Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2020/0413**

Re: **XSLJ**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member Theodore Tavoularis**

Date: **14 April 2021**

Place: **Brisbane**

The decision under review is affirmed.

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

Senior Member Theodore Tavoularis

CATCHWORDS

MIGRATION – Non-revocation of mandatory cancellation of a Class TY Subclass 444 Special Category (Temporary) visa – where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 79 – decision under review affirmed

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth)
Migration Act 1958 (Cth)

CASES

Afu v Minister for Home Affairs [2018] FCA 1311
ETWK and Minister for Immigration and Border Protection [2017] AATA 228
FYBR v Minister for Home Affairs [2018] FCA 500
FYBR v Minister for Home Affairs [2019] FCAFC 185
Minister for Home Affairs v Buadromo [2018] FCAFC 151
SCJD and Minister for Home Affairs [2018] AATA 4020
Suleiman v Minister for Immigration and Border Protection [2018] FCA 594
Uelese v Minister for Immigration and Border Protection [2016] FCA 348
Waits and Minister for Immigration and Multicultural and Indigenous Affairs [2003] AATA 1336
YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

SECONDARY MATERIALS

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

CONTENTS

REASONS FOR DECISION

Senior Member Theodore Tavoularis

14 April 2021

1. XSLJ (the "Applicant") is a 41 year old citizen of New Zealand.[1] Movement records indicate the Applicant initially arrived in Australia on 13 December 2003. According to the Movement Records before the Tribunal dated 7 March 2017, the Applicant's movements in and out of Australia can be summarised as follows:[2]

Arrive	Depart	Days	Years	Approximate Age On Arrival
13 December 2003	2 January 2004	20	0 1/12	24 5/12
20 January 2004	20 December 2004	335	0 11/12	24 7/12
29 December 2004	13 April 2011	2296	6 3/12	25 6/12
18 April 2011	**14 April 2021**	3649	10	31 9/12
	Total	6300 Days	**17 3/12**	

2. It appears highly likely that there was at least one other movement in and out of Australia by the Applicant between 18 April 2011 and the present, though only brief. It appears that when sentencing the Applicant in May 2018, the Downing Centre District Court permitted the Applicant to return to New Zealand briefly – to deal with an extenuating circumstance.[3] In any event, I am satisfied that on his most recent entry, the Applicant became the holder of a Class TY Subclass 444 visa ("visa").[4]

3. The Applicant was 24 years old when he first arrived in Australia, and has spent 17 years and 2 months here. In that period, he has only been outside of Australia for something like 32 days.

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1 T1, 186.

2 Ibid.

3 T1, 49.

4 Note: while the movement by the Applicant in and out of Australia in 2018 is not recorded in his movement history, I will presume that the visa pursuant to which he re-entered Australia for the final time in 2018 was the same visa current at the time of his most recent previous arrival (in April 2011). That particular visa was a Class TY Subclass 444 visa.

4. The Applicant has a history of criminal offending in Australia and New Zealand. The Applicant's New Zealand criminal history (in terms of sentencing episodes) runs from April 1997 to April 2002. This history involves offending in the realms of (1) offences against the authority of the police; (2) drug offences; (3) offences of violence; (4) fraud-type offending involving unlawful use of a credit card. He also has a traffic history in New Zealand. In terms of sentencing episodes, it commences in January 1997 and runs to September 2001. There are three convictions for traffic offences involving the unlawful use of a motor vehicle and a failure to comply with a request by police to stop his vehicle. The totality of offences for which the Applicant has been convicted is 20 punished across separate court dates. In terms of custodial time, the totality of the head sentences imposed upon the Applicant for his offending in New Zealand amount to approximately 7 years and 9 months.

5. The Applicant's history in Australia is more significant both in terms of its timespan and number of offences. In terms of sentencing episodes, his Australian criminal history commences in August 2006 and runs to August 2018. Having regard to the relevant *"Check Results Report"* in the material,[5] the Applicant has committed 21 offences punished across 12 court dates.

6. His offending in Australia has involved (1) traffic/driving offences; (2) property offences; (3) drug offences; (4) offences challenging the lawful authority of the police; and (5) offences of violence. By far, the predominant and most serious range of offences he has committed in Australia relate to illicit drugs. Referring only to this aspect of his offending, there are convictions for: (1) possession; (2) supply; (3) manufacture; (4) possession of drug-related paraphernalia. In terms of custodial time, the totality of the head sentences imposed upon the Applicant for his offending in Australia amount to approximately 12 years and 9 months.

7. This matter comprises a remittal from a previous decision of this Tribunal made on 14 April 2020. Therefore, the process of the Applicant having his visa mandatorily cancelled by a delegate of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (the "Minister" or the "Respondent") occurred as a precursor to the previous hearing before this Tribunal.

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[5] T1, pages 33–36.

8. Suffice it to say that the Applicant made his request for revocation of the mandatory cancellation decision by making necessary representations to that end. He was then notified of the non-revocation decision pursuant to s 501CA(4) of the Act and then lodged his application with this Tribunal which, as mentioned, conducted the first hearing in March 2020. This, in short compass, is the procedural and jurisdictional history of the matter up to the point of its first ventilation in this Tribunal. To the best of my understanding, neither party is agitating any procedural or jurisdictional argument.

9. The hearing before me proceeded by way of video link on 22 and 23 February 2021. The hearing received oral evidence from the Applicant and four additional witnesses. Given the first Tribunal decision-maker issued a confidentiality order under s 35 of the of the *Administrative Appeals Tribunal Act 1975* (Cth), it is pertinent for reasons of clarity to provide a table of all witnesses who provided evidence with the acronyms attributed to them. A true and correct copy of that table of witnesses is attached hereto and marked **Annexure A**.

10. The Tribunal also received written evidence. That written evidence was compiled into an agreed Exhibit List, a true and correct copy of which is attached to these Reasons and marked **Annexure B**.

ISSUES

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

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

12. As mentioned, the Applicant has previously made the necessary representations required by s 501CA(4)(a) of the Act. Thus, the issue is whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised. As a starting point, it is

necessary to refer to the Full Court of the Federal Court of Australia's observations in *Minister for Home Affairs v Buadromo*:[6]

> *"…there has been some discussion in the authorities as to whether s 501CA(4) contains a residual discretion in the decision-maker by reason of the use of the word 'may' in the chapeau of the subsection, or whether the balancing of the factors favouring a refusal to revoke the cancellation is part of the one exercise of determining whether there is another reason the original decision should be revoked. The weight of authority in this Court favours the latter view…"*[7]

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

- whether the Applicant passes the character test; and
- whether there is another reason why the decision to cancel the Applicant's visa should be revoked.

14. If the Applicant succeeds on either ground, the weight of authority indicates that the Tribunal is compelled to find that the cancellation of the Applicant's visa must be revoked.[8] I will address each of these grounds in turn.

DOES THE APPLICANT PASS THE CHARACTER TEST?

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

16. The Applicant makes the following concession in their Statement of Facts, Issues and Contentions ("SFIC"):

> *"The Applicant fails the character test, and so the issue for the Tribunal is whether or not there is "another reason" why the original cancellation decision should be revoked."*[9]

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6 [2018] FCAFC 151.

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

8 Ibid.

9 A1, 11, [41].

17. As alluded to in the above description of the Applicant's history of criminal offending in Australia, something in the order of 12–13 years of head custodial time have been imposed upon the Applicant. Having regard to the cumulative period of custodial terms imposed upon the Applicant, there can be no question that the Applicant does not pass the character test pursuant to s 501(6)(a) of the Act. I am consequently satisfied that the Applicant does not pass the character test and cannot rely on s 501CA(4)(b)(i) of the Act for the mandatory cancellation of his visa to be revoked.

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

18. In considering whether to exercise the discretion in s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* ("the Direction" or "Direction 79") has application.[10] The Direction provides guidance for decision-makers on how to exercise the discretion. Relevantly, it states that:[11]

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

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

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

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

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

11 Direction, sub-paragraph 7(1)(b).

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

a) International non-refoulement obligations;

b) Strength, nature and duration of ties;

c) Impact on Australian business interests;

d) Impact on victims;

e) Extent of impediments if removed.

22. I note and emphasise the importance of these considerations being "*other*" considerations, as opposed to "*secondary*" considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*:[12]

> *"…Direction 65 [now Direction 79] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply."*

23. Paragraph 6.3 of the Direction sets out a number of principles that should inform the decision-maker's consideration. Briefly stated, they are as follows:

(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia;

(2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere;

(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against women or children or vulnerable members of the

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12 [2018] FCA 594 at [23].

community such as the elderly or disabled, should generally expect to be denied the privilege of coming to, or forfeit the privilege of, staying in Australia;

(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious that any risk of similar conduct in the future is unacceptable;

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

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

(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations for determining whether to exercise the discretion.

24. I will now turn to addressing these considerations.

Primary Consideration A – Protection of the Australian Community

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

26. In determining whether the mandatory cancellation of an Applicant's visa serves to protect the Australian community, this paragraph of the Direction points out to decision-makers that mandatory cancellation "*without notice of certain non-citizen prisoners is consistent*" with

the abovementioned principle that: (a) it must be acknowledged that remaining in Australia is a privilege conferred on non-citizens in this country; and (b) those non-citizens must not abuse that privilege by breaking this country's laws or by otherwise disrespecting its important institutions.

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

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

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

Applicant's contentions

28. In his SFIC, the Applicant describes his offending as *"serious indeed"* and, with particular reference to his drug-related crimes, he said *"Drug-related crimes are not only serious, they are a threat to the very fabric of the Australian community"*. With reference to the application of the factors in paragraph 13.1.1.(1) of the Direction, the relevant portion of the Applicant's SFIC says the following:

> *"**Protection of the Australian Community***
>
> *50. Under this heading, the Tribunal must consider both the nature and seriousness of the conduct and the risk to the community were the Applicant to re-offend or engage in other serious conduct. The Direction guides the decision-maker concerning matters to be considered when assessing the evidence (i.e. cl 13.1.1). There is no doubt that the Applicant's offences in question were serious; indeed, they were described as such by the sentencing judges. Drug-related crimes are not only serious, they are a threat to the very fabric of the Australian community.*
>
> *52. In terms of the Direction, it is clear that the Applicant has offended frequently. His record shows at least three sets of drug-related offences in New Zealand from 1997 to 2001 and numerous drug-related offences over many years in Australia. His offences start off with small cannabis possession matters and increase in seriousness to encompass possession and use of "harder" drugs and then their manufacture and supply.*
>
> *53. The Applicant's offences took place in New Zealand, New South Wales, and the Northern Territory. Large sums of money are involved. The offences are planned and premeditated. Some of them are committed while the Applicant was on bail for other drug-related offences.*
>
> *54. There are offences related to acts of violence. It is accepted these matters would generally be considered serious.*

> *55. It has been alleged that the Applicant provided false and misleading information by failure to disclose his offences on his incoming passenger cards on more than one occasion. For the Applicant, the erroneous disclosure was due to his poor state of literacy – such that the Applicant failed to recognise this requirement needed to be met - and was dependent upon fellow passengers to help him fill out his arrival card because he was too embarrassed to admit to his literacy level and seek formal assistance."*[13]

29. The description of the nature and seriousness of the Applicant's offending appeared to evolve at the hearing. With particular reference to the latter chapter of the Applicant's offending history, the Applicant's representative,[14] during closing submissions, said this:

> *"It is accepted, as it must be, that this primary consideration weighs against revocation. Plainly the applicant has a significant and substantial criminal history in both New Zealand and Australia and a number of the applicant's offences - particularly more recently - in both the Northern Territory and Sydney, NSW, are extremely serious and there is no shying away from the serious nature of the applicant's criminality and those matters obviously and plainly weigh adversely against the applicant in his prospects to get back his visa and we concede as much in our written submissions."*[15]

Respondent's contentions

30. In the SFIC filed on behalf of the Respondent, there is a more formulaic application of the relevant factors in paragraph 13.1.1(1) of the Direction and a conclusion that *"Having regard to the following matters, the Applicant's conduct should be viewed very seriously"*.[16] This description of the nature of the offending had its echo in closing submissions made by the Respondent's representative,[17] during which she said the following:

> *"With respect to the protection of the Australian community it's not been disputed that the applicant has a lengthy and serious criminal history which includes frequent offences, offences of violence, for example, assault occasioning actual bodily harm and instances of evading police, one of which the Minister accepts that did not result in the criminal conviction."*[18]

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13 A1, 13–14.

14 Dr Jason Donnelly, Barrister-at-law, New South Wales Bar, Latham Chambers, legal representative for the Applicant.

15 Transcript, 23 February 2021, page 14, lines 10–17.

16 R1, 5, [26].

17 Ms Subasha Prasad, Associate, MinterEllison, legal representative for the Respondent.

18 Transcript, 23 February 2021, page 25, lines 39–43.

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

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

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

(b) The principle that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed;

(c) The principle that crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties, are serious;

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

(e) The frequency of the non-citizen's offending and whether there is any trend of increasing seriousness;

(f) The cumulative effect of repeated offending;

(g) Whether the non-citizen has provided false or misleading information to the department, including by not disclosing prior criminal offending;

(h) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour);

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

32. **Sub-paragraph (a)** of paragraph 13.1.1(1) of the Direction provides that crimes of a violent and/or sexual nature are viewed very seriously. There is nothing before me which indicates that the Applicant has ever been convicted of a crime of a sexual nature.

33. In terms of crimes actually or potentially involving violence, the following convictions are recorded in his New Zealand criminal history:

Court	Result Date	Offence Date	Offence Description	Result
Otahuhu District Court	11/6/1998	9/4/1998	Common Assault (Crimes Act) Manually	Convicted and Sentenced : Reparation -$500.00 / Suspended Imprisonment – 9 Months, Suspended for 1 Years beginning 11/06/1998, Standard Release Conditions / Supervision by Community Corrections - 11/06/1998 - 1 Year / Additional Information - I 9M /SPEC CONDTS
Warkworth District Court	3/11/1998	12/4/1998	Aggravated Assault (Manually)	Convicted and sentenced: fine $400

34. In terms of convictions for crimes actually or potentially involving violence in Australia, his Australian criminal history reads thus:

Source	Court	Date	Offence	Result
Qld	Southport Magistrates Court	14/10/08	PPRA 790(1) Assault or Obstruct Police Officer	Conviction recorded, fined $300
NSW	Sydney District Court	12/6/09	Assault occasioning actual bodily harm in company of other(s)	Imprisonment for 6 months suspended on entering a bond with conditions including 6 months obeying NSW probation service directions, and advising the registrar of any change of address
NSW	Sydney District Court	12/6/09	Assault occasioning actual bodily harm in company of other(s)	Imprisonment for 15 months suspended on entering a bond with conditions including 15 months obeying NSW probation service directions, and advising the registrar of any change of address

35. With reference to the offences involving violence in New Zealand, there is nothing in the material before the Tribunal which is informative about the nature and circumstances of that offending.

36. With reference to the three offences potentially or actually involving violence in Australia, there is nothing in the material by way of a police record (or other record) relating to the Applicant's conviction for *"Assault or obstruct police officer"* for which he was convicted on 14 October 2008. Suffice it to say that the Applicant was fined the sum of $300 which is perhaps more consistent with offending in the realm of either outrightly refusing a lawful direction or doing so with some low-level physical resistance.

37. The material is, however, more informative with regard to the Applicant's respective convictions for *"assault occasioning actual bodily harm in the company of others*" for which he was convicted in the Sydney District Court on 12 June 2009. The material does contain a description of the circumstances of the offending.[19] This description is heavily redacted and would be difficult for the reader to follow if quoted in full in these reasons. Suffice it to say that the general circumstances of the offending involved a motor vehicle that had been delivered to a workshop for mechanical repairs in September 2007. The vehicle was then taken to a panel beating workshop for smash repairs. There appeared to be some dispute about either the location of the vehicle or a perceived delay in its return to the owner. The police summary then says:

> *"Around 1pm on 12 Nov 2007 [redacted] received a further phone call from [redacted] In which he threatened to cut his head off if his car wasn't returned. . About 2.30pm on the same afternoon [redacted], the owner [name], [name] and three other unknown males attended the location a short time later and was confronted by the six men. [redacted] continually said to [redacted], "Where is my fucking car, where is my fucking car?" [Redacted] replied several times, "I'll get your car for you, I'll get your car for you.""*[20]

38. What then seems to have transpired is that a first assault was administered upon the person who was being asked about the location of the car ("Initial Victim"):

> *"At this point [redacted] punched the victim in the face. All the other men present then punched the victim in the face. All the other men present then punched and kicked the victim numerous times. At this point another panel beater tried to intervene on the victim's behalf but was threatened with the same treatment. The victim regained his feet and walked to the office of the workshop. He was bleeding from the mouth and nose."*[21]

39. It then transpired that a second person ("Second Victim") became involved in the melee, most probably the brother of the Initial Victim. This Second Victim was assaulted, and the Initial Victim was assaulted a second time:

> *"A short time later [Second Victim] arrived at the location. He was armed with a ring spanner to try and protect his brother. The offenders than assaulted [Second Victim] by punching him and kicking him. [Initial Victim] was assaulted for a second time."*[22]

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19 T1, 287–289.

20 T1, 288.

21 T1, 288.

22 T1, 288.

40. The police narrative recorded the following further details about the offending and its physical impact on the Initial Victim:

> *"[The Applicant], and the two unknown males began to punch into him until he fell to the ground where they continued to kick him in the head and face. At this point another panel beater tried to intervene on the victim's behalf but was threatened with the same treatment. [The Initial Victim] regained his feet and walked to the office of the workshop. He was bleeding from the mouth, nose and face.*
>
> *[…]*
>
> *As a result of the assault, [Initial Victim] has serious facial injuries including fractured nose and eye socket. These require surgery and at this point a full report on injuries is unavailable. [The Second Victim] has cuts and bruising to his face."*[23]

41. This offending has obviously involved the administration of violence upon at least two victims. The violence is both serious and significant. Judging from the injuries sustained by the Initial Victim, it is not beyond the realms of possibility that the violence could have resulted in a fatality. Having regard to the circumstances of this extremely serious offending (that is, the conduct culminating in the Applicant's two convictions for assault occasioning actual bodily harm), I find that sub-paragraph (a) of paragraph 13.1.1(1) of the Direction militates very strongly in favour of a finding that the totality of the Applicant's offending must be viewed as extremely serious.

42. **Sub-paragraph (b)** of paragraph 13.1.1(1) of the Direction provides that crimes of a violent nature against women or children are viewed very seriously, regardless of the sentence imposed. The Applicant has no convictions for such offending in either New Zealand or Australia.

43. The Tribunal notes with concern that the material discloses some suggestions of domestic violence between the Applicant and a former partner. It is contained in a psychological report and documents produced by the Department of Family and Community Services[24] These allegations were put to the Applicant and he flatly denied them in the following exchange:

> *"Ms Prasad: So one instance is recorded at page 706 and one's recorded at 713, that maybe the same incident, but there was one incident where they talked about [redacted], being present in the home when you assaulted [redacted] and that assault resulted in [redacted] being hospitalised; do you recall that incident?*

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23 T1, 288–289.

24 T1, 706, 713; 819.

Applicant: Yes, I don't want to incriminate myself but that's never been to court and I dispute those allegations and they're not true, yes.

Ms Prasad: I'll just note that at page 713 there was an affidavit put on clarifying that an assault did occur […] so you deny that that incident in April 2014 occurred?

Applicant: No, there was an incident. There were voices raised and there was arguments […]."[25]

44. However, the complainant in the alleged domestic violence incident was not called to give evidence. Therefore, it is difficult to fairly allocate any weight against the Applicant pursuant to this sub-paragraph (b).

45. **Sub-paragraph (c)** of paragraph 13.1.1(1) of the Direction provides that *"crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the positions they hold, or in the performance of their duties, are serious."*

46. There is no conviction in either New Zealand or Australia for offending against vulnerable members of the community. However, in New Zealand the Applicant has committed the following offences against police officers:

Court	Result Date	Offence Date	Offence Description	Result
Otahuhu District Court	15/4/1997	21/9/1996	2 counts of Obstruct/Hinder Police	Convicted and sentenced for each charge. Fined $50.
Otahuhu District Court	15/4/1997	21/9/1996	2 counts of Resist Police	Convicted and sentenced for each charge. Fined $50.

47. The material does not contain any descriptive evidence or summary about these convictions in New Zealand. It suffices to say that (1) they occurred 24–25 years ago at a time when the Applicant was approximately 17 years of age and (2) they were punished by relatively mild fines in the sum of $50. While it may be said that this offending may have involved an

[25] Transcript, 22 February 2021, page 31, lines 1–11.

element of youthful indiscretion, the offending is nevertheless captured by this sub-paragraph (c), but, ultimately, is not at the serious end of this type of offending.

48. The position is marginally different with reference to the Applicant's commission of these types of offences in Australia. His criminal history in this country contains the following convictions:

Source	Court	Date	Offence	Result
Qld	Southport Magistrates Court	14/10/08	PPRA 790(1) Assault or Obstruct Police Officer	Conviction recorded, fined $300
NSW	Sydney District Court	13/4/2007	Resist officer in execution of duty	No discrete sentence was imposed, but the matter was taken into account in sentencing the Applicant for "Supply a prohibited drug".

49. I have checked the totality of the material and to the best of my understanding, there is no police record or other summary of the abovementioned *"Assault or obstruct police officer"* offence for which the Applicant was convicted on 14 October 2008. Contrary to what may be said about his similar offending in New Zealand, which he committed as a relatively young person, the same cannot be said about the age at which the Applicant committed this offence. He was 29 years of age at the time of conviction and yet had still not formed any appreciative comprehension of the important requirement to observe and respect the lawful authority governing the community back into which the Applicant now seeks re-admission. The fine imposed is not insignificant and, if nothing else, the Applicant's unlawful conduct occupied police time and consumed their resources for something that the Applicant should have been mature enough to avoid.

50. The abovementioned *"Resist officer in execution of duty"* offence actually occurred on 25 June 2005 but the Applicant appears to have been dealt with for it almost two years later in April 2007. An abbreviated reference to the relevant police record about this offence adequately describes the circumstances of its commission:

> *"About 4:00pm on Saturday 25th June 2005, police were making a patrol of [redacted]. At the intersection of Dowling Street and Sydney Place, police observed*

the Accused, [the Applicant], sitting in a maroon coloured Holden Commodore at the intersection of Sydney Place and .Mcelhone Street, which is a well known location for the supply of prohibited drugs.. At the time the Accused was facing away from police and had a female passenger seated in the front passenger seat of the vehicle..

[…]

Police informed the Accused that he had been observed in a location which is well known for the supply of prohibited drugs and that they were going to search him. At this point the Accused was asked to put his arms against the wall and stand still.. Police located a black flat bum bag concealed down the front of the Accused's jeans. When police located the bum bag the Accused began to struggle with police and has attempted to turn around. Police pushed the Accused up against the wall and handcuffed him.. The Accused continued to struggle with police and as a result the Accused was administered a one second burst of OC spray to the facial area and placed on the ground.. Police removed the bum bag from the Accused and searched the contents. Police located a small resealable plastic bag containing a number of pink coloured tablets, which had the [redacted] logo stamped on them. Police also located a resealable plastic bag with a small amount of clear crystal substance and $760 cash. Police, searched the Accused's wallet and located a small purple coloured plastic container which was heat sealed on all sides. This container appeared to contain a small amount of powder type substance.. Police asked the female passenger to get out of the vehicle and stand on the footpath. Police asked the female how she knew the Accused and what they were doing in Sydney Place."[26]

[Errors in original]

51. There can be no question that the Applicant's respective offences in both New Zealand and Australia directly challenged lawful directions made by *"government representatives or officials […] in the performance of their duties […]"*. As such, these offences fall squarely within the ambit of sub-paragraph (c) which stipulates that such conduct is to be regarded as "serious". This finding is, in turn, contributory towards a finding that the totality of the Applicant's offending must be found to be "extremely serious". I am prepared to "discount" the two offences committed in New Zealand given that he committed them as a relatively young person. But this is more than outweighed by the offence committed in New South Wales which was part of more serious offending in the realm of illicit drugs.

52. **Sub-paragraph (d)** of paragraph 13.1.1(1) of the Direction directs a decision-maker (subject to sub-paragraph (b) of paragraph 13.1.1(1) of the Direction) to the sentence(s) imposed by the Courts for a crime or crimes of a non-citizen/applicant. The imposition of a custodial term is regarded as the last resort[27] in any reasonably and correctly applied

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26 T1, 293.

27 See *Saleh and Minister for Immigration and Border Protection* [2017] AATA 367.

sentencing process. Custodial terms are viewed as a reflection of the objective seriousness of an applicant's offending.[28]

53. The custodial terms imposed for the Applicant's offending in both Australia and New Zealand can be conveniently summarised in the following two tables. First, for custodial terms imposed in New Zealand, the following can be noted:

Court Date	Offence	Imprisonment (months)
19-Sep-01	Drove a Motor Vehicle In A Dangerous Manner; Failed To Stop When Followed By Red/Blue Flashing Lights	1
11-Jun-98	Common Assault(Crimes Act)Manually	9
19-Sep-01	Possess Pipe or Utensil for Cannabis; Possess Knife In Public Place (Summ Off)	0.25
7-Dec-01	USE CREDIT CARD FOR PECUNIARY ADVANT [(sic)]	2
17-Apr-02	POSSESS CLASS B DRUG METHAMPHETAMINE	3
17-Apr-02	POSSESS METHAMPHETAMINE	24
17-Apr-02	Possess For Supply Cannabis Plant	12
17-Apr-02	DEAL METHAMPHETAMINE	24
17-Apr-02	POSSESS METHAMPHETAMINE FOR SUPPLY	18[29]
	Total term of imprisonment	7 years, 9 months

54. Second, for custodial terms imposed in Australia, the following can be noted:

Court Date	Offence	Imprisonment (months)
13-Apr-07	Various	12
12-Jun-09	Assault occasioning ABH in company of other(s)	15
12-Jun-09	Assault occasioning ABH in company of other(s)	6

28 See *PNLB and Minister for Immigration and Border Protection* [2018] AATA 162.

29 Note: this sentence is, somewhat counterintuitively, recorded as *"6 Months, 1 Year"* in the New Zealand Criminal History.

8-Nov-17	SUPPLY A COMMERCIAL QUANTITY OF METHAMPHETAMINE	72
29-Aug-18	Manufacture prohibited drug >= large commercial quantity	48
	Total term of imprisonment	12 years, 9 months

55. To my mind, the custodial terms imposed on the Applicant make for sober reading. He is a man in his very early forties. Yet his offending has been of such seriousness that it has caused judicial sentencing officers to impose head custodial terms of something in the order of 20 years of custodial time. In other words, his offending has been so serious that the totality of custodial terms imposed on him (in terms of head sentences, not actual time served) represents almost half of his life.

56. For the purposes of this sub-paragraph (d), I find that the above-tabulated sentencing regimes imposed on the Applicant across the totality of his offending, very strongly militate in favour of a finding that the Applicant's offending has been of an extremely serious nature. To my mind, this finding is only augmented by the reality that the Applicant has managed to compile such a significant number of custodial terms as a relatively young man in his early forties.

57. **Sub-paragraph (e)** of paragraph 13.1.1(1) of the Direction involves an examination of the frequency of a non-citizen's offending and whether there is any detectable trend of increasing seriousness. To my mind, it is self-evident that the task involving the allocation of any weight to this sub-paragraph (e) largely parallels the exercise compelled by the immediately preceding sub-paragraph (d). This is because any increasing trend in the seriousness of the offending is usually analogous to the regime of sentencing imposed for it.

58. Turning firstly to the frequency of the Applicant's offending, I have prepared the following tables demonstrating the frequency of the Applicant's offending in both New Zealand and Australia. These tables are expressed in terms of respective court dates and in terms of actual offence dates.

New Zealand				
First court date	**Last court date**	**Timespan**	**Court date count**	**Frequency (court dates/year)**
21 January 1997	17 April 2002	5 yrs, 3 mo	10	1.91
First offence	**Last offence**	**Timespan**	**Offence Count**	**Frequency (offences/year)**
20 August 1996	30 September 2001	5yrs, 1 mo	20	3.91
Australia				
First court date	**Last court date**	**Timespan**	**Court date count**	**Frequency (court dates/year)**
23 August 2006	29 August 2018	12yrs	12	1.00
First offence	**Last offence**	**Timespan**	**Offence Count**	**Frequency (offences/year)**
21 August 2006	2 November 2016	10yrs, 2mo	21	2.06

59. I should point out that in terms of the offence count for Australia, the absolutely most favourable count for the Applicant was performed. In other words, the above offence count for Australia was carefully prepared to avoid any double counting of (1) *"called up"* prior offences,(2) any appeal hearings results, (3) further court dates attributable to the re-sentencing of called up offences, (4) and the hearings of any further appeal(s).

60. In New Zealand, the Applicant found himself before lawful authority on approximately two occasions per year for the commission of almost four offences per year. In Australia, the Applicant found himself before lawful authority on an average of one occasion per year for the commission of just over two offences per year. On the sheer numbers alone, there can be no finding other than that the totality of this Applicant's offending has been committed on a frequent basis.

61. The next element of this sub-paragraph (e) involves an investigation of whether there is an increasing trend in the seriousness of the offending. Referring firstly to his offending in New Zealand, while it can be said that most, if not all, of that offending was committed during the Applicant's relative youth – that is, between the ages of 17–21 – it would not be safe to use this as a reason against a finding about the increasing trend of the seriousness of his offending in that country. As early as September 1996, the Applicant was convicted for four offences involving *"resist police"* and *"obstruct/hinder police"*. This offending graduated in seriousness to common assault in 1998 that resulted in the imposition of a suspended

custodial term of nine months. There followed six convictions for offences in the realm of illicit drugs ranging from possession of a pipe or utensil for consumption of those drugs, *"POSSESS METHAMPHETAMINE FOR SUPPLY"*, *"DEAL METHAMPHETAMINE"*, together with a further three possession offences relating to methamphetamine and cannabis. It should also be noted that this drug offending committed in 2001 was punished by custodial terms. I find there is a detectable trend of increasing seriousness in the Applicant's New Zealand criminal history.

62. The New Zealand position is largely analogous to what has occurred in Australia, probably to a more extreme extent. The Applicant's offending in Australia commenced with a court date for a traffic offence in August 2006. From then onwards, the offending is instantly *"serious"* rising to *"extremely serious"*. As early as April 2007, the Applicant has respective convictions for *"supply a prohibited drug"* and *"manufacture prohibited drug – commercial quantity"*. This offending involved the imposition of a custodial term of 12 months with a non-parole period of five months. There followed the abovementioned two convictions for *"assault occasioning bodily harm in company of other(s)"* in mid-2009.

63. A crescendo in the seriousness of the offending can be readily seen in the Applicant's respective convictions in 2017 and 2018. At the Darwin Supreme Court in November 2017, the Applicant was convicted of *"Supply a commercial quantity of methamphetamine"* for which a six-year head custodial term was imposed with a non-parole period of three years. In May 2018 at the New South Wales District Court, the Applicant was sentenced to a term of imprisonment of two years, five months and 28 days with a non-parole period of 362 days consequent upon a conviction for *"manufacture prohibited drug >= large commercial quantity"*. This sentence was appealed by the Crown and resulted in an increase to the sentencing regime with a head custodial term of four years and a non-parole period of two years.

64. A unique feature of the Applicant's offending history is that the timing of his offending, particularly from 2010 onwards, is not analogous to the sentencing dates in November 2017, May 2018 and August 2018. In 2010 the Applicant was involved in a criminal enterprise involving the manufacturing of dangerous drugs. That exercise resulted in an explosion at the manufacturing facility or *"lab"* causing the death of one of his co-conspirators. As I understood the material, the prosecuting authorities presented an indictment which included a charge of involuntary manslaughter against the Applicant

arising from the death of his co-conspirator. The court ultimately directed the jury to find the Applicant not guilty on the manslaughter charge because the Crown was unable to identify with certainty exactly what caused the explosion.[30] This entire criminal justice process took from approximately 2010 to 2017–2018. During the intervening period, the Applicant was separately convicted for the *"supply a commercial quantity of methamphetamine"* offence at the Darwin Supreme Court in November 2017.

65. For the remaining *"manufacture prohibited drug – large commercial quantity"* offence, the Applicant was, as outlined above, ultimately sentenced in August 2018 to a head custodial term of four years with a non-parole period of two years for the 2010 offending. To my mind, there is an undeniably increasing trend seriousness evident in the Applicant's offending, especially from 2010 onwards.

66. I am of the view that an application of this sub-paragraph (e) results in an inevitable finding that both the frequency of the Applicant's offending and its increasing seriousness strongly militate in favour of a finding that the totality of the Applicant's offending has been at least of a very serious, more likely extremely serious, nature.

67. **Sub-paragraph (f)** of paragraph 13.1.1(1) of the Direction concerns itself with an examination of the cumulative effect of an Applicant's repeated offending and how such an effect does or does not demonstrate the seriousness of that offending. Several cumulative effects can be gleaned from the Applicant's offending history.

Failure to experience any deterrent effect

68. Even a cursory review of the Applicant's offending history (and the sentences imposed for it) demonstrates the Applicant has failed to experience any measurable deterrent effect. It is very difficult to form any other view when one has regard to the historical sequence of his offending. As mentioned, he arrived in Australia in December 2003. By August 2006, he was convicted for his first offence in Australia. From the very beginning, there is no semblance of him learning any lesson from past offending. He committed offences in New Zealand and relatively soon after arriving here, commenced offending here.

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30 T1, 476–478.

69. There follows at least four sentencing episodes in Australia for the commission of offences as diverse as (1) property offences, (2) drug offences, (3) offences against the lawful authority of police and (4) offences of violence (assault). These sentencing episodes run from April 2007 until June 2009. Yet again, during this initial phase of his offending in Australia, the Applicant failed to be deterred from continuing to offend.

70. Perhaps the most significant phase of his offending in Australia that is demonstrative of a failure to experience any deterrent effect can be seen from 2010 onwards. In 2010, the Applicant was involved in an operation for the manufacture of drugs. This unlawful activity resulted in an explosion in a shed at the rear of a property that had been rented by the Applicant. There is no contest about the purpose of the unlawful activity being the manufacturing of a prohibited drug. Similarly, there is no contest that the Applicant's 23 year old co-offender was severely injured, and died in hospital after his family decided to turn off his life support.[31]

71. The significant points for present purposes are that (1) this drug-manufacturing activity saw the Applicant charged with a range of drug offences plus a charge for manslaughter consequent upon the death of his co-offender and (2) while on bail awaiting trial for these very serious charges, the Applicant then committed some of his most serious offending involving the trafficking of unlawful drugs between New South Wales and the Northern Territory. His role in this trafficking activity was not at a low level or cursory. It is pertinent to have regard to the relevant portion of the sentencing remarks for this offending, which demonstrate (1) the scale of the unlawful activity and (2) the Applicant's role in it. In sentencing the Applicant, His Honour Grant CJ noted the following:

> *"[Applicant], I proceed to sentence in this matter on the basis that you brought the 191 grams of methamphetamine into Darwin and provided it to [Buyer 1] and [Buyer 2]. You either brought it in personally, or you were instrumental in arranging for it to be brought in. [Buyer 1] and [Buyer 2] did not have the money to purchase that quantity of methamphetamine in advance. As they sold the methamphetamine, payments would have been made to a supplier.*
>
> *I find on the basis of the police evidence that the value of the methamphetamine was somewhere between approximately $100,000 and $200,000, depending on the manner and quantities in which it was sold. I also note the police evidence to the effect that methamphetamine fetches a higher price in Darwin than it does in the southern states, and so derives higher profits.*

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31 T1, 473.

Although it is not possible for me to find the precise proportion of profits from that undertaking you were to receive personally, I do find that they were substantial and that they were sufficient to warrant the risks that you were taking by reason of your involvement in that undertaking.

Having said that, I sentence you on the basis that there are no indicia of unexplained wealth or substantial enrichment which would point to substantial profit-making activities at the high level sometimes seen in these courts.

I also find that your involvement in the supply of the 191 grams of methamphetamine to [Buyer 1] and [Buyer 2] involved a degree of premeditation and planning and that your involvement was not limited to that of a courier. So much is apparent from your continuing association and communications with them in that period in the first half of 2015.

You defended the matter to trial and you were found guilty by jury as I have said. In the circumstances, I approach the sentencing process on the basis that you did not accept responsibility for your conduct in this respect and that you do not feel any particular remorse for it."[32]

72. To my mind, a further cumulative effect evident from the Applicant's offending and his failure to experience any deterrent effect from sentences imposed on him can be seen in the evolution of the sentencing regime imposed upon him in 2018. This sentencing regime derives from the abovementioned unlawful drug-manufacturing activity from 2010 which caused an explosion. The Applicant took the resulting two charges to trial. They comprised (1) knowingly taking part in the manufacture of a prohibited drug namely pseudoephedrine not less than the commercial quantity and (2) the manslaughter of the co-offender.

73. The jury was directed to acquit the Applicant of the manslaughter charge.[33] The Applicant was initially sentenced for the manufacturing in May 2018 to a custodial term of two years, five months and 28 days. In 2018, the prosecution successfully appealed that sentence on the basis that it was manifestly inadequate. The Applicant was re-sentenced in August 2018 to a head custodial term of four years with a non-parole period of two years. There can be little to cavil with the suggestion that the varied sentence imposed on the Applicant in August 2018 may very well have been less severe if his preceding criminal history in Australia had been of a less serious nature. It is clear from the sentencing remarks of Judge Maiden SC

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32 T1, pages 57–58.

33 Note: as I understood the material, the case was run on a "dangerous act" manslaughter provision. There was ambiguity about the cause of the explosion. The Crown said that the Court did not need to be satisfied about what the cause of explosion was, it need only decide that there was a dangerous act (drug manufacture) and that an explosion happened. The Applicant's counsel cited High Court authority which suggested that all links in the chain between the unlawful/dangerous act needed to be proven beyond reasonable doubt.

made on 21 May 2018 that the antecedent history of the Applicant's offending history in Australia was taken into account.[34]

Failure to demonstrate respect for lawful authority

74. To an extent analogous with the immediately preceding discussion around a failure to experience a deterrent effect is the reality that the Applicant has failed to demonstrate any measurable respect for the lawful authority governing the Australian community back into which he now seeks re-admission. First, there is little to be said in response to a finding that the Applicant's repeated convictions deriving from repeated challenges to lawful authority are demonstrative of a failure to respect such authority. He has convictions for this type of offending in both New Zealand (April 1997) and Australia (April 2007 and October 2008).

75. Second, perhaps at a more fundamental level, the Applicant's propensity to offend caused him to disrespect the privilege of bail which had been afforded to him after being charged with drug manufacturing and manslaughter consequent upon the explosion at the drug-manufacturing facility in 2010. Not only did he disrespect the privilege of bail, but he further disrespected the laws against supplying illicit drugs that saw him convicted in at the Darwin Supreme Court in November 2017.

Predominant role of offending in the Applicant's life

76. I have earlier recounted number of offences committed by the Applicant, the number of court dates that dealt with that offending, and the cumulative length of head custodial terms imposed for that offending. As mentioned earlier he, is now just under 42 years of age. In New Zealand, across an offending period of about 5 years, he was convicted of approximately 4 offences per year. He arrived in Australia in December 2003. In Australia, for an offending period of approximately 10–11 years, he has been convicted of approximately 2 offences per annum. The totality of his offending has caused judicial sentencing officers to impose head custodial terms in the approximate cumulative term of 20 years. It is not incorrect to suggest that the Applicant's difficulties with law enforcement have come to dominate his life – both in this country and across its entire 40 year lifespan.

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[34] T1, 45.

The Applicant's offending has supplanted his role as a parent and has precluded him from working in his trade

77. Further cumulative effects have resulted from the Applicant's offending. First, his offending and the custodial consequences he has paid for it has, on any reasonable view, severely impacted on his capacity to play a *"hands on"* parenting role to his three children. I will expand on this point later in these reasons. Second, the extent of his difficulties with the criminal law in this country have effectively precluded him from earning his living as a qualified panel beater. In his statutory declaration made on 26 February 2020, the Applicant said:

> *"I am a qualified panel beater. I commenced work as a panel beater when I was 15 years of age. I completed my apprenticeship in New Zealand. When I moved to Australia, I worked as a panel beater for approximately 6 years. I worked for [business name redacted] at [suburb redacted]. I am a hard worker, and if given the chance to be a productive member of the community again, I will not waste that chance."*[35]

Effect of drugs on the Australian community – including the death of his co-manufacturer

78. There can be no challenge to the suggestion that the Applicant will have been aware of concerted government and community-based campaigns against the significant social and economic difficulties arising from illicit drugs. An additional cumulative effect of the Applicant's offending has been previously recognised by this Tribunal and specifically involves the damage caused to the fabric of the Australian community as a result of the trafficking, supply and consumption of illicit drugs. In *SCJD and Minister for Home Affairs* [2018] AATA 4020, albeit in response to a different highly dangerous drug, Senior Member Cameron of this Tribunal noted the following:

> *"The corrupting effect of drug trafficking on the community has many facets. In many instances such as with overdosing on heroin it leads to death. The heroin toll in this country is almost as high as the road toll but rarely rates the same attention. It destroys families. Parent and children relationships frequently cease as a result of a person's drug dependency. There is a massive toll on the nation's mental health system caused by consumption of drugs. Frequently, this leads to the triggering of or early onset of a variety of mental health afflictions. These can include anxiety, psychosis, schizophrenia, bipolar disorders and paranoia. Tragically, drugs are all too frequently trafficked to young people including secondary school pupils. It leads to lives and potential careers being derailed, if not finished. It places demands on hospitals, health care systems, disability support networks and agencies, ambulance services, police, courts and other associated organisations and entities.*

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35 T1, 830–831, [10].

> *In the course of ruining lives drug abuse leads to its victims often having to descend into crimes such as burglary, shoplifting and robbery (amongst others) to support their habit. Innocent people going about their lives can be the subject of robbery and attack by drug affected persons.*
>
> *There is also the organised crime element involved in drug trafficking. The insidious trade of drug trafficking generates vast amounts of cash upon which no tax is paid. This loss of the revenue which is enormous, means that society as a whole is deprived of income that could be provided towards and possibly improve essential public services such as schools, hospitals, police and emergency services."*[36]

79. I am of the view that the learned Senior Member's observations in relation to the effects of heroin on the community are equally applicable to methamphetamine. I am accordingly of the view that the cumulative effects of the nature and extent of the Applicant's repeated offending I have outlined above, both in Australia and New Zealand, attract application of this subparagraph (f) in favour of a finding that the totality of his offending has been of at least a very serious, more likely extremely serious, nature.

80. **Sub-paragraph (g)** of paragraph 13.1.1(1) of the Direction points to an inquiry as to whether a non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending. There seems to be a peculiar anomaly in the material about this specific sub-paragraph (g). The material discloses at least one instance where upon re-entry into Australia, the Applicant failed to disclose his criminal convictions in this country.

81. There is a ready concession appearing in an earlier SFIC filed on behalf of the Applicant:

> *"In completing several Incoming Passenger Cards, it is accepted that the applicant neglected to disclose any prior criminal offending. The applicant has explained that this failure was a result of his being too humiliated and ashamed of his inability to read and write to ask someone for help. He accepts that he should have asked for assistance."*[37]
>
> [Internal citations omitted]

82. The movement records demonstrate the Applicant has entered Australia on four occasions. On each of those occasions, the Applicant had to complete the usual *"Incoming Passenger Card"*. Each of those cards posed the following question ***"If you are not an Australian***

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36 Per Senior Member Cameron, [81]–[83].

37 T1, page 784.

citizen, do you have any criminal conviction/s". On each, the Applicant answered with: *"No"*.

83. During his oral evidence before me, the Applicant readily accepted the answers were incorrect and sought to attribute the incorrect answers to a combination of illiteracy and incorrect guidance provided by a fellow passenger. I have misgivings about the purely subjective nature of that explanation because it is not the subject of any independent evidence about the Applicant's levels of literacy. I also have misgivings about his *"fellow passenger getting the answer wrong"* on the first occasion the Applicant as required to fill out a passenger card. Even if I did accept that contention, I would have further difficulty in accepting his contention that he continued to make the same error into at least three subsequent passenger cards. In the end, the reality is that the Applicant has re-entered Australia four times and on each of those four occasions has incorrectly answered the relevant question about his past criminal convictions.

84. In the circumstances, I allocate a moderate level of weight to this sub-paragraph (g) in favour of a finding that the totality of the Applicant's unlawful conduct to date has been serious.

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

86. **Sub-paragraph (i)** of paragraph 13.1.1(1) of the Direction refers to a non-citizen who has committed a crime while in immigration detention in Australia. I have carefully reviewed the material and cannot locate any records relating to the Applicant's time in immigration detention. Accordingly, there is nothing in the material suggestive of facts or circumstances pointing to the Applicant's commission of a crime *"while in immigration detention"*. This sub-paragraph (i) is not relevant to determination of the instant application.

87. While the material contains no reference to the Applicant committing offences in immigration detention, the material nevertheless contains certain references to other conduct, which, to

my mind, falls within the reference to *"other conduct"* appearing at the **chapeau** to the factors at 13.1.1(1) of the Direction. That introductory paragraph reads as follows:

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

88. First, there is reference in the records summonsed from the NSW Department of Corrective Services dated from September 2007 that indicates the Applicant failed urine drug screen tests that he was required to undertake as a condition of his release:[38]

> *"**OFFENDER NAME: [Applicant]***
>
> *Date: 17 September 2007 […]*
>
> ***Location:** BURWOOD COMMUNITY CORRECTIONS*
>
> ***Text:** Reported as required.*
>
> *discussed urinalysis results with him. Appeared to be surprised that his results came back positive. said that he had not smoked any, however queeried the possibility of him providing a positive result if he has been exposed to the drug via friends."* [39]
>
> [Errors in original]

89. Second, there is a more recent record dating from March 2016 demonstrating the Applicant's *"poor compliance"* with the conditions of a bond. The relevant record in the material summonsed from the NSW Department of Corrective Services says the following:

> *"**OFFENDER NAME: [Applicant]***
>
> *Date: 23/03/2016 […]*
>
> ***Location:** BANKSTOWN COMMUNITY CORRECTIONS*
>
> ***Text:** [Applicant] attended appointment as directed, discussed with [Applicant] that he had been breached due to his poor compliance while at the Sutherland office and his lack of contact, explained to [Applicant] that he had obligations under the bond to attend his appointments and keep in contact with parole."* [40]

90. While I accept that neither of these two incidents resulted in any additional conviction(s) for the Applicant, it is clear that he has a demonstrated record of failing to meet the requirements of orders that have been lawfully imposed on him which require him to either do or refrain from doing a particular thing. Accordingly, I find this *"other conduct"* is captured

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38 See eg, T1, 297.

39 See eg, T1, 297.

40 T1, 312.

by the subject chapeau and moderately favours a finding that the totality of his conduct has been of at least a very serious, more likely extremely serious nature.

91. Having regard to the totality of the evidence to which the abovementioned relevant sub-paragraphs (a), (c), (d), (e), (f), (g), together with the chapeau of paragraph 13.1.1(1) of the Direction are relevant. I am of the view that the Applicant's offending conduct can be readily characterised as at least very serious, more likely extremely serious.

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

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

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

    (ii) paragraph 13.1.2(1)(b) requires me to consider the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen reoffending.

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

93. In the Respondent's SFIC, there is reference to the likely nature of harm that would be occasioned on the Australian community were the Applicant to re-offend:

> *"Taking these in turn, the nature of the harm to the Australian community should the applicant commit similar offending is incredibly serious. The applicant's supply and manufacture of illicit addictive drugs over many years will have contributed to substantial harm to the community both in terms of the mental and physical impacts of the use of such drugs, but also by way of a significant financial cost to the community associated with emergency services and law enforcement activities for drug-related crime."*[41]

94. In the Applicant's SFIC, there is the following concession:

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41 R1, 7, [34].

"It is accepted that if the Applicant were to re-offend, such criminality could cause substantial emotional, financial, and physical harm to the Australian community"[42]

95. To my mind, there are two ways to understand the nature of the harm that would befall the community in the event of this Applicant re-offending. The first way is by having regard to his criminal history. There is no question that were the Applicant to again, for example, (1) find himself in possession of goods suspected of being stolen, (2) directly challenge the lawful authority represented by the police, or (3) enter upon land without lawful excuse, then such conduct would involve adverse outcomes for the Australian community.

96. Second, and more importantly, were the Applicant to again involve himself in the commission of very serious to extremely serious types of offending in the realm of illicit drugs, the impact on the community would be much more severe. The increased severity derives from the fact that not only the consumers/users/addicts of these illicit substances are affected. They obviously are, because they are most the most visible victims. But there are other unseen victims as well. The families and other close connections of those adversely affected by illicit drugs also suffer. They may not suffer in the same immediate physical sense that an addict suffers. However, the adverse effects of a relative's or friend's addiction often results in unexpected and very damaging emotional and financial consequences for those within the orbit of affected addicts. The scourge of illicit drugs has consumed more than its fair share of the community's resources relating to police and law enforcement, the judicial system and the healthcare system.

97. The terms of paragraph 6.3(4) of the Direction have clear application to the instant facts. Were the Applicant's record of criminal offending in the realms of supplying and/or manufacturing illicit drugs to be repeated, the resulting consequences and harm may very well be so serious that any risk of similar conduct in the future is unacceptable. I am of the view (and I find) that reasonably-minded members of the Australian community would regard this Applicant's history of drug offending to be so serious that they would refuse to accept any risk of its re-occurrence.

98. The Applicant speaks of having overcome his predisposition to abuse illicit substances and to consequently offend to a very serious or extremely serious level. He wants to re-configure

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[42] A1, 17, [67].

his life such as to be a responsible father-figure to his three infant children. The difficulty with that contention is twofold. First, the children were born respectively, in December 2013, November 2015, and January 2016. The presence (or imminent presence) of children in his life did not prevent the Applicant from offending and incurring convictions in February 2014,[43] April 2015 (5 convictions – not including a called-up prior offence), and December 2015 (2 traffic offences).

99. Second, and perhaps more significantly – certainly in terms of the risk of him being removed from the Australian community and thus the lives of his three infant children – the Applicant, *"at some time prior to 28 May 2015"*,[44] committed the extremely serious offending of supplying a commercial quantity of methamphetamine for which the Darwin Supreme Court sentenced the Applicant to a head custodial term of 6 years with a non-parole period of 3 years. In neither of these two instances did the presence of infant children in his life deter, dissuade or discourage the Applicant from offending in such an extremely serious way.

100. I find that the Applicant's offending – especially in the realm of the supply and manufacture of illicit drugs – has been so serious that any risk of its re-commission would be unacceptable to the Australian community. Were he to re-offend in a similar way, I am of the view that there is a convincing likelihood that such future offending would result in very significant physical, psychological and/or financial harm to the Australian community including, quite conceivably, to a catastrophic level. The nature of the harm to be occasioned by individuals or the Australian community in the event of similar or identical offending would be very serious, more likely extremely serious.

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

The Applicant's Personal Circumstances Form ("PCF")

101. In his PCF, the Applicant was asked to identify factors that explained the commission of his past offences which he thought should be taken into account in the determination of whether his visa status should be restored to him. His response can be summarised thus:

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43 The offence which was dealt with on this date was actually committed on 25 July 2013 (See T1, 253). The Applicant's first child was born in December of that year. No doubt the mother of that child was pregnant at the time the Applicant was charged with this offence.

44 T1, 56.

> *"Yes. There are many factors which I believe have contributed to my offending behaviour such as chronic exposure to chronic Domestic violence causing severe childhood trauma. My Mother's partners were extremely violent to my siblings and I. My sister and I were often beaten and tortured at the hands of my Mothers many partners and [redacted]. My Mother had many partners after separating from the man I believe was my biological father and we were often exposed to their sexual and violent acts. I believe this trauma and abuse led me to use illicit substances however I now realise this did not help. I am sober and absent from illicit substances and have been for some time – this can be supported by urinalysis results. I also believe my childhood trauma and abuse affected me mentally and although I have never had a formal diagnosis I believe poor mental health is a contributing factor + something I am willing to address"*[45]

102. Also in his PCF, the Applicant spoke of why there is a low likelihood of him offending:

> *"There is absolutely no chance of me re-offending. I am going to gain employment immediately after release, I have gained extra qualifications while incarcerated and I want to be a good father and partner and set a good example for my family so they can be proud of me."*[46]

103. There can be little or no argument about the traumatic nature of the Applicant's early childhood. This element was duly recognised and reported on by each of the three clinicians who have had an involvement in this case. It also seems common ground that the Applicant has resorted to the abuse of illicit substances as a means of numbing the pain of his traumatic childhood. This has seen him commence an involvement with illicit drugs from as early as his teenage years when he started smoking marijuana which then saw him transition to a very destructive dependency on methylamphetamine when he was 19 years of age.

104. Any evidence about the Applicant now representing an *"absolutely no chance"* of re-offending must be received with considerable caution. This is self-reported evidence from the Applicant. While the PCF speaks of him *"going to gain employment immediately after release"*, there is little certainty about the nature of that employment. During his oral evidence, the Applicant spoke of variously taking up employment in traffic controlling-type work with his brother-in-law. There was also reference to him returning to work in his panel beating trade. Then there was reference to the possibility of him doing some kind of online course that would, in turn, give him sufficient qualifications to commence work as a personal

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45 T1, 124.

46 Ibid.

trainer. He also spoke of taking employment in the electrical services industry.[47] None of these alternatives could be said to be concrete options that he will definitely pursue upon a return to the community. These options are largely speculative and aspirational.

The Applicant's SFIC – prior hearing

105. The Applicant's SFIC filed in advance of his previous hearing is dated 24 February 2020. This document was written with the benefit of respective reports from the consultant psychiatrist, Dr Olav Nielssen and the Applicant's social worker Dr Juliet Ardren. In this first SFIC, the Applicant spoke of a *"non-existent"* risk of him re-offending. In the alternative, the Applicant suggested the Tribunal should find the Applicant is at a *"low"* risk of re-offending.

> *"35. The applicant contends that the likelihood of him engaging in further criminal conduct is non-existent. The applicant has expressed an extremely strong desire to remain drug and offending free. On numerous occasions the applicant has said to Ms. Ardren, "I will not give up, no matter what", "I will not relapse, no matter what", and "I have learnt my lessons and want a normal healthy life for my family and myself"*
>
> *36. Should the Tribunal reject this contention, the applicant's risk of re-offending could be characterized as low.*
>
> *(a) The applicant's last criminal offending was in early 2016. It is contended that this was minor offending for which he was convicted, with no other penalty. The last serious criminal offending was in May 2015;*
>
> *(b) The applicant has shown insight into his offending and his drug use. The applicant has taken steps to address his drug use, and has been substance free for approximately 3 ½ years. This is despite the fact that drugs are readily available both in custody and immigration detention. The applicant has completed a number of courses with Ms. Ardren, and has a plan for ongoing counseling and urinalysis with Ms. Ardren should he be released into the community. Even before his engagement with Ms. Ardren, the applicant was taking steps to address his drug use, and participated in a voluntary Alcohol and other Drug Program whilst in custody in the NT;*
>
> *(c) The sentence of imprisonment imposed on the applicant in the NT was the first time he had been sentenced to a term of imprisonment since his children were born. This has had a significant effect upon the applicant, in that he has see what his children have had to go through without him at home, and he realizes what he is missing out on as a father. The applicant has a determination to be a good father to his children, and to be the father that he never had."*[48]
>
> [Errors in original; internal citations omitted]

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47 A2, 5.

48 T1, 784.

106. While I accept the above-quoted portion of commentary is from the Applicant's prior SFIC, little or no credence should be allocated to a contention that this Applicant's risk of recidivism ranges from *"non-existent"* to *"low"*. The risk level of *"non-existent"* is based upon a self-professed desire of the Applicant to remain drug and offending free. It is also based on what he apparently told Ms Ardren in terms of not intending to relapse and to otherwise live a healthy life. The difficulty with that contention is that he has previously completed courses with similar clinical providers in 2015 and 2016,[49] yet continued his involvement with illicit drugs and consequential offending.

107. In relation to the Applicant's alternately contended level of risk (ie *"low"*), regard must be had to the reality that:

- the offending for which the Applicant was convicted through 2015 and 2016 cannot be accepted as *"minor"* offending. His convictions during this period range from *"possess prohibited drug"* to *"possession of equipment for administering prohibited drugs"* to *"enter inclosed [sic] premises not prescribed land without lawful excuse"*. While it can be accepted that these are not the most serious examples of the Applicant's offending, they cannot be construed as *"minor"* offences or misdemeanours;
- in terms of the passage of time since the Applicant's last serious offending, it should be noted that he was first taken into criminal custody for the offending in Darwin in August 2016. The Applicant has, therefore, been effectively removed from the Australian community on a continuous basis for a period approaching five years.

The Applicant's SFIC – this remittal hearing

108. The Applicant's SFIC for the present hearing made reference to the respective opinions of Ms Ardren and a psychologist, Mr Borenstein and contended that those opinions *"are powerful statements of the efforts which the Applicant has made to change his life around and to become seriously abstinent from drugs […]"*[50] Similar to the contentions previously made in the earlier SFIC, the Applicant contends that his period of abstinence from the

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49 T1, 145, 313.

50 A1, 15, [58].

consumption of illicit substances during his time in criminal custody and then immigration detention is *"itself a good predictor of future success"*.

109. I have misgivings about the sustainability of that contention in circumstances where any abstinence now propounded by the Applicant is the result of his forced removal from the community into either prison or immigration detention and not the result of a conscious or voluntary choice made by him. Surely the ultimate predictor of future success in terms of abstinence is the Applicant's capacity to remain drug-free on his own volition in the broader community. His capacity in this regard remains untested. Things do not bode well for him in terms of self-imposed abstinence in the broader community for at least two reasons. First, there is a reference in the material – albeit dating from September 2007[51] – that while the subject of a lawful order previously imposed on him, the Applicant failed a urine test for the detection of illicit substances in his system. Second, by his own evidence, the Applicant has previously had periods of abstinence in the community and yet returned to abusing illicit drugs and offending.

110. The second SFIC also speaks of the Applicant's determination to not return to previous negative influences that have spawned the adverse outcomes arising from his past association with illicit substances. This latter SFIC confirms that upon being paroled and returned to the community, the Applicant's intention is to reside with his sister and to pursue qualifications that will lead to him securing remunerative employment. [52] According to this second SFIC, *"[t]hese representations all bespeak of the chances of the Applicant re-offending being low."*

111. I have misgivings about this contention because it must be tempered against the reality that the Applicant will, upon a return to the community, continue to communicate with his former partner (Partner T) who herself has had issues with illicit substance abuse:

> *"[…] I was previously in a de facto relationship with a female by the name of [Partner T] (see G Docs, 119). Unfortunately, after the negative result in the last Tribunal proceedings, [she] ended our romantic relationship. The stress and unknown of my future were too much to bear for [her].*
>
> *16. Despite the above, [Partner T] and I have remained good friends. We speak almost daily. [She] also resides in Sydney. I consider [her] a strong connection of*

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51 T1, 297.

52 Note: at the hearing, the Applicant indicated that he would no longer be going to stay with his sister. Instead, he will live with her partner: Transcript, 22 February 2021, page 9.

mine. No doubt, if I am removed to New Zealand, [Partner T] will suffer emotional hardship at seeing me deported." [53]

112. The prospect of a future visa cancellation proceeding arising from any further offending is also contended to represent a *"significant deterrent against the Applicant engaging in future criminality […]"* The main point seems to be that the difficulties he has faced with the current attack on his visa status has, in itself, had a deterrent effect on his future risk of recidivism.

113. To properly assess any weight attributable to this contention, it is first necessary to understand the context in which it is made. The Applicant now claims to have experienced some sort of shock or epiphany arising from the reality that his visa may be cancelled if he continues to engage in criminal conduct in Australia or elsewhere.[54] He seems to contend that the lack of any previous formal warning about this possible adverse impact on his visa status will somehow act as a deterrent against future offending. Looking at his history of offending, it is very difficult to discern how any asserted failure by others to warn him about adverse outcomes arising from his sustained unlawful conduct is somehow explanatory of that conduct. The Applicant cannot now be heard to say: *"well if I knew that my continued offending would threaten my visa status to remain here, I would have stopped offending."*

114. The harsh reality to be taken from the Applicant's offending history is that it has resulted in harm and dreadful outcomes for his children and the broader Australian community. His purported attribution of blame for his offending on others apparently failing to warn him about the consequences of his offending is, in and of itself, indicative of a failure to take responsibility for his past offending.

115. The second SFIC purports to dispel the sentencing remarks of Grant CJ who, upon sentencing the Applicant at the Darwin Supreme Court in 2017 said *"I do not consider that at the present time your prospects of rehabilitation could be considered to be particularly good given your prior criminal history and your extended history of drug use."*[55] Those sentencing remarks are sought to be dispelled on the basis that they are, (1) *"now fairly*

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53 A2, pages 3–4, paragraphs [15]–[16].

54 See, eg, T1, 784, [34]; See also, Transcript, 23 February 2021, page 14, lines 45–47; page 15, lines 1–5.

55 T1, page 60.

dated", (2) were made before the Applicant's undertaking of certain rehabilitative courses and (3) him now being confronted with an existential threat to his visa status.

116. A couple of things can be said about this contention. First, Grant CJ's sentencing remarks, while made in November 2017, were made in the context of the material then-available to the court. While the Applicant may have completed certain rehabilitative courses there is no certainty that those courses have or will result in any change in the Applicant's risk profile. This is because his risk profile remains to be tested in the broader community. Second, even if the Applicant did not apprehend an existential threat to his visa status as a result of his offending, he must surely have apprehended a similar existential threat to his capacity to properly care for and parent his children. Clearly, the latter threat had no bearing on his predisposition to commit the offences which post-dated the birth of his first child.

117. In the second SFIC, reference is also made to the sentencing remarks of Judge Maiden SC who sentenced the Applicant in 2018 and who noted that any reliable measure of rehabilitation for this Applicant was dependent upon him engaging with *"[…] considerable professional psychiatric and/or psychological assistance to deal with his mental state and addictions"*.[56] It is now said on behalf of the Applicant that the Tribunal can be satisfied he has reached this threshold because *"[…] the Applicant has engaged in several rehabilitative programs during his time in immigration detention […]"*.

118. The completion of several rehabilitative programs in immigration detention cannot be safely found to comprise the *"considerable professional psychiatric and/or psychological assistance"* stipulated by Judge Maiden SC for the purposes of properly addressing the Applicant's mental state from time to time and the level of his addictions. His Honour was in no doubt that *"[…] because of the 2017 matter there must be some concern that he may reoffend if his mental state becomes one where he does not seek professional advice and resorts to illicit substances."*[57] I have misgivings about whether the courses completed by the Applicant in immigration detention constitute such *"professional assistance"* such as to militate against any risk of the Applicant returning to abusing illicit substances and consequently offending.

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56 T1, page 49.

57 Ibid.

119. The further contention is made in the second SFIC that this Tribunal should safely find that the Applicant has self-regulated his way out of a pattern of abusing illicit substances and that this apparently successful outcome has little or nothing to do with such substances not being available to him in prison or immigration detention. According to the second SFIC, these *"[…] drugs are accessible in prison and immigration detention (often in the context of peer pressure where the Applicant was, and is, surrounded by criminals)."* It is further contended that the Applicant's decision to avoid drugs in prison and immigration is his choice alone.

120. I do not accept that simply because the Applicant has not returned to abusing illegal drugs that may be readily available in the closed confines of prison and/or immigration detention, there can now be a safe finding that his risk of relapsing into illicit drug abuse upon a return to the community is somehow less than it was prior to his removal from the Australian community. The extent to which drugs may or may not be available in prison/immigration detention is not known with any certainty. What is known with certainty is that those are very highly controlled environments that strictly regulate a prisoner/detainee's capacity to get on with their daily lives. Illicit substances only enter the closed confines of prison/immigration detention as contraband. In the broader community, those substances are far more freely available. The Applicant's capacity to resist those substances in the more freely available paradigm of the general community has not been tested since his removal from in it in August 2016.

121. Similarly, the second SFIC contends that the Tribunal should not accept that the Applicant's abstinence is yet to be tested in the general community. According to this second SFIC, this level of testing has already occurred during his time in prison and then immigration detention. According to the SFIC, these are *"institutions where drugs and non-citizens of bad character reside"*. For reasons I have mentioned in the immediately preceding paragraph, this contention should be largely rejected. It is clear from the Applicant's past history of involvement with these illicit substances that he readily associated with persons of bad character who were involved in illicit drug abuse and in committing very serious drug offences involving the supply and manufacture of those drugs.

122. Finally, the second SFIC urges this Tribunal to look beyond any finding that despite the Applicant's completion of courses relating to substance abuse both in Australia and New Zealand, he nevertheless relapsed back into abusing those substances. The reason things

are different now, says the second SFIC, is that the Applicant's circumstances are apparently materially different to those of his past involving as they do, an existential threat to his visa status and his desire to play a greater parental role in the lives of his three children in Australia.

123. I am not certain that the Applicant's circumstances, upon a release into the community, would be *"materially different"* to his circumstances prior to August 2016. The only certain component about his return to the community is that he will find accommodation – most probably on a temporary basis – at the residence of his sister's ex-partner. The Applicant's employment prospects remain aspirational, uncertain, and unfixed. Despite his efforts to re-connect with his children, the stark reality is that all of the children are (or have been) cared for by other people; and all of the children are (or have been, from time to time) the subject of external intervention from governmental authorities who have acted out of concerns for the safety of those children. At the risk of using an unkind phrase for the children, upon any release back into the community, the Applicant will be confronted with the long road of changing the children's status as actual or potential *"wards of the state"* to being re-unified with him as a primary parent.

The Applicant's written evidence

124. The Applicant provided two written statements. They are respectively dated 26 February 2020 and 3 January 2021. The first of his statements was tendered for his earlier hearing before this Tribunal. His second statement was tendered for this hearing. In the second statement, the Applicant confirms he has been in immigration detention from August 2019. The Applicant identifies five principal factors informative of his risk of recidivism:

(a) he has avoided troublesome conduct as a detainee in immigration detention;

(b) he has used his time in immigration detention since the last Tribunal hearing and has developed a focus on *"healing"* his body and continuing on a good path with his life;

(c) he has undertaken several rehabilitation programs during his time in immigration detention. He describes those courses thus:

> *"**Smart recovery program**. In this program, participants talk about their current and/or previous drug addiction, weekly plans, and provide mutual support to reduce the risk of taking drugs again in the future. The program is*

conducted by a lady named [redacted]. I have undertaken this program since about November 2019. I attend weekly on a Wednesday for about 45 minutes to an hour.

***Drug and alcohol counselling**. Independent of the smart recovery program, I have attended an individualised counselling program with [redacted]. In these sessions, I have been taught mechanisms to avoid future abuse of drugs, provided insight into the adverse implications of being involved with drugs, and otherwise have my urine randomly tested (to ensure I am not taking drugs in immigration detention). I undertake this individualised counselling with [redacted] about once a month.*

***Anger management refresher**. I have done a six-week refresher program related to anger management. This program required me to attend a session once a week with a counsellor. I consciously applied myself during the counselling sessions.*

***Online parenting program**. I have been completing an online parenting program. I am currently up to module seven in the program. I have been completing this program for about 11 months. This program aims to provide me with the necessary skills to be the best father to my three children in Australia."*[58]

(d) he has tried to contribute to the cultural fabric of the detention centre acting as *"a representative for non-citizens in immigration detention at DCC Meetings with detention staff"*;[59]

(e) he has undertaken charity work during his time in immigration detention, assisting with the recycling efforts of the facility.[60]

125. The Applicant's conduct in both prison, and, in particular, immigration detention is to be commended. There can be no suggestion that he is a troublesome detainee. His readiness to participate in the fabric of his immediate community in the detention facility is impressive. I accept that little or none of this altruistic behaviour was present in this Applicant at the time of his offending which was focussed on himself, both in terms of (1) satisfying is predilection to abuse illicit substances and (2), for all intents and purposes, earn his living from the drug trade, be it in the manufacture or supply of unlawful drugs. The unknown quantity, of course, is to what extent this Tribunal can now be satisfied that this altruism and community-mindedness will feature in the Applicant's life upon a return to the community.

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58 A2, 2.

59 A2, 8. [8].

60 A2, 8, [9].

The Applicant's oral evidence – in chief

126. During his evidence in chief, the Applicant was not taken through the minutiae of his criminal history. He was, however, asked about his perspective on his history of offending in this country and how he felt about it. He said:

> *"Dr Donnelly: With the benefit of hindsight now, as in 22 February 2021; what's your perspective on your criminal history? How do you feel about your offending?*
>
> *Applicant: I'm deeply sorry to the Australian people for my offending over the years and to all the people that have been affected by my actions and I truly am sorry for the way I've been living my life and to be honest I'm ashamed of myself. Yes, I've been thinking about it while I've been locked up and, yes, I just want to be a better person for my kids and I want them to be proud of me. Yes, I'm really sorry. I truly am sorry."*[61]

127. He was then asked about his efforts to rehabilitate himself. He spoke of his engagement with the social worker, Ms Ardren, during his time in immigration detention. The engagement with Ms Ardren commenced during his time in criminal custody in Darwin and continued after he had been placed in immigration detention in Sydney.

128. The Applicant also spoke about his participation in the abovementioned SMART recovery program and an online parenting program. He made reference to participation in certain meetings run by Alcoholics Anonymous and said the following:

> *"Dr Donnelly: And you said that helped you to change and only you can do that and in fact you have changed; what about these AA meetings?*
>
> *Applicant: It was good. A group would get together and we just talk about our offending and it was good to listen to other people's stories and it was good to share my stories. If someone with my criminal history can change and sit there and explain to people what I've been through and I've changed and, yes, it was good. Yes, I just realised that the life I've been living is ugly and that's not the life I want anymore for my kids and I want to be able to get a job and contribute to the Australian community and be a good member of society for my kids and for myself."*[62]

129. He readily accepted his substantial criminal history and said the following about the impression this Tribunal should now have about his risk of recidivism:

> *"Dr Donnelly: And you said earlier that you had accepted you had a substantive criminal history?*
>
> *Applicant: Yes.*

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61 Transcript, 22 February 2021, page 6, lines 30–37.

62 Transcript, 22 February 2021, page 7, lines 21–30.

Dr Donnelly: With that context in mind, how can the tribunal be sure that you won't reoffend if you're allowed to stay in Australia?

Applicant: Since I've been incarcerated, I've been looking in the mirror. I've been looking at my behaviour. I've been looking at the way I've been living, and it's unacceptable, and like I said before I'm ashamed. I want my kids to be proud of their dad - I want them to look up to me. I don't want to model bad behaviour. And I've been working on myself the whole time. Each day I try and be a better person than I was the last day. Also, I've started going - we do Fellowship in here. I do bible studies. I've really been - I've been doing SMART Recovery, I've been doing the drug and alcohol - I've been talking to [immigration detention counsellor]. And it's just - I'm ready to live a life without drugs, and to be honest I haven't lived a life without drugs so I'm really looking forward to it. My new passion is training hard - I want to be a PT, a personal trainer. That's going to be one of my goals when I get out, to do a six week course and become a personal trainer and just focus on training people. In here, like I said before, I train eight or nine people a day on the weekdays. I really get enjoyment out of helping people. I'm even helping them with their diet. [Redacted], he's in my wing - he's got high cholesterol. I make sure - I go out of my way every day and I do fifteen laps with him, so five laps in the morning, five laps at 11.30, five laps at 6.30. And it just really - to see him start losing weight, and start looking after himself, and try and keep him in a good headspace - it really means a lot to me. And that's the kind of stuff I want to do once I get out.

Dr Donnelly: So you're moving onto the topic of your future plan. So you want to help people?

Applicant: Yes. And I want to be a personal trainer."[63]

The Applicant's oral evidence – cross-examination

130. During cross-examination, the Applicant was asked about his history with illicit substances. It transpired that his involvement with them dates back to his teens:

> *"Ms Prasad:*[64] *Okay, thank you. The next thing I wanted to ask you about is (indistinct words) the tribunal has to consider is your risk of reoffending. Now, from the information that I can see it appears as though you have been using methamphetamine since you were about 15 years old […].*
>
> *Applicant: Yes, I've been smoking ice since I was 19 but I've been using speed before that and before that was pot."*[65]

131. In terms of employment after his return to the Australian community, the Applicant spoke of several options ranging from working in the electrical services industry (with a specialist electrician who deals with traffic lights and roadworks), to returning to work as a panel beater, to becoming a personal trainer:

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63 Transcript, 22 February 2021, page 8, lines 46–47; page 9, lines 1–26.

64 Ms Subasha Prasad, Associate, MinterEllison, legal representative of the Respondent.

65 Transcript, 22 February 2021, page 24, lines 34–42.

"Ms Prasad: Now, if you are to be released from immigration detention I'd be interested to know - you talk about having a job lined up if you are released; can you tell the tribunal about this job?

Applicant: It was at [Applicant's sister's ex-partner's business] - he does traffic lights and roadworks.

Ms Prasad: Yes?

Applicant: Yes, that's an option. Also I'm a qualified panel beater, yes, I might do that but actually my new goal is to become a PT, like I said earlier on, so I think it's a six week course, it costs $2500. Yes, so my goal is to work, get money - just to get money to do that and obviously get money, get a house, yes, do piss tests for DOCS and do what I need to do to see my kids and start getting visits and stuff like that.

Ms Prasad: So when you say you have a job lined up, you have places that you can turn to to find employment, you don't actually have an actual job offer?

Applicant: Well, I had a job offer back at the last AAT hearing. Yes, I'm not sure if it still stands.

Ms Prasad: Okay. So your intention is to resume full time employment?

Applicant: Yes.

Ms Prasad: So you don't have currently an offer for a job?

Applicant: Yes.

Ms Prasad: You did at the time of the last hearing but you're not sure if that job offer remains?

Applicant: Yes, I'm not sure.

Ms Prasad: Okay. You were also hoping to become a personal trainer?

Applicant: Yes.

Ms Prasad: And is that something you're hoping to do while you're working fulltime?

Applicant: Well, I've just started looking into it here. There's a course online here that I could do but it's only recognised in America but I was going to start doing it anyway just to get the knowledge about the different names of the muscles and stuff like that but, yes, it's (indistinct words) just to get fulltime work and eventually become a PT."[66]

[Errors in original]

132. In terms of ongoing treatment, counselling and other support, the Applicant will access or proposes to access upon his release, he spoke of trying to maintain contact with Ms Ardren and of possibly doing another parenting course together with courses relating to moderating his propensity to abuse alcohol and illicit substances:

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66 Transcript, 22 February 2021, page 25, lines 7–38.

"Ms Prasad: All right. And on the last occasion before the tribunal you called Ms Juliette Ardern [sic] to give evidence on your behalf and she's filed some letters about you and the progress that you've made?

Applicant: Yes.

Ms Prasad: Are you still in contact with Ms Ardern [sic]?

Applicant: Yes, I am but [(the Applicant explained Ms Ardren was prevented from attending the hearing before me because of a personal matter)]

Ms Prasad: Okay. So if you are to be released into the Australian community; would you be turning to her for support?

Applicant: Yes, I would be but again if her health is not good then I'll seek support somewhere else.

Ms Prasad: Okay?

Applicant: But the plan is to carry on too, yes.

Ms Prasad: And if you were to carry on with her and she was able to assist you; do you know what that support would look like?

Applicant: It would probably be weekly or maybe every two weeks, I'm not sure, but it would be just going to have one on ones with her.

Ms Prasad: Okay. And is that the only type of support you would be accessing if you are released into the community?

Applicant: No, I want to do another parenting course but one where I actually go to talk to someone because I'm better when I'm talking to someone and they're explaining things and obviously, you know, I can practice the tasks that they give you with the kids in practical terms not just over the phone. So, yes, my goal is to do another parenting course. I would do drug and alcohol probably with Juliette and other stuff. What else? And I've asked Amy to court order me urines every week so they can start processing my paperwork to get custody of S XSLJ, that's what we talked about the other day but she explained to me that it's going to take some time and I understood that. Yes, so I'll be doing stuff like that as well. And to be honest I'm willing to do anything that doctors want me to do to help me be a better person and be a better parent and to help me get the kids back."[67]

133. The Applicant was taken to portions of Dr Niellsen's report from 14 March 2018 and, in particular, to the two following paragraphs:

> *"The diagnosis of depressive illness is made on the basis of [the Applicant's] previous account of symptoms of depression, including insomnia, lack of energy and motivation, anxiety symptoms and negative ruminations. However, that condition also appeared to be in remission on the basis of [his] presentation during the recent interview, when his mood was assessed to be appropriate to his circumstances and he did not appear pervasively depressed.*
>
> *[…]*

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[67] Transcript, 22 February 2021, page 26, lines 27–47; page 27, lines 1–13.

> *[The Applicant] was thought to be likely to benefit from ongoing counselling for substance use, given the history of long term abstinence and relapse, and the complications of past relapses. He is also at increased risk of developing depression, and may require treatment for depression in future."*[68]

134. The Applicant was then asked about any measures he had in place, or intended to put in place, given the fact that he had, in the past, resorted to abusing methamphetamine as a means of dealing with the traumatic effects of his childhood and adolescence. The following transpired during cross-examination:

> *"Ms Prasad: So the reason that I'm asking about whether you would do anything for treatment of depression or to assist you in managing that is because Dr Nielsen has said that you are at increased risk of developing depression. So he wasn't saying that you had it when he assessed you but he's saying that you are at an increased risk and in the evidence which is before the tribunal you have talked about using methamphetamines in the past to sort of numb feelings of your childhood and your adolescence?*
>
> *Applicant: Yes.*
>
> *Ms Prasad: So I think it would be important to tell the tribunal what you think you will do or what you plan to do to I guess assist you if you develop depression or you're feeling a bit low; what do you intend to do about that?*
>
> *Applicant: Yes, I don't think that it's a problem to be honest. I've been here 18 months, I'm out the door of my unit at a quarter past eight every day for the last 18 months. Just being active and keeping busy and talking to my kids and just having faith that I'll get back to them - yes, depression I don't think is a problem.*
>
> *Ms Prasad: Okay?*
>
> *Applicant: But if it was to a problem I'd definitely reach out and talk with [Ms Ardren] but, yes, I really don't think it's a problem."*[69]

135. It is, to my mind, a matter of concern that the Applicant addresses Dr Nielssen's observation that the Applicant may be at increased risk of developing depression simply on the basis that he does not think *"that it's a problem to be honest"*. With due respect to the Applicant, this is not necessarily an analysis that can be safely made by him alone. His difficulties with illicit substances across a long period of time and its causative effects behind his very significant offending history, to my mind, mandate that he must engage in an on-going regime of psychological/psychiatric review such that he satisfactorily deals with the emotional pain arising from his childhood trauma. It is equally a matter of concern (for the purposes of his risk of recidivism) that if he alone thinks his psychological symptoms are

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68 T1, 848.

69 Transcript, 22 February 2021, page 28, lines 30–47.

causing him difficulty, only then will he *"reach out and talk with [Ms Ardren]"*. This self-regulation of his symptomatology does not bode well for his risk of recidivism.

136. The Applicant acknowledged that he would face new pressures if returned to the community involving the all-too-familiar issues of sourcing an income, finding accommodation, and adjusting to life outside the closed and strictly regulated confines of prison and/or immigration detention. His evidence during cross-examination was that he didn't think this presented any challenge to him that he could not satisfactorily deal with:

> *"Ms Prasad: I guess on that note, XSLJ, you talk about currently you don't perceive yourself to have depression or any symptoms of that but if you are to be released and you're released into the Australian community it's going to be different, the stresses that you are going to face are going to be different to what you have now. You'll need to source an income, you'll need to find accommodation, so while you may not feel that you have those issues what I'm suggesting to you is that if you are to be released into the community, that's a very different environment. There'll be lots of pressures that you haven't faced for the last four years and eight months since you've been first incarcerated in August 2018. What do you propose to do if you're released into the community - sorry, I'll start again, XSLJ. Just bear with me for a moment?*
>
> *Applicant: Well, I'm lucky enough to have a place to go to live. Obviously straight away I wouldn't have to pay rent but I'm not one to sit around and do nothing. My main goal is to not only to pay rent but to save up money to get my own place so I can facilitate visits with S XSLJ, T XSLJ and C XSLJ. I'm a very hard worker and I love working to be honest and so I'm looking forward to getting a job. These stresses I understand, yes, you're right about there being different stresses, I fully agree, but like I said before I'm lucky to have a place to go that's not immediately asking me for money to live so I think the stress would be manageable especially with Juliette there, [redacted], and just being able to see my kids more often. Yes, and like I said I want money to be able to take them to fun parks, to buy them ice-creams, to just be a good dad. So I don't see the different circumstances being a problem."*[70]

137. Finally, the Applicant was asked about his employment history in Australia, in particular since 2010. He said the following:

> *"Ms Prasad: Okay. You just talked about loving work. I just wanted to ask you, XSLJ, when was the last time you were employed?*
>
> *Applicant: Just before I got burnt I was doing part time work for a guy called [redacted] at [business redacted] and before that I was at [business redacted], I've got a reference from him. I worked for him for a period of time and then went to gaol and then he paid my bail, got me out of gaol and I worked for him for another three years. The reason I haven't worked after that in the meantime is because of my skin*

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[70] Transcript, 22 February 2021, page 29, lines 1–24.

being tight and, yes, because I'm 80 per cent burnt that's why I haven't worked previously.

Ms Prasad: So just to clarify: you haven't worked since 2010?

Applicant: Yes."[71]

138. There followed several questions from me about the Applicant's risk of recidivism. I was particularly interested in two aspects of his evidence. First, the increasing level of seriousness of the Applicant's offending, particularly since the incident involving the explosion. Second, the reality that despite the arrival of three children, the Applicant's offending did not abate. The Applicant responded thus:

"Senior Member: Now, we don't have time, and it would be inconvenient I suppose to do that, but Ms Prasad has tried to do it and of course Dr Donnelly has quite rightly referred to it but before we were to talk about risk, what it would be convenient to do is to read through your history and just to read it like a timeline and to see how it's gone and every time we get to a date or a marker just sort of pull over a little bit and then have a look at the factual circumstances of what happened at each of those markers, or some of those markers, and what I'm suggesting to you is when you look at that offending history it's difficult to find some kind of reality that when bad things happen to you because of your offending for some reason it doesn't put you off doing it again."[72]

[…]

Now, the really worrying one is when the cook was happening back in 2010, and as we hear from offending involving the cooking of methamphetamine […]

A very bad thing happened. Your friend, [redacted], was killed […]. It wouldn't have been something that would have shocked you and taken you by surprise because as you said earlier today, in your very frank evidence, you knew what was going on and fair enough. But the troubling part of that is that not even that was enough to put you off going back and reoffending, that's one example.

[…]

The second example is when you overlay the arrival of your children, your three children, over your offending pattern it's very hard to see how the arrival of three children, that desperately need you obviously, has put you off further offending. So again what I've got to do in this decision-making process is listen to all of this that you've got to say, read all of this that I've been given to read, listen to the very capable submissions of these very capable lawyers, and somehow get to a point where I'm convinced that you're not at risk of reoffending; do you understand the difficulty I've got there?

Applicant: Yes, it just cut out but this time I've been clear for four years eight months, I've never been clean that long. I'm in Darwin with no family support. I hit rock bottom. It was when I was at court (indistinct words) going up to the court and I was

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71 Transcript, 22 February 2021, page 29, lines 26–36.

72 Transcript, 22 February 2021, page 37, lines 37–47.

> *at lunch this was when it hit me. I was listening to all the evidence going on in the court, we went down for lunch and I was just thinking and that's when the pin dropped that I don't want this life anymore and with all the one on one counselling, that's when I said before, I only can change the rest of my life, like, I can't change the past but I am deeply sorry for the past and my behaviour to the Australian community and everyone that's been affected, I truly am, but I really have changed and I have never been clean for this long and I had a friend I knew, [whose] Mum rang me, and she's pregnant with a baby and she's still taking drugs. She wanted me to talk to her. I talked to her. But as I explained to my mum I can say, 'Please give up. Don't do it, do it for the baby' and say everything that I know but at the end of the day it's up to her whether she wants to change her life and what I'm trying to say is I'm at this point and I can't believe with my criminal history and the way I used to be that I'm this person that I am today and as much as it's hurting me being away from my kids this whole time I wouldn't change it for the world because it's changed the person that I am now. If I didn't come to gaol I wouldn't be where I am today."*[73]

The expert evidence

139. There is evidence from three experts in the material. The first of those is Ms Juliet Ardren. Ms Ardren describes herself as a *"Social worker and alcohol and other drugs specialist"*. She has provided three reports. They respectively date from 16 May 2018, 25 February 2020, and 26 February 2020. I will address each in turn with specific reference to the Applicant's risk of recidivism.

140. In the 16 May 2018 report, Ms Ardren said the following about the requirements necessary for the Applicant to *"continue developing the attitude and skills to avoid crime, substance misuse, and live a productive live in the community"*:

> *"[The Applicant] has currently served 19 months. However, it needs to be included that on release [he] already has a job lined up (Corroborated by attached support letter). Also, that he will see me twice weekly for counselling. I will be taking [him] through circle of security and the PPP program, which I am a facilitator in. He will undergo weekly urinalysis & receive the counselling needed to address the underlining issues that fuelled his substance use. This will continue to support and enable [him] to receive the supports he needs to continue developing the attitude and skills to avoid crime, substance misuse and live a productive life in the community."*[74]

141. In the 25 February 2020 report, Ms Ardren recapitulates many of her earlier observations and says *"[f]rom all observations, [the Applicant] is making every effort to rehabilitate himself, having maintained total abstinence for a period of three years seven months."* Her

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73 Transcript, 22 February 2021, page 38, lines 1–12.

74 T1, 140.

report suggests the following elements must be in place for the Applicant to avoid re-offending:

> *"If [the Applicant] is granted permission to remain in Australia which [he] calls his home, having lived in Australia for over seventeen years, under my supervision, or with referral to the most appropriate professional [he] will undergo twice weekly urinalysis, twice weekly counselling sessions and continue on with SMART Recovery which [he] has been attending on a regular basis at Villawood. This will continue to support and enable [him] to receive the supports he needs to continue developing the attitude and skills to avoid crime, substance misuse and live a productive life in the community."*[75]

142. In the 26 February 2020 report, Ms Ardren confirmed that she had been seeing the Applicant for twice-weekly counselling sessions since May 2018. She was of the view that the Applicant *"[…] has maintained complete abstinence from all substances for the past three and a half years."* She recounted the various programs completed by the Applicant during his time in either or both criminal custody and/or immigration detention. She reached the following conclusion about the Applicant's risk of recidivism:

> *"17. [The Applicant] has told me that he wants to completely change his life, and in my opinion, he has already done this. [He] has stopped all contact with any old associates, and he takes full responsibility for his offending, and displays an incredibly honest portrayal of his history. [He] has remained abstinent whilst incarcerated and feels like a different person carrying for his health, fitness and overall well-being.*
>
> *[…]*
>
> *19. I believe that [the Applicant] has excellent prospects of rehabilitating himself, and that there is a very low risk that he will re-offend in any way."*[76]

143. It is notable that neither party to this proceeding called Ms Ardren to give oral evidence. I am mindful of two things. First, the Applicant's evidence that due to certain personal circumstances, Ms Ardren was not in a position to be called.[77] Second, while the Applicant did make reference to Ms Ardren in his evidence, no component of the transcript of Ms Ardren's evidence at the first hearing of this matter was put to the Applicant or to any other witness for the purposes of the instant hearing. To the best of my recollection, the Applicant did not place any reliance on the transcribed oral evidence of Ms Ardren from the previous hearing.

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75 T1, 857.

76 T1, 851–852.

77 See Transcript, 22 February 2021, page 26, lines 32–34.

144. Be all of this as it may, the neither the written nor previously transcribed oral evidence of Ms Ardren was tested at the hearing before me, and, accordingly, only minimal weight can be safely afforded to it.

145. The second of the experts is Mr Sam Borenstein, clinical psychologist. His report is dated 13 March 2020 and was obviously prepared in advance of the hearing of this matter at first instance.[78] I also note from a copy of the transcript of the first instance hearing that Mr Borenstein also gave oral evidence. Mr Boreinstein conducted an assessment interview with the Applicant by way of audiovisual link on 2 March 2020. Preparation of his written report followed.

146. Mr Borenstein summarised the Applicant's history and made a relatively detailed analysis of the Applicant's background. He also conducted an interview with one of the Applicant's former partners (and mother of the two eldest children), Partner T on 12 March 2020. Mr Borenstein's report contains considerable detail about both the background of Partner T and the history of her relationship with the Applicant. In terms of Partner T's future plans with the Applicant, Mr Borenstein noted the following:

> *"I asked [Partner T] about her future plans. [Partner T] says she is a devoted mother, and she plans to complete her Community Welfare course at TAFE, and "not project too much into the future, and to be definitely with [Applicant] and be a family".*
>
> *I asked [Partner T] whether she would contemplate relocating to New Zealand, and she replied, "it would be too stressful for me and the children. We' re settled here, and we've got a good routine. I have a house through the Department of Housing, it would be too traumatic to move". [Partner T] can foresee a happy, stable and connected family unit which represents priority and sole motivation for both her and her de facto partner, [Applicant]."*[79]

147. In terms of an *"Opinion and Conclusion"*, Mr Borenstein reviewed the previous reports and findings of the psychologist, Mr Phil Gorrell, which dates from 18 April 2009 and the respective earlier reports of Ms Ardren from 16 May 2018 and 26 September 2019. Mr Borenstein also took into account the sentencing remarks of Grant CJ when sentencing the Applicant in 2017, particularly His Honour's remark that the Applicant would not be a good prospect for rehabilitation given his prior criminal history and drug use. Mr Borenstein also took into account the sentencing remarks Judge Maiden SC made when sentencing the

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78 T1, 861–873.

79 T1, 869–870.

Applicant in May 2018 wherein His Honour said the Applicant's risk of re-offending was linked to his ability to remain engaged with professional psychiatric or psychological assistance to deal with his mental state and addictions.[80] There is no comment or finding by Mr Borenstein about whether the Applicant's participation in or completion of any or all of the *"smart recovery program"*, *"drug and alcohol counselling"*, *"anger management refresher"*, and *"online parenting program"* reach the threshold of professional psychiatric or psychological assistance contemplated by Judge Maiden SC.

148. Mr Borenstein seemed to predicate his findings about the Applicant's risk of recidivism primarily on the length of time the Applicant had abstained from consuming illicit substances:

> *"The best predictor for relapse is the length of time of abstinence. [The Applicant] has abstained from all drugs for a period of at least three years and seven months, due to incarceration. [He] highlights the fact there are drugs available in prison, and more again in the Villawood Detention Centre, where he is currently held, which are freely available to him if he had shown any tendency to relapse."*[81]

149. Mr Borenstein noted that the Applicant *"[…] has responded very favourably to rehabilitation in ways that attracted the attention of two Judges in separate sentencing remarks, and given the history of extensive drug usage is regarded as not common, but possible."*[82] In terms of a concluded opinion, Mr Borenstein thought the risk of the Applicant resuming his connection to illicit drugs and consequently re-offending to be *"extremely low"*:

> *"In summary, there are many positive elements to [the Applicant's] personal history and clinical profile. He provided protection for others which included his younger sister and de facto partner, [Partner T]. [The Applicant] states he has had time to reflect on his past, and in particular the role of illicit drugs, as he attempted to ameliorate psychological pain and suppress past traumas. [The Applicant] has responded very favourably to psychological intervention and drug and alcohol rehabilitation, and given he has successfully abstained for three years and seven months, and demonstrates positive and effective lifestyle changes, I believe the risk of him returning to drugs and reoffending is extremely low."*[83]

150. Mr Borenstein was not called to give oral evidence at the instant hearing. Accordingly, the Respondent did not have the opportunity to test his evidence. There is no suggestion, as

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80 T1, 871.

81 T1, 871.

82 Ibid.

83 T1, 873.

was the case with Ms Ardren, that external circumstances prevented Mr Borenstein from giving oral evidence at the instant hearing. Further, while reference is made to Mr Borenstein's findings in the course of the Applicant's oral evidence and during oral submissions, no portion of the transcript referable to Mr Borenstein's evidence at the first hearing was put to the Applicant or any other witness for the purposes of the hearing before me. As was the case with Ms Ardren, the Applicant did not, for the purposes of this hearing, place any reliance on the transcribed evidence of Mr Borenstein.

151. Neither the written nor previously transcribed oral evidence of Mr Borenstein was tested in oral evidence at the hearing before me, and, accordingly, only minimal weight can be safely afforded to it. The further point to note about Mr Borenstein's report is that it dates from March 2020 and was predicated on the Applicant's circumstances that applied in March 2020. Where and with whom the Applicant will reside upon release into the community is different now to what it was at the time of Mr Borenstein's examination and report. Similarly, there is no reference in Mr Borenstein's report about the Applicant's employment prospects. His report goes no higher than to say his *"sister resides in Australia, who has stated she will provide her brother with support, which includes assisting him with employment."*[84]

152. The third of the experts is Dr Olav Nielssen, psychiatrist. His two reports are respectively dated 23 November 2014 and 14 March 2018. Both reports appear to have been prepared during the lengthy pending period between the Applicant being initially charged with manslaughter and drug offences arising from the explosion in 2010 and finalisation of those charges.

153. In the first of his reports, Dr Nielssen confirms that he interviewed the Applicant in October 2014. He summarised the Applicant's psychiatric, medical and substance abuse histories. Dr Nielssen made the respective diagnoses of (1) substance use disorder and (2) depressive illness.[85] With reference to the former diagnosis, Dr Nielssen said:

> *"The diagnosis of substance use disorder is made on [the Applicant's] account of regular use of drugs that have harmful effects on psychological function and on social performance, and the complications of drug use, including the role of drugs in triggering depression and in these offences."*[86]

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84 T1, 872.

85 T1, 841.

86 T1, 841.

154. With reference to the diagnosis of depressive illness, Dr Nielssen noted:

> *"The diagnosis of depressive illness is made on the basis of [the Applicant's] account of experiencing symptoms of depression, including insomnia, lack of energy and motivation, anxiety symptoms and negative ruminations. [His] mood appeared moderately depressed at the time of the recent interview."*[87]

155. While it can be accepted that Dr Nielssen's first report is now almost seven years old, it is pertinent to refer to his findings about the level of intervention the Applicant had, at that time, sought for his symptomatology:

> *"[The Applicant] has not sought treatment for depression with either counselling or antidepressant medication. There was no mention of psychological intervention in the summary of his treatment. He may derive some benefit from either counselling or treatment with antidepressant medication. He is also likely to benefit from ongoing counselling for substance use, and monitoring of his abstinence from drug use."*[88]

156. Dr Nielssen's March 2018 report arose from his review of the Applicant conducted via an interview (by audiovisual link) held on 13 March 2018. The purpose of the further report *"was to enable Dr Niellsen to prepare a psychiatric report at the request of his legal representative for use in his sentencing proceedings"*.[89] Again, Dr Nielssen summarised the Applicant's general history, psychiatric history, medical history, and substance abuse history. After conducting a mental state examination, Dr Nielssen reached the following psychiatric diagnoses:

- Substance use disorder, in remission;
- Depressive illness, also in remission.

157. With reference to the former diagnosis, Dr Nielssen opined that: *"[h]is substance use disorder was described as being in remission, on the basis of his long term detention in a relatively drug free environment, and his reported change in attitude towards drug use."*[90] With reference to the second diagnosis, Dr Nielssen opined: *"that condition also appeared to be in remission on the basis of [the Applicant's] presentation during the recent interview,*

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87 Ibid.

88 Ibid, 841–842.

89 T1, 843.

90 T1, 848.

when his mood was assessed to be appropriate to his circumstances and he did not appear pervasively depressed."[91]

158. With reference to the Applicant's future predisposition towards becoming depressed, Dr Nielssen opined thus:

> *"**[The Applicant] carries an increased risk of becoming depressed, on the basis of what might be an inherited vulnerability to develop depression, the effects of neglect and abuse in childhood**, the psychological effect of disfiguring burns, the death of his close friend, the predictable effect of his use of methamphetamine, and **the stresses relating to his concern about the welfare of his children** and the possibility of extradition [sic] at the end of his sentence."*[92]
>
> [My underlining and emphasis]

159. It appears that Dr Nielssen sought to condition his findings on the basis of the Applicant engaging in ongoing counselling for substance abuse. He said the following in this regard:

> *"[The Applicant] was thought to be likely to benefit from ongoing counselling for substance use, given the history of long term abstinence and relapse, and the complications of past relapses. He is also at increased risk of developing depression, and may require treatment for depression in future."*[93]

160. Several things can be said about the opinions of Dr Nielssen. First, both of his reports are now aged. The first is almost seven years old, and the second is three years old. Those reports were drafted in accordance with Dr Nielssen's observations of the Applicant at those respective times. Second, Dr Nielssen was not called to give evidence at the instant hearing and, as best as I understand the transcript from the previous Tribunal hearing, he did not give oral evidence at that hearing either. Accordingly, the Respondent was denied the opportunity (at both hearings) to test the written evidence of Dr Nielssen.

161. Third, to my mind, the primary determinant about any weight allocable to the albeit aged and untested opinions of Dr Nielssen is to understand the extent to which the Applicant's proposed ongoing counsellor-client engagement with Ms Ardren and his completion of the several courses he has done in immigration detention meets the threshold of Dr Nielssen's

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91 Ibid.

92 Ibid.

93 Ibid.

stipulation that there be *"ongoing counselling for substance use, given the history of long term abstinence and relapse, and the complications of past relapses."*[94]

162. The further determining factor about the extent of weight allocable to Dr Nielssen's assessment that the Applicant's two diagnosed conditions remain *"in remission"* is whether the extent of the Applicant's ongoing engagement with any rehabilitative process is sufficient to militate against Dr Nielssen's assessment that the Applicant *"[…] is also at increased risk of developing depression, and may require treatment for depression in future."* Allied to these observations are my earlier misgivings about the extent to which the Applicant's self-diagnosis or analysis about the state of his depressive symptoms can now be safely relied upon as a protective factor against the risk of a depressive episode(s) causing him to return to an abuse of illicit drugs.

Other witnesses – Mr S L

163. Mr S L is Partner R's father. Partner R is the mother of the youngest of the three biological children of the Applicant, Child S. Mr S L provided both written and oral evidence for the instant hearing. In his statement dated 4 January 2021, from the specific perspective of the Applicant's rehabilitation, Mr S L made the following observations:

> *"It must be noted that whilst he was last incarcerated, [the Applicant] passed every random drug test he was subjected to and willingly participated in drug counselling courses in a serious and unwavering commitment to recover from drug addiction. [He] has also completed anger management and self-improvement courses as part of his recovery program.*
>
> *[The Applicant] has used physical fitness as part of his strategy for continued sobriety and now regards being fit, healthy and drug free as his normal state of being. Helping other detainees do physical fitness training is [his] way of surrounding himself with positive people and helps keep his goal of being a personal trainer firmly in sight. And more to the point, it keeps people he does not want to associate with out of his way.*
>
> *Taking into account the above information, [the Applicant] is now a confirmed recovered addict with time (period without relapse), knowledge (understanding of addiction and behaviour), personal honesty (what living with sobriety requires), self-love (forgiveness and acceptance) and purpose (the motivation to raise his children to be decent and upstanding citizens) on his side."*[95]

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94 T1, 848.

95 A14.

164. In his oral evidence in chief, Mr S L confirmed the contents of his abovementioned written statement to be true and correct. He was specifically asked about the Applicant's risk of re-offending and said the following:

> *"Dr Donnelly: Thank you. Given XSLJ's criminal history in Australia?*
>
> *Mr S L: Yes.*
>
> *Dr Donnelly: Why do you say that he will not reoffend and be, as you say, an upstanding member of the Australian community?*
>
> *Mr S L: Because XSLJ doesn't like who he was back then. He doesn't like the person he was prior to when he went into gaol the last time. He understood from the last time he was allowed to read some of the transcripts from the New South Wales police whilst he was incarcerated in Darwin and he understood that people who he thought were friends were actually informing on him behind his back and he came to the realisation that there are no friends in crime, that he in fact had no real friends there and the result of the whole thing was that he was apart from his children and due to his own upbringing in New Zealand he could see that it was quite likely that his children were going to go the same way as he was and he just looked at his life, he looked at himself, he evaluated what he wanted out of life and he evaluated what he really wanted for his children and he found purpose in that. In detention he does fitness, or personal training I should say, and has that service for a couple of other people in there and he's just turned into this person who accepts his part, he accepts that he's the only one that can change that and I just respect him so much for the personal honesty he's displayed in understanding that and turning it around. So in my discussions with him he wants to actually become a personal trainer or fitness consultant at some stage in the future but immediately if he's released from detention he does have work with his brother-in-law, [redacted], working on a road thing. You know, he'll need to assimilate back into the community and things but the one thing that I can understand about XSLJ is that he just does not want to go back to where he was in life and he doesn't want to let his children down. He wants to be there to guide them and they will need that guidance so, I mean, I talk to my son, [redacted], about drinking, about alcoholism and, you know, I have to take what he says, whether he's drinking or not, I have to take a 50/50 on that whereas I talk to XSLJ and I know 100 per cent the conviction he has behind his words and what he wants to do and his absolute commitment to making sure that his children don't end up going down the wrong path in life as he did."*[96]

165. During cross-examination, Mr S L was asked about his opinion that the Applicant has good prospects of rehabilitation. He responded thus:

> *"Ms Prasad: Okay. You spoke earlier about XSLJ having good prospects of rehabilitation and that he's changed?*
>
> *Mr S L: Yes.*
>
> *Ms Prasad: Why do you say that? For example, do you have any qualifications that would be relevant to rehabilitation?*

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[96] Transcript, 22 February 2021, page 43, lines 35–47; page 44, lines 1–20.

Mr S L: Yes, I'm a recovered alcoholic of 28 years. I initially used to attend Alcoholics Anonymous for a couple of years when I first stopped drinking. I don't feel the need to do that anymore although I understand - you know, my wife drinks alcohol. It still says hello to me from the refrigerator but I'm able to say, 'No, I don't want that sort of thing in my life. I don't want that sort of lifestyle' and I can see that XSLJ has a lot of the same attitudes that I had to develop and understand to be successful in keeping myself off alcohol.

Ms Prasad: But you don't have any formal qualification?

Mr S L: I reiterate I am a recovered alcoholic of 28 years. My experience at abstaining from alcohol is a formal qualification if you ever want one. You know, what more can I say to you? I have dealt with my problems and I am able to recognise when other people are dealing with their problems or are not honestly dealing with their problems. As in the case of my son, [redacted], he's an alcoholic, he doesn't like the idea, I don't think he's successfully dealing with it at the moment, he's trying on and off, compared to XSLJ who is successfully dealing with his addiction problems. So whilst I may not have a formal qualification I would argue to you that 28 years as a recovered alcoholic is a pretty good indicator of whether someone understands addiction or not and whether someone can successfully deal with it and whether someone can successfully recognise the attributes in someone else required to deal with those issues."[97]

166. There followed some questions from me with specific reference to Mr S L's capacity to make an assessment of the Applicant's level of rehabilitation and consequential risk of recidivism given that his evidence in this regard appeared to be based solely on his own experiences as a recovering alcoholic:

"Senior Member: So your understanding of his offending is based primarily upon what he's told you, what you've read in the newspaper or other media coverage of the offending and whatever conclusions you have reached as a result of your own life experience they're the three main grounds upon which you've formed a view about his criminal history and his pattern of offending and reoffending; that would be right, wouldn't it?

Mr S L: Well, I actually have read some of the decisions and that that have been made and I have read some of the professional opinions of people who have been tasked with interviewing him and - - -

Senior Member: Which professional people are they?

Mr S L: And, you know, I understand that he's - - -

Senior Member: Which professional people are they?

Mr S L: Well, if you give me half a minute I can find some of those - I've got some affidavits here of the - hang on.

Senior Member: Well, to save you looking them up?

Mr S L: Yes.

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97 Transcript, 22 February 2021, page 45, lines 44–45; page 46, lines 1–23.

Senior Member: The tribunal understands your evidence that you say that you've read at least some medical or medicolegal reports from experts that have looked into XSLJ's symptoms from the past?

Mr S L: That's correct.

Senior Member: But I think the unavoidable reality for that part of your evidence is surely this, isn't it, and that is that your capacity or experience to give that kind of clinical evidence or clinical evidence relating to rehabilitation, that evidence and your capacity to give it is limited to your experience of what you've learnt as a result of the treatment administered upon you and not from treatment that you're qualified to administer to others; would that be a fair characterisation of your evidence about rehabilitation?

Mr S L: No, sir, that wouldn't be a fair characterisation at all. Okay, so a person, for example, can have a degree. They can be 23 years old and have a Social Services degree; does that qualify them to make decisions about other people's lives or in essence do they need 10 or 15 years lived experience to be able to properly understand through experience the decisions they're making and what's best for the people around them. So whilst people might put, 'Are you a qualified person?' I'm saying I have the life experience and that's what we ask of parents, life experience. You know, you're not qualified to be a parent, you become one because you have a child. So what I am saying to you, sir, is I have lived experience of people who are able to put their lives back together and understanding of the attitudes. I have experience of the attitudes that people must adopt to successfully put their lives back together. Now, you can I'm not qualified but I can say to you, sir, I have lived experience, I understand when people are not just saying the right words but doing the right things because I - do you understand that?

Senior Member: So the - - - ?

Mr S L: Because, I mean, you know, you can have a lawyer - - -

Senior Member: Yes. The high point of your evidence about the applicant's rehabilitation really, when you boil it down, the high point of your evidence is that you say that you're qualified to make a judgement about the applicant's rehabilitation based upon your apparent and successful rehabilitation from trouble with alcohol. So your rehabilitation from alcohol qualifies you to judge the level of XSLJ's rehabilitation from an addiction to illicit substances; that's what it comes down to, isn't it?

Mr S L: No. I'm not making a judgement, I'm offering you an opinion. You're free to take my opinion or not. That's up to you, okay. What I can say to is I have lived experience of people who claim to have recovered and yet I see them down the track and they're not recovered, okay. There are only a couple of people in my life that I've known who have recovered. XSLJ is one of those people, my older brother is another of those people. Most of the other people who I've spoken with or had something to do with in terms of addiction have never recovered."[98]

[Errors in original]

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98 Transcript, 22 January 2021, page 48, lines 30–47; page 49, lines 1–47; page 50, lines 1–47; page 51, lines 1–10.

167. In many respects, Mr S L is to be complimented for the fortitude behind his provision of written and oral evidence for the instant hearing. His evidence involved the provision of some negative information or comments about his own daughter (Partner R) who is the biological mother of the youngest of the three relevant children. As well, Mr S L was quite forthright about his own difficult and adverse experiences with alcoholism.

168. Well-intended though his evidence was, it must be received with caution and with an eye to the reality that he is not a clinical or other expert on substance abuse issues. In particular, his lack of expertise limits the extent to which Mr S L can comment on how substance abuse issues have featured and may in future feature in the life of this Applicant. Accordingly, only limited, if any weight, can be allocated to Mr S L's evidence from the perspective of the Applicant's risk of recidivism.

Other witness – Ms G P

169. Ms G P is a close friend of the Applicant and she says she has *"[…] grown to know [the Applicant] very well over the past 12–18 months."*[99] She has come to know the Applicant because in late 2019, she was in a drug rehabilitation facility with one of the Applicant's former partners. She met the Applicant as a result of a request from Partner T to assist with some of the care responsibilities for the two children of the Applicant's relationship with Partner T, namely Child T and Child C. She says that the Applicant has recently expressed remorse and regret for the circumstances into which his offending has now placed him:

> *"After some of these more recent conversations [the Applicant] has reached out to me, and connected to his own sadness, guilt and shame, courageously accepting accountability for being the reason his children are suffering today without him, regardless of Immigration laws in place. It is this integrity, strength and substance of character that I admire in [him], and leaves me with no doubt that he is a dedicated loving father, who will excel and positively contribute to Australian society if alowed to re-enter."*[100]
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> [Errors in original]

170. In her statement, she speaks of her faith in the Applicant's ability to return to remunerative employment, to follow a program of treatment or support and to otherwise become a contributing member of the Australian community:

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99 A7, 1.

100 A7, 4.

"I have complete faith in [the Applicant's] ability to apply himself in work, support programs and any other things required of him to live as a healthy contributing member of society. He has an unwavering willingness and commitment to learn new things, and enough humility to check in, and have self awareness around his own behaviour.

[The Applicant] is accountable for his crimes and is still processing the devastating irreversible impact and consequences of his actions. He has compassion and empathy for the victims of his past crimes, he speaks with regret and sadness when we have spoken in depth. He has lived with the commitment to learn from these mistakes, his willingness and time have served as a catalyst for [his] compelling change in behaviour. I believe without a doubt that this change is authentic, fueled by the undeniable love a parent feels for their children. and I will continue to support [the Applicant] and his family in any way I can if he remains in Australia."[101]

[Errors in original]

171. From her own experiences in overcoming an addiction to illicit drugs, Ms G P spoke of an individual's capacity to *"unlearn"* unhealthy behaviour. The essence of her evidence seemed to be that the Applicant is at a low risk of returning to abusing illicit substances and to consequently offending because of the period of his abstinence during his time in prison and/or immigration detention:

> *"It takes time to "unlearn" unhealthy behaviour (3 months minimum for our brain to form new neurological pathways, and that repeated behaviour for some years (varies) for that behaviour to be considered ingrained.) and given that time I believe [Partner T] can improve. Similarly as [the Applicant] has proven, he has changed his behaviour, with substantial time, honesty, accountability, self-help resources and support.*
>
> *This change for [the Applicant] has taken a long time, and leaves him ready and prepared to step up and support his children and ex defacto partner if permitted to re-enter Australia. This will not only save his children from the irreversible psychological and emotional damage they will endure if returned to care, but will also ease the strain on FACS resources required to employ career's, transport etc, which are already spread so thin."*[102]

172. During the course of her evidence in chief, Ms G P was asked for her opinion about the Applicant's risk of re-offending. The following transpired between her and the Applicant's legal representative:

> *"Dr Donnelly: Has XSLJ spoken to you about his perspective on his offending?*
>
> *Ms G P: Yes.*
>
> *Dr Donnelly: What has he said to you?*

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101 A7, 8.

102 A7, 9.

Ms G P: I believe that he will not offend again through his conviction, his word, his daily lifestyle in Villawood, that he has been engaged in for an extended period. He – he is reliable, he calls when he says he's going to call, he's – I guess the phrase he's walking the walk and not just talking the talk, in my opinion.

Dr Donnelly: Has he expressed remorse to you though, directly?

Ms G P: Yes.

Dr Donnelly: What has he said? What has he said to you?

Ms G P: He holds deep accountability for what he has done, and he's still in the process of healing from what has happened, the trauma that he has put himself through and other people, and currently his children, which he has guilt about daily.

Dr Donnelly: Just based on your dealings with him – I'm not asking you to provide an expert opinion – but just based on your dealings with him factually, do you think he will reoffend?

Ms G P: No.

Dr Donnelly: What do you say that for?

Ms G P: He – it's hard to explain. I have yet to meet someone with as strong a mind, as in commitment to word. He has – his word means a lot to him, and I've seen that evidently in the promises he makes his children, in the things he says he's going to do. He has supported me through emotional turmoil at times, and has not crossed any boundary that has made me feel uncomfortable or that he has got an alternative agenda, and yes, I feel thoroughly confident in his word and what he says he will do."[103]

173. In her cross-examination, Ms G P said that she had a certain level of familiarity with the Applicant's criminal history both here and in New Zealand. In terms of his risk of re-offending, she did not think it likely that he would re-offend because of the length of time says she has known him. The following transpired between Ms G P and the Respondent's legal representative:

"Ms Prasad: Okay. A moment ago Dr Donnelly asked you about XSLJ's criminal history, and you said that you were aware of it. Can you tell me what you know, like specific details about what you know of his criminal history?

Ms G P: I know that in New Zealand, before he came to Australia, he committed some crimes involving some violence and some drug possession and use, then he came to Australia and he had a conviction, and they followed. I do have some notes written down because it's really hard to remember, but I am aware that it was quite extensive and then the meth explosion in 2010, but it was possession and stolen – suspected stolen property, resisting arrest. Like I am aware of all the different things. And then there was continued crime after he was given his bail and continued crime in the Northern Territory and running drugs – sorry, yes, I'm not sure that's the correct term, you know, moving drugs around after his (indistinct).

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[103] Transcript, 22 February 2021, page 55, lines 22–47.

Ms Prasad: Okay. All right. And so knowing all of these things about his extensive criminal history, you've given your views that he is – he's – I think you said earlier that you don't think he will offend. Can I ask you why you think that?

Ms G P: Yes. I haven't made this decision lightly, and it's only because I have known XSLJ for so long that I am so convicted in what I say. Initially I was very – I didn't believe that someone with this criminal history could reform, before speaking to XSLJ, just my general judgment on someone who commits such crimes, my general judgment would be that person could not reform. Over the months of talking to XSLJ for hours about his childhood, his accountability, his guilt, his shame, watching him go through moments where he is triggered severely where he knows his children are not being cared for correctly in care, and he has called me in those moments and I've witnessed him be able to regulate those emotions, to come down from that feeling, to seek feedback from me, to check in if he is being reasonable, and this has been on several occasions and several different instances, and I would – witnessing that has given me much more conviction in believing in XSLJ. Assisting him in his parenting courses, he knew all of the answers. He did not need my assistance. But he's suffering with semi-literacy and needing – I was blown away and that was straight away. I've attempted to - - -

Ms Prasad: Okay. But – sorry to cut you off, [Ms G P], but just to be clear you've only really had a relationship and been talking to XSLJ for the last 12 or so months? Yes, absolutely. That's true."[104]

174. As was the case with Mr S L, the Tribunal compliments Ms G P on the forthright and genuine basis on which she has provided her evidence. She is clearly a devoted friend of both the Applicant and Partner T. She clearly wants to play some kind of supportive and facilitative role in their lives and in the lives of the three relevant children. While I accept that Ms G P was not being asked to provide an expert opinion, that does not increase the probative value of her evidence. She is not clinically qualified to provide any opinion about the extent to which the Applicant's past involvement with illicit substances may now be said to be under some remedial management and control. Her evidence in this regard was provided from her own life experience of difficulties with illicit substance abuse. As such, although well-intended, only limited, if any, weight can be allocated to her evidence on the specific issue of the Applicant's risk of recidivism.

Findings about recidivism

175. To my mind, the evidence which I have referred to above discloses the following purported *"positive factors"* which may suggest a low-medium risk of recidivism. They comprise:

(a) sobriety in immigration detention/prison;

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104 Transcript, 22 February 2021, page 59, lines 28–47; page 60, lines 1–19.

(b) his employment prospects upon a return to the Australian community;
(c) the passage of time since his last offence(s);
(d) his level of insight into the effects of drug use, and his mental health;
(e) the deterrent effect of the potential loss of his visa status, particularly because this will lead to separation from his three minor children;
(f) the extent of his engagement with mental health services and programs comprising the courses he has completed in immigration detention, and his proposed continued counselling with Ms Ardren (or equivalent);
(g) his good conduct in immigration detention and prison;
(h) his remorse for his offending; and
(i) his engagement with religion.

176. I have had regard to each of the positive factors listed above. Most of the evidence relating to the positive factors was adduced from lay witnesses. So far as such evidence was adduced from experts, it was not contemporaneous with all of the Applicant's present circumstances, and the Respondent did not have the opportunity to that expert evidence in cross-examination.

177. Further, the positive factors are, to my mind, convincingly challenged by the following *"negative factors"*:

(a) his sobriety in immigration detention/prison has occurred within the closed confines of those institutions and remains to be tested in the broader community;

(b) his employment prospects are not clearly defined and are ultimately uncertain;

(c) the fact that he has not offended for some time is not impressive because he has been removed from the Australian community in prison/immigration detention since August 2016;

(d) while he contends that he has insight about the effects of his illicit drug use and the state of his mental health, he nevertheless has sought to level some measure of blame upon others for his unlawful activity because those others apparently failed to warn him about its adverse impact on his visa status and, further, that he and he alone will form a view about whether his depressive symptoms become *"a problem"* in his life;

(e) his contention that the threat of deportation will remove him from the lives of his children is not credible because the factor of the children in his life was no deterrent to him offending on an extremely serious basis shortly after the children were born;

(f) in terms of the extent of his engagement with mental health services and programs, I am not convinced that the Applicant's proposed sessions with Ms Ardren and the several courses he has done in immigration detention is sufficient to meet Dr Nielssen's threshold for *"ongoing counselling for substance use, given the history of long term abstinence and relapse, and the complications of past relapses"*, and likewise, I am not satisfied that the Applicant's self-diagnosis or analysis of the state of his depressive symptoms can be safely relied upon as a sufficiently protective factor against him disengaging and relapsing into abusing illicit drugs;

(g) I am doubtful that he is genuinely remorseful about the nature and extent of his offending. Whatever remorse he does have is, to my mind, most clearly seen in his apprehension about a possible permanent removal from the lives of his three infant children with the result that they may very well be permanently in the care of other people.[105]

178. Weighing the *"positive factors"* against the *"negative factors"* identified above, I am not satisfied that this Applicant represents a low risk of recidivism. Having regard to the totality of the evidence and my findings thereon, I am of the view that his risk of recidivism ranges from (1) at best, low-moderate; and (2), more likely, a risk of re-offending that is now little or no different than what it was at the time of his most recent removal from the Australian community.

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[105] See Transcript, 22 February 2021, page 10:

"Dr Donnelly: So, correct me if I'm wrong, just expanding on what you've just said; is it fair to say that your main agitation for this application before the tribunal is wanting to stay in Australia to be with your kids?

Applicant: Yes.

Dr Donnelly: All right?

Applicant: If I didn't have kids I would happily go back to New Zealand."

Conclusion: Primary Consideration A

179. I have had regard to the provisions of paragraphs 13.1.1 and 13.1.2 of the Direction and have also had regard to sub-paragraphs 6.3(3) and (4) of the principles appearing in the Direction. I find that (1) the nature of the Applicant's offending conduct to date is very serious, more likely, extremely serious, (2) there is a convincing likelihood that if the Applicant re-offended, the Australian community would conceivably suffer catastrophic physical, psychological and/or financial harm; and (3) his risk of recidivism ranges from, at best, low-moderate, to, more likely, his risk now being no different than what it was at the time of his most recent removal from the Australian community.

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

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

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

182. The first exercise for the purposes of ascertaining allocable weight to this Primary Consideration B involves identification of the children actually or possibly relevant to this proceeding.

Mother	Psuedonym	Birth Month	Age	Time left until 18
Partner T	Child C (or "C XSLJ")	Nov-15	5yrs 5mo	12yrs 7mo

Partner T	Child T (or "T XSLJ")	Dec-13	7yrs 4mo	10yrs 8mo
Partner R	Child S (or "S XSLJ")	Jan-16	5yrs 3mo	12yrs 9mo
Applicant's Sister	Nephew C	Unknown	9 yrs (approx.)	9yrs (approx.)

183. It seems to be common ground between the parties that these are the only three biological children of the Applicant relevant to this proceeding.[106] In addition, there is a fourth minor child, specifically, the Applicant's nephew, Nephew C, who was born in August 2010.[107]

184. It therefore seems clear that the abovementioned four children come within the auspices of paragraph 13.2 of the Direction. Prior to applying the factors stipulated at Paragraph 13.2(4) of the Direction, it is necessary to have regard to the oral and written evidence in relation to the level of the Applicant's connection to each of the relevant children.

The Applicant's SFIC

185. In the Applicant's SFIC, much store is placed on the Applicant's future prospects of playing some type of meaningful role in the lives of the abovementioned four minor children. This basic premise culminates in the following contention appearing in the Applicant's SFIC in relation to the three biological children:

> *"The primary consideration of the best interests of minor children in Australia weighs heavily in favour of revoking the mandatory cancellation decision for the Applicant's three children. Since the last Tribunal proceedings, the Applicant has continued to build and maintain a positive ongoing relationship with his three children in Australia."*[108]

186. With reference to Nephew C, the Applicant's SFIC contains the following conclusive contention:

> *"It follows that it is in the best interests of the Applicant's nephew ([redacted]) for the mandatory cancellation decision to be revoked. As to the attribution of weight*

106 See A1, 19, [76]; see also R1, 9, [40]–[58].

107 See A1, 22, [88]–[90]; see also R1, 12, [59].

108 A1, 22, [87].

> *concerning this minor child, at least marginal weight should be afforded in favour of the Applicant."*[109]

187. It is acknowledged that Children T and C have been and are primarily parented by other people. That said, the contention put on behalf of the Applicant is that despite his very long absence from their lives as a result of incarceration in one form or another, he has nevertheless maintained *"a close and loving relationship with these two children"*.[110] It is contended that these two children visit the Applicant when possible and have *"daily telephone contact"* with him.[111]

188. It is further contended that the Applicant *"is likely to play a positive parental role in the future for [Child C] and [Child T]"*.[112] The respective ages of the children are noted with the resulting contention that both of them *"still have many years to go before turning 18"*.[113] The resulting contention is that were the Applicant to remain in Australia, there is a likelihood of him playing a *"substantial, positive role in these children's lives"*.[114]

189. It is urged upon the Tribunal that none of the Applicant's past offending has directly impacted upon any of the children apart from his lengthy period of separation from them due to his incarceration. It is contended that *"the likely effect of separation between the Applicant and the children, in Australia, would be significant."*[115]

190. In terms of primary parenting responsibility for both of these children, the Applicant's SFIC accepts that their mother, Partner T, already fulfils a parental role for them. It is not wide of the mark to suggest that Partner T has had her own difficulties in meeting the parental responsibilities for both of these children to the extent that external intervention has been required:

> *"the evidence demonstrates that [Partner T] struggles emotionally without the Applicant's presence. When the Applicant was incarcerated in 2016, [her] drug use escalated, and she lost the care of the children. However, [she] has worked hard to*

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109 Ibid, [90].
110 A1, 19, [77].
111 Ibid, [77].
112 Ibid, [78].
113 Ibid, [79].
114 Ibid.
115 Ibid, [80].

have the children returned to her, and she found the Applicant to be a huge support for her during this time."[116]

191. The Applicant's SFIC then turns to a discussion about Child S. The Applicant was incarcerated (and has remained incarcerated on a continuous basis) since the time Child S was only seven months old. As was the case with Partner T, Partner R has had her own difficulties with the parenting responsibilities relating to Child S. As the Applicant's SFIC notes:

> *"[Child S] is the Applicant's child with [Partner R]. [Child S] was only seven months old when the Applicant was incarcerated. [Child S] was removed from [Partner R]'s care due to her drug abuse. The Applicant has been working hard to develop a relationship with [Child S] via telephone contact, and more recently, visits to the Villawood Immigration Detention Centre (before COVID-19 restrictions)."*[117]

192. As I understood the Applicant's SFIC, reliance is sought to be placed on a report by a psychologist, Ms K M, whose report appeared as an annexure to a statement of Partner S' father, the abovementioned Mr S L.[118] This statement of Mr S L was tendered during the earlier proceedings and is dated 24 February 2020. The Applicant's SFIC purports to place a level of reliance on the opinions of Ms K M which can be summarised thus:

- *"it is my opinion that [Child S] would benefit from a relationship with his father"*;
- *"face to face contact should be supported when [the Applicant] is released"*;
- *"as [Child S] seems to be closely connected with Ms [redacted] and Ms [redacted], it is likely that, initially, contact would be best supported with one or both of these adults present."*;
- *"[The Applicant] has stated a willingness to comply with directives relating to contact"*.

193. I am cautious about allocating any measure of significant or determinative weight to the opinion of Ms K M for the following reasons:

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116 Ibid, [81].

117 Ibid, [82].

118 T1, 815–828.

- she was not called to give oral evidence at the instant hearing and thus, the Respondent was denied the opportunity of testing her evidence in cross-examination;
- she did not give evidence at the previous hearing and her evidence was not tested at that hearing either;
- her report is now aged over two years because it dates from 11 October 2018, and therefore cannot be regarded as current;
- her report was prepared for separate and unrelated proceedings in relation to the custodial arrangements for the children consequent upon the difficulties experienced by either or both of Partner T or Partner R meeting their parental responsibilities;
- to the extent Mr S L may speak about the evidence of Ms K M, only very limited, if any, weight can be placed in Mr S L's evidence given that he is not Ms K M and that he is not otherwise clinically experienced or qualified to speak about her evidence.

194. Consistent with what the Applicant had to say in his oral evidence, his SFIC says that he *"is eager to play a positive parental role for [Child S], proceeding at a pace that [Child S] can cope with."*[119] Given Child S is the youngest of the three children, the resulting contention is put that there *"are many years before he turns 18"* and were the Applicant to remain in Australia, *"he will play a substantial and positive role in [Child S]' life."*[120] It is further contended that Child S has different circumstances than those of Children T and C because Child S *"[…] does not have another person currently fulfilling a permanent parental role"*. In terms of a parental role for Child S, it is further contended that his maternal grandfather, the abovementioned Mr S L, will be able to assume some type of parental role.

195. With specific reference to Nephew C, the following contentions are made:

> *"88. There is also evidence that the Applicant maintains a relationship with his nephew, [Nephew C] (aged nine). The Applicant has stated that he has 'a positive and ongoing relationship' with [Nephew C]. The Applicant indicated that he has*

119 Ibid, [84].

120 Ibid.

pictures of [Nephew C] on his wall in immigration detention and otherwise speaks with [Nephew C] on the telephone.

89. It is accepted that [Nephew C] already has someone who fulfils a parental role (i.e. the Applicant's sister, [redacted]). Nonetheless, if the Applicant is deported to New Zealand, such a decision will frustrate the possibility of the Applicant building and maintaining a strong uncle relationship with his nephew."[121]

The Applicant's other written evidence

196. The Applicant filed two written statements across the breadth of the two hearings in this matter. For the purposes of the first hearing, the Applicant swore a statutory declaration on 26 February 2020.[122] In this first statement, the Applicant was still in a de-facto relationship with Partner T. He noted that:

> *"7. I speak with [Partner T], [Child T] and [Child C] on the phone daily, and they visit me whenever they can. I have a very positive relationship with [Child T] and [Child C]. I have been in their lives since they were born."*[123]

197. In the first statement, the Applicant also made reference to Child S and said the following:

> *"8. I have another child, [Child S], who was born [in January 2016]. [Child S] is currently in the care of Family and Community Services [("FACS")]. I helped to parent [Child S] until he was 7 months old, which is when I was incarcerated in the Northern Territory. When I was incarcerated, his mother was left to care for [Child S] alone. She has struggled with drug abuse, and has not been able to kick her addiction, which is why [Child S] is with FACS.*
>
> *9. I started having phone contact with [Child S], which was difficult because he didn't know me, but we have recently starting have face-to-face visits at the Detention Centre. [Child S] has been with someone from FACS during these visits. I am willing to follow all directions from FACS during these visits. I am willing to follow all directions from FACS about visits and contact with [Child S], and do whatever courses FACS recommend, so that I can build the best possible relationship with [Child S]. My goal is to eventually apply for custody of [Child S], but I am happy to go as slowly as he needs, so that he does not have any extra trauma."*[124]

198. In this first statement, the Applicant expressed concern about the impact on the children in the event of his removal. While he acknowledged that his offences have had a negative impact on the lives of many families and victims, he nevertheless was of the view that he

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121 A1, 22, [88].

122 T1, 829–836.

123 Ibid, 830.

124 Ibid.

can make some meaningful parental contributions to the lives of his children were he allowed to remain here:

> *"30. I truly fear that if I am deported and removed from their lives, then [Child T], [Child C] and [Child S] may become subject to the same traumatic abuse that myself and my siblings endured growing up.*
>
> *31. I acknowledge that my offences had a negative impact on the lives of many families, and I am deeply ashamed of this fact, as I believe every child should be raised in a loving nurturing environment, by adults that have what is best for their children at heart."*[125]

199. The Applicant's second statement filed for this hearing is dated 3 January 2021.[126] In this written statement, the Applicant makes reference to each of the relevant minor children. In many respects, this second statement updates the first on issues such as, for example, the state of the Applicant's relationship with Partner T and the capacity of Partner R to play any active role in the care of Child S:

> *"10. All of my immediate family reside in Australia.*
>
> *11. First, I have a very close and ongoing relationship with my sister ([redacted]). I speak to [her] regularly on the telephone. [She] resides in Sydney, New South Wales. If I am removed from Australia to New Zealand, I appreciate this will cause [my sister] substantial emotional distress.*
>
> *12. My sister has two children named [Mr B] (aged 21) and [Nephew C] (aged nine). I have a positive and ongoing relationship with my two nephews in Australia. For example, I speak to my nephews on the telephone. In my room at the VIDC, I have photos of them on the wall.*
>
> *13 [Child C] has an active interest in rugby league (which I have also had in the past). I want to stay in Australia to continue my ongoing relationship with my nephews. In particular, I would like to play an important uncle role for my nephews. If I am in New Zealand, it will also be difficult to maintain a very close relationship with my nephews.*
>
> *14. Secondly, my brother [redacted] also resides in Australia. I love my brother, although it must be accepted that I have not had a close relationship with him over the last several years. I have a much closer relationship with my sister in Australia than with my brother.*
>
> *15. Thirdly, I was previously in a de facto relationship with a female by the name of [Partner T] (see G Docs, 119). Unfortunately, after the negative result in the last Tribunal proceedings, [she] ended our romantic relationship. The stress and unknown of my future were too much to bear for [her].*
>
> *16. Despite the above, [Partner T] and I have remained good friends. We speak almost daily. [She] also resides in Sydney. I consider [her] a strong connection of*

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125 Ibid, 834.

126 A2.

mine. No doubt, if I am removed to New Zealand, [she] will suffer emotional hardship at seeing me deported.

17. Fourthly, my three children reside in Australia. I have an excellent relationship with my daughter, [Child T] (aged seven). During the evenings, we speak at great length on the telephone. We send each other videos and otherwise maintain a close connection (despite being detained in immigration detention).

18. I also have a positive and loving relationship with my son, [Child C] (aged five). I also speak regularly to [Child C] on the telephone. We play games on the telephone and enjoy speaking with each other. Given that [Child C] is younger than [Child T], I can hold a conversation with [Child T] at greater length.

19. My previous de facto partner ([Partner T]) only recently got [Child T] and [Child C] back from state care. My two eldest children had been removed from [Partner T's] care owing to her previous drug addiction. Naturally, if I am released back into the Australian community, I would love to spend as much time with [Child T] and [Child C] as possible.

20. I am also the father of [Child S] (aged four at the time of writing). Unfortunately, [he] is currently in foster care (because [his] biological mother has shown little interest in taking care of [him]). I speak to [Child S] every Saturday by telephone (for a 30-minute video call). I enjoy a loving and ongoing relationship with [Child S].

21. I also have a good relationship with [Child S]'s foster carer (a woman named [Ms J]). If I am released back into the Australian community, I will take practical, lawful steps to have [Child S] returned to my legal custody. I want my son to live with me (noting that I am his father).

22. Undoubtedly, the strongest reason for me wishing to stay in Australia is to be with my daughter and two sons. I know that if I am deported to New Zealand, it will be difficult to maintain a close physical relationship. Electronic communications are not the same as face-to-face contact."[127]

The Applicant's oral evidence at the instant hearing – in chief

200. An initial concession made by the Applicant during his evidence in chief was that the principle purpose behind his efforts to have his visa restored is for him to play a meaningful parental role in the lives of his three children:

> *"Dr Donnelly: What kind of relationship do you think you'd have with your children if you were in New Zealand?*
>
> *Applicant: Well, I'd do the best to ring them as much as possible to be honest and video call. Yes, but I just don't think it would very good. I mean, it would be very hard on them and me. My kids are my heart. I can't go back to New Zealand without my kids, you know. The kids need a father and I need my kids and I think it's important that I'm in their lives. Yes, I just worry for them.*

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127 A2, 3–4.

Dr Donnelly: So, correct me if I'm wrong, just expanding on what you've just said; is it fair to say that your main agitation for this application before the tribunal is wanting to stay in Australia to be with your kids?

Applicant: Yes."[128]

201. The Applicant contended that things were different now and that he was prepared to put the children's best interests first:

> *"Dr Donnelly: Okay. Can I just ask you this finally: what's different now? I mean, your children have always been your children, you've always been their father, you've committed criminal offences in the past; what's different now?*
>
> *Applicant: Back then I was being selfish and I had a drug addiction and I was putting my drug addiction first before my kids and I'm ashamed that - I thought I was still being a good dad but now I look back and I wasn't being the dad they deserve and the dad I could have been to them. […]*
>
> *Dr Donnelly: All right?*
>
> *Applicant: And the difference is I wasn't putting them first and I'm ready to put them first and, like I said before, that's not the life I want anymore.*
>
> *Dr Donnelly: Yes?*
>
> *Applicant: And I'm the only person that can change it and I've changed, I really have. And I feel good every day, (indistinct words), I feel good giving to people, I feel good helping others. Yes, my best time of the day is when I'm on the phone to my kids video call, just playing Barbies with T XSLJ or playing games with C XSLJ and even on the weekends when I talk to S XSLJ I look so much forward to it, it's my highlight."*[129]

The Applicant's oral evidence at the instant hearing – cross-examination

202. In cross-examination, the Applicant spoke about the nature of his relationship with Partner T and, in particular, the extent to which her difficulties with the abuse of illicit substances have adversely affected her capacity to properly parent Children T and C:

> *"Ms Prasad: I might ask you about the type of - about your relationship with T XSLJ and C XSLJ. Now they've been taken into foster care a couple of times. The first time was because [Partner T] had an overdose, I think, in 2016. Is that correct? And then more recently, I think your evidence just now was that she wasn't coping. Now we've just established that you've been incarcerated or in immigration detention for the last four years and eight months, but your children are seven and five years of age. So you've been in custody for most of your son's lives, and since T XSLJ was two and a half years old. Would you agree with that?*

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128 Transcript, 22 February 2021, page 10, lines 27–39.

129 Transcript, 22 February 2021, page 10, lines 42–47; page 11, lines 16–24.

Applicant: Yes, I've missed every birthday that my boys - yes."[130]

203. The Applicant spoke of difficulties he has experienced in establishing and maintaining a relationship with the children since his imprisonment. It is clear that telephone calls and video calls have been the primary source of communication between him and the children, especially since the restrictions were placed on visitations at Villawood as a result of the COVID-19 pandemic:

> *"Ms Prasad: And since you've been in custody, it's obviously more difficult for you to establish a relationship with your children. You've talked about having face to face visits, and also having electronic video calls and phone calls. Can I ask you, when was the last time you saw T XSLJ and C XSLJ face to face?*
>
> *Applicant: How long's COVID been on for? A year, is it?*
>
> *Ms Prasad: Yes, I'd say just under a year - since about March last year, there were restrictions in place in Australia?*
>
> *Applicant: Yes, well - yes, I know it was definitely, if not 11 months ago, 12 months ago. But that's only because of COVID.*
>
> *Ms Prasad: And prior to that, how often were you seeing them face to face? Before the COVID restrictions?*
>
> *Applicant: Off the top of my head, it was every couple of weeks - or maybe three weeks. I'm not sure. It was hard with the - single mum bringing in the two kids, but she'd do her best.*
>
> *[…]*
>
> *Ms Prasad: You were saying earlier when Dr Donnelly asked you about your phone calls and contact with T XSLJ and C XSLJ and S XSLJ - am I correct in understanding that you speak to T XSLJ and C XSLJ on a daily basis with video calls?*
>
> *Applicant: Yes.*
>
> *[…]*
>
> *Ms Prasad: So just to summarise my understanding. You've had pretty consistent contact with T XSLJ and C XSLJ since you were incarcerated in August 2016?*
>
> *Applicant: Yes.*
>
> *Ms Prasad: However, (indistinct words) quite consistent you had some face to face visits that [Partner T] used to facilitate?*
>
> *Applicant: Yes.*
>
> *Ms Prasad: And then once COVID restrictions kicked in you have been having phone calls and video calls?*
>
> *Applicant: Yes."*[131]

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130 Transcript, 22 February 2021, page 14, lines 9–17.

131 Transcript, 22 February 2021, page 14, lines 19–32; page 15, lines 24–27; page 16, lines 33–41.

204. There followed some questions about the extent of the Applicant's contact with Child S since the Applicant's incarceration. It transpired that he has only met with Child S in person *"about four times"*:

> *"Ms Prasad: So you say August 2019 you had face to face visits with S XSLJ?*
>
> *Applicant: Say it again, sorry?*
>
> *Ms Prasad: In the letter that [Ms A R][132] has provided to the tribunal she states that you began face to face visits with S XSLJ in 2019?*
>
> *Applicant: Yes.*
>
> *Ms Prasad: And you've just told me that that date was around August 2019?*
>
> *Applicant: No, the date I spoke to [Ms A R] and introduced myself was 3 or 4 August 2019 and obviously it's a slow process so that just started the ball rolling and eventually I got a visit from S XSLJ, yes.*
>
> *Ms Prasad: Okay. How many times did S XSLJ visit you in Villawood before the COVID restrictions were in place?*
>
> *Applicant: Unfortunately it's only been about four times."*[133]

205. Finally, the Applicant was asked about the extent of his relationship with the mother of Child S (Partner R). He said the following:

> *"Ms Prasad: All right. Do you still have a relationship with S XSLJ's mother, like, do you still talk to her?*
>
> *Applicant: Yes, I do.*
>
> *Ms Prasad: How often do you talk to [her]?*
>
> *Applicant: It was every two weeks. When she contact visits with S XSLJ she'd ring me on a video call but now the last few weeks because of COVID she hasn't been able to get him.*
>
> *Ms Prasad: So you only speak to [Partner R] when she's video calling you so you can talk to S XSLJ?*
>
> *Applicant: Yes, and I spoke her the other day. She rang up and she was a bit upset about not seeing him because of COVID and she was a bit upset. But in my statement one of the photos is [Partner R] and S XSLJ on a video call with me."*[134]

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132 Ms A R is a case manager at an Authorised Out of Home Care Service provider in New South Wales. See also Exhibit A4.

133 Transcript, 22 February 2021, page 17, lines 32–45.

134 Ibid, 18, lines 14–25.

Other witnesses – Mr S L

206. As alluded to earlier in these reasons, Mr S L has provided a written statement for the instant hearing. It dates from 4 January 2021.[135] Mr S L also gave oral evidence at the hearing. By way of background, Mr S L is the father of Partner R. In his written statement, he describes his background thus:

> *"I have come to know [the Applicant] intimately on a personal level over the past two and a half (2½) years. [He] is the father of my grandson, [Child S], whose mother is my daughter [Partner R]. [Child S] has been made a ward of the state of NSW and is currently in foster care.*
>
> *This letter is to confirm my ongoing and regular contact with [the Applicant], who is currently being held at Villawood Immigration Detention Centre in Sydney and to provide information supporting [the Applicant's] application to stay in Australia for the consideration of the Tribunal hearing [his] application."*[136]

207. Mr S L has a relatively broad knowledge of the state of the Applicant's parenting involvement with not just Child S, but each of the three relevant children:

> *"[The Applicant's] primary concerns centre around the physical and emotional welfare of his three children, [Child S] who is currently in foster care, and [Child C] and [Child T] who have been in foster care in recent times, but are now back residing with their mother.*
>
> *It must be noted that whilst [Child S] has been removed from his mother's care permanently, [Child C] and [Child T] have also been removed from their mother's care temporarily on two occasions."*[137]

208. As I have mentioned earlier in these reasons, Mr S L presented as a forthright person who gave forthright evidence. This extended to making some frank comments about the failings of his daughter (Partner R) in meeting parental requirements in relation to Child S:

> *"Unfortunately, I have to recognise that my daughter [Partner R] has in fact abrogated her responsibilities as a mother and parent to [Child S]. [He] has been in foster care for over three (3) years now and [Partner R] has done nothing, not one thing, in order to regain [Child S] into her care. It seems to me she has accepted a lifestyle where she doesn't have the daily responsibility of caring for [Child S], rather, someone else does the hard, day-to-day work of raising [Child S] whilst she gets carefree weekend visits with him. It must be noted that [Partner R] does not have a regular job and has not had a regular job in many years.*
>
> *[…]*

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135 A14.

136 A14, 1.

137 A14, 1.

[Partner R's] attitude and behaviour contrast significantly with those of [the Applicant] with regard to their individual relationships with [Child S]."[138]

209. Mr S L has maintained contact with the Applicant during the Applicant's time in immigration detention. He says he is aware of the extent to which the Applicant has gone to establish strong and ongoing relationships with each of the three biological children:

> *"Whilst [the Applicant] has been in immigration detention over the past eighteen months, he has done everything possible to improve his life, to improve his understanding of his children's needs and improve his communication with his children. As such, [the Applicant] has built strong, on-going relationships with each child i.e. they know who their father is, and they want him in their daily lives. [The Applicant] also recognises this will be a slow and measured process."*[139]

210. With particular reference to Child S, Mr S L speaks of the Applicant having made *"real gains"* in forming a positive and loving relationship with Child S:

> *"[The Applicant] has also made real gains in forming a positive and loving relationship with [Child S] as evidenced by positive daily voice messages to [Child S] in the morning and telephone calls as often as [Child S] desires. [The Applicant] has also made every effort to be supportive of [Child S]'s carers, with [Child S' carer] often utilising [the Applicant] as a go to point of contact for [Child S] when [Child S] has been upset, often calling [the Applicant] to speak with [Child S] whilst on the way home from day care. [Child S] now calls [the Applicant] "Dad".*
>
> *Evidence of a close bond forming between father and son is that of [Child S] requesting exactly the same kind of cap that [the Applicant] wears for his Christmas present from [the Applicant]. This was in response to the offer I made to [the Applicant] to purchase and send a Christmas present and a birthday present for [Child S] on [the Applicant]'s behalf. Further indications of this developing bond are requests from [Child S] to his carer ([redacted]) to talk with "Dad"."*[140]

211. During examination in chief, Mr S L affirmed the content of his 24 January 2021 written statement, and confirmed he had no changes to make to it. He was asked about his understanding of what kind of relationship the Applicant has with Child S. He said the following:

> *"Dr Donnelly: What kind of relationship, if at all, does XSLJ have with his son, S XSLJ?*
>
> *Mr S L: I talk to XSLJ very regularly about his contact with S XSLJ. He's come from a position where S XSLJ was initially I think hesitant to contact him to now where he calls him 'Dad'. Recently at Christmas time, for example, I know XSLJ's been in*

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138 A14, 2.

139 A14, 2.

140 A14, 3.

detention and doesn't have a lot of money and I said to him, 'Hey, would you like me to get a present for S XSLJ?' and I said, 'Have a chat to S XSLJ and see what he wants' and S XSLJ wanted the exact same cap that XSLJ has. Now he wants to identify with his father. XSLJ leaves him message every morning, not at the moment because my understanding is S XSLJ has been removed from his carer and placed elsewhere. I have some concerns about that but that can be addressed later. But prior to that S XSLJ was getting a loving message every morning from XSLJ and [Ms J H] would also on the way home in the car after school call XSLJ so that S XSLJ could talk to him and tell him about his day. So I think over the last 18 months XSLJ had bult a very positive and strong relationship with S XSLJ to the point where S XSLJ now refers to XSLJ as 'Dad'."[141]

[Errors in original]

212. During cross-examination, Mr S L was asked about whether he had ever met the Applicant's other two children, Children T and C. It transpired that he had not met those two children:

"Ms Prasad: Okay, thank you. How often do you speak with XSLJ?

Mr S L: It could be up to three times a fortnight, between one and three times a fortnight.

Ms Prasad: And have you - - - ?

Mr S L: And, you know, those conversations might go for 20 minutes at a time, sometimes longer.

Ms Prasad: Thank you. Have you met XSLJ's other children, C XSLJ and T XSLJ?

Mr S L: No, I haven't.

Ms Prasad: Okay?

Mr S L: I haven't had the opportunity but I would welcome that opportunity. As I regard XSLJ as my son-in-law his other children are absolutely welcome in my life.

Ms Prasad: Yes?

Mr S L: The other thing is those two children are half-siblings to S XSLJ so they're part of my de facto family as far as I'm concerned. I just haven't had the opportunity to meet them at the moment.

Ms Prasad: Okay. The reason I was asking is because you said earlier about the impact on C XSLJ and T XSLJ and not having a parent so it was just curious if you had any existing relationship with them?

Mr S L: No, I don't but XSLJ discusses his issues around C XSLJ and T XSLJ's lives. He uses me as a bit of a sounding board. You know, he might want a perspective on what's happening and how he may be able to deal with that sometimes. If he needs to talk to someone about something that concerns him I'm there for that and I don't know if he has concerns in terms of C XSLJ and T XSLJ I would welcome them in my life quite frankly and I do know that he speaks with C XSLJ and T XSLJ every day for at least half an hour in the evening, I know he sometimes talks to them

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141 Transcript, 22 February 2021, page 42, lines 26–41.

during the day as well and I know he leaves them a very loving message every morning."[142]

213. To my mind, Mr S L's evidence must be received with a measure of caution for a number of reasons. First, he is not a clinician and cannot express any definitive or reliable clinical view of the extent of any parental relationship between the Applicant and Child S. Any such views expressed by Mr S L are those of a well-intended and forthright layman. Second, Mr S L has never met Children T and C. In those circumstances, it is very difficult to safely allocate any measure of weight or credibility to whatever he may have to say about the nature and level of parenting involvement between the Applicant and those two children.

Other witnesses – Ms G P

214. Ms G P is a friend of the Applicant who has known him for 12–18 months. She provided a written statement for the instant proceeding. It is dated 4 January 2021.[143] She now speaks of having a very strong friendship with him. She met the Applicant through Partner T with whom Ms G P was receiving treatment for substance abuse issues at a rehabilitation centre in Sydney. In the course of making the acquaintance of Partner T, Ms G P gradually became involved in playing a supportive role for the care of Child T and Child C, especially when Partner T's psychological issues prevented her from doing so:

> *"In late 2019 my friend in recovery [Partner T] reached out to me for help and support as she consistently struggled with anxiety. It was through her that I knew "of" [the Applicant], who was her long-term on/off again boyfriend and father of [Child T] and [Child C]. I have known [Partner T] for approximately 3 years, and I decided to stay with her indefinitely to help with the children."*[144]

215. Ms G P's involvement with Partner T and the two children (T and C) allowed her to view developments relating to Partner T's intermittent capacity to discharge a full-time parental role for both of the children. It is clear that Partner T's capacity to do so becomes, from to time, severely impacted by her prevailing psychological symptoms:

> *"I left [Partner T]'s house as her anxiety appeared to improve with [the Applicant's] daily support, despite that they were no longer in a romantic relationship. I was surprised when [Partner T] began dating that [the Applicant] was supportive and accepting. He understood and respected [Partner T]'s needs and only wanted what was best for her and the children. I was included on voice calls with [Partner T] and*

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142 Transcript, 22 February 2021, page 45, lines 14–42.

143 A7.

144 Ibid, 1.

[the Applicant] where this became evident, and over time as I have grown to know [the Applicant] this has not changed."[145]

216. Ms G P has identified that the Children T and C have suffered trauma as a result of the Applicant not being available in a hands-on parental role. She considers the only way for this trauma to be minimised and ameliorated is for the Applicant to remain in Australia and to develop an active parental role:

> *"It is vital in my opinion that [Child T] and [Child C] suffer no further immediate trauma if their healing is to be effective. The impact of children so young having to live with strangers in FACS care alone will take time, and [the Applicant] must be involved. [Child T] and [Child C] were moved from my care, back to their mums, to two Aunts houses, emergency FACS care, and two temporary care places and currently back to their mums.*
>
> *[…]*
>
> *At present [the Applicant] has no legal parental rights for any of his children, and has been told his Immigration status must be dealt with first. This does not mean he has not been a father to his children, but it has made it difficult especially when the law becomes involved. [The Applicant] faced his own fears and reached out to interchanging FACS workers by phone and email to advocate for himself, his position as [Child T] and [Child C]'s father and the important need that he maintain daily contact with his now (5 and 6 year old) children, living in a stranger's care."*[146]

217. Ms G P acknowledged that she had little or no knowledge about the extent of the Applicant's parental connection with Child S. Even so, she said the following:

> *"I acknowledge I have not referred often to [the Applicant's] other son [Child S], being that I am not acquainted with him or his mother [Partner R]. This does not reflect [the Applicant's] love, dedication or commitment to [Child S] at all, and similarly [the Applicant] has forged relationships with [Partner R's] family and is building a strong authentic connection with [Child S]' Foster Carer '[Ms J H]". Over quite a short time this relationship has grown, and [Child S] now video calls [Child C] when he wishes, which happens regularly. [The Applicant] often calls after [Child S] has called, and the happiness in [Child C]'s voice is obvious and infectious."*[147]

218. As was the case with Mr S L, I am of the view that Ms G P's evidence must be received with a measure of caution. She is not a clinician and her evidence about any trauma suffered by the Children T and C, or about the level of the Applicant's parental role to date must be received as evidence from a well-intended lay-person who is a friend of both the Applicant and Partner T. The further point to bear in mind is that it is difficult to accept that Ms G P

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145 A7, 4.

146 A7, 5–6.

147 A7, 7.

has been at arms length from the milieu surrounding the Applicant's parental role with the Children T and C.

219. Although not said in any disparaging or disrespectful terms, it is difficult to find such objectivity in the evidence of Ms G P in circumstances where she is a close personal friend of Partner T and the Applicant. The main theme of Ms G P's evidence is one of support, encouragement and availability to help. I therefore receive her evidence on the basis of a genuine and available role she will be able to play were the Applicant to have his visa status to remain in Australia restored to him.

220. During her evidence in chief, Ms G P affirmed the contents of her 4 January 2021 statement, and did not have any changes to make to it. She described the contact that she has had with the Applicant and Children T and C over the last 12 months:

> *"Dr Donnelly: What kind of contact have you had with XSLJ over the last 12 months?*
>
> *Ms G P: Quite a lot of contact. It really intensified when I looked after the children for nine days in May I think it was and he would call the children daily to keep in touch with him about how the children were. Our contact continued after I returned the children and without even meaning to our conversations got deeper and deeper, we're very similar minded about spirituality, and I was also intrigued – I wanted to get to know XSLJ because I care a lot about his children.*
>
> *"Dr Donnelly: You said that you took care of his children for nine days in May last year?*
>
> *Ms G P: Yes.*
>
> *"Dr Donnelly: What children were they?*
>
> *Ms G P: That is T XSLJ and C XSLJ. […].*
>
> *"Dr Donnelly: That's fine. And where did you take care of them?*
>
> *Ms G P: At my unit at Cronulla where I am today.*
>
> *"Dr Donnelly: All right. And what was your capacity in taking care of them? How did they come into your care?*
>
> *Ms G P: It was actually XSLJ that reached out to me at that time because [Partner T] needed some respite. They were no longer in a relationship, but she was unable to talk on the phone due to her anxiety and it was XSLJ that was able to arrange it."*[148]

221. Ms G P was then asked about the knowledge she has of the extent of any parental relationship between the Applicant and Child S:

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148 Transcript, 22 February 2021, page 54, lines 7–28.

"Dr Donnelly: Has XSLJ spoken to you about any other children that he has?

Ms G P: Yes, he has another son S XSLJ.

Dr Donnelly: Do you know what, if at all, what relationship he has with S XSLJ?

Ms G P: Yes, he has sent me videos and I've witnessed XSLJ develop a relationship with S XSLJ's foster carer, [Ms J H], and that relationship has grown and so has S XSLJ's relationship with XSLJ. He has forwarded me videos of S XSLJ that S XSLJ has sent him because he wanted to say hello to daddy randomly, which has just made XSLJ's day, and he has wanted to share that with me. He loves all of the children equally."[149]

222. During cross-examination, it transpired that in addition to looking after Children T and C for nine days, Ms G P has actually stayed with Partner T and the two children *"for a few months"* and she otherwise explained her relationship with the Applicant as *"platonic friends"*:

"Ms Prasad: And I understand that you stayed with her and T XSLJ and C XSLJ for a few months?

Ms G P: Yes. I actually saw [Partner T] weekly from the moment we left [the rehabilitation centre] because we both attended a support group weekly, I saw her every week, and then yes.

Ms Prasad: Okay?

Ms G P: I think the beginning of 2019 she was not attending the group as much, and that's when we didn't see each other for a little while.

Ms Prasad: Okay. All right. So the next question I had – so it was about your relationship with XSLJ – I note that you say that you're platonic friends?

Ms G P: Yes.

Ms Prasad: Are you still, I guess, a friend in recovery for [Partner T]?

Ms G P: Yes. I attempt to be but I believe her anxiety is quite bad at the moment, and phone calls – like it's – I stopped reaching out because I'm not – her phone calls aren't returned and it's – yes. I'm not in contact with her at the moment, no."[150]

<u>*Other witnesses – Ms J W*</u>

223. Ms J W is the aunt of Partner T. She provided a written statement[151] and gave oral evidence at the instant hearing. She affirmed the written statement at the hearing and said its contents were true and correct to the best of her knowledge. She has known the Applicant since 2010 but has *"[…] only gotten to know him well in the last twelve months."*[152] The extent of

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149 Transcript, 22 February 2021, page 57, lines 15–24.

150 Transcript, 22 February 2021, page 59, lines 11–26.

151 A8.

152 Ibid.

the relationship between Ms J W and the Applicant changed consequent upon Partner T's mental state and the extent to which it impacted upon her capacity to care for the Children T and C:

> *"My contact with [the Applicant] ramped up in May 2020 when I took [Child T] and [Child C] into my home once it became clear [Partner T] was not in an environment or mental state to look after them. Prior to this I had little contact with him. The children were with me for just over two weeks until temporary foster care became available.*
>
> *[The Applicant] contacted me from Villawood Immigration Detention Centre as soon as he became aware the children were with me. We were then in daily contact for the duration of time the children were with me. This contact continues today, however on a less frequent basis."*[153]

224. While the Children T and C were Ms J W's care, she commendably used her best endeavours to ensure the Applicant was in regular video call contact with those children:

> *"At that time, [the Applicant] explained to me that he was in regular video call contact with the children, before [Partner T] refused him contact. He was very distressed about this and was concerned that now the children were with me he would lose further contact. I assured him he would have regular contact with the children while they were with me. This began a video call from him to the children at an agreed time every day. It was clear that [the Applicant] had an existing relationship with the children already and I thought it was important for all of them to assist the relationship to continue."*[154]

225. Ms J W's statement concludes with her expressing a strong belief that *"[…] regular contact and therefore the continued building of the relationship between [the Applicant], [Child T] and [Child C] is very important for the children's sense of family and routine."*[155]

226. During her evidence in chief, Ms J W was asked about the nature of the Applicant's relationship between Children C and T and responded thus:

> *"Dr Donnelly: As best you can comment, if at all, what relationship does XSLJ have with his children?*
>
> *Ms J W: Well, he's the father of the kids. They while they were staying with me, XSLJ actually contacted me initially to see if he could keep in touch with the kids while they were with me. And it was that was, kind of, yes, the beginning of my relationship with him, I guess. Getting to know him. I was happy for him to be in FaceTime contact with the kids while they were with me. And he called in, he asked, you know, if he could talk to them daily, and I didn't have a problem with that. So*

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153 Ibid.

154 Ibid.

155 Ibid.

we organised a time and every day he called at that time and the kids would, you know, chat and tell him about their day, and you know, they'd just play games and things.

Dr Donnelly: Right. Do you know whether XSLJ has a good relationship, or otherwise, with his children at present?

Ms J W: Yes. Yes, absolutely. He's yes, he they're very close. They still talk on the, you know, via what they can through the videos. They talk about him all the time. They're, yes, they love him, yes. He's their dad."[156]

227. She was then asked about the mental health circumstances affecting Partner T's capacity to parent the Children T and C and responded thus:

"Dr Donnelly: You mentioned just a moment ago that T XSLJ and C XSLJ's mother is not entirely stable, I think, is the word you used?

Ms J W: Yes.

Dr Donnelly: What do you say that for?

Ms J W: The kids have been taken into care twice. She's had some addiction problems, and she suffers with anxiety and depression, and that those factors all come together to make, yes, life as a single mum pretty hard. And she doesn't always cope the best."[157]

228. In cross-examination, Ms J W was asked about the extent of her knowledge of the Applicant's criminal history. She responded thus:

"Ms Prasad: Okay. Do you know anything else about his criminal history?

Ms J W: No, not really. No details, no.

Ms Prasad: All right. When you say you're aware of the drug lab and the explosion, what do you know about that incident?

Ms J W: All I know is that there was a well, from what I've read in the newspaper, really. That there was a lab in a shed at the back. It exploded. XSLJ and a friend were there at the time. One of them yes, the friend passed away. Yes.

Ms Prasad: That's okay. Thank you. But other than that incident, you're not aware of any of XSLJ's other offences that are recorded in his criminal history?

Ms J W: No.

Ms Prasad: No?

Ms J W: No. I know there were other things, but I don't know the details."[158]

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156 Transcript, 13 February 2021, page 3, lines 34–47; page 4, lines 1–2.

157 Transcript, 13 February 2021, page 4, lines 22–25.

158 Transcript, 13 February 2021, page 5, lines 24–36.

229. Ms J W also gave evidence about the difficulties confronting Partner T in meeting her obligations to properly parent the Children T and C:

> *"Ms Prasad: Okay. Now, a moment ago, and I noticed in your statement that I've got here that you've signed on 4 January, you talked about [Partner T] was not in an environment or mental state to look after them. So you're talking about the most recent time T XSLJ and C XSLJ were taken into care?*
>
> *Ms J W: Yes. Yes.*
>
> *Ms Prasad: Can you just explain to me what you understand was going on with [Partner T] at the time?*
>
> *Ms J W: Well, she suffers ongoing from depression and anxiety, and she has at the time, was using liquid G, and so was, kind of, yes, either asleep or out of it for some of the time. Not really looking after the kids as, you know, as a minimum.*
>
> *Ms Prasad: Yes, okay. And I'll just ask you to clarify. Liquid G, that's an illicit drug, would I be correct in assuming that's GHB?*
>
> *Ms J W: Yes. Yes. The yes."*[159]

230. Ms J W provides her evidence as a concerned aunt (of Partner T) and grand-aunt of Children T and C. To the extent she gives an opinion about the nature of any parental or other bond between the Applicant and the Children T and C, she does so as a lay-person and without any clinical experience. The further point is that while she has known the Applicant since 2010, her relationship with him has only *"ramped up in May 2020"* when psychological symptoms prevailed upon the capacity of Partner T to properly care for those two children. While her proactive attitude and ready disposition towards assuming responsibility for the care of these two children is commendable, I am of the view that Ms J W's evidence must be received with a measure of caution to which only a limited amount of weight can be allocated.

Other witnesses – Ms J H

231. Ms J H is the duly and lawfully appointed foster carer for Child S. She has provided both written and oral evidence for the purposes of the instant hearing. Her written statement is dated 5 January 2021 and appears in the material.[160] She speaks positively of the relationship between the Applicant and Child S noting: *"[…] I have been witness to the interactions between [Child S] and [the Applicant]. They have always been positive & you*

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159 Ibid, page 5, lines 38–47; page 6, lines 1–2.

160 A10.

can see the love and devotion of [the Applicant] towards [Child S] & the love [Child S] has for [the Applicant]."

232. Ms J H speaks very favourably of an on-going relationship between the Applicant and Child S, going so far as to say that the Applicant *"is a big part of [Child S]' life & [Child S] needs his daddy."*[161] She foresees adverse outcomes for Child S in the event of the Applicant's removal noting that if the Applicant *"was to be deported there is going to be extraordinary difficulties for this bond to grow not to mention trying to maintain."*[162] Despite the physical absence of the Applicant from Child S' life, Ms J H notes *"[Child S] & [the Applicant] regularly send voice messages, photos & videos."*[163]

233. Her statement concludes on the basis that the Applicant is a *"VITAL connection in [Child S]' life and this I have witnessed during visits, phone calls & video calls."*[164]

234. In her evidence in chief, Ms J H confirmed the contents of her written statement. She further confirmed she had no changes to make to it. She confirmed that she had been Child S' carer for the significant majority of his young life thus far:

> *"Dr Donnelly: How do you know XSLJ?*
> *Ms J H: I know XSLJ as I'm a carer for his son, S XSLJ.*
> *Dr Donnelly: How long have you been a carer for S XSLJ for?*
> *Ms J H: I've been S XSLJ's carer since he was 16 months old.*
> *Dr Donnelly: How old is S XSLJ now?*
> *Ms J H: XSLJ is now five years old.*
> *Dr Donnelly: So he's been in your care continuously since he was ?*
> *Ms J H: For about three and a half years, yes."*[165]

235. Ms J H spoke of the extent and type of contact time the Applicant has spent with Child S. It included both face to face time and virtual contact:

> *"Dr Donnelly: As best you can tell the tribunal, what kind of contact has XSLJ had with his son?*

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161 Ibid.
162 Ibid.
163 Ibid.
164 Ibid.
165 Transcript, 23 February 2021, page 8, lines 25–33.

Ms J H: S XSLJ has had face to face contact, where we've gone out to visit and spent quite a number of hours in a contact placement. He's also had FaceTime phone calls, video calls, with S XSLJ, where he interacts, he'll read him books, plays games. They just they're building a bond, and it's one that is gradually increasing, and S XSLJ's so happy to see his dad. So happy to talk to him. I think it's really, really important."[166]

236. Finally, Ms J H expressed a personal opinion about the impact of a removal of the Applicant:

"Dr Donnelly: I see. How would you feel, yourself, if XSLJ was removed?

Ms J H: I think that would be a terrible shame if that happened. XSLJ and I have a good working relationship. It would he's worked so hard, and he's he truly does deserve to remain in Australia to continue having contact with his children. And have a chance to build that special bond between a father and son. It's most important."[167]

237. In cross-examination, certain questions about the level of Child S' development were put to Ms J H:

"Ms Prasad: Yes, okay. All right. There are some reports before the tribunal about S XSLJ and S XSLJ's development. I just wanted to ask you some questions about S XSLJ and his developmental milestones and how he's going with that?

Ms J H: Yes.

Ms Prasad: When he was much younger, I think we're talking about August 2018, there was discussion, and I think you raised some concerns about developmental delays that S XSLJ had. Can you talk about those?

Ms J H: Those developmental delays, well, basically, was his speech, his fine motor skills, and his ability to interact in a positive way with other children.

Ms Prasad: Okay. I think I noticed there was some, I guess, some sort of self harming behaviours, like banging his head?

Ms J H: Yes.

Ms Prasad: Yes?

Ms J H: He was doing that. That was basically, that was down to frustration as not to be able to communicate what he wanted, and I thought that being able to understand […] what he was trying to communicate"[168]

238. Ms J H also spoke about remedial therapy being undertaken by Child S. The level of therapy is not insignificant:

"Ms Prasad: Okay. Can I confirm that he is still, I guess, undertaking speech and occupational therapy?

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166 Ibid, page 8, lines 44–47; page 9, lines 1–3.

167 Ibid, page 9, line 18–23.

168 Ibid, page 10, lines 17–33.

Ms J H: He's still undertaking speech, occupational therapy, he seems to be almost up to date with. He's doing very, very well. You can hold a conversation with S XSLJ, and he understands what you're talking about, and you can understand him very clearly. He's come a long way.

Ms Prasad: Okay. How often is he attending speech and occupational therapy?

Ms J H: Speech was once a week. That was prior to COVID. At the moment, there's no OT at the moment, and speech is on hold for now.

Ms Prasad: Okay. But I guess, after, I guess, the COVID restrictions ease and he'd be going back to speech and OT?

Ms J H: Yes. Yes, he will be."[169]

239. Finally, Ms J H gave evidence about an actual diagnosis for the developmental difficulties of Child S. An initial diagnosis of *"foetal alcohol syndrome"* was eventually found to be *"global developmental delay syndrome"*:

> *"Ms Prasad: Yes. Now, [Ms J H], I saw that the paediatrician had made, sort of, alluded to a diagnosis for S XSLJ of foetal alcohol syndrome. We haven't seen we don't have any material beyond, I guess, that 2018 time period. Can you tell me whether S XSLJ was ultimately diagnosed with that?*
>
> *Ms J H: He wasn't diagnosed with that, no.*
>
> *Ms Prasad: Okay. No?*
>
> *Ms J H: They did say he was too young to be have that testing, but he was diagnosed with global developmental delay syndrome.*
>
> *Ms Prasad: Okay?*
>
> *Ms J H: And I believe that was 2019."*[170]

240. The following comments can be made about the evidence of Ms J H. She is not a clinician, so any evidence she now purports to give about the nature and extent of the parental relationship between the Applicant and Child S must be viewed as evidence from a well-intended and duly interested observer. She is *"duly interested"* because she is the primary and lawfully appointed foster carer of Child S and has been for the last almost four years – certainly, the overwhelming majority of Child S' life thus far. Therefore, the evidence she gives about the Applicant's parental relationship with Child S must be viewed with some caution.

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169 Ibid, page 11, lines 4–15.

170 Ibid, lines 19–28.

241. That said, her evidence about her own observations about Child S must be taken at a higher level than that of Mr S L, Ms G P, and Ms J W. Of these four witnesses, Ms J H has been, by far, the most *"hands-on"* of all of them in terms of actual parental care provided to one of the three relevant biological children. A significantly greater level of weight should be allocated to Ms J H's evidence about (1) the various therapies and treatments being administered to Child S; and (2) the ultimate diagnosis of global development delay syndrome affecting Child S. These items (1) and (2) could only have been made known to Ms J H by duly-qualified clinicians. I accept the best evidence of these items (1) and (2) should be provided by those clinicians. However, I am mindful the Tribunal is not bound by the rules of evidence and I will accept Ms J H's evidence about items (1) and (2) with a view of them carrying significant weight.

Other witnesses – various

242. There are a range of other statements contained in the material which make some measure of reference to the issues relating to any or all of the four relevant minor children. None of the makers of these statements were called to give evidence and, accordingly, the Respondent was not able to test any of this evidence in cross-examination. I will briefly refer to each of these remaining statements:

- there is a statement from a Case Manager at *"Lifestyle Solutions"* which is an authorised *"Out of Home Care Service Provider"* in New South Wales. Lifestyle Solutions hold the case management responsibility for Child S and are authorised to make decisions in relation to Child S and his care. The relevant statement is dated 8 December 2020 and contains the following about the parental relationship between the Applicant and that child:

  > *"I can confirm that [the Applicant] has had ongoing and consistent communication with Lifestyle solutions since 2018 and has demonstrated ongoing commitment to his son's care and wellbeing. [The Applicant] has been cooperative and open to suggestions regarding parenting support classes or relevant education programmed to support [the Applicant] to further develop his relationship with his son. [The Applicant] has expressed a consistent and ongoing desire to care for his son in the future should [the Applicant] be permitted to continue to reside in Australia for the purposes of supporting his children.*
  >
  > *Lifestyle Solutions is of the view that [the Applicant] having a positive relationship with his son is in the best interest of [Child S], and for [the*

Applicant] to remain actively involved in [Child S'] Life to support him as his father."[171]

[Errors in original]

To my mind, only limited weight can be allocated this statement significant though the role of Lifestyle Solutions may be in terms of the care arrangements for Child S, the Respondent was denied the opportunity to put any questions to the maker of this statement in terms of how the above-quoted views and opinions were derived or reached.

- Mr B T is an adult nephew of the Applicant, and the brother of Nephew C. While not a minor child for the purposes of this Primary Consideration B, Mr B T's evidence is relevant to determining whether it is in the best interests of Nephew C for the Applicant tor remain in Australia. Mr B T has provided a statement (dated 27 January 2021);[172] and a statutory declaration (sworn 24 August 2018).[173]
    - The written statement says:

      "[The Applicant] has been big part of my life since I was very young. [The Applicant] brought me and my mum over to Australia from New Zealand during difficult times (at a time when my mum and I had very little). [The Applicant] has always been there for us."

      [Errors in original]
    - The statutory declaration says:

      "My uncle [the Applicant], has been a vital role model in my upbringing. With a tough childhood he was one family member I could always go to, whether I needed someone to talk to, help with schoolwork or hobbies he was always willing to lend a hand. […] [h]e's always provided me with support and love whenever Ive needed it […] I believe Im growing into a ambitious young man who without the help of my uncle would be struggling."

      [Errors in original]

  It is difficult to allocate any reliable or definitive measure of weight to these documents because Mr B T was not called to give oral evidence at the hearing before me, and so the Respondent was denied the opportunity to test his evidence in cross-examination.

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171 A4.

172 A5.

173 T1, 138–139.

- Mr C S is a fellow detainee of the Applicant at Villawood. The Applicant has adopted a mentoring role for Mr C S as and has tried to assist him through certain personal difficulties. With specific reference to the Applicant's relationship with his children, Mr C S had the following to say in his statement of 26 November 2020:

  > *"Not only is he a good mentor but he is also a good father who is in regular contact with his young children. I know he misses them immensely, as everything he is doing, and has done, has been for them. They are the only reason that he has chosen to stay and fight this. They are his centre of balance and reason for being.*
  >
  > *Not many people would choose to stay in Villawood as long as he has, without being from a wartorn country but it's the love for his children that has given him the strength to persevere."*[174]

  Well-intended though Mr C S' evidence may be, it must be viewed with caution because of (1) his proximity to the Applicant given their mentor/mentee relationship; and (2) the relatively limited time Mr C S has known the Applicant.

- Ms J G is a *"long-term dear friend"* of the Applicant who has known him since 2006. She provided a statement dated 12 October 2020. She says the Applicant has played a *"big part"* in her life and that they have maintained contact since their initial meeting in 2006. She adds that *"we currently talk every day and have done so for about a year now […]"* During that time, Ms J G has noticed an *"immense change in [the Applicant's] overall character"*. Her statement[175] makes the following comments about the Applicant's parental bond with the three biological children.

  > *"He displays such love and care for his children every day when we speak, he expresses care and concern for them and makes constant effort in building as much of a relationship with his kids as he is able to whilst not being able to be physically present they do video call multiple times in the day.*
  >
  > *[…]*
  >
  > *I am aware of [the Applicant's] history, his last incarceration and the charges that he was given. I know that his time inside has heavily impacted him and he is ready to start his new life with his children/family."*

  Ms J G was not called to give oral evidence and the Respondent was denied the opportunity to test her evidence in cross-examination. It should also be borne in mind that Ms J G has a level of proximity to the Applicant such that it is difficult to see how her evidence could be truly objective. Further, whatever views she expresses about

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174 A6, 1–2.

175 A9.

the nature and extent of the Applicant's parental bond with the children, they are made as a lay-person and have no clinical basis. For these reasons, only very limited weight can be afforded to her evidence.

- Ms K H is a high school friend of the Applicant from New Zealand. In her statement contained in the material sworn 5 January 2021[176] she said she has known the Applicant since *"the early stages of high school"*. With specific reference to the Applicant's parental relationship with his three biological children, Ms K H said the following:

  > *"His only purpose is to be the best version of himself, not just for him but his 3 children who he speaks to daily 20min each morning and up to 1.5 hours each night. His baby girl [Child T], 7, who is the spitting image of her dad and so close They read, draw chat about al sorts of things. [Child C], 5, her brother. [The Applicant] wants to be that guiding dad to his son. And [Child S] who turns 5 in a few days wants his daddy*
  >
  > *[…]*
  >
  > *[The Applicant] also may not be Australian but he has 3 Australian children who want their daddy every day to cuddle them and tell them they are loved physically to their faces. He wants his children to live a better life than he did. I know that he can do that"*
  >
  > [Errors in original]

  While it can be accepted that Ms K H has known the Applicant for a fair amount of time, her evidence is not clinically derived and can only be accepted as the evidence of a concerned and well-intended lay-person/friend. Only minimal weight can be allocated to it.

- Ms M W is a caseworker with the New South Wales Department of Communities and Justice. Her statement from 8 January 2021[177] appears in the material. She is the case worker for Child T and Child C. Ms M W notes:

  > *"The family have had an open case with the Department of Communities and Justice since 15 April 2020. I have been their caseworker since the 27 August 2020. I have been supporting their mother [Partner T] through intervention to reduce reported risk of significant harm concerns pertaining to [Child C] and [Child T].*
  >
  > *I can confirm their father [the Applicant] has been having daily telephone contact with [Child C] and [Child T] during this time. [Child C] and [Child T]'s mother has reported this has been positive for the children."*

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176 A11.

177 A12.

I am prepared to allocate a certain measure of weight to the evidence of Ms M W. While it is not clear whether her evidence is clinically based, it suffices to say that she does have – as a duly qualified and experienced case worker – a certain level of proximity to the familial circumstances in which the Children T and C have found themselves. Contrarily, in terms of allocable weight, the Respondent was not able to cross-examine Ms M W and thus test her evidence. Accordingly, while there is nothing determinative to be taken from her evidence, it should be regarded as reliable and well-founded evidence.

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

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

> *(a) The nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);*
>
> *(b) The extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;*
>
> *(c) The impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;*
>
> *(d) The likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;*
>
> *(e) Whether there are other persons who already fulfil a parental role in relation to the child;*
>
> *(f) Any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);*
>
> *(g) Evidence that the non-citizen has abused or neglected the child in any way, including physical, sexual and/or mental abuse or neglect; and*
>
> *(h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.*

244. For the purposes of clarity, I point out that I will be approaching the application of these subparagraphs to the instant facts by grouping the relevant minor children thus: First, I will deal with Child T and Child C given they have the same biological mother – Partner T;

second, Child S, given that he has a separate biological mother – Partner R; and third, Nephew C, given that he is separate from the other three children and about whom there is little information upon which to make any reliable finding about allocation of any weight to this Primary Consideration B.

Children T and C

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

246. The Applicant has been removed from the Australian community into either criminal custody or immigration detention since August 2016. There can be little argument with the finding that this removal from the general community has resulted in long periods of absence and the Applicant has consequently had limited meaningful contact with both of these children.

247. With specific reference to Child T, there is evidence in the material that as early as January 2015, when Child T was 13 months old (and before Child C was born), she and her mother (Partner T) relocated to Queensland. The material indicates Child T either resided with her mother or, in the alternative, was placed into the care of the Applicant's sister. In neither scenario is there indication of any durable parental relationship between the Applicant and Child T. A case note from the New South Wales Department of Corrective Services dated 12 January 2015 says the following:

> *"Daughter [Child T] […] usually resides with her mother in Qld, [the Applicant] stated they came down for Christmas and the mother left without [Child T], he thinks she may have been stressed and wanted a break, she has been talking about coming down to get [Child T], [the Applicant] says he pays all required child support and he has no concerns about [Child T] staying in Sydney with his sister or returning to qld despite [Child T]'s mother reporting feelings of suicide. [The Applicant] advised [Child T] cannot stay with him due to his place not being child friendly and [the Applicant's sister's] place being a more family friendly environment, he hopes one day to be stable enough for [Child T] to live with him."*[178]
>
> [Errors in original]

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178 T1, 298.

248. Further, a pre-sentencing report prepared for a court date on 16 January 2015 notes the following about the then-current circumstances of the Applicant:

> *"The offender reported he has a one year old daughter form a previous relationship, he stated his daughter primarily resides with his ex-partner in Queensland, however is currently in the care of his sister in Sydney. Attempts were made to verify this information with the offender's sister, however due to child care commitments she was unable to speak with Community Corrections prior to the Court date."*[179]

249. There is therefore minimal evidence of any durable and demonstrable relationship between the Applicant and Child T. Even prior to his placement into criminal custody/immigration detention on and from August 2016, it is clear that he played next to no parental role in the life of Child T. As against that, it is necessary to have regard to the evidence of the abovementioned witnesses such as Mr S L and Ms G P who speak of the Applicant seeking to maintain contact with Child T during the period he has been physically removed from that child's life. It cannot be found that the Applicant has abandoned any hope of a parental or similar bond with this child during his time out of the community.

250. With respect to Child T, balancing the two themes of the evidence (i.e., the Applicant's absence versus his recent efforts to make and maintain contact with his children) referable to this sub-paragraph (a), I am of the view that a moderate level of weight is allocable to this sub-paragraph (a) in favour of a finding that the Applicant's visa status be restored to him.

251. Child C is 5 years of age. While I accept that the Applicant has played a parental role in the life of Child C, having regard to the Applicant's placement into custody in August 2016, the Applicant has been physically absent from this child's life for the overwhelming majority of it. In a written statement, the Applicant wrote:

> *"7. I speak with [Partner T], [Child T] and [Child C] on the phone daily, and they visit me whenever they can. I have a very positive relationship with [Child T] and [Child C]. I have been in their lives since they were born.*
>
> *8. I also have another child, [Child S], who was born on [redacted] January 2016. [he] is currently in the care of Family and Community Services. I helped to parent [Child S] until he was 7 months old, which is when I was incarcerated in the Northern Territory. When I was incarcerated, his mother was left to care for [Child S] alone. She has struggled with drug abuse, and has not been able to kick her addiction, which is why [Child S] is with FACS."*[180]

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179 T1, 339.

180 T1, 830.

252. If Child C was born in November 2015, and the Applicant was taken into custody in August 2017, that means, at most, he was only able to play a parenting role in Child C's life for approximately 9 months. However, he also says he was playing a parenting role for Child S (who has a different mother) for seven of those nine months.

253. It is undeniable that not only has the Applicant been physically absent from Child C's life for *"long periods"*, he has been physically absent for virtually the totality of Child C's life. Therefore, I am bound by the terms of Direction 79 to give this sub-paragraph (a) less weight because there have been *"long periods of absence"*.

254. Therefore, with respect to Child C, similarly to Child T, I am of the view that a moderate level of weight is allocable to this sub-paragraph (a) in favour of a finding that the Applicant's visa status be restored to him.

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

256. It seems clear that prior to the commencement of his period of incarceration in August 2016 the Applicant did not play any positive parental role in the life of Child T or C. It should, however, be accepted from the material that he nevertheless paid child support towards the care of Child T. Further, although he thought his own residential premises were apparently not suitable for looking after Child T, he nevertheless made arrangements for Child T to reside with his sister. But this does not equate to a positive parental role. The position can be said to have changed after the Applicant's incarceration in August 2016. The evidence of his witnesses demonstrates an intention on his part to establish and maintain a regular pattern of communication with Child T and C. One can only take at face value the Applicant's stated intention during his oral evidence before me to take necessary legal and other steps in order to re-unify with his three children. However well-intended this evidence may be, there is a long way to go (in a legal/administrative sense) before the Applicant can achieve any such outcome.

257. Child T is currently seven years of age and will turn eight at the end of this year. Child C is currently five years of age. There are at least 10 years of parenting referable to Child T until she attains the age of 18 years, and 13 years of parenting referable to Child C. This is a factor that attracts some measure of weight in favour of the Applicant. Having regard to the totality of the evidence – particularly that relating to the Applicant's demonstrated pattern of regular communications with both Children T and C during his period of incarceration – I am of the view that a moderate level of weight is attributable to this sub-paragraph (b) in favour of a finding that the Applicant's visa status to remain in Australia be restored to him.

258. **Sub-paragraph (c)** of paragraph 13.2(4) of the Direction involves an assessment of any negative impact of the Applicant's prior conduct, and any likely future conduct, on the subject minor children in Australia.

259. To the best of my understanding of the material, there is no evidence that the Applicant's prior conduct and pattern of offending has had any adverse impact on the mental health of Child T or C. Of course, they are respectively aged seven and five years. They are probably too young to express any such views. As against that, there is the reality that the Applicant's conduct has contributed to the removal of Children T and C from both his care and the care of Partner T. The material contains reference to an *"Application initiating care proceedings"* dating from April 2017. In those proceedings, the New South Wales Department of Family and Community Services sought the following orders:

- an interim order allocating interim parental responsibility of Children T and C to the Minister who administers Family and Community Services; and
- an order allocating parental responsibility of Children T and C to the Minister who administers Family and Community Services until Children T and C attain 18 years of age.[181]

260. What is not known from the material is the extent to which any future unlawful conduct by the Applicant will negatively affect Child T and C. On balance, I am of the view that any re-commission of similar drug production and supply offending by the Applicant would, in all likelihood, result in his further incarceration. Consequently, this would most likely have a

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181 T1, 717–718.

negative impact on Children T and C. At best, only a slight level of weight is allocable to this sub-paragraph (c) in favour of the Applicant having his visa returned to him.

261. **Sub-paragraph (d)** of paragraph 13.2(4) of the Direction refers to an assessment of the likely effect that any separation of Children T and C from the Applicant would have on them, taking into account the Applicant's ability to maintain contact in other ways.

262. It seems clear from the evidence of the Applicant and a predominant number of his witnesses such as Mr S L, Ms G P, Ms J W and Ms J H that the Applicant has sought to maintain some measure of consistent and regular communications with the children for the period of his physical removal from their lives. Those communications have involved face-to-face visits (especially prior to the COVID-19 restrictions on visitations) plus telephonic and electronic modes of communication.

263. Were the Applicant to be removed to New Zealand, there is little or nothing to suggest he would not be able to maintain contact with Child T via these telephonic/electronic/digital and any other real-time communication platforms. There is nothing in the material indicating any resistance to such contact between the Applicant and Children T and C, be it from Partner T or anyone else. It is very likely that were he to be removed to New Zealand, the Applicant's communication with the children through such telephonic/electronic/digital communication platforms will continue.

264. I am thus of the view that despite the possibility of maintaining non-face-to-face communications with Children T and C in the event of the Applicant's removal to New Zealand, this sub-paragraph (d) is of moderate weight in favour of a finding that it is in the best interests of Children T and C for the Applicant's visa status to remain in Australia to be restored to him.

265. **Sub-paragraph (e)** of paragraph 13.2(4) of the Direction asks whether there are other persons who already fulfil a parental role in relation to the children. A very unfortunate aspect of this case is that both the Applicant's and Partner T's serious difficulties with addiction to illicit substances have significantly compromised their capacity to parent Children T and C.

266. Those difficulties and their severe impact on the Applicant's and Partner T's capacity to parent the children have necessitated the intervention of lawful authority (FACS) to secure the safety of the Children. The impact of substance abuse on the collective parenting capacity of the Applicant and Partner T (whether as a de-facto couple, or as part of some type of shared parenting arrangement) is clear even from witnesses who are supportive of the Applicant. Both Mr S L and Ms G P spoke about this in their evidence and made it clear that the capacity of Partner T to consistently and reliably fulfil a primary parenting role for Children T and C is a fluctuating and fluid matter.

267. The sad reality of the evidence is that there are *"other persons"* who, due to the impact of drug issues (in the case of Partner T) or incarceration and/or drug issues (in the case of the Applicant) have been compelled to fulfil a parental role in relation to Children T and C. The capacity of Partner T to properly parent the children remains a work in progress. Likewise, while the Applicant expresses an intention to go through necessary legal channels to re-unite himself with his children, he is a long way from achieving any final outcome in this regard.

268. In these circumstances, it is very difficult to safely allocate any measure of weight in favour of the Applicant pursuant to this sub-paragraph (e).

269. **Sub-paragraph (f)** of paragraph 13.2(4) of the Direction requires the Tribunal to consider any known views of the children about their separation from the Applicant, having regard to their age and maturity.

270. The primary source of evidence about any views of the children derives from what his supportive witnesses have to say about this issue. Ms G P, that of Mr S L, and that of Ms J W, each say that Children T and C will suffer some kind of adverse outcome in the event of the Applicant's physical removal from their lives. As I have found in relation to the evidence from these lay-witnesses, their evidence, although well-intended, is not clinically based. The further reality is that little or no weight can be allocated to this factor because Children T and C are simply too young to be capable of expressing any such views. Accordingly, this sub-paragraph (f) is neutral to determination of the instant application.

271. **Sub-paragraph (g)** of paragraph 13.2(4) of the Direction looks to evidence that the Applicant has abused or neglected the child/ren in any way, including physical, sexual,

and/or mental abuse or neglect. I am not aware of anything in the material indicative or supportive of a finding that the Applicant has abused or neglected the children in any way. This factor is neutral to determination of the instant application.

272. **Sub-paragraph (h)** of paragraph 13.2(4) of the Direction looks for evidence that the child/ren have suffered or experienced any physical or emotional trauma arising from the Applicant's conduct. Apart from the lay evidence of Mr S L, Ms G P and Ms J W who each spoke about the impact of the Applicant's absence from the life of Children T and C, there is nothing else in the material relevant to this specific issue. Further to that, the evidence of the abovementioned lay-witnesses is not clinically based and cannot take this factor (h) anywhere further than having a neutral value in terms of allocable weight for the purposes of this Primary Consideration B.

Child S

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

274. As mentioned earlier, Child S was born in January 2016. While the Applicant resided with Child S for a period of seven months until taken into criminal custody/immigration detention in August 2016, there is little in the evidence to support the proposition of any durable or lengthy nature of any parental relationship between the Applicant and this child. Equally, there is no denying the reality that there have been extremely long periods of absence by the Applicant from the life of Child S.

275. This is not to say that there has been absolutely no meaningful contact between the Applicant and this child. There is the helpful evidence of Ms J H (the lawfully appointed foster carer of Child S since June 2017) who spoke of the positive nature of the interactions between the Applicant and Child S. Ms J H spoke of being supportive of an ongoing father-son relationship between the Applicant and this child.

276. Similar to the Children T and C, and in part because of the terms of Direction 79 which require me to afford less weight because the Applicant's incarceration has caused *"long periods of absence"*, I am of the view that, at best, a moderate level of weight is allocable

to this sub-paragraph (a) to support a finding that the Applicant's visa status be restored to him.

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

278. It is important, to my mind, to differentiate between Ms J H's evidence wherein she supports a level of on-going communication and Child S from any inference or presumption that the Applicant is likely to play a positive *"parental"* role in the future life of Child S. Ms J H Is the lawful guardian of Child S and will thus lawfully play the main positive parental role of that child into the future.

279. While the Applicant speaks of initiating proceedings to lawfully assume primary care responsibilities for his children, this can only be taken as a stated intention and not in any way be regarded as definitive. The Applicant is yet to commence such proceedings and there is no certainty that he will obtain the outcome he now speaks of. At best, these intended proceedings or steps are a work in progress. That is not to say that the Applicant cannot be reasonably expected to play any positive parental role in the future of Child S. It is simply the extent of that role which is yet to be defined.

280. The Applicant has ample time to play such a role to whatever extent may be lawfully and practically open to him. This is because there are nearly 13 years of parenting time left to run until Child S attains the age of 18 years. This is an element in favour of the Applicant. Having regard to all of the evidence relevant to this sub-paragraph (b), I am of the view that it is of moderate weight in favour of a finding that the Applicant's visa status be restored to him.

281. **Sub-paragraph (c)** of paragraph 13.2(4) of the Direction involves an assessment of any negative impact of the Applicant's prior conduct, and any likely future conduct, on the subject minor children in Australia.

282. As I understood the evidence of Ms J H, there is little to suggest that the Applicant's prior unlawful conduct has had any negative impact on Child S. Ms J H has observed Child S readily and happily communicating and liaising with the Applicant. She gave evidence of Child S asking her about when he will next speak with the Applicant and that in her opinion, *"[the Applicant] is a big part of [Child S]' life & [Child S] needs his daddy."* I am also mindful of the parallel evidence of Mr S L in this regard.

283. The material does not reveal any extent to which any future unlawful conduct by this Applicant will negatively affect Child S. It is, to my mind, reasonable to find that were the Applicant to re-commit similar offences of drug production and drug supply, this would most likely have a negative impact on Child S which is yet to be ascertained. Accordingly, only a slight level of weight can be allocated to this sub-paragraph (c) in favour of the Applicant having his visa returned to him.

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

285. The evidence of Ms J H makes it clear that there has been a certain level of communication between the Applicant and Child S. Reference should again be made to her evidence in chief, where she spoke of face-to-face visits and then real-time alternate communications:

> *"Dr Donnelly: As best you can tell the tribunal, what kind of contact has XSLJ had with his son?*
>
> *Ms J H: S XSLJ has had face to face contact, where we've gone out to visit and spent quite a number of hours in a contact placement. He's also had FaceTime phone calls, video calls, with S XSLJ, where he interacts, he'll read him books, plays games. They just they're building a bond, and it's one that is gradually increasing, and S XSLJ's so happy to see his dad. So happy to talk to him. I think it's really, really important."*[182]

286. It is clear, therefore, that were the Applicant to be removed to New Zealand, there is little or nothing to cavil with the suggestion that he would be able to maintain contact with Child S via these telephonic/electronic/digital and any other real-time communication platforms. There is nothing in the material indicating any resistance from Ms J H to such contact

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182 Transcript, 23 February 2021, page 8, lines 44–47; page 9, lines 1–3.

between the Applicant and Child S. Indeed, it will be recalled that Ms J H says *"[Child S] asks to talk & visit with his daddy & I support this 100%."*[183] It is therefore very likely that were he to be removed to New Zealand, the Applicant's communication with Child S through such telephonic/electronic/digital communication platforms will continue.

287. I am thus of the view that despite the possibility of maintaining non-face-to-face communications with Child S in the event of the Applicant's removal to New Zealand, this sub-paragraph (d) is of moderate weight in favour of a finding that it is in the best interests of Child S for the Applicant's visa status to remain in Australia to be restored to him.

288. **Sub-paragraph (e)** of paragraph 13.2(4) of the Direction asks whether there are other persons who already fulfil a parental role in relation to the children. Clearly, there is such a person – Ms J H who, since June 2017, has been the lawfully appointed foster carer under the auspices of FACS due to Partner R's serious and ongoing issues with illicit substance abuse. The material contains the relevant order made by the Children's Court at Campbelltown formally allocating *"all aspects of parental responsibility for the child [Child S] to the [NSW] Minister [for Family and Community Services] until he is 18 years of age."*[184]

289. Therefore, it can be safely found that Ms J H already lawfully fulfils a *"parental role"* in relation to Child S. This sub-paragraph is of neutral weight in the determination of the instant application.

290. **Sub-paragraph (f)** of paragraph 13.2(4) of the Direction requires the Tribunal to consider any known views of the children about their separation from the Applicant, having regard to their age and maturity.

291. The main source of evidence about the views of Child S in this regard comes from Ms J H and to a lesser extent, Mr S L. As I have explained in relation to earlier sub-paragraphs referable to Child S, it is clear that there is a definite line of communication between the Applicant and this child. Child S knows who the Applicant is and knows the Applicant as his father. Ms J H is to be, respectfully, commended for so readily facilitating the ongoing relationship between the Applicant and Child S.

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183 A10.

184 T1, 627.

292. This finding should be tempered by the reality that Ms J H's evidence, although well-intended, is not clinically based. The same can be said of Mr S L in this regard. Ultimately though, little or no weight can be allocated to this factor because Child S is simply too young to be capable of expressing any such views. The only safe finding is that this sub-paragraph (f) is neutral to the determination of this instant application.

293. **Sub-paragraph (g)** of paragraph 13.2(4) of the Direction looks to evidence that the Applicant has abused or neglected the child/ren in any way, including physical, sexual, and/or mental abuse or neglect. I am not aware of anything in the material indicative or supportive of a finding that the Applicant has abused or neglected the children in any way. This factor is neutral to determination of the instant application.

294. **Sub-paragraph (h)** of paragraph 13.2(4) of the Direction looks for evidence that the child/ren have suffered or experienced any physical or emotional trauma arising from the Applicant's conduct. Apart from the lay evidence of Ms J H, and, to a lesser extent, Mr S L who each spoke about the impact of the Applicant's absence from the life of Child S, there is nothing else in the material relevant to this specific issue. Additionally, the evidence of the abovementioned two lay-witnesses is not clinically based and cannot take this factor (h) anywhere further than having a neutral value in terms of allocable weight for the purposes of this Primary Consideration B.

Nephew C

295. I have earlier referred to the nature of the Applicant's relationship with Nephew C. The Applicant summarises this item in his latest statement now before the Tribunal.[185] Further, in closing submissions made on behalf of the Applicant, the following was said in relation to Nephew C:

> *"Dr Donnelly: Apart from that, the other observation I just wanted to very briefly make and that is with the best interest of minor children in Australia, which I neglected to mention before and I apologise to the tribunal and to my learned friend. And it is to do with the applicant's nephew, [Nephew C]. My submission is respectfully that some margin of weight at least could be given to that also, in combination with what I have already said about the best interest of minor children in Australia. We accept that not much weight should be given to that because [Nephew C] already has other individuals who maintain a parental role, although there is some evidence in the*

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185 See [199] of these Reasons – specifically, paragraphs [12]–[13] of the quoted portion of the Applicant's latest statement before the Tribunal.

applicant's statement for which he was not cross-examined on or challenged on, to indicate that he has built a relationship with his sister's son and he has got a picture of him on his wall, and talks to him in immigration detention and that that relationship would be best sustained by revocation of the mandatory cancellation of the visa."[186]

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

297. The nature of the relationship between Nephew C and the Applicant is clearly non-parental. The Applicant refers to it as *"a positive and ongoing relationship"*. I note the comments of Mr B T in his statement and statutory declaration, and, primarily on that basis, accept the relationship the Applicant has with Nephew C to be genuine. Be that as it may, it is difficult to allocate any durable characterisation to it. As well, the Applicant cannot cavil with a finding that he has spent long periods of absence from the life of Nephew C and consequently has had limited meaningful contact with him. Very minimal, if any, weight can be allocated to this sub-paragraph (a) in favour of the Applicant.

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

299. Nephew C is primarily cared for by the Applicant's sister. The Applicant's connection with Nephew C appears to go no further than one of a loving uncle who wants to maintain a presence in the life of his nephew. It is not possible to extrapolate a likelihood of the Applicant playing a *"parental"* role in the future from such a nephew-uncle relationship. As against that, there are some nine years until Nephew C attains the age of 18 years and it would not be unreasonable to infer that the relationship between the Applicant and Nephew C may evolve into something more parental than what it has been in the past and what it presently is.

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186 Transcript, 23 February 2021, page 23, lines 1–14.

300. I am of the view that a moderate level of weight is attributable to this sub-paragraph (b) in favour of a finding that the Applicant's visa status to remain in Australia be restored to him.

301. **Sub-paragraph (c)** of paragraph 13.2(4) of the Direction involves an assessment of any negative impact of the Applicant's prior conduct, and any likely future conduct, on the subject minor child/ren in Australia. There is little or nothing in the evidence to indicate any negative or other impact of the Applicant's past conduct upon Nephew C. Similarly, there is a dearth of evidence about any future offending by the Applicant upon Nephew C. There is, to my mind, insufficient evidence in the material to safely allocate any measure of weight to this sub-paragraph (c).

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

303. The Applicant spoke of having pictures of Nephew C on his wall in immigration detention and otherwise speaking with Nephew C on the telephone. In the absence of any evidence to the contrary, there is nothing in the material to suggest that this telephonic mode of communication would not continue upon his removal to New Zealand. Similarly, it is reasonable to infer that such telephonic contact could evolve into other real-time forms of communication. Accordingly, minimal, if any weight is attributable to this sub-paragraph (d) in favour of the Applicant.

304. **Sub-paragraph (e)** of paragraph 13.2(4) of the Direction asks whether there are other persons who already fulfil a parental role in relation to Nephew C. Nephew C does not share the same parental difficulties that have been experienced by the Applicant's three biological children. Nephew C has been and is very likely to remain safely in the care of his biological mother – the Applicant's sister. Clearly, the Applicant's sister already fulfils a parental role in relation to Nephew C. This is conceded by the Applicant in his SFIC.[187] Minimal, if any weight is allocable in favour of the Applicant in relation this sub-paragraph (e).

305. **Sub-paragraph (f)** of paragraph 13.2(4) of the Direction requires the Tribunal to consider any known views of the children about their separation from the Applicant, having regard to

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[187] A1, 22, [89].

their age and maturity. The material contains nothing about the views of Nephew C in the event of the Applicant's removal. No weight can be safely allocated to this sub-paragraph and it is neutral to determination of the instant application.

306. **Sub-paragraph (g)** of paragraph 13.2(4) of the Direction looks to evidence that the Applicant has abused or neglected Nephew C in any way, including physical, sexual, and/or mental abuse or neglect. I am not aware of anything in the material indicative or supportive of a finding that the Applicant has abused or neglected Nephew C in any way. This factor is neutral to determination of the instant application.

307. **Sub-paragraph (h)** of paragraph 13.2(4) of the Direction looks for evidence that the child/ren have suffered or experienced any physical or emotional trauma arising from the Applicant's conduct. There is nothing in the material to support any such finding. This factor is neutral to determination of the instant application.

Conclusion: Primary Consideration B

308. Having regard to:

(a) the relatively young ages of the three biological children and the relative absence of any parental relationship between the Applicant and those children because of the Applicant's removal from the Australian community for most of their lives, and the state care arrangements which have been in place for each child from time to time;

(b) the relatively young age of Nephew C and the reality that he is primarily cared for by the Applicant's sister and thus the Applicant cannot be said to have any durable parental relationship with that child;

(c) the reality that the Applicant already maintains contact with the four relevant children through telephonic and other electronic real-time means and that this level of connectivity is very likely to continue in the event of his removal to New Zealand;

(d) the reality that others primarily parent Child T, Child C, and Nephew C, and that Ms J H is the lawfully appointed foster carer for Child S;

(e) the further reality that any stated intention by the Applicant to lawfully re-introduce himself into the lives of his biological children as their primary carer remains an intention only and is a long way from being realised;

(f) the reality that the Applicant has been absent from the lives of all of the children since August 2016;

(g) in relation to each of Children S, T and C, considered individually, the moderate level of weight I have allocated to sub-paragraphs (a), (b) and (d) and the slight level of weight I have allocated to sub-paragraph (c);

(h) with reference to Nephew C, the minimal levels of weight I have allocated to sub-paragraphs (a), (d), and (e) and the moderate level of weight I have allocated to sub-paragraph (b);

(i) the Respondent's position that this Primary Consideration B *"should be given limited weight in favour of revocation"*[188]

– I am of the view that the cumulative best interests of the four relevant minor children in Australia weigh moderately in favour of revocation of the mandatory cancellation of the Applicant's visa. I qualify this finding by saying that the weight attributable to this Primary Consideration B does not outweigh the very heavy weight I have attributed to Primary Consideration A.

PRIMARY CONSIDERATION C: THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

309. In making the assessment for weight to be allocated to Primary Consideration C, paragraph 13.3(1)[189] of the Direction provides that I should consider whether the Applicant has breached, or whether there is an unacceptable risk that he would breach, the trust of the Australian community. I must also have regard to (1) the Government's views in this respect

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188 R1, 9, [40]. See also R1, 10, [47]; R1, 11, [48]–[59].

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

and (2) any overarching principles and guidance provided by the Direction.[190] Paragraph 13.3(1) of the Direction directs a decision-maker to endorse non-revocation as an appropriate finding simply because the nature of an Applicant's offending is such that the Australian community would expect that he/she should not hold a visa.

Factual circumstances relevant to this Primary Consideration C

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

- the Applicant arrived in Australia on 13 December 2003 aged approximately 24 years 5 months. He is now 41 years of age;
- for the purposes of the instant application, there are four relevant minor children in Australia. Three of them are biological children and the fourth is a nephew. Having regard to the relevant factors applicable to each of the four relevant children, I have allocate a moderate level of weight in favour of the Applicant pursuant to Primary Consideration B;
- the Applicant has been involved in two specific relationships in Australia that have resulted in the three biological children. The Applicant and Partner T are the biological parents of Children T and C. The Applicant and Partner S are the biological parents of Child S. Nephew C is the child of the Applicant's sister;
- the Applicant has a very lengthy and extremely serious criminal history. His history in New Zealand records the commission of 20 offences dealt with at 10 court dates;
- his history in Australia records the commission of 21 offences dealt with at 12 court dates;
- his offending history discloses a rate of offending in New Zealand at the rate of approximately four offences per annum, and in Australia, at a rate of two offences per annum;[191]

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

191 The *"start date"* for determination of the rate of his offending in Australia is 2006 – the year he first offended in Australia. The *"end date"* for his offending is 2016, when he was taken into criminal custody.

- in terms of sentencing, his offending in New Zealand has seen the imposition of head custodial terms totalling seven years and nine months. His offending in Australia has been punished by head custodial terms totalling almost 13 years;
- I have made a finding that were this Applicant's offending (especially in the realm of drug manufacturing and supply) to be repeated, the nature of harm to members of the Australian community could involve significant physical, psychological and/or financial harm including, quite conceivably, to a catastrophic level;
- I have made an assessment of his risk of recidivism. My assessment of the totality of the evidence has led me to a finding that his risk of recidivism ranges from (1) at best, low-moderate; and (2), more likely, a risk of re-offending that is now little or no different than what it was at the time of his most recent removal from the Australian community;
- the Applicant arrived in Australia in December 2003 and commenced offending in August 2006, less than three years after his arrival;
- I have expressed misgivings about the extent to which the Applicant's proposed sessions with the social worker (Ms Ardren) – or her equivalent – and the several courses he has done in immigration detention are sufficient to meet Dr Nielssen's threshold for *"ongoing counselling for substance use, given the history of long term abstinence and relapse, and the complications of past relapses"*;
- consequently, I am not satisfied that the Applicant's self-diagnosis or analysis of the state of his depressive symptoms can be safely relied upon as a sufficiently protective factor against him disengaging from any necessary therapy and relapsing into abusing illicit drugs.

The Evolution of the Australian Community's "Expectations"

311. In 2003, this Tribunal said that in considering weight attributable to this Primary Consideration C, one must look to the expectations of "*…the informed, reasonable member of the Australian community, rather than a member of the Australian community who is only prepared to consider the punitive aspects of the power under s 501.*"[192]

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192 *Waits and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] AATA 1336 at [36] (per DP Block).

312. In 2017, Deputy President Forgie of this Tribunal considered that paragraph 13.3(1) of the Direction leads a decision-maker to:[193]

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

313. This more circumspect nature of the Australian community's expectations also seems apparent in the decision of Justice Mortimer in *YNQY v Minister for Immigration and Border Protection* ("*YNQY*"):[194]

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

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

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

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193 *ETWK and Minister for Immigration and Border Protection* [2017] AATA 228 at [102] and [103].

194 [2017] FCA 1466 at [76]–[77].

315. In *Afu v Minister for Home Affairs* ("*Afu*"),[195] Justice Bromwich said:

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

316. In *FYBR v Minister for Home Affairs* ("*FYBR*"),[196] Justice Perry observed that:

> *"It follows, in line with the authorities, that cl 11.3 of Direction 65[197] is a statement of the Government's view as to the expectations of the Australian community for the purposes of determining whether or not to refuse a visa. Contrary to the Applicant's submissions, it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or evidence about those expectations. Rather, the Tribunal must give effect to the "norm" stipulated in cl 11(3) which will of its nature weigh in favour of refusal, at least in most cases..." [198]*
>
> *[My underlining]*

317. The single judge decision in *FYBR was* appealed to the Full Federal Court. On 25 October 2019, the Full Court upheld the single judge decision in *FYBR*, confirming Justice Perry's reasons and approach to the expectations of the Australian community.[199]

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

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195 [2018] FCA 1311 at [85].

196 [2019] FCA 500.

197 Note: *FYBR* was concerned with a visa refusal. This means the relevant paragraph relating to expectations of the Australian community was paragraph 11.3 [et seq] of the Direction. The instant case is, of course, a matter relating to the non-revocation of a mandatory cancellation decision. In those latter circumstances, the relevant paragraph is 13.3 [et seq] of the Direction. Further, "the Direction" is now Direction 79 that took operative effect on and from 28 February 2019. The paragraph numbering in Direction 79 relating to "expectations of the Australian community" remains the same as per Direction 65 – that is, paragraph 11.3 for visa refusal matters and paragraph 13.3 for non-revocation matters.

198 *FYBR*, paragraph [42] (Perry J).

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

(a) the "*expectations of the Australian community*" cannot be measured or determined as in the case of a provable fact. Rather, it is an assessment of community values made on behalf of that community.[200]

(b) it is not for the Tribunal to determine for itself what such "*expectations*" are by reference to the Applicant's circumstances or evidence about those expectations;[201]

(c) the Government's views in relation to community expectations are contained within the Direction. The Minister is entitled to make statements as to what the Government thinks the "*expectations of the Australian community*" are, and the Tribunal should have due regard of those statements, if made;[202]

(d) in assessing the weight attributable to this Primary Consideration C, decision-makers can have regard to the principles in paragraph 6.3 of the Direction, in particular, sub-paragraphs 6.3(5) and 6.3(7). The allocation of the weight attributable to this Primary Consideration is a matter for the decision-maker.[203]

Analysis – Allocation of Weight to this Primary Consideration C

319. The Applicant's PCF contains a shortly-stated employment history in Australia. It tells us that from 2003–2008 he worked as a panel beater at a motor vehicle smash repair shop in Sydney.[204] This is corroborated by a statement of the principal of that former business (which has since ceased to trade) namely, Mr P C. Mr P C confirmed that the Applicant was employed by that business from 10 February 2004 to 1 July 2005 and from 16 December 2005 to 29 December 2006. Mr P C was of the view that the Applicant performed his duties as an employed panel beater *"in a competent manner"*.[205]

320. As mentioned earlier, the Applicant has given both written and oral evidence of an intention to involve himself in other areas of employment that can be broadly stated as (1) electrical services; (2) obtaining qualifications to become a personal trainer; and (3) returning to the

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200 *Afu* at paragraph [85].

201 *FYBR* at paragraph [42].

202 *FYBR*, paragraph [74] (Charlesworth J) citing *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348.

203 Ibid, paragraphs [77] (Charlesworth J) and [105] (Stewart J).

204 T1, 125.

205 A13.

panelbeating trade. As against this, the evidence is that during his time in Australia, he has spent a total of something like seven years in criminal custody and/or immigration detention and that he has not engaged in remunerative employment since 2010.

321. The Applicant's PCF refers to certain positive contributions he has made to the Australian community thus: *"I am a hard worker and qualified panel beater who has worked in Australia for 6+ years and paid Australian taxes."*[206] The PCF is silent about his participation in any volunteer activities and in any community and cultural activities. While not performed in the Australian community, it is worth noting that as per the Applicant's own evidence, corroborated by that of Mr C S, he has provided self-improvement assistance to fellow detainees in the realms of mentoring, fitness and advocacy of their rights.

322. It would not be safe to find that the Applicant has solid history of remunerative employment history in Australia. It would appear that when he turns his mind to some kind of lawful activity, be it panel beating or assisting others, he does it well. This observation must be tempered against the dominant role that his involvement with illicit drugs and consequent very serious to extremely serious offending has played in his life in the Australian community.

323. The Applicant's professed determination to either immediately return to remunerative employment or to obtain qualifications to do so in a new area in which he has not worked before must be viewed in the context of his history of criminal offending. It cannot be denied that while he has worked in remunerative employment in the past, it has not acted as a deterrent from him criminally offending to a very serious and often extremely serious level. I do not accept there to be any correlation between this Applicant engaging in actual or potential remunerative employment and a reduced risk of recidivism.

324. This Applicant's history of offending across some 21 years in both Australia and New Zealand with, particular reference to the offences for which he was punished at the Darwin Supreme Court in November 2017 and the Downing Centre District Court in August 2018 resulting in the imposition of significant head custodial terms has, without question, breached the expectations of the Australian community. Viewed in its totality, his offending

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206 T1, 125.

has been extremely serious and has (1) represented a direct challenge to the lawful authority represented by the laws governing Australia and (2) consumed a disproportionate level of this country's law enforcement, healthcare, and judicial resources in dealing with the consequences of his offending.

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

(a) the Applicant has made a modest level of contributions to the Australian community via his limited employment history and whatever assistance he may have rendered to fellow detainees;[207]

(b) putting aside the time he has spent in criminal and other custody in Australia, it can be fairly found that the Applicant has spent some 10–15 years in the Australian community;[208]

(c) the removal of the Applicant will have a negative impact on the four relevant children in Australia;[209]

(d) the extremely serious nature of the Applicant's offending to date;[210]

(e) my finding that his risk of re-committing similar or identical offences (particularly those dealt with in November 2017 and August 2018) upon any return to the Australian community is at best low-moderate, and more likely, no different to what it was at the time of his most recent removal from the Australian community;[211]

(f) My assessment that, were the Applicant's offending to be repeated, particularly in the realm of supply or manufacture of illicit drugs, the nature of harm to members of the Australian community could involve significant physical, psychological and/or financial harm including, quite conceivably, to a catastrophic level.

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207 Direction, paragraph 6.3(7).
208 Direction, paragraph 6.3(5).
209 Ibid, paragraph 6.3(7).
210 Ibid, paragraph 6.3(3).
211 Ibid, paragraph 6.3(4).

Conclusion: Primary Consideration C

326. I am of the view that the immediately preceding factors (a)–(f) inclusive, read as a whole in the context of this case, militate in favour of not revoking the cancellation of the Applicant's visa. I accordingly find that this Primary Consideration C is of heavy weight in favour of affirming the non-revocation decision under review.

OTHER CONSIDERATIONS

327. It is necessary to look at the Other Considerations listed at paragraph 14 of the Direction. I will now consider each of the five stipulated sub-paragraphs (a), (b), (c), (d) and (e) to the extent any of them may be relevant to the instant facts.

(a) International non-refoulement obligations

328. As best as I understood the evidence, no claim is made by or on behalf of the Applicant that his removal to New Zealand would engage any of Australia's non-refoulement obligations that could possibly be owed to him. This was confirmed during the course of submissions by the Applicant's representative:

> *"Senior Member: Okay. Well, in the evidence I recall some kind of vague reference to a fear of going back to New Zealand or something like that. That doesn't rise to the point of engaging on refoulement obligations or anything like that, does it? Because I distinctly recall the words, "fear of going back" or "fear of some kind of harm or damage" or something. Are we in the territory of consideration (a) or not?*
>
> *Dr Donnelly: No. No, Senior Member, we are not, no."*[212]

329. This Other Consideration (a) is therefore not relevant to determination of the instant application.

(b) Strength, nature and duration of ties

330. In its SFIC, the Respondent contends that little or limited weight in favour of revocation should be allocated to this Other Consideration (b):

> *"74. Having regard to all of the issues above, the Minister contends that this consideration should be given little weight.*

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[212] Transcript, 23 February 2021, page 20, lines 36–45.

> *75. Furthermore, any weight given to this consideration does not outweigh the primary considerations weighing in favour of non-revocation, particularly the protection of the Australian community and expectations of the Australian community, and should accordingly be given limited weight in favour of revocation."*[213]

331. The Applicant first came to Australia in December 2003 aged 24 years. He commenced offending in Australia in August 2006, under three years later. Having regard to 14.2(1)(a)(i) of the Direction, it is safe to find the Applicant did begin offending *"soon after arriving in Australia"*. Until removed from the Australian community in August 2016, he had spent something like 10–15 years in that community. He offended less than three years after his arrival. Accordingly, no weight can be allocated in favour the Applicant on the basis of paragraph 14.2(1)(a)(i).

332. Some measure of weight may be allocable in favour of the Applicant via an application of paragraph 14.2(1)(a)(ii). This is on the basis that he has spent at least some time in Australia contributing positively to the Australian community. I have found that he has a modest history of remunerative employment in this country. I have also found that he has made modest contributions to the Australian community via his positive activities in immigration detention. As against that I have also found that he has spent something like seven years in custody/detention and that he has not engaged in remunerative employment since 2010. Applying the terms of paragraph 14.2(1)(a)(ii) of the Direction as favourably towards the Applicant as I can, I will find that he has made some measure of cumulative positive contributions to the Australian community. That said, only a slight measure of weight is allocable to him pursuant to this sub-paragraph 14.2(1)(a)(ii).

333. More compelling weight can be found upon an application of paragraph 14.2(1)(b) of the Direction. It is concerned with the strength, duration and nature of any social or family links with Australian citizens or people who can otherwise remain here indefinitely.

334. In his PCF, the Applicant identifies the following *"**living parents, step-parents, brothers, sisters and adult children**"*:

- his sister, born June 1980;

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213 R1, 14.

- his brother, born November 1974.[214]

335. With reference to a "***list of other close family members including cousins, grandparents, uncles/aunts***", the Applicant identified the following people in his PCF:

- his abovementioned adult nephew, Mr B T, born in October 1999;
- his abovementioned minor nephew, Nephew C, born in August 2010.[215]

336. In his PCF the Applicant was asked to *"**describe the impact the cancellation of [his] visa would have or has had, on [his] family**"*:

> *"While my family is small, we are very close. For me to be deported my family would be devastated. I was the first to move to Australia and my siblings followed me over so we could be together. My brother and sister are my main supports (besides my Partner) while I am in custody, our relationship is important to me and we maintain regular contact."*[216]

337. During his evidence in cross-examination, the Applicant was asked to summarise his relationships with the Australian community. He responded as follows:

> *"Ms Prasad: All right. I just wanted to clarify: in relation to your relationship with people in the community you have not had any contact with your brother, [redacted], but you have your sister, [redacted], and her two children?*
>
> *Applicant: Yes.*
>
> *Ms Prasad: Now, [Mr K]; that was [your sister's] former partner?*
>
> *Applicant: Well, they were together at the last tribunal but unfortunately they're not together anymore.*
>
> *Ms Prasad: And then there's your three children?*
>
> *Applicant: Yes.*
>
> *Ms Prasad: And of course you still have a friendship with [Partner T] and (indistinct words), [Partner R]?*
>
> *Applicant: Yes.*
>
> *Ms Prasad: So they're the extent to your ties to the Australian community?*
>
> *Applicant: No, I'm really good friends with [Ms G P]. I'm good friends with [redacted], [redacted], and my kids and [Partner T] and [Partner R] and even though I haven't spoken to my brother in years he's still blood and, yes, it's a relationship that I would*

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214 T1, 123.

215 Ibid.

216 Ibid.

be able to fix because he's my brother and, yes, I really want the chance to be able to sort that relationship out as well.[217]

338. It is pertinent to briefly review the relevant statements in the evidence indicative of the level of the Applicant's strength, nature and duration of ties in this country:

- the statement of Mr B T indicates he would *"be devastated emotionally if the Applicant is removed to New Zealand"*;[218]
- the statutory declaration of Mr B T indicates that Mr B T has *"little to no family members left in Australia being my mum and [the Applicant]*" and describes the Applicant as supportive and loving. Mr B T also, at least in part, attributes his personal success in finding a job to the Applicant;[219]
- Ms G P said the following:

  > *"Personally I will be distraught and emotionally inconsolable if [the Applicant] is deported to New Zealand. I value his friendship and have grown to love him and his family as part of my own. Our similar spiritual, moral and ethical values lead to hours of discussion, and during times of emotional distress for me [the Applicant] consistently provides a kind ear without judgement. He has been an amazing support for not only me, but more importantly his children."*[220]

- Ms J W, the aunt of Partner T, said *"I strongly believe regular contact and therefore the continued building of the relationship between [the Applicant] and [Child T] and [Child C] is very important for the children's sense of family and routine."*[221]
- Ms J G said these things about why it is important for the Applicant to remain in Australia: *"I have no doubt that if given the chance to remain in Australia, he will not disappoint, he speaks of working and parenting full-time […] I know that […] he is ready to start his new life with is children/family."*[222]
- The Applicant's friend who he has known since the early stages of high school, the abovementioned Ms K H, said:

  > *"[The Applicant] and I reconnected over a year ago and talk all the time. Our friendship and charts are meaningful. Now I know the choices he has made*

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217 Transcript, 22 February 2021, page 20, lines 31–47; page 21, lines 1–2.

218 A5.

219 T1, 138.

220 A8, 8–9.

221 A8.

222 A9.

and the lifestyle he lived were poor to say the least. And he has served time for those. But the man I have been talking to is not that person anymore."[223]

- The father of Partner R, Mr S L, noted the following:

"I now know [the Applicant] as a person. I have taken the time to get to know him. He has earned my absolute respect for honestly holding himself to account. He has earned my ongoing friendship for rethinking and changing his attitudes and behaviour. For these reasons, he has earned my ongoing and unwavering support in any capacity that he may require."[224]

339. With specific reference to this paragraph 14.2(1)(b), I find that the strength, nature and duration of the Applicant's relationships with members of the Australian community falling within the ambit of that sub-paragraph are strong and palpable. I find that this paragraph 14.2(1)(b) weighs strongly, but not determinatively, in favour of revocation of the decision to mandatorily cancel the Applicant's visa.

(c) Impact on Australian business interests

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

(d) Impact on victims

341. There is no victim impact statement (or equivalent) before me that the Applicant's continued presence in Australia would have an adverse impact on any victims of his of his offending. It suffices to say that the nature, extent and seriousness of his offending in the realm of the production and supply of illegal drugs has doubtless claimed its fair share of victims.

342. Be that as it may, in the absence of any victim impact statement (or equivalent) about any impact on a specific victim(s), it would, in my view, be unsafe to allocate any weight to this Other Consideration (d) in circumstances where there is no information before the Tribunal about how non-revocation of the mandatory cancellation would impact any such victim(s).

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223 A11.

224 A14.

343. Accordingly, I am of therefore of the view that this Other Consideration (d) is of neutral weight for the purposes of determining the instant application.

(e) Extent of impediments if removed

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

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

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

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

345. The Respondent contends:

> *"as the applicant will face few impediments if he were returned to New Zealand, this factor should be given limited weight in favour of revocation and does not outweigh the primary considerations."*[225]

346. Contrastingly, the Applicant contends *"[t]his consideration weighs strongly in favour of the revocation of the mandatory cancellation decision."*[226]

347. In his PCF, the Applicant responded by ticking the *"No"* box in response to the question ***"Do you have any diagnosed medical or psychological conditions?"***. The Applicant can thus be safely found to be a relatively young man in a good state of health.[227] Further in his PCF, the Applicant ticked the *"Yes"* box in response to the question ***"Do you have any concerns or fears about what would happen to you on return to your country of citizenship?"*** He provided the following details:

> *"Returning to New Zealand puts my life at great risk from past acquantainces and my ex-step father. My return to New Zealand would also put my sister [redacted] at risk and [Mr R B]'s life at great risk. Threats of Murder have been made from [my*

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225 R1, 15, [82].

226 A1, 24, [101].

227 Direction, 14.5(1)(a).

sister's] ex-partner with whom she was in a domestically violent relationship (corroborated by an AVO in NZ)"[228]

348. Two things can be said about this stated *"concern"*. First, as mentioned earlier, it does not rise to the level of a fear of harm necessary to engage any non-refoulement obligations that Australia may owe to the Applicant. Second, to the extent the Applicant apprehends a challenge to his personal safety upon return to New Zealand, he will, just like every other New Zealand citizen, have the right to seek protection from the police and law enforcement mechanisms of that country.

349. In his most recent statement before the Tribunal (dated 3 January 2021), the Applicant identified the following impediments if removed to New Zealand:

- *"First, I have no family support in New Zealand. My siblings reside in Australia. Equally, all my associations and connections are with people in Australia."*
- *"Secondly, I already have a position of employment ready to go to in the Australian community"*
- *"Thirdly, I have the most horrific and disadvantaged upbringing in New Zealand. Being forcefully returned to a place where I have so many bad memories is also likely to be bad for my mental health and well-being"*
- *"Fourthly, although I may indeed be entitled to some social welfare in New Zealand, that does not mean I will not suffer substantial hardships in that country."*
- *"Fifthly, there is also the remote prospect that I may be the subject of harm at the hands of my sister's former partner […]"*[229]

350. The following can be said about the abovementioned five contentions. First, while it can be fairly accepted that the Applicant appears to have only the one elderly relative (his *"nan"*) who is aged 96 and in a nursing home, he nevertheless agreed that he had schoolfriends in New Zealand although he had not spoken to them *"for years"*.[230] However, it should also be noted that during his oral evidence, the Applicant said that but for the presence of his children in Australia, he would have no hesitation in returning to New Zealand. Therefore,

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228 T1, 126.

229 A2, 7–8.

230 Transcript, 21 February 2021, page 10, lines 1–16.

the absence of familiar faces to him in New Zealand does not necessarily appear to be an impediment to the extent he makes it out to be.

351. Second, for reasons I have mentioned, the Applicant's employment prospects in Australia are less than certain and are more aspirational than anything else. As I recall the evidence, the idea of working in the electrical services industry may no longer be current. This has been replaced by an apparent prospect of him working as a traffic controller, becoming a personal trainer (subject to completion of a course) and a possible return to panel-beating. It cannot be safely said that the Applicant has *"employment ready to go in the Australian community"*.

352. Third, to the extent that a return to New Zealand may cause him any mental distress and/or anguish in terms of the difficult childhood he experienced there, he will have access to the same (or nearly the same) level of community mental health support that is currently available to him in Australia. Put simply, he will be entitled to mental health support to the same standard as that available to other New Zealand citizens. Fourth, his contention about suffering substantial hardships despite being entitled to receipt of social welfare in New Zealand is of no significant weight. The hardships that will confront him were he to find himself on social welfare in New Zealand will be no different to those experienced by other citizens of that country.

353. Fifth, I have earlier dealt with the Applicant's fear of harm at the hands of his sister's former de facto partner. The Applicant will have the right to access police and law enforcement protection in New Zealand against any such perceived threat.

354. I have earlier sought to address the evidence relating to the Applicant's psychological symptomatology. To the extent that he may require such further treatment and/or consultations in New Zealand, it is safe to find that these facilities and services will be available to him in that country to the same extent that they are available to other citizens of that country.[231] Similarly, he will be able to access any additional medical care, treatment and governmental support in New Zealand at or about the same (or very nearly the same) level as available to him in Australia. Put simply, he will have access to those medical and

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[231] Direction, paragraph 14.5(1)(a).

other social and economic supports in New Zealand in the context of what is generally available to other citizens of that country.[232]

355. The Applicant spent the first 24 years of his life in New Zealand and, as the movement records have indicated, he has returned to New Zealand infrequently for short visits. He is not unfamiliar with that country and I do not consider he will confront any significant or substantial language or other cultural barriers to re-establishment in New Zealand.[233]

356. Having regard to the totality of the evidence, I am of the view that this Other Consideration (e) is of moderate weight in favour of revocation.

FINDINGS: OTHER CONSIDERATIONS

357. With reference to these Other Considerations, to the extent that any of them may weigh in favour of revoking the mandatory visa cancellation decision, they are outweighed by Primary Considerations A and C, which favour non-revocation very heavily and heavily, respectively. The allocation of weight referable to the Other Considerations in the present matter can be summarised as follows:

- international non-refoulement obligations: not relevant;
- strength nature and duration of ties: of strong, but not determinative weight;
- impact on Australian business interests: not relevant;
- impact on victims: neutral; and
- extent of impediments if removed: of moderate weight.

CONCLUSION

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

358. Under s 501CA(4)(b) of the Act, there are two alternate conditions precedent to the exercise of the discretion to revoke the Applicant's visa: either the Applicant must be found to pass the character test; or I must be satisfied that there is another reason, pursuant to the

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232 Direction, paragraph 14.5(1)(c).

233 Paragraph 14.5(1)(b) of the Direction.

Direction, to revoke the cancellation. As I have noted above, the Applicant does not pass the character test. Having reference to the Direction and to the totality of the evidence before me, there is not another reason for me to revoke the cancellation of the Applicant's visa.

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

- Primary Consideration A weighs very heavily in favour of non-revocation;
- Primary Consideration C weighs heavily in favour of non-revocation;
- Primary Consideration B weighs moderately in favour of revocation;
- I have outlined the weight attributable to the Other Considerations. I do not consider that the totality of the weight attributable to the relevant Other Considerations (b) and (e) combined, even when conjoined with the moderate weight I have attributed to Primary Consideration B, outweigh the significant, combined and determinative weight I have attributed to Primary Considerations A and C; and
- A holistic view of the considerations in the Direction therefore favours the non-revocation of the decision to cancel the Applicant's visa.

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

DECISION

361. The decision under review is affirmed

I certify that the preceding 361 (three hundred and sixty-one) paragraphs are a true copy of the reasons for the decision herein of Senior Member Theodore Tavoularis

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

Associate

Dated: 14 April 2021

Date(s) of hearing:	**12 & 13 February 2021**
Counsel for the Applicant:	**Dr Jason Donnelly (direct access)**
Advocate for the Respondent:	**Ms Subasha Prasad**
Solicitors for the Respondent:	**MinterEllison**

ANNEXURE A – WITNESS LIST

WITNESS ACRONYM	RELATIONSHIP TO APPLICANT	STATEMENTS
XSLJ	Applicant	A2; T1, pp 829–836
Mr S L	Father of Applicant's former partner (Partner R) (mother of Child S)	A14
Ms G P	Close friend of the Applicant for 12–18 months	A7
Ms J H	Lawfully appointed foster carer for Child S	A10
Ms J W	Aunt of Partner T	A8

ANNEXURE B – EXHIBIT REGISTER

EXHIBIT	DESCRIPTION OF EVIDENCE	DATE OF DOCUMENT	DATE RECEIVED
T1	Indexed Bundle of Relevant Documents (paged 1–945)	–	25 November 2021
R1	Respondent's Statement of Facts, Issues and Contentions (paged 1–15)	3 February 2021	3 February 2021
R2	Transcript of Proceedings in AAT matter *XSLJ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020/0413) at first instance: • Day 1, Thursday 26 March 2020 (paged 1–94); • Day 2, Friday 27 March 2020 (paged 95–169).	–	4 February 2021
A1	Applicant's Statement of Facts, Issues and Contentions (paged 1–26)	7 January 2021	8 January 2021
A2	Applicant's Supplementary Statement (paged 1–8) including annexure: • Annexure A: Various photographs (paged 9–46).	3 January 2021	8 January 2021
A3	Applicant's Tender Bundle containing IHMS Medical Records (70 pages bearing various numbers)	–	8 January 2021
A4	Statement of Ms A R, Case Manager at an authorised Out of Home Care Service provider in New South Wales (1 page)	8 December 2020	8 January 2021
A5	Statement of Mr B T, Applicant's nephew (1 page)	27 January 2021	8 January 2021
A6	Statement of Mr C S, Applicant's friend (2 unnumbered pages)	26 November 2020	8 January 2021

A7	Statement of Ms G P, Applicant's friend (10 unnumbered pages) with annexure: • Transcript of Academic Record from TAFE NSW current to 16 February 2019 indicating Ms G P's eligibility to receive a *"Statement of Attainment in Mental Health"* (1 page).	4 January 2021	8 January 2021
A8	Statement of Ms J H, Applicant's son's carer (1 page)	5 January 2021	8 January 2021
A9	Statement of Ms J G, Applicant's friend (1 page)	12 October 2020	8 January 2021
A10	Statement of Ms J W, Applicant's former partner's aunt (1 page)	4 January 2021	8 January 2021
A11	Statutory Declaration of Ms K H, Applicant's friend, sworn and witnessed on 5 January 2021 (2 pages)	5 January 2021	8 January 2021
A12	Statement of Ms M W, Applicant's caseworker at NSW Department of Communities and Justice (1 page)	8 January 2021	8 January 2021
A13	Reference from Mr P C, Applicant's former employer (1 unnumbered page)	29 January 2021	8 January 2021
A14	Reference from Mr S L, Applicant's former partner's father (4 unnumbered pages)	4 January 2021	8 January 2021
A15	Certificate of Completion for *"ParentWorks"* course (1 page)	24 January 2021	8 January 2021