Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2021/6718**
Re:	**JTNW**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Linda Kirk**
Date of written reasons:	**12 January 2022**
Place:	**Sydney**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal sets aside the reviewable decision made by the delegate, dated 16 September 2021, to refuse to revoke the Mandatory Visa Cancellation Decision, and in substitution, decides that the cancellation of the Applicant's Class XE Subclass 790 Safe Haven Enterprise visa is revoked.

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

Senior Member Linda Kirk

CATCHWORDS

MIGRATION – mandatory cancellation of visa – Class XE Subclass 790 Safe Haven Enterprise visa – where visa was cancelled under s 501(3A) because applicant did not pass character test – substantial criminal record - Ministerial Direction No. 90 – primary considerations – other considerations – decision set aside and substituted

LEGISLATION

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

Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth)

CASES

Ali v Minister for Home Affairs (2020) 380 ALR 393; [2020] FCAFC 109

Anderson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 205

BAL19 v Minister for Home Affairs [2019] FCA 2189

BYMD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 3476

Castle and Minister for Home Affairs [2020] AATA 1778

CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 69

DQM18 v Minister for Home Affairs [2020] FCAFC 110

FFXL and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 3655

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

FRVT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 294

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

Hernandez v Minister for Home Affairs [2020] FCA 415

Jagroop v Minister for Immigration and Border Protection and Another (2016) 241 FCR 461

Jal v Minister for Immigration and Border Protection [2016] AATA 789

Marzano v Minister for Immigration and Border Protection [2017] FCAFC 66

Minister for Immigration and Border Protection v Le (2016) 244 FCR 56

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

Nuuamoa and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 3295

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

Pourabbas Aghbolagh and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 4269

Saleh and Minister for Immigration and Border Protection [2017] AATA 367

Suleiman v Minister for Immigration and Border Protection (2018) 74 AAR 545

Suleiman v Minister for Immigration and Border Protection [2018] FCA 594

Williams v Minister for Immigration and Citizenship [2013] FCA 702

WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 55

XDJD and Minister for Immigration and Border Protection (Migration) [2021] AATA 2882

XFKR and Minister for Immigration and Border Protection [2017] AATA 2385

XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1138

SECONDARY MATERIALS

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

Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) (RALC Explanatory Memorandum)

Explanatory Memorandum for the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 ('the CIOR Explanatory Memorandum')

Migration Regulations 1994 (Cth)

PAM3: Act - Compliance and Case Resolution - Case resolution - Minister's powers - Minister's residence detention intervention power

PAM3: Act - Compliance and Case Resolution - Case resolution - Minister's powers - Minister's residence determination power

WRITTEN REASONS FOR DECISION

Senior Member Linda Kirk

12 January 2022

1. JTNW ('the Applicant') is a 47-year-old citizen of Iran who first arrived at Christmas Island on 11 July 2012 with his wife and son.[1] On 5 January 2018 he was granted a Class XE Subclass 790 Safe Haven Enterprise visa ('the visa').[2]

2. On 6 October 2020, the Applicant was convicted in the Paramatta Local Court of *Stalk/intimidate intend fear physical etc harm (domestic)-T2*; two counts of *Contravene prohibition/restriction in AVO (Domestic)*; *Destroy or damage property <=$2000 (DV)-T2*; *Common assault (DV)-T2*; and *Armed w/I commit indictable offence-T1* and was sentenced to an aggregate term of imprisonment of 20 months with a 12 month non-parole period.[3] The Applicant lodged a severity appeal regarding the custodial sentence and on 12 October 2020 the District Court of NSW at Paramatta confirmed the original order.

3. On 13 November 2020 the visa was cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) ('the Act') ('Mandatory Visa Cancellation Decision') because a delegate of the Minister ('the Respondent') was satisfied the Applicant did not pass the character test in subsection 501(6) of the Act as he was considered to have, pursuant to subsection 501(7)(c), a *'substantial criminal record'*.[4] The letter invited the Applicant to make

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[1] Exhibit R1, G16, 67.
[2] Exhibit R1, G17, 68.
[3] Exhibit R1, G9, 41.
[4] Exhibit R1, G17, 68.

representations to the Minister about revoking the decision to cancel the visa within 28 days of receipt of the letter.[5] At the time the Applicant was serving a sentence of full-time imprisonment at the Glen Innes Correctional Centre in New South Wales for an offence against a law in Australia.[6]

4. On 3 December 2020, the Applicant made representations seeking revocation of the Mandatory Visa Cancellation Decision.[7]

5. On 16 September 2021, a delegate of the Respondent decided, under subsection 501CA(4), not to revoke the Mandatory Visa Cancellation Decision ('the Reviewable Decision').[8]

6. On 20 September 2021, the Applicant applied to the Tribunal for review of the Reviewable Decision under subsection 500(1)(ba) of the Act.[9]

7. The matter was heard by the Tribunal on 24 and 25 November 2021. The Applicant attended the hearing by videoconference from Villawood Immigration Detention Centre and was represented by counsel. The following persons gave oral evidence and were cross-examined at the hearing:

    - the Applicant;
    - the Applicant's son, DA;
    - DA's case manager, Sam Augimeri

8. The material before the Tribunal consists of:

    - Section 501G-Documents (G1-G18, pages 1-98) filed 28 September 2021 – Exhibit R1
    - Respondent's Tender Bundle (TB1-TB5, pages 1-176) filed 8 November 2021 –

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[5] Exhibit R1, G17, 71.
[6] Exhibit R1, G4, 14.
[7] Exhibit R1, G11-12.
[8] Exhibit R1, G3.
[9] Exhibit R1, G1.

Exhibit R2

- Statement of Applicant dated 20 October 2021 + Annexure A – Exhibit A1
- Statement of DA dated 20 October 2021 – Exhibit A2
- Statement of Reza Mola Salehi dated 19 October 2021 – Exhibit A3
- Statement of Mohammad Mollasalehi dated 19 October 2021 – Exhibit A4
- Statement of Vahid Nooralizadeh Asl dated 19 October 2021 – Exhibit A5
- Advocacy Report of Tariq Pordily dated 20 September 2021 – Exhibit A6
- DFAT Country Information Report Iran dated 14 April 2020- Exhibit A7
- Country Policy Information Note Iran: Christians and Christian converts dated 26 February 2020 – Exhibit A8
- Landinfo Report – The Iranian Welfare System dated 12 August 2020 – Exhibit A9
- Statement of Sam Augimeri dated 13 September 2021 – Exhibit A10
- Respondent's Supplementary Submissions dated 29 November 2021
- Applicant's Supplementary Submissions dated 3 December 2021

9. The Tribunal has reviewed all the evidence before it and refers to all relevant materials below.

LEGISLATION

10. Subsection 501(3A) of the Act compels the Minister to cancel a visa in certain circumstances:

> *(3A) 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.*

11. Paragraph 501(6)(a) of the Act relevantly provides that a person does not pass the '*character test'* if the person has a '*substantial criminal record'*. Paragraph 501(7) of the Act relevantly provides:

> *(7) For the purposes of the character test, a person has a* ***substantial criminal record*** *if:*
>
> *(a) the person has been sentenced to death; or*
>
> *(b) the person has been sentenced to imprisonment for life; or*
>
> *(c) the person has been sentenced to a term of imprisonment of 12 months or more; or*
>
> *(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or*
>
> *(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or*
>
> *(f) the person has:*
>
> *(i) been found by a court to not be fit to plead, in relation to an offence; and*
>
> *(ii) the court has nonetheless found that on the evidence available the person committed the offence; and*
>
> *(iii) as a result, the person has been detained in a facility or institution.*

12. Section 501CA of the Act applies if the Minister makes a decision under subsection 501(3A) to cancel a visa that has been granted to a person.

13. Subsection 501CA(4) confers on the Minister the discretion to revoke the Mandatory Visa Cancellation Decision under subsection 501(3A). Subsection 501CA(4) provides:

> *(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.*

14. Paragraph 500(1)(ba) of the Act provides that applications may be made to the Tribunal for review of decisions of a delegate of the Minister under subsection 501CA(4) not to revoke a decision to cancel a visa.

MINISTERIAL DIRECTION NO. 90

15. The Minister is empowered by subsection 499(1) of the Act to give written directions to a person or body having functions or powers under the Act. The Direction must be applied by

all decision-makers, except for the Minister acting personally, such as the Minister's delegates and the Tribunal.[10]

16. On 8 March 2021, the Minister signed *Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ('the Direction'). The Direction commenced on 15 April 2021 and revoked the previous Direction 79 on the same date.[11]

17. The following principles in paragraph 5.2 of the Direction provide a framework within which decision-makers should approach their task, including whether to revoke a mandatory cancellation:

> *(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 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 risk of causing physical harm to the Australian community.*

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[10] Section 499(2A) of the Act; *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 69, [4] (Rares, O'Callaghan and Jackson JJ).

[11] Direction [2-3].

18. Paragraph 6 of the Direction provides that, informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in paragraphs 8 and 9, where relevant to the decision.

19. Paragraph 8 of the Direction identifies the following as primary considerations:

    a) Protection of the Australian community from criminal or other serious conduct;

    b) Whether the conduct engaged in constituted family violence;

    c) The best interests of minor children in Australia; and

    d) Expectations of the Australian community.

20. Paragraph 9 of the Direction identifies a non-exhaustive list of other considerations:

    a) International *non-refoulement* obligations;

    b) Extent of impediments if removed;

    c) Impact on victims; and

    d) Links to the Australian community, including:

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

        (ii) Impact on Australian business interests.

21. Paragraph 7(1) provides that, when taking the relevant considerations into account, '*information and evidence from independent and authoritative sources should be given appropriate weight*.*'* Paragraph 7(2) states that *'[p]rimary considerations should generally be given greater weight than the other considerations.*' That does not preclude the Tribunal, however, based on the specific circumstances of each case, to give an 'other' consideration the equivalent of or greater weight than a primary consideration.[12] Paragraph 7(3) states that *'[o]ne or more primary considerations may outweigh other primary considerations.*' However, as held in *Jagroop v Minister for Immigration and Border Protection and*

[12] *Suleiman v Minister for Immigration and Border Protection* (2018) 74 AAR 545, [23]; [28] (Colvin J).

Another:[13] '*the weighing process in each case is in substance left, as it must be, to the individual decision-maker exercising the power under s 501'*.

ISSUES FOR DETERMINATION

22. Before the power in sub-section 501CA(4) of the Act, to revoke the original decision, is enlivened, the decision-maker must be satisfied that the conditions for the exercise of the power have been met.

23. There is no dispute that the Applicant made the representations required by sub-section 501CA(4)(a). The issue is whether the discretion to revoke the Mandatory Visa Cancellation Decision may be exercised. In *Minister for Home Affairs v Buadromo*[14] the Full Court of the Federal Court of Australia made the following observations in relation to sub-section 501CA(4):

> *there has been some discussion in the authorities as to whether s 501CA(4) contains a residual discretion in the decision-maker by reason of the use of the word 'may' in the chapeau of the subsection, or whether the balancing of the factors favouring a refusal to revoke the cancellation is part of the one exercise of determining whether there is another reason the original decision should be revoked. The weight of authority in this Court favours the latter view...*[15]

24. The issues for determination are:

1) whether the Applicant passes the *'character test'*; and

2) whether there is '*another reason'* why the Mandatory Visa Cancellation Decision should be revoked.

25. If the Applicant succeeds on either ground, the Tribunal must find that the Mandatory Visa Cancellation Decision should be revoked.

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[13] (2016) 241 FCR 461 at [57].

[14] [2018] FCAFC 151.

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

EVIDENCE BEFORE THE TRIBUNAL

Background and employment

26. The Applicant was born in Kermanshah in Iran in 1974.[16] He is the second child of his parents and has six brothers and sisters. His father died in 1988, leaving his mother to work as a dressmaker to support her family.[17] The Applicant worked in manual jobs to get his mother 'through the hard times'. His mother 'was not only poor and desperate but also discriminated against'.[18] He completed primary and secondary school and went on to college to study agricultural machinery and graduated as a technician. He got a job as an agricultural machinery technician with the Ministry of Agriculture. After working in this job for a short period of time he left because he 'wanted to keep [himself] away from the corrupt and dishonest order of things in state institutions' and found a job as a bus driver.

Migration to Australia

27. The Applicant met his former wife in 2000, and they married in February 2001. They have two children, a son born in June 2004 and a daughter born in August 2013.[19] The Applicant and his wife and son travelled to Australia, seeking 'asylum, protection and safety'.[20] They arrived at Christmas Island in early June 2012.[21] The family moved to Sydney in September 2012. The Applicant obtained a heavy vehicle driver's license and secured a job as a heavy vehicle driver.[22]

Conversion to Christianity

28. Since coming to Australia, the Applicant has converted to Christianity and been baptised.[23] Prior to his incarceration, the Applicant attended and was active in the church in his local area.[24] Since he has been in immigration detention, he has kept up his faith by reading the

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[16] Exhibit R1, G12, 51.
[17] Exhibit R1, G11, 47.
[18] Ibid.
[19] Exhibit R1, G12, 51.
[20] Exhibit R1, G11, 47.
[21] Ibid, 48.
[22] Ibid.
[23] Ibid.
[24] Exhibit A1, [8].

Bible at the library.[25] His extended family in Iran are all Muslims and they do not support his conversion or practice of Christianity.[26]

Criminal history in Australia

29. The Applicant's National Police Check dated 26 October 2020 records the Applicant's convictions in Australia. The Applicant's offending arose from three incidents that occurred during June 2020.

30. On 6 October 2020, the Applicant was convicted in the Paramatta Local Court of *Stalk/intimidate intend fear physical etc harm (domestic)-T2*; two counts of *Contravene prohibition/restriction in AVO (Domestic)*; *Destroy or damage property <=$2000 (DV)-T2*; *Common assault (DV)-T2*; and *Armed w/I commit indictable offence-T1* and was sentenced to an aggregate term of imprisonment of 20 months with a 12 month non-parole period.[27] The Applicant also received a two year community correction order for *Contravene prohibition/restriction in AVO (domestic)* and *Stalk/intimidate intend fear physical etc harm (domestic).* The extract of the sentencing remarks of Magistrate Brender indicate that the Applicant's offences were committed against his former wife.[28]

31. The Applicant's first offence of *Stalk/intimidate intend fear physical etc harm (domestic)* and one of the *Contravene prohibition/restriction in AVO (domestic)* offences occurred when his former wife was living in a refuge. The Applicant communicated with her, in breach of an Apprehended Violence Order (AVO) dated 9 June 2020, which precluded him from going within 200 metres of his former wife's premises or communicating with her by any means.[29] The extract of the sentencing remarks of Magistrate Bender records that the Applicant said to his former wife 'I know you have a relationship with [A]. I know where you're meeting. I'll kill him and then throw acid on you.' His Honour considered this statement would have put the victim *'in great fear'.*[30]

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[25] Exhibit A1 [7].
[26] Ibid [4].
[27] Exhibit R1, G9, 41.
[28] Exhibit R1, G7, 33-35.
[29] Exhibit R2, TB2, 64.
[30] Exhibit R1, G7, 33.

32. The other offences occurred when the Applicant, in breach of the AVO, went to his former wife's house on two occasions in June 2020. The extract of the sentencing remarks records that on 19 June 2020, the Applicant arrived at the house unannounced at 10:30pm, and began going through her possessions to retrieve gifts he had given her previously. When she repeatedly asked him to leave, the Applicant went to the kitchen and picked up a large knife. The Applicant's teenage son put his arms around him; the Applicant threw the knife at the television, smashing the screen, as well as picking up a glass and throwing it at a wall. He held up the knife in the direction of his son, and then put the knife to his former wife's throat and said he would 'do it later', insinuating that he would kill her, and instead demanded money. His wife and children escaped to the premises of a neighbouring business.[31]

33. In his oral evidence at the hearing, the Applicant denied in relation to the first incident that he went to the refuge where his former wife was living, or that he telephoned her and made threats.[32] He said that he was unaware of the conditions of the AVO at this time as he does not read English and it had not been interpreted for him.[33] In relation to the second incident, the Applicant said that 'it happened quite quickly' and he made a 'mistake'.[34] He said that did not go to the house unannounced, as his children had contacted him and asked him to come there.[35] His former wife made him tea and they had a 'friendly conversation' and he gave her $12,500 in an envelope for her to use to pay for the children's expenses.[36] He asked her for $4,000 from this money so he could pay for lawyer's fees.[37] She told him that she was going to sell a property in her name to pay for a loan for her new partner. At this point he 'cracked it' and threw the cup of tea against the wall.[38] He then picked up a knife and threw it at the TV. He denied that held the knife to his wife's throat and threatened her.[39]

34. The extract of the sentencing remarks records that on 24 June 2020, the Applicant went to the house again, in breach of the AVO. The Applicant told the Tribunal that his son had

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[31] Exhibit R1, G7, 34.
[32] Transcript of Proceedings (24 November 2021) 15, 17, 21, 27.
[33] Ibid 13.
[34] Ibid 14.
[35] Ibid 22.
[36] Ibid 23.
[37] Ibid 24, 25-26.
[38] Ibid 24.
[39] Ibid 25.

contacted him and told him that he and his mother and sister had been transferred to safe accommodation and the house was unoccupied.[40] At this time he was living in his van and so he went to the house to stay there. The lease for the house was in his name and he was concerned that if he did not organise to terminate the lease he would be 'blacklisted' by the landlord.[41] He was sleeping on the couch when his former wife arrived there with the police.[42]

Apprehended Violence Order

35. The AVO dated 6 October 2020 is in effect until 5 October 2025. It relevantly states:

> ***Orders about family law and parenting***
>
> *[The Applicant] must not approach [his former wife], [his son] or [his daughter] or contact them in any way unless the context is:*
>
> *a. through a lawyer*
>
> *b. to attend accredited or court-approved counselling, mediation and/or conciliation*
>
> *c. as ordered by this or another court about contact with children*
>
> *d. as agreed in writing between you and the parent(s) about contact with children.*

36. In his statement dated 20 October 2021, the Applicant wrote:

> *I am conscious that I am not currently permitted to speak to my children due to the AVO in place. If I am released into the Australian community, I will take steps to have the terms of the AVO amended (such that I can have access to my children again).*[43]

37. The Applicant told the Tribunal that he has had the AVO translated, and it says that he is not permitted to have any contact with his children unless he goes to the Family Court.[44]

Remorse and responsibility for offending

38. In his sentencing remarks, Magistrate Brender noted that a Corrective Services Pre-sentence report recorded that the Applicant had not appeared to demonstrate any insight

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[40] Ibid 29.

[41] Ibid 30-31.

[42] Ibid 29.

[43] Exhibit A1 [9].

[44] Transcript of Proceedings (24 November 2021) 32.

into the impact of the offending beyond the personal ramifications.[45] When limiting the non-parole period of the Applicant's sentence to 12 months, which is not the standard ratio of parole to non-parole period, His Honour noted that the Applicant did not have a criminal record and his prospects of rehabilitation.[46]

39. In his statement in support of request for revocation of the cancellation of his visa, the Applicant stated:

> *I expressed my full remorse and truly acknowledge that I committed offences against the Australian law. I do acknowledge the seriousness of the offence and I understand and hold myself accountable for them. I pleaded guilty in the local and district court and sincerely expressed my deep remorse.*
>
> *I really regret to have committed acts of such nature and since serving my term in prison, I had the opportunity to reflect on my wrongdoing. I know my behaviour left my children in fear and anxiety and the misfortune possibility of mental complications in their future lives. I acknowledge that I needed more than a few courses on anger management and avoidance of aggressive behaviour in emotionally hard times, which I was duly deprived of, all probably because of my ignorance and lack of insight into the ramifications of such ignoble conduct on my personal life as well as that of the victims, namely my former wife and my beloved children.*
>
> *I take full responsibility for the offences I committed and assure the Minister that I do not see the slightest chance of relapsing into social misdemeanour as I feel extremely remorseful about my criminal acts and the pain and distress, I caused to the victims of my offensive behaviour who were the closest of my relations, my former wife and my children for whom I have always cherished a happy and successful prospect.* [47]

40. During cross-examination it was put to the Applicant that he had not shown any remorse for his actions. He stated:

> *[T]his is not true. I pleaded guilty, that's why I ended up in prison for 20 months. I took the responsibility.*[48]

41. The Applicant was asked whether he considered he was the victim. He stated:

> *No, no, there is a misunderstanding. Who said I'm not remorseful? ... But, yes, I do accept and I have to tell you when you talk about victim, the first victim in such a horrible incident that I committed and that I'm really remorseful, is my children - are my children, yes. And, no, I don't say that I am a victim, no. If I had controlled my actions on that night, if I was mindful and aware of my action, these things would never have happened and I'm sincerely remorseful.*[49]

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[45] Exhibit R1, G7, 33-34.

[46] Ibid 33.

[47] Exhibit R1, G12, 53-54.

[48] Transcript of Proceedings (24 November 2021) 17.

[49] Ibid.

42. The Applicant told the Tribunal that he has paid the consequences of his 'one-off' offending:

> *that incident that involved (indistinct) it was such a spontaneous that I just burst off the table in sort of embarrassing anger that I shouldn't have, and I've paid for it. I've paid the consequences and I fixed myself and I changed myself. And I assure you I won't be that person with that anger anymore. It was only one-off. In 20 years, only one-off. It wasn't regular.*[50]

Insight into offending

43. The Applicant explained to the Tribunal his understanding of the reasons for and impact of his criminal offending and how he could have avoided this behaviour:

> *I got angry all of a sudden in a second and this one second short anger and aggression led my life to make a wrong decision and act wrongly. And then consequently my children been impacted, my happy sort of relationship with my wife was impacted. And if I had thought mindfully if I was quite mindful at the time of incident I could avoid it. For example, if I had left the scene or I had gone for a walk to contemplate first it could have been quite differently.*[51]

Rehabilitation

44. In his statement in support of his request for revocation of the cancellation of his visa, the Applicant wrote:

> *Throughout my term in prison, I went out of my way to demonstrate exemplary conduct, without any breaches of discipline or struggles with the detention authorities or even the police at the time I was arrested. This, I genuinely believe, will testify to my true intention [n]ot to re-offend and fall back into atypical conduct I demonstrated due to impulsive decisions that I made unknowingly while under tremendous emotional distress. I will continue to take counselling and further rehabilitation sessions to keep me away from the slightest possible chance of engaging in inappropriate behaviour. I pledge and promise to be a law-abiding resident and compensate my past.*[52]

Courses and work in gaol

45. When the Applicant was at the Metropolitan Remand and Reception Centre, he undertook an anger management course. He attended the course two times a week for three weeks and completed all except one session.[53] He was unable to complete the course as he was

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[50] Transcript of Proceedings (24 November 2021) 28.

[51] Ibid 7.

[52] Exhibit R1, G12, 54 [24].

[53] Transcript of Proceedings (24 November 2021) 19.

transferred to another gaol.[54] In his statement dated 20 October 2021, the Applicant explained how the course assisted with his rehabilitation:

> *The program provided some insight into the negative impacts while getting angry. The program taught students to disengage from stressful situations and, if required, leave a particularly contentious and stressful situation. The program taught students to be consciously aware of their feelings to manage them before they get out of control.*[55]

46. The Applicant worked as a painter for four months at the first gaol and for eight months at the second gaol in which he was incarcerated.[56]

Conduct in detention

47. During cross-examination, the Applicant was asked whether in mid-September 2021 he had a telephone call with his former wife's new partner, A, and made threats to him. He agreed that he had been in contact with A, but that A had called the Applicant and it was a 'friendly call'. He told the Tribunal that A had made many calls and sent messages to him which occurred 'every day' and the contact was amicable.[57]

Psychological treatment

48. The Applicant told the Tribunal that he has seen a psychologist and a psychiatrist at the immigration detention centre. He is also in touch with a mental health doctor in Melbourne as well as doctors in the United States and Iran with whom he communicates via video chat. He is an active member of an international group that meets every night online and they take turns to share their individual experiences and concerns and they get guidance from experts.[58]

Risk of re-offending

49. In his statement dated 20 October 2021, the Applicant addressed the risk of him re-offending:

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[54] Exhibit A1 [15].
[55] Ibid [16].
[56] Transcript of Proceedings (24 November 2021) 19.
[57] Ibid 18.
[58] Ibid 36.

> *I have no plans to commit any further criminal offences in Australia. I have truly learned the errors of my past. I have spent both time in prison and immigration detention, which have acted as a significant deterrent against reoffending in the future.*[59]
>
> *…*
>
> *I do not believe I will engage in further criminal offending in Australia.*[60]

50. During cross-examination the Applicant was asked to comment on his risk of re-offending. He stated:

> *I I've done it once and I faced the consequences badly and I learned a lot. [A]s I told you, my children are the focus, are the centre of everything in my life for me. I don't want them to be exposed to such a thing again at all … I've been driving, my business for the transport business for 10 years owning a truck and like a truck transport and I even travel to Perth. I don't even have one infringement notice for speeding or any sort of traffic offences. I'm such a patient peaceful sort of person. But that mistake I really paid for it. I never ever in my life I don't want to face court, legal authorities ….*[61]

Children

51. In his statement in support of his request for revocation of the cancellation of his visa, the Applicant described his children's current circumstances and his desire to regain contact with them:

> *My son is 17 years of age and is at a critical stage in his life. He has been rejected by his mother and lives in an arranged accommodation. He needs my parental support. I was informed that he spent a few nights in parks when he was dismissed from home and he had no place to go. Besides to my distress due to the strong sense of guilt from wrongdoing, this has caused me further anxiety and mental and emotional distress. … I blame myself for the situation and reprimand myself for my wrongdoings which destroyed my family and affected the life of my children as result. I am also ashamed I am not able to do anything and provide care for son when he mostly needs it. Only the hope of being able to support and look after my son (if I return to community and his named is removed from the AVO) and in the future my daughter through the channels permitted by law while the AVO is in effect helps me survive.*[62]

52. The Applicant told the Tribunal how his removal would impact on his children:

> *And the most important factor that I guess you are all well aware of it by now is my children. How am I supposed to leave my children and then how am I supposed to do that? It's impossible, I can't even imagine not be able to have my children with me. And although the mother now is into another relationship and I don't mind, she's entitled to live her life whatever she feels like doing that, but when it comes to my children I like to father them, I like to be*

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[59] Exhibit A1 [12].

[60] Ibid [14].

[61] Transcript of Proceedings (24 November 2021) 8.

[62] Exhibit R1, G12, 53.

part of their life and as they want me to be part of their life … I want to provide for my children, I want to father them.[63]

Family members in Iran

53. In his statement dated 20 October 2021, the Applicant wrote that his mother is almost 80 years of age. Since he has been in Australia, he has provided some financial support to his family in Iran who are 'fairly poor'. If he were removed to Iran, he would not receive practical and financial assistance from his family.[64]

Future plans

54. In his statement dated 20 October 2021, the Applicant outlined his plans for the future:

> *I want to get back into my painting business. In the interim, if required, I would be happy to undertake work with my contacts in Australia to provide me with immediate stability. For example, I have offers of employment in the welding industry.*[65]

55. The Applicant told the Tribunal that he will be able to rent a house shortly after he is released back into the community.[66]

Impediments on return

56. In his statement in support of his request for revocation of the cancellation of his visa, the Applicant wrote:

> *I am a Christian convert to Christianity. If I am ever denied the opportunity to get my visa back and stay here in Australia, a gloomy uncertain prospect awaits me in Iran. Conversion of a Muslim to another religion in Iran entails harm and persecution from the authorities. People with new faiths are regularly threatened, assaulted and detained without charges or they are even executed. This is what I do not want to experience.*[67]

57. The Applicant described to the Tribunal the fears he has in relation to being returned to Iran:

> *I will be consider (indistinct) but I'm not going to exaggerate that upon stepping in the airport I going to be arrested, executed and killed. No, it could be a gradual thing. And I have to live with that fear at all times, that any minute I may get caught. And because (indistinct) by the*

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[63] Transcript of Proceedings (24 November 2021) 9.

[64] Exhibit A1 [20].

[65] Ibid [11].

[66] Transcript of Proceedings (24 November 2021) 14.

[67] Exhibit R1, G11, 50.

authority for this (indistinct) happen it happens. So that's why I have to live with that fear at all time.[68]

Applicant's son, DA

58. In his statement dated 20 October 2021, the Applicant's son, DA, described his current circumstances as 'exceptionally difficult'.[69] He is living in crisis accommodation after his mother 'kicked [him] out of the house'. His relationship with his mother had 'deteriorated considerably' in the six months before she asked him to leave.

59. For the past seven months he has been working four days a week as a first-year apprentice plumber and attending TAFE one day a week. He has a second job working on weekends at a supermarket.[70]

60. He outlined why he wishes for the Applicant to remain in Australia:

> *I believe it is in my best interests for my father to be a significant part of my life. I love my father with all my heart. My father had played an instrumental role in my development. My father has supported my sporting needs in the soccer arena, my educational needs and has otherwise been a first-class father to me during my development.*[71]

61. He explained that he has taken steps to have the AVO amended so he can re-establish contact with his father:

> *I have attended Parramatta Local Court, Castle Hill Police Station, and Legal Aid to have the AVO orders varied (so that I can approach the Court to have the current orders amended such that I can have physical contact with my father). I have been sent around the merry-go-round and have not had any luck in having the impugned orders varied at this stage.*
>
> *However, I indicate to the Tribunal that my express intention is to have the current orders amended so that I can reconnect with my father. I have no fear of harm concerning spending time with my father.*[72]

62. He outlined the nature of his relationship with his father and the support he has provided the family:

> *[M]y father has been an excellent role model for my sister and me. He has worked hard in Australia to support our family, treated us with respect, dignity, and always had our best*

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[68] Transcript of Proceedings (24 November 2021) 9.

[69] Exhibit A2 [8].

[70] Ibid [9].

[71] Ibid [13].

[72] Ibid [14]-[15].

interests at heart. I cannot believe that my father faces a real prospect of being removed to Iran.

My father would take me to soccer. My father supported my training endeavours as a soccer player. My father was a family man. My father loved my mum and his children deeply (and he still loves us deeply to this day). I love my father also.

My father always wanted the best for me. He worked seven days a week in his painting business. Moreover, I used to work with my father on weekends in the painting industry. We did this for between 3 to 4 years.

…

My father would take me to train every morning at 4:30 AM for soccer practice. He did this at least 5 to 6 days per week. He was an amazing father.[73]

63. He described the impact the Applicant's removal would have on him and his sister:

> *I would be shattered if my father was deported to Iran. I am already struggling and in crisis accommodation at present. I believe that my family has been ripped apart. I also envisage that my sister … would also be emotionally distressed if my father was permanently removed from Australia.*[74]
>
> *Dr. Donnelly asked me how I would feel if my father was deported from Australia. Straight away, I answered that I would not be able to survive! My father is the one person that I truly look up to. He is the only person that can save me and provide structure and cogency in my life.* [75]

64. In his oral evidence at the hearing, DA was asked what it would mean for him if his father were removed to Iran. He stated:

> *For me, my father is my whole life. Like, without my father, this year-and-a-half, I've been stressed out, like. And I blame myself for that, because if I'd spoken up, the results would have been way different. And I blame myself for that every night before I go to sleep, when I wake up, I just think of my dad. And I will have no future without my dad. I'm 17. I've got no family in Australia. My whole - everyone is overseas. My mum has left me. I haven't seen my sister. I haven't seen (Indistinct) my sister and my mother in five months. And my father is the only person I have and if he gets removed to Iran, I will have no future. I will have no one.*[76]

Sam Augimeri

65. Sam Augimeri is a Senior Case Manager with Mission Australia's Youth on Track Program, which is contracted by the Department of Youth Justice to provide behavioural and family intervention in a voluntary capacity to young people aged 10-17 years who have had at least one formal contact with police. He has been case managing DA, since early July 2021.

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[73] Exhibit A2 [18]-[20], [22], [24].

[74] Ibid [24]-[25].

[75] Ibid [24].

[76] Transcript of Proceedings (24 November 2021) 49.

In his oral evidence at the hearing, Mr Augimeri explained that when he first met DA he was 'homeless at the time living on a park bench because him and his mother had had a falling out'.[77] He was 'dabbling with a bit of alcohol' and using cannabis as 'a coping mechanism for being at home with his mother'.[78] Since he has been working with DA, his primary focus has been addressing DA's immediate housing needs and providing support to renew the relationship with his father.[79] They have now arranged some transitional accommodation for DA.[80]

66. In his statement dated 13 September 2021, Mr Augimeri wrote that the Applicant's son has been 'feeling isolated from his father' and has been 'suffering an immense sense of ambiguous grief, mental and emotional turmoil, and disenfranchisement'.[81] He has become estranged from his mother leaving him feeling even more isolated. In accordance with the DA's wishes and acting on his behalf, Mission Australia has commenced the process of applying to vary the AVO conditions, requesting that DA be removed from the AVO as a protected person, so that he may resume a relationship with his father.[82] Most recently, they have written to Superintendent Batchelor of Hills PAC to assist with the application and are awaiting a response from him. DA has focussed his efforts on trying to assist his father to stay in the country and if he is released from immigration detention, they will resume their efforts with the application to vary the AVO conditions.[83] Mr Augimeri told the Tribunal that he believes the AVO should remain in some form as it is intended to protect people, but he believes that DA not having contact with his father 'is causing a whole host of problems and resentment and grief for [DA]'.[84] In his view, DA should be permitted to at least have phone contact with his father.[85]

67. In his statement Mr Augimeri wrote that DA has 'spoken often about how he wishes to continue to grow with his father in Australia, and that his only wish is to be able to speak

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[77] Ibid 38.
[78] Ibid 40.
[79] Ibid 38.
[80] Ibid 41.
[81] Exhibit R1, G14, 61.
[82] Exhibit R1, G14, 61; Transcript of Proceedings (24 November 2021) 39.
[83] Transcript of Proceedings (24 November 2021) 39.
[84] Ibid 45.
[85] Ibid 46.

with his father again'.[86] Currently DA is working three jobs to save money to get his father started again when he is released back into the community. It is his belief that DA will not continue to make these 'positive choices' if his father is removed from Australia 'because they won't be worth anything to [him]'.[87] When DA was referred to them, he had a charge of stealing, but he has not since reoffended and has no plans to do so 'because he has something to look forward [to]'.[88]

68. Mr Augimeri wrote that he spoke with the Applicant in mid-September 2021 and heard 'how much he loved DA and how he wanted to build a future with DA in it' and he also 'spoke highly of his daughter'. It was clear to him that the Applicant 'was genuine, and that he was purely interested in the wellbeing of his family' and his 'priority was making sure that both his children were safe and happy'.[89] He asked the Applicant whether he would be making contact with DA if the condition was deleted and he said, 'he'd love to … but until that point he just couldn't take any chances'.[90] The Applicant said to him, 'regardless of what happens to me, just please look out for my son'.[91]

EXERCISE OF DISCRETION TO REVOKE MANDATORY CANCELLATION

1) Does the Applicant pass the '*character test'*?

69. In the representations and documents that the Applicant submitted to the Department and the Tribunal, he does not dispute the information in the National Criminal History Check report dated 26 October 2020 regarding his criminal convictions and sentences. This report records that on 6 October 2020, the Applicant was convicted in the Paramatta Local Court of *Stalk/intimidate intend fear physical etc harm (domestic)-T2*; two counts of *Contravene prohibition/restriction in AVO (Domestic*); Destroy or damage property <=$2000 (DV)-T2; *Common assault (DV)-T2*; and *Armed w/I commit indictable offence-T1* and was sentenced to an aggregate term of imprisonment of 20 months with a 12 month non-parole period. The Tribunal is satisfied that the Applicant has a '*substantial criminal record'* for the purposes of section 501(3A)(a) and section 501(6) of the Act as he has been sentenced to a term of

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[86] Exhibit R1, G14, 61.
[87] Transcript of Proceedings (24 November 2021) 40.
[88] Ibid 41.
[89] Exhibit R1, G14, 61.
[90] Transcript of Proceedings (24 November 2021) 39.
[91] Ibid.

imprisonment of 12 months or more: section 501(7)(c). The Tribunal is also satisfied, for the purposes of section 501(3A)(b) of the Act, that on 13 November 2020, the Applicant was serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the state of New South Wales.

70. Having found that the Applicant does not satisfy the character test, the Tribunal finds that section 501CA(4)(b)(i) cannot be invoked to revoke the Mandatory Visa Cancellation Decision.

2) Is there '*another reason'* why the Mandatory Visa Cancellation Decision should be revoked?

71. In determining whether pursuant to section 501CA(4)(b)(ii) of the Act there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked, the Tribunal must in accordance with paragraphs 8 and 9 of the Direction take into account the relevant 'primary considerations' and 'other considerations'.

PRIMARY CONSIDERATIONS

Primary Consideration 1 – Protection of the Australian community

72. Reiterating the general guidance and principles in the Direction, paragraph 5.2 states that:

> *(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 risk of causing physical harm to the Australian community.*

73. Paragraph 8.1(2) states that in considering the need for protection of the Australian community, decision-makers should also have regard 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) Nature and seriousness of the Applicant's conduct to date

74. Paragraph 8.1.1(1) sets out factors to be considered in determining the nature and seriousness of the non-citizen's criminal offending or other conduct to date. Relevant to the Applicant's conduct, the Tribunal must have regard to the following factors:

> *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) …*
>
> *(ii) …*
>
> *(iii) …*
>
> *(iv) …*
>
> *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) …*
>
> *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 an absence of a warning should not be considered to be in the non-citizen's favour).*

75. The Applicant accepts that his behaviour must be considered to be very serious because it clearly caused great fear to the victim and probably also his children, who were present and witnessed what happened.[92] He also accepts that his use of a knife to threaten the victim adds considerably to the seriousness of the offending, as it greatly increased the potential harm that could easily have ensued. Furthermore, the fact that the offending took place

[92] Applicant's SFIC [28]; Transcript of Proceedings (24 November 2021) 60.

after a Court had issued an order explicitly designed to prevent such actions also adds to its seriousness.[93]

76. Having regard to the factors in paragraphs 8.1.1(1)(a)(i)-(iii), the Tribunal finds that the nature and seriousness of the Applicant's offending is very serious. It involved acts of family violence against his former wife in the presence of their son. Further, it involved the use of a knife which the Applicant put to the victim's neck and threw at a TV. The use of this weapon in this manner had real potential to cause serious harm.

77. Having regard to paragraph 8.1.1(1)(c) of the Direction, the Tribunal finds that the custodial sentences imposed on the Applicant by the courts are an objective indicator of the seriousness of his criminal offending. Sentences involving terms of imprisonment are a last resort in the sentencing hierarchy, which reflects the objective seriousness of the offences involved.[94] The sentencing Magistrate viewed the Applicant's offending as very serious as demonstrated by the imposition of a significant custodial sentence for what were his first offences.

78. The Respondent contended that the Applicant's conduct in mid-September 2021 when he allegedly contacted and made threats to A, should be taken into account in considering the nature and seriousness of the Applicant's conduct. The Tribunal accepts the Applicant's evidence that he and A did speak on the phone at this time, that the call was initiated by A, and that he did not make the alleged threats.

79. On the basis of the evidence before it, and for the stated reasons, the Tribunal finds that the Applicant's criminal offending is very serious in nature, and this weighs against the exercise of the discretion to revoke the Mandatory Visa Cancellation Decision.

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

80. Paragraph 8.1.2(1) of the Direction states:

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[93] Ibid.

[94] *Jal v Minister for Immigration and Border Protection* [2016] AATA 789 at [24]; *PNLB and Minister for Immigration and Border Protection* [2018] AATA 162 at [22] and *Saleh and Minister for Immigration and Border Protection* [2017] AATA 367 at [50].

> *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 harms 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.*

81. Paragraph 8.1.2(2) of the Direction provides that in assessing the risk that may be posed to the Australian community, decision-makers must have regard to, cumulatively:

> *a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
>
> *b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> *i) information and evidence on the risk of the noncitizen 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). …*

82. Having regard to the nature of the harm to individuals or the Australian community if the Applicant were to reoffend in accordance with paragraph 8.1.2(2)(a) of the Direction, the Tribunal finds that any future reoffending by the Applicant may involve physical and/or psychological harm to his victims. The Applicant's criminal offending included threatened physical violence committed against his former wife in the presence of his son. The Tribunal has previously recognised the physical and psychological harm that is caused by violent behaviour in a domestic context. In *XFKR and Minister for Immigration and Border Protection* ('*XFKR*'), the Tribunal observed:

> *The Tribunal would add that, in a society that adheres to fundamental sex equality principles, violence that is gendered and directed at women (and which seeks to degrade and dehumanise women on the basis of sex) is both individually and systemically intolerable. Its harms are threefold. First, it results in direct physical and psychological harm for those women against whom the violence is directed. Second, it psychologically harms the children of these women — children who, as in this instance, witness their mothers being abused, degraded and dehumanised — and send a message to those children (male and female) that behaviour of this sort is to be tolerated. Third, it normalises those socially enforced gender imbalances that allow sex based inequalities and violence to arise in the first place. The impact this has, socially, on systemic equality between the sexes cannot be underestimated.*[95]

83. If the Applicant's previous criminal behavior were to be repeated, this would pose a significant risk to members of the community, including women and children. As noted

[95] [2017] AATA 2385 at [45].

above, and recognised in *XFKR*, domestic violence offences inflict substantial physical and psychological harm on individuals and diminish respect for women and equality between the sexes in society more generally. In addition to the potential harm to the Applicant's victims, there is the significant financial cost to the community associated with emergency services and law enforcement activities of any future offending by the Applicant. For these reasons, the Tribunal finds that the nature of the harm to individuals should the Applicant engage in similar criminal offences is serious.

84. Having regard to the likelihood of the Applicant engaging in further criminal or other serious conduct in accordance with paragraph 8.1.2(2)(b) of the Direction, the Tribunal notes that the Applicant has expressed his remorse for the offences he has committed. The Applicant claims to understand the seriousness of his offences and says he regrets his actions and their impact on his former wife and his children. The Tribunal has had regard to the evidence before it that prior to his convictions in October 2020, the Applicant had no previous convictions or other adverse conduct recorded against him. It also has noted that the Applicant's offending occurred in the context of the breakdown of his marital relationship and took place over a short period of one month. These matters do not excuse or mitigate the very serious nature of the Applicant's actions or reduce the seriousness of potential outcomes if he was again to act violently towards his former wife or another woman. However, they do indicate that the Applicant's criminal behaviour was precipitated by his emotional distress following the failure of his marriage, causing him to act in violent manner which he had not previously been accused or found to have acted.

85. In making this finding, the Tribunal notes that the Applicant had no recorded incidents in gaol or immigration detention, and that in gaol he worked as a painter for twelve months and 'received numerous positive work reports'.[96] The Tribunal also has noted the Applicant's evidence that he will not reoffend as he has 'done it once and … faced the consequences badly and … learned a lot'. It finds that this evidence indicates that the Applicant is determined not to re-offend.

86. The Tribunal has had regard to information and evidence on the risk of the Applicant re-offending as required by paragraph 8.1.2(2)(b)(i) of the Direction. In the Sentencing

[96] TB2, 48.

Assessment Report dated 23 September 2020,[97] the Applicant was found 'unable to demonstrate insight into the impact of his offending behaviour beyond the personal ramifications incurred'. He was assessed at a 'medium-low risk of reoffending' according to the Level of Service Inventory – Revised (LSI-R).[98] The Applicant's evidence is that his offending occurred following an angry outburst causing him to lose control. He has since reflected on his actions and recognised that there were steps he could have taken which would have prevented him acting in a violent manner, for example if he had 'left the scene or … gone for a walk to contemplate first'. The Tribunal finds that this evidence demonstrates that the Applicant has some insight into the triggers for his offending and how he can avoid acting in a similar manner in future, and that this reduces the likelihood of his re-offending.

87. The Tribunal has had regard to the evidence of rehabilitation as required by paragraph 8.1.2(2)(b)(ii) of the Direction. The Applicant's evidence is that while he was in gaol he engaged in an anger management course, and he attended all but one session which he was unable to complete when he was transferred to another facility. He claims he learned how to 'disengage from stressful situations' and 'to be consciously aware of … feelings [and] to manage them before they get out of control'. This evidence indicates that the Applicant gained an awareness of the reasons for his outburst of anger which led to his violent actions and how he can manage this more effectively should it occur again in the future.

88. On the basis of the evidence before it and taking into account available information and evidence of the risk of the Applicant re-offending and his rehabilitation, the Tribunal finds that the likelihood of the Applicant engaging in further criminal or other serious conduct is low to moderate. In the context of the potential harm to the Applicant's victims should he engage in the same or similar criminal conduct in the future, specifically family violence offending, the Tribunal finds this risk to be unacceptable.

89. For the reasons above and applying the guidance in paragraphs 8.1.1 and 8.1.2 of the Direction, Primary Consideration 1 weighs against the revocation of the Mandatory Visa Cancellation Decision.

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[97] TB2, 47-51.
[98] Ibid 49.

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

90. This Primary Consideration is relevant in the Applicant's circumstances as he has been convicted of seven offences that involve family violence arising from three incidents in June 2020. The victims of these offences were the Applicant's former wife and his son.

91. In considering the seriousness of the family violence engaged in by the non-citizen, paragraph 8.2(3) of the Direction states that decision-makers must consider the following factors:

> *a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;*
>
> *b) the cumulative effective of repeated acts of family violence;*
>
> *c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:*
>
> *i. the extent to which the person accepts responsibility for their family violence related conduct;*
>
> *ii. the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);*
>
> *iii. efforts to address factors which contributed to their conduct; and*
>
> *d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement of other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status, should the non-citizen engage in further acts of family violence.*

92. The Applicant contended that where the Applicant's family violence offending has been addressed under the primary considerations of the protection of the Australian community, and the expectations of the Australian community the Tribunal should not 'double count' this offending under this primary consideration, and accordingly it should be given neutral weight.[99] The Applicant relied on a number of Tribunal authorities in support of this contention*: Castle and Minister for Home Affairs (Migration)*;[100] *BYMD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*;[101] *FFXL and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*;[102] *Nuuamoa and Minister for Immigration, Citizenship, Migrant Services and*

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[99] Applicant's SFIC [61]; Transcript of Proceedings (25 November 2021) 68.

[100] [2020] AATA 1778 [38].

[101] [2021] AATA 3476 [155].

[102] [2021] AATA 3655 [122].

Multicultural Affairs (Migration);[103] *Anderson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)*;[104] *Williams v Minister for Immigration and Citizenship*;[105] *Pourabbas Aghbolagh and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration*).[106]

93. The Respondent acknowledged that this primary consideration is not intended to direct decision-makers to 'double count' the Applicant's family violence offences and decision-makers are not usually required to take the matter into account repetitiously. It argued that this primary consideration and the assessment it necessitates is qualitatively different from that called for by the protection of the Australian community consideration.[107]

94. The Respondent drew the Tribunal's attention to the recent Federal Court decision in *XSLJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.*[108] In this matter, the applicant contended that the Tribunal erred in having regard to its finding that the applicant's offending had severely impacted on his capacity to play a hands-on parenting role to his three children ('parenting finding') and its finding that the applicant's criminality in Australia effectively precluded him from earning his living as a qualified panel beater ('work finding') in its approach to the consideration in cl 13.1.1(1)(f) of Direction 79. The applicant submitted that to take into account the parenting finding and the work finding in its consideration of cl 13.1.1(1)(f) would be to impermissibly 'double count' these considerations against the applicant, because they are expressly addressed in the context of the considerations in cl 13.2(4) (Best interests of minor children) and cl 14.2 (Strength, nature and duration of ties to Australia) of Direction 79. Halley J rejected this submission, stating as follows:

> *Not being required to take into account a matter "repetitiously" is a fundamentally different proposition to prohibiting a matter being taken into account for two or more mandatory considerations. The matters to be taken into account in addressing mandatory and other considerations may well overlap, particularly in circumstances where a consideration is expressed in general terms. It is neither desirable nor, in my view, permissible not to have regard to material*

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[103] [2021] AATA 3295 [108].
[104] [2021] AATA 205 [217].
[105] [2013] FCA 702 [60].
[106] [2021] AATA 4269.
[107] RSFIC [34]; Transcript of Proceedings (25 November 2021) 83.
[108] [2021] FCA 1138.

that is otherwise relevant to a consideration in Direction 79 on the basis that it is more directly relevant to another consideration in that direction.

I am not satisfied, therefore, that any error of law is demonstrated simply on the basis that the Tribunal has taken into account a matter in addressing more than one mandatory or other consideration in Direction 79.[109]

95. On the basis of this authority, the Tribunal accepts the Respondent's submission that the Applicant's domestic violence offending may be taken into account in considering one or more mandatory or other considerations. It finds that it would be impermissible for it to disregard material relevant to the consideration of the family violence primary consideration merely for reason that it had already been considered in the context of one or more of the other three primary considerations or other considerations. It therefore does not accept that having regard to such material amounts to impermissible 'double-counting'.

96. Having regard to the frequency of the Applicant's family violence offending and its cumulative effect in accordance with paragraph 8.2(3)(a) and (b) of the Direction, the Tribunal notes that the Applicant's offending occurred on three occasions over a one month period. His offending began with a verbal threat made to his former wife and escalated to an armed physical threat made against her in front of their son, causing her fear and damage to property. The Tribunal notes that the Applicant has no previous recorded charges or convictions in relation to any alleged domestic violence by the Applicant against his former wife. His offending was triggered by the breakdown of their marriage and, while his relationship with his former wife has now ended, there is the potential that he will harm another female partner if they were to face relationship problems or a break-up in the future.

97. In relation to the factors in paragraph 8.2(3)(c)(i) and (ii) of the Direction, the evidence is that the Applicant has accepted responsibility for his family violence conduct and that he appreciates the impact of this conduct on his former wife and his son. Whereas he continues to state that his actions were precipitated by his anger in relation to his wife being unfaithful to him, he acknowledged that this 'doesn't necessarily mean the other partner has not to act mindfully'. He recognises that he could have been wiser and not acted the way he did, and that it was 'not … her fault'.[110]

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[109] Ibid [123]-[124].

[110] Transcript of Proceedings (24 November 2021) 35.

98. In relation to the factors in paragraph 8.2(3)(c)(iii) of the Direction, the Tribunal notes that whilst the evidence indicates the Applicant undertook an anger management course in gaol, there is no indication that he has taken any other steps to obtain treatment for his behavioural issues that led him to act violently towards his former wife. Based on the evidence before it, the Tribunal cannot be satisfied that the Applicant has fully addressed the factors that contributed to the domestic violence offences for which he was convicted.

99. Having regard to the factors in paragraphs 8.2(3)(d), the evidence is that the Applicant committed acts of family violence against his former wife despite an AVObeing issued on 9 June 2020 for the protection of her and their children. The Tribunal cannot therefore be satisfied that the threat of serious consequences will prevent the Applicant from committing further acts of family violence.

100. On the basis of the evidence before it and applying the guidance in paragraph 8.2 of the Direction, the Tribunal finds that the Applicant's offences involving family violence are serious. Accordingly, Primary Consideration 2 weighs against the revocation of the Mandatory Visa Cancellation Decision.

Primary Consideration 3 – The best interests of minor children in Australia affected by the decision

101. Paragraph 8.3(1) of the Direction requires decision-makers to determine whether revocation is in the best interests of the child. This consideration applies only if the child is expected to be under the age of 18 years at the time the decision is made: paragraph 8.3(2). If there is more than one child affected, the Tribunal must consider the interests of each child individually to the extent that their interests may differ: paragraph 8.3(3).

102. In considering the best interests of the child, paragraph 8.3(4) relevantly requires the following factors be considered:

> 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 the 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 in any way, whether physically, sexually or mentally;

h) …

103. There are two children whose best interests must be considered by the Tribunal, namely the Applicant's son DA who was born in June 2004 and is aged seventeen years, and his daughter who was born in August 2013 and is aged eight years.

104. In his statement in support of his revocation request dated 3 December 2020, the Applicant stated that he believes it is the best interests of his children for him to remain in Australia. Although he is subject to the AVO, he can contact them through a lawyer or plan visitations by agreement in writing between himself and his former wife. He wrote that his children need his financial and emotional support, and he understands they miss him terribly. If he is removed, 'there remains no slightest chance for them to get on with their lives in a proper way in the Australian society'. He is 'fully aware of the problems children from broken families grapple with endangering their own well-being as well as that of the society at large' including 'aggressiveness, anxiety, [and] developing bad habits resulting in educational underachievement.'[111]

105. Having regard to the factors in paragraph 8.3(4)(a), the evidence before the Tribunal is that the Applicant loves his children 'whom [he] cannot live without'.[112] He was a central figure in both his children's lives until his incarceration in October 2020. DA's evidence is that he and his father have a loving relationship and that the Applicant has provided him with considerable emotional and practical support when he was growing up. He described the Applicant as 'an excellent role model for my sister and me'. The Applicant's contact with his children has necessarily been limited by the AVO imposed on him in October 2020, which significantly limits his ability to communicate with his children, and which he has adhered to strictly over the past 12 months. There is limited evidence as to the Applicant's daughter's

[111] Exhibit R1, G11, 49.

[112] Ibid 47.

relationship with her father. She is in the custody of her mother and apparently has not spoken to her father since he entered gaol. On the basis of this evidence, the Tribunal is satisfied that the Applicant and his children had a meaningful and loving relationship throughout their lives prior to his incarceration, and that he and his son have a strong desire to re-establish contact with each other as soon as they are permitted to do so.

106. In relation to the factors in paragraph 8.3(4)(b), the evidence is that DA will reach adulthood in mid-2022. Accordingly, there is limited time available for the Applicant to play a positive role in his son's life until he turns 18 years of age. However, given the vulnerable circumstances in which DA finds himself, he will require the support of a parental figure until he is able to find secure and permanent accommodation and is psychologically stable. In relation to the Applicant's daughter, as she is aged eight years there is a considerable period during which the Applicant could play a positive role in her life. However, the AVO significantly restricts their ability to communicate and is effective until October 2025. In the absence of her mother's permission and cooperation, it is unlikely that the Applicant's daughter will be able to resume her relationship with her father in the foreseeable future.

107. Having regard to the factors in paragraph 8.3(4)(c) and (g) of the Direction, the Tribunal notes that the Applicant's children were present when the Applicant's made threats to their mother and damaged property at their home. The Tribunal finds that this would have likely been a very distressing experience for both children, and if it were repeated it would again cause them considerable distress. DA's evidence is that he blames himself for not speaking about the incident which he believes may have resulted in a different outcome for the Applicant. This evidence indicates that DA continues to be affected by the Applicant's offending and that its impact on him may have long-term consequences.

108. Having regard to the factors in paragraph 8.3(4)(d), (e) and (f), the evidence demonstrates that the Applicant's ongoing separation from DA will have a considerable impact on him. Both DA and Mr Augimeri gave evidence that DA is fully committed to taking steps to have his father released back into the community and to have the AVO amended so he can at least have phone contact with him. DA is working seven days a week and making positive choices, including not engaging in criminal behaviour, which are largely motivated by his desire to be reunited with his father. DA's evidence to the Tribunal is that his father 'is [his] whole life' particularly following his recent estrangement from his mother. The Tribunal finds that if DA and his father remain permanently separated, it will have a devastating effect on

him. The evidence in relation to the Applicant's daughter is limited, however it appears that she is residing with her mother and therefore she has someone in her life who is fulfilling a parental role. However, if the Applicant is released into the community, she will at least have the opportunity to re-establish physical contact with her father if the AVO is amended to allow her to do so, or when it ceases to be in effect in October 2025.

109. Applying the guidance in paragraph 8.3(4) of the Direction, the Tribunal finds that Primary Consideration 3 weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision as it is clearly in the best interests of the Applicant's children for him to have his visa reinstated and be permitted to remain in Australia.

Primary Consideration 4 – The expectations of the Australian community

110. Paragraph 8.4 of the Direction states:

> *(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, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:*
>
> *(a) acts of family violence; or*
>
> *(b) …;*
>
> *(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 …*
>
> *(d) …*
>
> *(e) …*
>
> *(f) …*
>
> *(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable 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.*

111. The Full Court of the Federal Court considered paragraph 11.3(1) of Direction 65, which is analogous to paragraph 8.4 of the Direction, in *FYBR and Minister for Home Affairs* [2019] FCAFC 185 ('*FYBR*'). The majority (Charlesworth and Stewart JJ) concluded as follows:

- Paragraph 11.3 contains a statement of the Government's views as to the expectations of the Australian community, which operates to impute or ascribe to the whole of the Australian community an expectation that wholly aligns with the expectation of the executive government of the day in respect of its subject matter.[113] It is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an applicant's circumstances or evidence about those expectations.[114]

- However, the question of whether it is appropriate to act in accordance with the deemed community expectation is in all cases left for the decision-maker to determine in the ultimate exercise of his or her discretion.[115] It is necessary for the decision-maker to assess the applicant's circumstances in order to reach an evaluative assessment of "appropriateness".[116]

112. The effect of paragraph 8.4 is that it imputes to the Australian community the expectation that non-citizens who have permission to remain in Australia will obey Australian laws. The question to be addressed does not involve an inquiry into what the Australian community does or does not expect, because that is normatively expressed in the terms of the consideration: paragraph 8.4(4). Rather, the relevant inquiry is 'whether it is appropriate to give more or less weight to a deemed community expectation' of non-revocation of a mandatory visa cancellation 'that might otherwise arise simply because of the nature of the non-citizen's character concerns or offences'.[117] As a normative expression, this consideration indicates the likelihood that community expectation will in most cases lead to non-revocation, without dictating an inflexible conclusion. The question for a decision-maker is the weight to be attached to this consideration.

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[113] Charlesworth J at [66]; Stewart J at [91].

[114] Charlesworth J at [67]; Stewart J at [104].

[115] Charlesworth J at [76].

[116] Stewart J at [97].

[117] Charlesworth J at [77].

113. Having regard to the expectations of the Australian community as stated in paragraph 8.4 of the Direction, the Applicant has breached a number of Australian laws and an AVO in place for the protection of his former wife and his children. The Applicant's offences also include family violence against his former wife which was committed in the presence of his children. As recognised by paragraphs 8.4(2)(a) and (c) of the Direction, the commission of these offences should generally result in the cancellation of the non-citizen's visa.

114. The Applicant arrived in Australia in July 2012 and has resided here for almost a decade. Having regard to the factors in paragraph 5.2(4) of the Direction, particularly the length of time the Applicant has been in Australia, this supports a finding that there is a higher level of tolerance by the Australian community for his criminal conduct than there would be for a non-citizen who has not lived in the community for an extended period of time.

115. Having had regard to the Government's views in relation to the expectations of the Australian community and giving them appropriate weight, and taking into account the nature, seriousness and impact of the Applicant's criminal offending, and the duration of his residency in Australia, the Tribunal finds that Primary Consideration 4 weighs against revocation of the Mandatory Visa Cancellation Decision.

OTHER CONSIDERATIONS

116. While the primary considerations carry particular weight, the Direction acknowledges at paragraph 9 that 'other considerations' must be taken into account by the decision-maker where relevant. Paragraph 7(2) states that '[p]rimary considerations should generally be given greater weight than the other considerations.'

117. The Tribunal notes that these considerations are 'other' considerations, as opposed to 'secondary' considerations. As Colvin J observed in *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 ('*Suleiman*') at [23]:

> *118. Direction 65 [now Direction 90] 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.

119. In *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[118] Wigney J held that this analysis 'tends to overcomplicate or over intellectualise the issue'. His Honour held at [23] that the use of the word 'generally' in clause 8(4) of Direction 79 (the same wording is used in section 7(2) of Direction 90) 'recognises that there may well be cases where the circumstances are such that one or more "other considerations" may be deserving of more weight than one or more primary considerations'. His Honour also held that the formulation identified in *Suleiman* 'is at least potentially problematic because it tends to suggest that a decision-maker cannot give greater weight to one or more of the "other considerations" in any given case unless they consider that the case is somewhat unusual or out of the ordinary'.

120. The 'other' considerations relevant to the Applicant's circumstances are considered in the following paragraphs.

International *non-refoulement* obligations

121. Paragraph 9.1 of the Direction relevantly provides:

> 1) *A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing. Accordingly, in considering non-refoulement obligations where relevant, decision-makers should follow the tests enunciated in the Act.*
>
> 2) *In making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. In doing so, decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable, and in the meantime, detention under section 189, noting*

[118] [2021] FCA 775 at [22].

also that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

3) *However, that does not mean the existence of a non-refoulement obligation precludes refusal or cancellation of a non-citizen's visa or non-revocation of the mandatory cancellation of their visa. This is because such a decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the non-citizen applies for a protection visa, the non-citizen would not be liable to be removed while their valid visa application is being determined.*

4) *Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in response to a notice of intention to consider cancellation or refusal of their visa under section 501 of the Act, in a request to revoke under section 501CA the mandatory cancellation of their visa, or can be clear from the facts of the case (such as where the non-citizen holds a protection visa).*

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

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

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

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

revocation decision under section 501CA, the person will be prevented from applying for any other class of visa except a Bridging R (Class WR) visa (see section 501E of the Act and regulation 2.12AA of the Regulations). In these circumstances, decision-makers should seek an assessment of Australia's international non- refoulement obligations.

International non-refoulement obligations

122. In *Ali v Minister for Home Affairs ('Ali')*,[119] the Full Court of the Federal Court said with respect to Australia's *non-refoulement* obligations:

> *[23] Although the concept of* non-refoulement *is not defined in the Act, s 5 contains a definition of "non-refoulement obligations" in the following terms:*
>
> ***non-refoulement obligations** includes, but is not limited to:*
>
> *(a) non-refoulement obligations that may arise because Australia is a party to:*
>
> *(i) the Refugees Convention; or*
>
> *(ii) the Covenant [being the International Covenant on Civil and Political Rights]; or*
>
> *(iii) the Convention Against Torture; and*
>
> *(b) any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a).*
>
> *[24] The concept of "non-refoulement" and its relationship to the Act was recently considered by the Full Court in* Ibrahim v Minister for Home Affairs *(2019) 270 FCR 12 (Ibrahim) at [100]–[113]. In summary and relevantly for the purposes of this matter:*
>
> *(a) The term "non-refoulement" is derived from Art 33(1) of the Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 art 33(1) (entered into force 22 April 1954) as amended by the Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) ('the Convention'), which provides:*
>
> ***Article 33***
>
> ***PROHIBITION OF EXPULSION OR RETURN ("REFOULEMENT")***
>
> *1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
>
> *(b) In Plaintiff M70/2011 v Minister for Immigration and Citizenship (the Malaysian Declaration Case) (2011) 244 CLR 144, Gummow, Hayne, Crennan and Bell JJ identified at [94] that Australia would contravene its non-refoulement obligations under Art 33(1), and thereby its international obligations, if it was to expel or return "in any manner whatsoever" a person*

[119] (2020) 380 ALR 393; [2020] FCAFC 109.

with a well-founded fear of persecution to a country where their life or freedom would be threatened for one of the identified Convention reasons. The Court also identified that Australia's international obligations would be breached if a person was returned without Australia first having ascertained whether the person is a refugee.

Risk of harm if removed to Iran

123. The Respondent accepts, and the Tribunal finds for the reasons that follow, that Australia has *non-refoulement* obligations with respect to the Applicant.

124. In his request for revocation of the Mandatory Visa Cancellation Decision the Applicant claims that that his conversion to Christianity would cause him 'harm and persecution from the authorities', that he would be 'threatened, assaulted and detained without charges' and even 'executed'.[120] The Applicant's evidence to the Tribunal is that he continues to practice his Christian faith and that he fears for his safety if he were to be removed to Iran. He has ongoing concerns about facing serious persecution and discrimination in Iran because he practices the Christian faith following his conversion from Islam.[121]

125. Country of origin information before the Tribunal includes the Department of Foreign Affairs and Trade Country Report with respect to Iran ('DFAT report') dated 14 April 2020.[122] It relevantly states the following which is relevant Applicant's claim that he faces religious persecution as a Christian in Iran:

- Over 99% of Iranians are Muslim, of whom 90-95% are estimated to be Shi'a and 5-10% Sunni.[123]
- Despite the protections afforded to them by the constitution, members of recognised religious minorities face official and societal restrictions.[124] By law, non-Muslims are barred from occupying senior positions in the government, military or intelligence, serving in the judiciary, or as public-school principals.[125]
- Non-Muslims seeking public sector employment or intending to run for public office are at a disadvantage compared to Muslims due to the requirement that all such candidates or

[120] Exhibit R1, 22.
[121] Transcript of Proceedings (24 November 2021) 9.
[122] Exhibit A7.
[123] Ibid [3.27].
[124] Ibid [3.34].
[125] Ibid.

applicants undergo the gozinesh review.[126] Government workers who do not observe Islamic principles and rules are subject to penalties and may be dismissed or barred from work in particular sectors.[127]

- The structure of the Islamic Republic favours the Shi'a Muslim majority to the exclusion of others.[128]

- Because the law prohibits citizens from converting from Islam to another religion, the government only recognises these groups because their presence in Iran pre-dates Islam.[129]

- All Christians and Christian churches must be registered with the authorities, and only recognised Christians can attend church.[130]

- DFAT assesses that Muslim converts to Christianity risk arrest and detention if their conversion is revealed.[131] It assesses that Christian converts face a high risk of societal discrimination if their conversion becomes widely known, particularly if they are from more religiously-minded Muslim family backgrounds.[132] This may involve ostracism of the individual from their family and discrimination in employment.[133]

126. The Applicant's evidence is that his family in Iran are Muslims, and his conversion to Christianity is not supported by them. The findings in the DFAT report that Christian converts face a high risk of societal discrimination if their conversion becomes widely known, particularly if they are from more religiously-minded Muslim family backgrounds, supports a finding that the Applicant's fears of facing religious discrimination in the community and in employment are well-founded.

127. The United Kingdom's Home Office Report titled 'Country Policy and Information Note *Iran: Christians and Christian Converts*' dated February 2020 ('Home Office Report') provides as follows in relation to Christian converts:

> *Christians who have converted from Islam are considered apostates - a criminal offence in Iran. Sharia law does not allow for conversion from Islam to another religion, and it is not possible for*

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[126] Ibid.
[127] Ibid.
[128] Ibid [3.36].
[129] Ibid [3.37].
[130] Ibid [3.38].
[131] Ibid [3.58].
[132] Ibid.
[133] Ibid.

a person to change their religious affiliation on personal documentation. There are reports of some Christian converts (and sometimes their family members) facing physical attacks, harassment, threats, surveillance, arrest, detention, as well as torture and ill-treatment in detention.[134]

128. The Home Office Report also states that due to a '*general government suspicion of contact with the outside world'* individuals who converted to Christianity whilst may be considered more of a threat than those who have converted whilst in Iran.[135]

129. On the basis of the evidence before it, particularly the country information cited above, the Tribunal is satisfied that the Applicant engages Australia's international *non-refoulement* obligations as defined in section 5 of the Act. The evidence supports a finding that there is a likelihood that the Applicant would face a real risk of suffering harm in Iran, which might include religious persecution, if he presents himself as an apostate from Islam. This finding is consistent with the decision to grant the Applicant the visa he has held since January 2018 which has protected him from *refoulement*.

Application for protection visa not permitted

130. As the Tribunal has found that Australia owes the Applicant *non-refoulement* obligations, it will consider whether he would be permitted to lodge an application for protection visa if the Tribunal does not decide to revoke the Mandatory Visa Cancellation Decision and his visa remains cancelled.

131. Section 501E provides:

Refusal or cancellation of visa--prohibition on applying for other visas

(1) A person is not allowed to make an application for a visa, or have an application for a visa made on the person's behalf, at a particular time (the application time) that occurs during a period throughout which the person is in the migration zone if:

(a) at an earlier time during that period, the Minister made a decision under section 501, 501A, 501B or 501BA to refuse to grant a visa to the person or to cancel a visa that has been granted to the person; and

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[134] Exhibit A8 [2.4.6].

[135] Ibid [2.4.11]; Applicant's SFIC [106].

(b) the decision was neither set aside nor revoked before the application time.

132. Section 48A(1B) of the Act provides

No further applications for protection visa after refusal or cancellation

(1B) Subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.

133. Section 48B provides:

Minister may determine that section 48A does not apply to non-citizen

1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 48A does not apply to prevent an application for a protection visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day on which the notice is given.

2) *The power under subsection (1) may only be exercised by the Minister personally*.

134. Section 5(1) of the Act defines '*protection visa':*

'protection visa' has the meaning given by section 35A.

Note: Section 35A covers the following:

(a) permanent protection visas (classified by the Migration Regulations 1994 as Protection (Class XA) visas when this definition commenced);

(b) other protection visas formerly provided for by subsection 36(1);

(ba) safe haven enterprise visas;

(c) temporary protection visas (classified by the Migration Regulations 1994 as Temporary Protection (Class XD) visas when this definition commenced);

(d) any additional classes of permanent or temporary visas that are prescribed as protection visas by the regulations.

135. As the Applicant's visa is a Safe Haven Enterprise Visa (SHEV) it is a 'protection visa' as defined. Accordingly, if the Tribunal decides not to revoke the Mandatory Visa Cancellation Decision, the Applicant will be prevented by section 48A(1B) of the Act from making a further application for a protection visa while he is in the migration zone unless the Minister determines that section 48A does not apply to him: s 48B; paragraph 9.1(8) Direction.

136. Further, if the Tribunal does not revoke the Mandatory Visa Cancellation Decision under section 501CA, the Applicant will be prevented from applying for any other class of visa except a Bridging R (Class WR) visa: section 501E and regulation 2.12AA of the *Migration Regulations 1994 (Cth).* In these circumstances, the Tribunal should make an assessment of Australia's international *non-refoulement* obligations: paragraph 9.1(8) Direction. As outlined above, the Tribunal finds that Australia has *non-refoulement* obligations with respect to the Applicant.

137. There is no evidence before the Tribunal as to whether the Minister has considered permitting the Applicant to make an application for a protection visa. It is unlikely that he would have done so prior to the determination of this review application. The Tribunal cannot speculate about whether he would permit the Applicant to apply for a protection visa if the visa remains cancelled. If the Applicant were permitted to make an application for a protection visa, the Minister (either personally or by his delegate) would likely refuse the Applicant's visa on character grounds. In *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[136] the Full Court of the Federal Court considered similar factual circumstances to those of the Applicant and observed:

> *Having regard to those provisions of the Act and Regulations, had the Tribunal given consideration to whether there was a realistic possibility that the appellant would be granted a protection visa, it would no doubt have been noted that it would be rather incongruous, if not somewhat bizarre, to think that there was a realistic possibility that the Minister would, on the one hand, vigorously oppose the revocation of the cancellation of the appellant's visa on character grounds, as he did before the Tribunal, and yet on the other, decide not to exercise his discretion to refuse to grant the appellant another visa on character grounds, either under s 501 or in the context of PIC 4001. It would scarcely matter that the refusal of the other visa on character grounds could be made by a delegate of the Minister, which was subject to review by the Tribunal, particularly given the Minister's power to set aside any favourable decision by his delegate or the Tribunal in that regard: see s 501A of the Act.*[137]

138. The Tribunal has considered whether the Applicant would be granted a protection visa if he were permitted to make an application for the same, and finds that there is not a realistic prospect that it would be granted him. It would be 'incongruous, if not somewhat bizarre' that the Minister would decide not to exercise his discretion to refuse to grant the Applicant a protection visa on character grounds, either under s 501 or in the context of PIC 4001,

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[136] [2021] FCAFC 35; 143. *DQM18 v Minister for Home Affairs* [2020] FCAFC 110 at [108]-[109].
[137] [2021] FCAFC 35 [55], [73].

when he has so vigorously opposed the revocation of the Mandatory Visa Cancellation Decision in this review application.

139. The Tribunal finds that the Applicant is unlikely as a consequence of the operation of ss 501E and 48A of the Act to be permitted to make any further substantive visa applications, including for a protection visa, whilst he is in the migration zone, and if such an application were made it would be highly likely to be refused. The Tribunal therefore must consider and engage with the immediate legal consequences of a decision not to revoke the Mandatory Visa Cancellation Decision in circumstances in which the Applicant would be unable to make an application for a substantive visa.

Obligation to remove unlawful non-citizen

140. Section 197C addresses the relevance of Australia's *non-refoulement* obligations to the removal of non-citizens from Australia as required by section 198 of the Act:

> ***197C Relevance of Australia's non-refoulement obligations to removal of unlawful non-citizens under section 198***
>
> *(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.*
>
> *(2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.*
>
> *(3) Despite subsections (1) and (2), section 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if:*
>
> *(a) the non-citizen has made a valid application for a protection visa that has been finally determined; and*
>
> *(b) in the course of considering the application, a protection finding within the meaning of subsection (4), (5), (6) or (7) was made for the non-citizen with respect to the country (whether or not the visa was refused or was granted and has since been cancelled); and*
>
> *(c) none of the following apply:*
>
> *(i) the decision in which the protection finding was made has been quashed or set aside;*
>
> *(ii) a decision made under subsection 197D(2) in relation to the non-citizen is complete within the meaning of subsection 197D(6);*
>
> *(iii) the non-citizen has asked the Minister, in writing, to be removed to the country.*
>
> *(4) For the purposes of subsection (3), a **protection finding** is made for a non-citizen with respect to a country if a record was made in relation to the non-citizen under section 36A that the Minister is satisfied as mentioned in paragraph 36A(1)(a), (b) or (c) with respect to the country.*

*(5) For the purposes of subsection (3), a **protection finding** is also made for a non-citizen with respect to a country if the Minister was satisfied of any of the following (however expressed and including impliedly):*

(a) the non-citizen satisfied the criterion in paragraph 36(2)(a) with respect to the country and also satisfied the criterion in subsection 36(1C);

(b) the non-citizen satisfied the criterion in paragraph 36(2)(aa) with respect to the country;

(c) the non-citizen:

(i) would have satisfied the criterion in paragraph 36(2)(a) with respect to the country except that subsection 36(3) applied in respect of the non-citizen;

(ii) satisfied the criterion in subsection 36(1C);

(d) the non-citizen:

(i) satisfied the criterion in paragraph 36(2)(a) with respect to the country but did not satisfy the criterion in subsection 36(1C); and

(ii) would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that the non-citizen was a non-citizen mentioned in paragraph 36(2)(a);

(e) the non-citizen:

(i) satisfied the criterion in paragraph 36(2)(a) with respect to the country but did not satisfy the criterion in subsection 36(1C); and

(ii) would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that the non-citizen was a non-citizen mentioned in paragraph 36(2)(a) and subsection 36(2C) or (3) applied in respect of the non-citizen;

(f) the non-citizen would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that subsection 36(2C) or (3) applied in respect of the non-citizen.

*(6) For the purposes of subsection (3), a **protection finding** is also made for a non-citizen with respect to a country if:*

(a) the Minister was satisfied (however expressed and including impliedly) that, because subsection 36(4), (5) or (5A) applied to the non-citizen in relation to the country, subsection 36(3) did not apply in relation to the country; and

(b) a protection finding within the meaning of subsection (4) or (5) was made for the non-citizen with respect to another country.

*(7) For the purposes of subsection (3), a **protection finding** is also made for a non-citizen with respect to a country in circumstances prescribed by the regulations.*

(7A) For the purposes of subsection (3), if an unlawful non-citizen has made more than one valid application for a protection visa that has been finally determined, that subsection applies only in relation to the last such application.

(8) For the purposes of subsection (5), it is irrelevant whether or not the non-citizen satisfied any other criteria for the grant of a protection visa.

(9) For the purposes of subparagraph (3)(c)(iii), a non-citizen who withdraws their written request to be removed to a country is taken not to have made that request.

198 Removal from Australia of unlawful non-citizen

(2B) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) a delegate of the Minister has cancelled a visa of the non-citizen under subsection 501(3A); and

(b) since the delegate's decision, the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501CA, to make representations to the Minister about revocation of the delegate's decision--either:

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the delegate's decision.

Amendment Act

141. The *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) ('the Amendment Act') came into effect on 25 May 2021.[138] It introduced a new s 36A which provides that, in considering a valid protection visa application, the Minister must consider and record findings against the protection obligations criteria (ss 36(2)(a) and 36(2)(aa)) before deciding whether to grant or refuse a protection visa based on the other criteria. It also amended s 197C to introduce s 197C(3)-(9) outlined above.

142. The Explanatory Memorandum for the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021 ('the CIOR Explanatory Memorandum') describes the purpose of the Bill in relation to removal of non-citizens who engage Australia's *non-refoulement* obligations:

> *Section 197C of the Migration Act provides that, for the purposes of section 198 (removal from Australia of unlawful non-citizens), it is irrelevant whether Australia has non-refoulement obligations in respect of a UNC, and that person must be removed as soon as reasonably practicable.*
>
> *…*
>
> *The purpose of the Bill is to clarify that the duty to remove under the Migration Act should not be enlivened where to do so would breach non-refoulement obligations, as identified in a protection visa assessment process, including Australia's obligations under the 1951*

[138] The *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) received royal assent on 24 May 2021.

> *Convention relating to the Status of Refugees and its 1967 Protocol (the Refugees Convention), the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).*[139]

143. The CIOR Explanatory Memorandum provides further clarification in relation to the effect of the amendments to s 197C in relation to the obligation to remove an unlawful non-citizen:

> *The amendments to section 197C of the Migration Act ensure that the power at section 198 of the Migration Act does not require or authorise an officer to remove an unlawful non-citizen whose valid application for a protection visa has been finally determined, and for whom a protection finding has been made through the protection visa process, in circumstances where to do so would be inconsistent with Australia's non-refoulement obligations. That is, the person cannot be removed to the country in relation to which their protection claims have been accepted, unless they no longer engage non-refoulement obligations or have requested, in writing, to be removed.*
>
> *…*
>
> *Together, the amendment to section 197C and the introduction of section 36A promote human rights by strengthening protections from removal where a person engages non-refoulement obligations under the CAT and the ICCPR, as well as under the Refugees Convention.*

Legal consequences of a non-revocation decision

144. The Applicant contends that if the Mandatory Visa Cancellation Decision is not revoked, he will not, by virtue of the statutory effect of s 197C(3) of the Act, be permitted to be removed from Australia.[140] The Respondent also relies on s 197C(3) to support its argument that the removal of an unlawful non-citizen in respect of whom a protection finding has been made in relation to a finally determined application for a protection visa is neither required nor authorised.[141] The question for the Tribunal is whether s 197C(3) applies to the Applicant's circumstances.

145. Deputy President Britten Jones observed in *XDJD and Minister for Immigration and Border Protection (Migration) ('XDJD')*[142] that '*protection finding'* in s 197C relates to a finding made through the protection visa process. The Applicant has not applied for a protection visa and

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[139] 2-3.

[140] Applicant's SFIC [116].

[141] Respondent's SFIC [48], [49].

[142] [2021] AATA 2882.

accordingly the provisions of s 197C which relate to circumstances where there has been a 'protection finding' with respect to a non-citizen are not relevant to the Applicant's situation. However, as Deputy President Britten-Jones noted in *XDJD*, there would be an expectation that a person who engages Australia's *non-refoulement* obligations would not be removed given the intention stated in the Explanatory Memorandum to 'strengthening protections from removal where a person engages non-refoulement obligations'.[143] Although in practice a decision may be taken not to remove an individual such as the Applicant about whom the Tribunal has made a finding that they engage Australia's *non-refoulement* obligations, pursuant to s 198 they would remain liable to be removed as soon as reasonably practicable. Accordingly, the legal consequences of a non-revocation decision in these circumstances would be the removal of the Applicant to Iran in breach of Australia's *non-refoulement* obligations.[144]

146. This finding that s 197C(3) does not apply to the Applicant's circumstances finds support in the Direction, which provides guidance in relation to determining the consequences of a non-revocation decision. Paragraph 9.1(2) states:

> *(2) In making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. In doing so, decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable, and in the meantime, detention under section 189, noting also that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.*

147. Paragraph 9.1(2) of the Direction requires the Tribunal to be mindful that, unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable. The Direction has not been amended following the introduction of the Amendment Act. It recognises that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen. This is consistent with the interpretation of section 197C adopted by the Tribunal as outlined in [145] above. Accordingly, irrespective of the engagement of Australia's *non-refoulement* obligations in the Applicant's circumstances, if

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[143] At 13.

[144] See *Minister for Immigration and Border Protection v Le* (2016) 244 FCR 56, 70-71 at [61]; [2016] FCAFC 244.

the Mandatory Visa Cancellation Decision is not revoked, the Applicant will be an unlawful non-citizen liable to removal as soon as it is reasonably practicable.

148. Guidance in relation to the legal consequences of a non-revocation decision where *non-refoulement* obligations are engaged is provided by the Full Court of the Federal Court decision in *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('WKMZ').*[145] This decision was made in the context of Ministerial Direction No. 79, but the principles it outlines in relation to how a decision-maker should consider the legal consequences of a non-revocation decision are also relevant to the Direction. *WKMZ* referred to the possible outcomes of a decision that a Mandatory Visa Cancellation Decision is not revoked: removal, indefinite detention, and the grant to the non-citizen of a visa.[146] As outlined above, the Tribunal finds that there is no realistic prospect that the Applicant would be granted another visa, including a protection visa.[147] The Tribunal must consider the consequences of the Applicant's removal to Iran pursuant to s 198, and the prospect that he may be held in ongoing immigration detention.

Removal to Iran

149. In *Ali*, the Full Federal Court observed that the consequence of removal of a non-citizen who engages Australia's international *non-refoulement* obligations not only affects the individual, but also 'impacts upon Australia's reputation and standing in the global community'.[148] Their Honours cited with approval the following passage in the judgment of Charlesworth J in *Hernandez v Minister of Home Affairs*:[149]

> *Had the Minister determined that Australia owed non-refoulement obligations to Mr Hernandez, that would be a factor capable of weighing in favour of revocation of the cancellation decision in the exercise of the discretionary power conferred by s 501CA(4). The existence of the obligation is clearly capable of furnishing "another reason" why the cancellation decision should be revoked. At the very least, it would be open to the Minister to conclude that Australia's reputational interests may be adversely affected by a decision resulting in the deportation of a person in contravention of Australia's obligations under international law.*

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[145] [2021] FCAFC 55.

[146] *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 at [97].

[147] See *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 35 at [73].

[148] See *Ali v Minister for Home Affairs* (2020) 278 FCR 627; [2020] FCAFC 109 at [91].

[149] *Hernandez v Minister for Home Affairs* [2020] FCA 415 at [65].

150. For the reasons stated above, the definition of 'protection finding' in s 197C means that there remains the potential of Australia removing the Applicant to Iran in breach of its *non-refoulement* obligations thereby adversely affecting Australia's reputational interests. Further, the Tribunal notes that s 197C does not preclude Australia from removing a non-citizen in breach of its *non-refoulement* obligations if they request voluntary removal.

151. The Tribunal finds that the potential for the Applicant to be removed to Iran pursuant to s 198 of the Act, or for him to be removed voluntarily, inconsistently with the *non-refoulment* obligations Australia owes to him, weighs strongly in favour of the revocation of the Mandatory Visa Cancellation Decision.

152. The Tribunal has had regard to country information that reports that Iran does not accept involuntary returns of its citizens. The DFAT report notes that Iran has 'a global and longstanding policy of not accepting involuntary returns'.[150] In March 2018, Iran and Australia signed a Memorandum of Understanding on Consular Matters ('the Memorandum').[151] This includes an agreement by Iran to facilitate the return of Iranians who arrived after March 2018 and have exhausted all legal and administrative avenues to regularise their immigration status in Australia.[152] The Memorandum does not apply to the Applicant, as he arrived in Australia in July 2012, some six years before it was concluded. As the Applicant refuses to voluntarily return to Iran, if he were removed from Australia to his country of citizenship, he would be an involuntary return. As Iran has historically refused to issue temporary travel documents to facilitate the involuntary return of its citizens from abroad, it is most unlikely that the Applicant could be returned there.[153] Accordingly, the Tribunal must consider the consequences of alternatives to removal of the Applicant to Iran.

Alternatives to removal to Iran

153. Paragraph 9.1(3) provides that a non-revocation decision need not necessarily result in a non-citizen's removal from Australia where there are other alternatives available:

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[150] Applicant's SFIC [107]; Exhibit A7 [5.27].
[151] Applicant's SFIC [108]; Exhibit A7 [5.27].
[152] Applicant's SFIC [108]; Exhibit A7 [5.27].
[153] Exhibit A7 [5.27].

(3) However, that does not mean the existence of a non-refoulement obligation precludes refusal or cancellation of a non-citizen's visa or non-revocation of the mandatory cancellation of their visa. This is because such a decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the non-citizen applies for a protection visa, the non-citizen would not be liable to be removed while their valid visa application is being determined.

154. There is no evidence before the Tribunal that consideration had been given to removal of the Applicant to another country in circumstances in which he is unable to be removed to Iran. Nor is there evidence as to whether the Minister has considered exercising his discretionary powers in favour of the Applicant. As this is an alternative to removal of the Applicant to Iran, it is relevant to the legal and practical consequences of a non-revocation decision. The Tribunal has considered whether the Minister would exercise his discretionary powers in favour of the Applicant under section 195A to grant him another visa, or under section 197AB to make a residence determination to enable him to reside at a specified place in the community, subject to appropriate conditions.

155. The Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)* (RALC Explanatory Memorandum) relating to the addition of s 197C into the Act, provided:

Australia will continue to meet its non-refoulement obligations through other mechanisms and not through the removal powers in s 198 of the Migration Act. For example, Australia's non-refoulement obligations will be met through the protection visa application process or the use of the Minister's personal powers in the Migration Act, including those under sections 46A, 195A or 417 of the Migration Act.[154]

156. Similarly, the COIR Explanatory Memorandum stated:

The Government's preference is to manage non-citizens in the community wherever possible, subject to meeting relevant requirements, including not presenting an unacceptable risk to the safety and good order of the Australian community. The Minister has a personal discretionary power under the Migration Act to intervene in an individual case and grant a visa, including a

[154] 166 [1142].

bridging visa, to a person in immigration detention, if the Minister thinks it is in the public interest to do so. What is and what is not in the public interest is for the Minister to decide.

The Minister also has a personal discretionary power to allow a detainee to reside outside of an immigration detention facility, at a specified address in the community (residence determination). While a residence determination permits an individual to be placed in the community subject to certain conditions, it continues to be a detention placement.

The Minister's powers to consider whether to grant a visa to permit an unlawful non-citizen's release from immigration detention, or to permit a community placement under a residence determination, until they are able to be removed from Australia consistently with non-refoulement obligations, means that the person's individual circumstances, and the risk they may pose to the Australian community can be taken into account. This enables the least restrictive option to be implemented for the person having regard to their circumstances.[155]

157. The Respondent contends that when regard is had to the statements of executive policy in the COIR Explanatory Memorandum and the amendments to s 197C, the Tribunal should find that Australia will not remove a non-citizen as a consequence of the cancellation of their visa to the country in respect of which the *non-refoulement* obligation exists.[156]

158. The Applicant drew the Tribunal's attention to the relevant Departmental policy guidance in relation to the exercise of the Minister's discretionary powers under ss 195A and 197AB contained in *PAM3: Act - Compliance and Case Resolution - Case resolution - Minister's powers - Minister's residence detention intervention power* (PAM 195A) and *PAM3: Act - Compliance and Case Resolution - Case resolution - Minister's powers - Minister's residence determination power* (PAM 197AB).[157] PAM 195A and PAM 197AB provide guidance to departmental officers in determining which matters to refer to the Minister so that he may consider whether to exercise his powers under ss 195A and 197AB respectively. Neither bind nor otherwise limit the power of the Minister to exercise the relevant powers.[158]

159. Relevantly, PAM 195A states that generally the Minister would not expect to have cases referred to him where the person's visa has been refused or cancelled under section 501 of

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[155] 13-14.

[156] Respondent's SFIC [53].

[157] Applicant's Supplementary submissions, 1-3.

[158] see PAM 195A at [7]; PAM 197AB at [23].

the Act.[159] PAM 197AB relevantly provides that, unless there are exceptional circumstances or he has requested it, the Minister would not expect the Department to refer cases to him where it is believed that a person presents character issues that indicate that they may fail the character test under section 501 of the Act.[160]

160. There is currently no evidence before the Tribunal that the Minister is considering an exercise of his personal powers in ss 195A or 197AB of the Act, nor is there evidence that he would do so in future. While those powers remain available to the Minister, the Tribunal cannot speculate on the Minister exercising those powers in the Applicant's circumstances. It finds however that the guidance contained in PAM 195A and PAM 197AB indicates that in circumstances such as the Applicant's, where a visa has been cancelled under section 501 due to failure to satisfy the character test, it is unlikely that the matter would be referred to the Minister for the exercise of his discretionary powers under s 195A or s 197AB of the Act.

161. For these reasons, the Tribunal accepts the Respondent's submission that while the powers in ss 195A and 197AB of the Act remain available, the immediate legal effect of non-revocation in the Applicant's circumstances is him being detained in immigration detention without a fixed chronological endpoint.[161]

162. In *FRVT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* ('*FRVT*') the Tribunal reached the same conclusion in relation to potential exercise of the Minister of his discretionary powers where the applicant's protection visa was mandatorily cancelled:

> *the Tribunal considers that it is very unlikely that the Minister, having decided not to revoke the mandatory cancellation of the Applicant's Protection visa, will exercise any non-compellable discretions, including those in sections 48B, 195A or 501J of the Act, in the Applicant's favour. This is especially so in the case of the Minister's broad discretion under section 195A of the Act to grant visas to persons in detention*.[162]

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[159] PAM 195A at [4].

[160] PAM 197AB at [10].

[161] Respondent's Supplementary submissions at [9] citing *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 at [136].

[162] [2020] AATA 294 at [279] and [312].

163. The approach taken by the Tribunal in *FRVT* has been applied by the Federal Court in *BAL19 v Minister for Home Affairs*;[163] *MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*;[164] and *DQM18 v Minister for Home Affairs*.[165]

164. For the reasons stated above, the Tribunal finds that the consequences of a non-revocation decision are that the Applicant will be held in detention without a 'chronologically fixed endpoint'.[166]

Ongoing immigration detention

165. The COIR Explanatory Memorandum stated as follows in relation to the detention of non-citizens who engage Australia's *non-refoulement* obligations but who cannot be removed from Australia:[167]

> *The amendments in the Bill are primarily aimed at protecting from removal those persons who engage Australia's non-refoulement obligations, but where character or security concerns mean they are ineligible for the grant of a protection visa. Persons who are granted a visa are not subject to removal. This means that persons affected by the amendments may be subject to ongoing immigration detention under section 189 of the Migration Act.*
>
> *Immigration detention remains a key component of border management and assists in managing potential threats to the Australian community – including national security and character risks – and ensures people are available for removal.*
>
> *Unlawful non-citizens who are unable to be removed due to barriers which include, but are not limited to, the situation where the amendments to section 197C made by this Bill will operate to protect them from removal in breach of non-refoulement obligations, may be detained until their removal is reasonably practicable. Removal in such cases may become possible if, for example, the circumstances in the relevant country improve such that the person no longer engages non-refoulement obligations, or if a safe third country is willing to accept the person. An unlawful non-citizen may also request in writing to be removed from Australia.*
>
> *Held detention in an immigration detention centre is a last resort for the management of unlawful non-citizens, particularly individuals whose removal may not be practicable in the reasonably foreseeable future.*

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[163] [2019] FCA 2189 [42]-[46].

[164] [2021] FCAFC 35 [42], [53], [55] and [73].

[165] [2020] FCAFC 110 at [108]-[109].

[166] *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 at [132].

[167] At 13.

166. If the Mandatory Visa Cancellation Decision is not revoked, the Applicant will remain in immigration detention whilst the Minister considers whether he can be returned to another country, or whether he will exercise of one of his discretionary powers under the Act. In *WKMZ,* Kenny and Mortimer JJ observed that consideration of these options may take some time:[168]

> *The period of a person's loss of liberty may be very lengthy, and have no chronologically fixed endpoint, being dependent on the completion of various administrative and executive steps and inquiries. The person concerned will have no accurate conception of when her or his detention might end. It may be inferred that any decision by the executive to abandon its adherence to Australia's international obligations would, as White J said in* AQM18, *be a serious step and not a decision taken quickly.*

167. As outlined in [152] above, in the Applicant's circumstances his removal to Iran will be unlikely due to that country's refusal to accept involuntary returns and the Applicant not being subject to the Memorandum concluded between Iran and Australia. In *WKMZ*, the Court referred to the need to engage with the legal and practical realities of the act of removal which may result in a person suffering further deprivation of liberty for an indefinite period of time: [169]

> *Once challenges to a visa refusal or cancellation are exhausted, the course that a particular individual's case might take will be highly fact-dependent. As* TCWY *and other authorities in this Court illustrate, being a national of some States will not guarantee that State will accept a person Australia seeks to remove. In turn, such circumstances will contribute to whether or not removal is "reasonably practicable". In other words, the operation of s 197C does not guarantee removal will occur immediately. It does not obviate the responsibility of a decision maker, in considering whether to revoke a visa cancellation, to engage with the legal and practical realities of the act of the removal. The nature of those realities may result in a person suffering further deprivation of liberty for an indefinite period of time.*

168. Based on the evidence before it referred to above, the Tribunal finds that the Applicant's removal from Australia to Iran is not likely to be 'reasonably practicable' at any time in the foreseeable future.

169. In *MNLR v Minister for Immigration, Citizenship and Multicultural Affairs,* Wigney J considered the potential for 'indefinite detention' arising from circumstances where it is not reasonably practicable to remove an unlawful non-citizen from Australia:[170]

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[168] *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 [132].

[169] Ibid [68].

[170] [2021] FCAFC 35 at [93]–[94].

> *It has also been said, in this context, that the effect of s 197C is that indefinite detention is "not a possibility" (AQM18 at [25]) or "no longer arises": Uolilo [v Minister for Home Affairs [2020] FCA 1135] at [91]. Those statements are undoubtedly correct if "indefinite" in this context is taken to mean that the period of detention may not, or will not, ever come to an end. That is because the detention will come to an end when the unlawful non-citizen is either granted a visa (in which case they are no longer an unlawful non-citizen) or they are removed from Australia pursuant to s 198 of the Act. Those statements are, however, somewhat questionable if "indefinite" is taken to mean that the actual period in which the non-citizen may or will remain in detention is unable to be defined or determined with any precision.*
>
> *There could be little doubt that the length of time that an unlawful non-citizen may spend in immigration detention may in some circumstances be very uncertain and very lengthy. That is particularly the case where the circumstances are such that it is not reasonably practicable to remove the unlawful non-citizen from Australia, for example where they are stateless or their nationality or citizenship is uncertain and no country will agree to receive them, and it cannot be said with any certainty when those circumstances may change. Detention is nonetheless to continue indefinitely in those circumstances until the person is able to be removed: Al-Kateb v Godwin (2004) 219 CLR 562; [2004] HCA 37 at [33]-[35] (per McHugh J), [227]-[231] (per Hayne J), [299], [301] (per Callinan J) and [303] (per Heydon J).*

170. In the Applicant's circumstances, there is most likely to be a significant delay before his removal from Australia while steps are taken to identify a country which will agree to receive him. During this period, he would be subject to ongoing immigration detention.

171. Having considered the circumstances referred to above, the Tribunal finds that the most likely consequence of a decision to not revoke the Mandatory Visa Cancellation Decision is the Applicant's ongoing immigration detention, and that the period of his loss of liberty may be very lengthy and have no chronologically fixed endpoint.

172. This consequence would be highly detrimental to the Applicant's psychological health and well-being and would also be in breach of Australia's international obligations and human rights standards. The Tribunal finds that the consequence of ongoing immigration detention is a factor that weighs very heavily in favour of revoking the Mandatory Visa Cancellation Decision.

173. While the Tribunal finds that ongoing immigration detention is the most likely consequence of non-revocation of the Mandatory Visa Cancellation Decision, it cannot discount the potential that the Applicant will be returned to Iran where he will be at risk of harm inconsistently with Australia's *non-refoulement* obligations. This consequence would be highly detrimental to the Applicant and weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

174. In conclusion, the legal and practical consequences of a decision not to revoke the Mandatory Visa Cancellation Decision are the prospect of his ongoing immigration detention with no chronologically fixed endpoint or his removal to Iran contrary to Australia's *non-refoulement* obligations. The Tribunal finds that these consequences both weigh very heavily in favour of revocation.

Extent of impediments if removed from Australia

175. The Direction states in paragraph 9.2:

> *(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country, taking into account:*
>
> *a) the non-citizen's age and health;*
>
> *b) whether there are substantial language or cultural barriers; and*
>
> *c) any social, medical and/or economic support available to them in that country.*

176. Having regard to the factors in paragraph 9.2(1)(a) and (c) of the Direction, the evidence before the Tribunal is that the Applicant is aged 47 years and has experienced mental health problems. As a citizen of Iran, the Applicant would have the same access to any social, medical and economic support as other citizens although such services may not however be of the same standard as those available in Australia. The Direction provides that the extent of any impediments to an applicant in establishing themselves and maintaining basic living standards is to be considered in the context of what is generally available to other citizens of that country. The DFAT report reports that healthcare is a major government priority in Iran and health care services are delivered on a nationwide network.[171] The DFAT report further details that the government has increased the availability of counselling services and therapeutic interventions for individuals suffering from mental illnesses.[172] Further, the World Health Organisation has reported that Iran's Ministry of Health and Medical Education has taken proactive measures to ensure access to and continuity of mental health services, particularly given the isolation caused by the COVID-19 pandemic.[173]

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[171] Exhibit A7, 15 [2.23].

[172] Ibid [2.25].

[173] Exhibit R2, TB5, 174.

177. Guided by paragraph 9.2(1)(b) of the Direction, the Tribunal finds that the Applicant will not face language or cultural barriers on his return, as he lived in Iran until the age of 38 years and therefore is familiar with life in his home country. It will take time for him to readjust to life in Iran and to find suitable employment. The Applicant's evidence is that he completed tertiary education in Iran and graduated as a technician. He was employed as an agricultural machinery technician with the Ministry of Agriculture in Iran and worked as a heavy vehicle driver and had a painting business in Australia. He should be able to find similar employment if he returns to Iran. The Applicant's mother, two brothers and four sisters reside in Iran and should be able to provide him with some level of support until he is able to find suitable accommodation and employment.

178. The Applicant's removal will significantly limit the possibility of him re-establishing his relationship with his two children. Whereas the AVO currently prevents the Applicant from communicating with his children other than in limited circumstances, his removal from Australia would make re-establishing their relationship very difficult.

179. Having regard to the evidence before it, the Tribunal finds the Applicant will face hardship if he is required to establish himself in Iran having not lived there for almost a decade. This hardship will be exacerbated by his separation from his children who will remain in Australia. Accordingly, guided by the factors in paragraph 9.2 of the Direction, the Tribunal finds that this consideration weighs in favour of the revocation of the Mandatory Visa Cancellation Decision.

Impact on victims

180. The Direction states in paragraph 9.3:

> *(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.*

181. There is no evidence before the Tribunal of the views of the Applicant's former wife and the impact on her of a decision to revoke the Mandatory Visa Cancellation Decision. The Tribunal has before it the evidence of the Applicant's son, DA, who also was a victim of the Applicant's offending. DA has a strong desire for the Applicant to remain in Australia so he

can resume a close relationship with his father. As outlined above, DA's evidence is that if his father were to be removed from Australia it would have a significant detrimental impact on his well-being and future prospects.

182. Having regard to the evidence before it, the Tribunal finds that the negative impact on the Applicant's son of a decision not to revoke the Mandatory Visa Cancellation Decision outweighs the impact on him as a victim of the Applicant's violent offending. The Tribunal therefore finds that this other consideration weighs marginally in favour of revocation of the Mandatory Visa Cancellation Decision.

Links to the Australian community

183. Paragraph 9.4 of the Direction requires decision-makers to have regard to paragraphs 9.4.1 to 9.4.2 below.

Strength, nature and duration of ties to Australia

184. Paragraph 9.4.1 requires consideration of the strength, nature and duration of the Applicant's family and social ties to Australia:

> *(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.*
>
> *(2) Where consideration is being given to whether to cancel a non-citizen's visa or whether to revoke the mandatory cancellation of their visa, the decision-maker must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:*
>
> *a) how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:*
>
> *i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and*
>
> *ii. more weight should be given to time the non-citizen has spent contributing positively to the Australian community.*
>
> *a) 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.*

185. Having regard to paragraph 9.4.1(2)(a) of the Direction, the evidence before the Tribunal is that the Applicant has resided in Australia for almost a decade, having arrived in Australia in July 2012. The Applicant committed the offences eight years following his arrival, and in accordance with paragraph 9.4.1(2)(a)(i) of the Direction, the Tribunal has given less weight to the strength, nature and duration of the Applicant's ties to Australia. The Applicant has however contributed positively to the Australian community during his ten year residence in Australia through his work as a heavy vehicle driver and his painting business. The Tribunal has given these contributions some weight in assessing the strength and nature of his ties to Australia

186. In relation to the factors in paragraph 9.4.1(1) and 9.4.1(2)(b) of the Direction, the Applicant has strong family ties in Australia, specifically with his two children. The evidence before the Tribunal is that the Applicant's son in particular would suffer significant emotional distress and hardship if the Applicant were returned to Iran.

187. In considering the factors in paragraph 9.4.1(2)(b), the Tribunal has had regard to the statements before the Tribunal from the Applicant's family and friends who state that they have known him since he has resided in Australia. The Tribunal finds that these individuals may experience emotional hardship if the Applicant is removed due to the duration of their friendship with him. However, there is no evidence that they rely on the Applicant for financial or practical support and therefore the Tribunal finds that the Applicant's removal would not have any significant impact on them. Accordingly, the Tribunal has given limited weight to the evidence contained in these statements.

Impact on Australian business interests

188. The Applicant does not claim that any Australian business interests would be affected by his removal to Iran. Accordingly, the Tribunal has given the factors in paragraph 9.4.2(3) no weight.

189. On the basis of the evidence before it, and having regard to the factors in paragraph 9.4, particularly the length of time the Applicant has resided in Australia, his contributions to the community, as well as the strength and nature of the Applicant's family and social ties in Australia, the Tribunal finds that this consideration weighs in favour of revocation of the Mandatory Visa Cancellation Decision.

CONCLUSION

190. In summary, the Tribunal finds that Primary Considerations 1 and 2 weigh heavily against revocation of the Mandatory Visa Cancellation Decision. The nature and seriousness of the Applicant's criminal offending is very serious, particularly as it has involved violent offences against his former wife in the presence of his children. The low to moderate risk of him committing future criminal offences coupled with the nature and seriousness of the harm this would cause to his future victims is such that the protection of the Australian community is best served by the non-revocation of the Mandatory Visa Cancellation Decision.

191. Primary Consideration 3 weighs in favour of revocation of the Mandatory Visa Cancellation Decision. It is in the best interests of the Applicant's children for him to remain in Australia. Primary Consideration 4 weighs against revocation of the Mandatory Visa Cancellation Decision as the expectations of the Australian community are that Applicant's serious family violence offences should cause him to forfeit the privilege of remaining in Australia, and this is not outweighed by decade residency in Australia and his employment contributions to the community.

192. In regard to the relevant Other Considerations, the potential for the Applicant to be *refouled* to Iran in breach of Australia's *non-refoulement* obligations and/or for him to be held in immigration detention for a very lengthy period with no chronologically fixed endpoint weigh heavily in favour of revocation. The impediments he will face on return to Iran and his links to the Australian community also weigh in favour of revocation of the Mandatory Visa Cancellation Decision.

193. The Tribunal is satisfied that there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked and decides that the Reviewable Decision should be set aside.

DECISION

194. The Reviewable Decision dated 16 September 2021 to refuse to revoke the Mandatory Visa Cancellation Decision dated 13 November 2020 is set aside and in substitution the cancellation of the Applicant's Class XE Subclass 790 Safe Haven Enterprise visa is revoked.

I certify that the preceding 194 (one hundred and ninety-four) paragraphs are a true copy of the reasons for the decision herein of Senior Member Linda Kirk

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

Associate

Dated: 12 January 2022

Dates of hearing:	**24 & 25 November 2021**
Date final submissions received:	**3 December 2021**
Counsel for the Applicant:	**Dr Jason Donnelly**
Counsel for the Respondent:	**Mark Cleary**
Solicitors for the Respondent:	**Sparke Helmore**