Chiagozie and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 2380 (8 July 2021)

Division:	GENERAL DIVISION
File Number:	**2021/2496**
Re:	**Fabian Chiagozie**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Member R Maguire**
Date:	**8 July 2021**
Date of written reasons:	**19 July 2021**
Place:	**Brisbane**

The decision under review is **affirmed**.

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

Member R Maguire

Catchwords

MIGRATION – non-revocation of mandatory cancellation – Class BS Subclass 801 – Partner Visa – where the Applicant does not pass the character test – whether there is another reason to revoke the cancellation – consideration of Minister Direction No 90 – consideration of Australia's non-refoulement obligations – decision under review affirmed

Legislation

Acts Interpretation Act 1901 (Cth)

Administrative Appeals Tribunal Act 1975 (Cth)

Criminal Code Act 1995 (Cth)

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)

Cases

Ali v Minister for Home Affairs [2020] 380 ALR 393

Ayoub v Minister for Immigration and Border Protection (2015) FCR 513

BCR16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2016] FCAFC 96

DQM18 v Minister for Home Affairs [2020] FCAFC 110

FYBR v Minister for Home Affairs (2019) 374 ALR 601

Gaspar v Minister for Immigration and Border Protection [2016] FCA 1166, (2016)153 ALD 337

GLD18 v Minister for Home Affairs [2020] FCAFC 2

Khalil v Minister for Home Affairs [2019] FCAFC 151

Law and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (migration) [2021] AATA 1994

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

Minister for Home Affairs v Buadromo [2018] FCAFC 151

Minister for Home Affairs v Omar (2019) 272 FCR 539

Minister for Immigration and Border Protection v MZYTS [2013] FCAFC 114; 230 FCR 432

MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 35

Naizmand v R [2018] NSWCCA 25

R v Chiagozie [2018] NSWDC 298

Xiao v R [2018] NSWCCA 4

YKSB v Minister for Home Affairs [2020] FCAFC 224

Other Materials

Department of Foreign Affairs and Trade, *Country Information Report: Nigeria* (Report, 3 December 2020)

National Drug Law Enforcement Agency Act No 15 of 1992 (Nigeria)

*United Nations Convention of the Rights of the Child, o*pened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

REASONS FOR DECISION

Member R Maguire

19 July 2021

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INTRODUCTION AND BACKGROUND

1. The Applicant seeks the review of a decision of a delegate of the Minister ("the Respondent") dated 13 April 2021 made pursuant to section 501CA(4) of the *Migration Act 1958* (Cth) ("the Act"), not to revoke the mandatory cancellation of the Applicant's Class BS Subclass 801 – Partner Visa ("the visa").[1]

2. Section 501CA(4) of the Act provides that the decision-maker may revoke the mandatory cancellation of a visa if the person made representations within the relevant time period, provided for in the *Migration Regulations 1994* (Cth) ("the Regulations") (28 days in accordance with reg 2.52), and the decision-maker determines that the Applicant passes the "character test", or, as provided under section 501CA(4)(b), there is another reason why the mandatory cancellation should be revoked.

3. Section 501(3A) of the Act is a mandatory cancellation power. It relevantly provides that the Minister (or his delegate) must cancel a visa that has been granted to a person if, under section 501(6)(a) of the Act the person has a "*substantial criminal record*" as defined by section 501(7). Relevantly, section 501(7) of the Act states:

> *(7) For the purposes of the character test, a person has a substantial criminal record if:*
>
> *…*
>
> *(c) the person has been sentenced to a term of imprisonment of 12 months or more;*
> *…*

4. The Applicant is a 46 year old man and citizen of Nigeria.[2] He has lived in Australia for 11 years, having arrived on 29 August 2009.[3] He has subsequently left Australia on two occasions. The first was on 9 September 2015 and he returned on 15 October 2015.[4] The second was on 24 February 2016, and he returned on 31 March 2016. On each occasion,

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1 Exhibit G1, G Documents, G1 Application for Review page 4.
2 Ibid G5, Statement of Reasons for Decision Under s501 CA of the *Migration Act Act 1958* not to revoke a mandatory cancellation visa decision under s 501(3A), 25.
3 Ibid G10 Movement Records, 62.
4 Ibid.

the Applicant nominated Nigeria as the country where he had spent most time abroad.[5]

5. On 29 May 2018,[6] the Applicant was sentenced at the Downing Centre District Court to nine years' and nine months' imprisonment for two counts of the "*import/export commercial quantity of border-controlled drugs or plants"*. The documents indicate that these counts were in relation to methamphetamine and cocaine respectively with the methamphetamine conviction attracting a sentence of six years and nine months and the cocaine conviction attracting a sentence of three years.

6. On 6 June 2019, whilst the Applicant was serving that term of imprisonment (that is, in actual criminal custody) the Respondent, pursuant to section 501(3A) of the Act, decided to mandatorily cancel the Applicant's visa on the basis that he did not pass the character test because of the operation of section 501(6)(a) (substantial criminal record) on the basis of section 501(7)(c),[7] i.e. that he had been sentenced to 12 months or more imprisonment.

7. Notice of this decision was given to the Applicant by hand. In accordance with reg 2.52(2)(b) of the Regulations the Applicant was invited to make representations to the Minister about revoking the cancellation decision within 28 days after he had received the notice. The Applicant made representations[8] to the Minister on 5 July 2019 within the period and in the manner specified.

8. On 13 April 2021, pursuant to section 501CA(4) the Respondent decided not to revoke the visa cancellation decision made under section 501(3A) of the Act,[9] and on 21 April 2021, the Applicant made the present application to this Tribunal for a review of that decision.[10] The Tribunal has jurisdiction to review this decision pursuant to section 500(1)(ba) of the Act.[11]

9. The hearing in the instant application took place on 24 June 2021. The Applicant appeared via video link and was represented by Dr Jason Donnelly. The Respondent was

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5 Ibid 61 – 62.
6 Ibid G6 Nationally Coordinated Criminal History Check Report, 28 – 29.
7 Ibid G11 Notice of Visa Cancellation, 63.
8 Ibid G15-16, Revocation Request, Personal Circumstances Form, 78 – 93.
9 Ibid G2 Letter from Department to Applicant, 7.
10 Ibid G1 Application for Review, 1 – 6.
11 The Act, section 500(6B).

represented by Mr Christopher Orchard of Sparke Helmore Lawyers. The Tribunal also received oral evidence from the witnesses set out below. The complete suite of written material forming the exhibit record is further particularised in the Exhibit Annexure attached hereto and marked "A".

10. By operation of section 500(6L)(c) of the Act, when an application is made to the Tribunal for a review of a decision under section 501CA(4) of the Act not to revoke a decision to cancel a visa, and the decision relates to a person in the migration zone, if the Tribunal has not made a decision within the period of 84 days after the day on which the person was notified of the decision under review in accordance with subsection 501G(1), the Tribunal is taken at the end of that period, to have made a decision under section 43 of the *Administrative Appeals Tribunal Act 1975*[12] to affirm the decision under review. At the hearing, the representatives of the parties agreed that for the purposes of this review, and section 500(6L)(c), the 84th day was Thursday 8 July 2021.

11. In this matter, the Tribunal was unable to draft and review its reasons for decision by 8 July 2021. Therefore, it provided the parties with its decision on that day and, in line with the principles enunciated in *Khalil v Minister for Home Affairs* [2019] FCAFC 151, undertook to provide the parties with reasons for its decision within a reasonable time.

ISSUES

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

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

13. It is not disputed that the Applicant has made the representations required by section

[12] (Cth)

501CA(4)(a) of the Act.

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

(a) whether the Applicant passes the character test; or

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

15. If the Applicant succeeds on either ground, the cancellation of the Applicant's visa should be revoked.

16. In considering section 501CA(4), it is necessary to refer to the Full Court of the Federal Court of Australia's observations in *Minister for Home Affairs v Buadromo*:[13]

> *…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…*[14]

DOES THE APPLICANT PASS THE CHARACTER TEST?

17. The character test is defined in section 501(6) of the Act. Under section 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 section 501(7). Section 501(7)(c) 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*". Section 501(7A) provides that for the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part) the whole of each term is to be counted in working out the total length of the terms.

18. The Applicant pleaded guilty in the District Court of New South Wales on 29 May 2018 of

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13 [2018] FCAFC 151.

14 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).

offences which Neilson DCJ described as "*substantive*".[15] He received total effective sentences (after a 25% reduction for an early plea) of seven years and six months which were to be served partially concurrently and with a minimum parole date of 26 November 2020.[16] The non-parole period was 4 years and six months.

19. As the custodial term imposed was "*a term of imprisonment of 12 months or more*", the Applicant does not pass the character test by virtue of his *"substantial criminal record"* as defined in section 501(7)(c) of the Act.

20. The Tribunal notes that the Applicant has quite properly conceded that he does not pass the character test as prescribed by section 501 of the Act,[17] and that the original decision to mandatorily cancel his visa was properly made under section 501(3A) of the Act.[18] The Tribunal is therefore consequently satisfied that the Applicant does not pass the character test, pursuant to section 501(6)(a) of the Act and that the Applicant therefore cannot rely on section 501CA(4)(b)(i)[19] of the Act for the mandatory cancellation of his visa to be revoked.

21. The remaining question therefore is found in section 501CA(4)(b)(ii), namely whether there is another reason why the original decision should be revoked.

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

Ministerial Direction No. 90

22. In considering whether to exercise the discretion in section 501CA(4) of the Act, the Tribunal is bound by section 499(2A) to comply with any directions made under the Act. In this case, *Direction No. 90 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* ("the Direction" or "Direction 90") has application.[20]

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15 Exhibit G1, G Documents, G7 Sentencing Remarks of the District Court of New South Wales, 31.
16 Ibid 29, 57.
17 Exhibit A1, Applicant's Statement of Facts Issues and Contentions (SFIC) at paragraph 9.
18 Transcript, page 59, line 5.
19 Note: This provides that the Minister is satisfied that the person passes the character test (as defined by section 501).
20 On 8 March 2021, the former applicable direction, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 90.

23. The purpose of the Direction as stated in paragraph 5.1(4) is to guide decision-makers in performing functions or exercising powers under sections 501 and 501CA of the Act

24. Paragraph 5.2 of the Direction sets out the principles which bind this Tribunal:

> *The principles below provide the framework within which decision-makers should approach their task of deciding whether to refuse or cancel a non-citizen's visa under section 501, or whether to revoke a mandatory cancellation under section 501CA. The factors (to the extent relevant in the particular case) that must be considered in making a decision under section 501 or section 501CA of the Act are identified in Part 2.*
>
> *(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. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) 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.*
>
> *(3) 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 measurable risk of causing physical harm to the Australian community.*
>
> *(4) 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.*
>
> *(5) 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 other 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.*

25. Paragraph 6 of the Direction requires that, informed by the principles in paragraph 5.2, decision-makers must take into account the considerations in sections 8 and 9, where relevant to the decision.

26. Paragraph 7(1) of the Direction provides that in applying the considerations, (both primary and other) information and evidence from independent and authoritative sources should be given appropriate weight. Paragraph 7(2) provides that primary considerations should generally be given greater weight than the other considerations. Paragraph 7(3) provides that one or more primary considerations may outweigh other primary considerations.

27. Paragraph 8 of the Direction sets out the following primary considerations in making a decision under section 501(1), 501(2), or 501CA(4):

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted family violence;

(3) the best interests of minor children in Australia; and

(4) expectations of the Australian community.

28. The Other Considerations which must be taken into account are provided in a non-exhaustive list in paragraph 9 of the Direction. These considerations are:

(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.

29. The Tribunal now turns to a more detailed consideration of Direction No. 90.

Primary Consideration 1 – Protection of the Australian Community

30. In considering Primary Consideration 1, paragraph 8.1(1) of the Direction requires that decision-makers should keep in mind 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. Decision makers are to have regard to the principle that entering or remaining in Australia is a privilege that this country 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.

31. Paragraph 8.1(2) of the Direction requires consideration to be given 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.

Nature and seriousness of conduct

32. Paragraph 8.1.1(1) of the Direction requires that in considering the nature and seriousness of the non-citizen's offending or other conduct to date, decision makers must have regard to the following:

(a) without limiting the range of conduct 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:

(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:

(i) causing a person 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 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 Court 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).

Risk to the Australian community

33. Paragraph 8.1.2(1) of the Direction requires that 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 becomes lower as the seriousness of the potential 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.

34. Paragraph 8.1.2(2) of the Direction requires that in considering the risk that maybe posed by the noncitizen 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 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.

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

35. Paragraph 8.2(1) of the Direction reflects the Government's 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.

36. Paragraph 8.2(2) of the Direction provides that the consideration of family violence is relevant in circumstances where:

(a) the non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven, howsoever described, that involve family violence; 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 being considered under section 501 or section 501 CAhas been afforded procedural fairness.

37. Paragraph 8.2 (3) of the Direction requires that in considering the seriousness of the 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 trendof increasing seriousness;

b) the cumulative effect of repeated acts of family violence;

c) Rehabilitation achieved at time of decision since the person's last known act of family violence, including:

i. the extent to which the person accepts responsibility for their family violence related conduct;

ii. The extent to which the non-citizen understands the impact of their behaviour on the abuse and witness of that abuse (particularly children);

iii. efforts to address factors which contributed to their conduct; 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, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status should the noncitizen engage in further acts of family violence.

Primary consideration 3 - Best interests of minor children in Australia

38. Paragraph 8.3(1) of the Direction requires decision-makers making a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA

is, or is not, in the best interests of child affected by the decision.

39. Paragraph 8.3(2) of the Direction provides that this consideration applies only if the child is, or would-be, under 18 years old at the time of the decision.

40. Paragraph 8.3(3) of the Direction provides that if there are two or more children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

41. Paragraph 8.3(4) of the Direction provides that in considering the best interests of the child, the following factors must be considered where relevant:

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 child has been, or is at risk of being, subject to, or exposed to,

family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way whether physically, sexually or mentally;

h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

Primary Consideration 4 - Expectations of The Australian Community

42. Paragraph 8.4 of the Direction details the expectations of the Australian Community as follows:

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

(2) In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, 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 contact, 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, “seriouscrimes” include crimes of a violent or sexual nature, as well as other serious crimesagainst the elderly or other vulnerable persons in the form of fraud, extortion, commercial 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 the 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.

(3) 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.

(4) 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 theparticular case.

Other considerations

43. Paragraph 9(1) of the Direction requires decision makers to take into account other considerations, including, but not limited to:

a) international non-refoulement obligations in accordance with paragraph 9.1;

b) extent of impediments if removed in accordance with paragraph 9.2;

c) impact on victims in accordance with paragraph 9.3; and

d) links to the Australian community reflecting the principles in paragraph 5.2 and paragraphs 9.4.1 to 9.4.2.

44. The Tribunal now turns to a consideration of the evidence before the Tribunal.

EVIDENCE BEFORE THE TRIBUNAL

Documentary Evidence

45. On 5 July 2019, the Applicant submitted a personal circumstances form to the department.[21] In this form, he stated his intention to live at Winston Hills if returned to the community, and that he intended to reside with his three children who were born in 2012, 2014, and 2015. He said that he had a good relationship with his children, and that he saw them at least four times per year. Non-revocation of his visa cancellation would result in the children missing out on learning how to speak their Nigerian native language and learning of their origins, and they would be lost without him in their lives. The Applicant listed his sister as being a relative living in Nigeria, and sought to explain his offending as having occurred because he was trying to get some money so that his ailing father could have better treatment in Nigeria. He was not able to help him because he got arrested, and his father died while he was in custody.

46. The Applicant expressed fear that he would be killed if returned to Nigeria, and said that he had been attacked the last time he was there trying to find out where his mother was buried. He said that Boko Haram members had attacked him in Lagos.

47. In assessing the current application, the Tribunal had the benefit of the following documents in relation to the Applicant's criminal conduct:

(a) Australian Criminal Intelligence Commissioner Check Results Report dated 22 March 2019.[22]

(b) The sentencing remarks of Neilson DCJ in *R v Chiagozie* [2018] NSWDC 298.[23]

(c) Conviction, Sentence and Appeals Report dated 6 June 2019.[24]

48. In support of his application for review, the Applicant has provided:

(a) A personal circumstances form dated 23 January 2020;[25]

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21 Exhibit G1, G documents, G16 Personal Circumstances Form page 79.
22 Ibid G6 Nationally Coordinated Criminal History Check Report 28.
23 Ibid G7 Sentencing Remarks of the District Court of New South Wales 30.
24 Ibid 58.

(b) Applicant's Statement of Facts Issues and Contentions, (SFIC) together with annexures;[26]

(c) A Department of Foreign Affairs and Trade country report on Nigeria;[27]

(d) Two statements from the Applicant dated 25 May 2021[28] and 17 June 2021;[29]

(e) A statement from Mr Philip Bradley dated 26 May 2021;[30]

(f) A statement from Ms Ann Nielsen dated 26 May 2021;[31]

(g) A statement from Ms Cassandra Smith dated 3 June 2021;[32] and

(h) A statement from Rev. Peter Baines dated 7 May 2018;[33] and

(i) A statement from Mr Guy Mazzella.[34]

49. In his statement of 25 May 2021, the Applicant recounted the circumstances of his three children who are presently residing in different placements in the care of the state in Victoria in consequence of their mother's mental health and alcohol issues. He spoke of his relationship with, and love for his children and expressed concern that his removal from Australia would significantly compromise his ability to maintain a strong and ongoing relationship with them.

50. The Applicant stated that he had worked for all but three months of his period in prison, and could not undertake rehabilitation programs as he was not eligible for courses given that he did not have a drug or alcohol problem. During his time in prison, he said that he had reflected on his serious criminal conduct and was truly sorry and remorseful for it. He said that he has promised himself that he will never go back to prison again, and he did not believe that he would engage in further criminal offending at all.

51. The Applicant denied having physically assaulted his former partner and said that he had

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25 Ibid G16 Personal Circumstances Form 79.
26 Exhibit A1, Applicant's Statement of Facts, Issues and Contention.
27 Exhibit A3, DFAT Country Information Report.
28 Exhibit A2, Applicant's Statement dated 25 May 2021.
29 Exhibit A7, Applicant's Statement dated 17 June 2021.
30 Exhibit A5, Statement of Philip Bradley.
31 Exhibit A4, Statement of Ann Neilsen.
32 Exhibit A8, Statement of Cassandra Smith.
33 Exhibit A6, Applicant's Tender Bundle, page 25.
34 Ibid 54.

never been charged with any domestic violence offences. He had accepted the terms of an interim Apprehended Domestic Violence Order ("ADVO") on a "*without admissions basis*" to avoid legal expenses and the financial and emotional pressure on his family unit.

52. The Applicant stated that if he was removed from Australia to Nigeria he would face significant impediments even though he had lived there for a substantial period of his life. His only remaining family in Nigeria is his sister who is married and has five children. She is not able to provide practical or financial support for him, and he will be entirely without support in Nigeria, which is a poor country with no welfare system, and a poor medical system.

53. The Applicant also expressed concern that he would have to serve another prison sentence and be further punished in Nigeria for his criminal offending in Australia. He expressed fear that he would face either death or serious persecution from Boko Haram, and he was at greater risk of being targeted by them as he is a Christian. On his last visit to Nigeria he had been attacked with rocks by Boko Haram members. He did not know how he would survive in Nigeria, and had lost his former business contacts in Nigeria.

54. The Applicant stated that his future plans were broadly speaking to gain employment, sole custody of his three children, and play a strong, active, and practical role in their lives. He had no plans to reunite with the mother of his children and claimed that he committed the criminal offences for financial gain, largely to fund medical expenses associated with his father's deteriorating health and situation in Nigeria. He denied that he engaged in the offences to fund a lavish style. He feared his return to Nigeria would destroy his relationship with his children as he would be living in another time zone, and almost in another world.

55. The Applicant provided a supplementary statement dated 17 June 2021 in which he argued that the LSI – R risk assessment report should be given significant weight. He also referred to his relationship with the child whom he described as his stepdaughter who is now residing with her biological father whom he said had created issues for his ex-partner to see her daughter. Given the opportunity, he proposed to take lawful steps to contact the child's father and reconnect with her.

56. The Applicant also expressed concerns at being charged under decree 33 of the *National*

Drug Law Enforcement Agency Act Cap No 15 of 1990 (Nigeria) ("**the Nigerian Drug Act**") which attracted a minimum sentence of five years imprisonment. At paragraph 20 of his statement, he set out section 22 (2) of the Nigerian Drug Act:

> *Any Nigerian citizen found guilty in any foreign country of an offence involving narcotic drugs or psychotropic substances and who thereby brings the name of Nigeria into disrepute shall be guilty of an offence under this subsection.*

57. The Applicant expressed concern that the breadth of the section might mean that on his return to Nigeria he could be taken to have brought the country into disrepute by his conduct in Australia

58. On the question of non-refoulement, the Applicant provided a number of articles which dealt with the dangers faced by Christians living in Nigeria. He also stated that his employment prospects in Nigeria in the foreseeable future would be doubtful, and that unemployment was running at 33% there. The Applicant also raised a fear of the prospect of indefinite detention or otherwise subject to immigration detention for an indeterminate period in the event that the Tribunal dismissed his application.

59. Mr Phil Bradley provided a statement dated 26 May 2021, and said that he'd known the Applicant for about 10 years having first met him while he was detained in Villawood, and that the Applicant had subsequently lived with him and his partner. He described the Applicant as polite, honest, and reliable. He had only recently become aware of the extent of the Applicant's criminal offending, and echoed the Applicant's claim that he was motivated by a desire to help fund his father's medical expenses. He said that the Applicant had attended church regularly, had a caring nature towards others, and that his offending seemed to be out of character.

60. Mr Bradley said that the Applicant had spent many hours collecting goods that people had left on footpaths and use them to earn money. He said the Applicant had tried to obtain employment after being released from Villawood and described him as being attentive towards the children and attending to parental chores.

61. Mr Bradley expressed the view that the Applicant's deportation would result in severe emotional hardship for the Applicant's children and potentially deprive them of his financial

support andlove. The children were presently living with three separate families in Victoria. He also considered that there would be emotional benefit to the Applicant's stepdaughter were he to remain in Australia. He said that he and his partner would be very upset if the Applicant were to be deported.

62. Mr Bradley said that he had regularly visited the Applicant in Villawood and in prison. He said that he understood the Applicant was a model inmate in prison, and had learned upholstery and kitchen skills. He confirmed that he and his spouse have agreed to allow the Applicant to stay in their spare bedroom after his release.

63. Anne Nielsen, in her statement dated 26 May 2021 described herself as a close friend of the Applicant, and said she had known him for over 10 years. She said that she had visited him regularly whilst he had been in Villawood until he was released in 2011 at which time he went to live with her and her partner Mr Bradley for about four months. She said that she and her partner had been like grandparents to the Applicant's children, and it would be devastating for them if he were to be deported. She said that the Applicant had been like a son to her and her partner. She also echoed the fears which the Applicant had expressed that he would be killed if returned to Nigeria. She said that she and her partner would be emotionally devastated if the Applicant was deported.

64. Ms Neilson said that the Applicant's former partner had taken the children to see him every weekend while he had been in Long Bay Correctional Complex. She also expressed the belief that the Applicant will not commit any further criminal offences in Australia, and is truly remorseful for what he did.

65. Cassandra Smith provided a statement dated 3 June 2021 in which she said that she and the Applicant have three children together, and that he was a good father and has always been great with the children who love him, and need him in their lives. She fully supported his bid to remain in Australia, and said she would be emotionally devastated if he were to be permanently excluded from Australia based on what she called his "*limited criminal history*". Ms Smith was not called to give evidence before the Tribunal.

66. The affidavit of Mr Guy Mazzella dated 29 June 2018 recorded that he was the Family and Community Services caseworker in respect of the Applicant's three children, and recorded

that Ms Nielsen had spoken positively of interactions between the Applicant and his children.

Background

67. The Applicant first arrived in Australia on 29 August 2009, and sought entry on the basis of a fraudulently obtained UC 456 Business (Short Stay) visa.[35] The Applicant claimed to have obtained this visa via a friend from church named Anton. The Applicant later told the Refugee Review Tribunal[36] that he had not paid Anton money, and that he did not know how Anton had obtained the visa. He agreed that he had known that it was a business visa, and that he had not been entitled to this visa. He said that Anton had told him that he could not obtain a refugee visa to travel in Australia so he would have to obtain a business visa. He said he believed that Anton had to pay money to obtain the visa.

68. When the Applicant presented his passport and visa, he was questioned by immigration authorities as to the purpose for his visit, and claimed to be coming to Australia to attend the 12th World Congress of the World Federation for Ultrasound in Medicine and Biology being held in Sydney 30 August 2009 to 03 September 2009 in order to discuss purchasing of products such as neck braces, empty first-aid boxes, bathroom scales and folding wheelchairs. He was unable to provide an explanation of what an ultrasound was, and the purpose of his claim to visit was found to be irrelevant to the subjects/topics of the Conference, which was covering topics which were for medical professionals and specialists, and was not a trade exhibition. After further questioning, the Applicant admitted that he was not in Australia to attend the conference but was rather seeking a better life and wished to claim protection from Nigeria.

69. At this point, the Applicant's visa was cancelled under section 116(1)(g) of the Act and regulation 2.43(1)(i), which can be shortly stated as providing that the Minister was satisfied that the visa holder did not have at the time of grant of the visa, or had ceased to have, a genuine intention to stay temporarily in Australia to carry out the work or activity in relation to which the visa had been granted. He was advised that he was being refused immigration clearance, was an unlawful non-citizen, and was being detained under section 189 of the

[35] Exhibit R2, Respondent's Tender Bundle TB4 Incident Detail Report(s) page 114.
[36] Ibid 132 paragraph 37.

Act pending the outcome of his protection claims.[37]

70. The Applicant was then interviewed without the assistance of an interpreter to allow him to provide any reasons why he should not be removed from Australia, and informed that he was expected to give true and correct answers to those questions.[38]

71. When asked to provide any reasons and fears for not wishing to return to his country of nationality, the Applicant replied:

> *Because the Taliban swear they will continue bombing until all Nigeria turn into Muslim. I am born a Christian and I don't want to turn into a Muslim.*
>
> *…*
>
> *I am scared of dying there, and turn into Muslim. If I am there, if I go back there I will die, I will commit suicide. I don't have any business there anymore, I have nothing there, they have destroyed everything I have. Staying there is like dying. I will commit suicide, it is better for me than turning into a Muslim.*

72. The Applicant also provided a statement[39] in which he enlarged on the circumstances which led him to leave Nigeria, and stated:[40]

> *I cannot return to Joss because I am a Christian and my life would be in danger there. Furthermore, I do not believe that I would be safe anywhere in Nigeria. I fear that the Taliban will be told about me and my attitude and that I will be singled out and pursued even if I relocate to another area. In addition, I believe that the current government secretly supports the Taliban because they want the entire country to become Muslim. I believe that sooner or later I'll be killed by the Taliban or their supporters. The only way I could avoid this would be to convert to Islam which I am not prepared to do.*

73. A Protection (Class XA) visa application made on 25 September 2009 whilst the Applicant was in immigration detention, was rejected on 3 November 2009 by the Minister's delegate, who found that the Applicant did not face a real chance of persecution by any individual or group in the foreseeable future, on account of his religion and that any fear of such on the Applicant's part was not well-founded.[41]

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37 Ibid 104 – 105.
38 Ibid 106 – 110.
39 Ibid 111 – 113.
40 Ibid 113.
41 Ibid 122.

74. The Applicant took this decision to the Refugee Review Tribunal, which considered that much of what the Applicant said in the statement accompanying his original application did not accord with the independent evidence available to that Tribunal.[42]

75. On 11 February 2010, the Tribunal affirmed this decision and found:[43]

> *Moreover, having regard to the extent to which the Applicant's evidence is at variance with the independent evidence available to me I do not regard him as a witness of truth. I do not accept that there is a real chance that the Applicant will be singled out by the Muslims to be attacked because he is perceived as being against their religion if he returns to Nigeria.… Based on my findings above I do not accept that there is a real chance that the Applicant will be persecuted for reasons of his religion if he returns to his home in Jos now or in the foreseeable future.*

76. On 19 June 2015, the Applicant was granted a Class BS Subclass 801 – Partner visa, and thereby became a permanent resident of Australia.[44]

77. In his statement of personal circumstances, the Applicant left blank the response in item 11 when he was asked to list his employment history in Australia. The only employment referred to by counsel for the Applicant in the body of the Applicant's SFIC was that the Applicant had "*worked for almost his entire period in prison*".[45] It appears that his primary source of income whilst at liberty was Centrelink, supplemented by "*few and far between*" exports of furniture to Nigeria.[46]

78. The Tribunal notes that there is no record of employment of the Applicant between his arrival in Australia on 29 August 2009 and the commencement of his incarceration on 27 May 2016, and that this is notwithstanding the assurance given by the Applicant in his statutorydeclaration of 21 October 2010:[47]

> *If permitted to stay in Australia I would like to work to support myself by working on a farm or driving a truck or in the building and construction industry.*

79. The Applicant gave evidence before the Tribunal that he got to know his co-accused Wilson

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42 Ibid 143.
43 Ibid 146.
44 Exhibit G1, G Documents page 63.
45 Exhibit A1, Applicant's Statement of Facts, Issues and Contentions paragraph 95.
46 Exhibit A6, Applicant's Tender Bundle page 32.
47 Exhibit R2, Respondent's Tender Bundle TB4 page 150.

while working in a storage container, however the circumstances of this employment are otherwise unclear to the Tribunal, as is the date when he first met Wilson.

80. Some 82 days after the grant of his partner visa on 19 June 2015, notwithstanding his previously expressed fears for his safety and life if he were forced to return to Nigeria, the Applicant, of his own volition departed Australia on 9 September 2015 bound for Nigeria. He returned to Australia on 15 October 2015.

81. Whatever experiences the Applicant may have had during this first trip back to Nigeria, they did not discourage him from returning to Nigeria again a little over three months later on 24 February 2016. He returned to Australia on 31 March 2016.[48]

82. When asked at the hearing who it was that got him involved in drugs and trafficking of drugs,the applicant replied:

> *It was a friend told me that I didn't take seriously until I went to visit my father back home and as you as a human being, if you see your father alive and he is very, very sick and can't even move his hands or…*

83. On his incoming passenger card, at question 5, he disclosed that he was carrying AUD$10,000 or more.[49] Following his arrest, money exchange receipts dated 1 April 2016 and 5 April 2016 were found in the Applicant's vehicle[50] for sums of $1,003.73 and $4,465.90. That the Applicant should return to Australia with such a substantial sum of money after visiting his father does not sit comfortably with his claim that his offending was motivated by a desire to assist his father with medical expenses. The Applicant's evidence before the Tribunal was that his father was "*well off*",[51] and had inherited his grandfather's "*wealth*".[52] There was no evidence of any request for financial assistance from his father. Moreover, if the father was actually in need, and in the physical condition described by the Applicant at hearing, the Applicant could have left some or all of the money with his father before he left Nigeria. The Applicant also did not make any remittance to his father on his return to Australia or during the two months prior to his arrest.

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48 Exhibit G1, G Documents page 62.
49 Exhibit G1 G Documents, G9, Incoming Passenger Cards page 60.
50 Exhibit G1, G Documents, G7, Sentencing remarks of District Court of New South Wales, page 41
51 Transcript, page 24, line 18.
52 Exhibit A6, Applicant's Tender Bundle, page 31 paragraph 6

84. In his personal circumstances form, the Applicant sought to explain his offending at item 10, where he stated:[53]

> *I was trying to get some money so that I can help my Father get a better treatment from his illness. But I couldn't help him as I got arrested and he died while I was in custody. I couldn't help my Father and he died.*

85. The Tribunal considers this claimed explanation as disingenuous, and notes that even if it were true, it would not detract from the criminality of the Applicant's conduct.

86. In summary, it can be seen that notwithstanding his claimed devout Christian upbringing, prior to seeking to enter Australia, the Applicant fraudulently obtained a visa knowing that he was not entitled to it. On his arrival in Australia, he presented it to border officials with the obvious intention of gaining entry on the basis of it. When questioned, the Applicant lied to border officials and told them that he was in Australia to attend a conference. When this claim was rejected and his visa cancelled, he sought protection and made many claims which were unsupported by independent evidence, and he was ultimately found not to be *"a witness of truth*." As if to vindicate this finding, following the granting of his partner visa in 2015, the Applicant on two occasions assessed for himself the risk he would face on return to Nigeria, and then, by his own conduct twice belied his previous assertions by returning to Nigeria, in a very short space of time, once within three months of the grant ofhis visa, and a second time within nine months.

87. The Applicant's offending which led to his current circumstance, appears to have commenced on 20 January 2016, some six months after the grant of his permanent residentvisa.[54]

88. The sentencing judge observed that the agreed facts before him detailed what may have represented three other importations, and noted:[55]

> *Such intelligence does not in any way increase the offender's culpability for the crime which he admits he committed, but rather, militates against any submission, which was not made, that this was a "one off", "out of the blue" occurrence.*

89. The sentencing judge rejected a submission by the Applicant's counsel that this system of operation was "*primitive*", and described it as "*sophisticated, albeit not the most sophisticated*

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[53] Exhibit G1, G Documents, G16, Personal Circumstances form, page 89
[54] Exhibit G1, G Documents page 42.
[55] Exhibit G1, G Documents page 39 at paragraph 19.

scheme known to be adopted by those importing drugs into Australia via the mail system".[54] His Honour appeared to substantially accept a Crown submission that the system included a number of counter-surveillance measures.[56] His Honour made repeated references to the Applicant's use of coded conversation in the course of the commission of offences.[57] Before the Tribunal, the Applicant denied being trained and using the word "*eggs*" as a code word for drugs, although he accepted that he had used phones with false subscription details.

90. The sentencing judge agreed with a submission by the Crown that telephone intercepts in May and June of that year indicated that the offender was implementing a familiar and well tested method of importation and collection, in which he will may well have been trained, and that he was aware that there were many people involved in the syndicate.[58] The sentencing judge described the Applicant's role as that of a middle manager, and considered that this raised his level of culpability.[59]

91. It appears, before the sentencing judge, it had been submitted that the Applicant was unaware of the consequences of his actions. At paragraph 55 of his reasons, the sentencing judge stated:[60]

> *The current offender is yet another offender who comes before me to say that he was quite unaware of the devastation wrought in our community by the use of illicit drugs, of how destroys lives and causes grave anxiety and distress to members of families of those who are addicted to drugs, but are themselves drug free. As a migrant to this country, it may be that the offender is not a person who listens to the radio or watches television shows regularly which broadcast that information throughout the nation and, therefore, I can accept that he may have been somewhat naïve. However, the extent of the precautions taken to prevent detection must have drawn to the offender's attention the fact that what he was doing was seriously wrong and that the reason for dealing so harshly with drugs is because of the damage they do to the community.*

92. The judge nevertheless accepted that the offender was unlikely to reoffend, and was truly remorseful,[61] but found that he was "*trafficking purely for financial gain*".[62] Earlier in his reasons, his Honour dealt with a submission that the offender became involved in the drug trade because he was short of funds to support himself, his family in Australia and his father in Nigeria. His Honour

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[56] Exhibit G1, G Documents page 38 paragraph 18.
[57] Exhibit G1, G Documents page 34 at paragraph 9; page 42 at paragraph 29; page 45 paragraph 38.
[58] Exhibit G1, G Documents page 39 paragraph 20.
[59] Exhibit G1, G Documents page 40 paragraph 22.
[60] Exhibit G1 G7 page 52 paragraph 55.
[61] Exhibit G1 G7 page 54 at paragraph 60.
[62] Exhibit G1 G7 page 56 paragraph 65.

referred to the decision in *Ruben Botero* (unreported, Court of Criminal Appeal, 24 June 1998), where Barr J "*pointed out that to make substantial amounts of money from trading in drugs for the purpose of the payment of personal and family debts is no less criminal than to make the same amounts of pure profit. The same principle applies to making any amount of money from trading in drugs, not just substantial amounts. It is merely a matter of logic*".[63]

93. Before the Tribunal, the Applicant gave evidence that he had been exposed to drugs in Nigeria, which was consistent with what he stated to the psychologist Mrs Headington.[64] He was however unable to recall an incident on 10 May 2011 where he was found to be in possession of one home-made Bong implement whilst in immigration detention, prior to the commencement of his offending.[65] He was aware that that drugs in Nigeria were illegal. In addition to this, the Tribunal notes that on each of his incoming passenger cards he placed a 'cross' in the "No" box in response to question one which asked whether he was bringingillicit drugs into Australia.

94. It appears from the reasons of the sentencing judge, that the Applicant commenced his offending, and had been arrested, and was in custody, within less than twelve months of his visa grant. His arrest and incarceration appears to have resurrected his interest in Christianity, and the cancellation of his visa appears to have resuscitated his fears of returning to Nigeria, even though he was recorded as telling a NSW Corrective Services case officer on 1 August 2018 that he was willing to return to Nigeria on completion of his non-parole period.[66]

Evidence at Hearing

Applicant's Testimony

95. The hearing was held on 24 June 2021. The Applicant was affirmed and gave evidence asdid Ann Nielsen and Philip Bradley. The Applicant told the Tribunal that there was no program for financial counselling in the detention centre, and he had promised his parole officer that he would do one, but had not yet made arrangements to do so, notwithstandingthe prospect of release as early as 8 July 2021. He said he was waiting for his parole officer's guidance on this point.

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[63] Exhibit G1 G7 page 40 at paragraph 22.
[64] Exhibit R2, Respondent's Tender Bundle TB1 page 6 at paragraph 20.
[65] Ibid 157 – 158.
[66] Ibid page 62.

96. The Applicant denied a report contained in Exhibit R3[67] of a domestic violence incident alleged to have occurred on 17 July 2015 wherein he was alleged to have punched his former partner in the face with a clenched fist. He said he had never punched her. He said his partner became angry while he was changing the baby's nappy. Police arrived and this led to a Provisional AVO, to which he consented. Asked if Ms Smith was lying, he said he did not want to call her bad names. He did not want to call her a liar, but repeated that he never punched her.

97. The Applicant was then referred to a Report[68] in support of an application initiating care proceedings dated 8 June 2017 wherein his former partner had been reported as saying that "*he had been physically violent towards her*". Asked if she was lying again in this instance, he said yes.

98. The Applicant was then referred to that document[69] wherein it was recorded:

> *1. On 31 July 2015, CS received a Risk of Significant Harm (ROSH) report alleging domestic violence perpetrated by* [the Applicant] *against Ms Smith. The report also alleged concerns around Ms Smith's emotional state and the belief that Ms Smith was consuming alcohol whilst four months pregnant. The report alleged that Ms Smith appeared to have a flat affect, showing no emotion response and not engaging with anyone including her children. This report was allocated for a child protection response. Community Services records reveal that the family engaged in case planning on 29 October 2015 with goals identified around addressing the domestic violence in the relationship between Ms Smith and* [the Applicant] *increasing supports for Ms Smith and assisting the children in attending day care.*
>
> *…*
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> *4. It was further alleged that Ms Smith stated that she does not want to care for her children any longer, that they remind her of a miserable time with their father and her ex-partner [the Applicant]. Ms Smith was alleged to have said that if she was to go home, she will kill the children and herself.*

99. When questioned in relation to this report, the Applicant said that he could recall seeking help for his partner, but denied that he had participated in a domestic violence program. He agreed that plans were made to address domestic violence, but maintained he suffered abuse in the relationship. He had been aiming to help her.

100. When it was put to him that he continued to participate in the importation notwithstanding the risk of

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67 Ibid 189.
68 Ibid 200.
69 Ibid.

arrest and removal of his children, he said he was blinded by his father's sickness.

101. The Applicant confirmed that his sister Victoria lives in Nigeria. He said his father had lived about two hours from his sister, and he saw them both when he visited. His sister is married and has five children. They have a grocery shop which they have been running for between 20 and 25 years, and have friends and family in Awka.

102. The Applicant was referred to a NSW Corrective Services Report[70] dated 1 August 2018 wherein it was recorded "*He is willing to return to Nigeria on completion of his NPP*" The Applicant denied having said that he was willing to return to Nigeria, and denied that he said it because he did not fear harm on his return. He said he would be happy to return if his life was not in danger. He said Boko Haram had his photos and he was of Jewish descent.[71]

103. The Applicant said that he has a Nigerian friend Kingsley who lives in Sierra Leone and sometimes travel to and from Nigeria. He did not know how often he travelled, and has not communicated with him much since his father died in 2018. The Applicant said that he had collected furniture in Australia and sent it back to Nigeria, and Kingsley had travelled to Nigeria to collect and sell the furniture for him.

104. The Applicant said that his father had been a well-known, well respected, and well off member of the community. Were the Applicant to return, the older people in his father's village would know that he was his son. His sister and family were well established, and Kingsley could assist him if he returned to Nigeria. He repeated that he will lose his life if he goes, as Boko Haram are killing people every day and they have his photo. He said:[72]

> *If I don't have any kids here, I would be happy to leave here and get there and travel to another neighbouring country and save my life.*

105. The Applicant adhered to, and confirmed that he had repeated what he had told the Refugee Review Tribunal.[73] His attention was drawn to that Tribunal's finding that it did "*not regard him as a witness of truth*". He then confirmed that since making those statements of his fears and the dangers he

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70 Ibid 62.
71 Transcript, page 22, lines 39-40.
72 Ibid 24, line 43.
73 Exhibit R2, Respondent's Tender Bundle TB4 pages 145-6 at paragraphs 78 and 79.

would face in Nigeria, he has returned there twice.

106. It was put to the Applicant that his assertion that he was of Jewish descent, had not previously been raised and that he was searching for additional reasons to support his case. The Applicant said that he said he was not saying this for his own sake, but for his children's sake and that is why he had not told his barrister that he was of Jewish descent.

107. In re-examination, the Applicant said that his text messages to Wilson had been in English, and when they spoke on the phone they used their common African language. The Applicant said that he never knew that drugs were bad, as marijuana was not called a drug in Nigeria. He thought it referred to alcohol etc for socialising. He claimed he only realised that drugs were bad for the community while he was in Long Bay when he was a sweeper, and listened to what was said, and he saw how people behave in jail.

108. Asked about his time in immigration detention when he first came to Australia. He said he shared a room with one other detainee. He did not know if this person was taking drugs or not. He repeated that he had not engaged in any domestic violence, but had engaged in counselling regarding domestic violence because he wanted his partner to get help for her drinking.

109. The Applicant was referred to a NSW Children's Court document[74] dated 29 June 2017, part of which was read to him, regarding allegations that his partner was subject to alcohol abuse and mental health issues. He said that his partner used to drink whatever was around, wine, vodka, whisky. He said he only became aware of her risk to the children when he was in Long Bay.

110. He recalled going to Annie Nielsen, whom he described as "*his mother in Australia*" for advice on the best way to get help for his partner.

111. The Applicant told the Tribunal that if he were to be removed to Nigeria, his sister and brother in law would not be able to provide him with financial assistance or provisions from their store, as they had their own children to provide for. He said their situation was worse now than when he visited, and they were not able to help him then. He last spoke to his sister six months ago to let he know he was out of prison.

[74] Exhibit A6, Applicant's Tender Bundle page 51.

112. If returned to his village, people who knew his father would not support him, and some of them had killed his mother and his brother.

113. The Applicant said that the situation in Nigeria is now worse than it was when he applied for a protection visa in 2009. He said that he knows from Facebook that Boko Haram has been killing Christians.[75]

Evidence of Philip John Bradley

114. Philip John Bradley was called as a witness, and confirmed his statement dated 26 May 2021. Under cross-examination, Mr Bradley was referred by Mr Orchard to a NSW Corrective Services Case Note Report[76] where he had expressed concerns regarding the Applicant's "*anti-social associates*" and said he subsequently found out of criminal activity. He said a suspicious looking person had stayed overnight in a van in their driveway. The witness was aware of the details of the Applicant's offending.

Evidence of Ann Nielsen

115. Ann Nielsen was called as a witness, and confirmed her statement dated 26 May 2021. Under cross-examination, the witness told Mr Orchard that she had initially thought the Applicant was only involved in the selling of drugs. She thought it would be difficult for anyone from overseas to find work in Australia and it was not easy for him to find a job.

Closing submissions

116. In closing submissions, Dr Donnelly relied on his SFIC. If released back into the community, the Applicant was planning to live in Winston Hills, and would have the support of Ms Nielsen and Mr Bradley. He drew the Tribunal's attention to Risk Factors in the Corrective Services Risk Mitigation Plan[77] wherein lack of finances was listed as a risk factor, and it was recorded that the Applicant had "*not completed any interventions in custody to address this risk factors (sic) as he has been ineligible for programs owing to his low risk rating"*. Dr Donnelly also referred the Tribunal to page 6 of the same document where it was recorded that Ms Nielsen had "*nil concerns*" relating to his

[75] Transcript, page 32, line 25.
[76] Exhibit R2, Respondent's Tender Bundle TB2 page 79.
[77] Exhibit A6, Applicant's Tender Bundle page 4.

release to her address.

117. Dr Donnelly also referred the Tribunal to the submissions on sentence made on behalf of the Applicant[78] wherein it was submitted that the Applicant had entered a plea of guilty to both counts at the earliest opportunity, and that the maximum discount should be applied.[79] He also referred the Tribunal to the decision (cited at paragraph 36 of the submission) in *Xiao v R* [2018] NSWCCA 4 at 269-278 as summarised in *Naizmand v R* [2018] NSWCCA25 by Fullerton J (with Hobeben CJ at CL and Price J agreeing at [27]:

> *… The legislature should be taken to have intended that a plea of guilty to a Commonwealth offence is not only a source of evidence of an offender's remorse and contrition and an indication of a subjective willingness on the part of an offender to facilitate the course of justice, but that pleas of guilty should be encouraged as having the utilitarian or objective value of saving time and cost to the community of a contested trial.*

118. He also referred the tribunal to paragraph 47 of the submission wherein it was asserted that the offender had demonstrated progress as he had worked for the entirety of his time on remand, as expressed in the letter from the Long Bay chaplain.

119. Dr Donnelly also referred the Tribunal to paragraph 63 of the defence submission to the effect that the principle of deterrence would be served by the imposition of a custodial sentence and further submitted that the visa cancellation and appeal process itself would act as additional deterrents against future offending.

120. Dr Donnelly also took the Tribunal to the letter from Rev. Peter Baines of the NSW Prison Chaplaincy Service dated 7 May 2018[80] which referred to the Applicant's work as an inmate and the "*significant degree of confidence in the inmate on the part of staff*". Rev. Baines stated that the Applicant's arrest and subsequent incarceration has been the sternest of wake-up calls. "*He expresses deep remorse at being involved with drug trafficking and realises that doing so to support his large family is no excuse. He is very aware of the harm the drugs do in the community, now living with people whose lives have been severely damaged*". Rev Baines also recorded that the Applicant attended church every Sunday and was a valued member of the Christian community.

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78 Ibid 14 – 24
79 Ibid 19.
80 Ibid 25.

121. Dr Donnelly also referred the Tribunal to a letter from Ms Nielsen[81] describing the Applicant as a "*very good father and husband, sharing domestic duties and child caring with Cassandra but was always struggling to find a job so that he could support his family"*. The letter also described how the Applicant was very remorseful for what he did, and that he was missing out on being a father caring for his children. Ms Nielsen had also offered appropriate physical, financial, and moral support to assist the Applicant to find work and successfully rehabilitate into the community.

122. Dr Donnelly also referred the Tribunal to the report[82] of Dr Headington which had been before the sentencing judge, and which described the Applicant as having had a "*good*" life with his family in a "*comfortable home with plenty of food and other essentials*" and were "*devout Christians*". The Applicant had described "*good memories of this time*", recalling that he was given a suit to wear to church, stating that "*not every child can have a suit for church*". The report noted that the Applicant had visited his father in Nigeria in 2015 "*despite it being dangerous for him to return, as his father was unwell*". It also recorded that the Applicant had a good relationship with a stepchild whom he took as his own. The Applicant had been on Centrelink at the time of his offending, and he and his partner were "*struggling financially*" and he had stated that he wanted extra money to help his father. According to the report, the Applicant had not made excuses for his actions, accepted responsibility, and expressed remorse guilt and shame for his involvement in the offending. He had also expressed the view that he deserved to be punished, and the observation was made that these attitudes appeared to be primarily linked to his religious beliefs.

123. The Tribunal notes that the report also recorded that the Applicant had appeared to have *"acted out of character and contrary to his highly moral and religious beliefs, with the main motivation being financial gain to support his family*".[83] The report also observed[84] that the Applicant "*did not present with common criminogenic needs such as substance use issues, emotional dysregulation, aggression issues or antisocial attitudes and peers. As such there are no suitable treatment programs available … with Corrective Services NSW. [The Applicant] has a number of protective factors including his Christian faith, supportive friends and family, his children and a good work ethic, which may reduce his risk of reoffending"*.

124. Dr Donnelly nevertheless submitted that the Applicant's offending was very serious.

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81 Ibid 26.
82 Ibid 28 – 38.
83 Ibid 36.
84 Ibid 37.

125. The Tribunal considers that the claim that the Applicant was "*struggling financially*" does not sit comfortably with the fact that he was able to afford two lengthy overseas trips back to Nigeria during the period immediately prior to the offending in respect of which he was charged, or that he declared he was carrying more than $10,000 in passenger entry card on his second return trip.

126. Dr Donnelly also referred to the Tribunal to evidence of the Applicant's ongoing relationshipwith his children, and evidence that the children wish to see their father, and his relationship with them.

127. Dr Donnelly also referred the Tribunal to Exhibit A7[85] which referred to a World Watch List report by an otherwise unidentified author from Open Doors on Nigeria which was annexure "B" to that statement, which recorded that more Christians are killed for their faith in Nigeriathan in any other country; violent attacks by the Islamic extremist group, Boko Haram and other groups are increasing across the country; and persecution and especially violent attacks are most prevalent in the North and middle belts of Nigeria, but government attempts to increase the influence of Islam across the country affect even Christian majority communities in the south.

128. Dr Donnelly also referred the Tribunal to an article by John L Allen Jr at angelusnews.com which was annexure "C" to Exhibit A7 and headed "*Why Nigeria is the most dangerous place in the world to be a Christian*", dated 21 January 2021. Dr Donnelly emphasised dot points drawn from it, including that Nigeria is a killing zone for Christians, which was said to be the single most dangerous place on the planet to be a Christian.

129. He also referred the Tribunal to annexure "D" an article by Cruxstaff at cruxnow.com titled "*Nigeria is becoming world's "biggest killing ground of Christians*"" 22 August 2020 which supported the proposition that Nigeria is becoming *"the biggest killing ground of Christiansin the world*".

130. Dr Donnelly also referred the Tribunal to annexure "E" an article from Open Doors UK wherein it was reported that violent attacks by Boko Haram and other Islamic extremist groups are common in the North and Middlebelt of the country, and becoming more common further south. It was also reported that Nigeria had risen several places on the World Watch List, and persecution had worsened in all areas of public and private life.

[85] Exhibit A7, Applicant's Statement dated 17 June 2021 Annexure B.

131. Dr Donnelly also referred the Tribunal to annexure "F", an article from persecution.org titled "*1470 Christians killed in Nigeria within four months / Persecution*" and a passage which reported killings and acutely disproportionate reprisals against indigenous Christians in the North and currently South West, South East and South-south.

132. Dr Donnelly also referred the Tribunal to exhibit "H", and took the Tribunal to the statement "*Boko Haram has publicly declared war on Christians and stated its aim to Islamise the whole of Nigeria*".

133. Dr Donnelly submitted that regardless of submissions made in 2009 and 2010, things are different now, and the most contemporary evidence plainly demonstrates that being a Christian in all parts of Nigeria places a person at extreme risk of violence or death. He also submitted that in the alternative, even a small risk of harm could be given significant weightin the Applicant's favour as a matter of broad discretion.

134. Dr Donnelly referred the Tribunal to the Full Federal Court cases of *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[86] and *BCR16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[87] and submitted thatit was open to the Tribunal to give weight in favour of revocation of the mandatory cancellation to the evidence of the circumstances faced by the Applicant in his home country even if that evidence was not sufficient to satisfy the Tribunal that Australia's non- refoulement obligations were engaged, and pointed out the distinction that the court had made regarding the exercise of the section 501CA(4) being quite distinct from the task in section 65 of the Act.

135. Dr Donnelly then referred the Tribunal to the judgement of Wigney J in the Full Court's decision in *MNLR,* wherein his Honour referred to the decision in *DQM18*[88] and said that the Tribunal has to consider whether there is any real prospect of the appellant being granted a protection visa, or a visa under section 195A of the Act in circumstances where the application for revocation of the cancellation of the visa is refused. This was an issue which the Tribunal had to deal with, and properly grapple with, given the significant human consequences involved for the Applicant given his non-refoulement claims.

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86 [2021] FCAFC 35 at [55], [63]. [64], [66], [72], and [73]. Perram, Wigney and Derrington JJ (Perram Jconcurring with the reasons of Derrington J).
87 [2016] FCAFC 96 at [48-49].
88 *v Minister for Home Affairs* [2020] FCAFC 110.

136. Dr Donnelly accepted that the primary consideration of protection of the Australian community weighed against revocation of the mandatory cancellation decision. He conceded that the Applicant's offending was on any view very serious, and "*it can't be said the drug importation or any other offending of a similar variety is anything but serious"*.[89] This had been borne out by the extensive period of imprisonment that the Applicant had received. However he submitted that the Tribunal should offset the weight to that primary consideration because the Applicant was unlikely to reoffend and was a person who wouldbe characterised as a low risk of offending at worst, and at best a remote prospect of reoffending.

137. Dr Donnelly submitted that the Applicant had given evidence consistent with what he had said before the clinical psychologist that he blamed himself for his offending and imprisonment, and that he had used his time in jail to change himself, and learned his lessons.

138. Regarding the best interests of minor children, Dr Donnelly submitted that the Tribunal should give heavy weight in favour of revocation to the evidence that the Applicant was a good father to his biological children and to his stepdaughter. His removal to Nigeria would severely compromise his ability to maintain a close and ongoing relationship with his children, and this was not in their best interests. In addition, the Applicant would face difficulties caused by different time zones, access to electronic communications, and would need the cooperation of the foster parents who are presently taking care of the children. He told the Tribunal there was some evidence that the foster parents wanted to cut off ties between one of the children and the Applicant.[90] He said it was not clear why that was the case, there was also claim that they did not want Ann Nielsen to see the children.

139. Dr Donnelly submitted that although the Applicant didn't have a sustained and structured long-term job in the private market, he was a good father and was for a large part, a stay- at-home father who took care of his children. He said it was open to the Tribunal to offset some of the weight in the Applicant's favour by the fact that there had been a departure from the children's lives on a day-to-day basis because of his offending, but the children were still relatively young and there are still many years before they turned 18, and there was a real prospect for him to play some positive role in the lives of the children in the future. This was particularly so if he got to remain in Australia and earn a proper wage and support the children without the disadvantage of an ex-partner who clearly had alcohol problems and mental health issues.

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89 Transcript, page 51, line 43.
90 Ibid 52, lines 29-30.

140. Dr Donnelly referred to the fact that the Applicant's step-daughter had gone back to live with her biological father, and accepted that his role in relation to her would not be parental in a fatherly sense because of this even though he still considered her as a stepdaughter.

141. Regarding domestic violence, Dr Donnelly submitted that the Tribunal did not have sufficient evidence or probative evidence before it to be satisfied that the Applicant had engaged in any domestic violence. What the Tribunal had before it were "*mere allegations that have not been tested in a court. … There is no evidence, photographs or anything of that kind of any physical injuries to her and of course he was not charged with any offending*".[91]

142. The Applicant had accepted and agreed to an apprehended domestic violence order on a "*without admissions*" basis, which was not a criminal offence itself, and was not an admission of any wrongdoing unless the court made a finding after a contested hearing that the AVO be imposed. There was no suggestion on the evidence that this was the case. He accepted that the Tribunal can make findings without criminal convictions, but said this was not a case where there was simply enough evidence for that to happen.

143. Dr Donnelly submitted that the family violence primary consideration should be treated with neutral weight.

144. Regarding the expectations of the Australian community, Dr Donnelly accepted that this primary consideration weighed against the Applicant, and agreed with the Tribunal that Direction 90 substantially tightened any discretion that the Tribunal might have had under the previous Direction. He submitted that there was not much that could be said at all in the Applicant's favour in respect of it, but it was a matter for the Tribunal in the exercise of its broad discretion what weight it decided to give to that primary consideration.

145. Regarding the Applicant's ties to the Australian community, Dr Donnelly submitted that the Applicant had ties to the Australian community through his three biological children, his stepdaughter and his two good friends who gave evidence. He submitted that although the Applicant didn't have extremely strong ties, he had reasonably good ties to Australia and its people. Moreover, there was evidence that his friends who had given evidence would suffer emotional hardship and distress if he were to be removed.

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[91] Ibid 54, lines 4-7.

146. Dr Donnelly further submitted that the Applicant had been in Australia for more than a decade, although he conceded that the weight to this could potentially be offset by the fact that he spent a period of time in detention and of course prison. He nonetheless contended that the other considerations weighed for the Applicant.

147. Dr Donnelly further submitted that the Tribunal could also have regard to the risk that the Applicant could be re-prosecuted in Nigeria for the offences he had committed in Australia, and even if there was a small risk that is something that the Tribunal in the broad exercise of its discretion could have regard to.

148. Dr Donnelly submitted that the Applicant would suffer insurmountable hardships if returned to Nigeria. His sister and her husband who are supporting five children would not be able to support him. He had left his father's village at the age of 12 years to live in the North for a number of years. Dr Donnelly also referred to the very high unemployment rate which had been exacerbated by the current pandemic. Threats to his safety, Covid-19 related travel difficulties, and the economic circumstances of the country, and his current lack of ties there would make it difficult for him to establish business again.

149. He further submitted that there is no evidence of any social welfare being available to the Applicant in his home country. Overall, Dr Donnelly submitted that other considerations should weigh very heavily in favour of revocation, and together with the best interests of the minor children in Australia, and these factors should outweigh the protection and expectations of the Australian community.

150. In his closing submissions, Mr Orchard submitted that there was no dispute that the Applicant failed the character test and that the Applicant had broadly conceded the facts of the sentencing remarks as set out in the G documents and his criminal record. The Applicant had been convicted of offences which carried maximum penalties of life imprisonment for importing a commercial quantity, and 25 years for trafficking. The sentencing judge had pointed out that the Applicant had been "*intimately involved*" in operating the scheme, and ran a sophisticated counter surveillance scheme and the Applicant was a middle manager in the importation scheme. The Applicant had conceded that he had used codewords from different numbers and other methods to avoid detection by the authorities.

151. Mr Orchard submitted that the judge's comment that the Applicant's offending fell in the low to

medium range was in the context of the maximum sentences, and that the convictions were not at the lower end of the spectrum for the purposes of Direction 90. They were extremely serious charges and extremely serious convictions for the purposes of the direction.

152. The significant term of imprisonment reflected the objective seriousness of the crimes.

153. Mr Orchard submitted that there was evidence before the Tribunal about domestic violence committed by the Applicant, but no charges as such. Mr Orchard referred the Tribunal to the police reports which indicated that the Applicant had punched his former partner in the head in the context of a domestic argument. He submitted that the Applicant had not called his ex-partner a liar directly, but did so by implication.

154. Mr Orchard submitted that the Applicant was simultaneously seeking to impugn his former partner's credibility, and presenting a statement from her in his favour without making her available to give evidence before the Tribunal. He submitted that it did not stand to reason that the Applicant could choose to accept evidence from her that he is a good person and that she would be devastated if he left and in effect call her a liar.

155. Mr Orchard submitted that the Tribunal should be slow to impugn the story of a victim of domestic violence especially where the Applicant was seeking to rely on her evidence in other respects.

156. Mr Orchard submitted that there was evidence from an independent and authoritative source that the Applicant had perpetrated domestic violence, in the form of the COPS report, and where there was no evidence of rehabilitation, the Tribunal should find that conduct to be very serious for the purposes of both the family violence and the protection of the Australian community parts of the direction. He submitted that both these aspects weighed against the Applicant.

157. Mr Orchard submitted that contrary to the Applicant's submissions, the Applicant had sought to deceive the department by attempting to enter Australia on fraudulent means. The Applicant's conduct must be viewed as very serious.

158. Mr Orchard submitted that if the Applicant's offending were to be repeated, importation and trafficking of methamphetamine and cocaine would be likely to result in serious physical psychological or financial harm up to and including death of countless members of the Australian

community. He referred the Tribunal to material cited in the Respondent's SOFIC about the deleterious impact methamphetamine in particular, and cocaine has on the Australian community, and that those harms included heart problems, stroke, mental health problems, even psychosis. He further submitted that the scale of the Applicant's offending would have a profligate impact on the health and justice systems, noting that more than half of the detainees in prison and police custody have reported recent use of ice.[92]

159. Mr Orchard submitted that ice has a burdensome impact on the justice system and more devastating effect generally on the health system. The seriousness of the harm that the relevant drugs could do to the community was reflected in part by the high sentencing available to people importing commercial quantities of the drug, and the seven years given to the Applicant for his offence in that regard.

160. Mr Orchard submitted that the Applicant remained a material risk that was unacceptable to the Australian community. Referring to Dr Donnelly's submission that the Applicant's early plea of guilty was indicative of remorse needed to be considered in the context of the strong Crown case before the court.

161. Mr Orchard submitted that there was some evidence from an LSIR tool about the Applicant's risk of offending. However, it was unclear whether or not in the context of that tool being used, it considered the Applicant's immediate turn to extremely serious offending in consequence of financial difficulties. It was also unclear whether or not it considered the Applicant's fraudulent attempts to enter Australia previously, and the fact that he had been found not to be a witness of truth before a previous Tribunal, or his willingness to commit crimes having just been granted a protection visa.

162. Mr Orchard submitted that the Applicant demonstrated a relatively limited degree of insight, saying that he had learned about the seriousness of drugs having taken a course while in prison. Mr Orchard submitted that the Tribunal should be sceptical of evidence that the Applicant did not have his eyes wide open about the dangers and harms of the substances and the illegality when he participated in the process using covert techniques to avoid detection.

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92 Exhibit R2, Respondent's Tender Bundle TB6 page 182

163. Mr Orchard further submitted that the Tribunal should reject any assertion that the Applicant was initially ignorant of the consequences of his actions. He submitted that the Applicant's actions were organised and premeditated offending, and he knew the impact it would have on the broader community. He submitted that the drugs were illegal in Nigeria and Australia, and that the Applicant admitted in evidence that he knew that they were illegal in Nigeria. He submitted in the alternative that ignorance of the law was no excuse.

164. Mr Orchard submitted that whilst the Applicant had pressed the claim that his father's illness was the driver of the offending, he had not said that his offending was driven by his own failure to properly manage his finances or engage in meaningful employment or seek roots to meaningful employment before turning immediately to offending.

165. Mr Orchard submitted that even if the Applicant's offending stemmed from his claimed motive, that did not diminish the criminality of his offending. There was no evidence the Applicant had completed any financial counselling, or made plans to do so. Any rehabilitation he may have achieved whilst in prison had not been tested in the community. The Applicant's assertion that he would find employment on release, needed to be looked at in the context of approximately four years the Applicant had spent at liberty in Australia, during which there was no clear employment or material participation in the workforce, or paying taxes. Residing at the same house as Philip Bradley and Ann Nielsen had not been a protective factor in the past and should not be considered to be one presently.

166. Mr Orchard submitted there remained a real risk the Applicant would reoffend, potentially causing serious and significant harm to members of the Australian community. Even if the Tribunal accepted Dr Donnelly submission that the Applicant was a low risk, Mr Orchard submitted that having regard to the significant harm that would be caused to the Australian community by the further distribution of poisonous drugs such as methylamphetamine, Primary Consideration 1 weighed very heavily against revocation.

167. Mr Orchard submitted that the consideration of family violence weighed against the Applicant but not as heavily as his importation offences under the protection of the Australia community.

168. Regarding the best interests of minor children, Mr Orchard submitted that the Applicant's three young children in Australia were all presently in care, and while it may be in their best interests for

the Applicant's visa cancellation be revoked that was severely mitigated by the factors listed in the Respondent's SFIC.

169. Regarding the expectations of the Australian community, Mr Orchard submitted that the seriousness of the Applicant's offending was of particular importance in this case, and that seven years imprisonment was a very long period of time. He submitted the charges against the Applicant were very serious on any objective measure, and that they were, for the purposes of the direction, among some of the most serious criminal offending that could be considered. He cited factors such as given that the length of time, which the Applicant had been imprisoned reflected the seriousness of his breaches of the law. Mr Orchard submitted that this consideration took on a much higher level of importance because of the seriousness of the Applicant's offending. He submitted that this consideration should weigh very heavily and be determinative. In the alternative, he submitted that cumulatively with the protection of the Australian community, these two considerations should be seen as determinative because both weighed very heavily against revocation, and were augmented by the family violence consideration.

170. Mr Orchard submitted that the case law required the Tribunal to consider the Applicant's non-refoulement claims, and that it was open to the Tribunal to simply disbelieve the Applicant.

171. The Applicant's claims were broadly the same as those made before the Refugee Review Tribunal except for the Decree 33 issue.[93] Mr Orchard submitted that the submission on behalf of the Applicant that he could be subject to double jeopardy misunderstood what the law purported to do which was to convict or punish someone for bringing Nigeria into disrepute which was different from convicting them for importation offences. He submitted that the decree was rarely given effect and rarely used as was reported at paragraph 5.44 of the Department of Foreign Affairs and Trade Country Report.[94] He submitted that the Decree 33 submission carried very little weight and should be disregarded.

172. Regarding the Applicant's claims that he feared harm on return to Nigeria, these were the same claims which had been put before the Refugee Review Tribunal and the courts. The Applicant had applied for a protection visa on the basis of fearing harm as a Christian and claimed that his business had been destroyed, and that his picture had been pinned up around the neighbourhood

93 Ibid 111.
94 Exhibit A3, DFAT Country Information Report.

and had red marks put on it. These claims had been rejected by the delegate, and also by the Refugee Review Tribunal which found notably that the Applicant, with respect to those claims, was not a witness of truth. The Applicant's claims that his photograph was still on display in Nigeria was not supported by other evidence, and the country information suggested Boko Haram were only interested in people of particularstatus.

173. Despite claiming to fear harm, the Applicant had returned to Nigeria twice for visits. His claim of being attacked with rocks on his last trip to Nigeria was not supported by any evidence such as medical reports police reports witness statements et cetera. It was open to the Tribunal to find based on the previous findings of the Refugee Review Tribunal, the general nature of the Applicant's evidence before this Tribunal and the lack of supporting evidence about his claimed harm on his return, that his claims were not true or fell more into the category of an impediment that he may face if he is returned.

174. Regarding the extent of impediments, the Applicant would face if removed, Mr Orchard submitted that the Applicant speaks English and at least one other Nigerian language, andwould not face any substantial language or cultural barriers if returned. The Applicant had accepted in evidence that he would have support, in the form of his sister, friends, and his father's own network, and that he would be happy to return to Nigeria but for his protection claims. If the Tribunal rejected the Applicant's claims for non-refoulement and harm on return, it should find that this consideration weighed neutrally.

175. Mr Orchard submitted that the Minister does accept that both the security situation in Nigeriais fluid, and that Nigeria's economy, for example isn't as robust as Australia's. The Applicant would face difficulty if he were removed but those difficulties are impediments would not be insurmountable having regard to the time he spent there since he was young, his networksthere, and his ability to engage with them on return. Whilst the Applicant might face difficulty re-establishing a business, there was no reason why he couldn't use his skills and networks to do so.

176. Difficulties in re-establishing himself was to be assessed by reference to what was availableto other citizens of that country. Whilst public facilities were limited, there was no evidencethat he would be denied access to them as far as they are available. Mr Orchard submittedthat whilst the Applicant may face some difficulty in re-establishing, this consideration should be given limited weight.

177. Regarding the Applicant's links to the Australian community, in strength nature and duration of ties, Mr Orchard submitted:[95]

> *The Applicant's engagement with the Australian community has been extremely limited. No work, little involvement and little participation, it would seem, more broadly. He has very limited social links.*

178. The Tribunal commences with consideration of paragraph 8.1.1(1) of the Direction.

PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY

Summary of the Applicant's Offending

179. The Respondent's Statement of Facts Issues and Contentions summarised the Applicant's offending as follows:[96]

> *29. The sentencing remarks of* [his Honour] *in the District Court (G7) reveal the following aspects of the Applicant's offending, which of itself is very serious:*
>
> *a. The first offence to which the Applicant pleaded guilty was importing a commercial quantity of a border controlled drug, namely, methamphetamine (contrary to s 307.1(1) of the Schedule to the Criminal Code Act 1995 (Cth)) (**Criminal Code**), and the second was trafficking a marketable quantity of controlled drugs, namely, methamphetamine and cocaine (contrary to s 302.3(1) of the Criminal Code). The maximum penalty for the importing offence is life imprisonment, and 25 years' imprisonment for the trafficking offence.*
>
> *b. The importing offence occurred over a period of 23 days between 12May 2016 and 3 June 2016 and related to five consignments of methamphetamine which the Applicant was involved in importing from India. The gross weight of the methamphetamine was 2.4kg, with an average purity of 80%. The commercial quantity of the drug is 750g. The amount involved in this offence was therefore around 2.2 times the commercial quantity, although* [his Honour]*DCJ considered it to be "towards the bottom of the range" (G7/37). While* [his Honour] *DCJ did not consider the Applicant to be the mastermind of the operation, his Honour did consider the Applicant to be "intimately involved in operating the scheme" (G7/38). His Honour considered the Applicant to have adopted a "sophisticated" counter-surveillance scheme and, considering the Applicant's role as a "middle manager in the importation scheme", his culpability fell in the middle of the scale between the bottom and mid-range (G7/40).*
>
> *c. The trafficking offence related to four separate trafficking events between 20 January 2016 and 7 April 2016. The total combined gross weight of controlled drugs was around 1.025 times the combined commercial quantity. Noting that the*

[95] Transcript, page 68, lines 8-10.
[96] Exhibit R1, Respondent's Statement of Facts, Issues and Contentions.

Applicant was not a drug user, which may have mitigated the seriousness of his culpability, but rather someone who engaged in trafficking and importing for financial reasons, his Honour considered this offending to fall below the midrange of objective seriousness

Application of Factors in Paragraph 8.1 of the Direction

8..1 Nature and seriousness of the conduct

180. Paragraph 8.1.1 (1) a) (i) of the Direction does not limit the range of conduct that may be considered very serious, and provides that violent and/or sexual crimes are viewed very seriously by the Australian government and the Australian community.

181. At paragraph 25 of the Applicant's SFIC, it was submitted:[97]

> *In considering the nature and seriousness of the Applicant's criminal offending, it can readily be accepted that offences involving the importation, sale, and distribution of large amounts of illicit substances in Australia should be viewed seriously. In reaching this view the Tribunal would be cognisant of the far-reaching implications of the proliferation of prohibited drugs into the wider Australian community, the potential harm for individual users, and the results in increased crime and law enforcement costs. The Applicant has been convicted of such offences.*

182. Dr Donnelly conceded before the Tribunal that the Applicant's offending was on any view very serious. As noted above, the offences carried maximum penalties of life imprisonment for importing a commercial quantity, and 25 years for trafficking. Mr Orchard submitted that the judge's comment that the Applicant's offending fell in the low to medium range was in the context of maximum sentences, and that the convictions were not at the lower end of the spectrum for the purpose of Direction 90. He submitted they were extremely serious charges and extremely serious convictions for the purposes of the direction and the significant term of imprisonment reflected the objective seriousness of the crimes.

183. The Tribunal notes the judge's remarks that the Applicant was "*intimately involved*" as a "*middle manager*" in "*implementing a familiar and well tested method of importation and collection, and that he was aware that there were many people involved in the syndicate*". The importation of the drugs included a "*sophisticated*" counter surveillance scheme, and the Applicant received a substantial term of imprisonment (even after a 25% discount for an early plea of guilty) notwithstanding that he

[97] Exhibit A1, Applicant's Statement of Facts, Issues and Contentions.

had no prior convictions. It is clear that the judge was of the view that this was not a *"one off",* or *"out of the blue"* occurrence. The Applicant's conduct was clearly planned and deliberate, and practised to the point where the judge anticipated training may have been involved. His offending included the importation of five consignments over a period of 23 days between 12 May 2016 and 3 June 2016, and fourseparate trafficking events between 20 January 2016 and 7 April 2016.

184. Having regard for the far-reaching implications of proliferating prohibited drugs into the wider Australian community, the potential for great harm, not only to individual users, but to the broader Australian community, and the increased burden placed on the law enforcement and criminal justice system, and the nation's health facilities the Tribunal views the nature and seriousness of the Applicant's offending as extremely serious.

185. Paragraph 8.1.1 (1) of the Direction in addition to criminal offending, requires consideration of "*other conduct*", and having regard to the principle that entering or remaining in Australia is a privilege that this country 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. The evidence before the Tribunal shows that this Applicant had, even before he first boarded a plane bound for Australia planned and implemented a scheme whereby he fraudulently procured a visa to which he was not entitled. He travelled on the basis of this fraudulently obtained document, and on arrival, he presented it to border authorities as a genuine article, and lied on interview in response to questions about his reasons for coming to Australia, before admitting his conduct to border officers, and being placed in immigration detention for a lengthy period. This pre-offending history shows that the Applicant had, by planned and deliberate conduct, demonstrated contempt for the expectations of the Australian community even before he set foot on Australian soil.

186. In the course of his airport interview on the date of his arrival, 29 August 2009, the Applicant told the interviewing officer:[98]

> *I don't want to go back, I want to stay away from my country… I am scared of dying there, and turn into Muslim. If I am there I will die. I will commit suicide….*

187. His ensuing claim for a protection visa was rejected, and he was subsequently found to be an

[98] Exhibit R2, Respondent's Tender Bundle TB4 page 109.

untruthful witness by the Refugee Review Tribunal. The Tribunal considers that the Applicant's attempted deception of border authorities and his evidence before the Refugee Review Tribunal which was found to be untruthful are both items of "*other conduct*" which warrant consideration. That Tribunal's finding that he was not "*a witness of truth*" appears to be entirely vindicated by the fact that the Applicant, of his own volition, belied his claims by twice returning to Nigeria within the space of nine months after gaining permanent residence of Australia. Moreover in cross examination before the Tribunal, the Applicant was referred to a NSW Corrective Services Report dated 1 August 2018[99] by his case officer wherein it was recorded "*he is a Nigerian citizen and is willing to return to Nigeria on completion of his NPP at present*". He denied making this statement, however, no reason was advanced by the Applicant as to why a case officer would record a false statement and attribute it to him. The Tribunal rejects this denial.

188. The Applicant's conduct, both prior and subsequent to the Refugee Review Tribunal's finding that he was "*not a witness of truth*" leads this Tribunal to find that he is not a credible witness, and this Tribunal therefore gives his evidence no weight.

189. Neither of the Applicant's statements broached the subject of the fraudulent business visa he obtained and presented to border officials for the purposes of gaining his initial entry to Australia. Neither was this issue mentioned in the SFIC filed on his behalf by Dr Donnelly, nor in the course of Dr Donnelly's oral submissions. Neither were the findings of the Refugee Review Tribunal that the applicant was "not a witness of truth" the subject of written or oral submissions by Dr Donnelly.

190. Indeed, at paragraph 37 of the Applicant's SFIC Dr Donnelly submitted that paragraph 8.1.1

(1) f) was not applicable in the circumstances of the case. The Tribunal rejects this submission, as it regards the applicant's conduct prior to and at entry into Australia and before the Refugee camp review Tribunal very seriously for the purposes of both paragraphs 8.1.1 (1) a) and f).

191. In addition, the applicant's assault of a woman who was four months pregnant must weigh against him for the purposes of paragraph 8.1.1 (1) a) (ii), as well as paragraph

8.2 of the Direction as discussed below.

[99] Ibid page 62.

192. The Tribunal finds that this "*other conduct*" is very serious, and adds further weight against revocation of the decision under review to that weight attributed to his criminal offending.

193. The Tribunal considers that the Applicant's criminal offending, significant term of imprisonment (particularly considering it was already discounted by 25%) and his provision of false and misleading information to the Australian Government requires that the nature and seriousness of his conduct must weigh very heavily against revocation of the decision under review. Factors 8.1.1 b), d), e), and k) are not applicable to this consideration. The Tribunal now turns to the considerations listed in paragraph 8.1.2 of the Direction.

8..2 The risk to the Australian community should the Applicant commit further offences or engage in other serious conduct

194. In considering Paragraph 8.1.2 of the direction, the Tribunal is mindful of the points expressed in paragraph 8.1.2 (1) that the tolerance for any future harm becomes lower as the seriousness of the potential harm increases, and that some conduct and the harm that would be caused, if it were repeated is so serious that any risk that it may be repeated is unacceptable.

8.1.2 (2) Assessing the risk to the Australian community

8.1.2 (2) a) The nature of the harm to individuals or the Australian community werethe Applicant to engage in further criminal or other serious conduct

195. The Tribunal considers that the nature of the harm to individuals or the Australian community should the applicant engage in further criminal or other serious conduct may include further untruthful statements or documents being produced to government authorities, violent assaults of potential future partners, who may or may not be pregnant, and further serious criminal importation and distribution of illicit substances.

196. At paragraph 40 of the Applicant's SFIC, it was conceded:[100]

> *On the hypothesis that the Applicant was to commit the same or similar offences in the future, it is accepted that it could cause serious physical, psychological and financial harm to members of the Australian community. There is no question that the nature of harm to members of the Australian community could be very serious ifthe Applicant were to engage in similar criminality in the future.*

[100] Exhibit A1, Applicant's Statement of Facts, Issues and Contentions.

197. At paragraph 36-37 of the Respondent's SFIC it was submitted:[101]

> *36. If the Applicant were to commit further importation and trafficking offences involving methamphetamine and cocaine, that conduct is likely to result in serious physical, psychological and financial harm to countless members of the Australian community.*
>
> *37. Illicit drugs have a significant and deleterious impact on the Australian community. In this regard, the Minister notes the impact of drug use outlined in the report by the Australian Institute of Health and Welfare updated on 16 April 2021, which identified that there has been a rapid increase in the number of deaths involving methamphetamine and other stimulants, including cocaine, which is four times higher than that in 2000. The AIHW report also identifies the long-term effects of methamphetamine and cocaine use as including: cardiovascular problems, stroke, depression and anxiety and psychosis. Methamphetamine was identified as the most commonly injected drugs in Australia and accounted for 21% of the total illicit drug use burden (TB 6/171, 178 – 179).*

198. In assessing the risk to the Australian community, the Tribunal is mindful of the government's view expressed in paragraph 8.1.2 (1) that the Australian community's tolerance of any risk of future harm becomes lower as the seriousness of the potential harm increases, and that some conduct in 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.

199. The Tribunal accepts the above submissions from both parties, as well as the additional submission which was made by Mr Orchard that the widespread distribution of the drugs would have a profligate impact on the health and justice systems and records with grave concern that more than half of the detainees in prison and police custody have reported recent use of ice.[102]

200. The Tribunal accepts that there is evidence before it that the Applicant is a low risk of reoffending, however that evidence has its roots to a large degree in the Applicant's own statements, which the Tribunal considers not creditworthy. It is unclear whether LSIR report had regard for the findings of the Refugee Review Tribunal. The Tribunal does not accept any suggestion of naïveté on the part of the Applicant. He clearly knew he was dealing in illicit substances, hence the observation by the judge that he agreed with the Crown's submission that the offender's conduct involved careful planning and execution, and sophisticated countersurveillance techniques. Whilst it may be accepted that the Applicant's plea of guilty it is indicative of remorse, it is also no less indicative of a likely awareness on the part of his counsel that a timely plea of guilty in the face of a strong Crown case would guarantee a 25% reduction in a particularly long term of imprisonment,

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101 Exhibit R1, Respondent's Statement of Facts, Issues and Contentions.
102 Transcript page 61; Exhibit R2, Respondent's Tender Bundle TB6 page 182

lessening his incarceration by a period of years.

201. The Applicant had attributed the blame for his offending in part to his financial circumstances, and desire to provide for his family and his ailing father. However it is clear that he must have spent money on the tickets for his trips back to Nigeria between 9 September 2015 and 15 October 2015 and 24 February 2016 and 31 March 2016 (at which time he declared possession of over $10,000 on his return to Australia) rather than remitting it to his father for his claimed medical expenses. There was ample time for the Applicant to remit some or all of these declared funds to his father following his return to Australia and prior to his arrest. However, there is no evidence before the Tribunal of any attempt to do so. There is no clear evidence before the Tribunal that the Applicant held any honest paid employment for any length of time, or paid any tax during the period of approximately 4 and a half years that he was at liberty in Australia. It was suggested that he previously had difficulty finding employment. If this is true, that difficulty will only be exacerbated in the future by the fact that he now has a substantial criminal record, and there does not appear to be any reason to believe that he will find it any easier to secure honest employment in the future that he has in the past. The Tribunal is concerned that this may, in the fullness of time lead to further offending.

202. Having earlier found that the Applicant is not a credible witness, the Tribunal gives no weight to his claims of remorse or rehabilitation, and considers that he is a real risk of reoffending.

203. Whether the risk of the Applicant reoffending is "*low*" as was submitted by Dr Donnelly, or "*material*" as submitted by Mr Orchard, having regard to the principles at paragraph 5.2 of the Direction, and in particular, subparagraphs (3) and (5) the Tribunal finds that the harm which would be caused if the Applicant's past conduct was to be repeated is so serious that any risk that may be repeated is unacceptable.

204. For these reasons, primary consideration 8.1 weighs very heavily against revocation of the decision under review.

205. The Tribunal now turns to the considerations listed in paragraph 8.2 of the Direction.

PRIMARY CONSIDERATION 2 – FAMILY VIOLENCE COMMITTED BY THE NON-CITIZEN

206. Paragraph 8.2(1) of the Direction reflects the Government's 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.

207. Family violence is defined in paragraph 4(1) of Direction 90 as follows:

> ***family violence means*** *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. Examples of behaviour that may constitute family violence include:*
>
> *(a) an assault; or*
>
> *(b) a sexual assault or other sexually abusive behaviour; or*
>
> *(c) stalking; or*
>
> *(d) repeated derogatory taunts; or*
>
> *(e) intentionally damaging or destroying property; or*
>
> *(f) intentionally causing death or injury to an animal; or*
>
> *(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
>
> *(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominately dependent on the person for financial support; or*
>
> *(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or*
>
> *(j) unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.*

208. The Tribunal notes that the definition of "*family violence*" at paragraph 4 (1) of the Direction refers to specific conduct perpetrated upon "*a member of the person's family*".

209. Neither "*family*" nor "*family member*" are defined in the Direction. However, there are definitions which aid in the determination of the meaning of these terms in the Act.

210. The *Acts Interpretation Act 1901* (Cth) ("the Interpretation Act") is of relevance to the interpretation of Direction 90. Section 46 of that act provides, in substance, that unless a contrary

intention appears, expression in an instrument have the same meaning as in the Act or instrument which enables or authorises them.

211. Section 5G of the *Migration Act 1958* (Cth) relevantly provides that members of a person'sfamily "*are taken to include […] (a) de facto partner of the person; [and] (b) someone who is the child of the person, […] because of the definition of child in section 5CA […]".*

212. Paragraph 8.2(2) of the Direction provides that the consideration of family violence is relevant in circumstances where:

> *(a) the non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence 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 being considered under section 501 or section 501CA has been afforded procedural fairness.*

213. As was noted by Senior Member Tavoularis in *Law and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (migration)* [2021] AATA 1994 at paragraph 122:

> *122. … This paragraph 8.2, however, directs decision makers to look at "independent and authoritative" evidence to establish whether particular conduct is "family violence" relevant to this paragraph 8.2. Put another way, this paragraph 8.2 requires decision makers to consider both (a) criminal convictions which involve family violence; and (b) incidents of family violence proven by other means, if those means are independent and authoritative.*

214. Paragraph 8.2(3) of the Direction requires that in considering the seriousness of the 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 of increasing seriousness;*
>
> *(b) the cumulative effect of repeated acts of family violence;*
>
> *(c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:*
>
> *(i) the extent to which the person accepts responsibility for their family violence related conduct;*
>
> *(ii) the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);*

(iii) efforts to address factors which contributed to their conduct; 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, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status, should the non-citizen engage in further acts of family violence.

215. Paragraphs 32-33 of the Applicant's SFIC relevantly submitted:[103]

> *32. Information received by the Department of Home Affairs outlined that the Applicant was previously subject to an Apprehended Violence Order (AVO) with his ex-partner listed as the protected person. The order was taken out after an alleged altercation whereby the Applicant was said to have physically assaulted his ex- partner by striking her to the face that resulted in serious facial injuries. The National Criminal History Check Report does not demonstrate any domestic violence-related convictions.*
>
> *33. The Applicant was provided with an opportunity to comment on the domestic violence allegations (from the Department of Home Affairs) and reserved his right to silence.…*
>
> *34.… The Applicant was never charged with any domestic violence offences, let alone found guilty of any such matters. While it is readily appreciated that the Tribunal can take into conduct for which a non-citizen has not been charged, the Tribunal would be very slow to find that the Applicant engaged in the impugned conduct. The alleged conduct related to the domestic violence matter are serious allegations; in that context, the Tribunal would need a fairly high level of probative evidence to be satisfied that the Applicant engaged in the alleged offending.*

216. The Tribunal accepts that there is no evidence before it so as to enliven consideration of paragraph 8.2(2) (a), i.e. that the Applicant has been convicted of an offence involving family violence.

217. However, the Tribunal considers that the issue of family violence is enlivened by paragraph 8.2(2)(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 being considered under section 501 or section 501CA has been afforded procedural fairness.*

218. Dr Donnelly submitted that there was no information or evidence from independent and authoritative sources indicating that the Applicant had been involved in the perpetration of family violence. He nevertheless accepted that the Applicant had previously been the subject of an

[103] Exhibit A1, Applicant's Statement of Facts, Issues and Contentions.

apprehended domestic violence order, but relied on the fact that it was made without any judicial proceedings making findings of fact concerning the allegations that were advanced in support of the AVO. Dr Donnelly also acknowledged that the Applicant's ex- partner had made an allegation that the Applicant physically assaulted her in their place of residence, but said this allegation was entirely rejected by the Applicant. He also asserted that the Applicant and his daughter were the subjects of violence at the hands of his ex- partner (who threw a glass of wine on the Applicant and the child). He submitted that the Applicant's partner had been intoxicated the time, and called the NSW Police and made false allegations against the Applicant concerning domestic violence.

219. At paragraph 53-56 of the Applicant's SFIC it was submitted:

> *53. Critically, the Applicant was taken to Blacktown Police Station by the NSW Police, where he was interviewed. After further investigation, the Applicant was released without charge. Considered in its proper context, the Applicant's partner was lucky not to be charged herself for (a) making the false domestic violence allegation against the Applicant; and (b) committing an act of assault upon the Applicant by throwing a glass of wine on him and the child.*
>
> *54. The mere fact that the Applicant agreed to the AVO on a <u>without admissions</u> basis provides no foundation to find that the applicant was involved in the perpetration of family violence. There is no probative evidence before the Tribunal that the Applicant was involved in adverse conduct that could be caught by paragraph 8.2. With respect, also as outlined earlier, the delegate erred in finding to the contrary.*
>
> *55. For completeness, the Tribunal will note that the Applicant's ex-partner (the alleged victim concerning the domestic violence) has mental health issues and (at least at the relevant time) had problems with alcohol. For these reasons, the Applicant's ex-partner lost custody of her three children with the Applicant.*

220. *Given the preceding, this primary consideration is to give neutral weight.* Documents produced under summons by the Commissioner of Police of New South Wales[104] are before the Tribunal. The Tribunal is satisfied that the Commissioner of Police of New South Wales is "*independent and authoritative*" for the purposes of paragraph 8.2(2)(b) of the Direction. The documents appear to be authoritative because they were made contemporaneously with the occurrence of the reported incidents, and thus carry an inherent level of reliability, and are independent because they were made by disinterested qualified law enforcement officers carrying out their lawful duty.

221. The Tribunal notes that in the body of the summonsed material,[105] referred to in the previous

[104] Exhibit R3, Respondent's Further Tender Bundle TB7 page 185
[105] Ibid 189

paragraph, it is recorded regarding an incident said to have occurred at 18:30 hours on 15 July 2015:

> *the Accused has pushed the Complainant in the chest with an open hand and the Complainant has fell onto the lounge. The Complainant has again questioned the Accused and said, "how am I supposed to know she had poo. She was fine whenshe went to bed. The Complainant states that the Accused has stood up with a clenched left fist and punched the Complainant to the right side of the face. This hasknocked the Complainant to the couch. The Complainant states that she was angryand has thrown a glass of wine in her hand. This has missed the Accused and landedon the floor.*

222. The Tribunal considers that the version of events given by the Applicant largely accords with the version of events recorded by police, except for the fact that the Applicant has omitted the references to pushing and punching.

223. The Tribunal notes that the report also noted that "*Due to conflicting version and no visible injuries or evidence the Accused was released out of custody and detained for the purpose of applying for a Provisional AVO*". The Applicant acknowledged that he had had agreed to the court making an AVO.

224. The Tribunal also has before it a Report in support of an application initiating care proceedings[106] which was a summary of information available to the Department of Family and Community Services to accompany an application to the Children's Court to support the determination that a child is in need of care and protection.[107] At page 8 of this document, the following appeared:

> *1. On 31 July 2015, CS received a Risk of Significant Harm (ROSH) report alleging domestic violence perpetrated by Mr Chiagozie against Ms Smith. The report also alleged concerns around Ms Smith's emotional state and the belief that Ms Smith was consuming alcohol whilst four months pregnant …. Community Services records reveal that the family engaged in case planning on 29 October 2015 with goals identified around addressing the domestic violence in the relationship between Ms Smith and Mr Chiagozie, increasing supports for Ms Smith and assisting the children in attending day care.*

225. The Tribunal also considers the Department of Family and Community Services report to be sufficiently "*independent and authoritative*" for the purposes of paragraph 8.2 (2) (b), and being records made in the course of carrying out its statutory duty. There is no reason to believe that the relevant officers did not record independent and authoritative information about the events recorded.

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106 Ibid 200.

107 Ibid 200.

226. The Applicant agreed under cross examination[108] that he had participated in planning about addressing domestic violence.

227. Although the Applicant's ex-partner provided a statement in support of the Applicant remaining in Australia, at no point in her statement did she comment upon or retract the statements she is reported to have made to police. She was not called to give evidence by the Applicant, and was therefore not subject to cross examination by counsel for the Respondent, or questioning by the Tribunal. There is considerable evidence before the Tribunal suggesting that the Applicant's ex-partner suffers mental illness, and there is no medical evidence before the Tribunal as to her state of health at the time she made the statement put forwardin her name. These factors, together with the fact that she was not called to give evidence lead the Tribunal to give no weight to the statement of the Applicant's ex-partner.

228. In his evidence, the Applicant substantially admitted most of the facts pertaining to the allegations recorded in the police and Department of Family Services reports, other than the specific instances of him pushing his ex-partner and punching her in the face. He did however agree that he had participated in planning about addressing domestic violence. The Tribunal considers it more probable than not that the Applicant did in fact exert violent force on his ex-partner in the manner described in the reports above.

229. The Tribunal notes with grave concern that approximately two weeks after the alleged episode of domestic violence of 15 July 2015 (in which the Applicant allegedly assaulted his ex-partner), the ex-partner was reported as being four months pregnant.

230. The four months' pregnancy of the Applicant's then partner is again referred to in an incidentreport regarding a domestic violence episode,[109] which also recorded "*Prior history of violence including stalking and intimidation".* The report further records that the victim declined to elaborate much about what happened and that no injuries or damage to property or assault intimidation was reported to police.

231. There is a further domestic violence episode report of 15 June 2014,[110] which recorded "*Prior*

[108] Transcript, page 19, lines 39 – 41.
[109] Exhibit R3, Respondent's Further Tender Bundle page 188.
[110] Ibid 190.

history of violence including stalking and intimidation", but nil fears held by the victim or police, and neither party asserted that there were any issues.

232. For the purpose of paragraph 8.2(3) (a), it appears that prior to the episode on 15 July 2015 there were episodes which do not appear to have involved identifiable physical family violence. However, on that date the Tribunal is satisfied that the Applicant escalated the level of family violence when he pushed his then partner causing her to fall on a couch, prior punching her in the face. The Tribunal considers that this reflects recurrent, but not necessarily frequent, conduct of increasing seriousness.

233. Physical domestic violence is a very serious issue in any context, but in this particular case, not only was the victim, to the knowledge of the Applicant mentally ill, she was also approximately 3 ½ months pregnant at the time he used violence upon her.

234. There is insufficient evidence before the Tribunal to allow it to form a view as to the cumulative effect of the repeated acts of family violence for the purposes of paragraph 8.2(3)(b).

235. The Applicant appears to be in continual denial of responsibility for his conduct towards his ex-partner, and does not exhibit any understanding of the impact of his behaviour on her, or any children who may have been present.

236. The Tribunal is not satisfied that the Applicant has made any particular efforts to address factors which contributed to his conduct, and claims to have been the victim rather than the perpetrator of domestic violence. To the extent that he admits having engaged in family violence programs, he claims to have done so with a view to dealing with his ex-partner's problems. He expressly stated at lines 35-37 of page 19 of the transcript:

> *"I didn't participate for my own benefit – for my own being violent or anything. I participated in it so she can change something and slow down in her drinking."*

237. For the purposes of paragraph 8.2(3) c) i., the Tribunal is not satisfied that the applicant accepts responsibility for his family violence related conduct. Neither is the Tribunal satisfied for the purpose of paragraph 8.2(3) c) ii. that the applicant understands the impact of his behaviour on the abused and witnesses. For the purpose of paragraph 8.2(3) c) iii, the Tribunal is not satisfied that the applicant has made efforts to address factors which contributed to his conduct.

238. The Tribunal gives particular weight to the fact that the applicant's partner was pregnant at the time he punched her in the face.

239. Having regard to all of the above, the Tribunal therefore that a consideration of paragraph 8.2 of the Direction weighs very heavily against revocation of the decision under review.

240. The Tribunal now turns to the considerations listed in paragraph 8.3 of the Direction.

PRIMARY CONSIDERATION 3 - THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA

241. In accordance with Article 3 of *United Nations Convention of the Rights of the Child,*[111] a decision maker should treat the best interests of any child under 18 as a primary consideration. This is in line with paragraph 8.3 of the Direction.

242. Evidence before the Tribunal shows that the Applicant is the father of three minor children in Australia. A daughter who shall be referred to as D1 is presently aged eight, a son who shall be referred to as S, presently aged seven, and a second daughter who shall be referred to as D2, presently aged five. The Applicant's former partner also has a daughter from a previous relationship, and the Applicant regards her as his stepdaughter. She shall be referred to as SD, and appears to be presently about 12 years of age.

243. The Applicant has been in custody of one description or another since 27 May 2016. The Applicant appears to have had regular contact with his children during the first year of his imprisonment. Around this time, the Department of Family and Community Services removed the children from the care of their mother who was suffering mental illness. SD was placed with her biological father, and the Applicant's biological children were placed inseparate households apart from each other. In consequence of New South Wales Children's Court orders made on 13 July 2018, all aspects of parental responsibility for the Applicant's biological children has been allocated to the Minister for Department of Communities and Justice until each child reaches 18 years. There are no contact orders currently in place, and the current care plan recommends the contact between the children and the Applicant to be a minimum of four times per year and that the Applicant has videoand telephone calls with the children.

[111] Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

244. The Tribunal accepts the evidence that the Applicant loves his children deeply and was a good father when they are in his care. The Tribunal also accepts that the Applicant has aspirations of reuniting his three children under one roof, and educating them as to their ancestral background and language.

245. Paragraph 8.3(4) a) of the Direction requires the Tribunal to consider 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). Clearly, the Applicant is the biological father of his three children D1, S, and D2. Whilst it cannot be said that there is no existing relationship between the Applicant and the children, he has been substantially removed from their lives, and only had limited meaningful contact with them since 27 May 2016, at which time D1 was two years old, S was one year old, and D2 was six months old. SD was about seven years old. This lengthy absence and limited meaningful contact lessens the weight the Tribunal might otherwise give to this consideration.

246. Paragraph 8.3(4) b) of the Direction requires consideration of 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 children turn 18, and including any Court orders relating to parental access and care arrangements. It will be a long time before the children each attain the age of 18. It has been submitted that the Applicant has reasonable prospects of having his biological children returned to his care if he is released into the Australian community. The evidentiary basis for this submission is not clear to the Tribunal. Whilst the Tribunal accepts that it would ordinarily be in the best interests of the children that they be able to reside together as siblings, the evidence before the Tribunal is not sufficient to allow it to conclude that the Applicant has "*reasonable prospects*" of having the children returned to his care, as this after all, would be a matter for the New South Wales Children's Court to determine following submissions from the relevant Minister as well as the applicant. This creates significant uncertainty as to the extent to which the Applicant is likely to be able to play a positive parental role in the future, and lessens the weight the Tribunal might otherwise give to this consideration.

247. There does not appear to be much prospect of the Applicant playing any role in SDs future life as she is now living with her biological father. Whilst it was submitted that the Applicant can still play a positive role in SD's life into the future, there is no evidence before the Tribunal of her biological

father's, or indeed of her own attitude to the Applicant's involvement in her life, and the Tribunal is unable to reach any conclusion as to the extent to which the Applicant may be play a positive parental role in her future life.

248. There is insufficient evidence to allow the Tribunal to reach a concluded view as to the extent to which the applicant is likely to play a positive parental role in the future if the futures of any of the children.

249. For the purposes of paragraph 8.3(4) c) of the Direction, there does not appear to be any specific evidence of an adverse impact of the Applicant's past or future conduct on any of the children, however the Tribunal considers that the applicant's past conduct has impacted adversely on the children via his enforced separation from them.

250. For the purposes of paragraph 8.3(4) e), of the Direction, parental responsibilities in respect of the Applicant's biological children are presently vested in the Minister as discussed above, and discharged on a day-to-day basis by persons unknown.

251. For the purposes of paragraph 8.3(4) f), of the Direction the Tribunal does not have the benefit of any known views of any of the children.

252. For the purposes of paragraph 8.3(4) g), of the Direction, there is no clear evidence before the Tribunal that any of the children has been specifically subjected to family violence perpetrated by the Applicant or have been abused or neglected by him in any way. There is however information that the children have been exposed to family violence by the Applicant against their mother, and this weighs against the Applicant.

253. For the purposes of paragraph 8.3(4) h) of the Direction, there is no evidence before the Tribunal that any of the children have suffered or experienced any physical or emotional trauma arising from the Applicant's conduct.

254. It was submitted by Dr Donnelly, and the Tribunal accepts, that the Applicant would encounter significant difficulties maintaining contact with his biological children by the usual means of either telephone or internet, and that this would be made more difficult by the difference in time zones.

255. It was submitted by Dr Donnelly that, overall, the Tribunal should give the best interests of the minor children very heavy weight in favour of revoking the mandatory cancellation decision. However, this submission finds little support in a close consideration of the specific requirements of the Direction, and very much hinges on whether the applicant would in fact be able to achieve custody of his children, and abstain from further offending in future.

256. The Tribunal considers it appropriate to give some limited weight in favour of revocation to this consideration.

257. The Tribunal now turns to the considerations listed in paragraph 8.4 of the Direction.

PRIMARY CONSIDERATION 4 - THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

258. The Direction makes clear that it is not the function of the Tribunal to independently assess community expectations in this case, but to proceed on the basis of the Government's views as articulated in the Direction.

259. The Tribunal gives weight to the very clear and unequivocal language of the simple proposition found in paragraph 8.4(1) of the Direction. It is in these words: *"The Australiancommunity expects non-citizens to obey Australian laws while in Australia."* Paragraph 8.4(2) (a) clearly states this expectation in circumstances of conduct involving acts of family violence. The language could not be clearer, neither could the Applicant's failure to meet this expectation.

260. This Applicant has sought to deceive border officers, and has committed multiple serious breaches of Australia's criminal law, with far-reaching consequences. In addition, he has subjected a pregnant, mentally ill woman to family violence. It was submitted by Dr Donnellythat the deemed community expectation is that this primary consideration would weigh against the revocation of the mandatory cancellation decision. He further submitted that the adverse ascription of weight to this primary consideration should be slightly reduced because the Applicant has resided in Australia since 2009 (i.e. about 11 years), and (relying on *FYBR v Minister for Home Affairs* (2019) 374 ALR 601) that the Australian community would afford the Applicant a higher level of tolerance. The Tribunal rejects this submission because it very much doubts that the Australian community would in fact afford the Applicant a higher level of tolerance having regard to the multiple deceptions the Applicant has perpetrated in order to come to and remain in

Australia, and the fact that he has spent well over half of his time in Australia either in prison or immigration detention, and the only evidence before this Tribunal that he has engaged in lawful employment was the work that he did whilst he was in prison for his criminal offending.

261. The Tribunal considers that the expectations of the Australian community weigh very heavily against this Applicant.

OTHER CONSIDERATIONS

262. It is necessary to consider the Other Considerations listed at paragraph 9 of the Direction.

International non-refoulement obligations

263. The Tribunal must give active intellectual consideration to the Applicant's fairly articulated representations about risk of harm, regardless of characterisation.[112] This cannot be deferred because the Applicant is able to apply for a Protection Visa.[113] The Tribunal's engagement with such claims, however relates to whether there is "*another reason*" for revocation pursuant to section 501CA of the Act, rather than the more expensive analysis routinely undertaken for Protection Visa applications.[114]

264. As held in *GLD18 v Minister for Home Affairs:*[115]

> *The predictive exercise involved in forming a state of satisfaction as to the well-foundedness of a visa applicant's expressed fear of returning to her or his country of nationality was described by the Full Court in Minister for Immigration and Border Protection v MZYTS [2013] FCAFC 114; 230 FCR 432 at [32-38]. Included in that exercise is, as the Court said at [37], an assessment and determination of what might happen to a visa applicant if she or he were returned to her or his country of nationality at the point in time the review decision is made, and what might happen in the near future thereafter…*

265. It has been submitted on behalf of the Applicant that he will face discrimination, persecution, and other hardships in Nigeria in consequence of his Christian faith. The Applicant claims that during

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[112] *YKSB v Minister for Home Affairs* [2020] FCAFC 224, 5; *Minister for Home Affairs v Omar* (2019) 272 FCR539, [34]-[44].

[113] *Ali v Minister for Home Affairs* [2020] 380 ALR 393.

[114] *Ayoub v Minister for Immigration and Border Protection* (2015) FCR 513, [27]-28; *Ali v Minister forImmigration and Border Protection* [2018] FCA 650 at [28].

[115] [2020] FCAFC 2 at [77] (Allsop CJ, Mortimer and Snaden JJ).

his last visit to Nigeria he was attacked by Boko Haram members whilst in Lagos. It was submitted that there is insufficient State protection to protect him against facing the same or similar injuries in the future at the hands of Boko Haram.

266. Aside from the threat posed by Boko Haram, it was declared by the Applicant that he would face double jeopardy in consequence of the prospect of being charged and punished in Nigeria under Decree 33 of the *Nigerian Drug Act*, section 22 (2) of which he declared was as follows:

> *Any Nigerian Citizen found guilty in any foreign country of an offence involving narcotic drugs or psychotropic substances and who thereby brings the name of Nigeria into disrepute shall be guilty of an offence under this Subsection.*

267. The claims made by the Applicant were put either as non-refoulement claims, and in the alternative, the harm and hardship falling outside a non-refoulement context were said to provide "*another reason*" to set aside the mandatory cancellation decision.[116]

268. In his statutory declaration of 17 June 2021[117] the Applicant expressed concerns at paragraphs 17 – 22 at the possible breadth of meaning which might be attributed to the undefined phrase "*the name of Nigeria into disrepute*", and that Nigerian authorities may consider that he has brought Nigeria into disrepute by being deported from a foreign country.

269. The Applicant articulated his concerns in this regard at paragraphs 18 – 19 of his statutory declaration of 17 June 2021:

> *18. First, I am concerned that my criminal record in Australia (particularly related to my drug offending) will result in me being charged in Nigeria. At [5.44], the DFAT Report is* ***very clear****: "Nigerian citizens returning from overseas with a criminal record can be charged under decree 33 of the National Drug Law Enforcement Agency Act (1990)" (Nigerian Drug Act).*
>
> *19. The DFAT Report continues at [5.44]: "Degree (sic) 33 provides for the prosecution of Nigerians returning to Nigeria with criminal convictions from overseas, including those with drug convictions and other serious crimes… The minimum sentence under Decree 33 is five years imprisonment".*
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> [Tribunal emphasis]

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[116] Exhibit A1, Applicant's Statement of Facts, Issues and Contentions at [78].
[117] Exhibit A7, Applicant's Statement dated 17 June 2021.

270. Given the Applicant's poor history of credibility when dealing with Australian authorities it should come as little surprise that the Applicant's reference to paragraph [5.44] of the Department of Foreign Affairs and Trade ("DFAT") Country Report contained a material omission, being the last sentence of that report which was as follows:

> *In practice, DFAT understands the Nigerian Government has rarely given effect to Decree 33.*[118]

271. This material omission fortifies the Tribunal's earlier finding that the Applicant is not a credible witness.

272. Concerningly, the Tribunal notes that this material omission also occurs at page 26 of the Applicant's SFIC.[119]

273. Counsel who appear before this Tribunal have a duty to assist in the administration of justice. Integral to the performance of this duty is the exercise of great care to ensure that they do not jeopardise, either their clients prospects, or their own reputations, by allowing false or misleading evidence, or submissions based on such evidence to come before the Tribunal.

274. The Tribunal has not had the benefit of any expert evidence regarding the practice of the Nigerian Government in respect of Decree 33, however, it appears to the Tribunal based on the DFAT Report that it would be a rare event for the Applicant to be prosecuted, as he claims to fear. The Tribunal also accepts the submission by Mr Orchard that the prospect of prosecution would only arise in circumstances where the person "*thereby brings the name of Nigeria into disrepute*", and there does not appear to be any evidence to support this element of the offence.

275. The Tribunal also notes that paragraph [5.20] of the DFAT Report is as follows:

> *5.20. Section 36(9) and (10) of the Constitution state that no person who shows they have been tried or pardoned for a criminal offence shall again be tried for that offence (otherwise known as "double jeopardy"). The Extradition (Amendment) Act (2018) and amends an earlier law to give effect to the rule against extradition of persons in cases of mistaken identity, and effect appropriate modifications on the Act to confirm (sic) to the provisions of the Constitution.*

276. The evidence before the Tribunal does not satisfy it that the Applicant will be exposed to, or is

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[118] Exhibit A3, DFAT Country Report.

[119] Exhibit A1, Applicant's Statement of Facts, Issues and Contentions.

likely to be prosecuted for an offence under Decree 33, and the Tribunal rejects the submissions on behalf of the Applicant in this regard.

277. Earlier in these reasons, the Tribunal discussed factors which lead it to find that the Applicant is not a credible witness, and gives no weight to his evidence.

278. The Tribunal is mindful that it must make findings on the issue of non-refoulement as at the present. As was pointed out by Mr Orchard, the Applicant's claimed concerns very much reflect the evidence which he provided previously to the Refugee Review Tribunal, and which were found to be not credible. The Tribunal gives weight to the fact that the Applicant willingly returned to Nigeria not once, but twice, within a period of eight months of obtaining permanent residence of Australia. The Applicant gave unsupported evidence that his photograph was in the possession of Boko Haram in Nigeria. However, 11 years after his departure from Nigeria the Tribunal considers this to be improbable and implausible. The Tribunal notes that country information suggests that Boko Haram are only interested in people of particular status.[120] The Applicant's claim that he was attacked with rocks in Lagos is also not supported by any other evidence, and does not sit comfortably with his statement a couple of years later to a NSW Corrective Services case officer on 1 August 2018 that he was willing to return to Nigeria on completion of his non-parole period.[121] The Applicant said "*… I will be happy to return to Nigeria if I don't feel threatened or if I don't feel harm*".[122] The Tribunal considers this statement to be in accordance with the statement made to the NSW Corrective Services officer referred to earlier in this paragraph.

279. During cross-examination, the Applicant raised for the first time an assertion that he was of Jewish descent, a claim which he acknowledged that he had not put to his barrister. This suggestion, in the light of the totality of the evidence discussed, appears likely to be a spontaneous invention.

280. In line with the Tribunal's assessment of his credibility, and the weight of evidence, the Applicant's evidence that he fears return to Nigeria is rejected.

281. The Tribunal nevertheless accepts, based on the DFAT Report, that the security situation across Nigeria is unstable and fluid.

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[120] Exhibit A3, DFAT Country Report page 20.
[121] Exhibit R2, Respondent's Tender BundleTB2 page 62.
[122] Transcript, page 22 lines 39 – 41

282. If, contrary to the findings of the Tribunal the Applicant does have a genuine fear of return to Nigeria, he himself effectively said in the course of his evidence that if he were returned he didn't have to stay in that country:[123]

> *I can go to Nigeria and travel to another country. If I don't have kids here, I would be happy to leave here and get there and travel to another neighbouring country and save my life.*

283. The Tribunal therefore finds that there is a real likelihood that if the Applicant is returned to Nigeria that he will relocate to another country of his choosing.

284. The Tribunal notes that section 36(3) of the Act provides as follows:

> ***Protection obligations*** *Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.*

285. Based on the Applicant's evidence that he would relocate to another country if returned to Nigeria, the Tribunal is not presently satisfied that the Applicant is owed protection obligations in consequence of section 36(3) of the Act.

286. There are no substantial grounds for believing, on the evidence provided, that there is a real risk the Applicant might be arbitrarily deprived of his life or suffer other harm as a "*necessary and foreseeable consequence*" of his repatriation.

287. In terms of a fear of harm falling below the non-refoulement thresholds, the generalised violence and security concerns the Applicant describes confront all Nigerian citizens, and not the Applicant personally.[124]

288. Overall, the evidence as it presently stands is not sufficient to satisfy the Tribunal that Australia's international non-refoulement obligations are enlivened on the facts of this case.

289. Considering the totality of the evidence, the Tribunal is not satisfied that the Applicant's claimed fear of harm amounts to another reason to revoke the mandatory cancellation of his visa.

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[123] Transcript, page 24 lines 41-44.
[124] The Act, section 36(2B)(c).

290. In the event that the Tribunal has erred in reaching this view, the Tribunal records that had it reached the alternative views in respect of non-refoulement or "*another reason*" in this respect, it would nevertheless have found that the risk to the Australian community posed by the Applicant outweighed the competing considerations[125].

291. For the above reasons, paragraph 9.1 of the Direction is given neutral weight.

Is the grant of a Protection Visa or a visa under s 195A a realistic possibility

292. Having regard to the Applicant's stated intention to seek a Protection Visa, it is convenient to consider at this point whether there is any realistic possibility that the Applicant might be granted a Protection Visa or a visa under section 195A of the Act.

293. The Tribunal has given consideration to whether there is any realistic possibility in all the circumstances, that the Applicant may be given a Protection Visa or a visa under section 195A. The Tribunal notes that by virtue of the recent amendments to section 197C(3) of the Act, an unlawful non-citizen in respect of whom a protection finding has been made and finally determined will not be liable for removal pursuant to section 198 of the Act.

294. Having regard for the manner in which the Applicant initially sought to gain entry into Australia, and the subsequent findings by a delegate, the Refugee Review Tribunal, this Tribunal, and the admission the Applicant does not pass the character test, and his other serious conduct, the Tribunal considers it highly improbable that the Applicant would be granted a Protection Visa. There would be a further problem for the Applicant in that as anApplicant for a Protection Visa, he would need to satisfy Public Interest Criterion 4001.[126] That criterion again effectively requires an Applicant to satisfy the Minister that he or she passes the character test, though the Minister has a discretion to grant a visa despite not being satisfied that the Applicant passes the character test. Having regard for the Applicant's history, the Tribunal considers it highly unlikely that the Minister would decide not to refuse to grant a Protection Visa to him. For the same reasons, the Tribunal considers it highly unlikely that the Minister would grant the Applicant a visa in the exercise of his power or discretion under section 195A of the Act.

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[125] *Ali v Minister for Home Affairs* [2020] FCAFC 109 at [110].

[126] see R. 866.225 in Schedule 2 to the *Migration Regulations 1994* (Cth).

295. The Tribunal considers that any application for a Protection Visa, or request for an exercise of discretion under section 195A of the Act in respect of this Applicant would effectively be an exercise in futility.

296. In the circumstances of this case, and having regard for the principles stated in paragraph 5.2 of the Direction, the Tribunal does not consider this to be another reason to revoke the mandatory cancellation of the applicant's visa.

Extent of impediments if removed

297. The Applicant is a 46-year-old man, and has not disclosed any physical or ongoing mental health conditions to the Tribunal. There are no substantial language barriers to his repatriation, and he is well familiar with Nigerian culture.

298. The Applicant does have relatives living in Nigeria in the form of his sister, her husband, and their five children. Whilst they are not in a position to offer him financial support, they are nevertheless family. The Tribunal accepts that the health and social welfare support systems in Nigeria are very limited, however, in the context of what is generally available to other citizens of that country, there is no reason to believe that the Applicant would be any worse off than any other citizen of the country.

299. The Tribunal accepts the submission made by Dr Donnelly that the Applicant will suffer significant emotional hardship if removed to Nigeria. It will mean in effect that the Applicant will not be able to play a fatherly role for his three children in Australia. The Tribunal also accepts that there may well be difficulties arising from Internet access and different time zones in the Applicant maintaining contact with his children.

300. The Tribunal also accepts that there is significant poverty and unemployment in Nigeria.

301. The Applicant raised concerns that his employment and survival prospects in Nigeria in the foreseeable future would be doubtful and that unemployment was running at 33% there.

302. The Applicant has previous business experience in Nigeria, and has demonstrated a degree of initiative in exporting furniture from Australia to Nigeria. The Tribunal notes that the Applicant

claims to have previously conducted successful clothing and food businesses, and there does not appear to be any reason why he could not use those skills to re-establish himself once more.

303. Moreover, DFAT Country Information pertaining to Nigeria records at paragraph [5.41- 5.44] that thousands of Nigerians enter and leave the country every day, and that there is no evidence of any stigma attaching to such returnees. It also details a range of assistance available to returnees including food, medical screening, overnight accommodation and money (up to €100) for basic needs and transportation. Returnees can also receive in-kind reintegration assistance and skills training. Some states also offer monthly stipends for returnees.

304. Having regard to this information, the Applicant's past business success, and his stated intention to relocate to a neighbouring country if forced to return to Nigeria, the Tribunal does not consider that his claimed employment prospects present a significant impediment to his return, or another reason to revoke the mandatory cancellation of the visa.

305. The Applicant also raised concerns about the impact of Covid-19 in Nigeria, however his evidence in this regard was very vague and generalised, and appears to have relied upon journalists reports in annexures D and L to his supplementary statement which was Exhibit A7. Annexure D records at page 31 that Covid19 has affected everyone in one way or another, and referred to numerous hardships. It also refers to the fact that International Christian Concern "*has been distributing food packages*", and was looking into measures about how to help with jobs in financial strain due to the pandemic. Annexure L, at page 54 referred to familiar measures "*like lockdowns, social distancing, work from home and travel restrictions*" as having significantly affected the economy. The Tribunal was not taken to any more specific evidence of the incidence or impact of Covid-19 in Nigeria, and there was no evidence to suggest that the Applicant's risks from Covid-19 would be any different from that of the rest of the population. There is not sufficient evidence before the Tribunal to satisfy it that this is a significant impediment to his return, or another reason to revoke the mandatory cancellation of the visa.

306. The Tribunal considers that it is nevertheless appropriate to give some weight in the Applicant's favour in respect of this consideration.

Impact on victims

307. Given the state of the evidence, this consideration is not relevant, and is given neutral weight.

Links to the Australian community

308. In considering paragraph 9.4, the Direction requires that decision-makers must have regard to the following two factors set out in paragraph 9.4.1 and paragraph 9.4.2 respectively:

i. the strength, nature, and duration of ties to Australia; and
ii. the impact on Australian business interests.

Strength, Nature, and Duration of Ties to Australia

309. For the purposes of Paragraph 9.4.1(1) of the Direction, the Tribunal accepts that this decision will impact heavily on the Applicant's immediate family members, namely his biological children who appear to have a continuing right of residence in Australia.

310. For the purposes of Paragraph 9.4.1(2) of the Direction, the Tribunal accepts that the Applicant arrived in Australia over 11 years ago, and has only departed twice for short periods during that time. He was a mature adult when he arrived. Australia is his settled home, even though, for a substantial part of the 11 years he has spent in Australia he has been either in immigration detention or prison.

311. He only appears to have been at liberty for about four and a half years of this period. He does have family ties in the form of his three biological children, and his claimed step daughter, and several close friends. He does not appear to have any employment business or other community ties beyond those discussed in these reasons. He appears to have limited social links, however he appears to have close links to Ms Nielsen and Mr Bradley.

312. There is very little evidence of lawful employment other than that undertaken by him whilst he was in prison. There is no evidence that the Applicant has engaged in any significant lawful employment whilst at liberty, or that he has ever paid income tax.

313. Having regard for the fact that the Applicant does have three biological children and a claimed step daughter in Australia, and that those children are likely to face emotional and psychological pain if the Applicant is removed to Nigeria.

314. The Tribunal gives this consideration some slight weight in favour of the Applicant.

Impact on Australian Business Interests

315. There is no evidence before the Tribunal so as to enliven consideration of this sub-paragraph. It is not relevant, and is therefore given neutral weight.

ANY OTHER CONSIDERATIONS – Indefinite Detention

316. The Applicant raised concerns at what he claimed was the prospect of being detained indefinitely in immigration detention should he have an adverse outcome in this Tribunal. However, the Tribunal does not consider that this concern raises another reason in favourof his application.

317. The majority in the recent High Court case of Commonwealth of *Australia v AJL20* [2021] HCA 21 (23 June 2021) makes clear at [4 – 5] that detention under s 189 (1) is lawful and required to continue until one of the eventualities provided for in s 196 (1) occurs; and that in such circumstances habeas corpus is not an available remedy, and that the lawfulness of detention was not conditional on the actual achievement of removal of the unlawful non-citizen as soon as reasonably practicable by the Executive, and that an order mandatingcompliance by the Executive with the duty imposed by s 198 was the appropriate remedy for non-compliance with s 198

318. In the event that the Executive is dilatory in returning the Applicant to his country of origin, his remedy is to seek a writ of mandamus, and the prospect of his indefinite detention is therefore not another reason to revoke the cancellation of his visa, and is given neutral weight.

FINDINGS: OTHER CONSIDERATIONS

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

- international non-refoulement obligations: neutral;
- extent of impediments if removed: some weight in favour of revocation;
- impact on victims: neutral;
- links to the Australian community, including:
    - strength, nature and duration of ties to Australia: weighs slightly in favour of

revocation; and

- Impact on Australian business interests: neutral

CONCLUSION

320. The Tribunal is now required to weigh all of the Considerations in accordance with the Direction.

321. In considering whether there is another reason to exercise the discretion afforded by section 501CA(4) of the Act to revoke the mandatory visa cancellation decision, the Tribunal finds as follows:

- Primary Consideration 1 weighs very heavily in favour of non-revocation;
- Primary Consideration 2 weighs very heavily in favour of non-revocation;
- Primary Consideration 3 is given limited weight in favour of revocation;
- Primary Consideration 4 weighs very heavily in favour of non-revocation; and
- To the extent that Other Considerations and Primary Consideration 3 weigh in favour of revoking the mandatory visa cancellation decision, they cannot, even when combined outweigh Primary Considerations 1, 2 and 4.

322. The Tribunal is now required to weigh all of the Considerations in accordance with the Direction.

323. Application of the Direction therefore favours the non-revocation of the cancellation of the Applicant's visa.

324. Consequently, the Tribunal cannot exercise the discretion to revoke the cancellation of the Applicant's visa.

DECISION

325. The decision under review is affirmed.

I certify that the preceding 325 (three-hundred and twenty-five) paragraphs are a true copy of the reasons for the decision herein of Member R Maguire

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

Dated: 19 July 2021

Date of hearing: 24 June 2021

Counsel for the Applicant: Dr Jason Donnelly

Solicitor for the Respondent: Mr Christopher Orchard
Sparke Helmore

ANNEXURE A

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED
G1	Section 501 G-documents (G1 to G18 pages 1 to 116)	R	-	7 May 2021
A1	Applicant's Statement of Facts, Issues and Contentions	A	25 May 2021	25 May 2021
A2	Statement of the Applicant	A	25 May 2021	25 May 2021

A3	Department of Foreign Affairs and Trade 'Country Information Report Nigeria' dated 3 December 2020	A	-	25 May 2021
A4	Statement of Ann Nielsen	A	26 May 2021	26 May 2021
A5	Statement of Philip Bradley	A	26 May 2021	26 May 2021
A6	Applicant's Tender Bundle	A	-	17 June 2021
A7	Supplementary Statement of the Applicant	A	17 June 2021	17 June 2021
A8	Statement of Cassandra Smith	A	3 June 2021	17 June 2021
R1	Respondent's Statement of Facts, Issues and Contentions	R	11 June 2021	11 June 2021
R2	Respondent's Tender Bundle (TB1 to TB6 pages 1 to 184)	R	-	11 June 2021
R3	Respondent's Further Tender Bundle	R		22 June 2021