Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

**XY and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 4147 (16 October 2020)**

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| Division: | GENERAL DIVISION |
| File Number(s): | **2020/4541** |
| Re: | **XY** |
| | APPLICANT |
| And | **Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs** |
| | RESPONDENT |

**DECISION**

| | |
|---|---|
| Tribunal: | **Senior Member A Poljak** |
| Date: | **16 October 2020** |
| Place: | **Sydney** |

The decision under review is affirmed.

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

Senior Member A Poljak

## CATCHWORDS

*MIGRATION – non-revocation of mandatory cancellation of Class SN Subclass 190 Skilled-Nominated visa – citizen of India – where visa mandatorily cancelled under s 501(3A) because applicant did not pass character test – substantial criminal record – domestic violence – whether there is another reason why the original decision should be revoked – Direction No. 79 – primary considerations – protection of the Australian community – expectations of the Australian community – other considerations – decision under review affirmed*

## LEGISLATION

*Migration Act 1958 (Cth) ss 499, 501, 501CA*

## SECONDARY MATERIALS

*Direction No. 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*

## REASONS FOR DECISION

**Senior Member A Poljak**

**16 October 2020**

1. XY, the applicant, is a citizen of TT. He first arrived in Australia on YYY as the holder of a Class SN Subclass 190 Skilled-Nominated visa (**visa**), which was granted offshore on 1 July 2016.

2. The applicant entered into an arranged marriage with XX on 27 April 2017. TE travelled to Australia from India in February 2018 to live with the applicant.

3. On 7 April 2020, the applicant was convicted by the Parramatta Local Court of the following four offences committed against TE on 30 March 2020: (i) *Common Assault (DV) – T2*; (ii) *Stalk/intimidate intend fear physical etc harm (domestic)-T2*; (iii) *Assault occasioning actual bodily harm (DV)-T2*; and (iv) *Intentionally choke etc person without consent (DV)-T1* (**offences**). For the offences, the applicant was sentenced to an aggregate term of imprisonment of 12 months, commencing on 30 March 2020 and expiring on 29 September 2020, with a non-parole period of six months. An Apprehended Domestic Violence Order (**ADVO**) was also made against the applicant for a period of two years.

4. On 22 April 2020, the applicant's visa was mandatorily cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) (the **Act**) (**mandatory cancellation decision**).

5. On 7 May 2020, the Parramatta District Court upheld the applicant's appeal from the aggregate sentence, with the order varied such that he was instead sentenced to a two-year term of imprisonment to be served by way of intensive correction order in the community (**ICO**). The applicant's appeal against the ADVO was dismissed.

6. The applicant made representations seeking revocation of the mandatory cancellation decision. On 23 July 2020, a delegate of the respondent decided under subsection 501CA(4) of the Act not to revoke the mandatory cancellation decision. This is the decision under review in these proceedings.

**RELEVANT LEGISLATIVE PROVISIONS**

7. Subsection 501(3A) of the Act provides that the Minister **must** cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test because of the operation of subsections 501(6) and 501(7).

8. Subsection 501(6) defines the character test. Relevantly, a person does not pass the character test if the person has a "*substantial criminal record*" as defined by subsection 501(7). Paragraph 501(7)(c) provides that for the purposes of the character test, a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

9. Subsection 501CA(4) of the Act provides that the Minister may revoke the original decision if the Minister is satisfied that the person passes the character test as defined by section 501; or that there is another reason why the original decision should be revoked. This is a discretionary power.

10. A decision under subsection 501CA(4) of the Act involves an assessment and evaluation of the factors for and against revoking the mandatory cancellation decision. A determination under subsection 501CA(4) must be carried out in accordance with any written directions given by the Minister under the Act: subsection 499(2A).

11. The Minister has made such written directions under subsection 499(1) of the Act, in the form of "*Direction No. 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*" (**Direction No. 79**). Therefore, in making a determination under subsection 501CA(4) of the Act, the decision-maker must comply with Direction No. 79.

**THE CHARACTER TEST**

12. It is not in dispute that the applicant fails the character test under paragraph 501(6)(a) of the Act. The applicant has a substantial criminal record as defined by paragraph 501(7)(c) of the Act by virtue of the applicant's sentence on appeal by the Paramatta District Court. At the time of the mandatory cancellation decision, the applicant was in full time custody, serving a term of imprisonment of 12 months. On appeal, the applicant was sentenced to a two-year term of imprisonment to be served by way of an ICO.

**DIRECTION NO. 79**

13. Direction No. 79 provides that the decision is to be approached within the framework of the Principles in paragraph 6.3 (**Principles**). These Principles are:

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

*(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against women or children or vulnerable members of the community such as the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*

*(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.*

*(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.*

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

*(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.*

14. Informed by the Principles, the decision-maker must have regard to Part C of Direction No. 79, which identifies the relevant considerations for determining whether to exercise the discretion to revoke the mandatory cancellation decision. Paragraph 13(2) provides that the primary considerations are:

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

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

*(c) expectations of the Australian community.*

15. The decision-maker must also consider other considerations insofar as they are relevant. Paragraph 14(1) states that these include (but are not limited to):

> *(a) international non-refoulement obligations;*
>
> *(b) strength, nature and duration of ties;*
>
> *(c) impact on Australian business interests;*
>
> *(d) impact on victims; and*
>
> *(e) extent of impediments if removed.*

**PRIMARY CONSIDERATION (A) – PROTECTION OF THE AUSTRALIAN COMMUNITY FROM CRIMINAL OR OTHER SERIOUS CONDUCT**

16. In determining this primary consideration, I note that I must have regard to matters set out in paragraph 13.1 of Direction No. 79, namely:

> *(1) When considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. 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.*

***(a) The nature and seriousness of the applicant's conduct to date***

17. Paragraph 13.1.1 of Direction No. 79 provides that in considering the nature and seriousness of the applicant's criminal offending or other conduct, a decision-maker must have regard to a number of factors, relevantly in this matter:

> *(a) The principle that, without limiting the range of offences that may be considered serious, violent and/or sexual crimes are viewed very seriously;*
>
> *(b) The principle that crimes of violent nature against women or children are viewed very seriously, regardless of the sentence imposed;*
>
> *(c) …*
>
> *(d) Subject to subparagraph (b) above, the sentence imposed by the courts for a crime or crimes;*
>
> *(e) The frequency of the non-citizen's offending and whether there is any trend of increasing seriousness; and*

*(f) The cumulative effect of repeated offending.*

18. The New South Wales Police Facts Sheet (**NSW Police Facts Sheet**) details the specifics of the four offences committed by the applicant on 30 March 2020, to which the applicant entered a plea of guilty and was convicted on 7 April 2020. At hearing it was confirmed that the facts as set out in the NSW Police Facts Sheet were agreed by the applicant. Some of the salient facts highlighting the nature and seriousness of the applicant's offending are detailed below:

> *…Whilst the victim was on the bed; the accused placed his knee on the victim's stomach area. The victim could not move and was struggling to breath due to the force of the accused's knee. The accused then placed a blanket which was located on the bed over the victims face. The accused applied pressure with his hand around the victim's throat and chin area. The victim struggled to breath due to the force of the accused hands and the blanket which was over her face…The accused maintained his grip and held the victim in this position for about two to three minutes…*
>
> *…The accused then pushed the victim in the face with one hand which caused the victim to fall back and hit the back of her head on the wall. The accused stood up immediately and has used physical force which is unknown as the victims eyes were closed; which collided with the victim's mouth causing the back of the victim's head to collide with the wall a second time. The victim felt immediate pain to the back of her head and sustained bruising to the inside of her mouth and lips…*
>
> *…The accused then pushed the victim onto the bed and said, "let me kill you and finish this chapter". The victim feared for her safety. The victim attempted to grab her phone to call for help however was unable to maintain hold of the phone due to the force of the accused. The accused then placed the blanket over the victim's head and applied pressure to her facial area…*
>
> *As a result of the incidents stated above the victim received a bruise on her right arm, several red marks around her nose, scratches on her chin and forehead and bruising to the inside of her mouth.*
>
> *The accused then locked all the doors to the premises and took the victims mobile phone…The victims friend contacted the police to report the incident.*
>
> *…During the interview the accused denied all allegations of assaulting, intimidating and strangulating the victim…The accused stated that the pair had a verbal argument and the only time he physically touched the victim was with reasonable force…*

19. It is evident that the applicant's conduct would have caused TE psychological harm. During the assaults, the applicant retained his hold on TE while she struggled to breathe for two to three minutes; the applicant threatened to kill her; and TE tried to call for help but the applicant took away her mobile phone and locked all the doors of their residence. The repeated assaults on TE over a prolonged period demonstrates that the applicant's conduct was committed consciously. This is particularly stark given the applicant choked

TE twice during the commission of the offences. On the first occasion, he placed a blanket on TE head and applied pressure to her face and chin area. He then released his grip, sat down on the bed and had a conversation with her, before continuing his assaults. He caused TE to fall and hit her head twice, but most seriously, then placed the blanket back over her head a second time and applied pressure to her facial area, causing her to struggle to breathe.

20. The seriousness of the applicant's conduct is reinforced by the sentences imposed on him. Sentences involving terms of imprisonment are the last resort in the sentencing hierarchy and any such sentence must be viewed as a reflection of the objective seriousness of the offences involved. In the present case, the applicant was sentenced by the Parramatta Local Court, by way of aggregate sentence to a term of imprisonment of 12 months, with a non-parole period of six months. On appeal to the Parramatta District Court, the applicant's sentence was reduced to a term of imprisonment of two years, to be served by way of ICO. The applicant is also subject to a two-year ADVO.

21. Regarding seriousness, Magistrate Hockey of the Parramatta Local Court said in sentencing remarks:

> *…Charges for which the defendant has pleaded guilty are serious charges. Charges of domestic violence by a man in relation to a woman, they of course are not only offences of physical violence but clearly psychological violence. Domestic violence is something within which our community will not tolerate and the legislation has made it very clear that these matters are to be dealt with very seriously.*
>
> *As [the applicant's representative] quite appropriately indicates the choke matter is perhaps the most serious of the four charges and in my view falls somewhere above the mid-range of seriousness bearing in mind the circumstances.*
>
> *Similarly the charge of assault occasioning actual bodily harm and the charge of stalk or intimidate fall towards the mid-point as far as seriousness of those offences are concerned.*
>
> *The charge of common assault perhaps falls slightly lower on the scale…*

22. Despite the applicant's sentence being reduced to an ICO by the Parramatta District Court, the appeal sentence still reinforces the seriousness of the applicant's offending. This is particularly so given the District Court extended the applicant's term of imprisonment by one year and imposed significant restrictions by way of the ADVO.

23. The applicant concedes that his criminality is very serious as the offending involved violence; was "*part of continuous conduct*"; the victim was a female; the offence occurred over a number of minutes; the victim was frightened; the victim sustained bruising to the inside of her mouth and lips; the offending involved significant use of force; the criminality was occasioned in a domestic violence context; and, the applicant received a custodial sentence for his offending.

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

24. In assessing whether the applicant represents an unacceptable risk of harm to the Australian community, regard must be had to paragraph 13.1.2(1) of Direction No. 79. This paragraph provides that I must have regard to, cumulatively:

> *(a) The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
>
> *(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen re-offending (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).*

25. At hearing the applicant was cross-examined at length about his offending. While he said that he was remorseful for his behaviour, I am not convinced that he was genuine. He failed to answer questions directly and was evasive when discussing his conduct. Despite expressing on several occasions that he regretted his actions and that the consequences of his offences had impacted his life in a negative way, the applicant lacked genuine insight into the psychological harm he likely caused TE.

26. The applicant also attempted to downplay his culpability for the offences, stating that TE attacked him first and was the instigator. He said TE was shouting at him and he was scared the police would be called. He said he was worried for their future and that he was only trying to calm her down. He placed his hand over her mouth in an attempt to stop her from screaming. The applicant explained that at the time he was in a "*different state of mind*" and "*had rage at the time and lost control*". This is inconsistent with the NSW Police Facts Sheet which records that the applicant stopped his assault on TE after choking her for the first time, attempted to talk to her after she stopped screaming and then resumed his assaults. Such conduct does not demonstrate a "*loss of control*" as described by the

applicant. The applicant said that after he committed the offences, he felt immediate remorse and grief and regretted what he had done. He tried to apologise to TE because he did not mean to hurt her. It appears that this is the reason why the applicant took TE mobile phone off her and locked the doors after he committed the offences.

27. Whilst the applicant entered a plea of guilty to the offences, it is significant that he initially "*denied all allegations of assaulting, intimidating and strangulating the victim*" to police and claimed that "*the only time he physically touched the victim was with reasonable force*". At hearing, the applicant said that he only told the police he used reasonable force because that was what TE instructed him to say. He said he did not intend to use force and it was unintentional. The applicant said at hearing that he could not recall whether the force he used was excessive or reasonable.

28. The applicant's lack of genuine insight into his offending behaviour and his failure to genuinely accept responsibility for his actions and the impact of his offending accentuates the overall risk that he will reoffend in the future.

29. The applicant concedes that the primary consideration of the protection of the Australian community weighs against the revocation of the mandatory cancellation decision, but the weight attributed should be substantially reduced as the applicant suffers from a mental health condition which had a causal connection to the applicant's commission of the offences. Having regard to the available evidence I am not satisfied that a psychological condition contributed to the applicant's offending in any material way, or that future treatment for the applicant's claimed condition would meaningfully reduce his risk of offending. My reasons for reaching this conclusion are detailed below.

30. Relevant aspects of the medical evidence of the applicant's mental health condition and treatment received are as follows:

    (a) A Patient Health summary report from Burwood Westfield Medical Centre dated 1 May 2020, includes references to two appointments the applicant had with XX, General Practitioner, in 2018, in which he is reported to have presented with depression and anxiety symptoms and to have *"relationship and financial problems*". He was prescribed medication and referred to a psychologist;

(b) The applicant subsequently attended a XX, psychologist, for three appointments, which appear to have taken place between May and July 2018. However, there is no contemporaneous evidence before the Tribunal detailing the nature of those appointments;

(c) The evidence shows that the applicant ceased anti-depressant medication at the end of 2019;

(d) In a report dated 4 May 2020, XX, registered psychologist, advised that he assessed the applicant's symptoms at the time of the index offences and found that he met the criteria for an adjustment disorder. He opined that, on the balance of probabilities, there was a "*causal connection between [the applicant's] mental health condition and his offending*". XX believed that the applicant would respond well to further treatment. In the report, XX detailed the background to the assessment. He stated that the initial assessment was conducted over the phone and took approximately 45 minutes. The assessment particularly focused on the applicant's mental health condition and the circumstances in the period leading up to and at the time the applicant committed the offences. He detailed the applicant's relationship with TE as reported by the applicant. Of note is that the applicant reported XX that TE "*was often picking fights, negative and did not contribute to daily living activities*". Regarding the offences, the applicant reported that "*after a period of being scratched and hit by his wife, he retaliated*". XX also records that the NSW Police Facts Sheet detailed "*there was physical violence from both parties*". He described factors that contributed to the applicant's offending at the time which included, inter alia, the applicant's cultural expectations and pressures to make the arranged marriage work; financial stress; lack of social supports; and worsening anxiety and depression. Regarding the applicant reoffending, he opined that the applicant represented no risk to the community and would not reoffend for the following reasons:

    (i) the applicant showed no signs of Antisocial Personality Disorder;

    (ii) the applicant did not have an extended criminal record; and

    (iii) the applicant agreed to engage in psychological counselling with XX in accordance with a 6-month treatment plan made up of 10 sessions.

(e) Upon his admission to Villawood Immigration Detention Centre (**VIDC**), the applicant underwent a Health Induction Assessment on 13 May 2020. It was noted that the applicant was stressed due to his marriage issues and current situation and was keen to see the mental health team;

(f) The applicant was assessed by a psychiatrist on 18 June 2020. The progress notes from the consultation record that it was a brief appointment and at the time the applicant was not on any psychotropic medication. The applicant reported to the psychiatrist that he had problems with TE from the beginning of their relationship and described her as "*argumentative, physically aggressive towards him and spending their money; he states it escalated to point where she had physically attacked him and he responded*". It notes that the applicant was stressed about his current circumstances and anxious to get his visa reinstated. The applicant reported being stressed and worried and as a result was not sleeping well. He requested to go back on medication. The psychiatrist's impression was that the applicant was suffering from stress and adjustment secondary to marital issues and detention and prescribed the applicant medication;

(g) The applicant was referred to a counsellor for relationship counselling and attended a consultation on 19 June 2020. The progress notes record that the applicant was offered a referral to a psychologist for relationship counselling, but he politely declined. The applicant reported he had seen a psychologist previously and "*was taught how to avoid his wife and her aggression*". It noted that the applicant plans to file for divorce and is looking forward to starting his life afresh without her;

(h) On 8 July 2020, the applicant again attended a consultation with a psychiatrist. The progress notes record that the medication was helping the applicant sleep but that he was still suffering ongoing stress from detention. The plan recorded by the psychiatrist notes no change to the applicant's current treatment and the recommendation that the applicant stay on medication while in detention but can be weaned once released. Further psychiatrist review as required and "*does not need specialist review unless new or acute issue*";

(i) In an updated report of XX dated 24 August 2020, he recorded that he undertook a reassessment of the applicant via telehealth. He said that the applicant's diagnosis

remained the same "*albeit the stressors have changed significantly since his detention*". XX recorded that the applicant had completed numerous courses (Impulsive rage and anger management; Anger Management; Stress management; Dealing with Difficult People; Depression Management; Healthy Relationships; Domestic Violence (Awareness and Prevention); and, Anxiety Therapy) while in detention and said that he intended to continue counselling to ensure no recidivism. XX opined that the courses attended by the applicant taught him "*evidence-based coping strategies to manage his symptoms more effectively and significantly decrease the likelihood of recidivism*". He reported that the applicant has been "*compliant with his anti-depressant medication*" which had helped his mood. XX also noted that the applicant attended on a psychiatrist in detention and was advised that he did not need regular sessions but could book if required; and

(j) At hearing, XX advised that his opinions were based on the information he had at hand. He said that an adjustment disorder usually occurred as a result of a stressor or event and it was very subjective depending on what a person finds stressful. In cross-examination, XX accepted that it was possible, that at the time of his assessment of the applicant in May 2020, if other stressors had resolved, the applicant's presentation could have been in response to his conviction and time in gaol. He accepted that not genuinely engaging in treatment could affect the applicant's chances of rehabilitation.

31. I treat the evidence of XX with caution. XX's initial assessment of the applicant, and the finding that he suffered from an adjustment disorder which had a causal connection to his offending, appears to be substantially based on self-reporting by the applicant. At hearing, the applicant said he told XX the facts of his offending conduct. This is particularly evident regarding the facts recorded by XX that there was physical violence by both the applicant and XX, which were not contained in the NSW Police Facts Sheet. At hearing, XX said he could not recall if the offences were explained to him in detail by the applicant and said the details provided were contained in his reports. If the offences involved more details and they were not included in his reports, then he was not aware of them. Additionally, XX confirmed that when he made his assessment he did not have before him any records from psychologists or psychiatrists who had treated the applicant in the past; including the applicant's attendances on a psychiatrist and counsellor while in detention. There is also

limited explanation in XX reports to adequately explain how the applicant's psychological condition contributed to the applicant's offending.

32. Despite XX recommending a 6-month course of treatment made up of ten psychological counselling sessions, the psychiatrist in VIDC advised the applicant that he did not need to attend regular sessions. The psychiatrist also found that the applicant's main stressor was his detention and that he could cease medication once released.

33. While the available evidence suggests that the applicant received some treatment for a mental health condition following XX arrival in Australia in 2018, there is nothing to indicate that any mental health condition he had was sufficient to materially interfere with his daily functioning.

34. Further, there is a pattern of past conflict and arguments with XX since her arrival in Australia in February 2018. The COPS report details a number of events in which the police were called regarding domestic related situations between the applicant and TE. While no charges have been laid against the applicant in relation to these events, the COPS records show a pattern of conflict involving the applicant and his wife.

35. I acknowledge that the applicant has undertaken some courses while in immigration detention. However, there is insufficient evidence to demonstrate any meaningful effort on the applicant's behalf to address the underlying causes of his violent offending since his arrest. The applicant only commenced online courses after the mandatory cancellation decision. While in detention, he also refused an offer for a referral to a psychologist for further relationship counselling.

36. On the evidence before me, I find that there remains a real risk of the applicant re-offending. I have very little confidence in his prospects of rehabilitation, particularly given his lack of genuine remorse and insight into his conduct. I am not convinced that any risk is an acceptable risk in this case, particularly since the applicant's criminal conduct involved violence against a female victim. The nature of the harm caused if the applicant were to reoffend is very serious and is likely to involve significant physical and psychological harm to members of the Australian community such that any risk of reoffending is unacceptable.

37. Given the extremely serious nature of the applicant's conduct, the significant harm to individuals or the Australian community should the applicant engage in further criminal or other serious conduct, and the unacceptable risk of the applicant reoffending, I am satisfied this primary consideration weighs heavily against revocation of the mandatory cancellation decision.

**PRIMARY CONSIDERATION (B) – THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA**

38. Paragraph 13.2 of Direction No. 79 provides that decision-makers must make a determination about whether revocation of the mandatory cancellation decision is, or is not, in the best interests of minor children in Australia affected by the decision.

39. This primary consideration is inapplicable in this case.

**PRIMARY CONSIDERATION (C) – EXPECTATIONS OF THE AUSTRALIAN COMMUNITY**

40. Paragraph 13.3(1) of Direction No. 79 provides that:

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the mandatory visa cancellation of such a person. Non-revocation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not hold a visa. Decision-makers should have due regard to the Government's views in this respect.*

41. The Principles to be applied, as set out in paragraph 6.3, state that the right of a non-citizen to be able to come to or remain in Australia is a privilege conferred in the expectation that he or she is and will be law-abiding.

42. The effect of paragraph 13.3(1) points to the likelihood that community expectations will in most cases call for non-revocation, without dictating an inflexible conclusion. Generally, the question for a decision-maker is the weight to be attached to this consideration.

43. The evidence shows that the applicant has worked for several years in Australia in highly specialised positions on a permanent skilled visa. The applicant has also purchased

property in Australia and paid taxes. These factors represent a positive contribution to Australia's economy, and thus, to the Australian community. However, the applicant only arrived in Australia in 2016. Any contribution made by the applicant in this regard has only been for a relatively short period of time.

44. The applicant also contends that he wishes to resume his marriage with TE after the expiration of the ADVO. He also claims that he wishes to support her financially in Australia, however, claims that if he is removed to India, he will be unable to provide such assistance. This claim by the applicant is inconsistent with evidence before the Tribunal and there is no evidence from TE demonstrating that she wishes to also continue her marriage with the applicant.

45. The applicant has plainly not met the community expectations that as a non-citizen he will obey the laws of this country. Having regard to the nature and seriousness of the applicant's offending, and in accordance with the Principles contained in paragraph 6.3 of Direction No. 79, I am satisfied that the Australian community would expect that the applicant should not hold a visa. This primary consideration weighs heavily against revocation.

**OTHER CONSIDERATION (A) – INTERNATIONAL NON-REFOULEMENT OBLIGATIONS**

46. This consideration is not relevant in this case. The applicant does not raise any international non-refoulement claims.

**OTHER CONSIDERTION (B) – STRENGTH, NATURE AND DURATION OF TIES TO AUSTRALIA**

47. Paragraph 14.2(1) of Direction No. 79 sets out two main factors to be considered in assessing the strength, nature and duration of a person's ties to Australia:

> *(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 person 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 persons*

*who have an indefinite right to remain in Australia, including the effect of non-revocation on the non-citizen's immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely)*

48. The applicant first arrived in Australia on 9 August 2016 and has resided in Australia for over four years. His offending occurred in March 2020.

49. The applicant has established some social links to the Australian community through the development of friendships and his contributions to Australia through his several years of specialised employment. The applicant has also purchased a residential property in Sydney for himself and TE.

50. The applicant has provided several letters of support from members of the Australian community, all of which speak highly of the applicant as a friend or colleague. XX, XX and XX provided written letters of support for the applicant and gave evidence orally at hearing. Salient aspects of their evidence are summarised below:

    (a) XX described the applicant as his former work colleague and friend. He said he has always known the applicant to be polite, compassionate, and insightful and described him as a good technical resource who contributed well to the company's goals;

    (b) XX first met the applicant in June 2019 when they worked for the same company. He described the applicant as charming, diligent, honest at work, maintaining a dignified temperament, a person of empathy, and a person who understands situations in daily life. He said the applicant was professionally sound and he had always found him to be a well behaved and respectful person. XX further said that the applicant impressed him as a responsible family man and caring husband. He claimed that the applicant has "*learned a big lesson*" and understands what he has done wrong. At hearing he said that the applicant's offending seemed out of character and he was not sure what had happened to his sanity. He said there were some factors at the time that may have contributed to his psychological state, namely, the applicant was unhappy in his new property; and

    (c) XX said that the applicant was his colleague and friend who he has known from about July 2019. He described the applicant as helpful, cheerful and insightful. XX

said that the applicant was a very caring and loving husband. He believes the applicant is very sorry for his conduct in Australia.

51. At hearing, XX, XX and XX all confirmed in cross-examination that they were unaware of all the details surrounding the applicant's offending. They also all confirmed that they had never met TE or seen the applicant socialise with his wife. Accordingly, I place little weight on their evidence particularly regarding the applicant's relationship with TE and their opinion of the applicant's offending conduct. However, I accept from the evidence that the applicant has a good professional reputation and has many friends in Australia.

52. While the strength, nature and duration of ties to Australia weigh in favour of revocation of the mandatory cancellation decision, it is significantly outweighed by the relevant primary considerations of the protection of the Australian community and the expectations of the Australian community.

**OTHER CONSIDERATION (C) – IMPACT ON AUSTRALIAN BUSINESS INTERESTS**

53. There is no evidence before me bearing upon the impact on any Australian business interests.

**OTHER CONSIDERATION (D) – IMPACT ON VICTIMS**

54. This consideration is not relevant in this case. There is no evidence from TE concerning the impact on her should the mandatory cancellation decision not be revoked.

**OTHER CONSIDERATION (E) – EXTENT OF IMPEDIMENTS IF REMOVED**

55. Paragraph 14.5 requires the decision-maker to have regard to the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account the non-citizen's age and health, whether there are substantial language or cultural barriers, and any social, medical and/or economic support available to them in that country.

56. There is an absence of language and cultural barriers affecting the applicant on his return to India. The applicant grew up in India and has spent most of his life there. All the

applicant's family reside in India. He has strong prospects of re-establishing himself in India upon his return particularly given that he undertook his tertiary studies in India (Bachelors and Masters degrees) and was consistently employed in professional roles after the completion of his studies and prior to moving to Australia. While I accept there will be some delay in obtaining employment and re-establishing his life in India, any hurdles he faces are not insurmountable.

57. Regarding the applicant's health issues, the evidence does show that the applicant suffers from mental health issues related to adjustment disorder. While I accept that the applicant has received some treatment for his mental health condition, any ongoing treatment in the future is unnecessary. His most recent assessment by a psychiatrist in detention found the applicant's stressors to be associated with his detention and that his medication could cease upon his release. He advised that the applicant did not require ongoing treatment but could seek help as required. I do not consider this to be an impediment on his return to India.

58. Regarding other alleged health conditions mentioned by the applicant, there is no evidence before the Tribunal detailing the nature of the conditions or ongoing treatment which may be required. In any event, the applicant advised at hearing that he had previously suffered a motor vehicle accident (MVA) and was treated in a private hospital in XX at nominal cost. While the standard of medical and mental health care in India is not commensurate with Australia, there is no evidence that he would not have the same access to such care as other Indian citizens. Further, the applicant has not identified any reason why, in the future, he would be prevented from accessing the same level of medical care he received when the MVA occurred.

59. The applicant also alleges that he holds fears that he will be the victim of violence if he returns to India. On the applicant's evidence, the family of his wife had threatened harm to him upon his return to India. He said at hearing that his wife's cousin contacted him on the phone and was very harsh. The applicant also indicated in his evidence that his parents had already received threats from the extended family of his wife. At hearing, the applicant said in 2019 eight people went to his parents' house and spoke harshly to his father and grabbed his shirt. He said they were very disrespectful. The conflict was in relation to TE safety. The applicant claims to remain concerned for his safety and well-being if returned to India.

60. While I accept there may be some conflict between the applicant and TE family on his return to India, given the nature of the applicant's offences and that his marriage to TE was arranged by their families, there is very limited evidence supporting a finding that there is a real risk to the applicant's safety upon his return to India. The alleged assaults on the applicant's family and the threats mentioned by the applicant, while hostile, did not include specific threats or acts of violence.

61. The extent of impediments if removed to India weighs slightly in favour of revocation of the mandatory cancellation decision.

**DECISION**

62. For the reasons outlined above, the primary considerations of the protection of the Australian community and expectations of the Australian community weigh heavily against revocation of the mandatory cancellation decision. To the extent other considerations weigh in favour of revocation, they are insufficient to outweigh the protection of the Australian community and expectations of the Australian community.

63. Accordingly, the decision under review is affirmed.

*I certify that the preceding 63 (sixty-three) paragraphs are a true copy of the reasons for the decision herein of Senior Member A Poljak*

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

Associate

Dated: 16 October 2020

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| Date(s) of hearing: | **28 September 2020** |
| Counsel for the Applicant: | **Dr J Donnelly** |
| Solicitors for the Applicant: | **Pannu Lawyers** |

Solicitors for the Respondent: **Sparke Helmore Lawyers**