



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

Division: GENERAL DIVISION

File Number: 2021/9225

Re: **Damien Pillay**

APPLICANT

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

RESPONDENT

DECISION

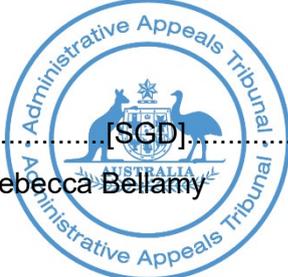
Tribunal: **Member Rebecca Bellamy**

Date: **21 February 2022**

Place: **Brisbane**

The decision under review is affirmed.

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[SGD]
Member Rebecca Bellamy

The seal of the Administrative Appeals Tribunal, featuring the coat of arms of Australia in the center, surrounded by the text 'Administrative Appeals Tribunal' and 'AUSTRALIA'.

CATCHWORDS

MIGRATION – Non-revocation of mandatory cancellation of a Class BW Subclass 857 – Regional Sponsored Migration Scheme- where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 90 – where receiving country is South Africa – frequent offending and traffic infringements – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth).

CASES

Bugmy v the Queen [2013] HCA 37

Deng v Minister Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1456

Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409

FYBR v Minister for Home Affairs [2019] FCAFC 185

Minister for Home Affairs v Buadromo [2018] FCAFC 151

SECONDARY MATERIAL

Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA

REASONS FOR DECISION

Member Rebecca Bellamy

21 February 2022

THE ISSUE BEFORE THE TRIBUNAL

1. The Applicant is a 34 year old citizen of South Africa. In November 2008, when he was 21 years old, he moved to Australia. The most recent visa granted to him was a Class BW Subclass 857 – Regional Sponsored Migration Scheme visa (“visa”).¹
2. On 4 August 2020, a delegate of the Minister (“the Respondent”) mandatorily cancelled the Applicant’s visa under s 501(3A) of the *Migration Act 1958* (Cth) (“the Act”) on the basis that he did not pass the character test and he was serving a full time custodial sentence.² On 5 August 2020, the Applicant made written representations to the Respondent requesting revocation of the cancellation of his visa (“revocation request”).³ On 26 November 2021 the Respondent decided not to revoke the cancellation.⁴
3. The Applicant subsequently lodged an application for review in this Tribunal on 29 November 2021.⁵ The Tribunal has jurisdiction to review that decision pursuant to s 500(1)(ba) of the Act.
4. The hearing of this application took place on 3, 4 and 9 February 2022. The Applicant gave evidence via videoconference. The Applicant’s mother, brother-in-law, cousin and two of his aunts gave evidence at the hearing by videoconference. Professor James Freeman, forensic psychologist, gave evidence by telephone. The Tribunal also received the written evidence that is listed in the attached exhibit list, marked “Annexure A”.

¹ Exhibit G1, G29, page 109.

² Exhibit G1, G30, page 110 to 116.

³ Exhibit G1, G15 pages 68 to 72.

⁴ Exhibit G1, G3, page 15.

⁵ Exhibit G1, G1 pages 1 to 7.

LEGISLATIVE FRAMEWORK

5. Revocation of the mandatory cancellation of visas is governed by s 501CA(4) of the Act. Relevantly, this provides that:

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.*
6. I am satisfied that the Applicant made the representations required by s 501CA(4)(a) of the Act. Thus, the issue is whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised. If either of paragraphs (i) or (ii) are satisfied, I should revoke the original decision.⁶

Does the Applicant Pass the Character Test?

7. The character test is defined in s 501(6) of the Act. Under s 501(6)(a), a person will not pass the character test if they have "*a substantial criminal record*". This phrase, in turn, is relevantly defined in s 501(7)(c), which provides that a person will have a substantial criminal record if they have "*been sentenced to a term of imprisonment of 12 months or more*".
8. On 27 March 2020 the Applicant was re-sentenced for some offences in respect of which he had originally been placed on Drug and Alcohol Treatment Orders. He was sentenced to concurrent terms of 14 months imprisonment and 11 months imprisonment with an immediate parole release date. What matters for present purposes is the term of imprisonment to which a person has been sentenced, not the amount of time they have actually served.⁷ Accordingly, there is no doubt that the Applicant has a "*substantial criminal record*" and, therefore, he does not pass the character test. Due to subsequent offending, the Applicant's parole was revoked, and he was incarcerated, meaning that he served a

⁶ *Minister for Home Affairs v Buadromo* [2018] FCAFC 151.

⁷ See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 415-416.

portion of those sentences of imprisonment in a custodial institution. He cannot rely on s 501CA(4)(b)(i) of the Act for the mandatory cancellation of his visa to be revoked.

Is There Another Reason Why the Cancellation of the Applicant’s Visa Should be Revoked?

9. In considering whether to exercise the discretion in s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (“the Direction”) applies.⁸
10. For the purposes of deciding whether or not to revoke the mandatory cancellation of a non-citizen’s visa, paragraph 5.2 of the Direction contains several principles that must inform a decision maker’s application of Part 2 of the Direction.
11. Those principles may be briefly stated as follows:
 - (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia’s law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.
 - (2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.
 - (3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

⁸ On 1 April 2021, the former applicable direction, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 90.

- (4) Australia has a low tolerance of any criminal or other serious conduct by visa Applicants or those holding a limited stay visa, or by other non- citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by non- citizens who have lived in the Australian community for most of their life, or from a very young age.
- (5) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

12. Paragraph 6 of the Direction provides that:

Informed by the principles in paragraph 5.2, a decision maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

13. Paragraph 8 of the Direction sets out four Primary Considerations that the Tribunal must take into account. They are:

- (1) protection of the Australian community from criminal or other serious conduct;
- (2) whether the conduct engaged in constituted family violence;
- (3) the best interests of minor children in Australia; and
- (4) expectations of the Australian community.

14. Paragraph 9 of the Direction sets out four Other Considerations which must be taken into account. They are:

- a) international non-refoulement obligations;
- b) extent of impediments if removed;
- c) impact on victims; and
- d) links to the Australian community, including:
 - i) strength, nature and duration of ties to Australia; and

ii) impact on Australian business interests

15. I note that paragraph 7(2) provides that the primary considerations should generally be given greater weight than the other considerations, and paragraph 7(3) provides that one or more primary considerations may outweigh other primary considerations.

BACKGROUND AND OFFENDING

16. The Applicant was born in 1987. In November 2008, he relocated from South Africa to Australia with his mother, step-father, brother and sister. The Applicant's biological father had been killed by a drunk driver in a motor vehicle accident before he was born.⁹ He completed school to grade 12 and worked for around five years in South Africa before moving to Australia.
17. The Applicant has an extensive traffic history in Australia, starting with drink-driving in May 2009, only six months after he arrived in Australia. According to the Applicant he was engaging in some binge drinking around that time.¹⁰ Nine days later, he was caught failing to display L plates and not having a person with an open license seated beside him. The very next day he was caught doing exactly the same thing, and for the third time ten days after that.¹¹ When asked about this in the hearing, the Applicant said he did not take the rules seriously and he thought he would get away with it, and that in South Africa it would not have been a big thing.¹²
18. The balance of the Applicant's traffic offences includes a further drink-driving offence, a drug-driving offence, unlicensed driving, disqualified driving, speeding (some 26 separate infringements including exceeding the speed limit by more than 30kmph), failing to display P plates, failing to stop at a stop sign, tailgating and failing to comply with license conditions. The Applicant's license has been subject to periods of good behaviour and night-time time driving restrictions, which he breached multiple times, and his license has been suspended and disqualified on multiple occasions for periods of up to two years. In the hearing the

⁹ Exhibit A10 page 3.

¹⁰ Transcript, page 12, lines 1 to 8.

¹¹ Exhibit R2, page 291.

¹² Transcript, page 12, line 37 to page 13, line 30.

Applicant admitted, in relation to an unlicensed driving infringement in 2010 that he committed around two weeks after being caught driving unlicensed, he had not been truthful when he told the police he did not know his license had been cancelled, and he did it thinking he would get away with it.¹³ He committed over 60 traffic offences between 2009 and 2020.

19. The first group of criminal offences that the Applicant committed arose from an incident that occurred on 18 February 2012. The police records state the Applicant had attended a brothel at about 3.00am. He engaged in an argument over the services offered, a disturbance occurred, he went to his car and got a tyre iron, then he approached the entrance doors and smashed them with the tyre iron. He also smashed the lights that illuminated the doorway and the car park, damaging both the doors and lights. The female staff inside the brothel were afraid for their safety and they called the police.
20. When the police arrived, they observed the Applicant in a car driving erratically backwards and forwards inside the car park and revving the vehicle's engine excessively. The Applicant showed signs of being intoxicated. Following a positive breath test, he told the police he had consumed "4 stubbies of coronas" but did not specify when. He admitted having dropped into the brothel on his way home from work but denied driving the vehicle immediately prior to police arriving. A further test showed a blood alcohol concentration of 0.106.¹⁴
21. In his written material, the Applicant explained the offence thus:

"...I was very intoxicated by alcohol I decided to visit a brothel. After I paid for the service I was about to receive I had a change of heart and decided I would like to have my money back and go home. They declined my request which I was upset and after walking out I threw a little rock on the outside signage which the police were alerted and I was arrested and charged for that offence and wilful damage."¹⁵

(Errors in original)

¹³ Transcript, page 14, line 45 to page 15, line 23.

¹⁴ Exhibit R2 page 239 to 248.

¹⁵ Exhibit G1, G20, page 94.

22. As recently as 21 December 2021, the Applicant gave Professor Freeman a similar version, including that he threw a rock at the sign post.¹⁶ In the hearing, he adhered to that version. Only when it was put to him that the police facts indicated that he had used a tyre iron did he admit to that. However, he said he threw it at a sign-post. He did not admit to smashing the entrance doors or smashing lights.¹⁷
23. On 2 March 2012, the Applicant was convicted of going armed so as to cause fear and wilful damage. He was sentenced to probation for 12 months. He was also dealt with for mid-range drink-driving and wilfully starting a vehicle in a way to cause unnecessary smoke/noise. He was fined and had his licence disqualified for seven months.
24. A few weeks later on 25 March 2012, he was caught driving while disqualified and his license was disqualified for two years. When he was intercepted on that occasion, he claimed to be his brother and produced his brother's South African driving license. According to Queensland Corrective Services records, on 25 October 2012 he told a corrective services officer that he would plead not guilty due to the driver having been his brother and not him. He said his brother was claiming it was him driving.¹⁸ However the Applicant's deception was discovered in court when the police observed that the Applicant's brother was not the person who had been driving.¹⁹ In the hearing in these proceedings, the Applicant admitted that it was him driving and that he drove knowing he was unlicensed because he thought he would get away with it.²⁰
25. On 27 May 2012 the Applicant obstructed police and contravened a direction. He was told to move on by police and he became argumentative and refused. He then refused to give his details when requested. The Applicant stated he was out drinking and going to clubs before the incident occurred. He was fined and sentenced in July 2012 to a six month good behaviour bond.

¹⁶ Exhibit A10, page 2.

¹⁷ Transcript, page 17, lines 31 to 44.

¹⁸ Exhibit, R2, page 570.

¹⁹ Exhibit, R2, page 235.

²⁰ Transcript, page 18, lines 16 to 25; page 95, lines 9 to 13.

26. On 23 November 2012 the Applicant unlawfully stalked a female victim, and in doing so he breached the probation order. According to the contemporaneous police records, at around 5.30am the victim was walking along a road to catch a bus to work. A car driven by the Applicant drove towards her on the wrong side of the road, then swerved across the road and stopped right next to her. The Applicant said he knew who she was, got out the car and tried to engage her in a conversation. This distressed her. A male witness approached them, and the Applicant told him to go away. The witness offered to call the police on behalf of the victim, but she declined. She walked away towards the bus stop. The Applicant got back into his car and pulled up alongside her at an intersection, then turned and stopped directly opposite the bus stop. The victim believed the Applicant was going to attempt to abduct her and she took two steps backwards to see what he would do. He started reversing slowly. The victim turned and ran back along the street into the grounds of a nearby church. The witness who had approached earlier waited with her until her mother came to pick her up.
27. When the police arrested the Applicant, he was interviewed and he admitted that he had approached and spoken to the victim, and that he was heavily intoxicated at the time. He was unclear about why he approached the victim. He said he noticed that she was feeling uncomfortable. He denied parking across from the bus stop.²¹
28. In his written evidence, the Applicant said that he thought the victim was someone he had met clubbing. He said he realised he would have made her feel uncomfortable so he turned around to go and apologise but he did not see her on the street so he drove home.²² He adhered to that account when he spoke with Professor Freeman²³ and in the hearing.²⁴ He denied having told the witness to go away, saying that he thinks he told him that it was “*all good*” and he thought he knew the victim.²⁵ When it was put to the Applicant that the police facts, which indicate that when the victim took steps backwards he put his car into reverse, strongly suggest that he was following her in his car, he denied it, stating:

“I wasn’t, like, intentionally following her but I was, like, I was going to go back and try and apologise but, like, when I was driving past and I seen her, you know the,

²¹ Exhibit R2, pages 226 to 227.

²² Exhibit G1, G 20, page 94.

²³ Exhibit A10 page 2.

²⁴ Transcript page 19 line 41 to page 20, line 14.

²⁵ Transcript, page 20, lines 25 to 28.

the first thing I was, like, shit, that's someone that I met at the club, let me try and engage in a conversation with her. And then it wasn't, you know, and when she walked off – I think I did a U-turn or I reversed. I'm not sure about what happened. And I just tried to apologise to her, that's all."²⁶

29. The Applicant said he did not have bad intentions and he is not like that.
30. It is apparent that the Applicant's version was not accepted by the police or the court. On 2 July 2013 the Applicant was convicted of unlawful stalking and sentenced to 18 months' probation. Although the Applicant had admitted to being intoxicated when he committed the offence he was not charged with drink-driving.
31. According to the Applicant, at around this time he was smoking cannabis and drinking with some new people.²⁷ This impacted his life in that he was unreliable at work and he missed court dates.²⁸ At some point after the stalking offence, a friend from work introduced him to methamphetamine²⁹ and he eventually became addicted.³⁰ He was associating with different people, trying to get money to be around them, and he fixed the phones of some of these people³¹ (which is relevant to his offending against his employer in 2014 – see below). He was also spending money on other things: he went out a lot and people relied on him to buy drinks, and he had a nice car. He was funding, in his words, a "*stupid lifestyle*" that he did not need.³²
32. Between 2012 and 2020 the Applicant committed over 60 offences, with the large majority involving fraud and dishonesty, drug possession and numerous breaches of judicial orders including failure to appear in court. In his written materials, the Applicant said his offending was mostly related to drugs and funding his habit.³³ He attributed it all to drug use when he spoke with Professor Freeman.³⁴ However, the first two serious offending episodes, being the offending at the brothel and the stalking, were not drug-related, instead involving

²⁶ Transcript page 20 lines 46 to 47; page 21 lines 1 to 7.

²⁷ Transcript, page 24, line 35 to page 26, line 19.

²⁸ Transcript, page 24, line 35 to page 25, line 21.

²⁹ Exhibit G1, G20, page 95.

³⁰ Exhibit A10, page 4.

³¹ Transcript, page 26, lines 40 to 46.

³² Transcript, page 27, lines 7 to 14.

³³ Exhibit G1, G20, page 95.

³⁴ Exhibit A10, page 4, para 8.3.

alcohol,³⁵ and some of his traffic offending preceded his introduction to methamphetamine. Further he was also funding an expensive lifestyle.

33. Between September 2013 and October 2014, the Applicant worked for a mobile phone retailer in Brisbane city that also repaired mobile phones and other electronic devices. He was employed as a technician, predominantly repairing mobile phones. In early October 2014, it was discovered that he had been stealing parts, phones and customer's phones that they had brought in for repairs or cleaning. He tried to sell at least one stolen phone on Gumtree. His employment was terminated. When questioned by the police, the Applicant denied everything. A police search of the Applicant's home uncovered mobile phones, parts and accessories.³⁶
34. A few weeks after his employment was terminated, the Applicant stole \$5,140 from his former employer's PayPal account. He used the business account, without permission, to pay for eBay purchases on his eBay account, to transfer money directly to his own account and to transfer money to a friend's account. His former employer did not know how he gained access to the account.
35. When questioned by the police, the Applicant said that money transferred to him was for unpaid wages. He claimed that his friend told him about the money in her account and he told her not to touch it. He denied involvement in the eBay purchases. He said he thought the transactions were made by his former employer as they had police contacts,³⁷ apparently implying that his former employer had set him up.
36. In the hearing, the Applicant said he used to use the PayPal account to order phone parts in his employment and he took advantage of the situation. He said, "*I didn't fully understand, you know, like what was actually happening.*"
37. When challenged about whether he knew it was wrong to steal from his employer, he said:

³⁵ Transcript, page 18, lines 37 to 40.

³⁶ Exhibit R2, pages 210 and 211.

³⁷ Exhibit R2, page 213.

*"I do now...but at that time, like I didn't - you know, like, I just felt like I had - like, all these extra things, and, like, employee wouldn't notice that I was doing this, and - as I said, like I just took advantage of the good situation that I was given, and I didn't understand the effects and the severity of my actions on how it affected everyone, especially the business and the people around me."*³⁸

38. When challenged again, he said:

*"I do understand that it was not fair. But I just never understood - I never realised that I could get caught for it or the impacts that it had. Like, I honestly didn't - didn't - yes, didn't realise the effects that it had, and I honestly thought I would get away with it, you know."*³⁹

39. When asked if he knew it was a crime, he said "Yes, I did."⁴⁰ He admitted that he transferred money to his friend's account pursuant to an agreement they made to "get some easy money" because he had access to the PayPal account.

40. On 19 March 2015, the Applicant was sentenced to six months' imprisonment, suspended for 12 months.⁴¹ In the hearing, the Applicant said that because he did not go to prison "it didn't really hit home".⁴² He added that after court the prosecutor had told him "You were so close to going to gaol" and that he was lucky he was not going to gaol.⁴³

41. In the five months after the suspended sentence was imposed, the Applicant committed 20 traffic infringements including 10 speeding offences and two breaches of a late night driving restriction. He had breached a late night driving restriction twice in the in the weeks preceding that court date. Further, between April and September 2015, the Applicant dishonestly obtained petrol without paying for it on a total of eight occasions.

42. When asked about the traffic offences in the months following the suspended sentence, the Applicant said that the Magistrate had warned him that if he kept driving like that he would end up in gaol, but he was hanging around the wrong people and he did not take it seriously.

³⁸ Transcript, page 27, lines 35 to 43.

³⁹ Transcript, page 27, line 46 to page 28, line 3.

⁴⁰ Transcript, page 28, lines 5 to 8.

⁴¹ Exhibit G1, G6, page 40.

⁴² Transcript, pages 28, lines 45 to 48.

⁴³ Transcript, page 29, lines 1 to 8.

He said *"I just never, ever, ever took any of these things - up until the last offence in 2020, I never took it serious."*

43. On 2 June 2015, the Applicant sold an iPhone on Gumtree for \$150 plus \$15 postage. However, after he received payment, he did not post the phone to the purchaser.⁴⁴ In the hearing he indicated that he never intended to.⁴⁵
44. In early December 2015, a woman, "Ms R" alleged that the Applicant had been violent towards her. This resulted in a protection order being made but the Applicant was not charged. According to the application for the protection order, the Applicant and Ms R had been in an intimate personal relationship for about four months and during that time, he had been staying with her. On 30 November 2015, the Applicant woke her up a verbal argument commenced. He told Ms R to *"get to f--king bed"* and she refused. He taunted her with his mobile phone, and she took it and threw it. It did not break. The Applicant then threw her phone, breaking it. As Ms R tried to get her phone, he grabbed her left arm and forced into the armchair. He then hit her three times to her forehead and verbally abused her, saying things such as *"I can't wait to get out of this dump"*, *"I never wanted to get with you in the first place"*, *"You are a joke"*, *"You are sick in the head"* and *"Your kids deserve better."* Ms R became fearful for her safety and attempted to leave. The Applicant blocked her, then as she tried to leave another way, he grabbed her and dragged her back inside. He later left the premises.
45. On 3 December 2015 the Applicant phoned Ms R to say he was on his way home. She said she would not be at the house and left. When she returned there was damage to the front window and flyscreen, and the lock to the security screen door had been tampered with from the inside. The television was missing. Ms R received three text messages from the Applicant's mobile phone as follows:
- *"stab"*
 - *"throw abuse terrorise you?"*

⁴⁴ Exhibit R2, page 149.

⁴⁵ Transcript, page 36, lines 34 to 37.

- *“I came back this morning but obviously whoever you been sucking off last night made you feel guilty so you ran an now you trying to keep abusing me hoping il give in again”*
46. When the police attended, they observed that Ms R appeared genuinely upset and concerned for her safety. There was bruising on her forehead, over left eye, on her inner bicep and her left wrist and hand.⁴⁶
47. In the hearing the Applicant described the relationship with Ms R as more like a friendship than a relationship. He denied having been violent but admitted to having sent text messages *“which wasn’t good”*. He said he had wanted to leave, and Ms R had stood in front of the door being abusive and crazy, so he sat down and waited for her to calm down before calling a friend to pick him up. The next morning he messaged Ms R to get his belongings. He was angry because he wanted his belongings. He admitted accessing the house through the window. He said a couple of days later they were on speaking terms again. He spoke with her from remand after he found out about the domestic violence allegations and she told him she was angry that he took the things he had bought for her, that he came to the house when she was not there and about the abusive texts. Some time later he asked his mother and stepfather to take some food to Ms R and check on her. His mother told him Ms R was back on drugs, that the house was totally trashed, and he should not go back there. He cut ties with Ms R after that.
48. When asked about the bruising on Ms R, the Applicant said he did not know how she got a mark on her forehead and he repeated that he had not hit her. The Applicant conceded that he had consented to the protection order being made but he had not known what the allegations were until he saw the document in these proceedings.⁴⁷
49. On 9 December 2015, the Applicant was convicted of failing to appear in breach of a bail undertaking and sentenced to three months’ imprisonment. That offence breached the suspended sentence which was fully invoked. The Applicant was given a parole release date of 9 March 2016.⁴⁸ This was the first time the Applicant had been incarcerated.

⁴⁶ Exhibit R2, pages 268 and 269.

⁴⁷ Transcript, page 61, line 25 to page 62, line 34; page 63, lines 25 to 43.

⁴⁸ Exhibit G1, G6, page 40.

50. On 11 March 2016, the Applicant was sentenced to 12 months' imprisonment with immediate parole for an array of property and drugs offences.⁴⁹
51. On 13 October 2017, the Applicant was sentenced to imprisonment, fully suspended, for breaching bail.⁵⁰
52. On 22 December 2017, the Applicant tried to defraud a Motorsport company out of \$3,200. He telephoned the company, giving a false name, and claimed to have accidentally deposited \$3,200 into their account. He asked for it to be sent back to his bank account. In fact, the business had provided a quote to a Damien King (the false name) but no payment had been received. The Applicant subsequently sent a Facebook message to an employee of the business pretending that his bank account had been taken over and \$3,200 had been transferred to that business. He then called the business asking when the money would be refunded. When the police caught up with the Applicant he declined to be interviewed.⁵¹
53. In representations made to the Respondent, the Applicant said he had attempted to receive a refund for an item that he purchased from a car accessory shop.⁵² However, in the hearing, he admitted that he was trying to dishonestly obtain money.⁵³
54. In January 2018, the Applicant was living in a share house in Gaythorne, a suburb of Brisbane, with two others. In late December 2017, the Applicant had taken sheets from a cupboard one of his housemate's rooms and used them to make his bed in his bedroom. That housemate, "Ms K", soon decided to move out.
55. On 2 January 2018, as Ms K packed her belongings, she noticed a number of items had been stolen from her bedroom. These included two cameras, an iPhone, a gold bracelet and approximately \$50 in coins. The Applicant was not there so she sent him a text message asking him about the sheets and stolen items. He did not reply.

⁴⁹ Exhibit G1, G6, page 39.

⁵⁰ Exhibit G1, G6, page 40.

⁵¹ Exhibit R2, page 106.

⁵² Exhibit G1, G20, page 100.

⁵³ Transcript, page 40, lines 24 and 25.

56. Ms K locked the remainder of her belongings, including a television that had been in the common living room, in her bedroom. She told her landlord what had happened. Later that day the landlord asked the Applicant about the stolen property and he denied knowledge of it. He then asked where the television was and was told it was locked in Ms K's bedroom. Ms K returned, took all of her property, and locked her bedroom door and the external doors. The Applicant subsequently damaged the door and door frame of Ms K's room attempting to gain access, presumably believing the television was still inside.
57. The police later discovered that on 28 December 2017, the Applicant had pawned one of Ms K's cameras at Cash Converters for \$300 and the next day, he had pawned the other camera at a different Cash Converters for \$40.⁵⁴
58. On 8 January 2019, the Applicant responded to an add on "Facebook Marketplace" for a Volkswagen Golf for sale for \$6,500. He contacted the owners and arranged to inspect the car the following day. The next day he took it for a test drive and agreed to pay \$6,500 for it. They completed some change of registration documentation. The police facts are unclear, but it appears that the Applicant tricked the owners into thinking he had paid for the vehicle by Electronic Funds Transfer or that he was about to do that. He went for one more test drive but never returned the car. He subsequently lodged the paperwork to have the car registered in his name.
59. The police subsequently located the car and the Applicant. The Applicant showed the police the vehicle key and what he claimed was an invoice relating to the transaction. He declined to be interviewed but did tell the police he bought the car for \$2,000. In the hearing, the Applicant said a friend has shown him how to do a "*fake transfer*", that he did not have any money in his account, and he had not intended to pay for the car.⁵⁵ He admitted that he had lied to the police.⁵⁶
60. On 28 January 2018, the Applicant was living in a hostel. Another person who was staying there left his laptop, hard drive and mouse in the common area of the hostel while he left

⁵⁴ Exhibit R2, pages 10 and 101.

⁵⁵ Transcript, page 52, lines 16 to 27.

⁵⁶ Transcript, page 53, lines 5 to 9.

for a short period. The Applicant stole them and made deep scratch marks on the cover, and he scratched the serial numbers and identifying particulars off each item, causing extensive damage. CCTV footage showed the Applicant stealing the items. The police found the items in the Applicant's room and he said he had borrowed them from a female, then he changed his story and said he had borrowed them from a male.⁵⁷

61. On 1 March 2018, the Applicant was convicted of possessing tainted property, being the two cameras belonging to Ms K. The other property that had been stolen from Ms K was not mentioned in the sentencing schedule prepared for the court.⁵⁸ Incredibly, the Applicant received no punishment.⁵⁹ In the hearing, the Applicant said he took the items, but not money, from the house in Gaythorne, and that he took money from a different share-house in Annerley. It does not appear that he was ever charged with that theft. When asked what drove him to steal from people with whom he was staying he said he took everything for granted and did not think he would get caught.⁶⁰
62. The Applicant was dealt with for damaging property and pawning the cameras on 18 September 2018. In that sentencing episode he was also dealt with for the theft he committed in the hostel, possession of stolen property in relation to two phones he was found with that were suspected of being stolen, and some other offences. The Drug and Alcohol Court put him on a Drug and Alcohol Treatment Order ("DATO"). The order prohibited the Applicant from using drugs or consuming alcohol, required him to report at least three times a week for drug testing, submit to random breath testing, submit to the AOD treatment court day program, participate in counselling or programs relevant to his rehabilitation, attend any meetings he was directed to attend, and attend vocational, education and employment programs or courses as directed.⁶¹
63. Between September 2018 and February 2020, the Applicant tested positive for drugs at least once each month, sometimes multiple times each month.⁶² In February and March

⁵⁷ Exhibit R2, page 85.

⁵⁸ Exhibit R2, page 353.

⁵⁹ Exhibit G1, G6, page 38.

⁶⁰ Transcript, page 42, lines 30 to 35.

⁶¹ Exhibit R2, pages 327 and 328.

⁶² Exhibit R2, pages 711 to 739.

2019, the Applicant was caught shoplifting twice. On 29 March 2019 he was caught speeding three separate times.⁶³

64. The Applicant was again dealt with by the Drug and Alcohol Court on 10 April 2019, for attempted fraud and unlawful use of a motor vehicle (the Volkswagen) that pre-dated the previous DATO, and the two instances of shoplifting. He was sentenced to a term of imprisonment of 15 months wholly suspended for two years. He was also sentenced to a further DATO where he was required to comply with a number of conditions set by the court.⁶⁴
65. Records from Corrective Services dated in June 2019 record the Applicant stating that his sister gave him \$5,000 to pay off fines that he owed, and she bought a car for the Applicant worth \$20,000.⁶⁵ In the hearing, the Applicant said his sister paid the deposit only and it was up to him to make the other payments, and that the car cost around \$10,000.⁶⁶ Later in the hearing, he claimed that he had paid back nearly all the money his sister had given him.⁶⁷
66. At some point before or in July 2019, the Applicant became aware that his older brother's visa had been cancelled. Corrective Services notes state that the Applicant disclosed that his brother had been deported to South Africa, however in the hearing the Applicant denied having said that and claimed to have had very little knowledge of his brother's situation, although he admitted to having known that his brother's visa had been cancelled due to offending and said he knew he was in immigration detention.⁶⁸
67. On 16 September 2019, the Applicant completed a Safety Plan which appears to be a relapse prevention plan.⁶⁹

⁶³ Exhibit R2, page 281.

⁶⁴ Exhibit G1, G10, page 57.

⁶⁵ Exhibit R2, page 463.

⁶⁶ Transcript, page 94, lines 2 to 13.

⁶⁷ Transcript, page 94, lines 14 to 30.

⁶⁸ Exhibit R2, page 457; transcript, page 81, lines 15 to 34.

⁶⁹ Exhibit R2, pages 775 to 781.

68. On 21 October 2019 the Applicant met with a person to purchase a mobile phone. He produced what appeared to be a transaction receipt showing the transfer of the purchase price to the victim's bank account. The victim then gave the phone to the Applicant. However, payment was never made. The Applicant admitted he had provided the victim with a fraudulent receipt and that he did not have the funds to pay for the phone and had not intended to pay for it.⁷⁰
69. On 23 December 2019 the Applicant tried to sell a stolen mobile phone.
70. On 13 March 2020 the DATO's were revoked due to non-compliance.⁷¹ The Applicant was due to be re-sentenced by the Drug and Alcohol Court on 27 March 2020. The day before, on 26 March 2020, the Applicant took a car from a used car dealership without paying for it. He had agreed to buy the car for \$7,000, and he showed a screenshot that appeared to display payment of \$7,000 via bank transfer. The necessary paperwork was completed, and the Applicant left with the vehicle. In fact, the Applicant had transferred five cents. The victim contacted the Applicant who said he would return and pay cash by 3.00pm the following day however he did not return to complete payment. The Applicant admitted to the police that he had shown the victim a fraudulent receipt and that he did not have the funds to purchase the car and did not intend to pay for it.⁷²
71. However, in representations he made to the Respondent in his efforts to have the cancellation of his visa revoked, the Applicant said he had been trying to arrange payment, he was in contact with the vendor, and he had agreed to return the car if he could not come up with the balance owed. He said he showed the police the deposit paid and his constant communication with the vendor.⁷³ In the hearing the Applicant admitted that he fraudulently took the vehicle.⁷⁴
72. On 27 March 2020 the Applicant was resentenced for the offences that had originally been dealt with by way of DATO's. For the offences dealt with on 18 September 2018, he was

⁷⁰ Exhibit R2, page 39.

⁷¹ Exhibit R2, page 306.

⁷² Exhibit R2, page 35.

⁷³ Exhibit G1, G20, page 100.

⁷⁴ Transcript, page 55, lines 15 and 16.

sentenced to 11 months' imprisonment and for the offences dealt with on 10 April 2019, he was sentenced to 14 months' imprisonment. He was given immediate parole.

73. On 20 April 2020, the Applicant and two associates went to an apartment complex and smashed the Perspex security screen to gain access to the secured carpark. They then walked through the carpark checking motor vehicles and storage cages. When questioned, by the police, the Applicant admitted having broken the Perspex to gain entry. In representations made to the Respondent, he admitted that he and his friend had been looking for things to steal. He said they did not see anything in the first car park so they decided to try another car park.⁷⁵

74. In a subsequent letter to the Respondent, dated 19 April 2021, the Applicant said:

*"During this time friend called me and asked for help. It was at this moment that I made the poor decision to not ask questions and agreed to help my friend. This event is what led to my current situation. I was charged with 'Break and Enter' and received a sentence of 18 months... I would like to say that I take full responsibility for my offending and I wish it never happened."*⁷⁶

75. In the hearing, the Applicant said he met some friends and normally he would not do something like that. He was affected by drugs and his friends encouraged him so they could get some easy money.⁷⁷

76. As a result of this offending, the Applicant's parole was revoked.

77. On 13 August 2020 the Applicant was convicted of 11 offences, including offences committed at the carpark, and sentenced to concurrent terms of imprisonment of 15 months, 12 months nine months, three months and one month with a parole eligibility date of 12 December 2020.

78. I have not included details of all of the Applicant's offending in this summary. In particular I have left out the offences arising from the Applicant's possession of drugs and drug related

⁷⁵ Exhibit G1, G20, page 98.

⁷⁶ Exhibit G1, G19, page 92.

⁷⁷ Transcript, page 56, lines 9 to 20.

utensils that were for his personal use and most of the instances when the Applicant failed to appear in court.

79. The Applicant was paroled to immigration detention on 19 May 2021.⁷⁸

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

80. In considering this Primary Consideration 1, paragraph 8.1 of the Direction requires decision-makers to keep in mind the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that this country confers on non-citizens in the expectation that they are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.
81. In determining the weight applicable to Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to 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

82. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction, relevantly, specifies that decision-makers must have regard to the following:
- (a) *without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:*

⁷⁸ Exhibit A2, page 126.

- (i) ...;
- (ii) *crimes of a violent nature against women or children, regardless of the sentence imposed;*
- (iii) ...;
- (b) ...
- (c) *with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;*
- (d) *the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;*
- (e) *the cumulative effect of repeated offending;*
- (f) ...;
- (g) *whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).*

83. There are some differences between the allegations recorded in the police records and the accounts given by the Applicant. The Applicant admitted that he lied to several victims of his crimes and to the police on various occasions. He also minimised some of his offending when he spoke with Professor Freeman and in the hearing. While he was frank about some things in the hearing, I do not consider him to be a sufficiently reliable witness to accept his word where it differs from the allegations contained in contemporaneous police records in circumstances where the Applicant was ultimately convicted of an offence arising from those allegations. With respect to the offences of which the Applicant was convicted, I accept that he was guilty, and I accept the factual basis of those convictions contained in the police records and the court's sentencing remarks.

84. With respect to the allegations of domestic violence, I accept that the Applicant sent abusive text messages to Ms R. He denied the rest and his denial was not inherently implausible or inconsistent with known facts. That the police observed bruising on Ms R that was consistent with an assault she said had occurred three days earlier raises a strong suspicion that she was telling the truth. However, in the absence of other evidence tending to support Ms R's allegations, I am not prepared to find that the Applicant was physically violent to Ms R.

85. The Applicant's criminal and traffic offending was frequent and persistent. It included many offences that either caused tangible harm to members of the Australian community or put members of the Australian community at increased risk of harm.
86. The Applicant committed offences that caused women to fear for their safety. He took a tyre iron to the doors of a brothel, frightening the female employees inside. He stalked a young woman who was walking to the bus stop so that she feared he was going to abduct her. He sent abusive text messages to Ms R and broke into her home, causing her to fear for her safety. He invaded the personal space of a female housemate by going into her bedroom and taking her bedsheets, which did not give rise to an offence, but it forms part of a continuum of serious conduct that included theft of her personal items and property damage. While the Applicant denied that he had directed criminal behaviour toward females, but the fact is that the people he chose to victimise with aggressive, predatory or invasive behaviour were all females. Even if his conduct cannot strictly be classified as being of a violent nature, it is objectively very serious because of the matters I have mentioned.
87. The offences that the Applicant committed against the mobile phone business that employed him involved abuse of the position of trust he had with his employer and abuse of the trust of customers who left their phones with him. He also breached the trust of people with whom he shared accommodation.
88. While the Applicant sought to characterise his offending as impulsive and opportunistic, some of it was planned and strategic, including the theft and attempted theft from his employer, his attempt to steal \$3,200 from a motorsports business and his two attempts to obtain cars without paying. These latter crimes represent an increase in the seriousness of his dishonesty offending over time.
89. The Applicant's traffic offending is extremely serious given the number of times he was caught engaging in unlawful behaviour of the kind that tends to increase the risk of harm to other road users. Drink-driving, drug-driving and speeding are obvious examples. However, unlicensed driving, breaching driving requirements (e.g. not displaying the correct plates) and ignoring driving restrictions are behaviours that undermine the system that exists to

control and regulate who is allowed to drive and under what circumstances for the safety of the community.

90. The cumulative impact of the Applicant's offending was that he was continually victimising individuals and businesses and breaking road rules that are there to protect road users. Additionally, a lot of resources in the criminal justice system were spent on him, largely to no avail, as he continued to use drugs and offend.
91. The Applicant was sentenced to imprisonment several times. A sentence of imprisonment is generally imposed as a last resort where no other option is appropriate. Some of the sentences imposed on the Applicant exceeded 12 months, which is a substantial period. While the Applicant was almost always given the benefit of suspended sentences or immediate parole, the head sentences reflected the seriousness with which the court treated his offending.
92. The Applicant was not formally warned in writing about the consequences of further offending in terms of his migration status. However, he was otherwise made aware of that when he discovered his brother's visa had been cancelled due to offending. That occurred in July 2019 at the latest. The Applicant continued to offend after that.

The Risk to the Australian Community Should the Applicant Commit Further Offences or Engage in Other Serious Conduct

93. Paragraph 8.1.2(1) provides that in considering the risk to the Australian community, a decision-maker 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.
94. In accordance with paragraph 8.1.2(2), in considering the risk to the Australian community, I must have regard to the following relevant factors on a cumulative basis:
 - (1) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and

- (2) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen re-offending; and evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence.

Nature of harm should the Applicant engage in further criminal or other serious conduct

95. The assessment of the nature of the harm to individuals or the Australian community were the Applicant to engage in further criminal or other serious conduct, is properly informed by the nature of his offending to date, including any escalation in his offending.
96. Should the Applicant engage in further dishonesty and property offences the nature of harm includes financial loss and damage to individuals and businesses, loss of personal items and the sense of violation that victims of property crime feel.
97. The harm from further stalking, threatening or aggressive behaviour includes psychological and emotional trauma.
98. The harm from further traffic offences of the kind that tend to increase the risk of collisions includes serious injury and death

Likelihood of engaging in further criminal or other serious conduct

99. The Applicant has given various explanations for his offending. In a statement made shortly before the hearing, he said his stepfather's alcoholism led him to stray away from the family unit, take drugs, meet bad people, and engage in criminal offending. He added that he developed a serious "*drug addiction health problem*" which led him to engage in a life of crime.⁷⁹
100. In her written material, the Applicant's mother, "Ms Y" described a difficult relationship between her husband and the Applicant when he was growing up, including neglect and

⁷⁹ Exhibit A9.

emotional abuse, and shame felt by the Applicant due to her husband's drinking problems over the years. In the hearing she resiled from that evidence considerably⁸⁰ however the Applicant's cousin and two of his aunts gave evidence that his stepfather was abusive and neglectful, and I find their evidence, taken together, to be more reliable.

101. An aunt, "Aunt C", lived in South Africa until December 2019. She thinks that the instability in the Applicant's family home contributed significantly to his poor mindset and decision-making ability. Similarly, another aunt, "Aunt N", believes the Applicant's current situation is directly linked to his unfortunate upbringing. However, neither claim to have a background in developmental psychology or to otherwise have relevant expertise.
102. With respect to the relationship between the Applicant and his stepfather in Australia, Ms Y said her husband would get angry when the Applicant or his brother would stay out late and, due to his intoxication, he would yell at them. He also considered them old enough to live on their own.
103. According to Ms Y, the Applicant had come to her at times when he had nowhere to live, however her husband had refused to have him on the basis that he was obviously in trouble and he did not want the police knocking on the door. She said she supported her husband, and because she was working, she could not be responsible for the Applicant at the time. She wanted to keep the peace with her husband at home. She feels she did not support him enough then.⁸¹ She had no knowledge that the Applicant was using drugs.⁸²
104. According to the Applicant's cousin, "Ms V" at some point after he had been incarcerated, he came to her home and her parents were also there. (Her parents are Aunt N and her husband). The Applicant spoke with them about his regret and his desire to get help. He said he was feeling depressed, and he needed to seek help for things he had not dealt with from his past, namely his childhood trauma.⁸³ This conversation must have occurred after the Applicant's 2016 imprisonment.

⁸⁰ Transcript, page 183; page 184, lines 1 to 29.

⁸¹ Transcript, page 189, lines 32 to 41; page 190, lines 9 to 11.

⁸² Transcript, page 190, lines 14 to 15.

⁸³ Transcript, page 121, lines 31 to 39.

105. Ms V said the Applicant said he intended to see them frequently, avoid getting into trouble, avoid being in “The Valley” (Fortitude Valley in Brisbane) late at night. He wanted to make sure her family could help him and he wanted to frequently be around them.⁸⁴ She recalled that:

“he was quite dishevelled, he was quite upset, he was crying, he was sad and he said that he needed help. He said that he needed our help. He said he needed help specifically with me to help him reconnect with church, with his faith, and to - I think for a stint he was attending Ipswich Church - Central Church here in Ipswich. He was coming to the train station, coming to our morning services, and I was assisting with that until I could connect him to a church which was closer by to where he lived.”⁸⁵

106. Her family advised the Applicant to seek some medical support but she is not sure whether he did that.⁸⁶ Ms V said at that time the support she and her husband provided was minimal because she did not think he needed much support given he had a parole officer and other things in place to assist him.⁸⁷

107. I note that it is well known in Brisbane that there are many pubs and clubs in Fortitude Valley and that illicit drug use, drunkenness and crime are particularly prevalent there. The carpark offending that landed the Applicant in gaol in 2020 was committed in Fortitude Valley.

108. For a period of around 18 months in 2016 and 2017, the Applicant was given stable, long term accommodation with his sister, “Ms L” and her husband, “Mr B”, in Mackay. Mr B set up a phone repair business so the Applicant would have a job, knowing he was very talented at fixing phones.⁸⁸ The Applicant was the only employee and he operated the business from a section of the house where he lived which was separate to the section where his sister and Mr B lived.⁸⁹ Neither the Applicant’s sister nor Mr B were aware that the Applicant was continuing to use drugs when he lived with them even though they would eat dinner together

⁸⁴ Transcript, page 122, lines 6 to 10.

⁸⁵ Transcript, page 125, lines 24 to 30.

⁸⁶ Transcript, page 122, lines 12 to 19.

⁸⁷ Transcript, page 125, lines 40 to 47.

⁸⁸ Transcript, page 156, lines 15 to 19; page 158, lines 38 to 39.

⁸⁹ Transcript, page 158, lines 19 to 25.

and chat.⁹⁰ They were not aware of any of the Applicant's drug use until the most recent period of incarceration.⁹¹

109. There is a gap in the Applicant's criminal offending between his release from gaol in March 2016 and August 2017 which appears to correspond with the period when he was living with his sister and Mr B, and working for Mr B. However, he continued to commit traffic offences during this period including drug-driving in August 2017. He went on to commit several criminal offences following that period.
110. After the Applicant moved from Mackay to Brisbane, according to his mother, he visited her once or twice a week and he lived with her for periods of time.⁹² He told Professor Freeman that he had never offended when he lived with his mother.
111. The Applicant was otherwise living in share houses, backpacker's accommodation and eventually he got a place of his own through the Drug and Alcohol Court.⁹³
112. According to the Applicant he did a series of courses pursuant to the DATO, which gave him insight and knowledge with respect to the effects of his drug use, and he learnt tools to deal with his triggers. He said he remained abstinent and did not offend for "*a substantial amount of time*" but in March 2020 he was taken off the order for lack of compliance.⁹⁴ In fact the Applicant consistently tested positive for drugs throughout the DATO and his longest period of abstinence was around five weeks.
113. The Applicant said that in the past when he had an urge to relapse, he would go to his family's houses and spend the weekend keeping himself occupied around prosocial people.⁹⁵ The Applicant stayed with Aunt N's family on some weekends between September 2018 to Christmas 2019, including much of the Christmas holidays.⁹⁶ He would go to church with her family and spend time with them at home. Aunt N did not think the Applicant was

⁹⁰ Transcript, page 160, lines 24 to 33.

⁹¹ Transcript, page 161, lines 9 to 12.

⁹² Transcript, page 190, lines 20 to 30.

⁹³ Transcript, page 50, lines 19 to 24.

⁹⁴ Exhibit G1, G20, page 96.

⁹⁵ Exhibit G1, G20, page 97.

⁹⁶ Transcript, page 110, lines 5 to 9; page 108, lines 1 to 8.

using drugs while staying with her. She asked him and he assured her he was not.⁹⁷ Apart from that, there have been extended periods of time when she has not seen the Applicant and she was not aware of his incarceration for three months in 2016.⁹⁸

114. The Applicant participated in a “Making Changes Modified” program between 10 June and 19 September 2019, consisting of 27 sessions. The program was a mandatory part of the Drug and Alcohol Court program. The program was designed specifically for participants with a moderate to high risk of general offending and substance use issues. A report dated in November 2019 noted that while the Applicant was generally enthusiastic about participating and got on well with others in the program, he demonstrated a mixed ability to grasp concepts and learnings. He had difficulty in creating a structured week and spoke of his activities as usually being impulsive.⁹⁹ The Applicant missed some sessions of a particular module reportedly for medical reasons, stress over his accommodation and the fact that his ex-partner and daughter were moving to Mackay.¹⁰⁰ The report recommended that the Applicant would continue to benefit from practice in problem-solving and managing impulsivity. It was noted that peer pressure was one of the Applicant’s primary risk factors moving forward although it would also be a strength should he maintain prosocial relationships that encourage change.¹⁰¹
115. Corrective Services file notes record instances where the Applicant has previously expressed resolve to reform. On 6 November 2018 he said he realised he had a problem and wanted to do something about it.¹⁰² In the hearing, he said at that time he was trying to change himself for the better for his family, his daughter, himself and the community.¹⁰³ On 12 March 2019, the Applicant expressed commitment to, and confidence in his ability to, make lifestyle changes to reduce his drug use.¹⁰⁴ On 24 June 2019, he said he was motivated to remain clean. He said it was time to grow up and cease drug use, likening it to

⁹⁷ Transcript, page 108, lines 10 to 25.

⁹⁸ Transcript, page 108, lines 27 to 45.

⁹⁹ Exhibit A2, page 137.

¹⁰⁰ Exhibit A2, page 138.

¹⁰¹ Exhibit A2, page 140.

¹⁰² Exhibit R2, page 601.

¹⁰³ Transcript, page 92, lines 30 to 44.

¹⁰⁴ Exhibit R2, page 495.

a child stopping playing with toys.¹⁰⁵ In relation to those notes, he said he understood the effect that his offending had on everyone, but he never really applied it to his behaviour.¹⁰⁶

116. Indeed, throughout the hearing, the Applicant's explanations for his offending were consistently that he did not think he would get caught and he did not take things seriously. When he had lived in South Africa, the Applicant did not have a license, but he drove.¹⁰⁷ He was asked if the rules were more relaxed in South Africa and whether his attitude that he was going to get away with offences and his failure to take things seriously were connected with how things were in South Africa. He agreed and added that in South Africa you can pay off a police officer (although he had never been in a situation where he had to) or just say that you forgot your license and they would let you go. He said normally he did not get caught driving without a license. He used to drink a lot because he was young, but he did not get a single charge or fine in South Africa. He said if a person is drunk when they leave a club a police officer will ask them if they can walk in a straight line and there were no serious consequences.¹⁰⁸
117. The Applicant was asked how methamphetamine affected him in the context of his offending. He replied that he did not think about the consequences, for example he thought if he got caught it would be all right or he would get away with it. However, the Applicant committed offences, and traffic infringements, before he started using methamphetamine. He was asked if there was a difference that methamphetamine made to his behaviour, and he indicated that he thought the difference was that he could blame his behaviour on the drugs, it gave him an excuse not to hold himself accountable.¹⁰⁹
118. The Applicant attributed his most recent offending to the isolation that came with the start of the pandemic. He could not visit his family, had more free time, and could not spend it productively as his movement was limited. That eventually led him back into drugs and

¹⁰⁵ Exhibit R2, page 461.

¹⁰⁶ Transcript, page 93, lines 19 to 24.

¹⁰⁷ Transcript, page 60, lines 10 to 11.

¹⁰⁸ Transcript, page 60, lines 13 to 34.

¹⁰⁹ Transcript, page 43, lines 8 to 34.

further offending.¹¹⁰ This cannot be entirely accurate: the Applicant was using drugs all through 2019, before the pandemic. He also explained it thus:

*“During this time friend called me and asked for help. It was at this moment that I made the poor decision to not ask questions and agreed to help my friend. This event is what led to my current situation. I was charged with ‘Break and Enter’ and received a sentence of 18 months... I would like to say that I take full responsibility for my offending and I wish it never happened.”*¹¹¹

119. In the hearing, the Applicant said he met some friends and normally he would not do something like that. He was affected by drugs and his friends encouraged him so they could get some easy money.¹¹² However, the Applicant was a 32 year old man at the time, not an impressionable teenager. This is only one example of the Applicant claiming to take responsibility for an offence while also blaming other people or making excuses.
120. Other explanations the Applicant put forward, in his revocation request, included that his offending was “*all petty offences*” and “*all opportunistic crimes*”, and that “*I don’t plan on committing offences they just happen randomly*” and “*I have been affected by drugs during every offence*”.¹¹³ None of this is accurate: his offences were not all petty, many were planned, and he was not always affected by drugs when he committed offences.
121. The Applicant also sought to minimise his offending, including when he gave evidence in the hearing. For example, he said he threw a rock at a signpost at the brothel, and only conceded that he used a tyre iron when that was put to him. In relation to stealing from his former employer he said, “*I didn’t fully understand, you know, like what was actually happening.*” When challenged about whether he knew it was wrong to steal from his employer, he was very slow to admit that he did know it was a crime. It is apparent that the Applicant does not take full responsibility for his offending. My concern is that he will make excuses for himself in relation to future behaviour rather than holding himself entirely responsible for abiding by the law.

¹¹⁰ Exhibit G1, G20, pages 95 and 96.

¹¹¹ Exhibit G1, G19, page 92.

¹¹² Transcript, page 56, lines 9 to 20.

¹¹³ Exhibit G1, G16, page 83.

122. After his visa was cancelled the Applicant acknowledged that he had been given multiple chances to turn his life around which he did not appreciate. He claimed that spending time in prison and detention gave him time to reflect on his criminal behaviour, how serious it is and how it could potentially mess up his future in Australia.¹¹⁴ He said his biggest reason for wanting his visa reinstated was his mother. He had been trying to clean up his act over the past year and that is why he decided to do a drug and alcohol program.¹¹⁵ He said he is very motivated to change, having never been away from his family for this long. He knows that if he breaks the law in future, he could be taken away from them again, and he does not want to, and he cannot go through this experience again.¹¹⁶ He expressed remorse on the basis that his offending was unacceptable to the community and to his family.¹¹⁷
123. I accept that the Applicant has not used drugs while in gaol or immigration detention. While in gaol, he achieved a low security classification and was transferred to a low security prison farm.¹¹⁸
124. According to the Applicant, his family have noticed a huge difference in him since his incarceration and they believe he has permanently changed for the better. He said he has already changed his circle of friends and he plans to spend his time with family and attend church on a regular basis. He knows that he will not reoffend.¹¹⁹ It is not apparent to me how the Applicant could change his circle of friends in the wider community while in custody unless he meant he had ceased contact with anti-social friends.
125. While in custody the Applicant completed a "INDIVIDUAL RE-ENTRY PLAN".¹²⁰ Additionally, he has recently engaged in a non-residential treatment recovery program at Odyssey House Community Programs. Through that organisation, he participated in a Smart Recovery Online Group which started on 6 December 2021 and continued throughout January 2022.¹²¹ On 18 January 2022 he completed a drug and alcohol abuse

¹¹⁴ Exhibit G1, G20, page 96.

¹¹⁵ Exhibit G1, G15, pages 70 and 71.

¹¹⁶ Transcript, page 5, lines 1 to 11.

¹¹⁷ Transcript, page 4, lines 35 to 45.

¹¹⁸ Exhibit G1, G18, page 90.

¹¹⁹ Exhibit G1, G19, page 93.

¹²⁰ Exhibit A2, pages 128 to 134.

¹²¹ Exhibit A3.

101 course with seven contact hours.¹²² The Applicant's recent engagement in rehabilitation programs, while encouraging, is quite limited. He has not looked into attending Narcotics Anonymous meetings online because he thought the Smart Recovery program would help him, but he said if it was recommended, he would look at doing it as the more protective factors he had the better.¹²³

126. According to the Applicant, if he gets his visa back, he will avoid drugs and focus his attention on his family, religion and the Australian public, and being a positive influence towards the community and his peers.¹²⁴ He said that being off drugs has allowed him to think clearly and make rational and good decisions. His plans are to:

- live with his mother;
- get medical assistance to avoid returning to drugs;
- get emotional and practical assistance from his extended family, especially Aunt C, to assist his continued rehabilitation in the community;
- obtain employment;
- avoid old negative influences;
- return to church;
- spend time with his daughter and other family members; and
- eventually, settle down after finding a partner.

127. The Applicant's mother has offered the Applicant accommodation in her home which she considers to be a stable environment in which he can thrive and become responsible.¹²⁵ She described the Applicant as a wonderful young man who lost his way to some bad decisions he made, and said he is remorseful.¹²⁶ The Applicant said his mother has assured him that when he gets out of detention he will be accountable to her for everything he does.¹²⁷ She has told him "*You go out, you'll tell me. You do this, you'll tell me*".¹²⁸ He said

¹²² Exhibit A3.

¹²³ Transcript, page 92, lines 25 to 29.

¹²⁴ Exhibit G1, G16, page 83.

¹²⁵ Exhibit G1, G23, page 103.

¹²⁶ Exhibit G1, G27, page 107.

¹²⁷ Transcript, page 6, lines 23 to 25.

¹²⁸ Transcript, page 77, lines 40 to 43.

before he was too embarrassed and uncomfortable to discuss his problems with his family whereas now, he will.¹²⁹

128. I have concerns about how much of a protective influence the Applicant's mother could be. My impression is that she has been quite detached from the lives of both her sons. She appears to have had very little knowledge about the lifestyles they were leading until they were incarcerated. She first became aware of the Applicant's criminal record when he was imprisoned recently.¹³⁰ She was aware that he went to prison six or seven years ago.¹³¹ The police would come around looking for him and when she asked him about it, he refused to talk about it.¹³² Further, she only found out that the Applicant had been imprisoned in 2020 because his lawyer contacted her daughter who told her. She had been frantically calling his phone looking for him.¹³³

129. Further, she currently seems to be in partial denial about the extent of each of her sons' wrongdoing. Eliciting from her what her other son had done to be incarcerated was like pulling teeth. She initially said she thought he was imprisoned because he did not attend court for some driving offences.¹³⁴ Upon further probing she said she thought the offending had to do with his work as a locksmith. Later, she said she thought it had to do with driving offences or doing jobs and not following through. Finally, when asked whether he was taking payment and then not doing the job she agreed.¹³⁵ She has recently spoken with the Applicant about the details of his offending and his drug use. She described the offences as "*petty theft and things like that*", which she said was the opinion she had formed about them. She admitted that she was aware that some of the offences involve the Applicant trying to swindle money from people.¹³⁶

130. Another concern I have is whether Ms Y's home will be a welcome environment, given his stepfather lives there and appears to be in charge. This is relevant because historically the

¹²⁹ Transcript, page 6, lines 29 to 39.

¹³⁰ Transcript, page 188, lines 33 to 44.

¹³¹ Transcript, page 188, lines 45 to 47.

¹³² Transcript, page 189, lines 5 to 10.

¹³³ Transcript, page 190, lines 38 to 48.

¹³⁴ Transcript, page 187, lines 21 to 38.

¹³⁵ Transcript, page 187, line 41 to page 188, line 29.

¹³⁶ Transcript, page 191, lines 1 to 20.

Applicant is better able to refrain from offending when he staying with family. The Applicant claimed that his stepfather is now very supportive and has offered to do everything he can to make sure the Applicant stays out of trouble.¹³⁷ He said his stepfather will help him if he needs to go to parole appointments or job interviews and that he is very confident in him now.¹³⁸ According to the Applicant's aunts and cousin, in recent years, the Applicant's stepfather has stopped drinking and is now a much better person. Ms Y said he has seen how emotionally distraught she is about the Applicant's predicament and has agreed to the Applicant living with them as he has realised how much it means to her.¹³⁹ The distinct flavour of her evidence was that her husband is only agreeable to the arrangement for her sake.

131. For the entire time that the Applicant's stepfather has known the Applicant, he has neglected and rejected him, including after he reformed. To go from that to being welcoming, accepting and supportive would require a drastic change, and Ms Y did not even claim that he is now any of those things. Had the Applicant's stepfather provided a letter of support, that may have gone some way to demonstrating such a change, however he did not.

132. Ms V is a church pastor. She loves the Applicant and wants to help him. She described the Applicant as a gentle soul who has a lot of goodness in him. Her mother, Aunt N, also wishes to help him. She first became aware of his drug addiction when he visited her around Christmas 2018 and his parole officer contacted him to ask if he had submitted to a drug test that morning. She asked him what that was all about and he told her that he had previously taken drugs but was not anymore. She helped him go to a testing location to take the test.¹⁴⁰ Aunt N only became aware of the Applicant's criminal history around two days before the hearing, although she had heard in around September 2021 that there was some sort of criminality.¹⁴¹ Her family is rooted strongly in the Christian way of life with strong morals and ethics. They are devastated with what they have come to know about the Applicant and would like to support him now.¹⁴²

¹³⁷ Transcript, page 86, lines 22 to 34.

¹³⁸ Transcript, page 87, lines 20 to 24.

¹³⁹ Exhibit A5.

¹⁴⁰ Transcript, page 107, lines 22 to 31.

¹⁴¹ Transcript, page 107, lines 35 to 40.

¹⁴² Transcript, page 102, lines 33 to 41.

133. Apart from providing a welcoming home, moral support, and taking the Applicant to church, it is not apparent to what extent she could help the Applicant. Aunt N's husband is ill with Stage IV kidney disease. She works and she supports him. Her children help out by taking care of her husband when she is working on weekends.¹⁴³ These matters limit Aunt N's capacity to supervise and assist the Applicant.
134. Aunt C promised that if the Applicant gets his visa back, she will help him in every way possible to make sure he does not repeat his actions.¹⁴⁴ She said being in detention has made the Applicant into a strong, resilient and humble person again. She and her husband lived only five minutes away from the Applicant's mother. They can provide the Applicant with emotional, practical, and spiritual support to ensure he lives a fruitful and full life in Australia. He would always be welcome in their home and she would make sure he attends church with her and is surrounded by positivity and good people. Having been a pastor in South Africa, she has experience in rehabilitating addicts and guiding them back into society. I accept that Aunt C and her husband would provide significant support to the Applicant if he would accept it.
135. The Applicant's sister provided a letter but did not give evidence in the hearing as she has recently given birth. According to her, the Applicant temporarily lost sight of his true values and made some poor and rash decisions. She said his offending is not a true reflection of who he is, and that once he is released, he will be looked after by their family, emotionally, physically and financially. They would help find him accommodation and employment, ensure he stays on track and help him get into rehabilitation programs.¹⁴⁵
136. The trouble with Ms L's evidence is twofold. First, to describe an eight year period of consistent offending and drug abuse as a temporary lapse in values shows an unwillingness to confront the truth and extent of the Applicant's anti-social behaviour. Second, Ms L and her husband are committing to do for him things they previously did for him with limited success.

¹⁴³ Transcript, page 110, line 45 to page 111, line 24.

¹⁴⁴ Exhibit G1, G28, page 108.

¹⁴⁵ Exhibit G1, G25, page 105.

137. Professor James Freeman, forensic psychologist, conducted a 1.5 hour assessment of the Applicant on 21 December 2021. Unfortunately, Professor Freeman did not have any information about the Applicant's history of traffic infringements or the police records containing details of the criminal offending when he conducted the assessment and provided his report. For that reason, I give less weight to his report and more weight to his oral evidence.
138. Professor Freeman opined that the Applicant appears to have generally experienced good mental health and does not have any personality disorders. He diagnosed the Applicant with a Methamphetamine Dependency Disorder that is in partial remission in a controlled environment. For the disorder to be in sustained remission, the Applicant would need to be removed from a custodial environment and be able to maintain abstinence.¹⁴⁶
139. Professor Freeman said that the Applicant would need to be vigilant for an extended period of time as methamphetamine dependency is usually chronic and requires lasting aftercare e.g., treatment, support and monitoring. He suggested the Applicant may benefit from engaging in complementary drug rehabilitation services e.g., ATODS, Narcotics Anonymous, etc.
140. Professor Freeman considered that the seriousness of the Applicant's predicament is profoundly unsettling to him. This is significant, according to Professor Freeman, because research has demonstrated that the application of legal sanctions can create a specific deterrent effect among certain individuals, reducing the risk of recidivism. However, he agreed that apart from deportation, ordinarily the most significant personal deterrent would be imprisonment¹⁴⁷ and that was not a sufficient deterrent in the past as the Applicant was unable to achieve lasting abstinence.¹⁴⁸ He opined that if the Applicant were to return to methamphetamine use, then his past behaviour would be a predictor of future behaviour, and it would be fair to say that he could easily be considered to be in the high risk category for recidivism.¹⁴⁹

¹⁴⁶ Transcript, page 135, lines 8 to 14.

¹⁴⁷ Transcript, page 138, lines 28 to 31.

¹⁴⁸ Transcript, page 1 through nine, lines 4 to 15.

¹⁴⁹ Transcript, page 139, lines 16 to 25.

141. In relation to the Applicant's knowledge of his brother's visa cancellation, Professor Freeman pointed out that, at the time the Applicant was in the grip of the methamphetamine dependency and his capacity to think logically and rationally would have been tremendously diluted. However, he said it was a concern that what was happening to a direct sibling was not a clear red light for him.¹⁵⁰ He added that humans are more worried about direct exposure to punishments, meaning threats to themselves, than indirect exposure to punishments, meaning things that happened to family members, friends, peers and acquaintances.¹⁵¹ He agreed that neither direction nor indirect consequences in the past have changed the Applicant's behaviour.¹⁵²
142. Professor Freeman was not able to quantify the risk of re-offending, but he did say that the outstanding question is whether the threat of deportation combined with the maturation process is enough to create lasting behavioural change. The maturation process is dependent on individual differences and cannot be measured or standardised.¹⁵³
143. Professor Freeman noted that the Applicant did not articulate a high degree of victim empathy during the assessment, and that was a reflection on who the Applicant was and who he is now.¹⁵⁴
144. With respect to the Applicant's relationship with his (claimed) daughter, Professor Freeman said that he understands the Applicant has never had full-time custody of her and he only saw her sporadically when he was not using methamphetamine. He tried to engage the Applicant more about his daughter but the Applicant had other things more pressing on his mind that he wanted to talk about, so he concluded that that relationship was not a significant anchor either way.¹⁵⁵
145. Professor Freeman acknowledged that the Applicant did not take things seriously in the past. He said it is difficult to disentangle the effects of substance abuse versus the

¹⁵⁰ Transcript, page 140, lines 15 to 25.

¹⁵¹ Transcript, page 140, lines 38 to 44.

¹⁵² Transcript, page 141, lines 9 to 13.

¹⁵³ Transcript, page 144, lines 16 to 36.

¹⁵⁴ Transcript, page 146, lines 4 to 36.

¹⁵⁵ Transcript, page 148, lines 42 to 47.

Applicant's underlying views of the world, but the Applicant is clearly vulnerable to engaging in non-consequential thinking.¹⁵⁶

146. Professor Freeman commented that the Applicant had a somewhat unsettled childhood. However, he did not opine that the Applicant had suffered trauma in his childhood, draw a direct or clear link between the Applicant's upbringing and his offending, or recommend any sort of therapy directed towards his childhood.
147. The Applicant committed numerous traffic offences and some serious criminal offences before he started using drugs. Accordingly, abstaining from drugs is not a complete solution. He has not done any rehabilitative courses aimed at addressing anti-social attitudes or developing victim empathy. The Applicant was in his early 30s when he committed the most recent offences. There is no evidence either way about whether, in terms of neurological development, he has potential to become more mature such that he engages in more consequential thinking and adopts a more responsible attitude.
148. None of the extensive interventions of the criminal justice system caused the Applicant to refrain from further offending. Nor did the cancellation of his brother's visa. It is not a given that the current threat of deportation, or any future threat of deportation, would be enough to keep the Applicant away from drugs and crime. The very real threat of imprisonment was not enough: when he was given a suspended sentence and told how lucky he was that he was not going to jail, it did not "*hit home*" in and he continued offending.
149. The Applicant has previously expressed resolve to change his ways for the better and he has not done so. It remains to be seen whether his current expressions of remorse and determination to reform, if genuine, will endure. The Applicant is only in partial remission and his ability to refrain from drug use in the wider community, which is much less structured and monitored, is untested.
150. The Applicant now has the promise of stable accommodation with his mother although I question how welcome he will feel there and therefore how long that arrangement will last.

¹⁵⁶ Transcript, page 151, lines 10 to 15.

I am also concerned about what capacity his mother has to monitor his behaviour when he is away from home. He also has the support of Ms C and her husband who live close by. He intends to attend church. However, he had family supports available to him before, and he attended church,¹⁵⁷ but those things did not stop him taking drugs or returning to crime. Indeed, the family members who were supporting him did not know he was using drugs and committing offences. Although they now know about his offending in general terms, and the Applicant claimed that he feels more comfortable asking for help now, he is adept at hiding his criminal activities and drug use from his family. The extent to which his family can support him in his rehabilitation depends on his commitment to making necessary changes, being honest with his family and engaging in relevant counselling.

151. The fact that the Applicant's family are aware of his challenges, he has had an extended period of abstinence and he has sensible plans for the future should lower the risk of recidivism. Therefore, I do not find that his risk of re-offending is as high as it was before he was incarcerated. That is, it is not almost certain that he will re-offend. Rather, I find that there is a moderate risk that he will re-offend, and in accordance with Professor Freeman's evidence, the risk becomes a high risk if he resumes methamphetamine use.

Conclusion: Primary Consideration 1

152. Primary Consideration 1 weighs heavily against revocation of the cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

153. Paragraph 8.2 of the Direction 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 in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen.

154. The Direction relevantly defines family violence as:

¹⁵⁷ Exhibit R2, page 478.

“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”.

155. The Direction does not define “*member of a person’s family*”, nor does it refer the reader to a definition in the Act or any other legislation. Generally, a de facto partner is understood to be a family member. This is reflected in the definition of family member in section 5G(2) of the Act which includes a de facto partner. The definition of de facto relationship in the Act also reflects what is generally considered to be a de facto relationship. That is, section 5CB(2) of the Act provides that a person is in a de facto relationship with another person if they are not married but they have a mutual commitment to a shared life to the exclusion of all others, the relationship between them is genuine and continuing, and they live together or do not live separately and apart on a permanent basis (and they are not related by family).
156. The definition of family member in the Act is geared towards establishing familial relationships for the purpose of visa applications. It is not necessarily apt in the context of establishing whether family violence has been perpetrated. For example, it does not include a former partner whereas it is well known that domestic violence does not necessarily stop when a relationship ends and, in fact, the most dangerous period for a victim can be the period after a relationship ends. Hence, I do not treat the definition in the Act as definitive and I have regard to the ordinary meaning of that term.
157. The Federal Court recently considered the meaning of family member for the purposes of the Direction in *Deng v Minister Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1456. Halley J held that given the absence of any explicit definition in the Direction, the seriousness with which “*family violence*” is treated in Direction 90 and the inclusive definition of “*members of a person’s family*” in s 5G(2) of the Act, the expression “*member of the person’s family*” should not be narrowly construed and should not be limited to close relatives and de facto partners of the non-citizen. Rather, it is apt to capture persons that might be living together in a household, providing companionship and emotional support to each other, sharing expenses or otherwise being financially dependent upon each other and in a relationship of mutual affection and obligation. It could, include persons who are in a relationship who are living together but do not satisfy all of the criteria of a de facto relationship for the purposes of s 5CB of the Act and reg 1.09 of the *Migration*

Regulations 1994 (Cth). His Honour added that such persons would be particularly vulnerable to coercion or control by the non-citizen or fearful of behaviour of the non-citizen. Ultimately, it is a matter of fact to be determined by the decision maker, informed by the indicia of family violence in cl 4(1) of Direction 90 and the definitions of “*family members*” and “*de facto partners*” in ss 5G and 5CB, respectively, of the Act.¹⁵⁸

158. The Applicant said he has only had one serious relationship and that was with a previous partner “Ms A”. He described his relationship with Ms R as more of a friendship. I asked his mother if she knew about Ms R, whether she might have been a friend or an associate of the Applicant, and she said Ms R was a friend. That seems to support that the Applicant viewed Ms R as a friend even where there was some intimacy involved. According to the police records, the Applicant and Ms R had only been in an intimate relationship for four months and they had been living together during that time. However, it is evident in the report that the Applicant did not have his own key to the property: he broke in to gain entry when Ms R was out. Nor is there any evidence of financial dependency or mutual obligation between the Applicant and Ms R. That looks more like he was staying with Ms R on her terms rather than living with her. Even avoiding a narrow construction, the evidence falls short of what is required to conclude that Ms R was a family member of the Applicant for the purposes of the Direction.
159. Accordingly, the text messages the Applicant sent to Ms R are not family violence for the purpose of the Direction. Primary Consideration 2 is neutral.

Primary Consideration 3: The best interests of minor children in Australia

160. Paragraph 8(3) of the Direction compels a decision-maker to consider the best interests of a minor child in Australia. Under paragraph 8.3(1), I must determine whether non-revocation under section 501CA is or is not in the best interests of a child affected by the decision. Where there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ

¹⁵⁸ *Deng v Minister Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1456, [156] and [157].

161. The Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia. Those include, relevantly:

- the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);
- the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;
- the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;
- the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;
- whether there are other persons who already fulfil a parental role in relation to the child; and
- any known views of the child (with those views being given due weight in accordance with the age and maturity of the child).

162. The Applicant claims to have biological daughter, "Child H", born in 2013, whose best interests would be affected by the decision. Child H is the child of Ms A with whom the Applicant had an on and off relationship for a period. There is no evidence before me from Ms A or Child H. The Applicant has been inconsistent about whether he believes Child H is actually his daughter. For example, a Drug and Alcohol admission document dated in 2018 states under "family/relationships" that the Applicant is not currently in a relationship and does not have any children.¹⁵⁹ When that record was put to him in the hearing, he said he did not recall it.¹⁶⁰ He told Corrective Services in 2019 that his ex-partner and daughter were moving to Mackay. In his revocation request he listed Child H as his child,¹⁶¹ he said he has

¹⁵⁹ Exhibit R2, page 340.

¹⁶⁰ Transcript, page 74, lines 1 to 4.

¹⁶¹ Exhibit G1, G16, page 78.

a beautiful seven year old daughter with his ex-partner, and he referred to having a partner (seemingly referring to Ms A) and daughter to look after.¹⁶² In the hearing, the Applicant said he was never sure if Child H was his daughter and on the few occasions when he brought up the topic with Ms A she “*shrugged it off*”.

163. Until immediately before the hearing, the Applicant had not told any members of his family that he had a daughter. He said he did not discuss it with his mother because there was always doubt in his mind.¹⁶³ The Applicant said Child H does not think he is her father and she knows him as Ms A’s friend.¹⁶⁴ Later in his evidence, he seemed to indicate that he did believe that Child H was his daughter and that she recognised him as her father, while at the same time acknowledging that she calls him his name rather than dad. The Applicant acknowledged that he was not ready for the responsibility of being Child H’s father and Ms A was “*cool with it*”.¹⁶⁵
164. The Applicant has never lived in the same home as Child H.¹⁶⁶ He only saw her on days when he was not using drugs, as Ms A could tell if he was.¹⁶⁷ The Applicant’s mother met Child H once when the Applicant was living with her and Ms A and Child H visited. Nobody said anything about the Applicant being Child A’s father.¹⁶⁸ Ms V was told that Child H was the Applicant’s biological child a couple of weeks ago by the Applicant’s sister-in-law who she thinks heard it from the Applicant.¹⁶⁹ She thought the Applicant’s sister-in-law had known or suspected it previously.¹⁷⁰ The Applicant claimed that Ms V used to joke that Child H had the Applicant’s hair and that she looks like him.¹⁷¹ However that is not consistent with the totality of Ms V’s evidence. Ms V has seen Child H once but not met her.¹⁷² She said she recalled times when the Applicant was visiting a girlfriend and her child, and he described that child as his girlfriend’s child.¹⁷³

¹⁶² Exhibit G1, G15, pages 70 and 71.

¹⁶³ Transcript, page 66, lines 1 to 4.

¹⁶⁴ Transcript, page 66, lines 14 and 15.

¹⁶⁵ Transcript, page 75, lines 43 to 45.

¹⁶⁶ Transcript, page 65, lines 24 to 29.

¹⁶⁷ Transcript, page 65, lines 33 to 39.

¹⁶⁸ Transcript, page 191, lines 34 to 45.

¹⁶⁹ Transcript, page 123, lines 10 to 21; page 124, lines 5 to 7.

¹⁷⁰ Transcript, page 124, lines 11 to 13.

¹⁷¹ Transcript, page 76, lines 43 to 45.

¹⁷² Transcript, page 123, lines 23 to 25.

¹⁷³ Transcript, page 123, lines 36 to 42.

165. The Applicant is not on Child H's birth certificate.¹⁷⁴ Ms A has never asked the Applicant to pay child support and he never has, although he claims to have helped pay for things. He indicated that Ms A is generally financially self-sufficient.¹⁷⁵ While the Applicant indicated that Ms A is happy for him to spend time with Child H, there is not a regular arrangement or written agreement.¹⁷⁶ There is no evidence that the Applicant is consulted in relation to major decisions that affect Child H for example which school she attends. The Applicant has never had Child H in his sole care overnight.
166. The Applicant claimed that he provided emotional, financial, and practical support to Child H, and that he has taken her to the beach and purchased toys for her. He said he wants to spend more time with her and support her subsistence and advancement in life. He said that prior to being incarcerated he had been in close contact with both Ms A and Child H, that usually every weekend he went to Ms A's home or they came to his apartment.¹⁷⁷ He said they all have a very close relationship, that he is a huge support for them both, and that deportation would have a huge impact on them both. He said they would be devastated by an adverse decision.¹⁷⁸ He also claimed that he speaks with Child H before and after school every day.¹⁷⁹
167. I find these claims to be grossly exaggerated. Ms A moved her and Child H to Mackay around November 2019. Prior to that the Applicant spent many weekends with his relatives. He admitted that he did not see Child H when he was using drugs, and the evidence is that he was using drugs until he was incarcerated, which limits the days when he could have seen Child H. Ms A did not provide a statement in support of the Applicant's visa being returned to him. If the Applicant was really such an integral part of Child H's life I would expect Ms A to have made some effort to assist the Applicant to remain in Australia for Child H's sake. The Applicant did not give a satisfactory explanation for Ms A's failure to do so,

¹⁷⁴ Transcript, page 73, lines 22 to 28.

¹⁷⁵ Transcript, page 66, lines 40 to 45.

¹⁷⁶ Transcript, page 67, lines 11 to 34.

¹⁷⁷ Exhibit G1, G16, page 79.

¹⁷⁸ Exhibit G1, G16, page 79.

¹⁷⁹ Exhibit G1, G16, page 81.

saying her attitude is that he got himself into this situation and he can get himself out, and that perhaps she does not appreciate the seriousness of the situation.¹⁸⁰

168. It seems unlikely that the Applicant would be able to maintain regular contact with Child H, and it is uncertain whether Ms A would want him to, if he were removed to South Africa.
169. Ms A currently has a partner.¹⁸¹ The Applicant expects that Ms A will continue to allow him to be involved in Child H's life to the extent that he has been in the past.¹⁸² If he is given his visa back, he will find out if he is Child H's father through the courts.¹⁸³ He said whether or not he is Child H's father does not affect the way he feels about her.¹⁸⁴
170. There is no reliable evidence that the Applicant is Child H's biological father. He has not wanted the full responsibility of being her father to date and he has never fulfilled a parental role in any form. Ms A has always fulfilled a parental role and there is no evidence that the Applicant would ever be called upon or permitted to do that. There is no evidence about what other relatives and supports Child H has in her life. Child H's views are not known. There is no evidence that Child H has suffered any significant negative impact while the Applicant has been in custody, and there is no evidence except the Applicant's word that she would suffer any such impact in the event that he is deported and effectively removed from her life.
171. I accept that if the Applicant were to remain in Australia, there is potential for him to visit Child A, take her to nice places and engage with her in a positive way as he has done in the past although this is somewhat dependent on Child H living near the Applicant and the Applicant behaving in a way that meets with Ms A's approval.
172. Revocation of the cancellation of the Applicant's visa is in Child H's best interests to a limited extent.

¹⁸⁰ Transcript, page 71, line 37 to page 72, line 5; page 72, lines 40 to page 73, line 19.

¹⁸¹ Transcript, page 67, lines 5 to 6.

¹⁸² Transcript, page 68, line 34 to page 69, line 9.

¹⁸³ Transcript, page 66, lines 34 to 39.

¹⁸⁴ Transcript, page 65, lines 43 to 48.

173. The Applicant also claims that best interests of Ms V's three children and Ms L's newborn baby would be impacted by the decision.¹⁸⁵
174. Ms V's children are aged nine, four and one. Ms V gave evidence that the Applicant was very close to the two older children and had not yet met the youngest. The Applicant claimed to have taken the older two on walks to the park, played with them and their toys, had nice conversations with them, and mutually enjoyed laughter and good times together. He said before he was incarcerated, he saw them several times per month. He wishes to continue to play an uncle role in their lives and in the life of the youngest. He would also like to play an uncle role for his sister's newborn baby, and his sister and Mr B would also like that.
175. Any involvement the Applicant would have in the lives of these children would be as an uncle, not a parent. They each have two parents looking after them. They are also part of a close extended family that includes Ms V's family, her brother's family, Ms V's parents, Ms L's family, the Applicant's brother and his wife, Ms C and her husband, and their two children and their respective families. Ms V and her children see her parents frequently and they see her brother around once a fortnight.¹⁸⁶ Their children video call each other weekly.¹⁸⁷ Her family does FaceTime with Ms L almost every second day and she sees the Applicant's brother when he is at one of their cousin's homes when they have family dinners.¹⁸⁸
176. While it appears that Ms V's two older children miss the Applicant, there is no evidence that they have suffered any significant harm due to his absence over the last two years. The other two children do not know him. All the children are young and there are many years in which the Applicant could make a positive contribution if he remains in Australia.
177. Given the love that Ms V expressed for the Applicant, I think it is likely that she will try to maintain some degree of contact with the Applicant if he is deported. The same goes for Ms L and Mr B. Accordingly, there is potential for the Applicant to have some contact with these children.

¹⁸⁵ Exhibit A1, paragraph 90.

¹⁸⁶ Transcript, page 128, line 44 to page 129, line 9.

¹⁸⁷ Transcript, page 129, lines 11 and 12.

¹⁸⁸ Transcript, page 129, lines 14 to 19.

178. The best interests of these four children cumulatively weighs in favour of revocation of the cancellation of the Applicant's visa but only to a minimal extent.

Conclusion: Primary Consideration 3

179. Taking into account the best interests of all the children mentioned above, this Primary Consideration weighs to a limited extent in favour of the revocation of the cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 4 – THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

180. In making the assessment for weight to be allocated to Primary Consideration 4, paragraph 8.4(1) of the Direction provides that the Australian community expects non-citizens to obey Australian laws while in Australia. It further stipulates that where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that he may do so, the Australian community, as a norm, expects the government not to allow the non-citizen to enter or remain in Australia.
181. Paragraph 8.4(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. Paragraph 8.4(3) of the Direction provides that 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.
182. Paragraph 8.4(4) of the Direction provides guidance on how the expectations of the Australian community are to be determined. This paragraph states:

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.

183. Paragraph 8.4(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185.

Analysis – Allocation of Weight to this Primary Consideration 4

184. Accordingly, in assessing the weight attributable to Primary Consideration 4, it is necessary to have regard to the following matters:

- the Applicant grew up with an abusive stepfather and he suffered some financial deprivation in South Africa, although sometimes he received support and care from extended family members who lived close by;
- the Applicant moved to Australia when he was 21 years old. He is now 34 years old;
- he committed a drink-driving infringement only six months after arriving in Australia and he continued to commit traffic infringements until he was incarcerated. He committed his first criminal offence a little over two years after moving to Australia;
- the Applicant has committed over 60 traffic infringements including infringements of the kind that increase the risk of harm to other road users. He has committed over 60 criminal offences including offences that caused women to fear for their safety and offences that involved the abuse of a position of trust;
- the criminal justice system gave the Applicant many opportunities to reform, for example by imposing probation and the DOTA's rather than incarceration. The Applicant wasted these opportunities by continuing to offend;
- the Applicant openly admitted that he did not take the law seriously. His disregard for the laws regulating the community that he seeks to re-enter is also evident in his frequent offending, multiple breaches of court orders and bail conditions, and consistent drug use throughout the period he was subject to DOTA's;
- his offences include serious offences;
- there is a moderate risk that he will re-offend;
- the Applicant has held some employment although he abused his position of trust with one employer by offending against them;
- there is no evidence that the Applicant has done any voluntary work in the community;
- if the Applicant is removed to South Africa, it will adversely affect members of his immediate and extended family, particularly his mother.

Conclusion: Primary Consideration 4

185. The Applicant has continually abused the trust of the Australian community, in ways that caused harm to members of that community, despite the considerable efforts of the criminal justice system to help him to reform and his family's willingness to accommodate and support him. Considering all relevant factors, this Primary Consideration weighs heavily in favour of non-revocation of the cancellation of the Applicant's visa.

OTHER CONSIDERATIONS

186. It is necessary to look at the Other Considerations listed at paragraph 9 of the Direction. I will now consider each of the four stipulated sub-paragraphs (a), (b), (c) and (d).

187. The Applicant does not make any claims with respect to Australia's non-refoulement obligations, and none arise on the evidence, so Other Consideration (a) is not relevant. There is no evidence before the Tribunal relating to the impact that the Applicant's continued presence in Australia would have on any of his victims. Other Consideration (c) is therefore not relevant.

188. I will address Other Consideration and (d) before dealing with Other Consideration (b).

(d) Links to the Australian Community

189. In consideration of this Other Consideration (d), paragraph 9.4 of the Direction requires that decision makers must have regard to the following two factors set out in paragraph 9.4.1 and paragraph 9.4.2 respectively:

- the strength, nature, and duration of ties to Australia; and
- the impact on Australian business interests.

The strength, nature, and duration of ties to Australia

190. The Applicant came to Australia as an adult at the age of 21 and he has lived in Australia for 13 years. He started committing traffic offences, including drink-driving, six months after moving here. He started committing criminal offences two years after arrival.

191. The Applicant has been gainfully employed during some of his time in Australia, although he stole from one employer which detracts from his contribution to the community through employment. He has not contributed to the Australian community through voluntary work.
192. In the Applicant's revocation request he claimed to have been employed by various employers from 2008 to 2019, although in the hearing he conceded that his drug use had impacted his ability to maintain employment and there were some periods of unemployment.¹⁸⁹ While it was contended on behalf of the Applicant that he has ties to the Australian community through his education and employment, no evidence was put forward of any such ties. He told Professor Freeman that he has one close friend and a number of drug associates.¹⁹⁰ Nor was there any evidence that he had contributed to the Australian community through his education. It can be assumed that he contributed through his employment and the payment of income tax, however he also abused the position of trust that he held with one employer.
193. The Applicant's immediate family in Australia are his mother, stepfather, older brother, and younger sister.¹⁹¹ He has two sets of aunts, uncles and cousins in Australia plus another aunt who lives in Mackay and was too busy to participate in these proceedings.¹⁹² Aunt C and her husband do not have the right to reside in Australia permanently. I am not aware of the immigration status of the aunt in Mackay.
194. I accept that the Applicant has a loving, positive relationship with his mother and sister, and that Mr B has a good relationship with him. I accept that his aunts, uncles and cousins have strong emotional bonds with him. I do not accept that he has emotional ties to his stepfather. I am not satisfied that the Applicant and his brother are close. In October 2019 he told Corrective Services that they are were not close anymore and he had not seen his brother in almost three years.¹⁹³ He had very scant knowledge about his brother's visa cancellation despite the gravity of that situation. His brother did not provide any evidence in these proceedings despite the gravity of the situation for the Applicant. The Applicant said his

¹⁸⁹ Transcript, page 85 lines 20 to 35.

¹⁹⁰ Exhibit A10, around para 7.

¹⁹¹ Exhibit G1, G16, page 76.

¹⁹² Transcript, page 104, lines 20 to 25.

¹⁹³ Exhibit R2, pages 433 and 434; transcript, page 81, lines 40 to 45.

brother was not asked without explaining why his brother was not asked.¹⁹⁴ I note that Aunt N, Ms V and Ms L all indicate that the Applicant and his brother are close but that is not supported by the evidence or the Applicant's own words, and none of these witnesses knew what was really going on in the Applicant's life until recently.

195. The Applicant's mother is an insulin-dependent diabetic.¹⁹⁵ She has high blood pressure and recently she had a blockage on her left leg which she needs to attend to. In the hearing the Applicant agreed that his previous claim that his mother was very ill was an exaggeration.¹⁹⁶ Ms Y has reduced her working hours by one half hours per day because she is not coping with the Applicant's predicament. It has been mentally draining for her.¹⁹⁷ She said she would be devastated if the Applicant is deported and that she would not have the money to visit him in South Africa. I accept that she will suffer significant emotional hardship if the Applicant is removed to South Africa and this, in turn, might continue to limit the hours she feels able to work.
196. The Applicant's sister described the family as very close and she said they all need and want the Applicant in their lives.¹⁹⁸ For reasons I have given, I do not accept that this is true of the Applicant's stepfather or brother. Mr B said he and Ms L would be devastated if the Applicant is deported. I accept that.
197. According to Aunt N, she watched the Applicant grow up until he was about 16 when she left South Africa.¹⁹⁹ In in South Africa she saw the Applicant on a weekly basis, and sometimes he spent most of the Easter holidays or Christmas holidays in her home.²⁰⁰ Her husband has polycystic kidneys with only about 10 to 11% function and is about to go on dialysis. The Applicant had been very concerned about him and had previously offered to donate one of his kidneys. In Australia, he has helped around their home and been a big part of her husband's life, assisting him with care.²⁰¹ She said she and her husband love

¹⁹⁴ Transcript, page 81, lines 35 to 37.

¹⁹⁵ Transcript, page 88, lines 20 to 24.

¹⁹⁶ Transcript, page 88, lines 28 to 29.

¹⁹⁷ Transcript, page 193, lines 1 to 12.

¹⁹⁸ Exhibit G1, G25, page 105.

¹⁹⁹ Transcript, page 102, lines 17 to 20.

²⁰⁰ Transcript, page 106, lines 37 to 43.

²⁰¹ Exhibit G1, G26, page 106.

the Applicant very much and would be devastated if he were removed to South Africa. It would destroy her as a person because she feels that she has not done enough for him and now she knows what she knows, she is able to do more for him to give him at least one last chance.²⁰²

198. It was readily apparent when Ms V was giving evidence that she loves the Applicant and is very concerned for his wellbeing if he is removed to South Africa. She said her brother would also be emotionally distraught. According to her the Applicant's brother suffers from depression and anxiety she "*can only predict that this would cause greater emotional distress to [him]*" which I find to be speculative, and I give it no weight.
199. All of the family witnesses who gave evidence expressed great worry about the Applicant's ability to cope in South Africa. I am satisfied that the Applicant's removal from Australia would cause emotional hardship to many members of the Applicant's family, especially his mother. None of his family are dependent on him for financial or practical assistance.

Impact on Australian business interests

200. The Applicant does not claim that his removal from Australia would adversely impact on Australian business interests. No weight can be allocated under paragraph 9.4.2 of the Direction.

Conclusion: Other Consideration (d)

201. Overall, I am satisfied that the Applicant's links to the Australian community weigh heavily in favour of revocation.

(b) Extent of Impediments if Removed

202. As a guide for exercising the discretion, paragraph 9.2 of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining

²⁰² Transcript, page 102, lines 27 to 31.

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 any substantial language or cultural barriers; and
- (c) any social, medical and/or economic support available to that non-citizen in that country.

203. In the Applicant's revocation request, he said he loves his family and could not see his life without them in it. He said it would be very traumatic for him to return there. Professor Freeman considered that the Applicant would be impacted by hardships and hurdles in South Africa, lifestyle instability, and uncertainty about accommodation and ability to find employment. He would be without his family to support him with those stressors. Aunt C raised a concern about thugs, gangsters and drug lords in South Africa.

204. The Applicant fears that in South Africa he would be homeless, with no support from anyone due to the pandemic. He said South Africa is a third world country. He described his extended family in South Africa as people he had not been in contact with for years, that he had probably seen them a few times, like "*at funerals or something*".²⁰³ He does not think they would support him because the first question they would ask him is what he did in Australia to be sent back. He fears that he will not get a job because of his criminal history and he could not ask much of his family in Australia because they have to survive.

205. The Applicant is a 34 year old man who is able bodied and in good health generally. He has been diagnosed with a methamphetamine dependency disorder that is currently in remission in a controlled environment.

206. The Applicant lived in South Africa until he was 21. I am not satisfied that he would face any substantial cultural barriers upon his return. He speaks English.

207. According to an article "*The 11 languages of South Africa - South Africa gateway*" English is an urban language of public life, widely used in the media, business and government. It

²⁰³ Transcript, page 9, lines 39 to 40.

is spread by the media and used as a common language of communication. Many South Africans are compelled to learn English simply to get a job and to work. English is spoken by 4.9 million South Africans, being 9.6% of the population, as a first language and it is spoken by 11 million South Africans as a second language. English is the dominant first language in Johannesburg, Cape Town and Durban, and it is widely used as a second language across the whole country.²⁰⁴ I am not satisfied that the Applicant would experience any substantial language barriers in South Africa, and I note that his ability to speak English is likely to benefit him in his efforts to obtain employment.

208. According to country information provided on the Applicant's behalf, in the third quarter of 2021, South Africa's unemployment rate rose from 34.4% to 34.9%, which was a record high. Job losses were in part due to stricter lockdown measures to curb the spread of a third wave of COVID-19 infections. South Africa is considered both a third and first world country. Some parts of the country, especially those in the south, seem like a first-world nation with world-class infrastructure and the living standards of a developed country. However, that is not the case in the northern parts where there is extreme poverty and insufficient basic amenities. About 0.25% of the population is unemployed and surviving on a maximum of \$1.25 a day. Nevertheless, South Africa has the second-largest mixed economy in Africa and a relatively high GDP per capita compared to other sub-Saharan African countries. There is a large agrarian sector with a huge portion of the population engaging in subsistence agriculture. Whereas some parts of South Africa like Cape Town and Johannesburg appear well-developed with diverse industries and top-notch infrastructure that is not the case elsewhere.

209. In South Africa there are many limitations imposed on people with criminal records including limitations with respect to employment. There are many pieces of legislation or regulations in South Africa prohibiting employers from employing people with criminal records. However, it is not clear from the country information, whether all employers, or only some specified employers, are prohibited from employing people with criminal records.

²⁰⁴ Exhibit A2.

210. There is, of course, an unregulated economy in most countries and I have no reasons to believe that South Africa is an exception. The Applicant used to work in South Africa stocking shelves, he studied retail management and graphic design at TAFE in Mackay, and he is able to repair and unlock phones. He has demonstrated that he can be proactive about earning a living: at one stage he made money from buying phone screens from eBay and advertising his services as a phone repairer on Gumtree. He is able bodied and relatively young, and he was able to maintain employment at times when he was using drugs. He helped his aunt and uncle doing jobs around their home, and presumably he could offer lawnmowing or physical labour services in South Africa. He speaks English. He told Professor Freeman would seek employment in the signage industry in South Africa.
211. I am satisfied that the Applicant has transferrable skills that he could use to earn some money whether in parts of the regulated economy where criminal records do not prohibit employment or in the unregulated economy including in the agricultural sector or doing odd jobs.
212. I have been provided with some internet articles about various forms of financial support provided by the South African government to its citizens. Some of the articles are old or undated. I have had more regard to current articles. Those indicate that the Applicant would not be able to access unemployment benefits unless he had previously contributed to the relevant scheme. He gave evidence that when he was employed in South Africa it was in casual positions. He did not have a superannuation fund there and he did not contribute to the Social Security system. I am satisfied that the Applicant could not rely on Government benefits to sustain himself in South Africa.
213. However, I think it is very likely that his family in Australia, together, would provide enough financial support for the Applicant's survival for the reasons given below. I also think it is likely that his family could arrange for some social support for him despite their efforts to persuade me otherwise.
214. The Applicant's sister is a teacher and she intends to return to work in 12 months. Her husband, Mr B, is a sales manager for a property developer. When Mr B was asked if he and Ms L could assist the Applicant financially if he were to return to South Africa he said

he did not know how that would work but said "*I guess if we had to*". He said he would rather offer financial support here in Australia. He added that they would not like the Applicant to live on the street. He had previously indicated that he considered himself blessed to be in a position to be able to help other people that are less fortunate.

215. The Applicant's cousin, Ms V, was asked if she and her husband could provide financial support to the Applicant if he did not get his visa back. She said she husband nearly had his business wiped out by the lockdowns, and she already works two jobs, but they would have to find a way whether by begging or getting another job. She could not say for certain how much help they could provide.
216. The Applicant's mother, Ms Y, works as a chef in the childcare industry and her husband is currently reliant on Newstart Allowance. Ms Y said she fears the Applicant will not survive in South Africa. They own their own home and are able to keep making mortgage payments despite Ms Y's reduction in her working hours. She paid for the Applicant's legal fees, for a solicitor and barrister, in these proceedings. However, she said she is looking to reduce her work and she does not know how she could support the Applicant in South Africa "*or do much for him.*" I find it implausible that, given her concerns that the Applicant will be destitute and the love she professes to have for him, in circumstances where she is keeping up with mortgage payments and she and her husband have income streams, albeit modest, and no dependents, she would not be able to provide some degree of financial assistance to him.
217. Aunt N is employed. She said she holds great concerns about the Applicant's ability to survive in South Africa as he has no remaining family or ties there, no accommodation and no stable form of income. Given his criminal history and the poor economic situation, she cannot see how he would be able to receive lawful employment, and he would be unable to subsist and would die. She also said the Applicant would struggle to fill out documents and take care of himself in South Africa, although I do not accept that as there is no evidence that the Applicant is not literate or has an intellectual impairment.
218. Aunt N and her husband paid for schooling expenses for the Applicant's family and also food and groceries in South Africa because his stepfather was hardly working, and he used to spend his money on alcohol and smoking. Aunt N currently helps her maternal aunt in

South Africa by sending around \$40 every three months for toiletries, adult nappies and healthcare needs. Before the pandemic, family members who travelled to South Africa would “*go to that community*” and give her aunt the money. Since the pandemic she uses bank transfer. Aunt N said she would be able to help the Applicant if he were removed to South Africa but that she would not be able to sustain a life as it is “*just too hard*”. I accept that Aunt N and her husband could not single-handedly pay the Applicant’s living expenses but given their history of providing financial assistance to needy relatives, including the Applicant, and their love and concern for his wellbeing, I am satisfied that they would provide what financial assistance they could.

219. Aunt C said that sending the Applicant to South Africa with no support would likely end him and that her mental state has been a mess, largely due to his immigration problems. She said life would be too difficult for the Applicant in South Africa. She said if the Applicant was returned to South Africa she and her husband would be able to provide very little financial assistance because if their visa application comes up now they need to have the funds available (they are on temporary visas). Her husband has a pension fund and access to some funds in a trust. They do not have work rights on their current visa, and they live with her son who works for an engineering company. They have a daughter who works for a clothing store.
220. The members of the Applicant’s family who gave evidence in the hearing were asked about family or social support for the Applicant in South Africa. The Applicant’s mother has a maternal aunt and a paternal aunt there. Ms V did not think that the maternal aunt would want to have the Applicant living with her as she thought it would be an imposition on her.
221. The paternal aunt and her husband are in their late 60s with four children. Aunt N does not have much contact with the children. She did not think she or her husband could ask anyone in South Africa to provide the Applicant with support as people cannot even afford to look after themselves. She has no connections there that could help the Applicant and most of them would not even know him.
222. The Applicant’s mother said her relatives there are old and sick and she cannot return with the Applicant to introduce him to them. When challenged about her evidence that there was

nobody who would help the Applicant, she said most of her relatives are just getting by themselves. However, she then said that she has not had any contact with them since she left South Africa and the only time she hears anything about them is when someone dies, which gives me reason to doubt that she knows what their current circumstances are.

223. Aunt C lived in South Africa until December 2019. She has extensive experience as a community worker in South Africa, and she had a very big social network in Durban. She was very active in a church, she was involved in community outreach programs, and she networked with the police, social development and hospitals. She has kept in touch with most of those people. Her church in South Africa does a lot of charity and outreach. She still works on certain projects with them from Australia.
224. She said every church in South Africa tries to help the homeless and the poor because there is so much homelessness and so much unemployment. If the Applicant was on the street in South Africa, her church would feed him, but she could not ask them to house him or find employment for him.
225. Aunt C's husband has two sisters living in South Africa and she speaks with them often. They live in Durban, one in her own home and the other in a retirement village. When asked if she could ask her husband's family to help the Applicant, she said they do not know him well so it would be very hard for her to do that. She said she could try but it is not easy for anyone in the family to take on the responsibility of having an adult living with them.
226. When challenged about her evidence, and the evidence of other witnesses, to the effect that the people they know in South Africa would not be prepared to give the Applicant a roof over his head she said:

"It [wouldn't] be a long term sort of thing, no-one is going to be able to do that. Yes, anyone is - everyone can help him for a day or two, maybe a week, maybe a month but long term, I don't think anyone can take on the responsibility of another adult. And I do know from my work with the church I do know they do have houses, but the longer he can stay in one of these houses if you do not have any home, is three weeks - 21 days. After 21 days you are back on the street."

227. When asked if her infirm aunt (her mother's sister) who lives on her own and needs some help might be able to accommodate the Applicant, given he would be able to help her, she said she did not think that would work but indicated they could ask her.
228. The family members who gave evidence all expressed great concern for the Applicant's wellbeing. While it is understandable that his mother and aunts spoke pessimistically about the impact of deportation on the Applicant in their efforts to help him get his visa back, I do not accept that their ability to assist him in South Africa is as limited as some of them claim. I am satisfied that Ms L and Mr B, Ms V, Ms Y and Aunt N will provide whatever financial assistance they can if the Applicant is in need of it for the basic necessities of life. I am satisfied that the Applicant can access some short term support from Aunt C's church or another church. I am also satisfied that the Applicant's mother and aunts will make their best efforts to arrange for some kind of family support for the Applicant in South Africa which could include temporary accommodation, food or merely welcoming him into their community.
229. According to the country information, healthcare in South Africa is a mix of public and private systems. The wealthiest 20% (approximately) of the population rely on private insurance-based healthcare and the rest of the population rely on the underfunded public health service. The public system provides free primary health care to those who are most vulnerable who cannot afford to pay and a partial subsidy for those in a position to make a part payment. The public health system in South Africa is struggling with shortcomings such as long waiting times, poor quality healthcare delivery, old and poorly maintained infrastructure, and poor disease control and prevention practices.
230. The Applicant recalled that in South Africa, if anyone in his family needed medical treatment they would go to the public hospital or a clinic. He said "*I'm pretty sure when my mum was there, we were under her healthcare or something*". I note that the Applicant's mother was unemployed in South Africa. Aunt C said there is an exceptionally poor health care system in South Africa: there are extraordinarily long queues, and she has seen people die waiting for medical assistance. Aunt N, speaking of an elderly, infirm aunt in South Africa, said when she is unwell, she is able to access public health care, she can go to hospital. She added that if you are sick in South Africa you are able to go to a hospital.

231. The Applicant does not currently suffer from any physical health conditions and he is relatively young. He has never sought medication or a medical procedure for his drug dependency, nor has any been recommended. Rather, he has received treatment in the form of supervision, education and counselling. Professor Freeman, who diagnosed the disorder, recommended long-term treatment, support and monitoring, and suggested complementary drug rehabilitation services such as ATODS and Narcotics Anonymous. There are Narcotics Anonymous groups throughout the world including in South Africa. There are in-person and online meetings available at no cost. In the hearing, the Applicant said he would engage with Narcotics Anonymous if it was recommended. This is viable option for the Applicant. Further, Aunt C said her church in South Africa offered rehabilitative support to addicts.
232. The challenges that the Applicant will face in terms of the standard of available healthcare, the economy, the way the government income support system works, the impact of a criminal record on employment prospects and the impact of COVID are challenges faced by the general population. He is relatively well educated, speaks English and has good health and transferable skills. He will have some degree of financial support from his family in Australia.
233. Being separated from his family is likely to impact the Applicant significantly, particularly in the context of a drug dependency. So will uncertainty in relation to accommodation and familial or social support. These are not challenges faced by the general population. However, there will be short term help available through Ms C's church and there are prospects of support from the community of extended family in South Africa. There will also be relevant psychological support available through Narcotics Anonymous and churches.
234. This Other Consideration (b) weighs moderately in favour of revocation of the mandatory cancellation.

Miscellaneous Consideration

235. It was contended on behalf of the Applicant that his challenging upbringing reduced his moral culpability for his offending, referring to the sentencing principles discussed in *Bugmy*

*v the Queen*²⁰⁵ (“*Bugmy*”). I was asked to treat this as a separate reason that weighs in favour of revocation of the cancellation of the Applicant’s visa.

236. *Bugmy* concerned an indigenous offender who had grown up in a family where he was surrounded by alcohol abuse and extreme violence. It is noteworthy that the decision does not support the proposition that a deprived background will *necessarily* reduce an offender’s moral culpability. That is evident in the following passages:

*“An Aboriginal offender’s deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender’s sentence.”*²⁰⁶

(Underlining added)

and

*“Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.”*²⁰⁷

(Underlining added)

237. Further, establishing a causal connection between a deprived upbringing and subsequent offending can cut both ways in the sentencing process. As the court stated:

*“An offender’s childhood exposure to extreme violence and alcohol abuse may explain the offender’s recourse to violence when frustrated such that the offender’s moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.”*²⁰⁸

238. The relevance of reduced moral culpability in the sentencing process is readily apparent, However, the sentencing exercise conducted by courts is fundamentally different to the

²⁰⁵ [2013] HCA 37.

²⁰⁶ Ibid [37]

²⁰⁷ Ibid [40]

²⁰⁸ Ibid, [44].

assessment I am required to undertake, although both take into account the protection of the community.

239. Separately to that, it is well accepted that an unsupportive home environment can make a person more vulnerable to substance abuse which can, in turn, lead to anti-social behaviour. However, there is a difference between identifying factors that could have contributed to a person's offending and partially excusing the offending. So much is made clear in the passages quoted above. In *Bugmy*, the deprivation and abuse in the offender's background was extreme, and the sentencing Judge had accepted that there was a causal connection between extreme violence in his family background and his subsequent violent offending. That is not the case here. The Respondent did not concede that the Applicant's background reduces his moral culpability, and the evidence before me does not persuade me that it does.

240. I have had regard to the difficulties in the Applicant's family home as part of his background as far as his background is relevant to my assessment of the Primary and Other Considerations.

CONCLUSION

241. In considering whether there is another reason to exercise the discretion afforded by s501CA(4) of the Act to revoke the mandatory visa cancellation decision, I find that:

- Primary Considerations 1 and 4 each weigh heavily against revocation of the cancellation of the Applicant's visa;
- weighing in favour of revocation are Primary Consideration 3 to a limited extent, Other Consideration (b) to a moderate extent and Other Consideration (d) to a heavy extent; and
- the remaining Primary and Other Considerations carry no weight either way.

242. To the extent that Primary Consideration 3 and Other Considerations (b) and (d) weigh in favour of revoking the mandatory visa cancellation decision, they cannot, even when combined, outweigh Primary Considerations 1 and 4. Accordingly, there is not another reason to revoke the cancellation of the Applicant's visa.

DECISION

243. The decision under review is affirmed.

*I certify that the preceding 243
(two hundred and forty-three)
paragraphs are a true copy of
the reasons for the decision
herein of Member Rebecca
Bellamy*

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

Associate

Dated: 21 February 2022

Date of hearing: 3, 4 and 9 February 2022

Counsel for the Applicant Dr Jason Donnelly

Solicitors for the Applicant: Potts Lawyers

Solicitors for the Respondent Minter Ellison

Mr David McLaren

ANNEXURE A – EXHIBIT LIST

| EXHIBIT | DESCRIPTION OF EVIDENCE | PARTY | DATE OF DOCUMENT | DATE RECEIVED |
|----------------|--|--------------|-------------------------|----------------------|
| G1 | Section 501 G-Documents (G1 to G31 paged 1 to 139) | R | - | 9 December 2021 |
| A1 | Applicant's Statement of Facts, Issues and Contentions (paged 1 to 39) | A | 3 January 2022 | 3 January 2022 |
| A2 | Applicant's Tender Bundle (paged 1 to 146) | A | - | 3 January 2022 |
| A3 | Applicant's Supplementary Documents (10 pages) | A | - | 31 January 2022 |
| A4 | Statement of Nancy Chetty (5 pages) | A | 1 January 2022 | 3 January 2022 |
| A5 | Statement of Yvonne Govender (6 pages) | A | 29 December 2021 | 3 January 2022 |
| A6 | Statement of Lois Naidoo (4 pages) | A | 28 December 2021 | 3 January 2022 |
| A7 | Statement of Matthew Bruggemann (3 pages) | A | 28 December 2021 | 3 January 2022 |
| A8 | Statement of Letitia Janine Verhey (6 pages) | A | 28 December 2021 | 3 January 2022 |
| A9 | Supplementary Statement of the Applicant attaching Annexure A: Photograph of Applicant's Niece | A | 3 January 2022 | 3 January 2022 |

| | | | | |
|-----|--|---|------------------|-----------------|
| A10 | Forensic Psychological Report of Professor James Freeman (paged 1 to 12) | A | 28 December 2021 | 3 January 2022 |
| R1 | Respondent's Statement of Facts, Issues and Contentions (paged 1 to 14) | R | 25 January 2022 | 25 January 2022 |
| R2 | Respondent's Supplementary Documents (1 to 58, paged 1 to 781) | R | - | 25 January 2022 |