Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	**GENERAL DIVISION**
File Number:	**2021/3870**
Re:	**Kasun Gayathra Wickramakarulu Arachchi**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Deputy President Boyle**
Date:	**2 September 2021**
Place:	**Perth**

The decision of the delegate of the Minister dated 9 June 2021 not to revoke the cancellation of the Applicant's Class BS Subclass 801 Partner visa pursuant to s 501CA(4) of the *Migration Act 1958* (Cth) is affirmed.

[SGD]

Deputy President Boyle

CATCHWORDS

MIGRATION – s 501CA(4) of the Migration Act – decision of a delegate of the Minister not to revoke the mandatory cancellation of the Applicant's visa – Applicant fails the character test – Direction 90 considered – Applicant is a citizen of Sri Lanka – Applicant convicted of 12 offences including weapon-related offences – there is not "another reason" to revoke the mandatory cancellation – allocating weight in assessing the expectations of the Australian community – analysis of the 'double counting' principle – reviewable decision affirmed

LEGISLATION

Migration Act 1958 (Cth) – ss 499, 499(1), 499(2A), 500(1)(ba), 500(6B), 501, 501(3A), 501(6), 501(6)(a), 501(7), 501(7)(c), 501CA, 501CA(3), 501CA(4), 501CA(4)(b), 501CA(4)(b)(i), 501CA(4)(b)(ii)

CASES

Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 646

BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96; (2017) 248 FCR 456

BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 94; (2020) 277 FCR 420

BSJ16 v Minister for Immigration and Border Protection [2016] FCA 1181

CZCV and Minister for Home Affairs [2019] AATA 91

Djalic v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCAFC 151; (2004) 139 FCR 292

EXT20 v Minister for Home Affairs [2021] FCA 629

FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 775

Filipovich v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 846

FYBR v Minister for Home Affairs [2019] FCAFC 185; (2019) 272 FCR 454

Gaspar v Minister for Immigration and Border Protection [2016] FCA 1166; (2016) 153 ALD 338

Hands v Minister for Immigration and Border Protection [2018] FCAFC 225; (2018) 267 FCR 628

Harrison and Minister for Immigration and Citizenship [2009] AATA 47; (2009) 106 ALD 66

Hodgson v Minister for Immigration and Border Protection [2017] FCA 1141

HZCP v Minister for Immigration and Border Protection [2018] FCA 1803; (2018) 78 AAR 325

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24

Minister for Home Affairs v HSKJ [2018] FCAFC 217; (2018) 266 FCR 591

Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332

Minister for Immigration and Multicultural Affairs v Ali [2000] FCA 1385; (2000) 106 FCR 313

NDBR v Minister for Home Affairs [2019] FCA 1631

Nguyen and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 4171

NTTH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 1143

Peterson and Minister for *Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 1256

PNLB and Minister for Immigration and Border Protection [2018] AATA 162

Pokrywka and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 5165

RZSN v Minister for Home Affairs [2019] FCA 1731

Suleiman and Minister for Immigration and Border Protection [2018] FCA 594; (2018) 74 AAR 545

Swannick v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 165; (2020) 280 FCR 559

Uelese v Minister for Immigration and Border Protection [2016] FCA 348; (2016) 248 FCR 296

Williams v Minister for Immigration and Citizenship [2013] FCA 702; (2013) 136 ALD 299

WQRJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 736

SECONDARY MATERIALS

Convention on the Rights of the Child, opened for signature 2 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) preamble, art 3

Department of Foreign Affairs and Trade, *DFAT Country Report Sri Lanka* (4 November 2019)

Department of Health, *National Drug Strategy 2017–2026* (18 September 2017)

Minister for Immigration and Border Protection (Cth), *Direction No 65: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* (22 December 2014)

Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79 – Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (20 December 2018) para 14.4

Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction no 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a*

visa under section 501CA (8 March 2021) paras 5.1, 5.1(3), 5.2, 5.2(1), 5.2(2), 5.2(3), 6, 7, 8, 8.1, 8.1.1, 8.1.1(1), 8.1.1(1)(a), 8.1.1(1)(b), 8.1.1(1)(c), 8.1.1(1)(d), 8.1.1(1)(e), 8.1.1(1)(f), 8.1.1(1)(g), 8.1.2, 8.1.2(2)(a), 8.1.2(2)(b), 8.2, 8.3, 8.3(4), 8.4, 8.4(1), 9, 9(1)(c), 9.1, 9.2, 9.2(1)(a), 9.2(1)(b), 9.2(1)(c), 9.3, 9.3(1), 9.4, 9.4.1, 9.4.1(2)(a), 9.4.2(3)

REASONS FOR DECISION

Deputy President Boyle

2 September 2021

THE APPLICATION

1. The Applicant seeks review of the decision of a **delegate** of the Respondent (**Minister**) dated 9 June 2021 not to revoke the cancellation of the Applicant's Class BS Subclass 801 Partner **visa** pursuant to s 501CA(4) of the *Migration Act 1958* (Cth) (the **Act**).

2. The Applicant's visa was cancelled under s 501(3A) of the Act on the basis that he did not pass the character test by reason of his substantial criminal record and he was serving a full-time term of imprisonment for an offence against a law of a State.

THE ISSUE

3. The issue for determination is whether the Tribunal should exercise the power in s 501CA(4)(b) of the Act to revoke the cancellation of the visa made under s 501(3A). This will require determination of:

   (a) whether the Applicant passes the character test (as defined by s 501 of the Act); and

   (b) if he does not pass the character test, whether there is "*another reason*" why the decision to cancel the Applicant's visa should be revoked.[1]

BACKGROUND

4. The following facts are taken primarily from the Minister's Statement of Facts, Issues and Contentions dated 13 August 2021 (**MSFIC**) and are not contentious.

[1] The Act s 501CA(4)(b)(ii).

5. The Applicant is a 32-year-old citizen of Sri Lanka. He first arrived in Australia on 20 February 2009.[2] He left Australia for two months in December 2009 and for two weeks in March 2017.[3]

6. He was granted the visa that is the subject of these proceedings on 12 February 2017.[4]

7. The Applicant's criminal record, as disclosed by the Western Australia Police Force History for Court – Criminal and Traffic record, is as follows:[5]

Court	Result Date	Offence	Offence Date	Result
Perth Magistrates Court	3 August 2020	Having ready access to both weapons and illegal drugs	5 December 2019	Six months' imprisonment (concurrent) from 3 August 2020
		Possess firearm with circumstances of aggravation	5 December 2019	$500 fine
		Possess a prohibited drug (cannabis)	6 December 2019	$150 fine
		Possess a prohibited plant	7 December 2019	$150 fine
		Possession of prohibited drugs with intent to sell or supply	7 December 2019	Six months' imprisonment (concurrent) from 3 August 2020

[2] R1, G18/294.
[3] R1, G18/294.
[4] R1, G19/295.
[5] R2, SG3/59.

		Possession of contrivance known as silencer	5 December 2019	$450 fine
		Unlicensed person possess firearm/ammunition	5 December 2019	Six months' imprisonment (concurrent) from 3 August 2020
		No authority to drive – suspended	6 December 2019	Motor driver's licence suspended for nine months (cumulative); $400 fine
Perth District Court of Western Australia	28 July 2020	(Attempt) demanding property by oral threats	5 December 2019	Two years and two months' imprisonment (concurrent) from 6 December 2019
Perth Magistrates Court	22 August 2019	Being armed in or near place of public entertainment	22 February 2019	Spent conviction; $1,000 (global)
Perth Magistrates Court	22 August 2019	Breach of bail (fail to appear soon after)	6 May 2019	Spent conviction; $1,000 (global)
Perth Magistrates Court	22 August 2019	Criminal damage or destruction of property	22 February 2019	Spent conviction; $1,000 fine (global)

8. On 22 August 2019, the Applicant was fined for the offences of "*being armed in or near place of public entertainment*", "*criminal damage or destruction of property*" and "*breach of bail (fail to appear soon after)*".[6]

9. On 28 July 2020, the Applicant was sentenced to imprisonment for two years and two months for the offence of "*Demanding property by oral threats*".[7] The offence occurred on 5 December 2020.

10. The Applicant was arrested on 6 December 2020. Following his arrest, police executed a firearms search warrant at the Applicant's residential address.[8] Police found an open safe in the Applicant's bedroom which contained a handgun, silencer, magazine containing one 9mm round of ammunition, a butterfly knife, knuckleduster, knuckleduster knife, four loose 9mm rounds, six modified 9mm rounds, three loose .243 rounds, 60 loose 9mm rounds, a firearm cleaning kit and a clipseal bag containing 21 LSD tabs.[9] Throughout the Applicant's room, numerous clipseal bags containing cannabis were also found with an approximate combined weight of 382 grams.[10]

11. On 3 August 2020 the Applicant was sentenced after he pled guilty to eight offences arising from the execution of the warrant referred to in [10] above.[11] The Applicant received fines and three (concurrent) sentences of imprisonment of six months for these offences.

12. By letter dated 12 August 2020 from the **Department** of Home Affairs,[12] the Applicant was notified that his visa had been cancelled under s 501(3A) of the Act with effect from that date. That letter, under s 501CA(3) of the Act, invited the Applicant to make representations to the Minister about revoking the decision to cancel his visa.

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[6] R2, SG3/60.
[7] R2, SG3/60.
[8] R1, G7/79.
[9] R1, G7/79.
[10] R1, G7/79.
[11] R1, G4/32–32; G6/43–45.
[12] R1, G19/295.

13. In response to the invitation to make submissions about revoking the decision to cancel his visa, the Applicant, by "*Request for Revocation of Mandatory Visa Cancellation under s 501(3A)*" dated 26 August 2020, made representations to the Minister.[13]

14. On 9 June 2021 a delegate of the Minister decided that the revocation power in s 501CA(4) was not enlivened.[14] The Applicant was notified of the delegate's decision on 10 June 2021.[15]

15. By application lodged with the Tribunal on 14 June 2021, the Applicant applied for review of the delegate's decision of 9 June 2021.[16]

16. I am satisfied that the Applicant made representations about the revocation of the cancellation of his visa in accordance with the invitation to do so issued under s 501CA(3) of the Act (see [12] and [13] above). I am also satisfied that the application was lodged with the Tribunal within nine days of the Applicant being notified of the delegate's decision not to revoke the cancellation of the visa.[17] The delegate's decision not to revoke the cancellation of the visa comes within the purview of s 500(1)(ba) of the Act. I am satisfied that the Tribunal has jurisdiction to review the decision.

THE HEARING AND THE EVIDENCE

17. The application was heard on 20 August 2021. The Applicant was represented by Dr J Donnelly of counsel and the Minister was represented by Ms E Tattersall of Sparke Helmore Lawyers. The following documents were admitted into evidence:

    (a) Statement of the Applicant dated 16 July 2021 including annexures A to H (**A1**);

    (b) Supplementary statement of the Applicant dated 16 August 2021 (**A2**);

    (c) Statement of Ajani Horanage dated 14 August 2021 (**A3**);

    (d) Supplementary statement of Joel Buckenara dated 15 August 2021 (**A4**);

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[13] R1, G7.
[14] R1, G3/13.
[15] R1, G2/10.
[16] R1, G2.
[17] The Act s 500(6B).

(e) Statutory declaration of Joel Buckenara dated 19 May 2021 (**A5**);

(f) Supplementary statement of Kavini Horanage dated 14 August 2021 (**A6**);

(g) Statutory declaration of Kavini Horanage dated 31 May 2021 (**A7**);

(h) Supplementary statement of Niroshan Lakmal Jayalathge Don dated 13 May 2021 (**A8**);

(i) Statutory declaration of Niroshan Lakmal Jayalathge Don dated 13 May 2021 (**A9**);

(j) Supplementary statement of Wendy Anderson dated 15 August 2021 (**A10**);

(k) Statutory declaration of Wendy Anderson dated 10 May 2021 (**A11**);

(l) Section 501 G documents received by the Tribunal 25 June 2021 (**R1**); and

(m) Respondent's Tender Bundle received by the Tribunal 13 August 2021 (**R2**).

18. The following witnesses gave evidence at the hearing:

(a) The Applicant;

(b) Niroshan Lakmal Jayalathge Don (the Applicant's business partner);

(c) Ajani Horanage (Niroshan Lakmal Jayalathge Don's wife);

(d) Wendy Anderson (a friend of the Applicant); and

(e) Joel Buckenara (a friend of the Applicant).

19. Following the hearing, the parties, at my direction, provided submissions on the matters to be taken into account in assessing weight to be given to the fourth primary consideration, the expectations of the Australian community. That issue is dealt with below under that consideration.

LEGISLATIVE FRAMEWORK

20. Section 501(3A) of the Act provides that:

The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) ...; and

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

21. A "*substantial criminal record*" is, relevantly, defined by s 501(7) of the Act as follows:

For the purposes of the character test, a person has a substantial criminal record if:

(a) …

(b) ...

(c) the person has been sentenced to a term of imprisonment of 12 months or more;

…

22. Section 501CA of the Act provides:

(1) This section applies if the Minister makes a decision (the **original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.*

…

(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.

(Original emphasis.)

Ministerial Direction 90

23. Section 499(1) of the Act provides that:

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

(a) the performance of those functions; or

(b) the exercise of those powers.

24. Section 499(2A) of the Act provides that:

[a] *person or body must comply with a direction under subsection (1).*

25. On 8 March 2021 the Minister, being the relevant Minister for the purposes of s 499 of the Act, made a direction titled "*Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*" (**Direction 90**). The commencement date for operation of Direction 90 was 15 April 2021. Upon its commencement, Direction 90 revoked the operation of "*Direction no. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*" (**Direction 79**).

26. Paragraph 5.1 sets out the objectives of Direction 90. Paragraph 5.1(3) relevantly provides:

> *Under subsection 501(3A) of the Act, the decision-maker must cancel a visa that has been granted to a person if the decision-maker is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c) or paragraph (6)(e)) and the non-citizen is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory. A non-citizen who has had their visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the decision-maker considering the request is not satisfied that the non-citizen passes the character test, the decision-maker must consider whether there is another reason to revoke the cancellation given the specific circumstances of the case.*

27. Paragraph 5.2 of Direction 90 sets out the principles which provide the framework within which decision-makers should approach their task of deciding whether to revoke a mandatory cancellation under s 501CA. These principles are as follows:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. 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 measureable* [*sic*] *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 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 measureable [*sic*] *risk of causing physical harm to the Australian community.*

28. Paragraph 6 of Direction 90 provides that, informed by the principles set out in para 5.2, the decision-maker must take into account the considerations in paras 8 and 9 of Direction 90 (where such considerations are relevant) in order to determine whether the mandatory cancellation of the visa should be revoked.

29. Guidance in relation to how the relevant considerations are to be taken into account can be found in para 7 of Direction 90 which provides:

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

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

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

Does the Applicant pass the character test?

30. Failure of the character test arises as a matter of law: *Harrison and Minister for Immigration and Citizenship.*[18] The character test is defined in s 501(6) of the Act. Under s 501(6)(a) of the Act, a person will not pass the character test if the person has "*a substantial criminal record*". Section 501(7)(c) (see [21] above) provides that a person will have a substantial

[18] [2009] AATA 47; (2009) 106 ALD 66.

criminal record if they have "*been sentenced to a term of imprisonment of 12 months or more...*" That is so in the Applicant's case. That is admitted by the Applicant.[19]

31. As the Applicant does not pass the character test, he cannot rely on s 501CA(4)(b)(i) for the decision to cancel his visa to be revoked. The issue, therefore, is whether the power under s 501CA(4)(b)(ii) should be exercised on the basis that there is another reason why the decision under s 501(3A) should be revoked (see [22] above). The Applicant agrees that that is the sole question for determination.[20]

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

PRIMARY CONSIDERATIONS

First primary consideration: Protection of the Australian community from criminal or other serious conduct (para 8.1)

32. Paragraph 8.1 of Direction 90 provides that when decision-makers are considering the protection of the Australian community, they:

> *(1) ... should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) Decision-makers should also give consideration to:*
>
> *(a) the nature and seriousness of the non-citizen's conduct to date; and*
>
> *(b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.*

Nature and seriousness of the conduct (para 8.1.1)

33. Paragraph 8.1.1 of Direction 90 provides:

> *(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:*

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[19] ASFIC para 10.

[20] ASFIC para 10.

(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 again, , [*sic*] *or an offence against section 197A of the Act, which prohibits escape from immigration detention;*

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

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

(e) the cumulative effect of repeated offending;

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

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

The parties' submissions

The Applicant

34. The Applicant accepts that he has a substantial criminal record and that his violent offending is "*very serious*".[21]

35. The Applicant also accepts that, given his offending history, any future offending of a similar nature would potentially cause physical, mental and/or financial harm to members of the Australian community.[22]

36. The maximum sentence for demanding property by oral threats of which the Applicant was convicted on 28 July 2020, is 14 years imprisonment. The Applicant was sentenced to a significantly shorter period of imprisonment and was eligible for parole after serving 13 months, which demonstrates his offending was at the lower end of the scale of seriousness.[23]

37. The sentences that the Applicant has received are a further indication of the seriousness of his offending. Dispositions involving an offender's incarceration are the last resort in the sentencing hierarchy, and consequently, the court viewed the offending as serious.[24]

38. At the time of sentencing the Applicant on the charge of demanding property by oral threats in July 2020, the sentencing judge stated that he was not sentencing the Applicant for the offences committed by his co-accused, Burton, however, he took the Applicant's attendance at the home and his conduct at the home into account in categorising the threat as being very serious criminal conduct.[25]

39. His Honour also noted in sentencing, that "[y]*ou're not being sentenced today for either having a firearm or for selling an illicit drug. But the fact that you had a firearm as a tool in*

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[21] ASFIC para 26.
[22] ASFIC para 28.
[23] ASFIC para 24.
[24] ASFIC para 25.
[25] ASFIC para 18.

your illicit business demonstrates that your use of that firearm in this very serious offending is, perhaps, not an isolated event".[26]

The Minister

40. Crimes of violence are viewed very seriously by the Australian Government and the Australian community.[27]

41. The Applicant's conduct leading to his conviction for the demanding property by oral threats was very serious because the conduct clearly was very serious: the Applicant pointed a gun at the victim, and his father, as a means of securing payment of a debt.[28]

42. The sentencing judge's view was that the offending was serious, unjustifiable and traumatic for the victim.[29] The Applicant himself accepts that "*offences such as demanding property by oral threats can be viewed very seriously"*.[30]

43. The Applicant's 22 August 2019 offence of "*being armed in or near place of public entertainment*" was also serious.[31]

44. Regard must also be had to the fact that the Applicant has been sentenced to more than one term of imprisonment for his offending.[32] Sentences involving terms of imprisonment are the last resort in the sentencing hierarchy.[33] Where a Court has sentenced an offender to a term of custodial imprisonment, this should be viewed as a reflection of the objective seriousness of the offences involved.

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[26] ASFIC para 19.
[27] MSFIC para 27.1, citing Direction 90 para 8.1.1(1)(a).
[28] MSFIC para 27.1.
[29] R1, G5/36–38.
[30] Citing ASFIC paras 14, 26.
[31] MSFIC para 27.2.
[32] Citing Direction 90 para 8.1.1(1)(b).
[33] Citing *PNLB and Minister for Immigration and Border Protection* [2018] AATA 162 at [22].

Consideration

45. The Applicant accepts that the offence of demanding property by oral threats is very serious. The circumstances of this offence were set out in Maclean DCJ's sentencing comments as follows:

> *Imprisonment is imposed as a penalty of last resort, and it must not be imposed unless the seriousness of the offence requires it or the protection of the community requires it… The maximum penalty for this offence is a term of 14 years' imprisonment. So you can see, right from the outset, that it is a serious offence, given that parliament has legislated a maximum penalty of 14 years.*
>
> *Circumstances of the offence were as outlined by the prosecutor in the statement of material facts as read to the court, and those facts have been admitted by you through your counsel. …*
>
> [O]*n 5 December 2019, you were with a man named Joshua Burton. At about 6 pm, you and Mr Burton drove past* [Mr M's] *house.* [Mr M] *was sitting at the front of his house. Mr Burton, who made a gesture to* [Mr M] *on the first occasion that you drove past. And on the second occasion, Mr Burton made another gesture and that gesture was in the shape of a gun.*
>
> *I do consider that both gestures were intended to intimidate or to offend* [Mr M]*. But I recognise that those gestures weren't made by you but were made by Mr Burton. And I don't consider that that conduct, in any sense, aggravates what was to take place. But it is a circumstance that forms part of the overall event.*
>
> *At about 7.20 pm, Mr Burton sent an SMS message to* [Mr M] *and it informed* [Mr M] *that he'd be given a week. At about 8 pm, Mr Burton and you called* [Mr M] *and told him that he owed money and that you and Mr Burton were going to fuck him up.*
>
> *You said to* [Mr M]*, "Do you want me to come there and shoot you?" And that was an overt and a serious threat. And as Mr Andrews properly submits, the offence was complete at that point and included Mr Burton being in the background, saying, "I'm going to bash you, you're a dog".*
>
> *By attending, however, you gave a physical presence to the threat and the attendance was a serious fact. It took place after three SMS messages were sent, which were also threatening and which extended the range of people who were threatened, to include someone named* [H]*.*
>
> *At 8.30 pm, you and Mr Burton attended at* [Mr M's] *home and the prospect of you attending, of violence, was enormous, given that* [Mr M] *armed himself and you and Mr Burton were also armed. You were certainly armed when you attended because you had a pistol and a silencer and, at some point, Mr Burton also became armed and he armed himself with an iron pole.*
>
> *You pointed the gun at* [Mr M] *and told him that you would shoot him. And you repeated what was a very serious and, no doubt, terrifying threat to* [Mr M]*. You extended again the range of people that you threatened in these events by pointing the gun also at* [Mr M's] *father. And no doubt, in doing so, you made a frightening event even more traumatic.*

> *There was no justification for your conduct and* [Mr M]*, quite properly, told you to leave. You didn't immediately leave. And Mr Burton struck* [Mr M] *over the head with an iron pole.*
>
> *…*
>
> *Notwithstanding your serious offending - and that serious offending being the threat itself and what took place after, namely, your attendance at the home and the further conduct with the firearm and Mr Burton's assault of* [Mr M] *- there were further threats and SMS messages which promised a return visit and they were sent to* [Mr M]*.*
>
> *Again, I mention those things, not because I'm sentencing you for that further conduct but to put into context the threat which is the subject of the indictment and the seriousness of that threat. And no doubt, how terrifying that threat must have been to* [Mr M]*, given the events that took place in the very short period of time after that offence was committed.*
>
> *…*
>
> [T]*he conduct in attending with the gun and the silencer demonstrates how serious your intent was, with regard to the threat.*
>
> *That was made manifestly obvious by the production of the gun and your demonstration that you had it, to the victim and the additional threat to shoot another person, namely* [H]*, and the gun being produced and pointed at the complainant and at his father, in the situation where repeated threats were being made to shoot* [Mr M]*.*[34]

46. In sentencing the Applicant on 3 August 2020 on the eight charges to which the Applicant had pleaded guilty (see [7] and [10] above), Magistrate Walton said:

> *Really it's the 382 grams of cannabis. Scales were found, clipseal bags, which are well established drug dealing indicia. And referencing the decisions of Sultana v Applewood. The charge of having (indistinct) to both weapons and illegal drugs emphasises the significance of that charge in terms of drug dealing and associated with dangerous weapons. In my view, taking into account his current circumstances, the principles I've said, together with the pleas of guilty and other matters, the terms of imprisonment are appropriate for some of the matters.*[35]

47. The details of those offences are set out in the Statement of Material Facts[36] produced under summons by Western Australian Police and are summarised at [10] above.

48. The events which gave rise to the charges of being armed in public and criminal damage of which the Applicant was convicted in August 2019 (see [7] above) are set out in a Statement of Material Facts produced by Western Australian Police under summons as follows:

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[34] R1, G5/35–38.

[35] R2, SG2/56.

[36] R2, SG3/77.

> *On Friday the 22nd February 2019 at 1:56am, the accused left the Aberdeen Hotel, Aberdeen Street, Northbridge. The accused walked down the laneway from Aberdeen Street, towards Errichetti Place, Northbridge.*
>
> *Police were contacted by members of the public relating to an incident involving bladed weapons, on Newcastle Street, near where the accused had walked to.*
>
> *The accused returned to Aberdeen Street about 2:12am, where he used a folding knife to tap the window of a red Holden Cruze, registration* [omitted], *which was parked approximately 40 metres from the Aberdeen Hotel. The vehicle had three persons inside at the time.*
>
> *As the driver began to slowly, drive the vehicle forwards, the accused began hitting and scratching the vehicle more aggressively and harder. The Aberdeen Hotel was also in the process of closing for the night and there were numerous persons around on the footpaths and street, attempting to go home.*
>
> *A member of public has flagged down passing Police, and identified the accused to them. The accused was confronted by Police, while still holding the knife. He was challenged by officers and subsequently arrested.*[37]

49. While the Applicant's conviction for demanding property by oral threats is the most serious of the Applicant's convictions (conceded to be "*very serious*" by the Applicant),[38] the other offences of which he has been convicted and the associated criminal activities are not insignificant, both in their nature and number. As Maclean DCJ observed in sentencing the Applicant:

> *… you were provided with a firearm by a peer, in the course of your enterprise of selling and supplying cannabis. You're not being sentenced today for either having a firearm or for selling an illicit drug. But the fact that you had a firearm as a tool in your illicit business demonstrates that your use of that firearm in this very serious offending is, perhaps, not an isolated event.*[39]

50. In assessing the seriousness of the Applicant's offending and other conduct against the considerations identified in para 8.1.1 of Direction 90, I find that:

    (a) (Paragraph 8.1.1(1)(a)) – as noted above, the Applicant, at para 26 of his SFIC, concedes his "*violent offending, which includes threats of violence is very serious*".

    (b) (Paragraph 8.1.1(1)(b)) – the Applicant's conduct was not of the type described in this consideration.

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[37] R2, SG3/76.

[38] See [34] above.

[39] R1, G5/37.

(c) (Paragraph 8.1.1(1)(c)) – the Applicant notes, correctly, that the sentence imposed in relation to the conviction for demanding property by oral threats was "*at the lower end of the scale.*"[40] He concedes, again correctly in my view, that "*it must be accepted that the Applicant's sentences are a further indication of the seriousness of the offending*".[41]

(d) (Paragraph 8.1.1(1)(d)) – the Applicant has been convicted of 12 offences (which vary in degrees of seriousness) committed over a short period (February to December 2019).[42] The Applicant arrived in Australia in February 2009, so there is a period of around 10 years before he commenced offending. It could not, therefore, be considered that his offending was "*frequent*" over the period that he has been in Australia, however, once he started offending in February 2019, his offending was frequent. The most serious of these offences was the last offence, the use of a gun (with silencer) in demanding property by oral threats, so there is a clear escalation of seriousness in the Applicant's offending.

(e) (Paragraph 8.1.1(1)(e)) – in looking at the cumulative effect of the Applicant's offending, the common (and disconcerting) characteristic is the possession of weapons (see [10] above) and, in the case of the firearm (for which the Applicant had a significant quantity of ammunition), the Applicant's preparedness to use them. In that regard I note Maclean DCJ's observation that he had the firearm "*in the course of* [his] *enterprise of selling and supplying cannabis"* and that he "*had a firearm as a tool in* [his] *illicit business.*"[43]

(f) (Paragraph 8.1.1(1)(f)) – not relevant.

(g) (Paragraph 8.1.1(1)(g)) – not relevant.

51. I am satisfied that the Applicant's offending was very serious.

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[40] ASFIC para 24.
[41] ASFIC para 25.
[42] R2, SG3/59-60.
[43] R1, G5/37.

The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct (para 8.1.2)

52. Paragraph 8.1.2 of Direction 90 relevantly provides:

> *(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.*
>
> *(2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:*
>
> > *(a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or serious conduct; and*
> >
> > *(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
> >
> > > *(i) information and evidence on the risk of the non-citizen re-offending; and*
> > >
> > > *(ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).*

53. The Tribunal in ***CZCV*** *and Minister for Home Affairs*[44] summarised the task for the Tribunal as follows at [56]:

> *In summary, the Tribunal is required to assess whether the Applicant poses an unacceptable risk of harm to individuals, groups or institutions in the Australian community. In order to make this assessment, the Tribunal is assisted by the following passage from Nigro v Secretary to the Department of Justice [2013] VSCA 213; (2013) 41 VR 359, [111]; [2013] VSCA 213 (which was cited with approval by Mortimer J in Tanielu v Minister for Immigration and Border Protection [2014] FCA 673; (2014) 225 FCR 424 at [95], as well as Gilmour J in WAD 230/2014 v Minister for Immigration and Border Protection (No 2) [2015] FCA 705 at [42]-[43]):*
>
> > *An unacceptable risk thus requires consideration of the likelihood of offending and, if it eventuates, what the consequences of such offending are likely to be. Whether a risk is unacceptable will depend not only upon the likelihood of it becoming reality but also on the seriousness of the consequences if it does.*

54. In ***BSJ16*** *v Minister for Immigration and Border Protection*[45] Moshinsky J stated, at [68]:

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[44] [2019] AATA 91.

[45] [2016] FCA 1181.

> *... there is no statutory constraint on the way that the Minister assesses risk, save that whatever he or she takes into account must be logical and rational.*

55. While the Tribunal and the Court in the above cases (and in the cases referred to therein) were considering visa cancellation in the context of predecessors to Direction 90, given the similarity in the wording of the several Ministerial Directions, the same considerations and principles apply to the present case. I adopt the approach indicated in the above cases.

Nature of harm to individuals or the Australian community (8.1.2(2)(a))

The parties' submissions

The Applicant

56. The Applicant accepts that his conduct was very serious. He also accepts that threatening his victim with violence and demanding property in the manner that he did, has the potential to cause physical, mental and/or financial harm to members of the Australian community.

The Minister

57. The nature of the harm that would be caused if the Applicant were to reoffend is serious and is likely to involve significant physical, psychological and financial harm to members of the Australian community such that the Australian community would have little tolerance for any likelihood of reoffending and future harm.

Consideration

58. Neither party made a submission specifically addressing the issue of the nature of the harm to individuals or the Australian community should the Applicant engage in further criminal or other serious conduct, which is the consideration directed by para 8.1.2(2)(a). Insofar as the parties' respective SFICs covered the issue, the submissions were "*rolled up*" with the broader issue of the risk to the Australian community and, in the case of the Minister, the tolerance of the Australian community to a repeat of offending.

59. In each case, the submissions made appeared to be limited to a repeat by the Applicant of the index offence, demanding property by oral threats. Direction 90, however, requires the decision-maker to consider the nature of harm should the Applicant engage in further criminal or other serious conduct (emphasis added). In the case of the Applicant, his

relevant conduct is more than just the index offence, although that is obviously the most serious of his offending conduct. I am, however, mindful of the Applicant's other offences and conduct which include the possession of an array of weapons, his prior offence of being armed in public and, most significantly, his drug dealing. In that regard I note the comments of Maclean DCJ in sentencing the Applicant cited at [49] above regarding the Applicant's use of a "*firearm as a tool in* [his] *illicit business*."

60. Although the Applicant repeatedly submitted (as did a number of those who gave evidence in support of the Applicant) that he is not a violent person and that he made "*a stupid decision*" to support a friend while under the influence of drugs, the facts do not support that characterisation of the Applicant or his conduct. The Applicant was a drug dealer: he concedes that. He chose to arm himself with serious and potentially lethal weapons and to use them offensively to collect a drug debt. He concedes that he was "*truly blessed that nobody was hurt with the firearm*".[46]

61. The nature of the harm to individuals and to the community if the Applicant were to engage in the criminal and other serious behaviour which he has in the past, is self-evident and serious. Some of the possible consequences to the community, and individuals within the community, were identified by Maclean DCJ in his sentencing remarks quoted above. In relation to the Applicant's drug dealing, Australia's *National Drug Strategy 2017–2026*[47] notes that the Australian community faces both direct and indirect harm from drugs, including mental health trauma, violence or other crimes, engagement with the criminal justice system more broadly, and healthcare and law enforcement costs.

62. I find that the nature of the harm that would be caused to the community if the Applicant were to reoffend or engage in the serious conduct that he has in the past would be serious, not only to individuals in the community, but also to the community as a whole.

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[46] ASFIC para 42.

[47] Department of Health, *National Drug Strategy 2017–2026* (18 September 2017).

The likelihood of the non-citizen engaging in further criminal or other serious conduct – risk of re-offending (8.1.2(2)(b))

The parties' submissions

The Applicant

63. In assessing the likelihood of the Applicant's reoffending in the future, various factors that may assist in explaining the Applicant's past conduct, as well as his more recent conduct, remorse, and rehabilitation are to be considered.[48]

64. On the night of the offence which gave rise to the Applicant's conviction for demanding property by oral threats, the Applicant and his co-offender, Burton, were drinking when Burton received a call from someone threatening to rape and kill his grandmother. The Applicant was not thinking straight when he agreed to accompany Burton to "*scare the victim*". When they arrived, the victim approached him with a taser gun, so he pulled out his firearm to scare him and defend himself.[49]

65. The Applicant admits he purchased the illegal firearm a few weeks earlier for protection as he carries large amounts of cash from his shop to his home each night and that he is fully aware of his irresponsible and unacceptable behaviour.[50]

66. The Applicant is not a violent person, and the offending was out of character. The Applicant is a victim of family violence and acted out of his "*protective instinct when I use* [*sic*] *to defend my mother from my drunken abusive father*".[51]

67. The Applicant was struggling to support his drug and alcohol habit and provide for his family at the time, which is why he "*stupidly decided*" to sell cannabis to make extra money.[52]

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[48] ASFIC para 29.
[49] ASFIC para 30.
[50] ASFIC para 31.
[51] ASFIC para 32.
[52] ASFIC para 33.

68. The Applicant was under a lot of personal and financial stress due to starting his own business and that he made a stupid decision to help a friend and was under the influence of drugs at the time of the offence.[53]

69. The Applicant's mental health was impacted at the time of his offending due to the breakdown of his relationship and being away from the family home and his two children.[54]

70. The Applicant was under a lot of pressure from his parents to study accounting, contributing to his anxiety and depression. He was also disappointed at himself for letting down his parents. His failed relationship left him feeling lonely and depressed. His need for acceptance and approval left him open to friendships with the wrong people.[55]

71. The sentencing judge of 28 July 2020 accepted that at the time of the offence, the Applicant was experiencing considerable financial stress and was engaged in drug use and drug supply. His Honour also accepted that the Applicant's conduct was influenced by negative peers and the lifestyle he was leading at the time.[56]

72. The discharge letter to the GP dated 17 August 2020 records that the Applicant occasionally used marijuana and LSD and drank half a bottle of whiskey daily.[57]

73. The sentencing judge of 28 July 2020 accepted the Applicant's remorse and acknowledged the Applicant's admissions to police and plea of guilty to that charge.[58]

74. The Applicant's offending was out of character and he is "*extremely remorseful to the victims*" for his actions and very embarrassed by his behaviour. The Applicant states it was a "*stupid ill-conceived decision*" that will never be repeated. The Applicant accepts the effect that his actions had on his victims, and he will work hard to change what he can about himself, so he never finds himself in a similar situation again.[59]

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[53] ASFIC para 34.
[54] ASFIC para 35.
[55] ASFIC para 36.
[56] ASFIC para 37.
[57] ASFIC para 38.
[58] ASFIC para 40.
[59] ASFIC para 41.

75. The Applicant stated that "*I understand how serious of a crime to be in possession of an illegal firearm. I am truly blessed that nobody was hurt with the firearm. I take full responsibility for my unacceptable behavior*" (without alternation).[60]

76. The Applicant has made a "*complete overhaul of [his] behaviour and attitude*" to live a fulfilling lifestyle that includes the wellbeing of his two daughters. The Applicant has a future plan to return to his pizza business and provide for his family. His goal is to provide a life for his children that he did not have the luxury of living and give his daughters a future. The Applicant also has a long-term business goal in the import/export field.[61]

77. Notwithstanding that the Applicant did not qualify for prison-based treatment programs, he elected to complete various courses, including Past Alcohol and Other Drugs, Standing on Solid Ground, Narcotics Anonymous (**NA**) 12 Step Program, MYOB Basics of Accounting and Infectious Diseases Cleaning (Covid-19 related). The Applicant attended NA weekly meetings and applied for the Pathways Program. He has completed the module "*Apply workplace health and safety concepts*" and two modules concerning his Certificate III in Accounts Administration.[62] The Applicant also attended brief intervention group therapy and, while in immigration detention, has completed a basic parenting course and an emotional intelligence course.[63]

78. The Applicant was of good behaviour and has no recorded incidents while in prison or immigration detention and has stated that he is willing to participate in other rehabilitation programs to show his serious intention of changing his behaviour.[64] The Applicant's Statement of Facts, Issues and Contentions dated 13 July 2021 (**ASFIC**) contends[65] that the Applicant will reside with a friend, Mr N, in Seville Grove if he is released into the community.[66]

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[60] ASFIC para 42.
[61] ASFIC para 43.
[62] ASFIC paras 44, 45.
[63] ASFIC para 46.
[64] ASFIC para 47.
[65] ASFIC para 47.
[66] (Note: this claim that the Applicant will reside with Mr N if he is allowed to stay in Australia was contradicted by the statement of Ms Anderson in A10 para 12, who said he would live with her.)

79. The Department of Justice Management and Placement checklist dated 7 August 2020,[67] lists the Applicant's security rating as being lowered from maximum to medium and that the Applicant worked as a level 1 cleaner while in prison, which is a "*highly trusted*" position.[68]

80. The Prisoner Review Board of Western Australia (**PRB**) decided the Applicant was assessed as a low risk of reoffending and did not pose an unacceptable risk to the safety of the community and was therefore granted parole.[69]

81. The sentencing judge stated that the Applicant is a good prospect for reform and a low risk of reoffending.[70]

82. The Applicant acknowledges that he had the support of a wide group of friends at the time of his offending and that that did not prevent him from offending at that time. However, the Applicant is now significantly more receptive to their support due to his experience of the consequences of his actions and the drastic changes in his life circumstances since he offended.[71]

The Minister

83. As noted above, the Minister's submissions on this issue were, in some cases, rolled-up with considerations relating to other paragraphs of Direction 90. Insofar as they were identifiable as relating to the issue of the likelihood of the Applicant engaging in further criminal or other serious conduct, they were as set out in the following paragraphs.

84. The Applicant's insight into the effect of his offending on its victims and his acceptance of responsibility for the offending is limited. In November 2020, a person charged with assessing the Applicant's suitability for parole concluded that the Applicant "*presented with little insights in the impacts his actions, and specifically the use of a firearm, had upon the*

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[67] R1, G7/78.
[68] ASFIC para 48.
[69] ASFIC para 49.
[70] ASFIC para 50.
[71] ASFIC para 52.

victims".[72] The assessor also identified the Applicant as engaging in victim blaming and failing to take responsibility or show remorse for his offending.

85. The extent of the Applicant's problem with drugs and alcohol, and its causal impact upon his offending, is unclear. The demanding property by oral threats offence was committed at a time when the Applicant was using both cocaine and LSD. However, the records indicate that in August 2020 he consumed half a bottle of whiskey per day and occasionally used marijuana, rarely used cocaine and used LSD a few times.[73] In September 2020, the Applicant "*was referred to the Coordinator of the Drug and Alcohol Unit at Casuarina Prison for consideration, however,* [the Applicant] *stated that he is settled in his Unit and job and only ever engaged in substance use on occasion*".[74]

86. In November 2020, the Applicant told the PRB that he "*had never had a problem with illicit substances claiming occasional use of cocaine at parties*".[75] The Applicant does not assert that drugs or alcohol were responsible for his other crime of violence. If alcohol and/or drug addiction is not the cause of the Applicant's offending, then it is not clear what was the cause.

87. The suggestion that the offences were out of character is not supported by the sentencing judge's comments, citing the passage quoted at [49] above.

88. The Applicant's employment, business interests and support of friends did not serve a protective function in the past and there is no reason for the Tribunal to conclude that they will serve that function in the future.

89. Whilst the Applicant was granted parole partly on the basis that he was assessed as a low risk of re-offending, the PRB's assessment should be given limited weight in circumstances where the import of the parole order is that the PRB was of the view that, with monitoring and supervision during the period of parole, the Applicant did not pose an unacceptable risk to the safety of the community, however, the Tribunal does not have the same comforts

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[72] Citing R2/SG2.
[73] R1, G7/69.
[74] Citing R2, SG2/16.
[75] Citing R2, SG1/2.

(being the imposition of conditions on the Applicant, and the effect that the prospect of being returned to custody could have) when assessing the Applicant's risk.

90. The rehabilitation completed by the Applicant is limited and it is not clear what value the Applicant has derived from that treatment.

Consideration

91. As noted above, the parties, in particular the Applicant, have concentrated on the incident on the evening of 5 December 2019 which resulted in the Applicant being convicted of demanding property by oral threats. The Applicant sought to explain the events of that night on his being affected by drugs and alcohol and responding to a threat made by the victim to rape and kill Burton's grandmother (see [64] above). This was also the narrative in the Applicant's signed statement dated 31 May 2021.[76] That statement had been provided by the Applicant to the Department in support of his request for revocation of the cancellation of his visa. It was not disputed by the Applicant that the claim that Burton had received a threat against his grandmother was first raised by him in that statement of 31 May 2021.[77] I do not accept the claim made (belatedly) by the Applicant that he acted in response to a threat made against Burton's grandmother.

92. The Amended Statement of Material Facts read to the Court at the time of the Applicant's sentencing on 28 July 2020 was as follows:

> 1. *During the evening of 5 December 2019 the offender was in company with co-accused Joshua Burton.*
> 2. *At about 6pm the offender and co-accused drove past the complainant's house at [deleted] twice in a green station wagon. The complainant was sitting out the front. On the first occasion Burton gave the complainant the middle finger. On the second occasion Burton made a gun shape with his hand and pointed it towards the complainant.*
> 3. *At about 7.20pm Burton sent the complainant a series of SMS messages, writing that he would give the complainant 'one week'.*
> 4. *At about 8pm the offender and Burton called the complainant. The offender said that the complainant owed them money and that they were going to fuck him up, and then asked 'do you want me to come there and shoot you'.*

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[76] R1, G17/286 paras 10–11.

[77] transcript at 33.

5. *Burton was heard in the background saying 'I am going to bash you dog'. The complainant hung up and then ignored three further phone calls.*
6. *At 8.18pm the complainant received a further three SMS messages from the number saying 'u want me to shoot* [H] *too', 'don't fuck around', and 'I'm coming'.*
7. *At about 8.30pm the offender and Burton arrived in the green station wagon at the complainant's house.*
8. *The complainant armed himself with a fishing spear and went out the side door to the house. The complainant's father followed him.*
9. *The offender and Burton then confronted the complainant. The offender produced a handgun from his pants and screwed a silencer onto it before pointing it at the complainant. The offender also pointed the gun at the complainant's father.*
10. *The offender repeatedly told the complainant that he was going to shoot him. The complainant, worried for his elderly father, told the offender and Burton to fuck off.*
11. *Burton then struck the complainant over the head with an iron pole.*
12. *The complainant and his father retreated inside the house and locked the door.*
13. *The offender and Burton fled the scene when they heard police sirens approaching the address.*
14. *The incident was captured on CCTV.*
15. *Later that evening, further SMS messages were sent to the complainant telling him that he had one week to come up with the 1k.*
16. *A message was sent at 12.20am the next morning, 6 December 2019, providing a BSB and Account number for the $1000 to be transferred to. The message read 'Put 1k in there by next Thursday otherwise I'll see you again'.*
17. *The offender was arrested on 6 December 2019 conveyed to Fremantle Police Station where he declined to participate in an electronic record of interview.*

93. At the hearing the Applicant was asked whether he had seen the Amended Statement of Material Facts that had been provide in the District Court hearing. He confirmed that he had and that the facts as set out in that document were the facts to which he pled guilty.[78]

94. Fairly obviously, the Amended Statement of Material Facts bears little resemblance to the story in the ASFIC or the Applicant's signed statement of 31 May 2021. In response to questions that I put to the Applicant at the hearing, he conceded that the debt which he and Burton were seeking to recover from the victim with the threats and the production of the gun on the night of 5 December 2019 was a drug debt. He denied that it was a debt owed to him, or to him and Burton, notwithstanding the reference in para 4 of the Amended

[78] transcript at 31.

Statement of Material Facts that the victim "*owed them money*".[79] I do not accept the Applicant's evidence. I am of the view that the Amended Statement of Material Facts, uncontested by the Applicant at the time of sentencing, reflects the reality that the drug debt was owed to "*them*", that is, Burton and the Applicant.

95. As noted above, the Applicant conceded that the first time that he had claimed that the events of 5 December 2019 were the result of a threat being made against Burton's grandmother was in his statement of 31 May 2021. He claimed that:

> *In the criminal court also, my lawyer at the time, in criminal lawyer, was aware of it as well. And the reason I pleaded guilty to it because I take full responsibility for my actions. There was a voicemail, but it does not - it does not justify any of my actions that night. So, under the advice of my barrister at the time, I pleaded guilty to all the offences and I take full responsibility for it.*[80]

96. I reject the Applicant's story that the reason for his actions on the night of 5 December 2019 were the result of a threat being made against Burton's grandmother. I am satisfied that had the lawyer been so advised, he would have raised that assertion with the Court or would have contested the facts as read. I also reject the claim made at the hearing that the Applicant advised his lawyer at the time that the events of that night were the result of a threat made against Burton's grandmother. The correct account of that night is, in my view, set out in the Amended Statement of Material Facts (see [92] above). Neither the Applicant nor his lawyer at the time contested the facts as set out in the Amended Statement of Material Facts and read to the Court on 28 July 2020.

97. In any event, apart from not believing the Applicant, I cannot go behind or impugn the convictions or the essential facts on which the conviction or sentence were based. The cancellation of the Applicant's visa was based on the Applicant's conviction and sentence imposed by the Court on 28 July 2020. Justice Moshinsky in *NDBR v Minister for Home Affairs*[81] at [47] said:

> *I accept the proposition that, where a conviction or sentence, or both, are the foundation of the exercise of a power vested in the Minister, it is not open to the Tribunal, when reviewing the decision of the Minister, to impugn or go behind the conviction or sentence or both (as the case may be): see Minister for Immigration and Ethnic Affairs v Daniele [1981] FCA 212; (1981) 39 ALR 649; 5 ALD 135 at 138-*

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[79] transcript at 52.

[80] transcript at 31.

[81] [2019] FCA 1631.

139 per Fisher and Lockhart JJ; Minister for Immigration and Ethnic Affairs v Gungor [1982] FCA 99; (1982) 42 ALR 209; 63 FLR 441 at 445-446, 449-450 per Fox J, at 468-469 per Sheppard J; SRT at [40]-[48] per Branson, Lindgren and Emmett JJ; Ali at [42] per Branson J; LFF at [42] per Beach, McLeish and Niall JJA. As noted by the applicant, these cases were helpfully reviewed by Bromberg J in HZCP at [41]-[77].

98. As noted by Moshinsky J in the above passage, Bromberg J in *HZCP v Minister for Immigration and Border Protection*[82] (at [41]–[77]) summarised the relevant authorities and, at [78], concluded:

> *I would respectfully adopt the distillation of the case law described by Beach, McLeish and Niall JJA in LLF. On that basis the applicable principles are these:*
>
> > *(1) Where a previous conviction is the foundation for the exercise of power by the decision-maker, no challenge can be made to the fact of the conviction (or sentence, as the case may be) or to the essential facts on which it was based, but the circumstances of the conviction may be reviewed for a purpose other than impugning the conviction itself.*
> >
> > *(2) Where the exercise of the power is not founded on the conviction, then the essential facts underlying the conviction are not immune from challenge and the conviction is only conclusive of the fact of the conviction itself, albeit there is a heavy onus on a person seeking to challenge the facts upon which the conviction is necessarily based.*

99. Another part of the Applicant's evidence that I do not accept and which is material to a number of issues including the seriousness of the Applicant's offending, his credibility and the likelihood of his reoffending, is his claimed reason for having procured the handgun and ammunition. As set out in [65] above, and in the Applicant's signed statement of 31 May 2021, he claimed that he purchased the illegal firearm a few weeks earlier for protection as he carried large amounts of cash from his shop to his home each night. That claim was shown to be false by the evidence that emerged at the hearing.

100. In cross-examination the Applicant conceded that he had sought out a gun and had been introduced to the person from whom he bought the gun, the silencer and ammunition by someone he had met through his drug dealing activities.[83] He claimed that he needed the gun because he "*was carrying a large amount of cash from the pizza shop every night, very*

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[82] [2018] FCA 1803; (2018) 78 AAR 325.

[83] transcript at 29.

late at night". He did concede at the hearing that he bought the gun in relation to his drug dealing as well.[84]

101. The Applicant's evidence in cross-examination in relation to his handling of the cash from the pizza shop was:

> *COUNSEL: When you say you were carrying large amounts of cash from the pizza shop late at night, what were you doing with the cash when you took it from the pizza shop?*
>
> *APPLICANT: Because I take it in a small safe at the end of every shift, so before I go to the bank the next day I have to keep the cash in my hand.*
>
> *COUNSEL: Where is the small safe?*
>
> *APPLICANT: It's in the pizza shop.*
>
> *COUNSEL: You're saying that part of the reason you bought a handgun and silencer was to carry cash from the till of the pizza shop, still to the safe also in the pizza shop?*
>
> *APPLICANT: No, it's mainly, the gun was always at home, it was in the neighbourhood, I was in the neighbourhood, it wasn't the best neighbourhood as well. So, I had it at home and I knew I had, mainly, I had the drugs at home so I had the gun in the house, I never carried it everywhere with me but I always have the cash from the pizza shop in my house every night when I go from the shop to the house, because then - - -*
>
> *COUNSEL: You just told me that you take the cash from the pizza shop into a small safe that is also kept on the premises at the pizza shop?*
>
> *APPLICANT: Yes, I take - it was a little safe that I take every day, from the shop to the house.*
>
> *COUNSEL: Is there a particular reason why you're taking the cash from the pizza shop home every evening?*
>
> *APPLICANT: Because I was the owner, I can't leave the shop, I can't leave all the cash in the premises overnight. It's all the takings, daily takings that has to go to the bank and it has to be deposited to the bank the next day. After being robbed, I was always very cautious about similar situations, that's what led me to do such an action which I'm extremely shameful about.*
>
> *COUNSEL: You've referred a few times to being robbed, so were you robbed at the pizza shop, or where were you robbed?*
>
> *APPLICANT: I wasn't robbed at the pizza shop, I was robbed in the city, in Perth city when I was in - after clubbing because I was wearing a nice silver chain and I had a nice phone. So, people notice that, that they decide to try rob me, but which they were successful that night.*

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[84] transcript at 29.

COUNSEL: *Because of that incident, you were then cautious?*

APPLICANT: *Yes.*

COUNSEL: *You purchased a handgun and also a silencer?*
APPLICANT: *Yes.*

COUNSEL: *What was the point of purchasing a silencer as well?*

APPLICANT: *I didn't think too much about it, it was just there, as the offer, so I took it.*

COUNSEL: *You say you bought this handgun and silencer for protection, but you only kept it at your house?*

APPLICANT: *Yes.*

COUNSEL: *For example, while you're getting to and from work with this safe full of money, you didn't use it for protection at any of those times?*

APPLICANT: *No. Because it was in a tiny safe, you can't open it.*

COUNSEL: *If it's in a tiny safe and you can't open it, why did you need to take it home every night and why did you need a gun to protect it?*

APPLICANT: *Because I wasn't making the right decisions those days, I was most of the time really either, what you call, I was suffering from depression and I was making all the wrong choices at those times. And I was on drugs.*

COUNSEL: *Were* [*sic*] did *you keep the handgun then?*

APPLICANT: *It was in the safe. I had a bigger safe in my house so it was in there.*[85]

102. The above account of his reason for purchasing a handgun, silencer and ammunition further unravelled with the evidence of his pizza business partner, Mr Don, whose evidence in cross-examination was:

COUNSEL: *Did you have a process, when he was working in the pizza business with you, in relation to what you would do with the cash that was in the tills at the end of the evening?*

WITNESS: *No, actually like the – do you mean the shop cash?*

COUNSEL: *Yes*

WITNESS: *No, the shop cash all – I handle the things, so he didn't handle any money thing in the shop.*

COUNSEL: *Okay?*

WITNESS: *In the end my wife handled the shop, all the cash and the accounts.*

COUNSEL: *Okay. So at the end of the day when you're closing up the shop for the day, what would you do with the cash that's in the till then, or the cash in the shop?*

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[85] transcript at 30–31.

WITNESS: *Like all the cash, we count it, I mean it is a – settle down all the accounts in the shops, so me or the person who closing and he – they put in whatever cash we earned that day and we envelope and give it to my wife and she going to deposit to the account straight away.*[86]

103. I then sought further clarification from Mr Don on this point as follows:

TRIBUNAL: *Each evening after the time the shop closes, could you just explain again what happened to the cash that was in the till?*

WITNESS: *Yes. So what we normally doing, so I'm the one who taking cash to home because my wife, she's the one who do all the accountant things.*

TRIBUNAL: *Right. So sorry, just stopping you there?...Your evidence is that you, each evening, took the cash home to your house?*

WITNESS: *Yes, correct.*

TRIBUNAL: *All right. Thank you. And was that the case all the time?*

WITNESS: *Yes, all the time, and the things happened for the* [the Applicant]*, that time, I'm in Sri Lanka, me and my family in Sri Lanka.*

TRIBUNAL: *Yes?*

WITNESS: *That time we miss around $1500-something, but I don't know what happened to that, maybe he got it with him that time.*

TRIBUNAL: *So when you were in Sri Lanka do you know who took the cash home?*

WITNESS: *Yes, I supposed to ask* [the Applicant] *to do that one and deposit to the account.*

TRIBUNAL: *Yes. So did - - -?*

WITNESS: *But when I went to Sri Lanka, after a few days the police caught him, I think.*

TRIBUNAL: *Okay. So that was only in December or around the November 2019, was it?*

WITNESS: *Yes, I went around – I think last week of November I went to Sri Lanka and he caught first week of December, I think.*[87]

104. The Applicant's counsel in re-examination immediately after the above exchange asked Mr Don when he had gone to Sri Lanka:

COUNSEL: *Mr Don, just so it's clear to me, so you went to Sri Lanka in late November, early December 2019?*

WITNESS: *Yes.*

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[86] transcript at 61–62.

[87] transcript at 63–64.

COUNSEL: *And sorry, just so I'm clear, who would take the money from the shop each evening?*

WITNESS: *Yes, because – yes,* [the Applicant] *was the one took the money that time because I asked – I went only for a couple of weeks so I ask him to collect the money and deposit once, but like normally what we're doing, like we're collecting and we – like we're going two, three times in a week because if we're not going every day into bank to deposit.*

…

COUNSEL: *So your - - -?*

WITNESS: *Yes, I think he collect…*

COUNSEL: *So your evidence - - -?*

WITNESS: *He didn't deposit, that week, any money. What I remember he didn't deposit any money in that week, I think when we count the shop money we miss around 1,500-something, $1,500.*[88]

105. Mr Don's evidence was also that the cash taken by the pizza shop was not significant because most people paid by credit card.[89] I also asked Mr Don about the safe at work to which the Applicant had referred in his evidence:

TRIBUNAL: *… did you have a safe at work?*

WITNESS: *No, we don't – we have that but we not keep in there.*

TRIBUNAL: *Did you have some sort of locked box or security or a little safe at work?*

WITNESS: *We got from the – early on, we're not using that one, we didn't use that one for a while.*

TRIBUNAL: *Did you use it at all?*

WITNESS: *We didn't use for that.*

TRIBUNAL: *And did – as far as you're aware did the applicant ever take that safe home with him at the end of the day?*

WITNESS: *No, that's a big one, he can't carry that one.*[90]

106. I am satisfied, as Maclean DCJ was, that the Applicant had purchased the handgun, "*as a tool in* [his] *illicit business*", (see [50] and [59] above) and that his claim that he purchased the handgun to protect cash that he carried home from the pizza shop is a fabrication.

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[88] transcript at 64.

[89] transcript at 65.

[90] transcript at 65.

107. In relation to the factors identified by the Applicant as indicating that he is a low risk of reoffending, I find:

(a) The claims referred to in [64] and [65] above are, for the reasons set out above, false.

(b) In relation to the claim referred to in [66] above, while he may have been the subject of, or witnessed, family violence as a child, I do not accept that his violent actions (presumably on 5 December 2019) were "*protective instinct when* [he] *use*[d] *to defend* [his] *mother* from [his] *drunken abusive father'*. His actions on that night had nothing to do with him "*protecting*" anyone and were far from instinctive. They were calculated actions over an extended period for the sole purpose of recovering a drug debt through violence, threats and the use of an illegal weapon. Further, as with many of the Applicant's submissions, this claim looks only at the offence of demanding property by oral threats. It overlooks the other serious offences of which the Applicant has been convicted. The array of offensive and potentially lethal weapons found by police on their search of the Applicant's residence on 6 December 2019 (see [10] above) is hardly indicative of a non-violent protector as he submits. They are clearly indicative of the Applicant being a violent person. His assertion that he is "*not a violent person*" flies in the face of the evidence and even his own admission that he has a substantial criminal record and that his violent offending is "*very serious"* (see [34] above).

(c) I accept, as Maclean DCJ did, that at the time of the 5 December 2019 offence, the Applicant was under various stresses including financial and matrimonial stresses, as well as stress caused by family expectations. It is not clear how long these factors had been in play before his first offence in February 2019 which resulted in his conviction for being armed in public. I find, however, that, contrary to his claim that the serious offence that he committed on 5 December 2019 was an instinctive, protective reaction, there was a significant degree of forethought on the Applicant's part. The actions that night were those of a drug dealer recovering a drug debt with the use of an illegal handgun and serious threats of violence (albeit the Applicant claims the debt was owed to Burton). There was nothing spontaneous or reactive about his actions that night.

(d) The lack of spontaneity in his actions that night is given further weight by what the police found the next day when they searched the Applicant's home. The array of weapons and other items found by the police (see [10] above) are indicative of a serious drug dealing operation.

(e) The Applicant has claimed remorse for his offending. I have no doubt that the Applicant has remorse for the situation in which he now finds himself as a result of his offending. His claims of remorse, however, are diminished by his continuing to deny the facts surrounding his offending. Even as recently as his 31 May 2021 statement[91] (upon which the ASFIC appears to be substantially based), the Applicant was still making the claims referred to in [64] to [66] above which, for the reasons set out above, I reject.

(f) The Applicant has undertaken a significant number of courses since he has been in prison and detention (see [77] above) and I accept his claim that he has cut ties with the negative contacts that he had when he was taking drugs and offending. I do note that in that regard the Applicant has been in custody since his arrest on 6 December 2019 so the opportunity to maintain those contacts has been restricted.

(g) The Applicant's involvement in drug programs and his involvement with NA are positive.

(h) The evidence also indicates that the Applicant's behaviour in prison has been without fault and that he has attracted positive assessments by the authorities while incarcerated (see [79] above).

(i) I also take account of Maclean DCJ's comment that the Applicant had good prospects for reform and was a low risk of reoffending and of the fact that the PRB granted the Applicant parole. In relation to the PRB granting parole, however, I repeat the observations that I made in ***Peterson*** *and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[92] at [75]–[77]. While the parole conditions would apply to the end of the Applicant's sentence (5 February 2022),[93] once the parole term finishes the Applicant will not be subject to any supervision or

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[91] R1, G17/286.
[92] [2020] AATA 1256.
[93] R1, G14/211.

control. As I noted at [76] of *Peterson* in relation to the comfort that PRB can take by imposing conditions on parole:

> *This Tribunal does not have the benefit of those comforts when assessing whether an Applicant is an acceptable risk. Once an applicant's visa is restored, the applicant is released free and unconditionally back into the community.*

(j) The Applicant has given evidence that he intends to go back into the pizza shop business and even has plans to expand into importing Sri Lankan produce (referring specifically in his evidence to the importation of Sri Lankan mud crabs).[94] These are obviously positive sentiments that, if followed through, may reduce the likelihood of the Applicant reoffending.

(k) The support that the various friends and the former business partner who provided statements and gave evidence is also a positive protective factor when considering the likelihood of the Applicant reoffending. The only caveat to that support is that in a number of cases, it seems to have been given without a full knowledge of the extent and nature of the Applicant's offending. That was particularly so in the case of Ms Anderson who had clearly been misinformed by the Applicant about the circumstances of his offending. Ms Anderson did, however, say that her view of the Applicant did not change even after the facts of the 5 December 2019 offence as set out in the Statement of Material Facts were read to her at the hearing.[95]

(l) It also must be borne in mind, as the Minister noted in the MSFIC, that this support and these friends were present in the Applicant's life when he engaged in drug and alcohol abuse and crime. While I am sure that all of those pledging support to the Applicant mean well and are sincere, their support in the past did not prevent the Applicant from offending and there is little to suggest that if that same support were provided in the future it would prevent, or at least help prevent, the Applicant from offending.

108. The Minister notes that the Corrective Services Parole Assessment prepared based on an interview with the Applicant on 23 November 2020 concluded that the Applicant "*presented with little insights in the impacts his actions, and specifically the use of a firearm, had upon*

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[94] transcript at 16–17.

[95] transcript at 76.

the victims".[96] That report also identified the Applicant as engaging in victim blaming and failing to take responsibility or show remorse for his offending.[97] The same attitudes were evident in the Applicant's evidence at the hearing and his statement of 31 May 2021 wherein he continued to claim that the victim of the offence committed on 5 December 2019 had, in effect, caused the events of that night by threatening to rape and kill his associate Burton's grandmother (see [64] above). That attitude and denial of responsibility does not augur well for the Applicant's future conduct. It also makes his repeated assertions of having accepted responsibility for his criminal conduct and remorse questionable.

109. On the positive side for the Applicant, I accept that he loves his children and appreciates that if he were to reoffend it is highly likely that he would be deported and cease to have contact with or have any meaningful involvement in his daughters' lives. That is clearly an incentive for the Applicant not to return to a life of drug and alcohol abuse and crime.

110. I assess the likelihood of the Applicant engaging in criminal or other serious conduct as moderate.

111. While the likelihood of the Applicant engaging in criminal or other serious conduct is moderate, the harm that would be caused if the Applicant were to repeat the offending and conduct that he has engaged in in the past is serious. I find that the first primary consideration, the protection of the Australian community, weighs against revocation of the cancellation of the Applicant's visa and that moderate to heavy weight should be given to it.

Second primary consideration: Family violence committed by the non-citizen (para 8.2)

112. The Minister says that there is no relevant evidence in respect of this issue and that it therefore is neutral.[98] Similarly the Applicant submits that, as there is no evidence going to this consideration, it should be given neutral weight.[99] Rather than determining the consideration to be neutral, I will, in line with para 6 of Direction 90 (see [28] above), treat this consideration as not relevant.

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[96] R2, SG1/2.
[97] R2, SG1/4.
[98] MSFIC para 34.
[99] ASFIC para 59.

Third primary consideration: The best interests of minor children in Australia (para 8.3)

113. Paragraph 8.3 of Direction 90 provides:

> *(1) Decision-makers must make 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 a child affected by the decision.*
>
> *(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to ... not revoke the mandatory cancellation of the visa, is expected to be made.*
>
> *(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.*
>
> *(4) 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.*

The parties' submissions

The Applicant

114. The ASFIC identified four minor children as being relevant to this consideration. They were the Applicant's daughters aged three and five, a godson aged five (**child 1**) and the four-year-old son of a friend (**child 2**).[100]

115. In his supplementary statement dated 16 August 2021 the Applicant identified five other children as being relevant.[101] They ranged from 18 months to seven years of age.

116. The Applicant said in A2 that he has a close relationship with child 1 and two of the five additional children he identified in his supplementary statement. He said that:

> *My relationship with these children has particularly developed, given the strong and ongoing friendship with at least one of their respective parents.*

117. He then referred to his friend Ms Anderson and her two children with whom, he said, he will live if released into the community.[102] He said that he "*will provide him with emotional and practical assistance as a member of the household*".

118. He said that if he is allowed to stay in Australia, he will "*play an uncle role*" to the five children identified in the supplementary statement and that "[g]*iven that I enjoy a very close relationship with at least one of their respective parents, there is a real prospect that I will see the children frequently enough in the community".* He conceded that he does not play any parental role in relation to these children.

119. In closing, Dr Donnelly described the Applicant's relationship, or potential relationship with these children as follows:

> *… And I think it can be broadly said that a finding could be made that it's in the best interests of those children the* [A]*pplicant remain in Australia so he can maintain that emotional enrichment of their lives. As I think he said and was unchallenged on that he wanted to play an uncle role to those children, and that in fact to some of those children he had in fact played an uncle role.*[103]

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[100] ASFIC para 61.

[101] A2, para 32.

[102] (As noted above at footnote 66, this is contrary to the claim in the ASFIC that he would reside with Mr N.)

[103] transcript at 89.

120. At that point I asked Dr Donnelly how, in an objective sense, it would be in those children's best interests for the Applicant to be allowed to stay in Australia. The Applicant's evidence and submissions had, in my view, been looking at the issue from the perspective of what the Applicant wanted in his relationship with these children, not from the perspective of the best interests of the children, which is the relevant perspective for the purpose of para 8.3 of Direction 90. Dr Donnelly's response was:

> *… No, I accept that. I think that the evidence is - unchallenged evidence, not just of the* [A]*pplicant but the parents of the children that were called to give evidence as independent witnesses have said that they wish him to play an uncle role in relation to those children and he's played that kind of role partially in the past to some of those children.*
>
> *…*
>
> *We certainly don't say, and I don't cavil with the proposition that very heavy weight should be given to those children, because of course he is not the father and there's no evidence that he's proposing to play a parental role to those children in the future.*
>
> *But there is evidence that that was unchallenged for example that the applicant is going to live with Wendy Anderson if he gets his visa back, and the evidence was that he would provide practical assistance to those children in his capacity as their uncle because he'd be living there…*[104]

121. Mr Buckenara, the father of two of the children identified by the Applicant also gave evidence that the Applicant "*was like an uncle to*" the children.[105]

122. Mr Don, the Applicant's former pizza business partner and the father of the Applicant's godson, gave evidence that he had made the Applicant his son's godfather:

> *Because he's my school friend and he's so friendly to my family, so we – normally in my background like we're selecting person as a Godfather who's normally close to my family and who is normally following the Catholic – he used to go to church earlier, so that's why I choose to give him.*[106]

123. Ms Anderson's evidence was that she had an 18-year-old son to whom the Applicant was "*like a father figure*"[107] and with her three year old, the Applicant "*was there when he was born, and has a great relationship with him too. They still communicate on the phone*…"[108]

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[104] transcript at 90.
[105] transcript at 79.
[106] transcript at 58.
[107] transcript at 71.
[108] transcript at 71–72.

The Minister

124. The Minister accepts that this factor weighs in favour of revocation of the cancellation of the Applicant's visa, but says that it does so only to a limited extent, because:

(a) the Applicant's daughters' mother fulfils the parental role;

(b) the mother of the Applicant's daughters does not wish to support the Applicant in these proceedings;

(c) the relationship between the Applicant and the relevant children other than his biological children is non-parental, and there is no evidence that the parents of those children are not caring for them in an appropriate way; and

(d) there is no evidence to suggest that the Applicant would not be able to maintain contact with any of the children via electronic means.[109]

Consideration

125. While I accept that the Applicant may have good relationships with the children other than his daughters to whom he refers, that, of itself, does not equate to it being in those children's best interests that the Applicant stays in Australia. In relation to the factors identified in para 8.3(4) of Direction 90, the relationship with those children is not parental, the children seem to have been able to maintain contact with the Applicant while he has been in prison and detention, others appear to be fulfilling parenting roles and there is no evidence that the children would be adversely impacted if the Applicant were to be removed.

126. While this consideration, insofar as it relates to children other than the Applicant's daughters, weighs in favour of revocation of the cancellation of the Applicant's visa, only minor weight can be given to it for the reasons set out above.

127. In relation to his daughters, the Applicant was not living with his daughters during the period leading up to his offending. I do accept that he did have regular and meaningful contact with his daughters up to the time of his arrest. His evidence in his statement of 16 August 2021 was that following his separation from the girls' mother in 2017, he visited the girls weekly

[109] MSFIC paras 37.1–37.4.

and spoke to them several times a week (if not daily) by phone.[110] His uncontested evidence was that since his incarceration he has had regular telephone contact with his daughters (supported by his ex-partner) who also visited him in prison.[111]

128. It is unfortunate that the Applicant's daughters' mother declined to give a statement in these proceedings. At para 63 of the ASFIC the Applicant advises that "*the Applicant's former partner does not wish to support the Applicant's proceedings before the Tribunal*". His evidence was that her attitude was that he had got himself into this situation and it was up to him to get himself out. I do not draw any adverse inference in relation to the Applicant's relationship with his daughters from his ex-partner's refusal to support him in these proceedings.

129. I am conscious of art 3 of the United Nations Convention on the Rights of the Child[112] (**CROC**) which provides:

> *1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

130. I am also conscious of the preamble to the CROC which states:

> *... the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,*
>
> *Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding...*

131. My assessment is that the best interests of the minor children, particularly the Applicant's daughters, would be served by the Applicant being allowed to stay in Australia and that moderate weight should be given to this third primary consideration.

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[110] A2 para 36.

[111] A2 para 37.

[112] Convention on the Rights of the Child, opened for signature 2 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Fourth primary consideration: Expectations of the Australian community (para 8.4)

132. Paragraph 8.4 of Direction 90 relevantly provides:

> *(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 of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.*
>
> *(2) In addition ... 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 would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:*
>
> *(a) acts of family violence; or*
>
> *(b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
>
> *(c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/ material exploitation or neglect;*
>
> *(d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or*
>
> *(e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or*
>
> *(f) worker exploitation.*
>
> *(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 the particular case.*

133. The Tribunal also refers to the principles set out in para 5.2 of Direction 90 as set out in [27] above.

134. As noted at [25] above, Direction 90 superseded Direction 79 on 15 April 2021. Senior Member Morris in ***NTTH*** *and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[113] at [194] noted that the provisions of Direction 90 contain generally similar wording to the corresponding provisions in Ministerial Direction No 65[114] (**Direction 65**), the predecessor to Direction 79. Those corresponding provisions in Direction 65 were considered by the Full Court of the Federal Court of Australia in ***FYBR*** *v Minister for Home Affairs*.[115]

135. Senior Member Morris at [195] and [196] of *NTTH* summarises the view expressed by the Full Court in *FYBR* and the adoption of some of the language of the judgment in *FYBR* into Direction 90 as follows:

> *195. It was the Court's view that it is not for a decision-maker to make his or her own personal assessment of what the 'expectations' of the Australian community may be. In this respect, the expectations articulated in the Direction are deemed — they are what the executive government has declared are its views, not what a decision-maker may derive by some other assessment or process of evaluation.*
>
> *196. It is significant that the new Direction imports the statement that the expectations of the Australian community are to be considered as a 'norm', which I take to be an acknowledgement of the approach taken by the plurality of the Court in FYBR. ...*

136. I respectfully agree with Senior Member Morris. In *Pattison and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs,*[116] I summarised the effect of the Full Court's judgment in *FYBR* and the current state of the law as follows:

> *156. ... The Full Court, in effect, found that the narrow approach taken by Mortimer J in YNQY and by Perry J in FYBR is the correct approach. That is the approach that the proper characterisation of this consideration is a 'kind of deeming provision' – expressing "an expectation deemed by the government to be held by the Australian community" (FYBR (FC) at [61] and [80] per Charlesworth J; see also Stewart J at [89]). A thorough analysis of the Full Court decision in FYBR (FC) is set out by Member Burford at [162]-[170] in her decision in Rehman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Rehman). See also decisions of the Hon. John Pascoe AC CVO, Deputy President in Hovhannisyan and Minister for*

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[113] *NTTH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1143.

[114] Minister for Immigration and Border Protection (Cth), *Direction No 65: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* (22 December 2014).

[115] [2019] FCAFC 185; (2019) 272 FCR 454.

[116] [2020] AATA 3953.

Immigration, Citizenship, Migrant Services and Multicultural Affairs at [77]-[78].

157. *Special leave was sought to appeal the decision in FYBR (FC). On 24 April 2020 the High Court (Kiefel CJ and Keane J) refused special leave.*

158. *Justice Stewart in FYBR (FC) found:*

> 89. *It is therefore to be expected that the Government of the day may wish to set the norms by which decisions to refuse or cancel visas are made. Where those norms are expressed, at least in part, as reflecting "community expectations" then, in that sense, they might accurately be understood as "deeming" what the community expectations are. That is because, as indicated, as a matter of practical reality there is no one or even necessarily dominant set of community expectations in this field.*
>
> 90. *However, it is not to be expected that the Government of the day would seek, via the device of "community expectations" or otherwise, to dictate to the statutory decision-maker the outcome of a visa refusal or cancellation in any particular case. That would be inimical to the process of decision-making that has been set up under the Migration Act and it would constitute unlawful dictation to the decision-maker: Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577 at 590-591 per Bowen CJ and Deane J; Bread Manufacturers of NSW v Evans [1981] HCA 69; 180 CLR 404 at 429-430 per Mason and Wilson JJ; CPCF v Minister for Immigration and Border Protection [2015] HCA 1; 255 CLR 514 at [37] per French CJ and [292] per Kiefel J.*
>
> 91. *The above contextual factors lead to two guiding considerations to the proper construction of Direction 65. First, "community expectations" as expressed normatively are what the Government says that they are, even though in actual fact if they were ascertainable community expectations might be quite different. Second, "community expectations" as expressed by the Government do not speak to the outcome in any particular case – they are to be understood and applied normatively.*

159. *Justice Charlesworth also observed:*

> 75. *Having regard to all that is said above, cl 11.3 should be understood as expressing a deemed community expectation that all persons who have committed serious criminal offences giving rise to character concerns should have their visa applications refused. The nature of the character test is such that the deemed expectation will arise in most if not all cases falling for consideration under s 501(1) of the Act, having regard to the nature and seriousness of the non-citizen's conduct, assessed in accordance with cl 11.1. The text of the clause emphasises that it may be appropriate to act in accordance with that expectation, so anticipating a class of cases in which it may not be appropriate to do so.*
>
> *…*
>
> 79. *…The Tribunal must in all cases determine whether it is appropriate to refuse to grant the visa. In an appropriate case, the Tribunal may make*

a decision that does not give effect to community expectations as the government has assessed them to be. In such a case, the decision-maker would depart from the relative ascription of weight for which cl 8(4) "generally" provides, as he or she is permitted to do. Read as a whole, the reasons of the primary judge should not be understood as suggesting otherwise.

160. Member Burford put it in Rehman as follows:

173. It follows that in deciding whether or not to revoke a cancellation decision, the Tribunal must have due regard to the statement of the Government's view deeming the expectations of the Australian community to be that the Applicant, having committed a serious crime, should not hold the visa.

Those expectations remain a primary consideration to which appropriate weight must be given. As expressed, or "deemed" in the Direction, they weigh against revocation with respect to "serious crimes".

174. However, it remains for the Tribunal to determine what constitutes appropriate weight to be given to this consideration in the ultimate decision. This will depend on the Tribunal's assessment of the totality of the relevant considerations including the primary and other consideration.

(Footnotes omitted.)

137. Due to the application of the "*norm*", as it is now referred to, in para 8.4(1) of Direction 90, and the deeming operation of the corresponding Direction as found by the Full Court in *FYBR*, this primary consideration weighs against the revocation of the cancellation of the Applicant's visa. I must, however, determine what weight should be given to this consideration. Little guidance is provided by Direction 90. I sought and received submissions from the parties on that issue.

138. The issue with apportioning appropriate weight to this consideration is the identification of the factors which are to be taken into account in the weighing exercise. A number of cases and Tribunal decisions have looked at considerations such as the seriousness of the non-citizen's offending, the antecedents and personal circumstances of the non-citizen and the impact that his or her removal would have on the community. These are, however in most cases, factors taken into account in assessing the other considerations under Direction 90. By taking these factors into account in giving appropriate weight to this consideration, is the decision-maker in effect "*double counting*"?

139. The Applicant's submissions, received on 21 August 2021 were to the following effect:

(a) There is clear overlap between the Primary Considerations related to the protection of the Australian community and the expectations of the Australian community. The Applicant identified the common factors that Direction 90 indicates are to be taken into account in both considerations.

(b) Firstly, any limitations on the scope of the discretionary power must be derived from the subject matter, scope, and purpose of the legislation.[117]

(c) Secondly, the authorities recognise that the protection of the Australian community lies at the heart of the discretionary power to cancel the visa of or deport a non-citizen convicted of serious criminal offences.[118] That purpose undoubtedly applies to the statutory power under s 501CA(4) of the Act.[119]

(d) Thirdly, s 501 of the Act is designed to protect the community from criminal or other undesirable conduct and to permit the Minister to give effect to what might loosely be described as community expectations that perpetrators of such conduct, should not be permitted to remain in Australia.[120]

(e) Fourthly, in the context of decisions made under s 501 of the Act, double counting a consideration can lead to the ultimate decision being infected by jurisdictional error.[121]

(f) Fifthly, where a matter is relevant to two or more mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously.[122]

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[117] Citing *Minister for Immigration and Multicultural Affairs v Ali* [2000] FCA 1385; (2000) 106 FCR 313, at 324 [35], citing *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, at 39–40, per Mason J.

[118] Citing ***Djalic*** *v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 151; (2004) 139 FCR 292 at [68].

[119] Citing ***Gaspar*** *v Minister for Immigration and Border Protection* [2016] FCA 1166; (2016) 153 ALD 338 at [38].

[120] Citing *Djalic* at [71].

[121] Citing *Williams v Minister for Immigration and Citizenship* [2013] FCA 702; (2013) 136 ALD 299.

[122] Citing ***Bale*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646 at [26]; ***Hodgson*** *v Minister for Immigration and Border Protection* [2017] FCA 1141 at [40]; ***RZSN*** *v Minister for Home Affairs* [2019] FCA 1731 at [67].

(g) Sixthly, it must be borne in mind that the requirement that a statutory discretion is exercised reasonably is sourced in the implication that Parliament intended that it be so exercised.[123]

(h) The statutory power in question under s 501CA(4) of the Act provides that the decision-maker may revoke the original decision if, inter alia, the Minister is satisfied that there is another reason why the original decision should be revoked.

(i) The text of the impugned statutory power says nothing of direct relevance concerning the double counting point nor does the context in which the statutory provision appears assist in resolving the double counting point.

(j) As for purpose, it would appear to be uncontroversial that a fundamental object underlying s 501CA(4) of the Act is to give effect to the important function of protecting the Australian community. However, the statutory effect of s 501CA(4)(b) of the Act requires a decision-maker to balance competing purposes involving both the Australian community and individual considerations associated with a non-citizen specifically.[124]

(k) Accordingly, the legislation's subject matter, scope, and purpose do not specifically resolve the double counting point. However, on one view, it is clear that the fundamental purpose concerning ss 501(3A) and 501CA(4) related to the protection of the Australian community is resolved by the decision-maker relevantly applying para 8.1 of Direction 90 (i.e. being the primary consideration specifically dealing with the protection of the Australian community).

(l) Given the preceding context, there is no necessity to consider relevant considerations under para 8.4 (expectations of the Australian community) to the extent those considerations have already been addressed under para 8.1 (dealing with the primary consideration of protection of the Australian community).

(m) In other words, a fundamental purpose of the impugned legislation (i.e. protecting the Australian community) has been considered under para 8.1 of Direction 90; there

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[123] *Citing Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 at [23]–[26], [29] (French CJ), [63] (Hayne, Kiefel and Bell JJ) and [88]–[89] (Gageler J) and at [65]–[66], (Hayne, Kiefel, and Bell JJ).

[124] Citing *Gaspar* at [38].

being no necessity to repeat the process under para 8.4. Expressed differently, it could fairly be said that the expectations of the Australian community consideration under para 8.4 are largely subsumed within para 8.1 of Direction 90.

(n) Having considered the relevant criteria under para 8.1 (protection of the Australian community), a decision-maker should not be permitted to repeat taking into consideration again those matters under para 8.4 (expectations of the Australian community). To do so would be, as so properly characterised, double counting.

(o) In effect, double counting would appear to be acting contrary to the rules of reason and justice. That is to say, a particular factor is being held against the non-citizen not once, but twice. This would contravene the implied restraint that the repository reasonably exercises the statutory power.

(p) Given the preceding, the relevant considerations reflected in para 8.4 should not be considered in circumstances where they have already been held against the non-citizen under para 8.1. To do so would be legally unreasonable.

(q) If that above is not accepted, the Tribunal should apply the principle outlined at [26] in *Bale*:

> *Where a matter is relevant to two or more mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously.*

(r) Applying *Bale*, where a matter is relevant to two mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously. In *EXT20 v Minister for Home Affairs*,[125] the Minister submitted that where a representation engages more than one consideration, the Minister is not required to assess that representation repetitiously under every consideration.[126]

(s) The Tribunal is permitted to ignore a consideration in circumstances where having regard to the impugned consideration would lead the decision-maker to engage in reasoning that is unlawful as a matter of law.

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[125] [2021] FCA 629 at [36].

[126] Citing *Bale.*

(t) Double counting would fit the description of legal unreasonableness, including, for example, being "*plainly unjust*" and "*arbitrary*".[127]

(u) It should also be kept in mind, with respect, that constitutional guarantees are concerned with substance and not form. The Minister must not "*do indirectly what is prohibited directly*".[128] The author(s) of Direction 90 appears to have assumed that double counting was permissible or otherwise did not turn their mind to the double counting point.

(v) The substance of the primary consideration dealing with the protection of the Australian community largely gives effect (at a lower level of abstraction or generality) to the criteria reflected under the primary consideration of expectations of the Australian community. Accordingly, and in summary, the Applicant makes two global submissions concerning the double counting point:

(i) Once the Tribunal has lawfully considered the full scope of para 8.1, it is impermissible for the Tribunal to have regard to those same considerations under para 8.4 (to the extent that they also apply under that latter primary consideration).

(ii) In the alternative, once the Tribunal has lawfully considered the full scope of para 8.1, the Tribunal is not required to take the matter into account repetitiously under para 8.4.

(w) The real question, with respect, is whether Parliament could reasonably have intended that a particular consideration (or sub-criterion) could repetitively be held against a non-citizen in circumstances where the statutory power in question involves human consequences.[129]

140. The Minister's submissions received on 24 August 2021 were to the following effect:

(a) The Tribunal is, by operation of s 499 of the Act, required to follow Direction 90.

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[127] Citing *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94; (2020) 277 FCR 420 at [137].

[128] Citing BSJ16 at [76].

[129] Citing ***Hands*** *v Minister for Immigration and Border Protection* [2018] FCAFC 225; (2018) 267 FCR 628 at [3].

(b) The statute bestows a wide discretion. Accepting that the protection of the Australian community is a central purpose behind s 501CA(4) (as the Applicant does), the Federal Court has also recognised (by reference to an earlier iteration of the Direction) that it is open to the Minister to make a statement of the Government's views as to the expectation of the Australian community and for the Tribunal to act on that statement.[130]

(c) In *FYBR* a majority of the Full Court authoritatively addressed the manner in which the Tribunal should address the expectations of the Australian community (in the context of the predecessor direction, which is in similar terms to clause 8.4 of the Direction).

(d) Direction 90 does not call for "*double counting*". The primary and other considerations under the Direction have distinct purposes. A factual matter (for instance, the applicant's criminal history) may be relevant for the purposes of the Tribunal assessing the protection of the Australian community, the expectations of the Australian community, and even considerations such as the best interests of the child, the impact on victims, or the strength, nature and duration of ties to Australia.

(e) That does not mean (in this example) that the Applicant's criminal history is being held against the Applicant in a manner contrary to the statutory purpose. As stated above, the Tribunal has a wide discretion, and is required to comply with the Direction.

(f) The Minister cites the passage in *Bale* quoted at [139(q)] above.

(g) His Honour's point was that there was no requirement for the decision-maker ("*usually*") to give repeat consideration to a particular matter where it might be relevant under more than one of the considerations under the direction.

(h) The Applicant's argument derives no support from *Bale*. Perram J appeared to be making the opposite point for which the Applicant contends. That is, that it is open for a decision-maker to take into account a factual matter for one, or more purposes by reference to the considerations under the Direction, but having taken the factual

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[130] Citing *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; (2016) 248 FCR 296 at [65] per Robertson J.

matter into account once, there is no need usually for that matter to be taken into account repetitiously.

(i) The above interpretation of the effect of Perram J's judgment is supported by the cases to which his Honour referred, in particular *Hodgson*. That interpretation was followed in *RZSN* at [53].

(j) Shortly stated, the Applicant's primary contention advanced in his supplementary submissions is not supported by *Bale*, or indeed any authority at all.

(k) In respect of the Applicant's alternative argument, as submitted above, it would be an error for the Tribunal not to consider both paras 8.1 and 8.4 in determining whether there is another reason to revoke the cancellation of the Applicant's visa. Nothing in *Bale* suggests that the Tribunal should not take into account the primary considerations listed in the Direction where relevant.

141. The Minister's submissions are, in my view, to be preferred. The approach proposed by the Applicant would, in effect, require the decision-maker, contrary to s 499 of the Act, to ignore specific factors identified by Direction 90 as being relevant. The other problem with the approach contended by the Applicant is that, by precluding consideration of factors that are relevant to other considerations, it leaves the decision-maker with little or nothing to consider in giving this consideration of the expectations of the Australian community weight. It significantly degrades the effect of this consideration which Parliament has deemed worthy of primary consideration status. That could not be the intent.

142. I also agree with the Minister's analysis of the Applicant's argument based on *Bale*. The language used by Perram J in the passage cited at [139(q)] above leaves open the very thing that the Applicant contends is prohibited, namely that the same matter can be taken into account by the Tribunal under more than one consideration. What his Honour is saying is that, having taken a matter into account under one consideration, the Tribunal does not commit legal error if it does not specifically refer to that matter in relation to another consideration. It has taken the relevant matter into account. There is nothing in his Honour's statement which could be taken as prohibiting the same matter being taken into account if

also relevant to another consideration. His Honour's language in fact suggests the opposite.[131]

143. In this case, given the principles stated in paras 5.2(1)–(3) of Direction 90 and the nature and seriousness of the offences, in particular the index offence which was calculated, committed over an extended period, involved a handgun and was, in effect, part of a larger criminal operation (albeit, according to the Applicant, not directly the Applicant's drug operation), moderate weight should be given to this consideration.

OTHER CONSIDERATIONS

144. Paragraph 9 of Direction 90 sets out the "*Other considerations*" to be taken into account as follows:

> *(1) In making a decision under section ... 501CA(4), other considerations must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):*
>
> *(a) international non-refoulement obligations;*
>
> *(b) extent of impediments if removed;*
>
> *(c) impact on victims;*
>
> *(d) links to the Australian community, including:*
>
> *(i) strength, nature and duration of ties to Australia;*
>
> *(ii) impact on Australian business interests*

International non-refoulement obligations (para 9.1)

145. Paragraph 79 of the ASFIC stated:

> *The Applicant has not made any claims which require assessment concerning Australia's international non-refoulement obligations, nor does the other available evidence indicate that such an assessment is necessary in this case. As such, this other consideration should be given neutral weight in this case.*

146. This was confirmed by Dr Donnelly in opening:

> *TRIBUNAL: Yes and I think in relation to the Christianity it was something that I was going to ask Dr Donnelly, it is the case, isn't it, that the applicant isn't seeking to raise a non-refoulement argument?*

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[131] See also *Filipovich v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 846 at [49].

COUNSEL: That's correct.[132]

147. Dr Donnelly made no further reference to non-refoulement.

148. The Applicant made references to his ability to practice his Christian faith in Sri Lanka. The purpose for which these claims were made was not clear. The Applicant did not suggest that religious persecution was the basis of a non-refoulement obligation being owed by Australia and, in any event, I do not find that to be the case. In his Supplementary Statement dated 16 August 2021, the Applicant said:

> *Indeed, I have not had considerable difficulties as a Christian when living in the country in the past. However, having carefully reviewed the DFAT Report, the persecution and ill-treatment of Christians appear to be a more recent phenomenon (which has occurred during my long-term residence in Australia). This claim is not something that I dreamt up to merely support my prospects of staying in Australia. I am a genuine Christian. I was unaware of what was happening in Sri Lanka concerning the persecution and discrimination of Christians (largely because I have adopted Australia as my home country).*[133]

149. Whatever the reason for the Applicant raising these claims, I have difficulty in accepting that, firstly the Applicant has strong Christian beliefs or, secondly, that even if he did (and wanted to practice Christianity in Sri Lanka), he would be prevented from doing so. The Applicant's evidence at the hearing in relation to his religious practice was contradicted to a significant degree by the evidence of his friend Mr Don, whose evidence was that the Applicant had not attended church for a number of years. Mr Don's evidence was that from 2016–2017 onwards the Applicant only went to church "*randomly*" and only went to church at Christmas and Easter.[134]

150. I am satisfied that there are no non-refoulement obligations owed by Australia to the Applicant and that non-refoulement is not a relevant a consideration.

Extent of impediments if removed (para 9.2)

151. Paragraph 9.2 of Direction 90 provides:

> *(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in*

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[132] transcript at 19.

[133] A2, para 50.

[134] transcript at 63.

establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

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

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

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

The parties' submissions

The Applicant

152. The Applicant has health issues. The Applicant has stated that he will be depressed and possibly suicidal without his children by his side. He states not being in Australia for his children will take him "*down a dark path with poor mental health and possible suicidal*".[135]

153. He claims that if he were to be returned to Sri Lanka, he would be considered a disappointment to his culture which "*might cause* [him] *to think that* [he] [has] *nothing to live for*".[136]

154. The Applicant's mother and two sisters reside in Sri Lanka. His mother has had a heart attack and the Applicant fears that she will not survive the "*heartbreak if he was to be removed from Australia and away from his children*".[137]

155. Since leaving Sri Lanka, he has not maintained contact with many of his family members or friends, and he will have little support if he is returned to Sri Lanka.[138]

156. The Applicant will face financial and emotional hardship upon returning to Sri Lanka due to his separation from his children, losing his business, and his relationship with his family in Sri Lanka.[139]

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[135] ASFIC para 81.
[136] ASFIC para 83.
[137] ASFIC para 84.
[138] ASFIC para 85.
[139] ASFIC para 86.

157. Contrary to what the delegate concluded, the Applicant will not have the benefit of economic welfare services. Further, there are considerable limits for citizens in Sri Lanka being able to access free healthcare. The Applicant cites Department of Foreign Affairs and Trade, *DFAT Country Report Sri Lanka* (4 November 2019) (**DFAT Report**). There is a real prospect that the Applicant will not be able to access appropriate healthcare for his ongoing mental health issues.[140]

158. The Applicant has given evidence that he is scared his mental health would deteriorate if removed to Sri Lanka, particularly being away from his children in Australia. This is likely to act as a significant impediment to the Applicant's prospects of reintegrating into Sri Lankan society.[141]

159. The evidence also shows that Sri Lanka has high levels of unemployment, which will also act as another impediment to the Applicant being able to find paid employment in that country.[142]

160. DFAT assesses that while no laws or official policies discriminate based on religion, adherents of religions other than Buddhism face a low risk of official discrimination from government authorities, which can affect their ability to practise their faith freely.[143] "*Accordingly, as a practising Christian, the Applicant faces a low risk of official discrimination from government authorities, impacting his ability to practice his faith freely; this is a matter that should be taken into account by the Tribunal in favour of the Applicant*".[144]

161. DFAT assesses that Christians face a low threat of violence from homegrown Islamic extremist groups. However, this could change if such groups were to expand in membership and strengthen their international links. The fact that the Applicant faces even a low threat of violence as a Christian is another matter that should be counted in his favour. In the

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[140] ASFIC para 89.
[141] ASFIC para 90.
[142] ASFIC para 91.
[143] ASFIC para 92.
[144] ASFIC para 93.

exercise of broad discretion, it is open for the Tribunal to give significant weight to even a small risk of harm in favour of the Appellant.[145]

162. The Applicant's mental health issues may be characterised as a disability, which provides further evidence that the Applicant may face discrimination in accessing employment and healthcare services in Sri Lanka.[146]

163. In totality, the Applicant will face very considerable impediments if removed to Sri Lanka. Although it is accepted that the Applicant is only 32 years of age and speaks Sinhala (i.e. Sinhalese language), he has ongoing mental health issues (which may deteriorate if he is removed from his children in Australia). The Applicant faces considerable difficulties obtaining employment given both his ongoing mental health challenges and the unemployment rate in Sri Lanka. Moreover, the Applicant will not be entitled to unemployment benefits in his home country. The evidence also shows that he will face considerable difficulties obtaining satisfactory healthcare services for his mental health issues.[147]

The Minister

164. The Tribunal should conclude that the Applicant will be able to gain employment upon his return to Sri Lanka. His perception of his own abilities is that he would be "*an asset to* [a] *company".*[148]

165. The Tribunal should take the Applicant at his word when he says he is a "*motivated and quick learner and when faced with challenges rise*[s] *to the occasion*".[149] The Applicant's business partner Mr Don, a person who could be presumed to have first-hand knowledge of the matter, stated that the Applicant has "*incredibly competitive management skills*".[150]

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[145] ASFIC para 95; Citing *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; (2017) 248 FCR 456.
[146] ASFIC para 96.
[147] ASFIC para 98.
[148] MSFIC para 45; citing R1, G7/74.
[149] MSFIC para 45; citing R1, G7/74.
[150] MSFIC para 45; citing R1, G17/267 para 13.

166. The Applicant has experience skills in different area of work which appear to be transferable to his home country.[151] It is therefore difficult to accept the Applicant's counsel's characterisation of his client as a disabled person who would face difficulty in accessing employment on that basis,[152] particularly given the Applicant's apparent belief that he is the only person in who can save his pizzeria business from failing.[153]

167. As to the Applicant's claim that he faces a risk of harm by reason of his status as a Christian in Sri Lanka, this is not a fear the Applicant expressed during the departmental phase of the proceedings despite him having legal representation at that time[154] nor is there any evidence to suggest that the Applicant has ever faced harm in Sri Lanka by reason of his faith in the past. The Applicant does not say anything about his faith at all in any of his statements to either this Tribunal or the department.

168. The Applicant's mental health issues are treated by prescription medication.[155] There is no expert evidence to support the claim that his mental health will deteriorate to the point that he will require treatment beyond prescription medication upon his return to Sri Lanka.

169. The problem with the Applicant's reliance on generalised country information in support of his claim that he will find it difficult to reintegrate into his home country is that there is nothing to suggest that he has attempted to determine whether he personally would face the issues he has identified.[156]

170. The Applicant's quotations from the DFAT Report are selective. For instance, the Applicant cites the sentence "*Many returnees have difficulty finding suitable employment and reliable housing on return*" but not the sentence that immediately follows that sentence which gives a different complexion to the relevant issue:

> *Those who have skills that are in high demand in the labour market are best placed to find well-paid employment. In 2016, the Sri Lankan Government undertook to recognise the educational and professional qualifications acquired by refugee returnees outside Sri Lanka. This involves obtaining an equivalence certificate;*

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[151] MSFIC para 45; R1, G7/74–76.
[152] Citing ASFIC para 96.
[153] MSFIC para 45; citing R1, G17/290 para 45.
[154] Citing R1, G17/245–246.
[155] MSFIC para 47; citing R1, G7/64.
[156] MSFIC para 48.

however, returnees continue to report delays in gaining recognition for foreign qualifications. The IOM provides eligible returnees with livelihood assistance and makes regular visits to monitor the welfare of returnees.[157]

171. The Minister acknowledges that the Applicant may face some difficulty in re-establishing himself due to his period of residence in Australia, however, this factor would only present as a short-term hardship and would not preclude resettlement.[158]

Consideration

172. At the time of Dr Donnelly opening, I sought clarification of the purpose for which the claims relating to the claimed restrictions on the Applicant practicing Christianity were raised:

> *TRIBUNAL:* *… one of the points I was going to ask you to clarify, by way of submission probably, is that there's no linking the claim of Christianity and potentially not being able to practice a religion to an impediment to the* [A]*pplicant establishing and maintaining a basic living standard akin to that which is enjoyed by other Sri Lankans.*
>
> *COUNSEL:* *I accept that within the meaning of impediments, yes, I accept that.*
>
> *TRIBUNAL:* *Because the impediments have to be – it's not just in general impediments, it has to be an impediment in establishing and maintaining a basic living standard with reference to health, social supports and the other three factors identified in the direction.*
>
> *COUNSEL:* *I accept what the* [T]*ribunal says.*[159]

173. In addressing the consideration of impediments if removed in closing, Dr Donnelly again referred to the Applicant wanting to practice Christianity and submitted that the Minister had not said "*anything much about the DFAT report being independent*".[160] The DFAT report, however, as the Applicant himself set out in the ASFIC, states that Christians face a low risk of discrimination and even a low threat of violence from homegrown Islamic extremist groups (see [160] and [161] above). Even if I were to accept that the Applicant now wishes to practice his Christian faith if he were returned to Sri Lanka, which I have trouble accepting, the evidence is that he faces only a low risk of discrimination. His own evidence

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[157] MSFIC para 50.1.

[158] MSFIC para 51.

[159] transcript at 19–20.

[160] transcript at 95.

was that he had practiced Catholicism growing up in Sri Lanka and that his family members in Sri Lanka (mother and two sisters) still practice their faith.[161]

174. Further, this consideration under Direction 90 requires the decision-maker to "*consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards*" in the context identified in sub-paras (a) to (c) (see [151] above). There was no explanation provided by the Applicant as to how, even if he were to face impediments in practicing Christianity (which the evidence does not establish), that would adversely impact his ability to establish and maintain a basic living standard.

175. The medical condition identified by the Applicant as being an impediment in his establishing and maintaining himself in Sri Lanka was his mental health condition which he identifies, generally, as being depression and anxiety. It was conceded by Dr Donnelly that, while the Applicant has been prescribed anti-depressants, he has not been diagnosed with any mental health condition[162] and that the Department of Justice Discharge Letter to GP[163] had not noted any diagnosis of a mental ailment. The following exchange took place at the hearing:

> *TRIBUNAL:* *… the discharge letter from the letter to GP, the discharge letter which appears at page 69, doesn't refer to him having been diagnosed with depression and I think the references to depression are the* [A]*pplicant, not surprisingly, reporting himself to be depressed by virtue of his incarceration and his separation from his family and children, which is almost - you would have to be somewhat odd if you weren't depressed by that but I don't know that it's actually a depression, as in a clinical depression diagnosed and treated.*
>
> *COUNSEL:* *Yes. I think that that's right, Deputy President.*[164]

176. In my view both parties' submissions were not entirely in line with, nor did they address, the specific consideration mandated by para 9.2 of Direction 90. The relevant consideration is whether, taking into account the Applicant's age and health (and the other considerations identified in sub-paras (b) and (c)), the Applicant would face an impediment or impediments in establishing and maintaining basic living standards in the context of the basic living

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[161] transcript at 21; transcript at 95.
[162] transcript at 84.
[163] R1, G7/69.
[164] transcript at 84.

standards that other citizens of Sri Lanka enjoy. The Applicant having access to the same medical and social benefits as other citizens of Sri Lanka does not go to the core consideration, namely, whether there would be impediments in him establishing and maintaining the relevant basic living standards. The mere fact that he might have access to the same level of medical and social benefits as other citizens does not mean that he will not face impediments because of his age and medical conditions, in establishing and maintaining basic living standards.

177. Similarly, the submission that the Applicant would not have access to the same sorts of medical and social supports and benefits in Sri Lanka as he would in Australia, including access to medication and treatment for any mental health condition, is not to the point. It may be that a lack of access to a particular treatment or medication may have a negative health impact that in turn causes the Applicant to be less employable or have some other impediment in establishing and maintaining a basic living standard (by Sri Lankan standards), however, the evidence to get to that conclusion (other than the Applicant's assertions to that effect) was, to put it mildly, thin.

178. Other than the Applicant presenting as depressed and anxious while he has been incarcerated, there is no medical condition identified by the Applicant that would be an impediment in his establishing and maintaining a relevant basic living standard. He is relatively young and there would be no language or cultural barriers to the Applicant establishing and maintaining himself to a basic living standard. He has family in Sri Lanka including his mother, two sister and uncles, aunties and cousins.[165] The Applicant claimed that these family members would not be able to provide any financial support and they would, as they had in the past, disown him because of his convictions and because he was unable to support his children.[166] The Applicant was not cross-examined in depth on these claims.

179. I accept that the Applicant will face some impediments in establishing and maintaining himself to a basic living standard. While not medically diagnosed, I accept that the Applicant does suffer from depression which would likely be exacerbated if he were to be sent back

[165] transcript at 21; transcript at 95.
[166] R1, G7/65; A2, 12, paras 46–47.

to Sri Lanka. It also appears from his uncontested evidence that he is unlikely to receive help from his family in Sri Lanka.

180. I note the Minister's acceptance that the Applicant would face impediments in establishing himself but that they would only be "*short-term*". That may well be the case, however, there was no basis or evidence put forward by the Minister to support the assertion that the impediments would be short-term. I note that Allsop CJ at [45] in *Hands* stated:

> *… The statements that he "may experience some emotional and psychological hardship" and "may experience short term hardship, [but] would be capable of settling in New Zealand without undue difficulty" are findings of fact simply incapable of being reasonably made by any decision-maker, there being no evidence at all to support them, and all evidence being to the contrary to a reasonable decision-maker.*

181. The same comment applies in the present case: see also *Swannick v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[167] at [21]–[22].

182. I accept that the Applicant will face some impediments in establishing himself to a basic living standard, primarily because of his depressed mood which is likely to be exacerbated by his separation from his children in Australia and the apparent lack of social and family support. Those impediments are not likely to be particularly significant and while this consideration weighs in favour of revocation of the cancellation of the Applicant's visa, only minor weight can be given to it.

Impact on victims (para 9.3)

183. Paragraph 9.3 of Direction 90 is as follows:

> *(1) Decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.*

184. Neither party made any submission on this consideration.

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[167] [2020] FCAFC 165; (2020) 280 FCR 559.

185. The wording of this consideration is materially the same as that of para 14.4 of Direction 79. As I noted in respect of the same provision in Direction 79 in *Nguyen and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[168] at [109]–[111] and in *Pokrywka and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[169] at [138]–[139], although para 9(1)(c) of Direction 90 and the heading to para 9.3 refer only to impact on victims, para 9.3(1) requires consideration of the impact of a decision not to revoke the cancellation of the visa on members of the community, including victims (emphasis added).

186. Insofar as a consideration broader than the impact on victims is required, then one aspect of the possible impact of the Applicant being permitted to stay (i.e. a decision to revoke the cancellation) has been dealt with under the first primary consideration, the protection of the Australian community. The impact of the Applicant's removal (i.e. a decision not to revoke) is also considered below in the consideration of the Applicant's links to the Australian community under para 9.4 of Direction 90 and in considering the best interests of minor children under para 8.3. Insofar as the impact on those members of the Australian community is to be considered, I have done so under those considerations.

Links to the Australian community (para 9.4)

187. Paragraph 9.4 of Direction 90 provides:

> *Reflecting the principles at paragraph 5.2, decision-makers must have regard to paragraphs 9.4.1 and 9.4.2 below.*

Strength, nature and duration of ties to Australia (para 9.4.1)

188. Paragraph 9.4.1 of Direction 90 is as follows:

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

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[168] *Nguyen and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 4171.

[169] *Pokrywka and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 5165.

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

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

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

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

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

The parties' submissions

The Applicant

189. The Applicant has immediate family members in Australia. The Applicant was in a relationship with an Australian citizen. They had two daughters now aged five and three years. The Applicant and his former partner ended their relationship. The former partner remains the primary parent of the children.

190. If the Applicant were returned to Sri Lanka, the Applicant's former partner would face practical and financial difficulties in not having the Applicant's support to take care of their children.

191. Multiple letters of support have been provided on behalf of the Applicant, including his ex-partner,[170] business co-owner, employees, and friends. These letters attest to the close relationship the Applicant shares with his children, his qualities as a father, as a friend, and as a community member.

192. The Applicant's ex-girlfriend states she has known the Applicant since July 2018. She describes him as a kind-hearted, caring, and hard-working person who is always willing to

[170] (Note: If the Applicant is referring to the mother of his daughters, as noted earlier, she advised that she did not support the Applicant and did not provide a statement.)

support and give advice to his friends, who he sees as his second family. She states that the offences committed by the Applicant are not an accurate reflection of the person he is.

193. The maker of another statement of support, Mr H, stated that the Applicant is a person of good character that has made some bad choices in recent times, that he is a family man who wants the opportunity of freedom to focus on his pizza business, his children, and to choose better company.

194. The Applicant's friend of 10 years, Ms R, referred to him as an honourable individual and a beloved father who she is proud to call her dear friend. Ms R stated that the Applicant is remorseful and accepts responsibility for his actions, and she asks that he is given a second chance.

195. The Applicant's friend of four years, Mr B, stated that the Applicant is a good and loyal friend who is an asset to Australia.

196. The Applicant's work history is:

(a) 2010 – Computer technician, Trax Technology.

(b) 2011 to 2012 – Warehouse hand, Campion Education.

(c) February 2013 to 28 December 2018 – Production manager – Cheeky Brothers Pizza.

(d) From 6 April 2019 – co-owner of Pizza Express Riverton.

197. The Applicant has resided in Australia for 12 years, having arrived as an adult of 20 years. The Applicant has developed ties through spending 12 years contributing to the community by his study, his employment, and his social connections.

198. If the Applicant is removed from Australia, he and his business partner in the pizza shop, will suffer the loss of employment and will lose the money they invested in the business. Due to changes in his partner's circumstances and the Applicant's incarceration, the business is struggling. However, if he returns to the business, he can help it grow, creating more jobs and expand the business as a great franchise.

199. The Applicant gave evidence at the hearing that he served at his church services, studied the Bible and helped with the church youth group for about three or four years.[171]

The Minister

200. The main impact on direct family members relevant to this consideration will be on the impact on the Applicant's two daughters. The impact on them will have been considered under the consideration of the third primary consideration, the best interests of children, and there is no need to "*double count*" that impact.[172]

201. The Tribunal should next consider the Applicant's length of residence in this country.[173] He has lived in Australia for approximately 12 years.

202. The end result of the above weighing exercise is that paragraph 9.4.1(2)(a) of Direction 90 weighs only slightly in favour of revocation.

203. The Applicant has provided statements from friends he has in this country. It can be accepted those people wish the Applicant to be able to continue living in Australia and would be emotionally impacted if he were removed. There is nothing to suggest that any of these people would face insurmountable hardship in the event of the Applicant's departure.

204. There is no evidence that non-revocation would have any impact on Australian business interests.[174] The pizza business referred to by the Applicant in his representations to the delegate is not a "*major project*" or "*important service*" that falls within this limb of Direction 90.[175]

205. The consideration weighs in favour of revocation but not to the point that it outweighs the primary considerations which weigh heavily against revocation.

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[171] transcript at 44.

[172] Citing ***WQRJ*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 736 at [78].

[173] Citing Direction 90 para 9.4.1(2)(a).

[174] Direction 90 para 9.4.2(3)

[175] Citing G7/64.

Consideration

206. The numerous statements and letters of support provided by the Applicant, along with the evidence of the Applicant and the others who gave evidence at the hearing, show that the Applicant has significant ties to members of the Australian community. The evidence shows that there would be an emotional impact and, in the case of his daughters for whom he provides financial support, financial impact if the Applicant were to be deported.

207. I agree with the Minister's submission in relation to potential impact on the pizza business (see [204] above) not being the sort of impact on Australian business interests to which para 9.4.2 of Direction 90 is referring. I also agree with the Minister's observation as to the value that can be placed on friends of the Applicant, albeit a significant number of friends, providing statements to the effect that they would rather the Applicant stays. As the Minister submitted, none of those who gave statements identified any financial hardship that would ensue if the Applicant were to be deported (with the possible exception of Mr Don).

208. I would also observe that there is limited value in friends giving statements to the effect that the non-citizen is not a person of a particular character when his criminal record and prior conduct clearly indicate that he is such a person. A number of the statements provided, and even the Applicant's own statements, asserted that the Applicant is not a person of bad character and is not a violent person. His record says otherwise, and by operation of the Act he is a person who fails the character test. He himself admits that he has a substantial criminal record and that his violent offending is "*very serious*" (see [34] above). It is not unreasonable to gauge a person by their conduct. A statement, undoubtedly provided with the best intent, which is based on the assumption that the Applicant is something other than what his conduct and criminal record show him to be, is of limited value.

209. The Applicant did not arrive as a child and has been in Australia for a relatively short time. The Applicant did, however, contribute to the Australian community through his employment, establishment of the pizza business and his work with youth through his church for several years.

210. It is clear that the Applicant has made significant social connections with members of the Australian community. The most significant connection that the Applicant has to the Australian community is his two daughters who are Australian citizens. I do not accept the Minister's submission that that connection cannot, or should not, be taken into account

under this consideration applying the principle set out in *WQRJ* (see [200] above). The paragraph of that decision to which the Minister refers applies the principle in *Bale* discussed above at [142]. The proposition that the Minister seems to be putting forward in citing that paragraph of *WQRJ* appears to be contrary to his argument as to the effect of the decision in *Bale* which, as the Minister contends (and I agree) does not support an argument that a matter cannot be taken into account under more than one consideration. In any event, the impact on the Applicant's children of his removal for the purposes of para 9.4.1 of Direction 90 is a slightly different consideration to the best interests of those children for the purposes of the third primary consideration under para 8.3 of Direction 90.

211. I find that the Applicant's ties to the community and the community's ties to him are real and that the members of his immediate family, his daughters, would be significantly impacted if he were to be removed from Australia. This consideration, links to the Australian community, weighs in favour of the revocation of the cancellation of the Applicant's visa. Minor to moderate weight should be given to this consideration.

THE WEIGHING EXERCISE

212. Direction 90 guides the decision-maker on how to apply the primary and other considerations. Paragraph 7 of Direction 90 sets out the way in which the relevant considerations are to be taken into account. It provides:

> *(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.*
>
> *(2) Primary considerations should generally be given greater weight than other considerations.*
>
> *(3) One or more primary considerations may outweigh other primary considerations.*

213. A number of cases have dealt with how the exercise of balancing the considerations is to be undertaken. While some of these cases were looking at that exercise under Direction 65 and Direction 79, the same considerations apply to the exercise required by Direction 90 which is materially in the same terms. I am guided by Colvin J's judgment in ***Suleiman*** *v*

Minister for Immigration and Border Protection[176] and the Full Court of the Federal Court judgment in *Minister for Home Affairs v HSKJ*.[177]

214. Colvin J's judgment in Suleiman was recently considered by Wigney J in *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[178] At [21] Wigney J cited [23] of Colvin J's judgment which was as follows:

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

215. Wigney J then observed at [22]:

> *It is the last sentence of this paragraph of Suleiman which has given rise to the issue in this case. That issue will be discussed in more detail later. It suffices at this point to note that, with the greatest respect to Colvin J, this analysis of paragraph 8 of the relevant direction tends to overcomplicate or over intellectualise the issue. More significantly, it may lead decision-makers into error. Paragraph 8 of Direction no. 79 is expressed in simple terms. Relevantly, decision-makers must take into account the primary and other considerations that are relevant to the individual case and, when it comes to weighing up the relevant considerations, have regard to three relevant principles: first, both primary and other considerations may weigh in favour of, or against, whether or not to revoke a cancellation of a visa; second, primary conditions should generally be given greater weight than other considerations; and third, one or more primary considerations may outweigh other considerations. It is difficult to see why any further elaboration of those simple principles or propositions is necessary or warranted.*

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[176] [2018] FCA 594; (2018) 74 AAR 545.

[177] [2018] FCAFC 217; (2018) 266 FCR 591.

[178] [2021] FCA 775.

216. I note that the third principle that Wigney J identifies is that "*one or more primary considerations may outweigh other considerations*". While he does couch this principle in terms of "*may outweigh*", the reference to a "*primary consideration*" potentially outweighing "*other considerations*" is perhaps ambiguous. When his Honour refers to "*other considerations*", is he referring to "*other considerations*" as that term is used in Direction 90 (i.e. Direction 90 para 9) or is he referring to the other considerations, both primary (i.e. Direction 90 para 8) and "other" (i.e. Direction 90 para 9) other than that primary consideration?

217. The other potential issue that Wigney J's use of the term "*other considerations*" raises, is that are we to take him as saying that one or more primary considerations (i.e. a consideration under para 8 of Direction 90) *only* can outweigh the "*other considerations*", even if you take his reference to "*other considerations*" as being to the other primary (Direction 90 para 8) considerations and the "*other considerations*" under para 9? I think not. I understand the weighing/balancing exercise to be one by which the decision-maker takes into account all of the considerations, primary[179] and other[180] (mindful of the fact that, generally, primary considerations are to be given more weight) and, having allocated a weight to each consideration, to place those that favour revocation of cancellation or the granting of a visa on one side of the scale and place those that weigh the other way on the other side of the scale and determine which category has the greater weight. I think that it is not correct to compare one particular consideration, such as the interests of minor children or impediments to establishing a living standard, and to say that one, usually protection of the community, outweighs that particular consideration. The exercise is not one of comparing any one consideration against another, it is an exercise of giving appropriate weight to each consideration and then balancing all of those which weigh in favour of revocation against those which weighing against revocation and deciding which category has the greater weight.

218. The Tribunal in *CZCV* at [164] summarised the legal position as follows:

> *Thus, when read together, these passages from Suleiman and HSKJ are consistent with guidance to be given in the express wording of Direction no. 65, specifically, in paragraphs 8(3) and (4). The Tribunal must ensure, that in considering the primary and other considerations in Direction no. 65, that it must undertake a genuine*

[179] Direction 90 para 8.

[180] Direction 90 para 9.

> *weighing exercise during which it is not automatically assumed that primary considerations will always weigh more than other considerations (as the use of the word "secondary" tends to suggest). Although, as a general rule, primary considerations should generally be given greater weight, the Tribunal must not fetter itself against giving an other consideration greater weight than a primary consideration, if in the circumstances of the case it is correct and preferable to do so. ...*

219. I adopt the approach directed by the above cases.

220. Looking at the first primary consideration, the protection of the Australian community, for the reasons set out above (see [111]), I find that this consideration weighs against the revocation of the cancellation of the Applicant's visa and that moderate to heavy weight should be given to it.

221. The second primary consideration, family violence, is not relevant in this case.

222. The third primary consideration, the best interests of minor children, for the reasons set out above, would be served by the Applicant being allowed to stay in Australia and moderate weight should be given to this third primary consideration.

223. The fourth primary consideration, the expectations of the Australian community, as it must, weighs against the revocation of the cancellation of the Applicant's visa. For the reasons set out at [143] above, moderate weight should be given to this consideration.

224. In relation to the relevant "*other considerations*" identified in Direction 90, the consideration of the extent of impediments weighs in favour of revocation of the cancellation of the Applicant's visa, however, for the reasons set out at [182] above, only minor weight should be given to it.

225. The consideration of the impact on victims as directed by para 9.3 of Direction 90, insofar as it encompasses the impact on members of the community other than victims, is covered by considerations of other paragraphs of Direction 90, and insofar as para 9.3 calls upon the Tribunal to consider the impact of a decision under s 501CA of the Act on victims, there is no evidence before me upon which I can make any assessment.

226. The consideration of the links to the Australian community weighs in favour of revocation of the cancellation of the Applicant's visa and, for the reasons set out in [211] above, minor to moderate weight should be given to this consideration.

227. Having weighed the considerations in favour of the revocation of the cancellation of the Applicant's visa and the considerations against the revocation of the cancellation of the Applicant's visa, I find that the considerations against the revocation outweigh those in favour revocation. Accordingly, I find that there is not another reason why the original decision should be revoked.

DECISION

228. The decision of the delegate of the Minister dated 9 June 2021 not to revoke the cancellation of the Applicant's Class BS, Subclass 801 Partner visa pursuant to s 501CA(4) of the Act is affirmed.

I certify that the preceding 228 (two hundred and twenty-eight) paragraphs are a true copy of the reasons for the decision herein of Deputy President Boyle

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

Dated: 2 September 2021

Date of hearing:	**20 August 2021**
Counsel for the Applicant:	**Dr J Donnelly**
Counsel for the Respondent:	**Ms E Tattersall**
Solicitors for the Respondent:	**Sparke Helmore Lawyers**