Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Sarimsaklio and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 1622 (7 June 2021)

Division: GENERAL DIVISION

File Number(s): **2021/1741**

Re: **Vedat Sarimsaklio**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member M Griffin QC**

Date: **7 June 2021**

Place: **Sydney**

The decision under review is affirmed.

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

Senior Member M Griffin QC

Catchwords

MIGRATION – mandatory cancellation of visa - Class BB Return (Residence) Subclass 155 (Five Year Resident Return) visa – where visa was cancelled under s 501(3A) because applicant did not pass character test – substantial criminal record - applicant's credibility – Ministerial Direction No. 90 – primary considerations – protection of the Australian community – seriousness of offending and future risk – best interests of minor children – other considerations – extent of impediments if removed – links to the Australian community – potential breach of Australian International Treaty Obligations – decision under review affirmed.

Legislation

Migration Act 1958 (Cth) ss 499, 500, 501, 501CA, 501E

Cases

FYBR v Minister for Home Affairs [2019] FCAFC 185

Gaspar v Minister for Immigration and Border Protection [2016] FCA 1166

Secondary Materials

Direction No. 90 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA

REASONS FOR DECISION

Senior Member M Griffin QC

7 June 2021

1. The Applicant seeks revocation of mandatory cancellation on 1 May 2020 of his Class BB Return (Residence) Subclass 155 (Five Year Resident Return) visa.

2. The Applicant has lived in Australia since he was approximately 6 months old. He is now 47 years of age. Since 1989, he has continued to commit a variety of offences, ultimately culminating in imprisonment for more than 12 months which has led to his failing the character test.

3. The question for this Tribunal is whether there is another reason why the mandatory cancellation of the Applicant's visa should be revoked.

ISSUES

4. The Applicant does not pass the character test because he has a substantial criminal record by virtue of having been sentenced to a term of imprisonment of 12 months or more: ss 501(6)(a) and (7)(c) of the *Migration Act 1958* (Cth) (the Act). This is not disputed by the Applicant.

5. The sole issue for the Tribunal's determination is whether it can be satisfied that there is another reason why the original decision should be revoked, such that the Tribunal may revoke the decision: s 501CA(4)(b)(ii) of the Act.

RELEVANT LEGISLATION AND POLICY

6. Section 501CA of the Act applies if the Minister makes a decision under s 501(3A) to cancel a visa that has been granted to a person: see s 501CA(1).

7. Section 501CA(4) 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.*

8. In *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166 at [38], North ACJ held that:

> *The preferable conclusion is that s 501CA(4)(b)(ii) requires the Minister to examine the factors for and against revoking the cancellation. If satisfied, following an assessment and an evaluation of those factors, that the cancellation should be revoked, the Minister is obliged to act on that view.*

There is a single, not a two stage, process and the Minister does not have a residual discretion to refuse to revoke the cancellation if satisfied that it should be revoked.

9. Section 501(6)(a) relevantly provides that a person does not pass the character test if the Applicant has a substantial criminal history. Section 501(7)(c) states that a person has a substantial criminal history if they have received a sentence of imprisonment of 12 months or more.

10. The Applicant was sentenced to a term of imprisonment for more than 12 months. The Applicant does not pass the character test.

11. Section 500(1)(ba) of the Act provides that applications may be made to the Tribunal or review of decisions of a delegate of the Minister under s 501CA(4) not to revoke a decision to cancel a visa.

12. The Minister has made a written direction pursuant to s 499 of the Act to guide decision-makers in the exercise of the power in s 501CA(4) (**Direction No. 90**). Section 5 of Direction No. 90 sets out preliminary matters, including general guidance and principles for decision-makers, which relevantly includes that:

    (a) Australia has a sovereign right to determine whether non-citizens who are of character concern have a right to enter or remain in Australia. Being able to comeor remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework and will not cause or threaten harm to individuals or the Australian community (paragraph 5.2(1));

    (b) non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia (paragraph 5.2(2));

    (c) the Australian community expects that the Australian Government can and should refuse entry to non-citizens or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community (paragraph5.2(3));

    (d) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age

(paragraph 5.2(4));

(e) decision makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community (paragraph 5.2(5)).

13. Part 2 of Direction No. 90 identifies the considerations relevant to former visa holders in determining whether to exercise the discretion to revoke the mandatory cancellation of a non-citizen's visa. It comprises four Primary Considerations and several specified, but non-exhaustive, Other Considerations, which must be taken into account.

14. Pursuant to Part 2 of Direction No. 90, the Tribunal must, to the extent that they are relevant to this case, take the relevant considerations (both primary and other) into account and:

(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight (paragraph 7.1).

(2) Primary considerations should generally be given greater weight than the other considerations (paragraph 7.2).

(3) One or more primary considerations may outweigh other primary considerations (paragraph 7.3).

15. These principles are of course dependent upon the facts and circumstances of each case.

16. The primary considerations are:

(1) Protection of the Australian community from criminal or other serious conduct (**Primary Consideration 1**);

(2) Whether the conduct engaged in constituted family violence (**Primary Consideration 2**);

(3) The best interests of minor children in Australia (**Primary Consideration 3**); and

(4) Expectations of the Australian community (**Primary Consideration 4**).

17. The Tribunal must also take into account other considerations insofar as they are relevant.

18. These considerations include (but are not limited to):

a) International non-refoulement obligations;

b) Extent of impediments if removed;

c) Impact on victims;

d) Links to the Australian community, including:

i) strength, nature and duration of ties to Australia;

ii) impact on Australian business interests.

THE CHARACTER TEST

19. As set out above, s 501(6)(a) of the Act provides that a person does not pass the character test if the person has a *"substantial criminal record"* as defined in s 501(7) of the Act.

20. For the purposes of the character test, a person has a substantial criminal record under s 501(7)(c) of the Act if the person has been sentenced to a term of imprisonment of 12 months or more.

21. In circumstances where the Applicant has been sentenced to imprisonment of 12 months or more, the Applicant satisfies the definition in s 501(7)(c) of the Act and therefore fails the character test.

EXERCISING THE DISCRETION

22. In exercising the discretion in s 501CA(4) of the Act, the Tribunal must comply with Direction No. 90 (see s 499(2A) of the Act) which sets out the relevant considerations.

The Applicant's evidence and credibility.

23. During the course of cross-examination by the Respondent's representative, the Applicant claimed privilege against self-incrimination. The basis of this claim was explored by the Tribunal and ultimately, it is the Tribunal's position that there is nothing probative in the exchange or the original question and that aspect of the evidence is ignored by the Tribunal.

24. During the course of the Applicant's evidence, he was questioned concerning his facility with the Turkish language, partly on the basis that he communicated with his parents in that language. The Applicant gave a variety of explanations as to his ability to speak Turkish in the context of questioning which the Applicant no doubt realised was related to his potentially being returned to Turkey and his ability to cope with living in that country.

25. The Applicant's parents both gave evidence, and it was clear enough from the whole of their evidence, that they communicated with the Applicant in the Turkish language. The Applicant's mother who said that she sometimes spoke some English to her son, the Applicant, also said that she spoke to her grandchildren in Turkish. This evidence all suggests that the Applicant was living in Australia but grew up and continued to live in a household of Turkish atmosphere.

26. The Tribunal is satisfied that the Applicant was being deliberately untruthful about his facility with the Turkish language.

27. This untruthfulness has ramifications for the whole of the Applicant's evidence. In the Tribunal's opinion, it demonstrates that the Applicant is prepared to be untruthful for his own purposes. It is, therefore, necessary to exercise some caution in accepting what the Applicant says if the evidence is not corroborated or substantiated by independent evidence. For example, the assertion by the Applicant as to the degree of difficulty he will suffer if returned to Turkey must be viewed with some caution in the Tribunal's opinion.

28. Ultimately on this topic, the Tribunal accepted, on all the evidence, the Applicant's assertion as to the difficulties he would experience.

Primary Consideration 1 – Protection of the Australian community

29. Paragraph 8.1 of Direction No. 90 provides:

(1) *When considering protection of the Australian community, decision-makers should keep in mind 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. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*

30. Paragraph 8.1(2) of Direction No. 90 provides that decision-makers should also give consideration to:

a) the nature and seriousness of the non-citizen's conduct to date; and

b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

The nature and seriousness of the Applicant's conduct to date

31. Sub-paragraph 8.1.1 of Direction No. 90 provides a list of factors to be considered in determining the nature and seriousness of a person's criminal offending or other conduct to date, which includes:

a) without limiting the range of offences that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community (sub-paragraph 8.1.1(1)(a)(i)-(iii)):

(i) violent and/or sexual crimes;

(ii) crimes of a violent nature against women or children, regardless of the sentence imposed;

(iii) acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious (sub-paragraph 8.1.1(1)(b)(i)-(iv)):

(i) causing a party to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

(ii) 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;

(iii) any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c);

(iv) where the non-citizen is in Australia, 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, or an offence against section 197A of the Act, which prohibits escape from immigration detention;

c) with the exception of the crimes or conduct mentioned in subparagraph a)(ii), a)(iii)or b)(i) above, the sentence imposed by the courts for a crime or crimes;

d) the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;

e) the cumulative effect of repeated offending;

f) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;

g) 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).

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

32. Paragraph 8.1.2 of Direction No. 90 provides that decision-makers must have regard to the following:

(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government’s view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases.

Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

(2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

i) information and evidence on the risk of the non-citizen re-offending; and

ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).

c) where consideration is being given to whether to refuse to grant a visa to the non-citizen – whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

Seriousness of offending and future risk

33. Paragraph 8.1.2(2)(b) of Direction No. 90 requires the Tribunal to have regard to the likelihood of the person engaging in further criminal conduct, including evidence of re-offending and rehabilitation.

34. The Applicant's counsel has set out in the Statement of Contentions some details of the Applicant’s offending history, although it does not attempt to refer to the entirety or magnitude of the Applicant’s offending.

35. A review of the entirety of the Applicant's history of offending, in the Tribunal's opinion, discloses an absolutely relentless and unstoppable course of conduct that may be seen as remaining relatively at the same level of seriousness, punctuated only by periods of non-offending when the Applicant was in actual custody.

36. The latest offending, which included committing the property offences whilst in company, involved actually entering the victim's home. There is no evidence in the Applicant's past to suggest any violent behaviour. However, the serious aspect of offending by entering a person's home and invading the sanctity of their space is the real potential for confrontation between the victim and perpetrator and the consequent foreseeability of some physical confrontation between the parties.

37. The Tribunal regards as particularly serious the Applicant's offending by virtue of the lengthy, continual history of offending, the fact that the offending is drug-related and the fact that the Applicant appears not to have been able to control his drug use or addictions.

38. As to the assessment of future risk of offending, the Tribunal notes that the Applicant shows a genuine determination not to commit further offences. This is perhaps unsurprising, having regard to the circumstances in which the Applicant now finds himself.

39. The Applicant's mother and other family members believe that he has reformed and that he is capable of stopping his drug taking which, in the past, has had the consequence of leading to the commission of offences to fund his drug habit. The picture presented by the Applicant so far is unfortunately the usual downward spiral of offending of the drug-addicted offender. It is not impossible for people in the position of the Applicant to rehabilitate and reform.

40. The Applicant has set out in detail those arguments which address rehabilitation and reform and the Tribunal takes those matters into account.

41. However, the assessment of the risk of future offending cannot be based merely on expressions of goodwill and determination to change and a recognition of past failures, all leading to a renewed and better understanding to change one's conduct in the future.

42. Furthermore, the Tribunal recognises that there are some likely protective factors which may assist the Applicant. These include a determination by his family to assist him in the future, a recognition by the Applicant of the consequences of re-offending should he remain in Australia and the need to be present in Australia for his family including his parents and his own son who, the Tribunal accepts, would greatly benefit from the presence of his father.

43. The Tribunal further accepts the desire and responsibility that the Applicant has to care for his parents.

44. The Tribunal accepts the force of the submission made by counsel that the Applicant has a longstanding drug problem which should be regarded as a significant health problem. That is undoubtedly correct and is taken into account by the Tribunal.

45. Furthermore, in the Applicant's favour, is the fact that he has demonstrated compliance and being of good behaviour whilst recently in immigration detention.

46. Failure by the Applicant in relation to urine screening in 2019 goes to demonstrate, at that time, a continuing problem with drugs.

47. The Tribunal accepts as genuine the Applicant's expression of remorse for his offending.

48. The Tribunal considers as significant in the assessment of risk the fact that the Applicant has had three warnings as to the consequences of continued offending. Those warnings were in 2007, 2009 and 2016 at which time the Applicant received a notice of decision to revoke his visa.

49. The concern by the Applicant for the welfare of his adult son who suffers from severe mental illness has not deterred the Applicant from committing offences which have placed him in custody.

50. The Applicant has received sufficient and clear warnings as to the consequences of continued offending. Such warnings included the potential loss of the Applicant's visa. The Applicant's history of offending discloses that he was not deterred from a continuation of offending.

51. The history of the Applicant's failed urine tests throughout his various times in custody is further evidence of the Applicant failing to make a change to his drug-taking behaviour. This is another factor the Tribunal takes into account in the consideration of future risk of offending.

52. The assessment of risk is not a scientific process, nor is it of mathematical or precise calculation. In the Tribunal's view, the assessment of future risk of offending must be carried out upon all evidence that is accepted by the Tribunal.

53. The Tribunal has already enumerated some of the main factors relied upon by the Applicant to demonstrate the relatively low risk of offending in the future. Past behaviour and conduct may be indicative of future conduct.

54. The evidence before the Tribunal demonstrates a very long history of continued offending, unaffected and unrelieved by interventions or orders made by courts in the past. Numerous opportunities for rehabilitation have been ineffectual in the Applicant's case. The history of the Applicant's offending demonstrates, in the Tribunal's view, that over many years nothing that has been attempted by the courts and even by the Applicant himself, has been able to stop or even diminish the Applicant's continued offending. The Tribunal takes the view that the Applicant's offending is largely directly connected to his drug use. The only periods of non-offending appear to be, as the Applicant's counsel suggests, when the Applicant has been incarcerated.

55. Weighing the protestations by the Applicant of reform and rehabilitation and determination to change, together with what is said to be the likely assistance from family and a recognition of the consequences of re-offending against the proven evidence of the Applicant's past, unrelenting conduct, the Tribunal is in no doubt whatsoever that the Applicant will continue to offend in like manner in the future. In the Tribunal's opinion, there is absolutely nothing in the evidence that satisfactorily overcomes the view that the Applicant will continue to re-offend to the same extent and dimension as in the past.

56. In Dr Donnelly's closing submissions, he accepted that it was open to the Tribunal to find that the Applicant presented a risk of re-offending, although that risk, he submitted, was an acceptable one on the basis that the type of offending, both passed and potentially in the future, was not of a violent type.

57. It is correct, in the Tribunal's view, that there is no history of violence in the Applicant's offending conduct. The fact that there may have been an Apprehended Violence Order (AVO) taken out against the Applicant by a former partner is disregarded by the Tribunal as having any relevance.

58. The Applicant is reported to have behaved well whilst in custody and immigration detention in recent times and the Tribunal accepts that he has participated in drug education programs such as EQUIPS and other programs of a like-nature manifests a genuine desire on the part of the Applicant to change. The Tribunal accepts the Applicant's remorse for past behaviour and further accepts that the Applicant's intention to behave well in the future is genuine.

59. These matters and the catalogue of other factors relied upon by the Applicant demonstrating that he has turned around his life and does not therefore present an unacceptable risk to the Australian community bear real weight in the Applicant's favour.

60. During the course of the hearing, the Applicant was pressed about the presence of a knife which he carried on the last occasion when he committed the burglary-type offences. The Applicant first gave evidence that he had no recollection about why he had the knife, however, after the luncheon adjournment, he gave evidence without explanation as to how he had come to remember the presence of the knife and which evidence, in the Tribunal’s view, was risible in the extreme. The Applicant said that he had possession of the knife at the time when he committed the offences because he had found it some few hours earlier at a friend’s home and that because the knife was rusty, he decided to take it home to clean and repair it. This explanation is patently absurd in the circumstances.

61. At the time of the commission of the offence, the Applicant was drug-affected. So concerned were the police when the Applicant was apprehended that it was felt necessary to taser the Applicant, although this may have been an over-reaction on the part of the police, the Tribunal is prepared to accept.

62. What is of grave concern, in the Tribunal’s view, is that the Applicant carried a weapon with him during the commission of the burglary-type offence and was unable to offer any proper explanation for its presence.

63. The Applicant has been charged and convicted of possessing a knife in a public place in the past.

64. The Tribunal bears in mind that there is no evidence that at any time when the Applicant has committed offences in the past, he has resorted to or threatened violence to any person.

65. The commission of the offence, accompanied by the presence of a weapon and the wherewithal to use it is of grave concern, in the Tribunal's view. It is entirely foreseeable that a drug-affected offender, without premeditation but carrying a weapon nonetheless, could use that weapon and serious harm could be occasioned to an innocent victim. It is equally foreseeable that innocent victims may be physically harmed during the course of perpetration of a burglary-type offence if the perpetrator is surprised by their presence. The offences committed by the Applicant in 2012, as well as the last offences, demonstrate that the Applicant was prepared to enter premises that were occupied.

66. All of this, in the Tribunal's opinion, suggests the real and foreseeable possibility of physical harm being occasioned to innocent persons by reason of the Applicant's conduct. The Tribunal is satisfied that the Applicant will most likely offend again and that offending will be of the same type and character as his past offending. The Tribunal is satisfied that there is the real likelihood that physical violence may occur in the perpetration of the offences.

67. The Applicant has carried a weapon in the past and it is apparent in his drug-induced state that he is not completely in control of its use.

68. Ultimately, the Tribunal is not prepared to accept Dr Donnelly's characterisation of the risk or the level of seriousness of that risk. In fact, it is the Tribunal's considered opinion, that there is, in the future, the real risk that the Applicant will commit further offences and that that risk is accompanied by a risk which is eminently foreseeable of physical harm being done to innocent persons in the prosecution by the Applicant of his criminal offending.

69. This matter alone, and the conclusion the Tribunal has come to, is of considerable weight in the overall assessment of this consideration and in particular of that aspect of unacceptable risk.

70. The seriousness of the Applicant's past offending, largely because of the quality of the offending and the duration of that offending, together with what the Tribunal considers to

be the certainty of the Applicant continuing to offend in the future, leads to a conclusion that this consideration weighs extremely powerfully and compellingly against the Applicant.

Primary Consideration 2 – Family violence committed by the non-citizen

71. Paragraph 8.2(1) of Direction 90 provides that the Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns are proportionate to the seriousness of the family violence engaged in by the non-citizen.

72. Paragraph 4(1) defines family violence to mean "*violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful*".

73. Primary Consideration 2 is relevant in circumstances where (paragraph 8.2(2)):

a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence (sub-paragraph 8.2(2)(a)); and/or

b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen has been afforded procedural fairness (sub-paragraph 8.2(2)(b)).

74. Paragraph 8.2(3) of Direction 90 provides that, in considering the seriousness of family violence engaged in by the non-citizen, the following factors must be considered, where relevant:

a) the frequency of the non-citizen's conduct and/or whether there is any trend in increasing seriousness (sub-paragraph 8.2(3)(a));

b) the cumulative effect of repeated acts of family violence (sub-paragraph 8.2(3)(b));

c) rehabilitation achieved at the time of the decision since the person's last known act of family violence, including (sub-paragraph 8.2(3)(c)):

(i) the extent to which the person accepts responsibility for their family violence related conduct (sub-paragraph 8.2(3)(c)(i));

(ii) the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children) (sub-paragraph 8.2(3)(c)(ii));

(iii) efforts to address factors which contributed to their conduct (sub-paragraph 8.2(3)(c)(iii)); and

d) whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence (including warnings about the non-citizen's migration status), noting that the absence of a warning should not be considered in the non-citizen's favour (sub-paragraph 8.2(3)(d)).

75. Despite vague reference in the evidence to an Apprehended Violence Order, the Tribunal accepts the Applicant's submissions that there is no admissible evidence that this consideration bears relevance to the Applicant's case.

Primary Consideration 3 – Best interests of minor children in Australia

76. Paragraph 8.3(1) of Direction No. 90 provides that decision-makers must make a determination about whether revocation is, or is not, in the best interests of a child affected by the decision.

77. This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to revoke or not revoke the mandatory cancellation decision is expected to be made (sub-paragraph 8.3(2)).

78. Paragraph 8.3(3) provides that the best interests of each child should be given individual consideration to the extent that their interests may differ.

79. Paragraph 8.3(4) provides a list of factors to be considered in determining the best interests of the child, which includes:

a) the nature and duration of the relationship between the child and Applicant. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence or limited meaningful contact (including whether an existing Court order restricts contact) (sub-paragraph 8.3(4)(a));

b) the extent to which the Applicant 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 (sub-paragraph 8.3(4)(b));

c) the impact of the Applicant's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child (sub-paragraph 8.3(4)(c));

d) the likely effect that any separation from the Applicant would have on the child, taking into account the child's or Applicant's ability to maintain contact in other ways(sub-paragraph 8.3(4)(d));

e) whether there are other persons who already fulfil a parental role in relation to the child (sub-paragraph 8.3(4)(e));

f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child) (sub-paragraph 8.3(4)(f));

g) evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the Applicant, or has otherwise been abused or neglected by the Applicant in any way, whether physically, sexually or mentally (sub-paragraph 8.3(4)(g)); and

h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the Applicant's conduct (sub-paragraph 8.3(4)(h)).

80. There is a relevant minor child, V, aged 15 years. The Tribunal accepts entirely the submissions by the Applicant that this child will be extraordinarily disadvantaged and his interests considerably affected should the Applicant be required to leave Australia.

81. In the past, the father has had contact with the child although the child does not and has not resided with the father since Court Orders have been made, giving residence of the

child with the mother. Nonetheless, the Tribunal accepts the Applicant has provided emotional, practical and financial support and played an active role in V's life and the Applicant plans, should he remain in Australia, to become more involved in the child's life.

82. The Applicant has carried on a fiction with the child that he is and has been living overseas whilst actually in custody and immigration detention.

83. The Applicant has continued contact with V by telephone whilst in custody and detention. V would be heartbroken if his father was deported.

84. This relationship with V is a compelling reason which gives weight to the Applicant's argument for revocation of the mandatory cancellation.

85. The Applicant has a granddaughter, E, born on 12 August 2020. The Tribunal accepts that the Applicant genuinely would like to play a role in the child's life in a grand-parental role.

86. The Applicant has a close relationship with his minor nephews, G (17 years), U (15 years) and niece M (10 years). There is no reason not to accept that the Applicant has always been a good uncle to them, communicates with them and that they would miss him and be very sad and upset were he to be deported. The Applicant would likewise be affected.

87. As to other relevant children referred to above, the relationships described by the Applicant and accepted by the Tribunal add considerable weight to this consideration in the Applicant's favour.

Primary Consideration 4 – Expectations of the Australian community

88. Paragraph 8.4(1) of Direction No. 90 provides as follows:

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government not to allow such a non-citizen to enter or remain in Australia.*

89. Paragraph 8.4(2) also provides that it may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the

Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

(a) acts of family violence; or

(b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;

(c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial, abuse/material exploitation or neglect;

(d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or

(e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or

(f) worker exploitation.

90. The above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community (sub-paragraph 8.4(3)).

91. This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case (sub-paragraph 8.4(4)).

92. This consideration has been the subject of extensive judicial discussion and ultimately determinative (see *FYBR v Minister for Home Affairs* [2019] FCAFC 185). Although these principles are discussed in relation to the former Direction No. 79, those principles are not relevantly different in principle with respect to Direction No. 90.

93. It is not for the Tribunal to substitute its own view for the expectations of the Australian community by reference to the Applicant’s circumstances. The Tribunal rather, must give

effect to the “norm” stipulated in Direction No. 90 at 13.3(1). per Stewart J and Charlesworth J (93); (100 to 104); (68).

94. This consideration, although weighing against the Applicant, is ameliorated to some extent in the weight which it carries by virtue of the fact that the Applicant has lived in Australia his entire life. The Tribunal therefore accords this consideration less weight by virtue of that fact.

OTHER CONSIDERATIONS

95. A decision-maker must also take into account Other Considerations where relevant. These considerations include (but are not limited to) (paragraph 9(1) Direction No. 90):

a) international non-refoulement obligations;

b) extent of impediments if removed;

c) impact on victims;

d) links to the Australian community, including:

(i) strength, nature and duration of ties to Australia;

(ii) impact on Australian business interests.

International non-refoulement obligations

96. The considerations at paragraph 9.1 of Direction No. 90 include (but are not limited to):

(1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has Convention and Protocol non-refoulement obligations.

(2) In making a decision under s 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen’s criminal offending or other serious conduct.

(3) However, that does not mean the existence of a non-refoulement obligation precludes refusal or cancellation of a non-citizen's visa or non-revocation of the mandatory cancellation of their visa.

(4) Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in response to a notice of intention to consider cancellation or refusal of their visa in a request to revoke the mandatory cancellation of their visa, or can be clear from the facts of the case (such as where the non-citizen holds a protection visa).

(5) International non-refoulement obligations will generally not be relevant to a consideration of the refusal, cancellation, or revocation of a cancellation, of a visa that is not a protection visa, where the person concerned does not raise such obligations for consideration and the person is able to apply for a protection visa in the event of an adverse decision.

(6) It may not be possible at the section 501/section 501CA stage to consider non-refoulement issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of non-refoulement obligations as given effect by the Act. A decision-maker, in making a decision under section 501/section 501CA, is not required in every case to make a positive finding whether claimed harm will occur, but in an appropriate case may assume in the non-citizen's favour that claimed harm will occur and make a decision on that basis.

(7) Where a non-citizen, in responding to a notice for the purposes of section 501 or 501CA, makes claims which may give rise to international non-refoulement obligations as given effect by the Act, and that non-citizen is able to make a valid application for a protection visa, those claims will, if and when the non-citizen makes such an application, be conclusively assessed before consideration is given to any character or security concerns associated with the non-citizen. This process would ordinarily be followed even in the highly unlikely event that consideration of the protection visa application is undertaken by the Minister personally.

(8) If, however, the refusal, cancellation or non-revocation decision is regarding a protection visa, the person will be prevented by section 48A of the Act from making a further application for a protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them - see sections 48A and 48B of the Act). Further, as a result of a refusal or cancellation decision under section 501 or a non-revocation decision under section 501CA, the person will be prevented from applying for any other class of visa except a

Bridging R (Class WR) visa (see section 501E of the Act and regulation 2.12AA of the Regulations). In these circumstances, decision-makers should seek an assessment of Australia's international non-refoulement obligations.

97. There is no evidence to indicate that this consideration is relevant to this review.

Extent of impediments if removed

98. Paragraph 9.2(1) of Direction No. 90 provides:

(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

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

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

c) any social, medical and/or economic support available to them in that country.

99. The Applicant has lived in Australia his entire life and the Tribunal accepts he has no connection with Turkey although his family associations are close in Australia and, in the Tribunal's opinion on the evidence, the Applicant must have some sense of Turkish culture. His removal to Turkey would be extremely traumatic. The Tribunal accepts the possibility of his being homeless. The Applicant is capable of work, being skilled in a number of areas of endeavour in which he trained in Australia. In fact, the Applicant ran his own business in Australia.

100. The Tribunal recognises the trauma emotionally, socially and in many other ways to the Applicant should he be removed from his environment and, more importantly, his family and specifically, family support which he expects will keep him from returning to drug taking. It is likely that someone in the Applicant's position, removed from Australia, will experience severe financial hardship although there is some evidence that he may receive some initial help from his brother who was a witness in the proceedings. The Tribunal recognises that to send the Applicant to Turkey may result in him returning to a life of drug taking and the consequences which follow from such an existence.

101. The Applicant's family and children, it is accepted, will in various ways be devastated should the Applicant be deported. The recognition by the Applicant of his family's distress will be a further imposition on the Applicant and cause the Applicant himself, consequential distress.

102. The Applicant will be able to have contact with his family should he be able to make arrangements or be financially secure enough to make that contact electronically or by other social media. Whilst this is a possibility, the prospect of the loss of day to day contact with family will be a further emotional and social imposition on the Applicant. These are some aspects of the very considerable impact deportation will have for the Applicant should he be returned to his country of origin. The Tribunal recognises the enormity of such a decision and therefore, this consideration weighs extremely strongly in the Applicant's favour.

Impact on victims

103. Paragraph 9.3(1) of Direction No. 90 provides:

> *Decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims…*

104. There is no evidence to indicate that this consideration is relevant to this review.

Links to the Australian community

105. Reflecting the principles of Direction No. 90 at paragraph 5.2, decision-makers must have regard to Direction No. 90, paragraphs 9.4.1 to 9.4.2 provided below.

9.4.1. The strength, nature and duration of ties to Australia

(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

(2) Where consideration is being given to whether to cancel a non-citizen's visa or whether to revoke the mandatory cancellation of their visa, the decision-maker must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have

regard to:

a) how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:

   i) less weight should be given where the non-citizen began offending soon after arriving in Australia; and

   ii) more weight should be given to time the non-citizen has spent contributing positively to the Australian community.

b) the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.

106. The Applicant has lived in Australia all his life. All of his family lives here in Australia. The Applicant has no family in Turkey nor any ties to that country apart from citizenship.

107. The Applicant's adult son, X, suffers severe mental illness. The Tribunal accepts that the Applicant is someone who has both concern for that son's welfare and furthermore, that he has a peculiar ability to control, deal with and offer support to that son. This particular relationship between the Applicant and his mentally-ill son is regarded as a matter of real weight in the Applicant's favour. However, the Tribunal recognises that by the Applicant's continual offending, the Applicant has placed himself in a position where the necessity to serve custodial sentences, means that the Applicant has not been in a practical position to render assistance to that son.

108. The Tribunal accepts that in the future the Applicant may have to play a more significant role in X's life because his mother will be unable to assist him.

109. The Tribunal recognises the genuine connection between the Applicant and all his family members, not only the minor children and his adult children and extended family, but also the particular relationship the Applicant has with his parents who both appear to value and need his support. The Applicant has lived, and proposes to continue to live, with his parents. Those parents are aged, and in ill-health, and the Tribunal accepts that they require the Applicant's presence in Australia. All family members will, to varying degrees, greatly miss the Applicant should he be removed. Likewise, the Tribunal accepts that the

Applicant will be affected similarly. These matters referred to are relevant not only to the Applicant's ties in Australia but equally to the impediments that should be considered in relation to his removal.

9.4.2 Impact on Australian business interests

(3) Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

110. There is no evidence to indicate that this consideration is relevant to this review.

Consideration: Potential breach of Australian International Treaty Obligations

111. The catalogue of considerations that may affect a Tribunal's decision in a matter such as this are clearly unlimited, provided of course that that consideration is relevant.

112. In this matter, the Applicant, through his counsel, argues that Australia would be in breach of its international obligations under articles 12(4) and 17(1) of the International Covenant on Civil and Political Rights (ICCPR).

113. The Applicant argues that this is a separate and distinct consideration to which the Tribunal should have regard and also another reason to revoke the mandatory cancellation of the Applicant's visa. The Tribunal is prepared to proceed on the basis that the Tribunal should consider the Applicant's argument in respect of this special consideration.

114. There are a number of issues raised by the Applicant.

115. It may be doubted that the Applicant's status, in this case, properly falls within the notion of a person whose "own country" is Australia as relevantly argued by the Applicant.

116. Specifically, the Applicant does not hold Australian citizenship but is, however, a person who had, until his visa was removed, a right to remain permanently in Australia. The

Applicant is not stateless which the Tribunal views as a relevant consideration when assessing Australia's relevant treaty obligations.

117. The Applicant is a Turkish citizen, although the Applicant has lived in Australia for approximately 47 years and all his ties and family are within Australia. For the purpose of consideration of the present question, the Tribunal is prepared to assume that the Applicant has no ties whatsoever to Turkey apart from being a citizen of that country and has no family and no practical connections to that country.

118. Although it may be doubted that Australia is the Applicant's "own country", for the purpose of this consideration the Tribunal will assume that the Applicant's argument advanced in this regard has a proper foundation.

119. Nonetheless, in considering whether Australia is the Applicant's own country there are, consistent with the Applicant's own argument, according to Nystrom, a number of factors required to be taken into account beyond mere citizenship in assessing the question of the Applicant's "own country".

120. In this case, there is no evidence and nothing is before the Tribunal in any form which indicates why the Applicant has not at least attempted to take out Australian citizenship. (It may be that the Applicant's past offending and consequent convictions have operated to deny the Applicant citizenship.) In any event, the Tribunal mentions this but makes clear that this factor alone does not disentitle the Applicant to claim Australia as "his own country".

121. However, on the objective evidence, the Applicant has lived in Australia for 47 years and has not become or attempted to become an Australian citizen. Objectively, therefore, the Applicant may be considered a resident who has demonstrated no desire or inclination to become an Australian citizen. This objective factor, in the Tribunal's view, is a relevant consideration in assessing whether Australia should be regarded in an objective sense, as the Applicant's "own country". A consideration of the same facts subjectively leads to the same conclusion. Subjectively, it is a relevant factor to take into account in this consideration that the Applicant has not chosen to take formal steps to make Australia his own country, that is, to become a citizen of Australia.

122. In the Tribunal's opinion, a more compelling factor is raised on the evidence relating to the Applicant's lengthy history of offending in assessing the status of Australia as the Applicant's "own country".

123. The Applicant, it is conceded, has committed a large number of criminal offences relatively continuously over a lengthy period of time. Those offences not only breached Australian laws but by the commission of those offences, the rights of other Australian citizens were affected.

124. Whether a person whose status is under consideration in the present regard is an Australian citizen, a permanent resident or a mere visitor to this country, it is implicit and therefore expected, that those persons should obey and abide by the laws, rules and regulations of the country in which they find themselves.

125. It is pellucidly clear in this case, that not only as a permanent resident has the Applicant failed to abide by the laws, rules and regulations of the country in which he has lived for 47 years but by the consistent and serious offending, the Applicant has, in effect, rejected the system of laws, rules and regulations that are imposed upon those who reside in Australia. It is not the point whether those breaches of laws were Commonwealth or State laws.

126. This, in fact, is a constructive rejection by the Applicant as someone who has refused to live within the laws and proper societal framework. The Applicant, by his offending, chose to place himself outside the law and failed to conform consistently with societal rules, regulations and expectations. This is not the case of someone who has occasionally committed offences and perhaps could be shown to have undergone periods of rehabilitation. The Applicant's offending has been relentless.

127. Thus, the Applicant, by virtue of his criminal conduct over a lengthy period from 1989 until his final offences that were dealt with in 2020, has demonstrated both objectively and subjectively, a refusal to abide by the Australia's laws and has deliberately, therefore, by his criminal conduct, chosen to behave in a way that placed himself outside the proper norms and conduct expected of a citizen, resident or visitor. The Applicant, in fact, became an "outlaw".

128. The implication which arises from the Applicant placing himself, by his deliberate conduct, outside the laws, rules and regulations which govern those who live in Australia, is powerful and compelling evidence, in the Tribunal's opinion, that the Applicant cannot properly be regarded as someone whose “own country” is Australia.

129. The Applicant's offending history and the fact that the Applicant lived in Australia for 47 years yet did not formalise his connection with Australia by attempting to take out citizenship, both together and severally, lead to a conclusion that the ICCPR does not apply to the Applicant in this case.

130. There are other matters which the Applicant's counsel has raised.

131. As to the question of arbitrariness, substantive or otherwise, in relation to the decision to return the Applicant to his country of citizenship, in the Tribunal’s opinion, it is a distortion of the true intent of the IPPCR to suggest that a decision which is made (absent any proof of *male fides*) is arbitrary in any sense substantive or otherwise.

132. A relevant decision in this regard, should it be made by this Tribunal, is properly authorised under the relevant legislation which sets up and allows this Tribunal to operate at law. Challenge on the basis of arbitrariness of the decision of a decision-maker, other than this Tribunal, is properly authorised by the operation of the Act and subordinate legislation and rules relating to this legislative framework.

133. It cannot be supposed that the proper application of provisions of the Act and its rules and subordinate legislation is unconstitutional. No challenge has been made or is asserted in this regard. It is a proper operation of the Act and Direction No. 90 to assess an applicant pursuant to the regime imposed by that Act and the consequential Direction No. 90. The Tribunal is satisfied that Australia has a sovereign right to make such laws and impose upon those who would live in Australia the scrutiny of Direction No. 90 and the consequences of its proper application.

134. There is no substance in the Applicant’s argument as to arbitrariness as it has been argued before this Tribunal.

135. Should the Tribunal have misapprehend any of the Applicant's arguments in relation to this special consideration, the Tribunal will now deal with the matter on the basis that the Applicant has demonstrated that this particular contention is correct and a proper and relevant consideration to be taken into account in the Applicant's favour.

136. The question then becomes what weight should be attached to this particular consideration.

137. Overall, assuming there to be a breach of Australia's international obligations to the Applicant in respect of the ICCPR, the Tribunal does not regard such a breach as argued by the Applicant as carrying so much weight that it overcomes or outweighs what the Tribunal considers to be the most determinative and important factors as considerations in this case.

138. Having regard to the past seriousness of the Applicant's offending and the future and foreseeable risk of offending in the future, any breach of Australia's Treaty obligations should be regarded as *de minimus* and a perfectly proper and proportionate response by the Australian government in the circumstances of the Applicant's offending and the need to protect the Australian community by deportation of the Applicant.

139. The weight to be attached to the seriousness of the Applicant's offending, the risk of his future offending and the expectations of the Australian community in this regard, particularly having regard to the length of time over which the Applicant has offended, must in the Tribunal's opinion, lead to a conclusion that these factors outweigh any breach this special consideration suggests as argued by the Applicant together with all other considerations which weigh in the Applicant's favour.

CONCLUSION

140. In this matter, as was submitted by the Applicant's counsel, the competing factors are particularly finely balanced.

141. There is a large body of factual material which weighs heavily in the Applicant's favour. These include the interests of his minor children, the effect on his parents and family should he be deported and the recognition by the Tribunal that, if deported, the Applicant will be subjected to extreme difficulties in re-establishing himself with the possibility of

homelessness, no family support and a likely relapse into drug taking. These last matters weigh heavily in the Applicant's favour and heavily also on the Tribunal's mind when reaching a decision in this case.

142. In reaching that decision, the Tribunal has also taken into account credible evidence of the Applicant’s rehabilitation and genuine determination to change his life, supported on the evidence by statements from his family and objective evidence including participation in drug education programs.

143. The Applicant's ties to Australia and the accepted and dramatic impediments to his removal are recognised by the Tribunal.

144. What, however, is also recognised by the Tribunal, is the view the Tribunal formed as to the risk of future offending and the likely harm that will be occasioned to innocent persons should the Applicant re-offend.

145. The Applicant’s counsel accepted in final submissions that there was a likelihood on the evidence that the Applicant would continue to offend but that the risk to the community was “an acceptable risk” particularly on the basis that the Applicant’s past offending had never been accompanied by the use of violence and therefore, the nature of any future risk was also a type of offending that would be accompanied by violence.

146. To put the matter perfectly clearly, the Tribunal is of the view that the Applicant will almost certainly re-offend and that it is more than reasonably foreseeable that the Applicant will cause physical harm to innocent people in the course of his offending.

147. Despite the significant and powerful weight of factors in the Applicant's favour and, in particular, the Tribunal has in mind the consequences of deportation on the Applicant, nonetheless, the Tribunal is of the view that the protection of the Australian community from future foreseeable harm from the Applicant’s future offending is a factor which, amongst others referred to above, weigh against the Applicant so strongly as to overcome even the most powerful submissions on the Applicant's behalf. The Tribunal is, therefore, of the view that for the sake of the protection of the Australian community, and taking into account the expectations of the Australian community, the original decision not to revoke the mandatory cancellation should be affirmed.

Order

148. The decision under review is affirmed.

I certify that the preceding 148 (one hundred and forty - eight) paragraphs are a true copy of the reasons for the decision herein of Senior Member M Griffin QC

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

Associate

Dated: 7 June 2021

Date(s) of hearing:	**1 June 2021**
Counsel for the Applicant:	**Dr Jason Donnelly**
Solicitors for the Respondent:	**Sarah Thompson, HWL Ebsworth Lawyers**