

...

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

94. In 2016, Mr Shrestha was convicted and sentenced for the Offences of 'Enter Building/Land with Intent Commit Indictable Offence' and 'Assault with Act of Indecency' which occurred in December 2015.<sup>106</sup>
95. The sentencing remarks of Magistrate Stewart in the Dubbo Local Court, described in detail above in these reasons, convey the objective seriousness of the Offences committed by Mr Shrestha.<sup>107</sup> After a Christmas street party, Mr Shrestha entered the front door of a woman's family home without consent, went to her bedroom and indecently assaulted her as she lay in bed. The Court found that the assault was not the result of any invitation, behaviour or conduct by the victim such that Mr Shrestha could misguidedly justify what he did.<sup>108</sup> The victim 'kicked out at him and demanded, "What are you doing here?"'<sup>109</sup> The indecent assault of the victim in her bedroom included touching 'the outside of her underwear and the vaginal area and to her bottom'.<sup>110</sup> The Court found that, although the touching by Mr Shrestha involved the 'outside of her undergarments, the contextual basis of the offending elevates it for both charges to around mid level'.<sup>111</sup>
96. In accordance with paragraph 11.1.1(1)(a), because Mr Shrestha was convicted of a sexually based offence it is viewed seriously. That offence, being 'assault with act of indecency', was a crime of a violent nature against a woman which, pursuant to paragraph 11.1.1(b) of Direction 79, is viewed very seriously. The Tribunal had evidence before it that the victim suffered psychological harm as a result of the commission of the Offences by Mr Shrestha.<sup>112</sup>
97. Paragraph 11.1.1(f) of Direction 79 requires decision-makers to have regard to 'the sentence imposed by the courts for a crime or crimes'. Mr Shrestha was sentenced to an 18 month term of imprisonment for each of the two Offences, to be served concurrently.

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<sup>106</sup> Exhibit R1, G5, pages 17-20.

<sup>107</sup> Exhibit R1, G6, pages 21-36.

<sup>108</sup> *ibid.*, page 32.

<sup>109</sup> Exhibit R3.

<sup>110</sup> Exhibit R1, G6, page 32.

<sup>111</sup> *ibid.*

<sup>112</sup> Exhibit R2.

The District Court of NSW subsequently confirmed the conviction but suspended the sentence of imprisonment on Mr Shrestha entering a good behaviour bond for the equivalent period of time.

98. While conceding the seriousness of the offending, Mr Shrestha contended that it should be 'placed in its proper context', in that the maximum period of imprisonment for the offence of entering building/land with intent to commit indictable offence is 7 years with no standard non-parole period and the maximum period of imprisonment for the offence of assault with an act of indecency is 5 years with no standard non-parole period.<sup>113</sup> In this regard, Mr Shrestha submitted that he received a term of imprisonment well below the maximum penalty for the Offences. Additionally, because the sentence was suspended, Mr Shrestha did not receive the 'harshest sentence available to the Court', being a custodial sentence,<sup>114</sup> and was permitted to remain in the community.
99. Despite Mr Shrestha ultimately receiving a suspended sentence and entering a good behaviour bond for 18 months, this does not reduce the very serious nature of the Offences he committed. To this end, the Tribunal again notes that paragraph 11.1.1(b) of Direction 79 provides that crimes of a violent nature against women 'are viewed very seriously, regardless of the sentence imposed' by a Court. The Tribunal, accordingly, finds that the indecent assault is to be viewed very seriously in its consideration of the nature and seriousness of Mr Shrestha's conduct.
100. Additionally, Magistrate Stewart found that the 'aggravating feature of the offence'<sup>115</sup> was that it occurred in the victim's home. After Mr Shrestha had assisted the woman to carry an Esky to her front door, she went inside and closed the door. Mr Shrestha 'later entered'<sup>116</sup> through the unlocked front door and committed the indecent assault in the victim's bedroom. There was found to be no behaviour, invitation or conduct by the victim that could 'by some misguided thought process justify' the Offences.<sup>117</sup>

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<sup>113</sup> *ibid.*, paragraph 36, page 8; Exhibit R1, G6, page 24.

<sup>114</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October, paragraph 37, page 8.

<sup>115</sup> Exhibit R1, G6, page 31.

<sup>116</sup> *ibid.*

<sup>117</sup> *ibid.*, page 32.

101. The Tribunal has had the benefit of considering the Victim Impact Statement provided to the Local Court for the sentencing of Mr Shrestha in July 2016.<sup>118</sup> The Victim Impact Statement was taken into evidence by the Tribunal and both parties had access to that statement. However, the Tribunal has decided not to publish any part of the Victim Impact Statement in circumstances where the Local Court made an order prohibiting the publication of any information that might identify the victim and the Court also did not reproduce any of the Victim Impact Statement in its transcript of proceedings, except to note that it was handed up and read to the Court by the victim.<sup>119</sup> The Tribunal does, however, note that the Victim Impact Statement details the understandable effect of the incident on the victim and her family some six months after it occurred. In this regard, in sentencing Mr Shrestha, the Local Court stated that '[c]learly the victim was, and remains, significantly traumatised, as evidenced by the victim impact statement, which she stoically read to the Court'.<sup>120</sup>
102. Where a court has sentenced an offender to a term of custodial imprisonment, this must be viewed as a reflection of the objective seriousness of the offences involved.<sup>121</sup> And despite the term of imprisonment being suspended, it nevertheless is a 'selection of a very serious form of punishment in the hierarchy of sentencing options'.<sup>122</sup> The Tribunal finds that the sentence imposed by the Court reflects the objective seriousness of those Offences.
103. For completeness, the Tribunal notes that paragraphs 11.1.1(c) to (e) and (g) to (j) are inapplicable in Mr Shrestha's application. In this regard, the Offences were not committed against a vulnerable member of the community, the offending is unrelated to immigration detention, Mr Shrestha's failure of the character test is unrelated to subsection 501(6)(c) of the Act, Mr Shrestha has no criminal history except the commission of the Offences, or repeat offending, in this or another country, and there is no evidence that he has provided false or misleading information to the Minister's Department.
104. Having regard to the evidence and the relevant considerations in paragraph 11.1.1 of Direction 79, the Tribunal finds that this limb of Primary Consideration 1, the nature and

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<sup>118</sup> Exhibit R2.

<sup>119</sup> Exhibit R1, G6, pages 21-27.

<sup>120</sup> *ibid.*, page 32.

<sup>121</sup> See *Pavey and Minister for Home Affairs* [2019] AATA 4198 at [44].

<sup>122</sup> See *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113; [2010] FCAFC 33 at [115].

seriousness of Mr Shrestha's conduct, weighs strongly in favour of exercising the discretion in subsection 501(1) of the Act to refuse to grant him the Visa.

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

105. Paragraph 11.1.2 of Direction 79 states as follows:

- (1) *In considering whether the non-citizen represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, decision-makers should 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. Some conduct, and the harm that would be caused if it were to be repeated, is so serious that any likelihood that it may be repeated may be unacceptable.*
- (2) *In addition, decision-makers should have regard to the principle that Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.*
- (3) *In considering the risk to the Australian community, decision-makers must have regard to, cumulatively:*
  - a) *The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
  - b) *The likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
    - i. *information and evidence from independent and authoritative sources on the likelihood of the non-citizen re-offending; and*
    - ii. *evidence of any rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decision should not be delayed in order for rehabilitative courses to be undertaken); and*
    - iii. *the duration of the intended stay in Australia.*
- (4) *Decision-makers should consider the risk of harm in the context of the purpose of the intended stay, and the type of visa being applied for, including whether there are strong or compassionate reasons for granting a short-stay visa.*

106. In relation to paragraph 11.1.2(1) of Direction 79, Mr Shrestha's offending included a sexual crime against a woman in her family home. Given the Tribunal's findings about the objective seriousness of the Offences committed by Mr Shrestha, it follows that the nature of the potential harm to the Australian community should he again commit the Offences is serious; it could involve physical and psychological harm to members of the community. Accordingly, the Tribunal finds that the Australian community's tolerance for any risk of future harm is low. The Tribunal therefore is satisfied that this factor weighs strongly in favour of exercising the discretion in subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa.

107. Mr Shrestha was 21 years old when he arrived in Australia on a student visa in 2006. Mr Shrestha has held limited stay visas since 2006 and applied for the Visa in 2017. In this respect, the Tribunal has regard to the principle in paragraph 11.1.2(2) of Direction 79, that Australia has a low tolerance of any criminal conduct by visa applicants or those holding a limited stay visa, reflecting that there should be 'no expectation that such people should be allowed to come to, or remain permanently in, Australia'. Accordingly, the Tribunal finds that this factor weighs strongly in favour of exercising the discretion to refuse to grant Mr Shrestha the Visa.
108. The Tribunal turns to considering the risk to the Australian community pursuant to paragraph 11.1.2(3) of Direction 79. Pursuant to paragraph 11.1.2(3)(a) of Direction 79, the Offences committed by Mr Shrestha were serious, against a woman and included sexual offending. As a result, and as previously mentioned, the nature of the harm to individuals should Mr Shrestha engage in further criminal or other serious conduct could be both serious physical and psychological harm to members of the Australian community. Accordingly, the Tribunal finds that the nature of the harm to individuals should Mr Shrestha engage in further criminal or other serious conduct weighs strongly in favour of exercising the discretion to refuse to grant him the Visa.
109. In relation to the likelihood of Mr Shrestha engaging in further criminal conduct or other serious conduct, under paragraph 11.1.2(3)(b) of Direction 79, based on the evidence before the Tribunal, it finds that prospect to be low. In reaching this finding, the Tribunal has had regard to information and evidence from independent sources, Mr Shrestha's rehabilitation efforts, the time he has spent in the community since the Offences and the duration of his intended stay in Australia. To this end, the Tribunal accepts the expert evidence of Dr Pulman, Forensic Psychologist and Clinical Neuropsychologist, that Mr Shrestha has a low risk of future reoffending. Dr Pulman determined that Mr Shrestha was in the low risk category for the risk of further violence or sexual offending using three separate professional tools to determine those risks.
110. Additionally, as part of the Pre-Sentence Report provided to the Local Court in 2016, a senior psychologist at Community Corrections assessed Mr Shrestha as being in the moderate to low risk category for future sexual offending and another assessment placed

him in the low risk category.<sup>123</sup> The Magistrate accepted that Mr Shrestha's conduct was 'out of character'.<sup>124</sup> The Local Court imposed the sentence on Mr Shrestha to act as a specific deterrent in the commission of future offences.<sup>125</sup> The Crown did not oppose the granting of bail to Mr Shrestha while he appealed his sentence to the District Court of NSW.<sup>126</sup> The Tribunal accepts that Mr Shrestha complied with the associated bail conditions and he also complied with the terms of his 18 month good behaviour bond, which ended in February 2018. Mr Shrestha remained in the community during this time. In this regard, in mid-2017, Community Corrections stated that Mr Shrestha was being 'case managed as a low risk client', with 'no concerns in regards to his stability, or community behaviours'.<sup>127</sup> From four months before the expiry of Mr Shrestha's good behaviour bond, he was no longer required to report to Community Corrections.<sup>128</sup> For these reasons, pursuant to paragraph 11.1.2(3)(b)(i) of Direction 79, the Tribunal finds that the weight in favour of exercising the discretion to refuse to grant Mr Shrestha the Visa is moderated because of the information and evidence from independent and authoritative sources describing the likelihood of Mr Shrestha reoffending as low.

111. As previously stated in these reasons, the indecent assault against a woman is viewed very seriously. Mr Shrestha pled guilty to the Offences, indicating an acceptance of responsibility and a willingness to facilitate the course of justice.<sup>129</sup> Mr Shrestha has expressed his remorse for the Offences on multiple occasions and the Tribunal accepts his regret at their commission, including because of his demeanour, conduct and statements to this effect at the hearing. For the avoidance of doubt, the Tribunal found Mr Shrestha to be a credible and genuine witness, who was clearly remorseful for his criminal offending and visibly upset at its effects. Mr Shrestha expressed regret for his actions, the impact on the victim, his family and his prospects of remaining in Australia and for his career. Furthermore, in 2016, Mr Shrestha was said to have 'expressed attitudes that would reflect that he regrets his behaviour, expressing shame and remorse, acknowledging that his behaviour was

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<sup>123</sup> Exhibit R1, G6, page 32; G18, pages 100-101.

<sup>124</sup> Exhibit R1, G6, page 32.

<sup>125</sup> *ibid.*, page 33.

<sup>126</sup> *ibid.*, pages 34-35.

<sup>127</sup> Exhibit R1, G15, page 90.

<sup>128</sup> Exhibit R1, G16, page 91.

<sup>129</sup> *Cameron v The Queen* (2002) 209 CLR 339.

inappropriate and unacceptable'.<sup>130</sup> In addition, the Tribunal notes that the evidence from Mr Shrestha's network in Australia, three of whom gave oral evidence at the hearing, confirmed his stated remorse for the offending and that it was out of character.<sup>131</sup>

112. It is also noteworthy that Mr Shrestha has remained in the Australian community since the commission of the Offences in December 2015, a period of almost 5 years. Following his term of imprisonment for the Offences being suspended in 2016, Mr Shrestha entered a good behaviour bond which he completed in February 2018. Towards the end of this 18 month good behaviour bond, Mr Shrestha applied for the Visa. After the refusal of the Visa by the Minister's Department in August this year, Mr Shrestha became an unlawful non-citizen and continued to remain in the Australian community; he was not taken into immigration detention. Mr Shrestha also has no other criminal history.<sup>132</sup> In this regard, it was submitted that the visa refusal process Mr Shrestha has experienced will act as a 'subsisting and ongoing deterrent' against further offending in circumstances where, if the Visa is granted, it will potentially be cancelled if he commits another serious crime.<sup>133</sup> The Tribunal accepts this submission and finds that it reduces the risk to the Australian community.

113. As detailed above in these reasons, Mr Shrestha has spent almost 5 years in the community since the commission of the Offences in 2015 which period of time, pursuant to paragraph 11.1.2(3)(b)(ii) of Direction 79, weighs in favour of evidencing his rehabilitation. In relation to other evidence of rehabilitation achieved by the time of this decision, the Tribunal notes that the Pre-Sentence Report of July 2016 stated that Mr Shrestha had contacted Community Drug and Alcohol Services as suggested, but that he was 'ineligible to participate in an assessment due to his temporary residency and not being covered by either Medicare or private health insurance'.<sup>134</sup> The Report outlined case management strategies in relation to Mr Shrestha, including consultation with a psychologist for 'appropriate sexual offending treatment options/recommendations in the local area' and referral to Drug and

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<sup>130</sup> Exhibit R1, G18, page 101.

<sup>131</sup> Exhibit R1, G14, pages 86-89; Exhibits A3-A5.

<sup>132</sup> Exhibit R1, G5, pages 17-20.

<sup>133</sup> Transcript of Proceedings, pages 44-45.

<sup>134</sup> Exhibit R1, G18, page 100.

Alcohol Services or programs to ‘access expert assistance around safe levels of alcohol consumption’.<sup>135</sup>

114. Mr Shrestha has described himself as a ‘social drinker’, including most recently as July this year,<sup>136</sup> however he also submitted that he no longer consumes alcohol and at least not to the level of intoxication since the Offences.<sup>137</sup> Mr Shrestha told the Tribunal that he does not drink and only occasionally tasted alcohol as it is a requirement of his recent work at a bar mixing cocktails. While Mr Shrestha acknowledged that he was ‘heavily intoxicated’<sup>138</sup> on the night of the Offences, Dr Pulman told the Tribunal that this was not ‘reflective of an alcohol dependence disorder’. However, Dr Pulman noted in her July 2020 report that, although Mr Shrestha is a low risk of further offending, ‘he indicated a willingness to engage in drug and alcohol rehabilitation’ and was ‘encouraged to meet with a drug and alcohol rehabilitation counsellor to discuss strategies to avoid any future relapse into alcohol consumption’ and, in relation to the indecent assault, Dr Pulman ‘recommended that he contact a counsellor within the Dubbo regional district for an initial consultation regarding his past forensic history’.<sup>139</sup> In this regard, Dr Pulman agreed under cross-examination that a program ‘would be of benefit’ in circumstances where alcohol was a ‘major contributing factor’ to the Offences.<sup>140</sup> Additionally, in relation to the sexual offending, Dr Pulman told the Tribunal that it ‘would certainly be beneficial’<sup>141</sup> for Mr Shrestha to participate in a program.
115. In response to the Tribunal’s question about Mr Shrestha’s statement in his Letter of Apology from 2018 that he had ‘undertaken psychological counselling’,<sup>142</sup> he confirmed that this entailed attending one session regarding the consequences of consuming alcohol before he was sentenced for the Offences in July 2016. Mr Shrestha also said he discussed strategies for avoiding alcohol with Community Corrections officers and had read self-development books and watched motivational movies to assist his rehabilitation and

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<sup>135</sup> *ibid.*, page 101.

<sup>136</sup> Exhibit R1, G18, page 100; G22, page 111.

<sup>137</sup> Exhibit R1, G18, page 100; G22, page 112.

<sup>138</sup> Exhibit A1.

<sup>139</sup> Exhibit R1, G22, page 113.

<sup>140</sup> Transcript of Proceedings, page 38.

<sup>141</sup> *ibid.*

<sup>142</sup> Exhibit R1, G13, page 85.

advancement. Mr Shrestha said he did not undertake any further formal rehabilitation or counselling as recommended to him because he understood that he could not access these services due to the temporary nature of his residency. Under cross-examination, Mr Shrestha also confirmed that he did not make any enquiries about undertaking rehabilitation or counselling in a private capacity, that is, not through the publicly funded (or subsidised) health system. As a result of the above discussion regarding rehabilitation, the Tribunal finds that there is a likelihood, albeit low, of Mr Shrestha engaging in further criminal or other serious conduct, noting that, since he was sentenced in July 2016, Mr Shrestha has not undertaken formal rehabilitative treatment to address the sexual offending and to discuss strategies to avoid future alcohol consumption. To this end, paragraph 11.1.2(3)(b)(ii) of Direction 79 states that decisions should not be delayed in order for rehabilitative courses to be undertaken. In summary, the Tribunal finds that the evidence of Mr Shrestha's rehabilitation moderates the weight in favour of refusing to grant him the Visa.

116. Paragraph 11.1.2(3)(b)(iii) of Direction 79 requires consideration of the likelihood of Mr Shrestha engaging in further criminal or other serious conduct taking into account the duration of the intended stay in Australia. The Visa applied for by Mr Shrestha in 2017, being a Skilled (Residence) (Class VB) visa, would, if granted, allow him to remain in Australia permanently. In addition to the foregoing reasons in relation to the likelihood of Mr Shrestha reoffending and his rehabilitation, the Tribunal finds that his desire to make a life and career in Australia on a permanent basis moderates the weight in favour of refusing to grant him the Visa.
117. Finally, the risk of harm is also considered in the context of the purpose of Mr Shrestha's intended stay in Australia and the relevant visa, pursuant to paragraph 11.1.2(4) of Direction 79. Mr Shrestha applied for a skilled visa, which would allow him to stay and work in Australia on a permanent basis. The Tribunal does not consider that there are strong or compassionate reasons for granting a short-stay visa to Mr Shrestha.
118. Given all of the above considerations, the Tribunal finds that there is a low, but continuing, risk to the Australian community that Mr Shrestha will re-offend in the future, which likelihood nevertheless represents an unacceptable risk of harm given the serious nature of his offending. However, as a result of the Tribunal's findings pursuant to paragraph 11.1.2 of Direction 79, the strength of the weight under this limb of Primary Consideration 1 in favour of exercising the discretion to refuse to grant Mr Shrestha the Visa is moderated.

### **Conclusion – Primary Consideration 1**

119. In conclusion in relation to Primary Consideration 1, the protection of the Australian community from criminal or other serious conduct, the Tribunal has found that the nature and seriousness of Mr Shrestha's conduct weighs strongly in favour of exercising the discretion to refuse to grant him the Visa. Additionally, the Tribunal has found that there is a low, but continuing, risk to the Australian community that Mr Shrestha will re-offend in the future, which represents an unacceptable risk of harm given the Offences. While some of the considerations related to risk under paragraph 11.1.2 of Direction 79 moderate the weight against Mr Shrestha, on balance, and considering the totality of relevant factors in Primary Consideration 1, the Tribunal finds that it weighs strongly in favour of exercising the discretion under subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa.

### **Primary Consideration 2**

120. Paragraph 11.2(1) of Direction 79 requires decision-makers to make a determination about whether refusal is, or is not, in the best interests of the child. That consideration applies only if the child is, or would be, under 18 years old at the time when the decision to refuse to grant the visa is expected to be made (paragraph 11.2(2)).
121. In considering the best interests of the child, paragraph 11.2(4) of Direction 79 provides a list of factors that must be considered where relevant, including:
- 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;*
  - ...
  - 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;*
  - ...
122. The Tribunal accepts that, if Mr Shrestha is returned to Nepal, there may be some difficulty in him maintaining a close relationship with the six year old child of his friend, Mr Manandhar. The Tribunal also accepts that those difficulties will be adverse to the best

interests of Mr Manandhar's child, for whom Mr Shrestha is 'like an uncle'.<sup>143</sup> Mr Shrestha has known Mr Manandhar's son since the child's birth in 2014. However, the relationship between Mr Shrestha and Mr Manandhar's child is non-parental; the child has two parents fulfilling a parental role and Mr Shrestha has not yet met the child in person, including because the child lives in Adelaide and Mr Shrestha lives in NSW. Accordingly, the child would not be denied access to a person fulfilling a parental role were the Visa refused. In addition, Mr Shrestha has only corresponded with Mr Manandhar's child by electronic communication, such as FaceTime. For these reasons, Mr Shrestha is unlikely to play a positive parental role in the child's life in the future and the likely effect of any separation from Mr Shrestha on the child would be minimal, noting that they can continue their relationship using electronic means as has occurred since the child's birth. There was evidence before the Tribunal that the child 'enjoys talking to Pratish on the telephone'.<sup>144</sup> There was no evidence that Mr Shrestha and the child could not continue their relationship through electronic means if the former was in Nepal. However, the Tribunal does accept that, if the Visa were granted, Mr Shrestha would likely meet the child in person in the future, which would strengthen their relationship.

123. The Tribunal heard oral evidence from Mr Manandhar and Mr Shrestha in relation to the latter's relationship with the child and has also considered the written statements provided in relation to this matter. This evidence demonstrates that the best interests of Mr Manandhar's son will be served by Mr Shrestha remaining in Australia.

124. For the foregoing reasons, and taking into account the list of relevant factors in paragraph 11.2 of Direction 79 that must be considered by a decision-maker in determining the best interests of the child, the Tribunal finds that Primary Consideration 2 weighs marginally in favour of granting Mr Shrestha the Visa. That is, the Tribunal determines that refusal of the Visa is not in the best interests of the child.

### **Primary Consideration 3**

125. Paragraph 11.3(1) of Direction 79 states that:

*The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will*

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<sup>143</sup> Exhibit A4.

<sup>144</sup> *ibid.*

*breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application of such a person. Visa refusal 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 be granted a visa. Decision-makers should have due regard to the Government's views in this respect.*

126. In *YNQY v Minister for Immigration and Border Protection*,<sup>145</sup> Justice Mortimer said of the expectations of the Australian community consideration, there under paragraph 13.3(1) of an earlier Direction made under section 499 of the Act, that:

*In substance this consideration is adverse to any applicant. As the Minister submits, it is inextricably linked to the other primary consideration of protection of the Australian community. 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 been convicted of serious crimes. In this primary consideration as expressed (and despite the references earlier in the Direction to 'tolerance') the Australian community's 'expectations' are defined only in one particular way: namely, that the Australian community 'expects' non-revocation where a person has been convicted of serious crimes of a certain nature. That is, this is 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 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.*

*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 inevitable that this consideration would weigh against revocation: that is what it is intended to do (see *Ueese* [2016] FCA 348; 248 FCR 296 at [64] - [66]).*

127. The Tribunal also notes the decision in *FYBR v Minister of Home Affairs (FYBR)*,<sup>146</sup> also considering the predecessor Direction, in which Justice Charlesworth stated that the task of the decision-maker is to 'identify what is the "government's view" about community expectations in the particular case, to "have due regard" to that view and to "generally" afford that view more weight than other non-primary considerations'.<sup>147</sup> Her Honour further held that Primary Consideration 3:<sup>148</sup>

*should be understood as expressing a deemed community expectation that all persons who have committed serious criminal offences giving rise to character concerns should have their visa applications refused. The nature of the character test is such that the deemed expectation will arise in most if not all cases falling for consideration under s 501(1) of the Act, having regard to the nature and seriousness of the non-citizen's conduct, assessed in accordance with cl 11.1. The text of the clause emphasises that it may be appropriate to act*

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<sup>145</sup> [2017] FCA 1466 at [76].

<sup>146</sup> [2019] FCAFC 185.

<sup>147</sup> *FYBR* at [74].

<sup>148</sup> *ibid.*, at [75].

*in accordance with that expectation, so anticipating a class of cases in which it may not be appropriate to do so.*

128. In addition, Justice Charlesworth confirmed that:<sup>149</sup>

*the degrees of tolerance referred to in cl 6.3(5) and cl 6.3(7) are matters that fall for consideration by the decision-maker in the ultimate exercise of his or her discretion. They are factors that may be taken into account in determining whether it is appropriate to give more or less weight to a deemed community expectation of visa refusal that might otherwise arise simply because of the nature of the non-citizen's character concerns or offences.*

129. Justice Stewart in *FYBR* said that:<sup>150</sup>

*community expectations are simply, and informally, expressed as follows: "If you break the law that will be held against you, the more serious the breach the more it will be held against you, and it may even be decisive".*

...

*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. In any particular case, the weight to be attached to that consideration because of the particular circumstances of the character assessment may be slight. In another case, because of the severity of the character assessment, the weight may be substantial. 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. That is why the decision-maker must assess what is "appropriate" in the particular circumstances. Nevertheless, an adverse character assessment is necessarily against a visa applicant, to some degree or other; no one will be awarded a visa because they are of bad character.*

130. Paragraph 11.3 makes plain that the Australian community expects that non-citizens will obey Australian laws. Mr Shrestha has breached this trust and he has been convicted of the Offences in Australia. Mr Shrestha was found guilty of entering the house of the victim with the intent to commit an indictable offence. This led to an indecent assault of a sexual nature against a woman in the bedroom of her home. In that way, the offending was serious. To reflect that gravity, Mr Shrestha was sentenced to a term of imprisonment of 18 months for each of the two Offences, which was wholly suspended on him entering a good behaviour bond. In 2016, the Local Court found the victim 'was, and remains, significantly traumatised' as a result of Mr Shrestha's offending. The Tribunal finds that Primary Consideration 3 weighs against the granting of the Visa to Mr Shrestha. That is, the Tribunal

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<sup>149</sup> *ibid.*, at [77].

<sup>150</sup> *ibid.*, at [101]-[102].

is satisfied that it is appropriate to refuse the Visa application of Mr Shrestha. However, this finding is moderated by the further considerations under this primary consideration discussed immediately below in these reasons.

131. Following *FYBR*, the Tribunal has considered paragraphs 6.3(5) and 6.3(7) of Direction 79 in determining whether it is appropriate to give more or less weight to a deemed community expectation of visa refusal. As set out above in these reasons, paragraphs 6.3(5) and 6.3(7) of Direction 79 provide that:

*(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, or contributing to, the Australian community for only 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;*

...

*(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 for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa application should be refused.*

132. Counsel for Mr Shrestha conceded that Primary Consideration 3 weighed against his client, however contended that the adverse weight attributable to this consideration should be moderated or otherwise reduced by applying paragraphs 6.3(5) and 6.3(7) of Direction 79 in circumstances where Mr Shrestha has resided and participated in the Australian community for 14 years and has made a positive contribution by reference to his extensive 12 year employment in this country.<sup>151</sup>

133. In 2006, Mr Shrestha arrived in Australia aged 21. He has lived in Australia for 14 years. While it is true that Mr Shrestha has not been in Australia 'only for a short period of time', he has not lived in the Australian community for 'most' of his life or 'from a very young age' (paragraph 6.3(5)). Accordingly, the Tribunal finds that its considerations pursuant to paragraph 6.3(5) of Direction 79 only marginally moderates the weight to be ascribed under Primary Consideration 3 in favour of exercising the discretion to refuse the Visa.

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<sup>151</sup> Exhibit A1, page 5; Exhibit R1, G12, page 79.

134. The Tribunal accepts that, considering the factors in paragraph 6.3(7) of Direction 79, Mr Shrestha has been making a positive contribution to the Australian community for a substantial period of time, putting to one side the significantly detrimental contribution he made as a result of the Offences during his time in Australia. Mr Shrestha has a strong employment record at various businesses in Sydney and Dubbo over 12 years and has received support from many colleagues and other Australian citizens and residents for his continued stay in Australia. Mr Shrestha has also demonstrated a charitable side, including through the donation of clothes, assisting with a Nepalese cultural association and supporting recent arrivals to settle in Australia. However, Mr Shrestha does not have any minor or other children in Australia and no immediate family, although he does have a cousin in Sydney and is considered to be 'like an uncle' to his friend's six year old son whom he has not met in person (considered in detail under Primary Consideration 2). Accordingly, the Tribunal accepts that these factors moderate the weight to be afforded to Primary Consideration 3 weighing in favour of exercising the discretion to refuse Mr Shrestha the Visa.
135. In conclusion, the Tribunal finds that, on balance, Primary Consideration 3, the expectations of the Australian community, weighs moderately in favour of exercising the discretion in subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa.

#### **Conclusion: Primary considerations**

136. In concluding its consideration of the primary considerations under Part B of Direction 79, the Tribunal notes that it has found that Primary Consideration 1, protection of the Australian community, and Primary Consideration 3, the expectations of the Australian community, respectively weigh strongly and moderately in favour of exercising the discretion under subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa. The Tribunal has found that Primary Consideration 2, the best interests of minor children in Australia, weighs marginally in favour of Mr Shrestha and against exercising the discretion to refuse to grant him the Visa.

#### **Other considerations**

137. Paragraph 12(1) of Direction 79 provides that 'other considerations' must be taken into account where relevant and include (but are not limited to) international non-refoulement

obligations; impact on family members; impact on victims; and impact on Australian business interests. The Tribunal turns to address these listed 'other considerations' and the additional considerations advanced by Mr Shrestha not contained in Direction 79 and notes that these considerations are 'other' considerations, as opposed to 'secondary' considerations. As Justice Colvin said in *Suleiman v Minister for Immigration and Border Protection (Suleiman)*:<sup>152</sup>

*...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 [now Direction 79] 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 [now Direction 79] 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 [now Direction 79] 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.*<sup>153</sup>

#### **Other consideration 1 – International non-refoulement obligations**

138. Mr Shrestha did not raise any international non-refoulement obligations and submitted that this consideration was inapplicable in determining his application before the Tribunal. Accordingly, the Tribunal gives this consideration no weight.

#### **Other consideration 2 – Impact on family members**

139. Mr Shrestha contended that this consideration was inapplicable to his application in circumstances where he does not have any immediate family members who reside in Australia. The Tribunal therefore gives this consideration no weight.

#### **Other consideration 3 – Impact on victims**

140. Paragraph 12.3 of the Direction requires that:

*Impact of a decision to grant a visa on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or*

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<sup>152</sup> [2018] FCA 594.

<sup>153</sup> Ibid at [23].

*victims, where that information is available and can be disclosed to the non-citizen being considered for visa refusal.*

141. While the Tribunal had the benefit of considering the Victim Impact Statement provided and read to the Local Court in 2016, there was no direct evidence before the Tribunal about the impact on the victim of Mr Shrestha's offending, or her family members, of a decision to grant him the Visa. In the absence of any evidence in relation to this consideration, the Tribunal finds that this factor weighs neither for nor against Mr Shrestha.

***Other consideration 4 – Impact on Australian business interests***

142. Mr Shrestha stated that this consideration was inapplicable to the Tribunal's determination of his application. This consideration is also given no weight by the Tribunal.

***Other considerations not listed in Part B of Direction 79***

143. As previously set out in these reasons, Mr Shrestha advanced a number of 'other considerations' in support of his application that are not expressly listed in Part B of Direction 79.<sup>154</sup> Paragraph 12(1) of Direction 79 does not limit the 'other considerations' that must be taken into account, where relevant, to the four contained in that document. The Tribunal addresses each of these additional 'other considerations' in turn.

***Employment***

144. Mr Shrestha submitted that the evidence demonstrates that he has made a positive contribution to the Australian community through his very strong 12 year employment history in this country.<sup>155</sup> The Minister contended that there was no evidence of such contributions and that any weight to be given to this consideration in favour of Mr Shrestha is significantly lessened by his commission of the Offences and the associated law enforcement or other resources expended as a result of that offending.<sup>156</sup> Counsel for Mr Shrestha highlighted that his client pled guilty to the Offences, thus receiving a discount when sentenced, but also avoiding the expense of a criminal trial to the state, in addition to

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<sup>154</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020, pages 15-16.

<sup>155</sup> Exhibit A1; Exhibit R1, G19, pages 102-105; G20, page 106; G21, page 107; G22, page 110.

<sup>156</sup> Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, page 9.

his client successfully appealing in the District Court the sentence imposed by the Local Court.

145. Mr Shrestha arrived in Australia in October 2006 and submitted that he had been employed in Australia since January 2007 at various businesses in Sydney and Dubbo.<sup>157</sup> The Tribunal accepts this employment history. There was evidence of Mr Shrestha's employment at his three most recent workplaces, being The Establishment Bar, Hog's Breath Café and BP, over a period of the last three years.<sup>158</sup> All of these businesses are based in Dubbo.
146. Mr Shrestha was described as, among other things, a 'valued employee', a 'reliable team member' with a 'commitment and passion for his career', 'loyal, punctual and always professional'.<sup>159</sup>
147. As a result of Mr Shrestha's visa status he is not currently working. However, Mr Shrestha has been offered a full-time position as a Café Manager at Jimmy Barnett Espresso Bar in Dubbo, subject to the resolution of his visa status. The owner and director of this business has said that he is looking forward to Mr Shrestha running the business in the near term.<sup>160</sup> The owner of The Establishment Bar also stated that it 'has a position held within our company upon his return'.<sup>161</sup>
148. Having regard to the fact that Mr Shrestha has largely remained employed in Australia since he arrived 14 years ago, including occasionally holding concurrent jobs, the Tribunal accepts that this other consideration weighs moderately against exercise of the discretion to refuse to grant him the Visa, including because of his contribution to the success of his employers' businesses and the payment of income tax for the benefit of the community.

### ***Volunteering***

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<sup>157</sup> Exhibit A1; see also G11, pages 57-74.

<sup>158</sup> Exhibit R1, G19, pages 102-105; G20, page 106; G21, page 107; Exhibit A6.

<sup>159</sup> Exhibit R1, G19, page 103; G20, page 106; G21, page 107.

<sup>160</sup> Exhibit A7.

<sup>161</sup> Exhibit A6.

149. Mr Shrestha contended that he had made a positive contribution to the Australian community by undertaking volunteer work with Australian businesses and a Nepalese cultural association.<sup>162</sup> The Minister submitted that no weight should be given to this consideration because the evidence indicated that the benefit was to Mr Shrestha's professional advancement rather than the community and there was no evidence of his contributions through volunteering.<sup>163</sup>
150. The Tribunal had documentary evidence in the form of a character reference from 2018 written by Mr Gaurav Deshpande a Senior Accountant at AMY Accountants Pty Ltd in Sydney.<sup>164</sup> Mr Deshpande referred to Mr Shrestha working as an intern at the former's previous place of employment and also as an 'unpaid intern in three other organisations' to gain accounting experience. There was no direct evidence regarding Mr Shrestha's unpaid work at these three other businesses.
151. In relation to charitable work, the Tribunal heard evidence from both Mr Shrestha and his friend, Mr Napit, regarding Mr Shrestha assisting the Nepalese cultural association, Guthi Australia.<sup>165</sup> Mr Shrestha said this work included setting up for events or whatever was required. There was conflicting evidence as to whether Mr Shrestha continued to volunteer with Guthi Australia when he moved to Dubbo more than 5 years ago.<sup>166</sup> Additionally, Mr Shrestha was said to donate his clothes to charity and assist new arrivals to settle in Australia.
152. Based on the evidence before the Tribunal, it accepts that this other consideration weighs against exercising the discretion to refuse to grant Mr Shrestha the Visa, however the weight ascribed to this consideration is marginal in circumstances where it was unclear to what extent Mr Shrestha's volunteer work with Guthi Australia continued beyond him leaving Sydney in 2015 and given his unpaid accounting work was, to a significant degree, in furtherance of his career, although noting that those businesses, and therefore the economy, did receive the benefit of his labour and skill.

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<sup>162</sup> Exhibit R1, G14, pages 86-87 and 89; Exhibit A3.

<sup>163</sup> Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, page 9.

<sup>164</sup> Exhibit R1, G14, pages 86-87.

<sup>165</sup> Exhibit A2; Exhibit A3.

<sup>166</sup> *ibid.*

### ***Support from the community***

153. Mr Shrestha submitted that he had support from members of the Australian community for him to be given a 'second chance at life in Australia'.<sup>167</sup> The Minister accepted that this consideration weighs marginally against exercising the discretion to refuse to grant Mr Shrestha the Visa.<sup>168</sup>
154. The Tribunal finds that this other consideration weighs marginally in favour of Mr Shrestha and therefore against exercise of the discretion to refuse to grant him the Visa, because of the evidence of his support from members of the Australian community including former and prospective employers, friends and family in this country.<sup>169</sup>

### ***Ties to Australia***

155. Mr Shrestha contended that he has developed 'respective ties to Australia and its people',<sup>170</sup> evidenced by him residing in this country for 14 years and developing professional and social ties to members of the Australian community.<sup>171</sup> The Minister accepted that Mr Shrestha would have developed some ties to Australia, including because of the evidence of his support from the community discussed immediately above, and that this consideration weighs marginally against exercising the discretion to refuse to grant Mr Shrestha the Visa.<sup>172</sup>
156. Mr Shrestha undoubtedly has ties to Australia as a result of his 14 years in this country. Mr Shrestha has not left Australia since his arrival in 2006 and has been employed for the overwhelming majority of this time. Mr Shrestha has also developed a friendship network in Australia; three friends gave evidence at the hearing in support of Mr Shrestha and him being given a second chance. Mr Shrestha is considered 'family' and 'like an uncle' to the son of one friend, despite never having met this child in person. Mr Shrestha also told the

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<sup>167</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020, page 15; Exhibit R1, G14, pages 86-89.

<sup>168</sup> Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, pages 9-10.

<sup>169</sup> Exhibits A3-A7; Exhibit R1, G14, pages 86-89.

<sup>170</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020, page 15.

<sup>171</sup> Exhibit R1, G14, pages 86-89; G17, pages 96-98; G22, pages 108-113.

<sup>172</sup> Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, pages 9-10.

Tribunal that he played cricket on weekends. Mr Shrestha is currently single, he does not have a spouse or any children in Australia and he has no immediate family in Australia, although he does have a cousin living in Sydney with whom he is close. Dr Pulman reported that Mr Shrestha described having a good friendship network in Sydney, but 'less so in Dubbo' and that he had not 'had any serious long-term relationships', including because his hours of work 'make it difficult to socialise and establish relationships'.<sup>173</sup> In this regard, the Tribunal notes that Mr Shrestha stated that he wanted to 'get married and settled down'.<sup>174</sup> On balance, the Tribunal finds that this other consideration weighs marginally against the exercise of the discretion to refuse to grant Mr Shrestha the Visa.

### ***Financial hardship***

157. It was submitted that Mr Shrestha will face financial hardship if he is removed from Australia in circumstances where he has 'better employment and career prospects' in this country compared to Nepal, including because he holds Australian educational qualifications and has established 'important business relationships with various Australian businesses'.<sup>175</sup> As a result, Mr Shrestha's future employment prospects were said to be better in Australia than Nepal.<sup>176</sup>
  
158. Mr Shrestha confirmed to the Tribunal that both of his parents are retired, including his father who worked in the banking industry, despite this year telling Dr Pulman that his father was still working in that sector.<sup>177</sup> The Tribunal accepts Mr Shrestha's evidence at the hearing on this issue. Additionally, Mr Shrestha said that his parents borrowed money to have him educated in Australia and he has debts, although he tries to send money back 'every now and then as much as I can'.<sup>178</sup> The Tribunal has no reason to doubt this evidence and accepts it. Mr Shrestha claimed that if he were to return to Nepal it would have 'devastating consequences' for his family, including because he would not be able to earn

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<sup>173</sup> Exhibit R1, G22, page 110.

<sup>174</sup> Exhibit A1.

<sup>175</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020, pages 15-16.

<sup>176</sup> Exhibit R1, G17, pages 96-98; Exhibit A2.

<sup>177</sup> Transcript of Proceedings, page 24.

<sup>178</sup> Exhibit R1, G17, page 97.

an Australian income to support them. This was previously described by Mr Shrestha as being faced with 'severe financial depression'.<sup>179</sup>

159. The Minister contended that this impediment weighs marginally against exercising the discretion to refuse to grant Mr Shrestha the Visa, noting that he would not have any social or cultural barriers to overcome if he returned to Nepal in circumstances where he left that country as an adult aged 21, Mr Shrestha's parents live in Nepal and, although retired, could be expected to provide him with some financial support, if required, and Mr Shrestha could use his experience in Australia to gain employment in Nepal.<sup>180</sup>
160. Mr Shrestha arrived in Australia on a student visa and attained multiple educational qualifications in this country, including a Bachelor of Professional Accounting and undertook unpaid work experience in this field. In this way, Mr Shrestha had the makings of a career in accounting in Australia. This has been impacted by his conviction for the Offences. While the Tribunal accepts that Mr Shrestha's employment prospects are currently better in Australia because of his recent experience and offers of future and continued employment in this country, there was no evidence before the Tribunal regarding the likelihood of Mr Shrestha's Australian educational qualifications or work experience not being recognised in Nepal, especially his accounting qualification, although Mr Shrestha said accounting was 'different' in Nepal. In addition, the Tribunal is satisfied that Mr Shrestha would not face any social or cultural barriers in Nepal in circumstances where he grew up in that country and left as an adult. Additionally, Mr Shrestha has immediate family in Nepal who could support him financially, including an older brother, although the Tribunal accepts the contention that the brother's income is insufficient to support their parents during retirement. The Tribunal is satisfied that Mr Shrestha could use the education he has gained in Australia to seek to secure employment in the accounting or hospitality sectors in Nepal, especially given his broad experience over many years in Australia. Finally, the Tribunal accepts that the earning of an Australian income would likely be more advantageous to Mr Shrestha than a Nepalese income. On balance, the Tribunal finds that this other consideration weighs marginally against the exercise of the discretion to refuse to grant Mr Shrestha the Visa.

### ***Emotional distress***

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<sup>179</sup> *ibid.*

<sup>180</sup> Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, page 10.

161. Mr Shrestha said he will face emotional distress if removed from Australia given he 'has built a life for himself' over his 14 years in this country and 'had no plans to return to Nepal'.<sup>181</sup> As referred to in relation to the preceding consideration, Mr Shrestha described facing 'severe financial depression', but having 'no other health conditions'.<sup>182</sup> Mr Shrestha stated that being returned to Nepal would 'certainly impact on my depression both mentally and financially'.<sup>183</sup> In that statement, Mr Shrestha also said that he 'would like to go visit my parents in Nepal', on the presumption that he was granted the Visa.<sup>184</sup> Mr Shrestha also referred to the likely criticism he and his family will face from neighbours, relatives and colleagues in Nepal if he returned without Australian permanent residency. Mr Shrestha also said that following the refusal of his Visa this year he has found it 'very hard' to sleep and focus and was 'very stressed'.<sup>185</sup>
162. The Minister contended that this impediment weighs marginally against exercising the discretion to refuse to grant Mr Shrestha the Visa, noting again that he would not have any social or cultural barriers to overcome if he returned to Nepal in circumstances where he left that country as an adult, his parents live in Nepal and could provide him with emotional support, and there was no evidence that Mr Shrestha could not access medical services in Nepal and available to Nepalese citizens.<sup>186</sup>
163. It was evident to the Tribunal that Mr Shrestha will be emotionally distressed at having to return to Nepal; he has lived in Australia for 14 years, held stable employment for a significant amount of that time, has a friendship network and wants to advance his career in this country, earn an Australian income and financially assist his retired parents in Nepal from this country. The Tribunal also accepts that Mr Shrestha would have to financially support his parents were he to return to Nepal, including because his brother's income is not sufficient to do so. Counsel for Mr Shrestha also submitted that if the Visa is not granted to him, there were remote prospects of Mr Shrestha being able to return to Australia.

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<sup>181</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020, page 16; Exhibit R1, G17, pages 97-98.

<sup>182</sup> Exhibit R1, G17, page 97.

<sup>183</sup> *ibid.*

<sup>184</sup> *ibid.*, page 98.

<sup>185</sup> Exhibit A1.

<sup>186</sup> Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, page 10.

164. The Tribunal finds that this other consideration weighs in Mr Shrestha's favour. However, the weight attributed by the Tribunal is marginal because Mr Shrestha has immediate family in Nepal who can emotionally support him upon his return to that country and there was no evidence that he could not access the medical services available to other Nepalese citizens. As a result, the Tribunal finds that this other consideration weighs marginally against the exercise of the discretion to refuse to grant Mr Shrestha the Visa.
165. For completeness, despite Mr Shrestha's references in his statement provided this year to the Minister's Department to 'severe financial depression' and being made to leave Australia impacting 'on my depression both mentally and financially', and aside from the advancement of the other consideration of emotional distress addressed immediately above in these reasons, Mr Shrestha did not claim before the Tribunal to have a mental health condition and there were no medical records before the Tribunal to that effect. Indeed, Mr Shrestha's statement to the Minister's Department said that he had 'no other mental health condition' apart from facing 'severe financial depression'.<sup>187</sup> For clarity, leaving aside the issue of prospective emotional distress, Mr Shrestha did not advance an argument in support of his application on the basis of any mental health condition he was, or is currently, experiencing. The Tribunal notes that Dr Pulman reported that Mr Shrestha had informed her that he had been diagnosed with depression when he moved to Dubbo, but he denied in that assessment having consulted a psychologist or counsellor to address his symptoms.<sup>188</sup> In this regard, Dr Pulman's opinion expressed later in her report was that Mr Shrestha had 'no history of mental illness'.<sup>189</sup> Again, there were no medical records before the Tribunal. Accordingly, for the avoidance of doubt, the Tribunal is not satisfied that Mr Shrestha has a mental health condition and no weight is given to this particular issue in his favour, noting the above separate finding and weighting in relation to emotional distress.

### ***Continued residence in the community***

166. Mr Shrestha contended that, despite his one-off criminal offending, he has 'continued to reside in the Australian community (without adverse incident) for almost five years' and proven that he does not pose an unacceptable risk of harm. In this regard, Mr Shrestha

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<sup>187</sup> *ibid.*, page 97.

<sup>188</sup> Exhibit G22, page 111.

<sup>189</sup> *ibid.*, page 112.

claimed, these 'peculiar circumstances' place him in a position outside the normal applicable circumstances in that 'it is rather odd that the applicant's continued residence in Australia should be stopped based on a character matter that occurred about five years ago'.<sup>190</sup>

167. The Minister contended that Mr Shrestha's submission about his continued residence in the community since the Offences without any further offending was relevant to the Tribunal's assessment of future risk of reoffending (under Primary Consideration 1) and therefore should be given no weight as an 'other consideration'.<sup>191</sup> The Tribunal has considered and addressed the risk to the Australian community under Primary Consideration 1 and found that Mr Shrestha poses a low, but continuing, risk of harm that is unacceptable.
168. As previously stated in these reasons, it is noteworthy that Mr Shrestha has remained in the Australian community since the commission of the Offences in December 2015, a period of almost 5 years. Following the suspension of his term of imprisonment in 2016, Mr Shrestha completed a good behaviour bond in February 2018. Towards the end of this 18 month good behaviour bond, Mr Shrestha applied for the Visa. After the refusal of the Visa in August this year, Mr Shrestha became an unlawful non-citizen and he continues to remain in the Australian community; he has not been taken into immigration detention.
169. While the Tribunal has made a separate finding under Primary Consideration 1 regarding the risk to the Australian community, the Tribunal accepts that this other consideration advanced on behalf of Mr Shrestha is distinct from that consideration and, while again noting his one-offending, finds that it weighs moderately against exercise of the discretion to refuse to grant him the Visa on the basis of his almost 5 year continued residence in the Australian community following the Offences, including in circumstances where he was subject to, and complied with, a good behaviour bond for 18 of those months and has not had any other adverse interaction with law enforcement after the commission of the Offences.

### **Conclusion: Other considerations**

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<sup>190</sup> Applicant's Statement of Facts, Issues and Contentions dated 2 October 2020, page 16.

<sup>191</sup> Respondent's Statement of Facts, Issues and Contentions dated 16 October 2020, page 10.

170. Mr Shrestha contended that, considered in total, the ‘other considerations’ he advanced should be given the most significant weight in the circumstances of this case. Mr Shrestha referred to Justice Colvin’s statement in *Suleiman*,<sup>192</sup> set out in full above, regarding the requirement for ‘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’. To this end, Mr Shrestha submitted that the other considerations, in their totality, should be afforded the greatest weight in the particular circumstances of this case because it is outside the circumstances that generally apply.<sup>193</sup> Mr Shrestha contended that, balancing all relevant considerations, the primary considerations weighing against him (Primary Consideration 1 and Primary Consideration 3) are outweighed by the countervailing ‘other considerations’.
171. The Tribunal does not accept these submissions. The Tribunal has found that two of the ‘other considerations’ advanced by Mr Shrestha weigh moderately in his favour (being his employment and continued residence in the Australian community) and that five of his ‘other considerations’ weigh marginally in his favour (comprising his volunteering, support from the community, ties to Australia, financial hardship and emotional distress). That is, all ‘other considerations’ advanced by Mr Shrestha weigh against the exercise of the discretion to refuse to grant him the Visa. However, the Tribunal is not satisfied that these ‘other considerations’, either solely or in their totality, and together with Primary Consideration 2, outweigh the remaining primary considerations, being Primary Consideration 1, the protection of the Australian community, and Primary Consideration 3, the expectations of the Australian community which, respectively, weigh strongly and moderately in favour of exercising the discretion to refuse to grant Mr Shrestha the Visa. That is, the Tribunal has found that Primary Considerations 1 and 3 outweigh Primary Consideration 2 and the other considerations advanced by Mr Shrestha.
172. It is worth restating Mr Shrestha’s history in Australia following his sentencing in 2016 for the Offences. Mr Shrestha was granted bail, unopposed, pending the outcome of his appeal to the NSW District Court, which led to the suspended 18 month term of imprisonment, but the serving of a good behaviour bond of equivalent length. Before and shortly after Mr

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<sup>192</sup> At [23].

<sup>193</sup> Applicant’s Statement of Facts, Issues and Contentions dated 2 October 2020, page 17.

Shrestha's application for the Visa in 2017, which would have granted him permanent residency, he was subject to the 18 month good behaviour bond for the Offences. In August this year, Mr Shrestha's application for the Visa was refused by the Minister's Department. Following the Department's refusal, Mr Shrestha applied to the Tribunal for review of that decision and a hearing was held in October this year. That is, Mr Shrestha has been an unlawful non-citizen in Australia for less than 3 months; Mr Shrestha's application for the Visa was only determined by the Minister's Department this year and he had remained in the community on a bridging visa up until that decision. Upon Mr Shrestha's bridging visa being cancelled in August this year, he became an unlawful non-citizen of Australia. While the Tribunal accepts that it may not be the usual course of events for an unlawful non-citizen, such as Mr Shrestha, to remain in the community during the completion of the associated legal or administrative processes surrounding the Visa, this situation has only existed from August this year. The Tribunal is not satisfied that these particular circumstances warrant the ascription of greatest weight to any or all of the 'other considerations' because they are outside the circumstances that generally apply. The Tribunal is not satisfied that the circumstances of this case are remarkable, despite it accepting as noteworthy that Mr Shrestha remained in the community for 5 years since the Offences, including because he has only been an unlawful non-citizen from August this year. The Tribunal also notes that the fact that Mr Shrestha remained in the community after the Offences and has not reoffended reduced the Tribunal's assessment of his risk of reoffending under Primary Consideration 1.

## **CONCLUSION**

173. Mr Shrestha does not pass the character test as defined in subsection 501(6) of the Act because he has a substantial criminal record. Accordingly, pursuant to subsection 501(1) of the Act, the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. As a result of his failure to pass the character test, Mr Shrestha was refused the Visa by a delegate of the Minister in August this year. Mr Shrestha applied to the Tribunal for review of that decision. It was common ground between the parties, and the Tribunal has found, that Mr Shrestha does not pass the character test. The remaining issue for determination by the Tribunal was whether it should exercise the discretion under subsection 501(1) to refuse to grant Mr Shrestha the Visa. This required a consideration of Part B of Direction 79.

174. It follows from the preceding paragraphs that Primary Consideration 1 and Primary Consideration 3 in Part B of Direction 79 respectively weigh strongly and moderately in favour of exercising the discretion under subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa. The Tribunal has found that Primary Consideration 2, regarding the best interests of minor children in Australia, weighs marginally in Mr Shrestha's favour.
175. Pursuant to sub-paragraph 8(4) of Direction 79, primary considerations should generally be given greater weight than other considerations. The four listed 'other considerations' in Direction 79 are inapplicable and make no contribution to Mr Shrestha's case. Additionally, the Tribunal has found that the combined weighting of the non-listed 'other considerations' advanced by Mr Shrestha, together with Primary Consideration 2, do not outweigh the two primary considerations weighing in favour of exercising the discretion to refuse to grant Mr Shrestha the Visa.
176. Ultimately, Primary Considerations 1 and 3 weigh in favour of exercising the discretion under subsection 501(1) of the Act to refuse to grant Mr Shrestha the Visa. The weight afforded to Primary Consideration 2 and the 'other considerations' fails to tip the balance in Mr Shrestha's favour. To this end, the Preamble to Direction 79 relevantly states:
- A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against women...should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
- In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify...refusing the visa.*
- Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.*
177. The Tribunal considers that these principles apply to this case. The Offences committed by Mr Shrestha were serious, with his offending including a crime of a sexual nature against a woman in her own home. Having regard to the above assessment of all of the primary and other considerations in Direction 79, and the non-listed other considerations submitted by Mr Shrestha, the Tribunal finds that the correct or preferable decision is to affirm the decision under review.
178. The Tribunal empathises with Mr Shrestha's position; it accepts his remorse for the Offences as genuine and acknowledges his strong desire to remain in Australia to continue

the life he has established in this country. However, on balance, the Tribunal has found that the weight afforded to the protection of the Australian community and the expectations of that community in favour of exercising the discretion to refuse the Visa outweighs the other primary consideration and the other considerations that weigh in favour of Mr Shrestha.

## DECISION

179. The Tribunal affirms the decision made by a delegate of the Minister on 17 August 2020 to refuse to grant Mr Shrestha a Skilled (Residence) (Class VB) visa pursuant to subsection 501(1) of the Act.

*I certify that the preceding 179 (one hundred and seventy-nine) paragraphs are a true copy of the reasons for the decision herein of Member W Frost.*



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Associate

Dated: 10 November 2020

Date(s) of hearing:	<b>26 October 2020</b>
Representative for Mr Shrestha:	<b>Ms K Chetty, My Visa Immigration Law Advisory</b>
Counsel for Mr Shrestha:	<b>Dr J Donnelly</b>
Solicitor for the Minister:	<b>Ms S Prasad, Minter Ellison</b>