Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2021/9367**
Re:	**MCGQ**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**The Hon. John Pascoe AC CVO, Deputy President**
Date:	**16 February 2022**
Place:	**Sydney**

I find that the correct and preferable decision is that the delegate's decision, dated 24 November 2021, which refused to revoke the mandatory cancellation of the Applicant's Class XB Subclass 202 Global Special Humanitarian visa, is set aside, and in substitution it is decided that the original decision is revoked.

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

The Hon. John Pascoe AC CVO, Deputy President

CATCHWORDS

MIGRATION – mandatory cancellation of visa under s 501(3A) – refusal to revoke cancellation – protection of the Australian community – risk of reoffending – best interests of minor children – links to the Australian community – international non-refoulement obligations – potential return to Afghanistan – likelihood of indefinite detention – decision set aside and substituted.

LEGISLATION

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

CASES

FRH18 and Minister for Home Affairs [2018] FCA 1769

FYBR v Minister for Home Affairs [2019] FCAFC 185

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

REASONS FOR DECISION

The Hon. John Pascoe AC CVO, Deputy President

16 February 2022

BACKGROUND

1. This is an application for the review of a decision of a delegate of the Respondent, dated 24 November 2021 ('the reviewable decision'), which refused to revoke the mandatory cancellation of the Applicant's Class XB Subclass 202 Global Special Humanitarian visa ('the original decision') ('the visa') pursuant to s 501CA(4) of the *Migration Act 1958* (Cth) ('the Act').

2. The Applicant's visa was mandatorily cancelled on 28 April 2021 under s 501(3A) of the Act on the basis that he did not pass the character test in s 501(6)(a) due to a substantial criminal record as defined in s 501(7)(c).

APPLICANT'S OFFENDING

3. The Respondent helpfully summarised the Applicant's offending in the material before the Tribunal:

> *The Applicant's offending commenced at the age of 17, with his first conviction for robbery armed with offence weapon in 2012….the Applicant, along with 2 associates, broke into the Austral Bowling Club. Armed with kitchen knives, they removed $11,595 from the till. The Applicant had obtained the knives, gloves and stockings for the robbery, and was responsible for ordering club patrons to remain on the ground.*
>
> *On 22 April 2016, the Applicant was convicted in Parramatta Drug Court of 25 offences. In respect of these convictions, the Applicant received an aggregate sentence of 24 months' imprisonment, commencing 23 March 2015 and concluding 22 March 2017. The court imposed a non-parole period concluding 22 April 2016 (the date of sentencing), and the Applicant was released subject to supervision.*
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> *The convictions related to events on a range of dates, including:*
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> *(a) On 1 April 2014, the Applicant was encountered by police at Merrylands Station. When police searched his vehicle, they located a large amount of cash, plastic resealable bags containing vegetable matter and a notepad recording what appeared to be recent sales. The Applicant was convicted of goods in personal custody suspected of being stolen and supply prohibited drug.*
>
> *(b) While on bail for these charges, on 23 May 2014, the Applicant was again encountered by police. A police search revealed, among other things, a wallet containing bank cards in four different names, a large amount of mail in different persons' names and 5 Seroquel tablets. The Applicant was convicted of goods in personal custody suspected of being stolen.*
>
> *(c) On 31 July 2014, the Applicant caught the attention of police after disobeying a 'No right turn' sign. He failed to stop when directed. When the police car stopped in front of him, the Applicant revved the vehicle, screeched the tyres and lunged towards the police vehicle, causing the police to be fearful of an immediate collision. When searched, police found a single block of white substance. The Applicant's blood and urine analysis returned positive readings for amphetamine and methylamphetamine. The Applicant was convicted of resist officer in execution of duty, drive while suspended, possess prohibited drug and drive under influence of alcohol*
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> *(d) On 25 August 2014, the Applicant was stopped by police. A police search located 2 cannabis joints, 39 Xanax tablets and a taser. The Applicant was convicted of possess prohibited drug and possess prohibited weapon.*
>
> *(e) On 24 September 2014, the Applicant was identified by police driving a vehicle that had been stolen a few days prior. He had in his possession a resealable plastic bag containing a clear crystal substance. When questioned by police, he admitted to using crystal methamphetamine*

earlier that morning. The Applicant was convicted of possess prohibited drug and drive conveyance taken without consent.

(f) On 27 October 2015, a police search of a vehicle occupied by the Applicant revealed multiple bank cards in the names of different people. A search of the Applicant's Guildford address revealed a small jar containing liquid GHB. The police also found numerous financial documents addressed to people other than the accused, a card skimming device and Tramadol. The Applicant was convicted of 2 drug possession offences and 9 counts of goods in custody suspected of being stolen.

Shortly after the Applicant's release on parole, he was reported for breaches:

(a) On 20 June 2016 – for use of prohibited drugs, and for failing to engage with drug and alcohol intervention services as directed. No action was recommended to be taken at that time.

(b) On 21 July 2016 – for being charged with a number of driving offences on 30 June 2016.

(c) On 14 November 2016 – having been convicted of the driving offences which took place on 30 June 2016, and for using prohibited drugs. The Applicant was later sentenced to a 30-month section 9 bond, and fines. A formal warning was recommended.

(d) On 21 November 2016 – for being charged with further offences on 17 November 2016. It was recommended that the Applicant's parole order be revoked. The Applicant was subsequently convicted of possess prohibited drug and goods in personal custody suspected of being stolen on 24 May 2017, and sentenced to a 12-month section 9 bond.

(e) On 30 December 2016 – for use of prohibited drugs. The recommendation of revocation was maintained.

(f) On 15 February 2017 – for use of prohibited drugs. The recommendation of revocation was maintained.

On 21 May 2018, the Applicant received further 4 convictions, including drive with child under 6 months not restrained. Three of his section 9 bonds were also 'called up'.

On 25 June 2018, the Applicant received another 9 convictions, including larceny and dishonestly obtain financial advantage etc by deception. He was sentence to imprisonment, suspended upon him entering section 12 bonds.

On 5 April 2019, the Applicant travelled to his partner's residence in Guildford. Believing he heard her having a conversation with another party, he forced his way in. The police facts sheet states the accused 'became aggressive and enraged towards the Victim, throwing her into her bed and slapped her a number of times in the face'. The Victim sustained a swollen and bruised right shoulder and swollen left cheek. The incident took place while the Applicant and his partner's child was asleep in the next room, and caused the child to 'cry out uncontrollably'. This allowed the Victim to escape and to ask a neighbour to call police.

On 26 April 2019, the Applicant was identified while driving a truck which had been stolen the week prior. He failed to stop when directed, drove dangerously while being pursued by police, damaged a parked car and attempted to resist arrest.

In respect of the April 2019 incidents, the Applicant was convicted of common assault (DV), police pursuit – not stop – drive dangerously, drive while disqualified and not give particulars to owner of damaged property. On 22 January 2020 he was sentenced in respect of these, as well as a number of breached bonds. Significantly:

(a) the Applicant was sentenced to multiple terms of imprisonment (the longest being 18 months i.e. concluding 21 July 2021), all to be served by way of intensive corrective orders (ICOs);

(b) the court put in place a 2-year AVO to protect the Applicant's partner;

(c) the Applicant was also disqualified from driving for 3 years from 22 January 2020.

In sentencing, Acting Magistrate Spence took into account encouraging reports from Odyssey House and Community Corrections.

1The Applicant's most recent convictions stem from events on 3 December 2020. The police were called in relation to a vehicle that had been doing burnouts. They found the Applicant, apparently unconscious in the driver's seat. A police search revealed a variety of illicit drugs (methylamphetamine, MDMA tablets and buprenorphine film patches). The police also found a flick knife and stolen number plates.

1In respect of these, the Applicant pleaded guilty to a range of drug, driving, resist officer and knife possession charges. In sentencing, the Magistrate noted the Applicant's lengthy criminal history. The fact he offended while subject to an ICO was 'a circumstance of major aggravation'. This meant no penalty other than imprisonment is appropriate. The Applicant was sentenced to an aggregate term of imprisonment of 12 months, with a 6-month non-parole period.

While in prison, the Applicant has had 5 incidences of drug possession and possession of drug implements.

While in immigration detention, the Applicant admitted to continued use of buprenorphine. He has also tested positive to buprenorphine and amphetamines during a random urine screen. On 9 October 2021, he was found with an improvised weapon.

ISSUE

4. It is agreed by the parties that the Applicant does not dispute that he does not pass the 'character test' as defined by s 501(6) of the Act. Therefore, the only issue before the Tribunal is whether there is another reason why the original decision, being the mandatory cancellation of the Applicant's visa, should be revoked pursuant to s 501CA(4) of the Act.

RELEVANT LEGISLATION AND POLICY

5. The relevant legislation and policy are as follows.

6. Section 501CA(4) of the Act states:

(4) The Minister may revoke the original decision if:

(d) the person makes representations in accordance with the invitation; and

(e) 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.

7. On 8 March 2021 the Minister made the Direction pursuant to s 499 of the Act to guide decision-makers in the exercise of the power in s 501CA(4). The Direction came into effect on 15 April 2021.

8. Paragraph 5.2 of the Direction sets out the following principles relevant to the exercise of the discretion:

(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-biding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.

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

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

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

(5) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even 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 sufficient in some

circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

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

10. Section 8 of the Direction provides that the four primary considerations are:

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

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

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

(d) expectations of the Australian community (Primary Consideration 4).

11. Section 9 of the Direction provides that the four other considerations which must be taken into account where relevant are:

(a) international non-refoulement obligations;

(b) extent of impediments if removed;

(c) impact on victims;

(d) links to the Australian community, including:

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

(ii) impact on Australian business interests.

EVIDENCE

Evidence of the Applicant

12. The Applicant confirmed that he was born on 11 September 1994, and confirmed his statement of 4 January 2022. The Tribunal also notes the Applicant's statement of 3 October 2021.

13. The Applicant said he was currently in a de facto relationship with Ms S, with whom he had two daughters aged approximately one and three.

14. The Applicant said that he had a very good relationship with his daughters and that he was in contact with them every day via phone calls and the Internet. The children visited him when it was possible to do so, particularly under COVID restrictions. The children live with their mother.

15. When cross-examined about his children, the Applicant said that his children were 'his world', but accepted he had only been 'present' for them when he had not been using drugs.

16. The Applicant gave evidence that he was part of a close-knit family with a sister (H, aged 28) and three brothers – A, Z (who is self employed), and a youngest brother, ZF, of around 15. ZF and Z provided statutory declarations in support of the Applicant. The Applicant's father died recently, and the Applicant was still grieving. He felt that with the loss of his father, it was very important for him to be able to provide support for his mother. He said that his family had always supported him despite his criminal offending. Both his mother and Ms S's mother assisted Ms S with the care of the children.

17. The Applicant gave evidence that he had gone to school in Afghanistan before coming to Australia at the age of 10. He spoke Farsi and had learned to read and write in that language, although he said he had since forgotten. At the time of his arrival, he was unable to speak English, and attended an intensive language school in order to learn to speak English.

18. The Applicant's evidence was that his life in Afghanistan had been stressful. His father had been a fighter with the *mujahideen* and was absent from home for long periods of time. There was also reference to traumatic events in his life before he came to Australia.

19. The Applicant's father had come to Australia on a protection visa and subsequently the rest of the family were granted humanitarian visas to come to Australia. The Applicant said that once he came to Australia, he developed very close relationships with his father who became his 'best friend'. He had been very much affected by the death of his father and his inability to be there for his mother.

20. The Applicant was questioned about his extensive criminal record, dating from 2012 when he was charged with armed robbery.

21. The Applicant said that most of his offending was due to drug use, and that if he were able to stop using drugs he would not reoffend. The Applicant said he had been introduced to drugs through friends who had involved him in criminal activity. The Applicant agreed that he had relapsed into drug use many times and said that he had 'no excuses left'. He said the bad events in his life had resulted from using drugs and making stupid decisions.

22. The Applicant accepted that he had been guilty of an assault against Ms S and that the assault took place while his daughter, M, was in the next room. He accepted that M had awoken during the assault but said that he had gone back to sleep. He said that at the time he had been living with his mother because his relationship with Ms S was 'rocky'.

23. The Applicant also said that Ms S had suffered from post-natal depression and mood swings which made it difficult to live with her. He had not been living with Ms S and M when his second child, A, was born. The Applicant said that before he got 'locked up', he did not contact Ms S and had stopped talking to her.

24. Under cross examination, the Applicant also accepted that he had continued to use drugs and had been guilty of a number of offences whilst in prison and in detention. He said that the last time he had used drugs was a month or two ago.

25. The Applicant said that the rehabilitation programs offered to him in person had been of limited value, but that he had been able to complete a range of courses whilst in detention which he had found helpful to him. The Applicant acknowledged that before he went to prison, he had been given numerous opportunities by the judiciary in various courts to get his life back on track and to become drug-free. He had not been successful in doing so, despite time spent at Odyssey House in particular. He acknowledged that he left Odyssey

House without completing the residential course, and indicated that he did not want to go back to Odyssey House.

26. When questioned what he would do if allowed to stay in Australia, the Applicant said he would work full-time and would support his partner and his children, and also look after his mother. He said that he had an offer of full-time employment and could start immediately if released. He said he had skills as a crane operator and water-proofer.

27. The Applicant said he had considered going into residential rehabilitation on his release. He said he would need to see a psychiatrist and a psychologist, and that he did not believe he had received a proper mental health diagnosis previously.

28. The Applicant accepted that he would have to address his drug addiction if he were to succeed in the community.

29. The Applicant said he was extremely fearful of being returned to Afghanistan. He said that he had family in Afghanistan but they all were desperate to leave that country. His mother contacted family whenever she could, but the Applicant said that everyone was 'on the run' in Afghanistan.

30. The Applicant said that if he were returned to Afghanistan, he would be unable to get any help for his drug addiction or mental health issues, and that he did not even have a place to stay. He was 'terrified' about the prospect of being returned to Afghanistan.

Evidence of Matt Visser

31. Mr Visser confirmed his report of 23 January 2022. He said he had spent three hours with the Applicant in interview as part of psychological testing.

32. When cross-examined, Mr. Visser said that the Applicant's risk of recidivism was 'high' and that this was based on the Applicant's criminal history.

33. In Mr. Visser's opinion, the Applicant was in need of long-term rehabilitation – a program of six to 18 months was most likely to work. He felt it would be an issue if the Applicant were able to leave the program of his own accord. He felt that if the Applicant were able to

complete an appropriate drug rehabilitation program, it would significantly decrease the risk of him reoffending, but in Mr Visser's opinion, that risk would still be moderate to high.

34. The Applicant's family connections and his children were, in Mr Visser's opinion, supportive factors in relation to his rehabilitation.

35. Mr Visser said that it was difficult to get into long-term rehabilitation programs.

36. The Applicant's relationship with Ms S was described by Mr Visser as 'mixed' and he said that it could have a negative effect. Mr Visser noted that although his relationship with his children was a supportive factor, he had in fact spent little time with the children. However, if he was not abusing substances, Mr Visser saw him as a very supportive father.

37. In his report, Mr Visser had referred to some of the traumatic incidents that had occurred in the Applicant's early life and which the Applicant had found difficult to talk about. In his opinion, the Applicant needed treatment for Post -Traumatic Stress Disorder. However, he said it would be difficult to effectively treat the Applicant's PTSD until his drug-use was under control.

38. Mr Visser said that there was, in his opinion, a link between drug-use and PTSD.

Evidence of Ms Karen Asal

39. Ms Asal affirmed her statement of 10 January 2022.

40. She said that she was aware of the Applicant's criminal history.

41. Ms Asal said that based on her observations, the Applicant was not using drugs during the last three or four years.

42. Ms Asal had not seen the Applicant with his children, but was aware of him wanting to provide for his children, and said that the Applicant's behaviour had changed after the birth of his children.

Other evidence

43. Character references were provided for the Applicant by various friends and family members, who were not required for cross-examination.

44. These references have been considered and given appropriate weight.

CONSIDERATIONS

45. The Tribunal must take into the primary and other considerations as set out in Direction 90 when making a decision whether to revoke the mandatory cancellation of the Applicant's visa.

46. Primary considerations would normally be given greater weight, but they may be outweighed by other considerations.

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

47. In considering this primary consideration, I have had regard to paragraph 8.1 of Direction 90.

Nature and seriousness of the Applicant's offending

48. There are two aspects to this consideration – the first is the nature and seriousness of the Applicant's conduct.

49. In this case, the Applicant has a very long criminal history which started from about the age of 17 and has continued until recently when the Applicant has been in prison and in immigration detention. Unfortunately even whilst in prison and detention, the Applicant has continued to offend especially in relation to substance abuse.

50. The Applicant's criminal history involves violence, theft, and fraud together with motor vehicle offences and a long list of drug-related offences.

51. He has also been convicted of a serious assault in a domestic setting. The victim of the assault was his partner, and the incident took place when his young daughter was asleep in the next room.

52. Many of the Applicant's offences directly or indirectly place the community at serious risk of harm. His young daughter was found unrestrained in a vehicle which failed to stop when told to do so by police, and which mounted the curb before eventually coming to a stop. The Applicant put his partner in the driver's seat in order to try to avoid blame.

53. It is very disappointing that the Applicant's conduct demonstrates a disregard for the law, perhaps best demonstrated by the fact that he continued to offend even when he was on parole or subject to intensive community orders or good behaviour bonds.

54. He continued to drive whilst disqualified.

55. At the hearing, the Applicant admitted to squandering the many opportunities given to him by courts at various levels to deal with his drug addiction and to become a productive member of society. Even whilst incarcerated, he continued to use drugs and cause disruption.

Risk to the Australian community should the Applicant reoffend

56. In considering this matter, I have regard to 8.1.2(2) of Direction 90.

57. The second aspect of primary consideration 1 is the risk to the Australian community if the Applicant were to be released.

58. The fact that the Applicant has been given so many opportunities to rehabilitate himself through the criminal justice system and has failed to take advantage of those opportunities is of serious concern. There are numerous breaches of parole conditions, breaches of bail conditions, and breaches of section 9 and section 12 bonds. His offending has continued while in prison and in immigration detention as demonstrated by the records out before the tribunal and not contested.

59. Further, the Applicant's psychologist gave evidence that the Applicant is at high risk of re-offending if he were not able to successful rehabilitate from the abuse of illicit drugs. The evidence was that in order to rehabilitate the Applicant was require a long period of residential education and care which he had failed to complete in the past. In fact the psychologist, Mr Visser, felt that the best thing for the Applicant would be to be placed into a program where it would be difficult for him to leave.

60. Even if the applicant were to successfully complete a drug rehabilitation program, Mr Visser still considered that his risk of re-offending would be moderate to high.

61. It is relevant that the Applicant has expressed remorse in relation to his past criminal activities and has acknowledged that his drug taking lead him to make the wrong decisions. He has said that he wants to change, and I accept that he is sincere in wanting to become drug-free and play a productive role in the lives of his children and family.

62. In light of all of the evidence before the Tribunal including the nature and seriousness of the Applicant's offences, and his prospects of rehabilitation, this consideration weighs heavily against revocation of the original decision.

PRIMARY CONSIDERATION 2 – FAMILY VIOLENCE

63. In this regard, I note paragraph 8.2.2 of Direction 90.

64. Family violence of any kind causes long term and serious harm, both to those affected by it and the community as a whole .

65. It must be taken very seriously and can never be discounted.

66. In this case, the Applicant committed acts of violence against his partner, in her home and with a very young child asleep in the room next door. The mother suffered physical injury. The child was awakened by the altercation, although the Applicant's evidence was that the child went back to sleep.

67. I note that the Applicant has only one conviction for family violence, although the number of convictions is not and should not of itself be a factor. The reality is the Applicant was involved in family violence, and this took place in circumstances where a child was proximate and may have been caused distress.

68. This consideration weighs heavily against revocation of the original decision.

PRIMARY EXPECTATION 3: BEST INTERESTS OF MINOR CHILDREN

69. The Applicant has two minor children with his partner, who are aged three and one. He also has a 14-year-old brother.

70. There was no evidence before the Tribunal that the Applicant played any significant role in his younger brother's life. Moreover, it is the Applicant's mother who is the full-time carer for the boy.

71. In relation to the Applicant's daughters, I accept the Applicant's evidence that they are 'his world'. They clearly play a very important role in his life, especially during his current period of detention.

72. This must be weighed against the evidence that the Applicant has spent little physical time with either child, and that he was 'not present' for them whilst using drugs.

73. The Tribunal must also take into account the family violence which occurred in proximity the Applicant's older daughter who was very young, and the Applicant's conviction for driving with a passenger unrestrained as was required.

74. On the other hand, I note the evidence of Ms S who was not required for cross-examination. Her evidence, which I accept, is that both she and the children are suffering very significantly, both financially and emotionally, as a result of the Applicant not being able to be with them. The Applicant's absence is having a particularly deleterious effect on their three year old daughter, as outlined in Ms S's statutory declaration of 4 January 2022.

75. Overall, I find this consideration weighs heavily in favour of revocation of the original decision.

PRIMARY EXPECTATION 4: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

76. Direction 90 sets out the expectations of the Australian Community. Broadly, these encapsulate the findings of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185, where the Full Court decided by majority that it is not for the decision-maker to assess the expectations of the Australian community for the purpose of applying this

consideration. Rather, the expectations of the community that decision-makers are required to consider are those set out in Direction 90 at paragraph 8.4.

77. It is clear authority that it is not the Tribunal's role to determine for itself the expectations of the Australian community. The Tribunal's role is to determine the weight to be given to this consideration.

78. In this case, the Applicant has a long and very serious criminal history including family violence. There is no evidence that would lead to the conclusion that the Applicant is highly likely to reform. Against this, it is relevant to consider that the Applicant came to Australia as a young child, in very difficult circumstances, and was almost certainly affected by mental health issues, including PTSD, which were never properly addressed and which almost certainly played a role in his drug addiction as noted by Mr Visser, the Applicant's psychologist, in his evidence to the Tribunal.

79. Overall, I give this consideration moderate to heavy weight against revocation of the original decision.

OTHER CONSIDERATIONS

INTERNATIONAL NON-REFOULEMENT OBLIGATIONS

80. It was accepted by both parties that non-refoulement obligations are owed to the Applicant in this case. In particular, the Applicant entered Australia on the basis that his father was the holder of a protection visa.

81. I note further that the Respondent accepted that, based on current circumstances, the Applicant's removal to Afghanistan may breach Australia's international non-refoulement obligations. It appears unlikely that the situation in Afghanistan will change any time in the foreseeable future. The Applicant gave evidence that his father had fought with the *mujahideen* against the Taliban, and that his family was well-known in Afghanistan. In all these circumstances, I find it highly unlikely that the Applicant would be removed from Australia. The Applicant therefore faces the prospect of indefinite detention.

82. I accept that there are various discretions available to the Minister which he may choose to exercise in favour of the Applicant being released from detention. However, those powers are entirely discretionary and are not compellable in any way.

83. It was accepted by both parties that the Applicant may apply for a protection visa. In this regard, the Tribunal must consider the effect on the Applicant of making such an application. In particular, the Applicant faces a potentially lengthy period of uncertainty whilst his application for a protection visa is considered. Also, he would likely remain in detention, at least until the matter is concluded, and that is likely to have an adverse impact of the Applicant's mental health, although he has given evidence that he has been able to access much better resources to help him deal with his drug addiction and mental health issues whilst in detention than when he was in the prison system. This does not however, in my view, compensate for the adverse effects of uncertainty and detention.

84. There was considerable argument at the hearing as to the weight the Tribunal should give to the Applicant's prospect of success in obtaining a protection visa. The criteria for the granting of a protection visa is quite separate to the issues before this Tribunal. However, the Tribunal must give proper consideration to the question, given all of the evidence before it, as to whether the Applicant has any reasonable prospect of being granted another visa.

85. In this regard, I have regard to Rares J's reasons in *FRH18 and Minister for Home Affairs* [2018] FCA 1769*,* and referred to in the decision of Kenny and Mortimer JJ in *WKMZ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55 as follows:

> *…it is difficult to see how any delegate acting rationally and reasonably, or the Minister herself or himself acting rationally or reasonably, could decide to grant a visa to a person who a) has had a different visa cancelled, and b) has applied for the cancellation to be revoked but has been unsuccessful. To grant or restore a visa in such circumstances would be to return a person to free and lawful residence in the Australian community, an outcome which under a different provision has been determined to pose an "unacceptable" risk to that same community…*

86. I note that the decisions referenced above were made prior to the issue of Direction 90 but in my opinion they remain relevant.

87. In this regard it is relevant that the Applicant's current visa was cancelled on character grounds. In such circumstances, it must be considered unlikely that he would satisfy the

criteria for the grant of a protection visa, or that the Minister would be minded to grant him another visa given his criminal record.

88. On the basis of the above, it must be concluded that the Applicant is likely to face a period of detention for which there is no definite end date, and that his prospects of successfully applying for a protection visa are not high. For the same reasons, the likelihood of him being granted another visa by the Minister must also be seen as low.

89. It is also relevant to note that if the Applicant is unsuccessful in being granted a protection visa, he is unable to apply again. This may mean that his chances of release from detention become even less likely.

90. Accordingly, I find that, in light of all of the above factors relevant to this consideration, weighs heavily in favour of revocation of the original decision.

Impediments to removal

91. The Applicant left Afghanistan when he was 10 years old. The country has been in turmoil ever since. The evidence was that his relatives are begging the Applicant's family to help them leave Afghanistan and come to Australia.

92. The only argument that could be put in favour of the Applicant returning to Afghanistan was that he is able to speak Farsi. He is, however, unable to read or write in that language, which would be a major disadvantage if he were to return to Afghanistan. Further, even if he were able to read and write in Farsi so as to be able to deal with officialdom, he would almost certainly be unable to access welfare services of anything approaching the reach and quality those in Australia.

93. The Applicant is likely to be homeless if returned to Afghanistan, as his relatives are described as being "on the run" from the Taliban. I accept the evidence that he himself is likely to be targeted by the Taliban because of both drug addiction and because of his family's past association with the force fighting against the Taliban.

94. The Applicant is highly unlikely to be able to access proper medical support of any kind - physical, mental, or rehabilitative for his drug use. Certainly, services would not be at the same standard as that available to him in Australia.

95. I do not accept the Respondent's contention that the Applicant's skills as a crane operator or water-proofer, which he has learned in Australia, would be of any assistance to him reintegrating in Afghanistan. There is simply no evidence to support that claim.

96. Overall, this consideration weighs heavily in favour of revocation of the original decision.

Impact on victims

97. There is no evidence of the impact on the victims of the Applicant's offending other than that of Ms S.

98. Ms S provided a written statement to the Tribunal which was not contested. In that statement, she says clearly that she has forgiven the Applicant, that she does not consider him a dangerous man but rather one who has been adversely impacted by the circumstances which lead to his drug use.

99. Ms S sees the Applicant as playing a very important role in supporting her and also in supporting their two children. She expressed a clear wish for the Applicant to be released into the community.

100. I give this consideration light to moderate weight in favour of revocation of the original decision.

Links to the Australian community

Strength, nature and duration of ties

101. The Applicant is clearly part of a large and a close family. His mother and his siblings all reside in Australia, and are likely to continue to do so. In the statements provided to the Tribunal, it is clear that if the Applicant were to be removed, his family and particularly his mother, his partner and their children would be deeply adversely affected.

102. The Applicant's education was completed in Australia, he acquired job skills in Australia, and he has the prospect of work in Australia.

103. The Applicant has been in a relationship with his partner for at least seven years, and both parties have expressed a strong desire for that relationship to continue. He has two children who need him. for both financial and emotional support.

Impact on business interest

104. There is nothing to suggest that this is a relevant consideration.

105. Overall, I find this consideration weighs heavily in favour of revocation of the cancellation of the original decision.

CONCLUSION

106. The Tribunal is placed in an almost impossible position when an adverse decision in relation to revocation would result in an applicant being detained for a period which has no specified end date. There are clear human rights implications in relation to such a possibility, and it sits at odds with the criminal justice system where, with few exceptions, sentences are for a specified period of time. The Applicant has, in common parlance, served his time for the crimes of which he was convicted.

107. In the current case, I accept that the Applicant is trying hard to reform and has been accessing relevant courses whilst in immigration detention. I also accept the evidence of Mr Visser that the Applicant's chances of reoffending are at best moderate to high, assuming that he is capable of rehabilitation and ending his drug habit. It is, in my view, critical to the Applicant's chances of successful reintegration into the community that he enrol as soon as possible in a residential drug rehabilitation program and that he complete it. It is unfortunate that the Tribunal does not have the power to compel the Applicant to attend such a program. It will be important that the Applicant have the strong support of his family in ensuring he does not leave any program before completion.

108. On the positive side, the Applicant has a supportive family and partner, and appears genuine in wanting to have an ongoing and positive influence on the lives of his children. He has skills and reasonable prospects of employment. The challenge for the Applicant is whether he has the strength to change his lifestyle, because if he does not, his prospects of remaining in Australia appear very bleak.

109. Having carefully weighed all of the factors in this case, I am of the opinion that the balance weighs slightly in favour of revocation of the original decision.

DECISION

110. I find that the correct and preferable decision is that the delegate's decision, dated 24 November 2021, which refused to revoke the mandatory cancellation of the Applicant's Class XB Subclass 202 Global Special Humanitarian visa, is set aside, and in substitution it is decided that the original decision is revoked.

I certify that the preceding 110 (one hundred and ten) paragraphs are a true copy of the reasons for the decision herein of The Hon. John Pascoe AC CVO, Deputy President.

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

Associate

Dated: 16 February 2022

Date(s) of hearing:	**7 February 2022**
Counsel for the Applicant:	**Dr. J Donnelly**
Solicitors for the Applicant:	**Crossover Law Group**
Solicitors for the Respondent:	**Ms G. Ng, Australian Government Solicitor**