Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2021/9573**

Re: **Mehmet Celik**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member M Griffin QC**

Date: **22 February 2022**

Place: **Sydney**

The Tribunal sets aside the reviewable decision of the delegate of the Minister dated 3 December 2021 not to revoke the mandatory cancellation of the Applicant's Class BC Subclass 100 Partner visa. In substitution, the Tribunal decides that the cancellation of the Applicant's Class BC Subclass 100 Partner visa is revoked.

.....SGD.....

Senior Member M Griffin QC

CATCHWORDS

MIGRATION – mandatory cancellation of visa – Class BC Subclass 100 Partner 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 – protection of the Australian community – seriousness of offending and future risk – family violence – best interests of minor children in Australia – expectations of the Australian community – other considerations – extent of impediments if removed – Impact on victims – links to the Australian community – the strength, nature and duration of ties to Australia – special consideration – mandatory cancellation of visa revoked - decision under review set aside and substituted

LEGISLATION

Migration Act 1958 (Cth)

CASES

FYBR v Minister for Home Affairs [2019] FCAFC 185

SECONDARY MATERIALS

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

REASONS FOR DECISION

Senior Member M Griffin QC

22 February 2022

1. The Applicant, who is of Turkish origin, is 37 years of age and seeks review of a decision of a delegate of the Minister, dated 3 December 2021, not to revoke cancellation of the

Applicant's Class BC Subclass 100 Partner visa (visa) pursuant to subsection 501(1) of the *Migration Act 1958* (Cth) (the Act).

2. The Applicant has committed a series of offences, many of which are serious, since he arrived in Australia and it is on account of those offences that the mandatory cancellation provisions of the Act came into operation.

ISSUES

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

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

EVIDENCE AT HEARING

5. The Applicant and his sister both gave oral evidence during the course of the hearing. As to the sister's evidence, Ms A, the Tribunal, after due consideration, is prepared to accept her evidence. That evidence supports, in a number of respects, submissions made on behalf of the Applicant, and the Tribunal gives appropriate weight to that evidence. The Tribunal notes, for example, that there is an offer of work within the family business to which the Applicant also referred and the Tribunal considers that this genuine offer of work may contribute to the Applicant's better and hopefully, non drug-addicted future behaviour which, in turn, suggests a lessening of the likelihood of committing future offences. This will, of course, be discussed more fully below within the relevant Considerations.

6. The Tribunal was considerably troubled by the evidence given orally by the Applicant. That evidence was evasive, sometimes contradictory in nature, and according to the Respondent's submissions that the Tribunal accepts, involved minimisation of his previous behaviour in a number of respects and attempted deception of the Tribunal. The Tribunal notes that the Applicant has, in the past, been convicted of deceitful behaviour in respect of fraud offences.

7. It is clear to the Tribunal that as at the time of hearing, the Applicant still lacks a certain insight into his past offending and constantly tried to minimise his behaviour, often by attempting to deflect blameworthiness to others. The Tribunal, upon careful consideration, however, is prepared to accept that there was a motor vehicle accident in or about March 2016, and from that motor vehicle accident, there flowed a series of consequences that led to the Applicant becoming addicted to prescription drugs.

8. Furthermore, the Tribunal is prepared to accept that the Applicant is genuine in his determination to avoid further criminal behaviour, not least because of the ramifications of loss of his visa and its serious consequences to him, his children and his family. This view is based, in part, upon an acceptance of evidence that the Applicant has behaved appropriately in custody and immigration detention and he has also demonstrated that he has reduced his reliance upon prescription opioids, relying on a program of Depot medication to assist in this process. The Tribunal also recognises that should the Applicant be released into the community, that he will necessarily have to exercise a high degree of determination to continue to access medication which is presently prescribed in Depot form.

9. These, and associated matters, will be discussed below in further detail within the relevant Considerations.

10. These general conclusions concerning the Applicant's creditworthiness are the result of a considered analysis by the Tribunal of all the evidence and it is not without some hesitation that the Tribunal has reached the conclusions stated above.

RELEVANT LEGISLATION AND POLICY

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

12. Section 501CA(4) provides that:

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

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

> *The preferable conclusion is that s 501CA(4)(b)(ii) requires the Minister to examine the factors for and against revoking the cancellation. If satisfied, following an assessment and an evaluation of those factors, that the cancellation should be revoked, the Minister is obliged to act on that view. There is a single, not a two stage, process and the Minister does not have a residual discretion to refuse to revoke the cancellation if satisfied that it should be revoked.*

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

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

16. Section 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 s 501CA(4) not to revoke a decision to cancel a visa.

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

    (a) Australia has a sovereign right to determine whether non-citizens who are of character concern have a right to enter or remain in Australia. Being able to come 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 (paragraph 5.2(1));

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

(c) the Australian community expects that the Australian Government can and should refuse entry to non-citizens or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community (paragraph 5.2(3));

(d) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age (paragraph 5.2(4));

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

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

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

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

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

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

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

21. The primary considerations are:

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

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

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

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

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

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

a) International non-refoulement obligations;

b) Extent of impediments if removed;

c) Impact on victims;

d) Links to the Australian community, including:
i) strength, nature and duration of ties to Australia; and
ii) impact on Australian business interests.

THE CHARACTER TEST

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

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

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

EXERCISING THE DISCRETION

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

Primary Consideration 1 – Protection of the Australian community

Paragraph 8.1 of Direction No. 90 provides:

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

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

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

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

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

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

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

(i) violent and/or sexual crimes;

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

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

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

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

(ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;

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

(iv) where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;

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

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

(e) the cumulative effect of repeated offending;

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

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

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

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

(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

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

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

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

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

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

c) where consideration is being given to whether to refuse to grant a visa to the non-citizen – whether the risk of harm may be affected by the duration and

purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

Seriousness of offending and future risk

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

32. The Applicant's history of offending commenced prior to 2018 but became more serious since that time, resulting in the most offences committed in 2018 and 2019. The Applicant's offending throughout time discloses drug offences or drug-related offences, all, or at least most of which, seem to be related to a drug addiction. The Tribunal accepts that the Applicant has a drug addiction and the offending is addiction-related.

33. Of concern, in the Tribunal's view, are the many instances of breaches by the Applicant of Court Orders, including Bonds, and other non-custodial dispositions which were meant to provide rehabilitation for the Applicant. Of particular seriousness are the breaches of Court Orders after the Applicant was dealt with sympathetically on his appeal to the District Court in February 2019.

34. Until 2018 the Applicant's offending history was dealt with largely by way of non-custodial sentences, including Intensive Correction Orders, Good Behaviour Bonds and Fines. None of this offending involves violence and the Tribunal takes that matter into account.

35. There is evidence that the Applicant, on occasions in 2012 and 2016, breached orders in relation to domestic violence. This matter is more fully dealt with below under the relevant consideration. The Tribunal does not accept that there is any evidence of domestic violence of the type contemplated by that relevant consideration and that the breaches of Orders made in respect of it, although relevant in considering that the Applicant has, in the past, breached orders, are regarded by the Tribunal as of very little consequence.

36. The Applicant's offending increased in seriousness over time, particularly the offending after 2018 where, by 2021, the Applicant had not only committed traffic-related offences but was in breach of previous Court Orders which makes that offending all the more serious. A

further serious factor in the Applicant's offending history are the numerous traffic offences which demonstrate, amongst other things, a woeful lack of concern for the safety of the Australian community. The Tribunal, therefore, regards the Applicant's offending as serious, although that description is properly viewed against a background of drug addiction. The Tribunal also notes the Applicant has been a user of heroin and other drugs in 2016, and most likely beyond that time, although the drug of choice, was fentanyl. The Tribunal also notes, in the Applicant's favour, there being no evidence to the contrary that the Applicant has abstained from the use of fentanyl for approximately 2 years.

37. This last matter the Tribunal takes into account in the Applicant's favour, particularly in regard to the diminished likelihood of the Applicant's re-offending. Furthermore on this topic, the Tribunal accepts that the Applicant has behaved properly and without incident both in custody and immigration detention which portends positively both for the Applicant's rehabilitation and for an assessment that the Applicant is at a lower risk of re-offending. This is so, although the Tribunal recognises that the Applicant has, in the past, not demonstrated a particular willingness to pursue rehabilitative processes.

38. Upon the Applicant's return to custody in November 2019 he was admitted to the John Morony Correctional Centre in July 2020 as a participant in a Drug Court program which he was unable to attend, through no fault of his own because of his pending migration status and, as a result, the participation in the program was terminated.

39. Seen in this way, the issue of the Applicant's migration status and withdrawal from the drug program denied him an advantage no doubt, meant to be beneficial for both personal rehabilitation and as an objective evidential factor which the Tribunal would have been able to take into account in considering rehabilitation and recidivism.

40. As to the seriousness of the Applicant's offending, the Sentencing Magistrate in the Moss Vale Local Court, on 4 December 2018, said of those offences:

> …on 7 February [2018] [the Applicant] entered a chemist at Cambelltown and presented a prescription for what is described as Durogesic patches, commonly known as fentanyl. The patient's name on the prescription was his and referred to a Dr Townsend having issues[d] the prescription. The pharmacist was suspicious about the circumstances because he had had an earlier false prescription from the same medical centre. As a result of that he told Mr Celik that he was unable to supply the prescription at the time, but the pharmacist asked for some identification and Mr Celik presented his own Medicare card in identification.

There is then a number of offences…

Mr Celik attended a pharmacy at various locations. He represented that he needed to fill a prescription for the same drug, commonly known as fentanyl, for chronic pain. In respect of at least one of those matters he made a false statement that he was flying overseas to Turkey to attend his father's funeral and he required a greater quantity because he would be absent from Australia. Some of those prescriptions were filled before it has ultimately been ascertained that the prescriptions which he presented were false. In addition, his wife came under notice of the police when she attended one pharmacy to collect part of the prescription. This was in fact in his name for a further patches of fentanyl. The police became aware of her and some of her property was found to have an association with Mr Celik. Ultimately police located Mr Celik in Bowral. He was arrested. He had with him a telephone and in the telephone the police found evidence of the supply of prohibited drug.

…In addition, when he was ultimately arrested, he was found to be in possession of false documents. Sequence 9. When he was arrested and a vehicle was searched, police found a folder. The folder contained letters from doctors at various medical surgeries, however all in the same format, all of which stated that a doctor had seen him between some prescribed dates and there was reference to him travelling to Turkey. The documents indicate generally that medication had been prescribed for him for that purpose and it was the same medication. The letters provided various lengths of travel over a period of time. The police made contact with a doctor that Mr Celik had consulted or believed to be consulted and the doctor informed police that he'd consulted Mr Celik on one occasion and did provide one certificate, but the remaining documentation involves multiple pieces of paper for obtaining fentanyl patches from various pharmacists.

In addition, in relation to the goods in custody offence, the police searched a vehicle and within the glovebox they located a number of prescriptions for various drugs that included fentanyl. Police also located prescription pads from a Dr David Stanley Evans. Police contacted Dr Evans who indicated that the prescription pad should not have been in the possession of Mr Celik.
…

In addition, at the time of all these offences Mr Celik was on what appears to be seven good behaviour bonds under s 9. There are three bonds for possession of prohibited drug, one bond for possession of equipment to administer a prohibited drug. In addition, there are three separate offences for contravention of an apprehended violence order.

41. As to the later offences dealt with on 11 February 2021, the Sentencing Magistrate said:

These offences are not just about you, if it was just you going to hell in a hand basket well to some extent so be it, but these sorts of offences corrupt our medical system, they [corrupt] our medical benefits system, they corrupt our pharmaceutical system and there is an enormous cost to the community in seeking to ensure compliance with prescription medicine regimes because people like you seek to rip off the system.

42. The Applicant sets out fairly a description of the background and circumstances of the 2018 and 2019 offending as follows:

- The applicant was involved in a motor vehicle accident on 18 March 2016 and suffered injuries to his left leg, lower spine, and disc injuries to his lower spine. He told the Court that he spent three weeks in hospital and was prescribed Fentanyl for pain relief, which he later became dependent on

- On 7 February 2018, the applicant attempted to fill a script for Fentanyl. However, the pharmacist became suspicious and did not fill it. They contacted the police, who later located the applicant

- During their investigation, police discovered that between November 2017 and March 2018, the applicant committed four offences relating to obtaining or attempting to obtain a prohibited drug (Fentanyl) by false representation, one of supplying a prohibited drug (Fentanyl), one of having goods in custody (possession of a prescription pad belonging to a doctor) and one of possessing a false document (a doctor's certificate to obtain property)

- The supply charge involved the applicant knowingly taking part in the supply of five Fentanyl patches to three different people for a total payment of $1,010. The sentencing remarks indicate that the applicant offended while subject to good behaviour bonds for drug possession and Apprehended Violence Orders

- On 4 December 2018 and 8 February 2019, the courts accepted that the applicant's dependence on prescription medication contributed to his offending. However, the appeal Judge stated that this did not reduce the seriousness of the offending

- The appeal Judge considered the offending fell mid-point between the middle of the range and lower end of the range of objective seriousness; and the supply offence fell into the lower end of the range of objective seriousness. The appeal Judge considered the applicant's subjective circumstances, and his sentence was varied as stated above

- However, the applicant reoffended, and the ICO issued on 8 February 2019 was revoked (**GD73**). On 11 February 2021, the applicant was convicted in the Local Court of New South Wales of the below offences and sentenced to terms of imprisonment ranging between one month and 18 months

- After serving 14 months in prison, the applicant was to be released on parole for 15 months and subject to supervision by Community Corrections, but was instead taken to immigration detention on 13 July 2021 when his visa was cancelled:

    - one count of deal with identity info to commit etc indictable offence
    - seven counts of obtain or attempt prohibited drug by false representation
    - six counts of forge or alter prescription, which includes prohibited drug
    - one count of possess forged prescription
    - one count of resist or hinder police in the execution of duty
    - two counts of goods suspected stolen in/on premises (not m/v)

- two counts of possess prohibited drug.

- In addition, the following offences were called up for re-sentencing:
  - one count of possess prohibited drug
  - one count of possess false document to obtain property
  - two counts of induce dispensation of substance by false representation
  - two counts of possess/attempt to prescribed restricted substance.

43. It may be discerned from a proper review of the Applicant's offending, although worryingly lengthy, that in the main, apart from some supply charges which the Tribunal views as particularly serious, that the offending is related to the Applicant's addiction on account of having been involved in an accident and the reliance upon prescription opioid medication.

44. The Tribunal finds that this offending, its genesis and purpose is different from those who are addicted to prohibited and illicit substances like heroin.

45. The offending is serious but must be viewed against the background of the nature and genesis of the addiction.

46. In the assessment of risk, it is clear that the Applicant, to the Tribunal's mind, is at some risk of re-offending having regard to the lack of rehabilitative measures. There is some hope, however, for future positive conduct in the fact that the Applicant, in the past, has been able to reject the use of heroin and, in the recent past, has refrained from the use of fentanyl.

47. The Tribunal finds that incarceration and the prospect of loss of his visa have had a salutary lesson which will encourage him not to re-offend. Risk of re-offending is also likely reduced by the support of his family and the Applicant's determination, which the Tribunal finds as genuine, to assist with his children, although one is now almost an adult.

48. These factors, enumerated and considered collectively, suggest that although there is a risk of re-offending, having regard to the Applicant's past history, it is nonetheless, somewhat reduced. Furthermore, the offences which the Applicant might commit will no doubt be similarly drug-related and as such, the Tribunal recognises will most likely not involve any ingredient of violence.

49. This consideration, overall, must weigh against the Applicant.

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

50. Paragraph 8.2(1) of Direction No. 90 provides that the Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns are proportionate to the seriousness of the family violence engaged in by the non-citizen.

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

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

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

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

53. Paragraph 8.2(3) of Direction No. 90 provides that, in considering the seriousness of family violence engaged in by the non-citizen, the following factors must be considered, where relevant:

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

    (b) the cumulative effect of repeated acts of family violence (sub-paragraph8.2(3)(b));

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

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

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

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

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

54. The Respondent relies on some evidence that in 2012 the Applicant threatened his then partner with a stick. The allegation was subsequently withdrawn together with other allegations of assault.

55. The Tribunal is not satisfied that there is any such evidence which could found, or be the basis for this matter to be considered under the family violence consideration

56. In 2016 there is reference to another matter in respect of which no allegation of physical violence can properly be accepted, nor is it suggested that there was any other form of abuse. The most that can be said is that the Applicant was in contact with the victim in circumstances where he was not allowed to do so.

57. Furthermore, a Police Factsheet, dated 5 July 2016, suggests that ‘police believe that there are real and evident signs that the relationship is typical of domestic violence patterns …’.

58. The Tribunal is not satisfied that this is acceptable evidence and disregards all evidence in respect of allegations of domestic violence entirely.

59. The end result is that there is no evidence, in the Tribunal’s opinion, of any matter which amounts to domestic violence and which could found the basis for analysis under this consideration or under any other consideration.

Primary Consideration 3 – Best interests of minor children in Australia

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

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

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

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

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

(b) the extent to which the Applicant is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements (sub-paragraph 8.3(4)(b));

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

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

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

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

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

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

64. There are three minor children of the Applicant, one of whom, Child B, has expressed very clearly the wish that her father remains in Australia. She is 17 years of age and does not live with her father or mother.

65. Of the other two children, born 2006 and 2017, one lives in a distant Australian state.

66. The third child, Child D, born in 2017, has autism and requires special care. Child D is cared for by one of the Applicant's sister. The other sister cared for this child in the past. It is apparent on the evidence that the child's mother is unable to care for her.

67. There are a number of nieces and nephews, the details of whom are vague, but in respect of whom, the Tribunal is prepared to accept that the Applicant has a suitably appropriate relationship, made the more so, the Tribunal infers, because of the cultural background of the Applicant and his family and siblings.

68. The Applicant, the Tribunal accepts, has been appropriately involved in the lives of his children in the past and genuinely proposes to pursue and appropriate parental relationship in the future.

69. The child, who expressed in evidence a desire for her father to remain in Australia, is nearing adulthood. As to the other two children, and in particular the child who has special needs and who is in the care of the Applicant's sister, both of these children, the Tribunal concludes, would suffer significantly should the father be required to leave Australia.

70. Although the Respondent concedes that this consideration weighs in favour of revocation, the Respondent also argues that the Applicant will not necessarily play a positive role in his children's lives given his history of drug use, and that there are other persons already fulfilling a parental role in relation to these children and further that the Applicant can maintain contact with his children via electronic means and they can visit him in Turkey.

71. None of these matters, individually or collectively, in the Tribunal's view, carry any weight in the Tribunal's assessment of this matter where the essence of this consideration is the best interests of minor children. The Tribunal is not satisfied that the Applicant will not likely play a role in his children's lives in the future. In fact, on the evidence, the Tribunal accepts as genuine, the Applicant's assertions that he wishes to do so.

72. This consideration, in respect of all minor children but particularly those who are the Applicant's children, weighs strongly in favour of revocation of mandatory cancellation.

Primary Consideration 4 – Expectations of the Australian community

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

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

74. Paragraph 8.4(2) also provides that it may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

(a) acts of family violence; or

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

(c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against

the elderly or other vulnerable persons in the form of fraud, extortion, financial, abuse/material exploitation or neglect;

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

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

(f) worker exploitation.

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

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

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

78. It is not for the Tribunal to substitute its own view for the expectations of the Australian community by reference to the Applicant's circumstances. The Tribunal rather, must give effect to the 'norm' stipulated in Direction No. 90 at 13.3(1). per Stewart J and Charlesworth J (93); (100 to 104); (68).

79. At paragraph 106 of the Applicant's outline, the Applicant argues that Paragraph 8.4 of Direction No. 90 appears to largely codify the majority judgement of the Full Court of the Federal Court of Australia in FYBR and Minister for Home Affairs.

80. That assertion is incorrect. FYBR dealt with the former Direction No. 65 which, for present purposes, should be regarded as having the same operation as the present Direction No. 90.

81. From what can be discerned as a unilateral ratio extracted from the separate judgments of the court, that decision explains the operation of the expression of the government's expressed attitude of the Australian community.

82. The operation of this consideration must weigh against the Applicant in this matter, but the weight to be attached to it will depend on its consideration within the constellation of other considerations, as well as factors which affect this particular consideration.

83. In this case, a relevant consideration to the Tribunal's mind in terms of the weight to be given to this consideration alone, is the fact that the Applicant has resided in Australia since 2004, which is approximately 18 years. During that time, the Applicant has worked and contributed to Australian society. Although those matters are appropriately dealt within a consideration related to the Applicant's ties to the Australian community, nonetheless, the period of time during which the Applicant has resided in Australia will, in the Tribunal's opinion, moderate the impact of this consideration against the Applicant.

84. This consideration, therefore, weighs moderately against the Applicant.

OTHER CONSIDERATIONS

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

(a) international non-refoulement obligations;

(b) extent of impediments if removed;

(c) impact on victims;

(d) links to the Australian community, including:

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

(ii) impact on Australian business interests.

International non-refoulement obligations

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

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

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

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

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

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

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

(7) Where a non-citizen, in responding to a notice for the purposes of section 501 or 501CA, makes claims which may give rise to international non-refoulementobligations 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.

87. The Applicant makes no claim or submissions pursuant to this consideration.

Extent of impediments if removed

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

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

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

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

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

89. The Applicant arrived in Australia when he was 20 years of age from Turkey and therefore has some appreciation of the culture. The Tribunal accepts that he understands the language of that country.

90. However this is not an end of the matter. It would be expected, and the Tribunal accepts, that the Applicant would have difficulty resettling in Turkey on a social, financial and emotional level. The Applicant has not lived in that country for 18 years and on the evidence, the Tribunal is prepared to accept that he would have difficulty accessing any Social Security system that the country has and to which the Applicant might eventually have resort.

91. Furthermore, the Applicant would have to resettle in a country where there are, on the evidence, very limited family connections.

92. The Applicant, accepting that he is addicted to prescription drugs would, in the Tribunal's opinion, have great difficulty accessing the same sort of treatment available to the Applicant were he to remain in Australia. Furthermore, the return of the Applicant to Turkey, in the Tribunal's opinion, would likely, the Tribunal infers, cause a relapse of any progress the Applicant has made in withdrawal from his opioid drug addiction. This, the Tribunal considers alone to be a credible impediment to his removal to Turkey.

93. There will be emotional distress suffered by the Applicant at being removed from Australia and his family.

94. Although there are no health impediments to the Applicant finding work, should he be removed to Turkey, it is not possible to make any precise determination about the existence of work and the Applicant's ability to readily secure work.

95. In the Tribunal's opinion, therefore, this consideration weighs modestly in the Applicant's favour.

Impact on victims

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

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

97. There does not appear to be any evidence which brings this consideration into contention.

Links to the Australian community

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

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

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

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

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

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

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

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

99. The Applicant has lived in Australia for 18 years and on the evidence, has worked until at least 2016 and contributed to Australian society and therefore, the Australian community.

100. The Applicant has immediate family members in Australia including 3 minor children, nieces and nephews, a mother, stepfather, and 2 sisters, all of whom are Australian citizens. The Applicant also has a number of cousins, as well as aunts and uncles, who reside in Australia.

101. In the Tribunal's opinion, the removal of the Applicant would have severe impact on the sister, Ms A, who currently, with her husband, cares for the child, D, whose situation has been discussed above.

102. The Tribunal is satisfied on the evidence that the Applicant has contributed to the financial support and well-being of his three children, and should the Applicant leave Australia, the mothers of his three minor children, and specifically the carers for the minor child, D, will no doubt experience financial hardship.

103. Apart from the Applicant's close and extended family who have already been referred to, the Tribunal notes also that the Applicant has a number of friends who have spoken well of him and all family and friends will suffer, depending upon their relationship with him, to varying degrees of emotional distress should the Applicant be removed from Australia.

104. Culturally, it is clear on the evidence, that the Applicant enjoys a strong relationship with close and extended family members which would make even keener their sense of loss should the Applicant be removed. The Applicant has been employed in Australia for a considerable amount of time and made a contribution which is positive to the Australian community in the Tribunal's opinion, particularly taking into account the 18 years during which the Applicant has resided in Australia which makes those ties particularly to other Australian citizens stronger and more likely to be keener felt should the Applicant be removed.

105. This consideration carries substantial weight in the Applicant's favour.

9.4.2 Impact on Australian business interests

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

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

SPECIAL CONSIDERATION

107. The Applicant makes a submission that the evidence concerning the Applicant's drug habit and the maintenance of that habit and its connection with the Applicant's criminal offending, should lead the Tribunal to consider the effect of this as a separate and special consideration. That much is accepted by the Tribunal and disclosed by the evidence, and should, therefore, be the subject of special analysis and regarded as an identifiably separate consideration and therefore, a special consideration within Direction No. 90.

108. The evidence, in the Tribunal's opinion, discloses that the Applicant's criminal history exhibits predominantly a history of drug offending with some dishonesty offences, all of which are consistent with the maintenance of a drug habit by the Applicant.

109. The Applicant submits that it is proper to conclude, following well-accepted principles of criminal justice, that the criminal behaviour of a person who is affected by mental illness and whose mental health materially contributed to his offending should be regarded as less culpable than an ordinary person so unaffected.

110. The Tribunal accepts that the preponderance of the evidence is that a substantial amount of the Applicant's criminality was materially linked to the Applicant's drug addiction and drug abuse problems.

111. The Applicant submits, by reference to accepted and suitably professional opinion, that addiction, according to the American Psychiatric Association, is defined as a brain disease. In Australia, the DSM-V lists criteria for the classification of addiction as a mental health condition. A further submission is made by the Applicant that it is widely accepted that addiction is a mental illness.

112. So much is accepted by the Tribunal in relation to those submissions by the Applicant.

113. It may be acceptable that drug addiction, in classifying it as a mental illness, arises because it is accepted that addiction changes the brain in fundamental ways, disturbing a person's normal hierarchy of needs and desires, and substituting new priorities connected with procuring and using drugs. This former statement made by the Applicant is also accepted by the Tribunal. Fundamentally, the submission that the Applicant makes is that illegal substance use is a mental disorder that affects a person's brain and behaviour, leading to

a person's inability to control their use of substances, such as legal or illegal drugs, alcohol or medications. The submission of the Applicant continues that 'addiction to drugs and alcohol is a mental illness. It is caused by a combination of behavioural, biological and environmental factors, resulting in changes in the brain structure and function'.

114. There is little direct evidence as to the connection between the Applicant's addiction, his drug-related offending and importantly, the way in which, in the case of each offence, that addiction directly or indirectly affected the Applicant in being able to control his behaviour. Of course, the Tribunal takes into account, by reason of inference properly able to be drawn, that there is a relevant connection between the Applicant's offending and the drug addiction from which he suffered.

115. However, not only is it a requisite to demonstrate a necessary connection between the offending and, in this case, the mental health issue of addiction but it is also necessary to consider the quality of the diminution of the Applicant's ability to control his actions and, in general terms, the quality of the impairment of his cognitive functioning and ability to control his actions in relation to the commission of each of the offences, or his offending behaviour overall.

116. In this case, the Tribunal is prepared to infer, from all the evidence, that the Applicant was impaired to some extent in respect of his offending by reason of the drug addiction. However, on all the evidence, and the inferences available, the Tribunal finds that the level of impairment is such, that modest weight only should be given to this separate special consideration.

CONCLUSION

117. The foregoing discussion amply demonstrates the Tribunal's considerable concern about the disposition of this matter. The Applicant's drug-related offending, together with his traffic history and the undeniable serious increased level of offending in 2018 and 2019 when he was found to have breached Court Orders as well as having offended, portray a particularly worrying offender where recidivism of the type of his past offending is to some degree, a real possibility.

118. A detailed and careful analysis and balancing of all the evidence relevant to the various considerations applicable in this case disclose two aspects of the evidence which are in the

Applicant's favour, related to two separate relevant considerations. Those are the interests of his minor children, and in particular the child who is described as needing special care, and the view taken by the Tribunal as to the Applicant's entire offending history related since 2016 at least, largely to drug-addiction related to the prescription of, and the Applicant's consequential use of, prescription drugs. This latter matter diminishes, to a degree, the blameworthiness of the Applicant's behaviour.

119. These two features combine, in the Tribunal's view, to provide another reason why, considering all the facts and circumstances and relevant considerations, the mandatory cancellation should be revoked.

ORDER

120. The Tribunal sets aside the reviewable decision of the delegate of the Minister dated 3 December 2021 not to revoke the mandatory cancellation of the Applicant's Class BC Subclass 100 Partner visa. In substitution, the Tribunal decides that the cancellation of the Applicant's Class BC Subclass 100 Partner visa is revoked.

I certify that the preceding 120 (one hundred and twenty) paragraphs are a true copy of the reasons for the decision herein of Senior Member M Griffin QC

.....SGD.....

Associate

Dated: 22 February 2022

Date of hearing:	**14 February 2022**
Counsel for the Applicant:	**Dr J Donnelly, Latham Chambers**
Solicitors for the Respondent:	**Ms C Campbell, HWL Ebsworth**