



Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2022/3685**

Re: **Adam Anesh Chand**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Member Andrew McLean Williams**

Date of Decision: **26 July 2022**

Date of Written reasons: **24 August 2022**

Place: **Brisbane**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal sets aside the decision made by the Delegate of the Respondent dated 2 May 2022 not to revoke the mandatory cancellation of the Applicant's visa, and now substitutes a decision, to revoke the mandatory cancellation of the Applicant's visa.



Member Andrew McLean Williams

CATCHWORDS

MIGRATION – Non-revocation of mandatory cancellation of a Special Category (Subclass 444) visa - 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 – decision under review set aside and substituted

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth)

Migration Act 1958 (Cth)

CASES

Bale v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs
[2020] FCA 646

BOE21 v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs
[2021] FCA 1429

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

Castle v Minister for Home Affairs [2020] AATA 1778

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

FYBR v Minister for Home Affairs [2019] FCAFC 185

Hands v Minister for Immigration and Border Protection [2018] FCAFC 225

JTNW v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs
[2021] AATA 4948

Mamatta v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs
[2022] AATA 1

Minister for Home Affairs v Buadromo [2018] FCAFC 151

Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11

Minister for Immigration and Citizenship v Li (2013) 249 CLR 332

Mukiza v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs
[2019] AATA 4445

PGDX v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs
[2021] FCA 1235

RGKY v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs
[2021] FCA 750

RTTW v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs
[2021] AATA 4813

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

Viane v Minister for Immigration and Border Protection [2018] FCAFC 116

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

SECONDARY MATERIALS

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 Andrew McLean Williams

24 August 2022

INTRODUCTION

1. On 1 December 2020, a Delegate of the Minister (“the Respondent”) mandatorily cancelled the Applicant’s Special Category (Subclass 444) visa (“the visa”) under s.501(3A) of the *Migration Act 1958* (Cth) (“the Act”), on the basis that the Applicant did not pass the character test, and because he was serving a full-time custodial sentence.¹
2. On 23 December 2020 the Applicant requested revocation of the cancellation of his visa (“the revocation request”).²
3. On 2 May 2022, a Delegate of the Respondent decided not to revoke the cancellation (“the decision”).³ The Applicant then lodged an application for review in this Tribunal, on 9 May 2022.⁴ The Tribunal has jurisdiction to review the decision, pursuant to s.500(1)(ba) of the Act.
4. The hearing of this application for review took place on 14 and 15 July 2022. At the hearing, the Tribunal heard in-person oral evidence from the Applicant; from his mother Mrs Adelaide Chand; from his sister, Ms Rikeshni Chand; from his 13 year old son (“Child A”); and from his father, Mr Anesh Chand (“Mr Chand Senior”). The Tribunal also received oral evidence from a psychologist, Mr Matt Visser, by means of audio-visual link.
5. The Tribunal also considered the documentary evidence submitted by each of the Applicant and Respondent, as detailed in the **attached** Exhibit Register, now marked as “Annexure A” to these reasons.

¹ Exhibit G1, G65 pages 269 to 274

² Exhibit G1, G12 pages 68 to 71.

³ Exhibit G1, G3 page 17.

⁴ Exhibit G1, G2 pages 3 to 10.

FACTUAL BACKGROUND AND OFFENDING HISTORY

6. The Applicant is a 31 year old male citizen from New Zealand. The Applicant initially arrived in Australia as a short stay visitor on 13 June 1996, when aged five,⁵ before arriving in Australia on a more permanent basis in 2011, when aged 20.
7. Since his first arrival, the Applicant has travelled to New Zealand and then arrived back in Australia on the following occasions:⁶
 - (a) Departed for New Zealand on 18 June 1996, arrived in Australia on 22 December 2005;
 - (b) Departed for New Zealand on 3 January 2006, arrived in Australia on 19 July 2011;
 - (c) Departed for New Zealand on 1 September 2012, arrived in Australia on 4 September 2012;
 - (d) Departed for New Zealand on 16 May 2013, arrived in Australia on 25 May 2013; and
 - (e) Departed for New Zealand on 17 April 2015, arrived in Australia on 19 May 2015.
8. The Applicant has a criminal and traffic history in New Zealand commencing in 2005, when aged 14 years, thereafter, spanning until 2011, when aged 20 years.⁷ The Applicant has variously accumulated New Zealand convictions for family violence; 'male assaults female (manually)'; threatening behaviour; property offences; dangerous driving; drink driving; breach of conditions of supervision; and breach of community work. In terms of sentencing dispositions in New Zealand the Applicant has received sentences of supervision, community work; as well as imprisonment, of up to four months.
9. The Applicant's New Zealand traffic history includes convictions for dangerous driving; failure to stop after a crash; driving whilst suspended; and multiple instances of drink driving. In relation to his New Zealand offending the Applicant explained that, even whilst still at school in New Zealand he had commenced associating with members of a Maori 'black

⁵ Exhibit G1, G64 page 268.

⁶ Exhibit G1, G64 pages 267-268.

⁷ Exhibit G1, G5 pages 44 to 46.

power' gang, being persons who were engaged in frequent criminal behaviour and drug use.⁸ In consequence, the Applicant says that he also started offending.

10. The Applicant was expelled from high school when he was around 14 years of age after police attended at the school in order to arrest the Applicant for an assault offence, for which the Applicant was subsequently convicted.⁹ When asked to describe the circumstances of that particular offence, the Applicant said that he and his underage friends had been drinking with a heavily intoxicated male person. The Applicant's friends wanted this male person to drive them home, however the Applicant warned his friends not to get in a car with the intoxicated male, whereupon the intoxicated male got out of the car and attacked the Applicant. The Applicant informed that his friends then set upon the male, and "*bashed*" him.¹⁰ The Applicant admits that he joined in the bashing, yet claims that he had only kicked the victim in the legs '*once or twice*' whilst his friends more aggressively attacked the head and torso of the victim, who at this stage was on the ground.¹¹
11. The Applicant's arrest at school in relation to a serious assault had the further consequence of the Applicant also being expelled from school. After his expulsion the Applicant commenced employment initially in the forestry industry, and also working for a tyre company.¹² During this period the Applicant informed the Tribunal that he continued to drink alcohol heavily, and that he also began smoking cannabis, on a daily basis.¹³ The Applicant stated that the abuse of alcohol and drugs were at the root of all of his offending whilst in New Zealand. In this regard the Applicant acknowledged that he was associating with the "*wrong people*", yet also says,¹⁴ that, even at that stage he was already desperate to try and "*find a way out*".
12. When aged about 15, the Applicant commenced a relationship with his now ex-partner and the mother of his two children, "Ms T". In 2009, the Applicant and Ms T had a son, "Child A". The Applicant continued to offend in New Zealand even after the birth of Child A.

⁸ Transcript p.25, lines 12 – 25.

⁹ Exhibit A2, page 2.

¹⁰ Transcript p. 28 lines 30 to 35.

¹¹ Transcript p. 28 lines 35 to 37.

¹² Transcript p.20, lines 15 – 22; p.25 lines 7 – 11.

¹³ Exhibit A2, page 5. .

¹⁴ Exhibit G1, G25 page 165.

13. In mid-2011, the Applicant and Ms T relocated to Australia, together with Child A, who was still an infant in order to be closer to the Applicant's parents and older sister, whom had already relocated to Australia. In 2012, the Applicant's daughter, "Child B" was born. Child B is now aged 10 years. There is a statement before the Tribunal from Child B, written in support of her father that reveals Child B's love for the Applicant. Unlike her older brother, and because of her tender age Child B did not provide any direct oral evidence before the Tribunal. Nonetheless, her (written) views are now taken into account by the Tribunal.
14. The Applicant's first offence in Australia was committed in 2013, at Innisfail, when the Applicant was apprehended for being drunk in a public place. He was not further punished for this offence.
15. The relationship between the Applicant and Ms T appears to have been volatile and markedly dysfunctional, with each them engaging in regular illicit drug use. Initially, after their arrival in Australia, the Applicant and Ms T moved in to live with the Applicant's parents. The Applicant continued to use drugs, smoking a gram of marijuana each night and also using methamphetamines, initially at an average of once per month, which gradually increased over time.¹⁵
16. Shortly after the birth of Child B, in early 2013, the relationship between Ms T and the Applicant ended, acrimoniously. The Applicant says he left the relationship with Ms T because Child A was "*growing up to see and notice everything*" and he was concerned that his son would witness their fighting.¹⁶
17. Over the next three years Ms T had custody of the children and moved to Cairns. Meanwhile, the Applicant moved to Sydney, where his older sister was residing. The Applicant and his family assisted both the Applicant and Ms T by paying for their rent and food.¹⁷ The Applicant eventually moved to Innisfail for a short period, before relocating back to Brisbane, as the children and Ms T had by this stage also moved back to Brisbane.

¹⁵ Transcript p.40

¹⁶ Exhibit A2, page 5.

¹⁷ Exhibit G1, G13 page 80.

18. Due to the conflict between the Applicant and Ms T during the period when the children were living with Ms T the Applicant was only able to see his children every few months, whilst in the company of his father Mr Chand Senior.¹⁸
19. In around 2015 the children were removed from Ms T's care by child safety officers, and placed into the care of the Applicant's parents.¹⁹ At this stage the Applicant returned to Sydney yet maintained regular contact with the children, and also regularly travelling back to Brisbane.²⁰ In 2016, the Applicant became the primary carer of the children for about 5 months.²¹ The Applicant eventually took Child A with him back to Sydney. Meanwhile, Child B was sent to live in the care of Ms T's aunt. Ultimately, both children were returned to the care of the Applicant's parents following the Applicant's arrest, in December 2019.²²
20. Although a matter clearly neither understood or even recognised by either the Applicant or by his family at the time, the eventual breakdown of the Applicant's already profoundly dysfunctional relationship with Ms T appears to have acted as the primary trigger for the Applicant descending into depression; which the Applicant then sought to deal with by means of his 'self-medicating,' with even more illicit substances, thereby sliding even further down the slope into drug dependency. More will be said by the Tribunal on this topic, later in these reasons.
21. In September 2014, whilst in Sydney, the Applicant assaulted two random male pedestrians, on the street. The police fact sheet,²³ records that the Applicant had approached the victims at a pedestrian crossing in central Sydney and had proceeded to slap one of them, in the face. The Applicant had then attempted to assault his selected victim again, leading to an intervention by the second pedestrian, in an attempt to render assistance to his friend. The Applicant then also hit the second pedestrian, again in the face. When later interviewed by the police about these assaults, the Applicant asserted that he 'hadn't' slapped either victim, having merely given each of them a "*light backhand*". When asked by the police why, the Applicant claimed it was because they were "*disrespectful*", as

¹⁸ Exhibit A2, page 5.

¹⁹ Exhibit G1, G23 page 160.

²⁰ Exhibit G1, G27 page 175.

²¹ Transcript p. 47 lines 38 to 46 to p.48 line 1.

²² Exhibit G1, G13 page 80.

²³ Exhibit R2, R2 pages 7 to 9.

“they don’t respect our Lord”. In November 2014 the Applicant was sentenced for these assaults and was placed on a 12-month good behaviour bond. The Applicant told the Tribunal that he had not been using illicit drugs at the time of these assaults, and had, at that stage, only been under the influence of alcohol.²⁴

22. On 8 March 2015 police attended the Applicant’s residence in response to a reported domestic violence incident involving the Applicant. The police report indicates the Applicant had got into a physical altercation with another male occupant of the house where he was residing at the time. The Applicant was also found by the attending police to be in possession of a small clip-seal bag containing cannabis,²⁵ and was fined for this possession offence, yet not apparently charged for the physical altercation.
23. On 9th June 2016, following an altercation involving the Applicant and Ms T, a domestic violence protection order was issued by the Magistrates Court, listing Ms T as the aggrieved and the Applicant as the defendant. The order required the Applicant to be of good behaviour towards Ms T and not commit acts of family violence against her.²⁶ The Applicant stated that at the time of this incident Ms T had lost custody of the children who were in the care of his parents, however Ms T would often arrive at his home unannounced when intoxicated, demanding to see her children. On the day of the incident Ms T had jumped over the security gate, such that the Applicant *“felt the need to defend his mother and children”*, resulting in the altercation that became the basis for the Protection order.²⁷
24. In 2016, the Applicant moved back to Queensland, and obtained custody of his two children, stating that he wanted Child A and Child B to be together, with him. Up until this point both children had been living with the Applicant’s parents, after they had been removed from Ms T’s care. The Applicant had been in Sydney where he maintained daily contact with the children while he continued to struggle with his drug dependencies and depression. Upon his arrival back in Brisbane the two children then moved in with the Applicant, who then became their primary caregiver, with assistance from his parents, at least for a few months.

²⁴ Transcript p. 33, lines 10 - 15.

²⁵ Exhibit R2, R4 page 35.

²⁶ Exhibit G1, G47 page 213.

²⁷ Exhibit G1, G23 page 160.

25. Between September and November 2016, in Brisbane, the Applicant shoplifted on two occasions, and 'contravened a lawful direction or requirement' on two further occasions. The Applicant appeared before the courts on four separate occasions for these offences, between November 2016 and January 2017, each time receiving fines, with no conviction recorded.
26. On 7 January 2017, in breach of the domestic violence protection order, the Applicant assaulted Ms T. On this occasion the Applicant had attended at his own parent's home in Brisbane, during a period when Ms T had been temporarily residing with them, despite the Applicant and Ms T no longer being in a relationship. Whilst the Applicant went inside his parents' home, Ms T had gone out to the Applicant's car in order to speak with her son, Child A. The Applicant then verbally abused Ms T, and also Child A, and then struck Ms T, on the face. The Applicant then got back into his car and reversed down the driveway whereupon he yelled at Ms T "*this is my fucking son I am taking him to Sydney*" and "*What the fuck you going to do about it? What, cunt?*" The police were called, and upon their arrival they observed swelling and a small cut on the right side of Ms T's forehead, such that she was transported to hospital for treatment.²⁸ During a subsequent police interview in relation to this incident the Applicant told the police that he would oftentimes yell and swear at Ms T, '*as it was only the way to get [his] message through*'. The Applicant also denied assaulting Ms T, instead claiming that as he had been entering the property Ms T had been walking towards him, whereupon the Applicant had merely '*pushed her out of the way*' and had swung his arm around, yet did not make any physical contact with Ms T.²⁹ Following this incident, the Applicant was bailed to re-appear at the Richlands Magistrate Court, on 7 February 2017. Ultimately, the Applicant failed to appear in the Richlands Magistrates Court as required on 7 February 2017; such that a warrant for his arrest then issued.
27. Shortly after the offence on 7 January 2017 the Applicant again returned to New South Wales, together with Child A. At this stage Child B remained in the custody of Ms T's aunt in Brisbane.

²⁸ Exhibit R2, R4 page 55.

²⁹ Exhibit R2, R4 page 55.

28. On 1 February 2017, and whilst in Sydney, the Applicant physically assaulted Child A, who was eight years of age at the time. The police statement of facts,³⁰ records that the Applicant, together with Child A had gone into a Centrelink Office in central Sydney in order to obtain information needed for Child A's planned school enrolment, in Sydney. The Applicant had become angry with Child A whilst inside the Centrelink office, and had proceeded to strike Child A on the face with an open hand, thereby causing Child A to fall to the ground. The incident was captured, by means of CCTV. The Applicant then proceeded to leave the Centrelink office, grabbing Child A by the ear, and dragging him along the street. This was observed by a number of witnesses, who also observed the Applicant yelling at Child A, who appeared to be distressed.
29. Approximately one week later, the Applicant attempted to enrol Child A in a primary school, in Sydney. The police were called, and the Applicant was arrested and charged for the assault on Child A on 1 February 2017. When questioned about these events the Applicant informed the police that he had only given Child A "*a little clip*".³¹ The Police then applied for an Apprehended Violence Order (AVO), naming Child A as the aggrieved party, and the police also arranged for emergency accommodation for Child A. Shortly afterwards, the Applicant's father, Mr Chand Senior, flew down to Sydney and retrieved Child A, taking Child A back to Brisbane to resume living with Mr Chand Senior, and his wife. The Applicant was released to bail with reporting conditions. A final AVO was issued by the NSW Local Court on 5 June 2017 protecting Child A, which then remained in effect for a further 12 months.³²
30. On 19 June 2017, the Applicant was convicted of 'common assault (DV)' and 'take action that results in physical injury/sexual abuse' arising out of the incident at the Sydney Centrelink office in February 2017; as well as for breaching his bail acknowledgment arising by reason of his failure to appear in Court when required. The Applicant was then sentenced to an 18-month good behaviour bond.

³⁰ Exhibit G1 G10 pages 63-66.

³¹ Exhibit G1, G10 pages 63-66).

³² Exhibit G1, G48 pages 215 to 216

31. At this stage the Applicant remained living in Sydney until after his conviction in order to comply with the reporting conditions applicable to his bail.³³ After the bail conditions were lifted, the Applicant returned to Brisbane and moved back in to live with his parents, while still continuing to return to Sydney regularly.³⁴
32. On 19 July 2017, police attended a Queensland address in response to a disturbance and located the Applicant, who was found to be in possession of a small quantity of cannabis.³⁵ Because of the outstanding warrant referable to his prior failure to appear before the Richlands Magistrates Court on 7 February 2017, the Applicant was arrested, and also charged in relation to the cannabis possession.³⁶ The Applicant appeared before the Magistrates Court in September 2017 and received fines for these offences.
33. On 13 February 2018 the Applicant was convicted of 'contravention of domestic violence order' and 'assault occasioning bodily harm' in the Magistrates' Court of Queensland, for the offences committed by him in Queensland prior to his departure for Sydney. For these offences he was fined \$1,200.
34. In 2018 the Applicant continued to offend in New South Wales by his committing mid-range drink driving; shoplifting; and cannabis possession offences. In consequence the Applicant appeared in the NSW local courts on three occasions. On each such occasion the Applicant was further fined.
35. On 28 October 2018 police attended an address in Brisbane in response to a domestic violence incident. It appears that on this occasion the Applicant's father, Mr Chand Senior was the complainant whom had called the police, after the Applicant had punched him in the face. The Applicant's mother also presented the attending police with a bowl, containing a mixture of tobacco and cannabis, together with a pipe. The Applicant admitted to the police that the cannabis belonged to him, and that he had been using the pipe, to smoke it.³⁷ The Applicant also told the police that, at this stage and due to the obvious breakdown of the relationship between himself and his parents, he would again be returning to Sydney.

³³ Exhibit A2, page 5.

³⁴ Transcript p,50 lines 20 to 40.

³⁵ Exhibit R2, R4 page 63.

³⁶ Exhibit R2, R4 page 59

³⁷ Exhibit R2, R4 page 67.

Three days later, the Applicant was further apprehended by the police in Queensland - this time whilst in possession of 0.3 grams of amphetamine.³⁸ On 2 November 2019, the Applicant was pulled over for an RBT and was again caught with a small amount of cannabis, and another drug utensil.³⁹

36. On 2 December 2019 the Applicant was sentenced for the further offences committed by him in Queensland in October and November, this time to 12 months' probation.
37. Only five days later, on 7 December 2019, the Applicant commenced on what would be later described during sentencing remarks in the Queensland District Court as a "*drug-induced rampage*."⁴⁰
38. Shortly prior to the commencement of the drug induced rampage, the Applicant had approached an illicit drug dealer in order to procure further quantities of the illicit drug, 'ice'. Previously, the Applicant had been using ice by means of injection, yet on this occasion the Applicant complained to the drug dealer that he was 'no longer obtaining the same high'. In response, the Applicant says that the drug dealer suggested that the Applicant should try drinking the ice, instead. Foolishly, the Applicant took that advice and proceeded to ingest the ice, orally. The results were to be rather profound. The Applicant quickly lapsed into a drug-induced psychosis, much of which the Applicant is now unable to remember.
39. In summary,⁴¹ at around 5:25pm on 7 December 2020, the Applicant commenced his drug-induced rampage firstly by verbally abusing a random member of the community, before crashing his vehicle into the front of a building, before accelerating away. The complainant was a vehicle breakdown response worker who was returning from a job when he passed the Applicant's car parked on the side of the road, whereupon the Applicant yelled obscenities at him as he passed. The Applicant then drove past the complainant - who had by this stage parked his own vehicle outside his workplace further up the road - and again yelled obscenities at him. The Applicant then did a U-Turn, and drove back towards the complainant, and then reversed up and over the gutter at speed, colliding with the front of

³⁸ Exhibit R2, R4 page 83

³⁹ Exhibit R2, R4 page 79.

⁴⁰ Exhibit G1, G7 page 50.

⁴¹ Exhibit R2, R6 pages 155 to 159.

the building, damaging a door and glass panel. The Applicant then accelerated away while continuing to swear at the complainant.⁴²

40. Shortly afterwards the Applicant pulled into the driveway of a random suburban home, where two children happened to be in the process of being loaded into a car by a supervising father, in order to drive to a public swimming pool. One child was visiting the home of the other, on a play date. After pulling over, the Applicant yelled through the car window "*Hey kids, get in the car. Quickly!*" In the process, the Applicant also attempted to open the passenger door of his car, as if to enable the children to get in. When the supervising father enquired of the Applicant what on earth was going on, the Applicant then screamed in response: "*I will fucking kill you. I will get my gun and I will fucking kill you*", before speeding off again. Not unsurprisingly, this gentleman immediately called the police.
41. Imminently, a police patrol car caught up with the Applicant. Upon seeing the police, the Applicant deliberately drove his car towards the patrol car, on the wrong side of the road, as if to ram it, thus forcing the officers to take evasive action in order to avoid a catastrophic collision. At the very last moment the Applicant himself swerved, and sped past the police patrol car whilst also yelling incoherent abuse towards the officers. The Applicant then continued driving at an excessive speed and on the wrong side of the road, weaving in - and out - of the oncoming traffic, thus forcing a multitude of further drivers to also swerve, and brake.
42. The Applicant eventually collided with two stationary cars which had been stopped ahead of him in adjacent lanes, waiting at a red traffic light; yet not before the Applicant had first also tried to squeeze his own car into the narrow gap between them. Whilst doing so the Applicant also yelled abuse at both the drivers, whilst also waving a metal pole menacingly at them, outside the window of his car. As can be imagined, both of the cars were extensively damaged, and one of the drivers also sustained some minor injuries.
43. Next, and by this stage at about 6:00pm, the Applicant stopped at a service station, where he alighted from his car and again began yelling at random motorists and pedestrians. The service station attendant remotely locked the doors of the kiosk as the Applicant

⁴² Exhibit R2, R6.

approached the front doors. The Applicant then attempted to open the kiosk doors before punching at them, whilst continuing to yell abuse at the service station attendant. The Applicant then threw a chair at the service station window, before using a large metal bar in an attempt to unsuccessfully smash through the shopfront doors, causing further extensive damage in the process. The Applicant also attempted to bludgeon another member of the public - who just happened to have the misfortune to be nearby on the service station concourse at the time - on the head with the metal pole, however that intended victim managed to deflect the blow with his hand, thereby sustaining bruising on the hand. The Applicant again struck at this person, who again defended himself, again by blocking the metal pole with his arm; thereby sustaining further injuries. The Applicant then approached the vehicle of another female patron on the service station concourse, who responded by threatening to call the police. The Applicant then struck at her vehicle with the same metal pole, causing even more property damage. The female driver then sped away. The Applicant again hit at the rear driver's side window of her car as she sped past. The Applicant then proceeded to run after her vehicle, however at about this juncture the police also arrived on the scene.

44. The Applicant attempted to flee, yet he was caught by the police. The Applicant struggled violently, and the police – showing what appears to have been remarkable restraint - attempted to subdue him, by means of a taser, albeit with only limited success. In consequence, paramedics needed to be called upon to sedate the Applicant, in order that the police officers could eventually effectuate their arrest. A blood specimen taken from the Applicant at this time revealed him to have a very high concentration of methamphetamine in his system.
45. Unsurprisingly, the Applicant was charged with a multitude of offences, and the Applicant was remanded in custody, where he remained until his sentencing before the District Court of Queensland in October 2020.
46. In February 2020, and whilst on remand, the Applicant sent a Christmas card and a handwritten note to the parents who had witnessed the attempted random child abduction.⁴³ The note said:

⁴³ Exhibit R2, R4 page 137 to 138.

"To [names redacted] I wish you all the best from the bottom of my heart Merry Christmas and God Bless and I hope this year goes better than you have planned To Both Famalies [sic] yours sincear [sic] Shadow"

(Errors in Original)

47. The sending of this Christmas card resulted in the Applicant being charged with stalking. The female complainant had become upset and fearful upon receipt of this card, and immediately called police. The complainant was concerned by the sinister connotations emanating from the *nom de plume* 'shadow'; and was worried that she and her family had been targeted by the Applicant.⁴⁴ As a result of receiving the card the complainant and her husband considered selling their home, as well as taking other increased security measures.⁴⁵
48. The Applicant told the police investigating this stalking offence that the Christmas card had been intended as an apology,⁴⁶ and the Applicant informed the investigating officers that he had signed off as 'shadow' purely by reason that this happened to be the nickname that had been conferred on him by other inmates, whilst in gaol.⁴⁷ However, when questioned further by the investigators the Applicant could not provide any satisfactory explanation for why it was the case that he had sent a Christmas card in February.
49. On 15 October 2020 the Applicant was sentenced in the District Court of Queensland held at Brisbane before his Honour Judge Farr SC for the offences arising out of the 7 December 2019 incident, and for the aforementioned stalking charge, committed in February 2020. In relation to all charges the Applicant entered a plea of 'guilty'.
50. During sentencing, his Honour made the following remarks:⁴⁸

"...It is quite apparent upon the information contained before me...that there is a sinister aspect to that letter and that signing it off as "Shadow" would understandably cause considerable consternation and anxiety for those people upon its receipt. To sign it with that name, in my view, tends to indicate that you were expressing the view that you would shadow them, or follow them, at some stage. No other inference is open on that material.

⁴⁴ Exhibit R2, R4 page 137.

⁴⁵ Exhibit R2, R4 page 137.

⁴⁶ Exhibit R2, R4 page 138.

⁴⁷ Exhibit R2, R4 page 138.

⁴⁸ Exhibit G1, G7 pages 54 to 55.

...

But in the circumstances of sending a letter of this nature after being advised not to do so by your father, addressing it to people who you have – or to a fellow that you have already threatened to shoot and kill at a time when you were attempting to abduct his child is a particularly serious act on your part.

...

I note in relation to your behaviour on the 7 December you did not desist voluntarily from any part of it in reality. You put many people's lives and wellbeing at risk through your behaviour, either with the pole or with your driving. You caused, I am easily able to infer, considerable fear and anxiety to the children the subject of the attempted abduction charges and to the parents of one of those children who were present at the time. You used a dangerous weapon twice against an unarmed man who was doing nothing other than going about his everyday life at a service station, and you used it in an act of what can only be described as gratuitous and significant violence. You caused considerable damage to property.

The fact that you were affected by methamphetamine at the time provides you with no excuse for your behaviour whatsoever. I am told that you are a long-term methylamphetamine user and that it had never affected you in such a way in the past and that you had taken it on this occasion by drinking it for the very first time. But I am also told that you did that because you had developed a tolerance to the drug and that you were attempting to use it in a way that would provide a greater hit.

There can be no doubt that general deterrence and personal deterrence are significant considerations on sentence in a matter such as this, as is the protection of the community. Protection of the community is of particular significance, given that you were drug affected at the time and that you have a lengthy and - lengthy drug problem with that very same drug, and I perceive that until you truly overcome that addiction you will present as a future risk. To what degree, I cannot say."

51. The Applicant was convicted upon his own admission and received the following punishments, with all terms of imprisonment ordered to be served concurrently:

- Assaults occasioning bodily harm whilst armed/in company: – three years imprisonment.
- Attempted abduction of child under 16: – 15 months imprisonment.
- Dangerous operation of a vehicle and adversely affected by an intoxicating substance: – 12 months imprisonment and motor vehicle licence disqualification for three years.
- Wilful damage and Attempted enter premises with intent to commit indictable offence: – six months imprisonment.
- Unlawful stalking: – six months imprisonment.

- Attempted abduction of child under 16: – no further punishment.
 - ‘Going armed so as to cause fear’ and ‘Fail to comply with requirement to stop private vehicle’: – no further punishment, restraint order issued.
52. On 16 October 2020 a restraining order was also issued by the District Court of Queensland prohibiting the Applicant from contacting, approaching, communicating, or otherwise publishing any material relating to the children and family of the abduction offences.⁴⁹
53. On 19 October 2021 the Applicant was granted parole.⁵⁰ On 22 November 2021 and upon his release from prison on parole, the Applicant was immediately transferred from the prison to immigration detention, where he has since remained, pending the outcome of this application for review.⁵¹

Oral Evidence Before the Tribunal

The Applicant

54. The Applicant gave oral evidence on the first day of the Tribunal hearing. By way of overview, the Applicant’s evidence was to the following effect:

- ***Ashamed of his criminal history***

*When I read about it, I’m – I’m ashamed of how I have behaved.*⁵²

- ***Time in custody has afforded time to reflect:***

*All right. So, you have said you’re ashamed of how you have behaved. What has made you come to that realisation?---Being incarcerated for almost two years, I have had the chance to – I have had the chance to have a clear mind and see all the mistakes I have made in the past and the poor decisions I have made.*⁵³

⁴⁹ Exhibit R2, R6 page 151.

⁵⁰ Exhibit G1, G49 page 218.

⁵¹ Exhibit G1, G49 pages 219 to 221.

⁵² Transcript, p.6 line 30.

⁵³ Transcript p.6 lines 33 – 36

- **Seeking help for his drug addiction and anger issues:**

Again, I'm very ashamed of my actions on the day. I am – I am seeking help from external anger – drug and alcohol classes to help with my drug addiction and my – my anger issues.⁵⁴

- **Accepts that his offending is very serious:**

Yes, I – I – I accept they are very serious offences.⁵⁵

- **Remorse:**

MEMBER: All right. Now, what makes you remorseful? You say that you're remorseful. What is it that you regret? What's the basis for your feeling of remorse?--I let my family down. I let my two children down. I could have hurt – I could have seriously injured innocent people.⁵⁶

- **Rehabilitation:**

All right. Now, you mentioned earlier – I'm just going to move briefly to the topic of rehabilitation. You mentioned earlier that you had been undertaking some – I think you said counselling for drug and alcohol. Let me just ask you some questions about that. So since you have been incarcerated and/or in immigration detention, what if anything have you done to address your drug problems?---Well, whilst I was incarcerated, I attended a (indistinct) course, a low intensity – a low intensity course for four weeks. After that I done an eight-week medium intensity course. I put – I – I would have tried to do the high intensity course as well but I was – I was out of timing for it. I was – I was getting released to go on parole. It took me a long time to get in to do the medium intensity course. By the time I was – I had the chance to do the high intensity course, there – I was being released to the detention centre. When I got to the detention centre, I have been doing ongoing counselling with Wiser Ways and also QUIHN...⁵⁷

- **Programs undertaken whilst in Immigration detention:**

Mr Chand, you also gave evidence about doing some programs in immigration detention. Let's start with Wiser Ways. There's a document in evidence before the tribunal but I want you to explain to the tribunal precisely what it was you did with Wiser Ways?---Yes. So with Wiser Ways, we started first off with anger management, with anger – anger management. We had five modules that we had to complete, and again, it was based on knowing what makes me angry and dealing with my anger issues.

⁵⁴ Transcript, p.6 lines 43 - 44.

⁵⁵ Transcript p.7 line 39

⁵⁶ Transcript p.8 lines 09 – 13.

⁵⁷ Transcript p.8 lines 25 – 40.

MEMBER: Having done that course and, you know, having been put in a situation where you had to focus on your anger and think about your anger, what are the things that make you angry? What have you learned?---What I have learned? Not to – not to deal with things based on my emotions at the time, to breathe, and if I have to, take myself somewhere else, breathe and come back and deal with – find a solution or deal with the problem, just not while I’m – while I’m angry. Having these techniques to calm me down helps me so I don’t behave the wrong way.

.....

DR DONNELLY: Mr Chand, I’m just going to move on now, and you mentioned that you had done work with QulHN, the Queensland Drug Group. Can you tell me a bit more about that, what sort of work you did with them?---Yes. So, Henry is the name of my counsellor. He rings me once a week. He sends – he sends plans, some – some – I wouldn’t say modules. He sends paperwork for me to do every couple of weeks, but he’s just a really good support. He supports me well if I have any questions based on my anger or drug addictions. He helps me address – address them if I need solutions to help me through the week where I have problems. He’s really supportful in that way – manner.

And how much time have you spent having therapy with Henry, or Mr Mount?---Just – maybe just over two months now.

Yes. And how many sessions?

MEMBER: How many times have you met with Henry?---I haven’t met with him personally. We do Zoom conferences, and just on the phone.

How many of those have you had?---I know I’ve got it written down somewhere, but I forgot. Once a week for two months. One, two, three, four, five, six - - -

So maybe about eight?---Yes. Yes.

About eight?---Yes.

And how is that going?---It’s really very good.

You’re liking that? It’s helping?---Yes. Yes. Yes.

All right. What sort of topics do you cover with Henry?---Anger – anger management.

Yes. Anything else?---We – after we do anger – finish our – my anger management plan, we’re going to go onto a drug and alcohol plan.

Okay. All right. So the plan is to continue with Henry?---Yes.

And to move on to other topics once you have dealt with anger?---Yes.⁵⁸

- **Now drug free:**

DR DONNELLY: Mr Chand, I just want to ask you some other questions now. I think it’s common ground that you have had a serious drug addiction problem particularly in the past. You have mentioned that you were on drugs when you have committed the more recent offences. With that sort of factual background, do you think you have a drug addiction problem at the moment?---It has been two and a half years, maybe a bit longer, since I have been on drugs, and I’m – I – I am determined – I

⁵⁸ Transcript page 11 lines 11 – 25; page 12, lines 45 to page 13, line 39.

am determined to stay sober, be – be a sober person. So at the – at the moment, I – I'm – I still need ongoing counselling just to keep me motivated to stay off drugs, but I don't – I don't – I can't – I don't know how to call myself, if I'm an addict or not at the moment because I have been off drugs for two and a half years. I'm – I'm motivated and determined to stay off drugs. And the – yes.

No, no, sorry, I apologise. Go on. Did you want to finish what you were saying?---While I was incarcerated for two and a half years, it was – there was temptations that I had to face and I – I – having the skills to combat – combat these temptations, I've done really well and I'm happy for myself and I feel – I feel like a different man.

All right. You said that you had temptations. Just perhaps you could clarify for the tribunal, what kind of temptations precisely did you have?---As – as we – we probably all already know that drugs do get into the detention – into the prisons and detention centres. While I was in prison, I – the – the first couple of months, I didn't have a job. I just studied my Bible and kept my head down. I didn't focus on anybody else but myself. Once the – after this, I got a job in the laundry where I was locked in the laundry for – for about four/five hours a day where I kept myself busy, and if I wasn't in the laundry I would be back in my – back in my cell, my single cell reading my Bible, so I kept myself busy with certain things, just to keep my mind clear. Yes.

Okay. What about in detention? You mentioned prison. What have you been doing in detention, apart from what you have described?---In detention, we have activities to do every day. I have been doing activities as well as I have been – they have an anger – they have a – they have a drug course and an anger management course there as well which I've been doing as well, just keeping myself busy. I'm still reading my Bible every night and I'm doing as much as I can to keep myself in a positive attitude and keep my mindset positive and staying determined to my change.⁵⁹

- **Plans and a support structure to ensure the Applicant does not lapse back into drug use:**

DR DONNELLY: Thank you, Member.

So apart from your accommodation, do you have any plans to ensure that you don't relapse back into drugs? I mean, there will be pressures that we all face, there's COVID-19, there's a whole host of pressures in everyday life. What sort of plans do you have to stay off drugs?---Look, I know – I know what triggers me to get on drugs is surrounding myself with the wrong people. Being in – being in jail, I tested myself if I was going to surround myself with good people or with – with good people and leave these people behind in my life, so doing that, having that as my motivation and being – working with my dad and supporting my family, that's all I have in my mind at the moment. So just keeping myself busy with my dad, keeping my dad happy and my kids happy.

All right. You have mentioned that you have done some counselling/therapy work with Henry, and do you have plans to continue with sort of counselling, drug therapy counselling?---Yes, I think – yes, I do...⁶⁰

⁵⁹ Transcript, p.13 line 36 to p.14 line 33.

⁶⁰ Transcript, p.15 line 35 to page 17, line 04.

55. The Tribunal notes the Applicant to be a man of limited education, with a restricted range of expressive language, who now readily admits to problems with both learning and memory. Nevertheless, the Tribunal had a good opportunity to assess the demeanour and credibility of the Applicant, and now accepts his evidence to be truthful, and assesses that the Applicant's resolve to not re-offend or to use drugs again in the future is quite genuine.

Mrs Adelaide Chand

56. Mrs Chand is the mother of the Applicant. As became clear from the evidence Mrs Chand is in quite poor health, having previously suffered from brain tumours. These have left Mrs Chand with ongoing difficulties including breathlessness, and a lack of energy, requiring that she often rest during the day.⁶¹

"Okay. When you say you're okay and you're fine; do you have any difficulties with day to day activities at the family home?---I actually had difficulties getting here today, walking from our carpark, with my breathing. Yes, I do. I'm very tired. I run out of energy quite quick.

All right. And does that mean that you need to rest during the day?---Yes, I do."

57. Mrs Chand's medical condition has also left her in a state wherein she has lost all sense of taste and is now unable to do any of the family cooking. Mrs Chand's generally poor health - coupled with the fact of the Applicant being in immigration detention and thus unable to assist in the care of Child A and Child B - has meant that the primary burden of looking after the Applicant's children has since fallen to her husband, Mr Chand Senior, who already works inordinately long hours, seven days per week, managing his interstate transport business.⁶²

58. Mrs Chand gave relevant evidence in relation to the close and loving relationship observed by her between her son the Applicant, and his own children, Child A and Child B:⁶³

"Okay. I just wanted to ask you some questions about two of your 10 grandchildren. What relationship does your son, Adam, have with his children?---A very close loving relationship. They talk daily on the phone. He rings them after school every day and he asks them what they did today at school. It's a funny relationship, loving relationship and he cares a lot about them.

⁶¹ Transcript p.62, lines 40 - 45.

⁶² Transcript p.63 line 35, to p.64 line 21.

⁶³ Transcript p.63, lines 10 – 30.

All right. And when he rings them after school; how long does he speak to the children for?---At least 30 minutes each.

And what about the weekend?---The same. Could be longer the weekends.

Okay. And as best that you can tell the tribunal, you've described the relationship between Adam and his children as being a very close relationship, loving and funny; have the two children, your grandchildren, spoken to you about how they feel about their father?---Yes.

And what do they say?---[Child A] always tells me that he loves talking to his dad, catch up and tells him the problems the boy has at school and Dad would tell them how to go about it.

All right. And what about the other child?---The other child, [Child B], she has not big issues, all little issues. But, those two have a lot of fun to talk about. They laugh a lot."

59. Mrs Chand also informed the Tribunal that she speaks to the Applicant in Immigration Detention each day, by telephone. Mrs Chand's sense of things, as derived from these telephone calls, is that the Applicant is now very much improved, having had a lengthy period without any illicit drugs, and now has a far more pro-social focus regarding the future.
60. If released from immigration detention, Mrs Chand informed the Tribunal that the plan would be for the Applicant to reside at accommodation located at her husband's business premises (a plan already previously endorsed by the parole authorities), during the remainder of his parole period, and for the Applicant to be immediately employed in her husband's business on a full-time basis as a yardman, before returning to reside with Mr Chand Senior and Mrs Chand and Child A and Child B in the home owned by Mr Chand Senior and Mrs Chand at the conclusion, of the parole period.⁶⁴

"Okay. And what kind of contact had you had with Adam over the last few years?---By the phone. We talk daily.

Do you speak on the video communication, like, similar to this like a Zoom or a Facetime or something like that?---No, I don't know how to do that on my phone. That's okay. So, you say you speak daily by the phone; how long do you speak with Adam for roughly?---Roughly around 20 minutes."

61. In the event that the Applicant is required to return to New Zealand, Mrs Chand told the Tribunal that she and her husband would also be very likely to return to New Zealand, in order to provide effective support for the Applicant; although the Tribunal did form the clear impression that Mrs Chand has considerable misgivings about the hardship that this would

⁶⁴ Transcript p.66, lines 30-45.

cause for herself and her husband, as well as for each of Child A and Child B, and for her adult daughter in Australia, Ms Rikeshni Chand, and her partner, and their infant child ("Child C"), in the event that Mr Chand Senior and Mrs Chand do relocate to New Zealand:⁶⁵

"Okay. And is that [relocation to New Zealand] a conclusive decision is that's something you're thinking about?---That's something we are thinking about.

Okay. So, when you say it's something we're thinking about; is it fair to say that, put another way, that your future plans are in a state of flux at the moment?---Yes, they are.

Okay. I just want to ask you about your own emotions. I mean, obviously your son's had his visa cancelled and he's in a detention centre; how has that made you feel yourself?---That's in the centre?

Yes and that he doesn't have a visa at the moment?---Yes. No, that's not good. He could get deported back to New Zealand.

So, when you say it's not good; has it impacted you emotionally?---Yes, it will. Because, my daughter will be left here in her own. She won't have no help with her baby and plus we have a business to think about.

And what about yourself? I mean, you'd see doctors for your - - ?---Yes, all my hospital appointments or my future appointments, my specialist yearly, it will be – I would have to miss out on them which the specialists are only for my specific case at the PA hospital.

At the PA hospital; is that in Brisbane?---Yes.

62. The evidence given by Mrs Chand (and also by Ms Rikeshni Chand) in relation to the Applicant's ex-partner - Ms T - suggests that Ms T is very unlikely to be an appropriate alternative custodial parent for either of Child A or Child B, who currently reside with their grandparents, Mr Chand Senior and Mrs Chand, in the event that the Applicant is deported.⁶⁶ In these circumstances it seems most likely that Child A and Child B would also relocate to New Zealand, in the event that Mr Chand Senior and Mrs Chand do follow the Applicant back to New Zealand.

Ms Rikeshni Chand

63. Ms Rikeshni Chand is the sister of the Applicant. They are less than eleven months apart in age, *"So, pretty much we've been side-by-side most of our lives. We're really strong, we're really close"*.⁶⁷ Ms Chand is a former airline hostess, who has recently given birth to

⁶⁵ Transcript p.66, lines 5 – 29.

⁶⁶ Transcript p.69 line 35 to p.71 line 35.

⁶⁷ Transcript p.73, lines 37 – 40.

her own daughter, the Applicant's niece, Child C, and now resides on the Gold Coast, together with her partner Ethan.

64. Both Rikeshni Chand and Ethan work part-time in the interstate freight business operated by Mr Chand Senior, based in Brisbane: Rikeshni as an administration officer, and Ethan as a compliance officer.⁶⁸
65. Both Child C and Ethan are reported as having their own positive relationships with the Applicant.⁶⁹ Rikeshni Chand also now provides a lot of support and practical assistance to her parents in terms of assisting with the care of Child A and Child B whilst the Applicant remains in Immigration Detention.⁷⁰
66. Rikeshni Chand informed the Tribunal about the strength of the relationship between the Applicant and Child A and Child B; and described how that relationship was qualitatively better than is the relationship between the children and their biological mother, Ms T.⁷¹
67. Rikeshni Chand also informed the Tribunal about the positive changes that she had observed in her brother, the Applicant, over the course of his time in prison and subsequently whilst in Immigration Detention; and gave her views regarding the risks of the Applicant re-offending; as well as information about the Applicant's future plans: in the event that he were to be allowed to be released back into the Australian community:⁷²

"Let me ask you this – well, first of all, if your brother was released into the Australian community; do you think he would engage in criminal offending? ---No. No, definitely not. He's learnt his lesson and I can see the changes.

You said you can see the changes; what changes are you referring to?---Since he's been in the immigration centre, I'm able to see him more, interact with him more over the phone calls et cetera. But, when I first went to go see him in the immigration centre, I noticed just little things. Like, his eye contact. Before he wasn't good at holding eye contact and long conversations. The way we speak about our children now, yes, the way his personality has actually really changed since he's been away. He's really changed. The way he speaks, you know, he doesn't want to get involved with any bad things whatsoever. He just wants to focus on the children and what we're going to do if he gets out if he's able to stay here. We just think of the positive

⁶⁸ Transcript p.82, lines 5 – 35.

⁶⁹ Transcript p.74, lines 10 -23; 31 – 41.

⁷⁰ Transcript p.75, lines 5 – 10; p.81, lines 20 – 36

⁷¹ Transcript p.11 to line 40.

⁷² Transcript p.77 lines 1 – 35; p.78 lines 11 – 47.

things and he doesn't like talking about negative things. So, we try focus on the positive and we try to just support each other and come up with what are we going to do when he comes out.

Okay. Has Adam spoken to you about drugs in the last couple of years, illicit drugs?--Not directly about drugs. But, I am aware of his drug addiction he had. What can you tell the tribunal about that?---Well, I personally think that he was dealing with his mental health issues and, due to his mental health issues, led him to his drug addiction and his mental health went even way further than any of us could see or even try help or anything whatsoever. He never had it around us or anything. So, yes, it was really difficult to identify for us, or for me. And have you seen him on drugs in detention or prison?---Not at all. I've seen his reports from the prison and I know he was in a good behaviour unit and, yes, it was very good reports from everyone. And I speak to the immigration officers when I go to see him and they call say to me and my father that Adam's one of the good ones, he's really respectful in the immigration centre which is lovely to hear."

68. Ms Rikeshni Chand also expressed her concerns regarding the potential repercussions, in the event that the Applicant were to be deported back to New Zealand:⁷³

"All right. Now, just moving on to another topic briefly. In the event that your brother, Adam, was unsuccessful in these proceedings, he would need to go back to New Zealand; how would that make you feel?---Well, firstly, losing my brother would be really – I would be really upset to lose him. Sorry. (Witness distressed.) Secondly, my parents would go back too. So, I would lose everyone here. I would lose everyone.

MEMBER: Why would your parents go back?---For my father. I think he can't justify living here a good life while Adam is struggling back in New Zealand with no support. I don't think he would.

Your father has what appears to be a good business?---Yes.

He's got a house here, he's got a business here, you're here, his granddaughter is here, or one of his granddaughters; why would he give all of that up and go back to New Zealand if Adam went?---One thing about my father is his children come first. They came to Australia first because I was here and I asked them to come here to support me here. That was when he first came here, they all came. He would do anything for me and my brother. He'd do anything. He loves us more than anything in the world.

Isn't the most important thing your father can do is to continue to provide financially? I mean, he seems to have given your brother a lot of the years, particularly in terms of financial support?---Yes.

Isn't that the most important factor?---Money, you mean? Does that mean like financial?

Well, being able to provide that support?---I think in his heart, money is not everything. I think he wouldn't be able to carry on waking up every morning knowing that his son's not okay.

⁷³ Transcript p.75 lines 41 to p.76 line 25; p.79 lines 25 – 34.

.../

Okay. Again, this might sound like a silly question but it's a follow-up question. In Maori culture – just expanding on what you sort of said to the tribunal – how do Maori culture deal with some mental health issues or what you're referring to?---From my knowledge, there's a lot of suicide. There's a lot of suicide that happens in New Zealand where especially young males don't know how to deal with what's going on with themselves, a lot of alcohol abuse. And they feel quite alone. So, they tend to turn towards – like, in New Zealand there's a lot of gangs . So, they turn to the gang for, like, a family."

Child 'A'

69. Child A is aged 13 and is currently in year 8, at high school. Child A gave evidence in relation to his daily communications by means of telephone with his father, in Immigration Detention. From this evidence the Tribunal formed the strong impression that the Applicant remains actively interested in the welfare of Child A, and that Child A retains a strong desire to engage with his father, no matter the fact of their enforced separation whilst the Applicant is in Immigration Detention. The evidence before the Tribunal makes clear that Child A regularly seeks to converse with his father and reveals Child A as willing to confide in the Applicant, and to turn to him for advice and guidance regarding the difficulties and challenges of adolescence. The impression formed by the Tribunal is also that the Applicant's parenting skills have continued to improve steadily, during the period of his enforced sobriety while incarcerated:⁷⁴

"Yes. What have the issues at school been?---Just friends and stuff, arguments, people dying, stuff like that.

At school?---Yes.

Yes, all right. But, it's getting better?---Yes.

Do you talk to your dad about that stuff?---Yes, I talk to my dad with that.

Yes, all right.

DR DONNELLY: [Child A], you had just said people are dying; what do you mean by that?---Well, 11 February, a Friday, my friend, [Redacted], Year 12, he passed away. Yes, he was only at school for two days. We don't really know how he passed though. It was either suicide or he did something stupid.

MEMBER: So, that shocked you?---Yes.

And you talked to Dad about that?---Yes.

...

⁷⁴ Transcript p.85 lines 1 – 20, 25 – 33.

DR DONNELLY: Okay. [Child A], it might sound like a silly question. But, I have to ask it. Do you want your dad to stay in Australia?---Yes, of course. Yes, of course I do. It just sucks without someone to talk to, like, in person.

MEMBER: I mean, you talk to your dad every day on the phone?---Yes.

Now, if he were to get deported, you could still do that; couldn't you?---Yes.

You could still talk on the phone. So, that wouldn't change?---No. But, it's different in person.

70. Although no direct oral evidence was taken by the Tribunal from Child B, there is enough evidence before the Tribunal for it to conclude that the Applicant has a positive parental relationship with Child B, as well,

71. As became clear from the totality of the evidence from the Chand family, in the event that the Applicant were to be deported, Mr Chand Senior - as the family patriarch - has determined to uproot his family and return to New Zealand in order to support the Applicant during his recovery from mental illness and transition from prison/immigration detention back into the community. The prospect of a relocation to New Zealand in this context was put to Child A:⁷⁵

"Okay. And if your dad had to go and live in New Zealand; how would that make you feel?---Sad. Because, I'd probably have to go there too, and I really don't want to.

You say you really don't want to go there?---Yes.

Why is that?---Well, one, I have no family that I really know there. Two, I'd be leaving all my friends and everything, like, my entire life here, I'd be leaving that behind.

Have you been to New Zealand?---I was born there and then I immediately came here. And I visited for three/four days when I was, like, ten.

And have you been back since?---No.

...

Okay. And just a final question from me. You've spoken to your father over the last couple of years; have you noticed any changes in him?---Yes, kind of. He seems, like, much – like he sounds, like, when he's talking it's not rude, it doesn't have any aggression in it and it overall sounds like he wants to listen.

Overall wants to listen. So, as in listen to what people say to him in a conversation?--Yes, he brings up stuff from, like, I'll ask him, like, 'What's happened?' and he'll be, like, 'Oh nah, this' – I was asking him this and he was chatting with [Child B] and so, yes, he also sounds like he wants to listen to me and that helps with me a lot.

So, just if we could take a step back before Dad had to leave the family; was he different? Was he more aggressive? Was he rude or not listening as much?---Yes. Before he left he was much more aggressive and you could hear it.

⁷⁵ Transcript p.86 lines 18 – 30; p.87 lines 11 – 44.

Okay. And just a final question if you can answer it. What do you think has brought about this change for your dad as you see it?---Can you please reword that?

Yes, certainly. So, you said that you feel like your dad's listening more now, he's chatting with [Child B], he's not as aggressive not as rude and overall, he wants to listen and you described that as being different from before when he was in the community; what do you think has brought about that change for dad? The shift in the way he reacts?---Sorry, I still don't understand.

That's okay. I'll put it in more simple terms. So, do you believe that your dad has changed over the last couple of years?---Yes, I do.

Okay. Are there any reasons that you think he's changed? ---Maybe the realisation that he has to get better."

Mr Anesh Chand

72. Mr Chand Senior is the father of the Applicant. He was an impressive witness. Now aged 54, Mr Chand Senior was born in Fiji in impoverished circumstances, before moving to New Zealand in 1987, where he worked as a long haul truck driver, before relocating to Australia and starting a similar business, in 2011. Mr Chand Senior clearly has a prodigious work ethic. Since his first arrival in Australia in 2011, Mr Chand Senior has built a business enterprise from a single prime mover to the point where the business now has 18⁷⁶ prime movers, 32 trailers, 21 employees; a wages bill of \$50,000 per week;⁷⁷ together with additional expenditure of approximately \$160,000 each month on financed business equipment.⁷⁸ Mr Chand Senior very clearly has considerable and unrelenting business obligations, together with the primary care responsibilities for his two grandchildren Child A and Child B, in addition to his carer obligations for his wife, Mrs Adelaide Chand.
73. Throughout the Applicant's formative years in New Zealand, Mr Chand Senior was frequently absent from home and on the road driving as part of his business enterprise. It is now satisfactorily clear to the Tribunal that Mr Chand Senior – and no matter whether rightly or wrongly – feels a strong measure of guilt that the Applicant's circumstances and conduct are attributable to his own frequent absences from home due to his work commitments, during the Applicant's formative years, in New Zealand. Now that Mr Chand Senior has a proper appreciation of the true nature and extent of his son's mental health condition, Mr Chand Senior is obviously determined to make amends for his past absences,

⁷⁶ Transcript p.94 line 44.

⁷⁷ Transcript p. 93 line 34.

⁷⁸ Transcript p.107 line 30.

and to invest considerable time and resources into the redemption of the Applicant. As became clear from his evidence, Mr Chand Senior has a solution in mind. To this end, in the course of his examination-in-chief, Mr Chand Senior provided the following:⁷⁹

[MEMBER:] "Right. You're proposing that Adam will come and be your yardman? - --Definitely in the yard, yes.

Yes, all right. Now, just explain to me – I've heard a lot of evidence about Adam living at the yard?---Yes.

Tell me about that?---Well, we couldn't get him on parole to come to stay at our house. Because, we had a bit of issue with Adam before. No, I didn't realise he was mentally sick basically. He was taking drugs. I've never touched drugs in my life. I've never seen drugs in my life. So, I had no idea what he was doing. So, a few times we ended up in arguments, short arguments when his ex-partner came over and all that. They had argument, I jumped in there to stop that and I rang the police. So, the police was called and they couldn't get parole to stay at that address for that reason.

All right?---So, I've got a place. Like, we've got an office there, I've got a caravan there. Sometimes drivers come overnight and they sleep there in the caravan. But, I've made a special room for him in the office so he can stay there till the parole is over.

All right. When does parole expire?---I think he's got another five/six months. I'm not 100 per cent on that.

All right. So, at least till the end of the year?---Yes.

All right. So, the plan would be he would live at Rocklea at the yard?---At the yard, yes.

Be the yardman?---Yes.

I've also heard evidence that you generally knock off work at 3 o'clock and pick the kids up?---I knock off work at two. (Indistinct words) leave work at 2 o'clock to be the first in the queue to pick the kids up.

Yes?---I sit there for 45 minutes.

Right?---Then I take them home, get the dinner and all that, then we speak to Adam every afternoon and then I go back to work like 10/11 o'clock I've got to work at night.

All right, I understand?---Yes.

So, Adam would go with you in the afternoon, spend time at the house?--- Pick the kids up with me, I'd drop them home, he can do all the dinners and all that and then I can go back to work and then I will go back and pick him up and take him to the yard to stay.

All right. Adam doesn't have a licence; does he?---No.

No. When is he eligible to get a driver's licence?---I think he's gone one more year to go on it.

All right?---Yes.

⁷⁹ Transcript p.95 lines 35 to p.97 line 5; p.98 lines 5 to p.99 line 10; p.99 lines 20-40.

So, you would take him to the school, drop him at home?---Yes.

He would do the afternoon shift at home?---Yes. You'd go back to the office?---Yes.

You'd come home from dinner?---M'mm. And then you'd drive him back to the office again?---Office again, yes.

...

All right. Why do you say that he won't go back to drugs now?---Yes. Because, now I know he's taken the drugs and working at work, we got a random company just comes and does the drug test for our drivers and all that. And he'll be part of that, that's the law. We've got (indistinct) in our yard and the company we work for, it's called Mainfreight Beacon. Every person on that Beacon has to be drug tested - - -

Beacon, B-e-a-c-o-n?---Yes.

Yes. So, this is part of your contract with Mainfreight?---Yes.

Because, you're a subcontractor?---Subcontract with them, yes.

You've got to participate in that safety system?---Yes, safety system and all that.

All right?---Because, we've got a workshop in our yard, we've got 32 trailers. So, most of the time the trailers are sitting in Mainfreight yard in Larapinta. So, mechanics – when part of Adam's there too – they'll go there and they check the tyres, they fix the tyres, they grease the trailers. So, everybody walks in that gate has to be compliant.

All right. So, they test for what drugs; alcohol, what else?---Everything. Alcohol, drugs.

Everything?---Everything.

How often would your staff be tested at Larapinta?---Larapinta can be done this week twice. And then drive to Sydney, Mainfreight. The next night they'll do it there.

That's the drivers?---That's the drivers.

But, what about somebody like Adam who's going to be a yardman?---Yes, in our yard we do once a month. But, random tests we got to do that and we've got to put them in Beacon system so Mainfreight can see we've done the test. And Mainfreight can do it anytime there. If you walk in that gate, the drug bus could be there anytime. Like, three in the morning – I've seen the drug bus there at three in the morning.

Yes?---You come in the gate, (indistinct words) are tested.

If Adam's working there; couldn't he conceivably avoid the random test while getting to know the routine?---No, he can't. We got to do it. We've got to put in the system that it's been done. So, once we done the test, they give you a yellow form, we scan it, we put it on our system and we send it to Mainfreight as well. So, (indistinct words) an update and Adam walks in there, all they've got to do is put his name on the system, it come up and tell them when he did the drug last test.

All right. And that's done a third party testing agency?---Yes, third party, yes."

...

DR DONNELLY: "Mr Chand, in terms of the relationship between Adam and his children; how would you describe the relationship?---I think I'd use the word excellent because they can stay on the phone for hours. And especially the weekend, if I want to take out them shopping or something, they wouldn't go. Because, they'll wait for their dad to ring or they'll ring as soon as I go.

And what kind of relationship does Adam have with the rest of the family? Your wife and his sister?---Pretty much pretty good, yes. He's a very changed person. We've seen that lately.

Sorry, you said Adam's a pretty changed person?---Yes.

What do you say that for?---The way he speaks now, the way he talks. I think what difference I find is that he's taking his medication, he's doing his (indistinct words) he gets his tablets and all that. So, I think we've got to keep him on it and make sure he does take his pills and all that and I think he'll come the other side now.

MEMBER: When did you first become aware that your son had a mental health condition?---When he went to prison."

The Expert Opinion Evidence

74. There is a forensic psychological report dated 10 February 2022 now before the Tribunal, prepared by a Professor James Freeman.⁸⁰ The Respondent submits,⁸¹ and the Applicant concedes,⁸² that only diminished weight can attach to the opinions expressed by Professor Freeman, by reason that Professor Freeman did not have the benefit of the documentary evidence in relation to the Applicant's New Zealand offending at the time of his preparing an assessment of the risk of recidivism by the Applicant.
75. Bearing that caveat in mind, and in summary, the Tribunal notes that Professor Freeman opined as follows:
- The Applicant presents with:
 - Cannabis dependency disorder (partial remission in a controlled environment);
 - Methamphetamine dependency disorder (partial remission in a controlled environment);
 - Persistent depressive disorder (longstanding in nature); and
 - Below average intelligence;

⁸⁰ Exhibit G1, G27.

⁸¹ Exhibit R1, paragraph [43].

⁸² Exhibit A1, Applicant's SFIC, paragraph [50].

- There is limited evidence to indicate that the Applicant has any form of personality disorder. Rather, the Applicant's offending behaviour is likely better explained via polysubstance drug dependencies; a vulnerability to fail to recognise high risk situations and [to] employ appropriate solutions. There is some evidence to suggest that the Applicant was vulnerable to sporadically utilise reactive violence when agitated or exposed to an emotional stressor: *"taken together there is a body of evidence to indicate that he can engage in erratic behaviours when impaired and/or agitated. As a result, he has a vulnerability to engage in impulsive and reckless behaviours with reduced consideration for the consequences. As such, he can engage in self-damaging behaviours, particularly when impaired with illicit substances"*,⁸³
- The Applicant rates 'well below' the average prisoner's ranking on the *Hare Psychopathy Checklist (PCL-R)* (a reasonably accurate predictor for the risk of sexual and violent recidivism);
- The Applicant rates at the borderline between "low" and "medium" on the 'HCR-20', (a checklist tool designed to assess the risk of future violent behaviour);
- The Clinical Summary of Professor James Freeman now provides the following:⁸⁴
 - "14.1 Mr. Chand is a 31 year old male who experienced a relatively stable childhood, although he appears to have been exposed to a negative peer support group during adolescence (that promoted alcohol abuse). He was also provided with an opportunity to obtain an education, although left school prematurely likely due to learning difficulties. He was quick to enter the workforce (e.g., 5 years in the forestry) but struggled with substance abuse. He subsequently attempted to seek improved lifestyle stability/conditions in Australia. However, he was destabilised by engagement in a volatile relationship and depression (that stemmed from his mother's poor health). This instability was intensified with the development of a methamphetamine dependency that: (a) appears to have set the foundation for a range of offending behaviours, (b) contributed to ongoing lifestyle instability, (c) reduced his contact with his children and (d) likely reduced his capacity to respond appropriately to emotional stressors (and seek treatment for his depression).
 - 14.2 The origins of the most recent offences can be directly attributed to his methamphetamine dependency that produced an episode of drug induced

⁸³ Exhibit G1, G27, p. 177).

⁸⁴ Exhibit G1, G27, pages 179 to 181.

psychosis (during which time) he engaged in a range of irrational/delusional behaviours. The applicant's broader offending behaviours can also be attributed to substance abuse, his failure to recognise and respond appropriately to high-risk situations (e.g., below average intelligence) as well as his ongoing depressive disorder. In regard to his drug use, it is noteworthy that methamphetamine usage promotes maladaptive decision making and response inhibition and elevated risk-taking propensities and cannabis use can create further deficits in decision making. However, it is likely his methamphetamine dependency disorder created the greatest level of lifestyle instability, and he readily accepts utilising the substance as a dysfunctional coping strategy for his depression. In regard to the latter, a secondary contributing factor was likely his depression, as individuals who suffer from depression are more vulnerable to make impaired decisions. Taken together and given the above-mentioned contributing factors, it may be proven likely that he didn't have the skills to break the addiction cycle at the time (particularly given the addictive nature of methamphetamines).

- 14.3 The risk of recidivism relates primarily to a condensed set of factors associated with:

Avoiding relapse into illicit drug use, particularly methamphetamine dependency as well as association with drug associates that condone or promote illicit drug use. Encouragingly, he has a sufficient level of insight into the origins of his offending behaviour and reports: (i) a strong motivation to avoid similar behaviour, (ii) engagement in various drug rehabilitation programs (e.g., LSI and MSI) that has resulted in the development of some strategies to avoid relapse. However, and not surprisingly, he will also need to be vigilant of relapse for an extended period of time as methamphetamine dependency is usually chronic and requires lasting aftercare e.g., treatment, support and monitoring;

Avoid contact with past associates that condone/support drug use; and

Remain under the care of a medical practitioner to manage his depressive symptomatology (via medication) and provide referrals to psychologists in order to improve his resilience and set/achieve lifestyle goals. In regard to such goals, his capacity to respond appropriately to emotional stressors will likely be improved if he can obtain greater lifestyle stability e.g., relationships, employment, etc.

- 14.4 There are some protective factors, including: (a) support of parents (that includes accommodation), (b) good employment prospects in Australia (with parents that will include drug testing), (c) willingness to engage in on-going treatment, (d) no intent to attempt to reconcile with his former partner, etc. Additionally, Mr. Chand reports that his current period of incarceration is a significant deterrent against recidivism and the threat of visa cancellation is profoundly unsettling. In regard to the latter, research has demonstrated that the application of legal sanctions can create a specific deterrent effect among certain individuals in regards to reducing the risk of recidivism, and he presents as cognisant of such threats.

- 14.5 In summary and based on the writer's Structured Professional Judgement (SPJ), Mr. Chand presents as a male who has been destabilised by poly-substance disorders that was likely exacerbated by his below average intelligence and depression. He has subsequently displayed a vulnerability

to experience lifestyle instability, that resulted in his placement in a range of high-risk situations that was followed by poor decision making. Throughout such difficulties, he appears to have continued to receive significant assistance from his parents (particularly his father), and the family are reportedly committed to assisting him achieve his above mentioned goals.

- 14.6 *In regards to the cancellation of his visa, Mr. Chand has not resided in New Zealand for a number of years e.g., since 2011. While he acknowledged having extended family members in the country (e.g., Uncles), he remains unsure of their whereabouts. Given this, he could not identify clear accommodation options and was uncertain about employment opportunities. In regard to the latter, he is cognisant that his father (who he remains heavily dependent upon) may close the business and relocate back to New Zealand (in order to continue to support his son), although he recognises this is not a particularly attractive option and enhances the negative impact on the secondary victims e.g., parents, children, etc. Taken together, Mr. Chand is likely to experience a range of hurdles/challenges reintegrating (and achieving lifestyle stability) in New Zealand.”*

76. In light of the acknowledged limitations in the report prepared by Professor Freeman, the Applicant arranged for a supplementary psychological assessment to be prepared by a Mr Matt Visser, also a clinical psychologist.⁸⁵ Mr Visser’s report, now dated 6 June 2022, is also before the Tribunal, as document A2, and Mr Visser gave oral evidence on the resumed hearing of the Tribunal on 15 July 2022 by means of audio-visual link.
77. Ultimately, Mr Visser opined that the absence of the New Zealand offending information from the materials used as background material before Professor Freeman’s HCR-20 ‘risk of recidivism’ assessment would have only slightly impacted the outcome of the HCR-20 assessment.⁸⁶
78. In light of that evidence, and ultimately, the Tribunal concludes that any initial concerns about the reliability of Professor Freeman’s risk of recidivism assessment are allayed, and the Tribunal assesses the HCR-20 result - as prepared by Professor Freeman - to still be sufficiently predictive that the Tribunal may now place reliance upon - and attach weight to - Professor Freeman’s report.
79. The Tribunal now accepts the conclusions reached by Professor Freeman: particularly those in relation to the relatively low risk of recidivism by the Applicant, and as to those

⁸⁵ Exhibit A2 pages 1 – 22.

⁸⁶ Transcript p.119, lines 15 – 45.

specific concerns identified in paragraph 14.6 of Professor Freeman's report, as now excerpted, above.

80. Mr Visser conducted his own clinical consultation with the Applicant on 3 June 2022 and assessed the Applicant as suffering from 'Persistent Depressive Disorder', with intermittent 'major depressive' episodes; as well as 'Stimulant Use Disorder, Amphetamine-type substance', with severe symptoms, yet presently 'in remission, in a controlled environment'. The slight differential in the diagnoses by Professor Freeman and that by Mr Visser appears to relate to the timeframe differences in their respective assessments, as well as because of some adjusted nomenclature between DSM-IV and DSM-V.⁸⁷ Ultimately, the Tribunal accepts the diagnoses and opinions regarding risk as now given by each of Professor Freeman and by Mr Visser, and assesses these two professional opinions as substantially consistent.

81. Contextually, Mr Visser's report observes:⁸⁸

"The family moved to Australia in 2011, having their daughter shortly after arriving. The relationship with [Ms T] was highly problematic on a number of fronts, including drug use, violence, infidelity, and issues around the care of their two children. During their relationship he described his mood as decreasing progressively, to the point that he met the criteria for a Major Depressive Episode. That has continued, now meeting the criteria for Persistent Depressive Disorder, a condition where a person experienced a prolonged period of low mood and related symptoms. At the age of 21, he began using methamphetamine, which quickly developed into dependence, constituting the diagnosis of a Stimulant Use Disorder.

As is often the case with drug use, I believe that his methamphetamine use is both causal to, and symptomatic of, his mental health issues. That his depressive symptoms have persisted well beyond the period of substance use suggests that, to at least at some degree, they are not exclusively related to his drug use. His offending behaviour also seems highly related to both his drug use and the relationship with [Ms T]. In this the most likely causal chain is that Mr Chand had persistent mood and relationship issues and chose to self-medicate with methamphetamine. As he never addressed the underlying cause, he would manage his symptoms through drug use, which in turn resulted in offending behaviour, resulting in further situational issues.

There are a number of likely impacts on Mr Chand and his family were he to be deported to New Zealand. Firstly, it would likely cause a decrease in his mental health, increase his risk of relapse into drug use, and from that recidivism. Research has shown that a significant change away from family support systems destabilises mental health and increases the risk of relapse for those with comorbid substance

⁸⁷ Applicant's Statement of Facts Issues and Contentions, paragraphs [81] – [82].

⁸⁸ Exhibit A2 pages 2 – 3, lines 65 – 125.

use and mental illness (Clark, 2002). His father indicated that there would be issues in attempting to relocate himself and his wife to New Zealand due to his business interests and the children's schooling. He described a difficult choice for himself and his family however, as he believed that were he not to do so, Mr Chand would become homeless without direct family intervention, making relapse an almost certainty.

Deportation from Australia is likely to have a negative impact on the children. While there is little to no research on forced deportation in an Australian context, a recent study looking at deportation of fathers between the US and Mexico suggested it can create "short and long-term adverse mental health outcomes [for children]." (Ojeda, Magana, Burgos & Vargas-Ojeda, 2020). While I cannot comment on the specific needs of his children, positive involvement of biological parents can be a significant protective factor for children in supportive care. Research into child development has highlighted a number of issues resulting from absent fathers, such as lower school completion, poorer social-emotional adjustment, and lower mental health as adults (McLanahan, Tach & Schneider, 2013). This is likely to be particularly problematic if the children's biological mother is less involved in their care, as seems to be the case in this matter.

The support of his children is also dependent on the current circumstance on his parents. Given his mother's failing health, it is likely that the family would benefit from Mr Chand's assistance both practically and emotionally. While there are alternative supports available to his parents in looking after his children, it is unlikely they would be as beneficial as direct involvement from their biological father. Mr Chand's description left little doubt that he cared for his children, but also suggested that he has spent much of his time outside of custody away from their home or unable to care for them directly. Many of his previous issues in caring for his children appear related to his drug use, and as such appropriate intervention would be critical in terms of being able to maintain his role as a father.

In terms of a treatment plan were he to remain in Australia, there are several available options. It is positive that he has been placed onto antidepressant medication, and such medication is likely to mitigate a degree of his mental health issues. Ongoing management through his GP would be sufficient to maintain a therapeutic dosage. Given that he has reported positive engagement with supportive counselling for both his anger management and drug use, continued support in that regard will decrease his risk of reoffending. Such support could be either through an individually based drug and alcohol counselling service, or through a group-based program such as Narcotics Anonymous. Due to the period of abstinence, I do not believe that it is necessary at this stage for him to attend a residential rehabilitation program. He may also find benefit, as suggested by Dr Freeman, in engagement with a psychologist to assist him with developing alternative coping strategies for his mental health issues. His father suggested that he was willing and able to support Mr Chand to that end.

82. During the giving of his oral evidence before the Tribunal, Mr Visser provided the following further elaboration upon his opinions:⁸⁹

⁸⁹ Transcript, p. 112 line 30 to p. 116 line 17; from p. 120 line 1 to p. 121 line 39.

DR DONNELLY: "All right. I just wanted to ask you some questions about those diagnoses. In relation to the diagnosis of persistent depressive disorder, would you say that that disorder is in remission at the moment or that's a persisting mental disorder?---Still current. And would you say that it's being appropriately managed at the moment?---Relatively. He's currently on anti-depressant medication which is certainly a good start in terms of doing that. And he also mentioned that he's been engaging in therapy which is again a positive. I mean, it will be as well managed as it can be I guess in a remand circumstance. So potentially better managed in the community but certainly those two would be – they're the majority of the treatment options.

And you mentioned potentially to be better managed in the community. So if the applicant were released into the Australian community, what is your opinion on the prospects of the applicant's depression being appropriately managed?---Look, I think with family support, that would be beneficial in terms of the condition. Certainly, the nature of – particularly the persistent depressive disorder is that it's quite consistent between different sort of environments. So, I would suspect it would still be there, at least to a moderate degree, progressively over time. But yes, with the family support, potentially current group supports through something like narcotics anonymous, would also be of assistance. And then we'll kind of tie with the therapy directly. I think would be better than what he's receiving currently. But I believe that the condition will still be there.

And you mention later in your report that the applicant could seek assistance from a GP, a general practitioner. What kind of assistance were you thinking of?---Primarily around the management of the level of the anti-depressant medication I believe is what I referenced there. So ongoing management with a GP, although obviously additionally, the sort of standard GP management for any other health conditions that arise.

Right?---That would be of primary assistance. And probably also a referral through the better access to mental health care scheme to be able to get ongoing therapy in the community.

Thank you. And I notice also at paragraph 40 on the first page, you refer to the substance use disorder with severe symptoms in remission. So is it your evidence that if the applicant were released into the Australian community, he would still be in remission? Or what is your precise evidence?---So in remission refers to a period of time without substance use. So in this case, it's longer than 12 months. I believe it's been around 20, give or take, since he's last used stimulants. (Indistinct) a controlled environment, sort of stipulates that it has been, you know, an environment where getting substances is more difficult. So in remand or in custody in this case. So it would still be there. Essentially, it has the potential to sort of move back into being in active use but that would really depend on how it's managed of course. If that answers your question.

Yes, thank you.

MEMBER: Mr Visser, it's the Member here. Looking at your executive summary and the two bullet points which constitute your diagnosis, in relation to the second bullet point, use of the words "in a controlled environment", I read that as being a qualifier on the diagnosis in the sense that "in remission" [is] solely because Mr Chand is in a controlled environment.

Now, if Mr Chand were to be released into the community, and it's no longer a controlled environment, what's the prospect of the disorder no longer being in

remission? Is that a significant qualifier to your diagnosis or not?---It's a good question, Senior Member. The – in a controlled environment, there isn't necessarily saying that it wouldn't be – like, as in that diagnosis, it is just literally that. He is currently in a controlled environment, but not necessarily whether or not he would or wouldn't be outside of it. The prospect of relapse in this case I think is very significant. In terms of what – the outcome on his mental health, in terms of his ability to engage with his family, et cetera. I think it will come down to how strong the support is to mitigate that. There's always a risk. I mean, he certainly has a long history of stimulant abuse and dependence.

Yes?---And so – yes, it is currently in remission. It means that he's had a period of time – an extended period of time without use. That's of benefit in terms of reducing the risk that he'll relapse. There is of course a chance of it. it [sic] will depend a little bit on how much he engages with, you know, the treatment options that are around and - - -

Just in relation to treatment options, specifically in relation to methamphetamine. My understanding – and I stand to be corrected if I'm wrong – is that really, the treatment options for methamphetamine addiction aren't very good. There are well developed addiction treatment regimes in relation to narcotics but in relation to amphetamine type drugs, particularly ice, the options out there are pretty thin on the ground. What's your understanding?---Well look, certainly from a pharmacological point of view, that's absolutely the case. There's pretty robust treatments as you say for opiates but in terms of amphetamines, I'm not aware of any drugs that are able to be prescribed to reduce the cravings or the potential (indistinct).

(Indistinct) - - - ?---The options then become - - -

- - - for example, Naltrexone, for amphetamines, is there?---No. Nor any of the methadone or any of that kind of stuff. No, not at all. So instead the treatment options then become, like psychological in a residential rehabilitation, those kind of treatment options. Certainly they're reasonable in terms of them. I mean, that's what they use for pretty much every other form of substance use. So, you know, say alcohol use disorder. An alcoholic, there aren't a lot of – there are some – there aren't a lot of things that will prevent that use or benzodiazepines, people get addicted to Valium and that kind of thing. Almost all of those are managed through community settings. So things like rehabs, narcotics anonymous or AA. Through ongoing drug counselling therapy, those kinds of approaches. So those would be the approaches that would be used in this case.

All right. I understand. Thank you?---No problem, Senior Member.

DR DONNELLY: Mr Visser, just following up, on page 2 of your report at about paragraph 75 on page 2, you opined that the applicant's – this is the second sentence – depressive symptoms have persisted well beyond the period of substance use. You suggest that to at least at some degree, they are not exclusively related to his drug use.

Can I ask you what is sort of the premise for that opinion, that the depression is not necessarily fully co-extensive with drug use?---Of course. So one of the considerations, certainly in any kind of mood disorder is the influence of drugs on mood. Obviously, you know, abusing stimulants can impact mood in a variety of different ways. Given that it's been quite an extended period of time without him being on substances and the depressive condition has persisted throughout that time, that it's reasonable to extract the two and say, look, while they absolutely have a self-reinforcing cycle, I'm sure that that's (indistinct) but given that it's been an

extended period of time well beyond, you know, the immediate kind of withdrawal effects of the drug, depressive symptoms have continued. That it is at least to some degree separate from that or would persist beyond that even without the (indistinct).

I know this is a difficult question. If you can't answer it, that's okay. Are you able to give a time period for – in your professional opinion, how long the applicant has suffered from depression?---It seems to have been quite a long time. Sorry, the exact time of the onset, I did comment on it somewhere here. Yes, it seemed to sort of coincide around the relationship with [Ms T] and that was certainly his father's opinion of it as well. So it was, yes, during the relationship. So I would have said around 21. So I believe he's 30, 31 at the moment. So about 10 years. But obviously influenced by the drug use as well.

Yes. And you say also on page 2 of paragraph 84 – or line 84, I should say – that if the applicant were to be removed to New Zealand, it would likely cause a decrease in his mental health and potentially exacerbate or increase his risk of relapse into drug use and recidivism. Why do you say that for?---I mean, there would be the change around – away from his family, essentially would be the main difference in that. So his father certainly seemed very supportive and very proactive and obviously the engagement with his children. While it's been problematic throughout the history, it seems to be a motivator for him to be able to maintain abstinence. Without those two, I think they would significantly increase if he didn't have those familial supports there.

So let me just as you this hypothetical scenario. If you just assume for the moment that the applicant's parents, mum and dad were to join him in New Zealand for example, would his mental health still be impacted?---I would say to a lesser degree. Certainly if that involved relocating the children as well – and I'm not sure whether or not that's part of this hypothetical scenario. That's my understanding. The biological mother is – sorry Senior Member, did you have a question?

MEMBER: Can we presuppose for a moment that the hypothetical scenario does include the children relocating to New Zealand, as well. Mum and dad and [the] children relocating to New Zealand. What would the impact on his mental health be then?---Look, I would say certainly in terms of the negative, it would be fair less. Far less. As they're kind of the main supports around him maintaining abstinence, I think him relocating with the entire family and the children would significantly mitigate all of those effects.

All right, thank you?---No problem, Senior Member.

DR DONNELLY: Just to take that one step further, say you were to presuppose that the parents were to join the applicant in New Zealand but the children were to stay here and say for example, be cared for by his sister, what would – would your opinion change?---Yes, look, it would fall between those two points really. That the children, as I said, are one of the reasons for that. I mean, I believe him missing them would have a negative effect than him not having access, like, direct access to them, would increase the likelihood of relapse and mental health issues but to a lesser degree given that if his parents were there and were supporting him, that, yes, that would still be quite beneficial, because his father in particular really seemed to be the strong support.

...

MEMBER: All right. One of the things that's turning my attention as I think through this case is [the] risk of this fellow not so much relapsing into recidivism, but relapsing

into drug use because of an inability to cope with ordinary life stressors. And because of stress generally, turning to drugs and then in consequence of the drugs, then lapsing back into crime. Do you have any comment to make on Mr Chand's ability to cope in the community without being tempted to rely upon drugs if confronted with ordinary stressors in life? You know, a domestic dispute with family, a relationship breakdown, some other normal difficulty that any person can face. But the risk in this case would seem, based upon the history, that he might turn to drugs in an attempt to self-medicate. Do you have any comment to make about that?---I certainly can. That's pretty much exactly my take on it as well, Senior Member. I think in terms of that the risks can just rely significantly on relapsing into drugs and that that would be the biggest risk factor in terms of recidivism as well. Certainly, in terms of his ability to manage his – the day-to-day stressors as you say, he historically hasn't been particularly strong, and that does seem to be an influence as well with the depressive aspects of the case. His depression being one of those things that he's clearly struggled to manage without self-medicating with methamphetamine use. But in part, that as a maladaptive coping strategy – as in, drug use specifically – is one of the things that you would really aim to target through ongoing psychotherapy. That is probably one of the biggest things that they would target through. That. And so, I believe that with his engagement in doing drug and alcohol counselling, which I believe has been over or around the last six months – he said late January he started - and ongoing therapy within the community, that would be exactly the kind of risk that you would look at managing.

Now, I suppose one of the factors that might act as a governor or a restraint on the use of a maladaptive coping technique such as going back into drugs might be better cognition of the risks he faces in terms of the risk of deportation, the risk of loss of family, his relationship with his children certainly seems to be improving quite steadily. Consciousness of the risk of losing those things – those important things in his life. To what extent might that act as a protective factor against the risk of his resorting to a maladaptive coping technique for ordinary stress such as reverting to drugs?---Look, I'd say it'd be a moderate factor. As you say, the evidence seem to suggest that, uh, his relationship with his children has been developing more strongly, um, that he does have other avenues for it. So, certainly it's, um, it's (indistinct) to increase his likelihood of being able to engage with treatment and at least consider before acting by relapsing and using again. So, yeah, I would say it would be a protective factor.

MEMBER: Did you talk about any of those factors in his discussions with you, did – was there any cognition by him of the risk he now faces if he doesn't tread the right line?

Yes, yes, he was – I think he expressed quite significant concern about not being able to see his children again.

MEMBER: Sufficient to make the connection between the risk of further drug use and that connection with children being obliterated?

Look, he – I didn't ask about it specifically in that particular instance, I would believe he has (indistinct) on several different times in his statement, I would have to have a bit of a look as to where he commented on it, but I do recall reading that in several of the statements that he had. So, understand that if he were to relapse into drug use, that that would mean that he would not have access to his children anymore.

MEMBER: All right.

Or (indistinct) limited access.

MEMBER: I am interested in what might be regarded as protective factors, factors that might insulate Mr Chand from future risk and obviously, risk for the community, if he were to relapse. You know, I would need to be satisfied that there's sufficient safeguards to protect against the risk of a relapse. So, it's – I'm really seeking to explore what you foresee as the safeguards and how sufficiently strong those safeguards are.

Look, in terms of the (indistinct) safeguards around it, no safeguard is bulletproof, that's the nature of them, that if somebody is sufficiently motivated, they will go and find drugs. In terms of the things that I would put – that I believe that are the protective factors that are most relevant here, certainly, his family support and his parents, and his willingness to be there, the engagement in work, which (indistinct) quite adamant about.

As well as the potential of drug testing through that process, the engagement with the children and, you know, therapeutic processes as I said. Something like (indistinct) and specific psychological assistance. So all of those things would be the protect factors. I think, in combination, they're relatively strong. As I said, those – none of them are bulletproof, you know, you can't guarantee that they were ultimately protected but they did significantly mitigate risk."

ISSUES

83. 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.*

84. The Tribunal is satisfied that the Applicant made the representations required by s.501CA(4)(a) of the Act. Thus, the issue becomes whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised. In circumstances where either of paragraphs (i) or (ii) are satisfied, then the Tribunal should revoke the original decision.⁹⁰

85. There are therefore two issues before the Tribunal:

- whether the Applicant passes the character test; and

⁹⁰ *Minister for Home Affairs v Buadromo* [2018] FCAFC 151.

- if not, whether there is ‘another reason’ why the decision to cancel the Applicant’s visa should nonetheless be revoked.

Does the Applicant Pass the Character Test?

86. The character test is set out 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 defined by 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*”.
87. On 15 October 2020 the Applicant was sentenced to a head sentence of three years imprisonment, together with other concurrent periods of imprisonment, some also in excess of 12 months. A period of 313 days was declared as time served, and the parole eligibility date was set at 7 December 2020. What matters for present purposes is the term of imprisonment to which a person has been sentenced, and not the amount of time eventually served.⁹¹
88. The Tribunal therefore finds that, because of the operative effect of s.501(7)(c), the Applicant has a “*substantial criminal record*”, and as a matter of law cannot pass the character test. In these circumstances the Applicant cannot rely on s.501CA(4)(b)(i) of the Act in order 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?

89. 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 Ministerial Direction”) has application.⁹²

⁹¹ See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 415-416.

⁹² On 1 April 2021, the former applicable direction, *Direction No. 79 – Visa refusal and cancellation under s.501 and revocation of a mandatory cancellation of a visa under s.501CA*, was revoked and was replaced by Direction 90.

90. For the purposes of deciding whether to revoke the mandatory cancellation of a non-citizen's visa, paragraph 5.2 of the Ministerial Direction contains several principles that must inform a decision maker's application of Part 2 of the Ministerial Direction.
91. Those principles are:
- (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.
 - (2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.
 - (3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.
 - (4) Australia has a low tolerance of any criminal or other serious conduct by visa Applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age.
 - (5) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

92. Paragraph 6 of the Ministerial 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.

93. Paragraph 8 of the Ministerial Direction sets out four 'Primary Considerations' that the Tribunal must take into account. These 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.

94. Paragraph 9 of the Ministerial Direction next sets out four 'Other Considerations' which must also be taken into account. These 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

95. These are "other" considerations, as opposed to merely secondary considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*:⁹³

"...Direction 65 [now Direction 90] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply."

⁹³ [2018] FCA 594.

PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY

96. When considering Primary Consideration 1, paragraph 8.1 of the Ministerial Direction requires decision makers to keep in mind that the Government is committed to protecting the Australian community from harm arising in consequence of criminal activity, or other serious conduct by non-citizens. Decision makers are required to have particular regard for the principle that entering or remaining in this country is a privilege that Australia 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 to the Australian community.
97. In determining the weight applicable to Primary Consideration 1, paragraph 8.1(2) of the Ministerial Direction requires decision-makers to give consideration to:
- a) The nature and seriousness of the Applicant's conduct to date; and
 - b) The risk to the Australian community should the Applicant commit further offences or engage in other serious conduct.

(a) *The Nature and Seriousness of the Applicant's Conduct, to Date*

98. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct thus far, paragraph 8.1.1(1) of the Ministerial Direction specifies that decision makers must have regard for a number of further factors. These are set out, as sub-paragraphs (a) – (g) inclusive, of paragraph 8.1.1(1) of the Ministerial Direction.
- (a) *without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:*
 - (i) *violent and/or sexual crimes;*
 - (ii) *crimes of a violent nature against women or children, regardless of the sentence imposed;*
 - (iii) *acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;*
 - (b) *without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:*
 - (i) *causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;*

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

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

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

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

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

(e) the cumulative effect of repeated offending;

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

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

99. On 15 October 2020 the Applicant was convicted before the District Court of Queensland of assaults occasioning bodily harm whilst armed/in company, for which he was sentenced to three years imprisonment. On that date the Applicant was also convicted of the following other offences, and given the following further (concurrent) terms of imprisonment:

- 'Attempted abduction of a child under 16': (15 months imprisonment);
- 'Dangerous operation of a vehicle' and 'adversely affected by an intoxicating substance': (12 months imprisonment, disqualified from driving for 3 years);
- 'Wilful damage' and 'attempted enter premises with intent to commit indictable offence': (6 months imprisonment);
- 'Unlawful stalking': (6 months imprisonment);
- 'Attempted abduction of a child under 16': (convicted yet no further punishment);
- 'Going armed so as to cause fear' and 'fail to comply with requirement to stop private vehicle': (convicted yet no further punishment, restraint order issued).

100. Concerningly, the offences giving rise to the convictions listed in the immediately preceding paragraph were committed by the Applicant only five days after the Applicant had previously appeared before the Magistrates Court of Queensland for drug-related offences, whereupon the Applicant had been placed on probation for 12 months: meaning that the offences subsequently committed by the Applicant on 7 December 2019 were committed whilst already on probation.
101. During sentencing, His Honour Judge Farr SC DCJ observed that the Applicant '*clearly paid no heed to the probation order*', and that the Applicant had breached the probation order both by merit of the fact of his re-offending; and because of his having failed to report for his probation intake assessment in the manner directed, thus '*constituting further evidence of his disregard to the order*'.⁹⁴
102. As recorded above, the Applicant has a substantial criminal and traffic history in both New Zealand and in Australia, such that the Respondent Minister contends,⁹⁵ pursuant to the prescribed factors in paragraph 8.1.1 of the Ministerial Direction, that the Tribunal should categorise the Applicant's offending as "very serious". In particular, the Respondent Minister submits that regard is required for:
- the fact that the Applicant has committed a number of violent crimes, and acts within the category 'family violence', which are required, in accordance with the Ministerial Direction, to be viewed very seriously;⁹⁶
 - the fact that the Applicant has been sentenced to a term of actual imprisonment, exceeding 12 months;⁹⁷
 - the frequency and cumulative effect of the Applicant's overall offending.⁹⁸ The Applicant commenced offending shortly after his arrival in Australia and has gone on to have now committed 33 offences in Australia over a period of seven years,⁹⁹ in circumstances wherein the frequency and seriousness of that offending has also steadily increased, over time;

⁹⁴ Exhibit G1, G7 pages 49 to 57.

⁹⁵ Exhibit R1, paragraph [22].

⁹⁶ Exhibit R1, paragraph [30], Ministerial Direction paragraphs 8.1.1(1)(a)(i), & (ii).

⁹⁷ Exhibit R1, paragraphs [32] – [33], Ministerial Direction paragraph 8.1.1(c)

⁹⁸ Ministerial Direction paragraphs 8.1.1(d) & (e)

⁹⁹ Exhibit R1, paragraph [32].

- the fact that there is information before the Tribunal indicating that the Applicant failed to declare (in the manner required under Australian law) on his in-bound passenger cards the fact of his prior New Zealand convictions, during each of his Australian border entries on 19 July 2011; 4 September 2012; and 25 May 2013: such that the Applicant has demonstrably provided false and misleading information to the Department.¹⁰⁰

103. By way of his Statement of Facts Issues and Contentions, and by way of his Counsel Dr Donnelley's final submissions, the Applicant correctly concedes that the sentencing remarks of His Honour Judge Farr SC DCJ were properly made;¹⁰¹ and, that in light of the Applicant's criminal history;¹⁰² prior sentencing dispositions;¹⁰³ and the evident increasing trend of seriousness in his offending,¹⁰⁴ infused as it is with elements of both 'violent' offending and 'family violence';¹⁰⁵ that it is now amply open for the Tribunal to conclude that the nature and seriousness of the Applicant's conduct to date has been "very serious".
104. The Applicant further concedes - again correctly - that it is also open¹⁰⁶ on the evidence for the Tribunal to conclude that the Applicant has previously provided false information to the Department on in-bound passenger cards; and for the Tribunal to now see fit to express its concern¹⁰⁷ for the Applicant's previous history of having breaching court orders: even after his having been warned by judicial officers of the consequences of doing that.

Consideration

105. Having regard to all of the information before it, the Tribunal assesses the Applicant's offending as "very serious"; and observes there to have been a trend of escalating seriousness in that offending over time, culminating in the offences giving rise to the head sentence of three years imprisonment imposed on the Applicant by his Honour Judge Farr SC DCJ on 15 October 2020.

¹⁰⁰ Contra Ministerial Direction para 8.1.1(1)(f).

¹⁰¹ Exhibit A1, paragraph [25].

¹⁰² Exhibit A1, paragraphs [29] – [33].

¹⁰³ Exhibit A1, paragraph [34].

¹⁰⁴ Exhibit A1, paragraphs [36] - [38].

¹⁰⁵ Exhibit A1, paragraph [38].

¹⁰⁶ Exhibit A1, paragraph [39].

¹⁰⁷ Exhibit A1, paragraph [40].

106. The Tribunal further finds that the Applicant provided false and misleading information to the Department in the form of his failing to properly declare his New Zealand criminal history on incoming passenger cards on each of 19 July 2011, 4 September 2012 and 25 May 2013.¹⁰⁸ as part of an effort by the Applicant to "*fly under the radar*".¹⁰⁹ The Tribunal also notes, with concern, that the Applicant does have a history of breaching court orders, despite his having been warned of the consequences of those breaches.

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

107. Paragraph 8.1.2(1) of the Ministerial Direction provides that, when considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be assessed to be completely unacceptable.
108. Paragraph 8.1.2(2) then provides that, when assessing the future risk that may be posed by the non-citizen to the Australian community should the non-citizen commit further offences or engage in other serious conduct, decision makers must have cumulative regard for:
- (a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct;
 - (b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:
 - (i) information and evidence on the risk of the non-citizen re-offending; and
 - (ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence; and

¹⁰⁸ Exhibit G1, G63 pages 264 to 266.

¹⁰⁹ Transcript p.123 lines 45 to 47 to p.124 lines 1 to 5.

- (c) where consideration is being given to whether to refuse to grant a visa to the non-citizen - whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

Nature of the harm to individuals or the Australian community or the Australian community should the non-citizen engage in further criminal or other serious conduct: 8.1.2(2)(a)

109. The Respondent Minister submits,¹¹⁰ that this is now a case wherein the risk of further harm is so serious that any risk whatsoever of the Applicant re-offending becomes completely unacceptable (8.1.2.(1)); and that the nature¹¹¹ of the harm that could beset individuals or the Australian community in the event that the Applicant were to re-offend includes the physical and psychological consequences flowing from further violent offending; the risk of death or injury from further traffic offending; and the very considerable health costs and other social costs and economic harms associated with drugs and alcohol, particularly the disproportionate¹¹² adverse effects that are caused by the drug 'ice'.
110. The Applicant rightly concedes¹¹³ that when having regard to the nature of the Applicant's prior offending the Tribunal should consider that any future offending of a similar kind would have the potential to cause very significant physical and/or psychological injury and financial harm to members of the Australian community. However, and for reasons that are explained in more detail, further below, the Applicant submits that the Tribunal should come to a more nuanced, favourable view regarding the question of future risk.

Likelihood of the non-citizen engaging in further criminal or other serious conduct in the future: 8.1.2(2)(b)

111. Paragraph 8.1.2(2)(b) of the Ministerial Direction requires decision makers when considering the likelihood of the non-citizen engaging in further criminal or other serious conduct to take into account:
- i) Information and evidence on the risk of the Applicant re-offending; and

¹¹⁰ Exhibit R1, paragraph [36]

¹¹¹ Exhibit R1, [37]- [40].

¹¹² Exhibit R1, paragraph [38].

¹¹³ Exhibit A1, paragraph [43].

ii) Evidence of rehabilitation achieved by the Applicant by the time of the decision.

112. The Respondent Minister submits that the prospects for the Applicant relapsing back into drug use remains very significant, thus giving rise to an unacceptable risk of further criminal offending, particularly further offending of the shocking type perpetrated by the Applicant on 7 December 2019. The Respondent Minister's rationale for so submitting is that:

- Only very limited weight can attach to the risk of recidivism assessment conducted by Professor Freeman that places the Applicant between a 'low' and 'medium' risk of violent re-offending, by reason that Professor Freeman did not have the benefit of all relevant information at the time of formulating his assessment;¹¹⁴
- The more recent (6 June 2022) psychological assessment of the Applicant conducted by Mr Matt Visser is silent on the question of the future risk of the Applicant re-offending;¹¹⁵
- Professor Freeman diagnoses the Applicant as having both Cannabis Dependency Disorder and Methamphetamine Dependency Disorder, each of which are only in 'partial remission in a controlled environment';¹¹⁶
- There is only very limited evidence of the Applicant's attempts at rehabilitation, which remain in the very early stages, and have not yet been tested in an uncontrolled environment.¹¹⁷
- The Applicant's prior attempts at rehabilitation in New Zealand were unsuccessful;¹¹⁸
- The fact of stable employment, parental responsibilities and the support of family were each protective factors that were also present in the past, yet these did not serve to insulate the Applicant from offending in the past: such that little can now be made of the argument that these will prevent the Applicant from offending again, in the future;¹¹⁹

¹¹⁴ Exhibit R1, paragraph [42].

¹¹⁵ Exhibit R1, paragraph [44].

¹¹⁶ Exhibit R1, paragraph [45.1].

¹¹⁷ Exhibit R1, paragraph [45.2].

¹¹⁸ Exhibit R1, paragraph [45.3].

¹¹⁹ Exhibit R1, paragraph [45.4].

- The Applicant has breached judicial orders in the past and previous penalties and warnings have not been enough to deter the Applicant from further offending.¹²⁰

113. In contrast to the position adopted by the Respondent Minister in relation to the risk of further criminal or other serious conduct by the Applicant in the future, the Applicant submits¹²¹ that the following matters, in combination, now serve to ameliorate that risk, down to a more tolerable level:

- The Tribunal should take regard for the factors that assist to explain the Applicant's past offending, as well as his more recent expressions of remorse, and efforts towards rehabilitation, including in particular the diagnoses and 'situational appreciations' provided by each of Professor Freeman and Mr Matt Visser;¹²²
- The Applicant is now on prescribed Endep, and the available evidence is that this treatment is working effectively.¹²³ The Applicant himself feels that the Endep has made a huge difference, and he recognises the need to continue to on medication and to engage in counselling, in the long term. The Applicant's father has the financial resources and the determination to make sure that this will happen.¹²⁴ Moreover, the fact of a mandated random drug testing program in the workplace serves as a further guarantee for this to happen. Prescribed medication (a key difference from the situation prior to his imprisonment) also considerably lessens the likelihood of the Applicant now attempting to self-medicate via illicit street drugs.¹²⁵
- The Applicant has displayed appropriate custodial behaviour, both in prison and while in immigration detention, and is now much better equipped with pro-social plans, plus far greater insight regarding the triggers for his drug use, in the event that he is now released back into the community.¹²⁶
- The Applicant's criminal offending in New Zealand is at least explicable in the sense that he was then still a teenager in the thrall of gang culture; and associating with delinquent peers. These factors are no longer present. Mental health issues,

¹²⁰ Exhibit R1, paragraph [45.5].

¹²¹ Exhibit A1, paragraphs [41] – [84].

¹²² Exhibit A1, paragraphs [44], [46] – [47].

¹²³ Exhibit A1, paragraph [48].

¹²⁴ Exhibit A1, paragraph [71].

¹²⁵ Exhibit A1, paragraph [75].

¹²⁶ Exhibit A1, paragraph [51].

substance dependency, a dysfunctional relationship and relationship breakdown all provide an important context for understanding the nature of the Applicant's past offending.¹²⁷

- The Applicant has displayed remorse and insight,¹²⁸ and this will lessen the chances of the Applicant re-offending¹²⁹
- Time in prison - and now facing the prospect of deportation - has had a salutary and sobering effect on the Applicant. The risk of deportation has made the Applicant recognise the extent of the impact of his wrongdoing on his family. The forever ongoing threat of deportation, which remains in the future in the event of another miss-step, now serves as another protective factor to lower the risk of recidivism.¹³⁰
- There is now a structured, pro-social post-detention plan, that will go a long way towards keeping the Applicant insulated from the risk of re-offending: working in his father's company; a focus on parental duties and family support; regular attendance at treatment and counselling, financed and enforced by his father. The advisability of this structure has been endorsed by the forensic psychological evidence, and the resolve of the Applicant to stay 'on course' has been supported by family members in their character assessment evidence.¹³¹
- The fact that the Applicant was granted parole on 19 October 2021 reveals that the Parole Board of Queensland is satisfied that the Applicant was sufficiently fit for conditional release back into the community, and in that light he does not represent an unacceptable risk of harm to the community.¹³²
- The Applicant has undertaken some drug rehabilitation whilst in prison, such that it should be accepted¹³³ that the Applicant has made progress towards addressing his drug addiction, and on 7 April 2022 the Applicant undertook the next step, in the form of an initial screening with Queensland Injectors Health Network (QuIHN) as another step towards ensuring that he does not engage in further substance abuse.

¹²⁷ Exhibit A1, paragraphs [52] – [53]; [56].

¹²⁸ Exhibit A1, paragraph [66].

¹²⁹ Exhibit A1, paragraphs [58]; [60]; [62] - [63].

¹³⁰ Exhibit A1, paragraphs [59]; [74].

¹³¹ Exhibit A1, paragraph [60].

¹³² Exhibit A1, paragraphs [67] – [68].

¹³³ Exhibit A1, paragraph [72].

The Applicant has also attended drug and alcohol counselling sessions and completed an anger management and domestic violence program with Wiser Ways.¹³⁴ The Applicant has expressed an intention to engage in drug counselling on a long-term basis; and will surround himself with family and persons who will support him to stay away from drugs.¹³⁵

- Evidence of family regarding their perception of the Applicant's regret for his past actions is a relevant¹³⁶ consideration.
- The risk of reoffending is not unacceptable, and only weighs moderately against revocation.¹³⁷ Unlike the Delegate at first instance, the Tribunal would not give this primary consideration significant weight, by reason that a person who is affected by mental illness ought, if properly considered, be regarded as less culpable.¹³⁸

Conclusion: Primary Consideration 1

114. After much careful deliberation the Tribunal is ultimately not persuaded that the Applicant presents as a completely unacceptable risk of engaging in further criminal or other serious conduct in the future. To this end the Tribunal accepts the opinions expressed by each of Professor Freeman and Mr Visser regarding future risk, as well as the evidence regarding the efforts made by the Applicant towards his own rehabilitation. The criticisms of their opinions and the reasons,¹³⁹ why limited weight should now attach to their opinions – as has been submitted to the Tribunal by the Respondent Minister – are ultimately not submissions that are embraced by the Tribunal. The Tribunal is comfortable with the reliability of the opinions expressed by Professor Freeman, and those of Mr Visser which are essentially corroborative of one another. The Tribunal now attaches weight and significance to their opinions as a key part of the foundation for the Tribunal's conclusions regarding the question of future risk, and about the adverse impacts that are likely to flow from a deportation decision.

¹³⁴ Exhibit A10, Exhibit G1, G55 pages 233.

¹³⁵ Applicant's SFIC, paragraphs [69] – [70].

¹³⁶ *RGKY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 750 at [63] – [70], per Rares J

¹³⁷ Exhibit A1, paragraph [77].

¹³⁸ Exhibit A1, paragraphs [78] – [84], and see. *Mukiza v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] AATA 4445 at [44].

¹³⁹ Tribunal's reasons, at paragraph [112].

115. In reaching this conclusion the Tribunal also attaches weight to the opinions expressed by each of Mr Chand Senior, and Mrs Chand, and Ms Rikeshni Chand, and by Child A, regarding their own observations of clear signs of positive change in the Applicant.
116. The Tribunal records that it has considered the fact that the Applicant is yet to spend any time in the community since the date of his last offending, and of the need - pursuant to the Ministerial Direction¹⁴⁰ - for more deliberative weight to attach to rehabilitative time spent in the community than in either prison, or immigration detention. Notwithstanding, the Tribunal remains satisfied that the Applicant's efforts towards his own rehabilitation have been genuine, and the Tribunal is satisfied that there is sufficient resolve - both within the Applicant and within his immediate family - to ensure that these efforts will be continued, for as long as may prove necessary. The Tribunal also records that it attaches considerable weight to the fact of there being a mandated drug testing regime in the workplace to which the Applicant will be returning; and to the fact that Mr Chand Senior clearly has sufficient financial resources at his disposal to be able to ensure that the Applicant will be able to afford to access appropriate counselling and psychological treatment. Although the risk of reoffending or a drug relapse will inevitably remain in some measure, the Tribunal concludes that this risk is now tolerable.
117. For completeness, the Tribunal also records that it now attaches little if any significance to the fact of obligatory rehabilitative efforts previously unsuccessfully undertaken by the Applicant, whilst still a youth offender, in New Zealand. At that stage, the Applicant was a much younger man, still within the thrall of delinquent gang culture, and completely unaware of the role of his (then yet to be even diagnosed) mental health condition. At that stage - and in contrast to the situation that now pertains - the Applicant had no proper insight regarding the maladaptive nature of his self-medicating with illicit substances, and the criminogenic role this played, in terms of his then engaging in other, related offending. Now, the Applicant is a good deal older; with greater maturity and insight; is properly diagnosed, appropriately medicated; and, to the Tribunal's satisfaction, sufficiently motivated to persist with the necessary treatment.

¹⁴⁰ Ministerial Direction, paragraph 8.1.2(2)(b)(ii)

118. As future risk represents but one of the two facets¹⁴¹ relevant to consideration of Primary Consideration 1, the finding just made by the Tribunal in relation to future risk requires that there be some removal of weighting in favour of non-revocation of the mandatory visa cancellation decision otherwise attaching to Primary Consideration 1. In that light - and although the nature and seriousness of the Applicant's conduct to date remains "very serious" - the Tribunal concludes that Primary Consideration 1 weighs only "very heavily" (rather than "significantly") against revocation. In other words, because of the Tribunal's views regarding future risk, the Tribunal moderates the weight that it now attaches to this primary consideration.
119. Accordingly, Primary Consideration 1 weighs **very heavily** against revocation of the cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

120. Paragraph 8.2(1) of the Ministerial Direction provides:
- (1) *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 (see paragraph (3) below).*
 - (2) *This consideration is relevant in circumstances where:*
 - a) *a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or*
 - b) *there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.*
 - (3) *In considering the seriousness of the family violence engaged in by the non-citizen, the following factors must be considered where relevant:*
 - a) *the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;*
 - b) *the cumulative effect of repeated acts of family violence;*
 - c) *rehabilitation achieved at time of decision since the person's last known act of family violence, including:*
 - i. *the extent to which the person accepts responsibility for their family violence related conduct;*

¹⁴¹ Ministerial Direction paragraph 8.1(2)(a) & (b).

- ii. *the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);*
- iii. *efforts to address factors which contributed to their conduct; and*
- d) *Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status, should the non-citizen engage in further acts of family violence.*

121. The Respondent Minister submits that the Applicant's criminal history in both New Zealand and Australia recite family violence-type convictions, and that there is no evidence of the Applicant having completed any courses, or other treatment to address issues of family violence.¹⁴² Accordingly, the Respondent submits that Primary Consideration 2 should now weigh "very heavily" against revocation of the mandatory visa cancellation decision.
122. The Applicant admits,¹⁴³ to his having been convicted of offences that fit within the family violence genre, as defined by the Ministerial Direction, and concedes¹⁴⁴ that this form of conduct can be categorised as "very serious". Yet, the Applicant further submits¹⁴⁵ that it would be inappropriate to attribute any further weight to Primary Consideration 2 against revocation of the cancellation of the Applicant's visa, by reason that the Applicant's criminal and other adverse conduct associated with family violence has already been taken into account when considering Primary Consideration 1; such that to now attribute any further weight to the same conduct under the auspices of a consideration of family violence would amount to unreasonable double counting.¹⁴⁶
123. As part of deliberations regarding the question of the seriousness of any family violence the Tribunal is required - because of paragraph 8.2(3) of the Ministerial Direction - to consider where relevant:

¹⁴² Exhibit R1, paragraph [55].

¹⁴³ Exhibit A1, paragraph [88].

¹⁴⁴ Exhibit A1, paragraph [94].

¹⁴⁵ Exhibit A1, paragraph [99].

¹⁴⁶ *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [11]; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [65] – [66]; *Castle v Minister for Home Affairs* [2020] AATA 1778 at [38]; *BYMD v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 3655 at [155]; *Mamatta v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 1 at [96] & [176]; and *RTTW v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4813 at [47].

- (a) the frequency of the Applicant's family violence conduct and/or whether there is any trend of increasing seriousness;
 - (b) the cumulative effect of any repeated acts of family violence;
 - (c) rehabilitation achieved by the Applicant since the Applicant's last known act of family violence, including:
 - (i) the extent to which the Applicant accepts responsibility for their family violence related conduct;
 - (ii) the extent to which the Applicant understands the impact of their behaviour on the abused and witnesses to the abuse (particularly children);
 - (iii) efforts to address the factors which contributed to the Applicant's family violence conduct; and
 - (d) whether the Applicant has re-offended since being formally warned of the consequences of any further acts of family violence.
124. Although the Tribunal remains conscious of the mandated¹⁴⁷ requirement to consider factual material relevant to consideration of the family violence primary consideration; and accepts this requirement as one that persists¹⁴⁸ even in circumstances wherein that same factual material has already been considered as part of deliberations relating to Primary Consideration 1, the Tribunal concurs with Dr Donnelly's submission: that the fact that weight has already been attached to family violence matters as part of the deliberation and assessment of past conduct under Primary Consideration 1 has the effect that no additional adverse weight can reasonably attach to family violence, under Primary Consideration 2.
125. However, so as to conform with the requirements of the Ministerial Direction, the Tribunal nonetheless still now proceeds to consider the discrete matters specified in paragraph 8.2(3) of the Ministerial Direction:
- (a) *the frequency of the Applicant's family violence conduct and whether there is any trend of increasing seriousness***

¹⁴⁷ Consider *JTNW v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4948 (9 December 2021) at [95]

¹⁴⁸ *XSLJ v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1138, per Halley J at [123] – [124].

126. The Tribunal does not assess the Applicant's family violence conduct as prolific, or as containing any evident trend of increasing seriousness. Rather, the Applicant's family violence offending appears to have been episodic and related in a key sense to his overtly dysfunctional relationship with his former partner Ms T, and to be as a consequence of his then undiagnosed, untreated mental health condition, which was self-medicated by the Applicant, inappropriately, via recourse to illicit drugs.

(b) the cumulative effect of any repeated acts of family violence

127. There is no evidence before the Tribunal relating to the *cumulative* effect of any repeated acts of family violence by the Applicant in the form of, (for example), a victim impact statement from Ms T. The only evidence of impact of family violence is that received from members of the Chand family, notably Mr Chand Senior and from Child A. Mr Chand Senior gave no evidence suggestive of any cumulative impact of the Applicant's family violence upon him. Mr Chand Senior's evidence was more to the effect that he finally now understood the factors that had caused his son's erstwhile conduct, and that he was forgiving of this, and determined to assist to ensure that behaviours of this type remained consigned to history. Meanwhile, Child A informed the Tribunal that he forgave his father, and was not fearful of him, and now desired far greater contact with the Applicant. This evidence does not suggest any cumulative adverse sequelae upon Child A, who presented before the Tribunal as quite mature and insightful, for a boy of only thirteen.

(c) rehabilitation achieved by the Applicant since the Applicant's last known act of family violence, including:

(i) the extent to which the Applicant accepts responsibility for their family violence related conduct

128. The Applicant has now, when before the Tribunal, accepted responsibility for his family violence-type conduct. The Tribunal is satisfied that the Applicant has more latterly developed an understanding of maladaptive anger responses, and the triggers for these.

(ii) the extent to which the Applicant understands the impact of their behaviour on the abused and witnesses to the abuse (particularly children)

The Tribunal is satisfied that the Applicant has had time to reflect upon - and to realise the consequences and impact of - his past family violence conduct, on his direct victims and on witnesses.

(iii) efforts to address the factors which contributed to the Applicant's family violence conduct.

129. There is evidence that the Applicant has completed an Anger Management program, described as an 'Anger Management and Domestic Violence Program', at Wiser Ways.¹⁴⁹ The description for this program provides: 'The Anger Management Domestic Violence Program consists of 5 modules, containing psychoeducational material to encourage men about moving to safer and respectful relationships, and related behaviours. The 5-module program has been peer-reviewed and developed for contemporary practice within the domestic violence sector. Furthermore, the Tribunal accepts that the Applicant's past family violence behaviours was but one part of a broader, more complex tapestry of issues and that other threads: such as drug addiction and depression need to be addressed as a necessary prelude before family violence is addressed. In that light, the Tribunal is satisfied that the treatment modalities, either already completed, or now underway, afford evidence of efforts by the Applicant to address issues that are also causally related to his family violence outbursts in the past.

(d) whether the Applicant has re-offended since being formally warned of the consequences of any further acts of family violence.

130. There is evidence of the Applicant having committed further acts of family violence, notably towards his former partner Ms T, even after the Applicant was warned of the consequences of same at the time that DVO's were issued to the Applicant. Significantly however these past warnings were issued prior to any effective therapeutic intervention, or even diagnosis, of the Applicant's underlying mental health condition.
131. The Tribunal assesses the Applicant's family violence conduct as **very serious**, without now attaching additional weight to family violence, on the basis that the required weight has

¹⁴⁹ see A10.

already been here included, as part of the Tribunal's antecedent deliberation regarding Primary Consideration 1. The Tribunal records that a different approach to that taken in these reasons may have been taken had family violence presented as a more centrally prominent 'theme' in the Applicant's overall past offending history. Ultimately the question of weight, and whether weight for family violence is attached as part of Primary Consideration 1, or more specifically as part of Primary Consideration 2 remains a matter for the Tribunal.

Conclusion: Primary Consideration 2

132. The Tribunal determines that in the case of Primary Consideration 2 the Applicant's family violence conduct should be viewed as **very serious yet should now be weighed neutrally**.

PRIMARY CONSIDERATION 3: THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA

133. Paragraph 8.3(1) of the Ministerial Direction compels a decision maker to make a determination about whether cancellation or refusal under s.501, or non-revocation under s.501CA is in the best interests of a child affected by the decision. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if 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
134. The Ministerial Direction sets out a number of factors, to take into consideration with respect to the best interests of minor children in Australia. Those include:
- b) 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);
 - c) 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;

- d) 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;
 - e) 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;
 - f) whether there are other persons who already fulfil a parental role in relation to the child;
 - g) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);
 - h) evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;
 - i) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.
135. The Applicant has two minor biological children in Australia, his son 'Child A' who is 13 years of age, and his daughter, 'Child B', who is 10 years of age.
136. The Applicant also has a one year old niece, 'Child C', the daughter of his sister Ms Rikeshni Chand and her partner, Ethan.
137. The Applicant also declared four minor cousins will be affected by his visa cancellation.¹⁵⁰ At the date of this decision one of these cousins is no longer a minor. The Applicant submits¹⁵¹ that this primary consideration should now weigh "very heavily" in favour of revocation of the visa cancellation decision.
138. In his personal circumstances form the Applicant reveals that he has been the primary carer for his two children, aided by his parents.¹⁵² In the sentencing remarks made by his Honour Judge Farr SC DCJ on 15 October 2020, his Honour notes the children to have been in the

¹⁵⁰ Exhibit G1, G13 page 79.

¹⁵¹ Exhibit A1, para [174].

¹⁵² Exhibit G1, G13 pages 77-78.

custody of the Applicant's parents, with the Applicant assisting with co-parenting.¹⁵³ During the period of the Applicant's imprisonment - and now immigration detention - the children have been in the care of the Applicant's parents, with some assistance also provided to them by their daughter, the Applicant's sister Ms Rikeshni Chand, who is the aunt of Child A and Child B.

139. Child A was born in New Zealand in 2009, and was raised by both parents until their relationship ended, in 2013. Over the next three years Child A was in the custody of his mother, Ms T, however the Applicant and his parents still assisted during that period by paying for rent and food for both Ms T and Child A. It is recognised that Child A was the victim of some family violence, especially during what has been termed in these proceedings as 'the Sydney Centrelink incident', and may have witnessed further instances of family violence, as committed by the Applicant towards Ms T. These incidents occurred a considerable time ago and do not appear to have been repeated, and the Applicant is now appropriately medicated for his mental health condition, and has much greater awareness of the factors that are the triggers for maladaptive coping mechanisms, such as illicit drug use or recourse to violence during times of stress. The Tribunal is satisfied that the domestic violence observed in this case was specific to a set of destabilising and dysfunctional circumstances specific to the Applicant's then relationship with Ms T, and that these are now considerably less likely to arise again in the future. Any concerns regarding the relationship between the Applicant and Child A are now largely mitigated by the very nature of the oral evidence given by Child A, when he was before the Tribunal.
140. The Applicant's daughter, Child B, was born in Australia in 2012. After the end of her parent's relationship in 2013 Child B initially spent more time with her mother Ms T, until she came to be under the care of the Applicant and his family, in about 2016.
141. Throughout his time in prison and immigration detention the Applicant has maintained close and regular contact with both children, by means of telephone. The strength of that relationship is substantiated by the evidence given before the Tribunal by each of the Applicant's parents, and by his sister Ms Rikeshni Chand; as well as by his son Child A; and in the written statement prepared by his daughter, Child B. The strong impression

¹⁵³ Exhibit G1. G7, page 49 to 57.

formed by the Tribunal is that the Applicant does love and care for the welfare of his two children; and that the Applicant has been a generally more reliable and available parental figure for both children than has been the case with their mother, Ms T. The further impression formed by the Tribunal is that that the Applicant is now clear-headed and drug free, and is aware of the need to 'make up for lost time', and to become a more deliberate and positive role in the lives of each of Child A and Child B.¹⁵⁴

142. The Applicant's niece, Child C, is still in her infancy and the Applicant has in consequence had much more limited contact with Child C, and does not fulfill a parental role in the case of Child C. The Tribunal is nonetheless still prepared to find that the best interests of Child C are best served, by the Applicant not being deported.
143. The Applicant's three minor cousins are currently aged 8, 12, and 16 years of age. Prior to his incarceration, the Applicant would see these children at family gatherings and would play with them, and teach them sport.¹⁵⁵ The Applicant does not fulfil a parental role in the case of these children and his evidence was that his contact with them had been limited since his incarceration.¹⁵⁶ Some - albeit only modest - deliberative weight in favour of revocation of the visa cancellation is also required to be attached to the interests of these minor cousins.
144. The Respondent Minister accepts that this Primary Consideration supports revocation of the visa cancellation decision, yet submits¹⁵⁷ that any weight in favour of revocation of the visa cancellation decision given to this Primary Consideration must be limited, by reason that:
- The Applicant's relationship with his children has been marked by periods of lengthy absence given his periods of imprisonment and in immigration detention (paragraph 8.3(4)(a) of the Ministerial Direction);
 - The lengthy periods of absence by the Applicant from the lives of his children as documented by Mr Visser in his psychological report;¹⁵⁸

¹⁵⁴ Exhibit G1, G12, page 68 to 263.

¹⁵⁵ Exhibit G1, G15 page 108.

¹⁵⁶ Transcript p. 53 lines 36 to 47 to p.54 lines 1 to 8.

¹⁵⁷ Exhibit R1, para [60].

¹⁵⁸ Exhibit A2, p.5 lines 221-229.

- In light of his criminal history, the Applicant is unlikely to play a positive parental role in the lives of his children (Ministerial Direction, paragraph 8.3(4)(b));
- Any future exposure to similar negative conduct by the Applicant is apt to have a negative effect on the children (Ministerial Direction paragraph 8.3(4)(c));
- The children can maintain a relationship with the Applicant which is substantively the same as that which is enjoyed by them whilst the Applicant remains in Immigration Detention by means of telephone, and they may travel to New Zealand during school holidays;
- The evidence suggests that, at least since the date of the Applicant's incarceration, and perhaps even before that the Applicant's parents have fulfilled the primary parental role (Ministerial Direction paragraph 8.3(4)(e));
- The Applicant does not perform a primary parental role in the case of his niece Child C, whom the Applicant has only met once, briefly, since her birth, and nor does the Applicant fulfill a parental role in the case of his four other declared cousins, one of whom is now 19 years of age and no longer a minor in any event;
- In light of the evidence given before the Tribunal by Mr Chand Senior, to the effect that in the event that the visa cancellation decision is not revoked Mr Chand Senior together with his wife and the Applicant's two children will leave Australia and relocate to New Zealand in order to be with the Applicant, this Primary Consideration can now only weigh slightly¹⁵⁹ in favour of revocation.

145. Having considered the countervailing considerations raised by the respective parties in relation to this primary consideration, the Tribunal concludes that the best interests of minor children in Australia do support revocation of the visa cancellation decision, and concludes that, in the event that the Applicant is deported, it becomes exceedingly probable that Child A and Child B will also end up being moved back to New Zealand; thus causing for each of them to be uprooted from their settled pattern of childhood normalcy, and from their education and friends and local cousins, and further jeopardising their prospects of an improved relationship in the future with their own mother, Ms T.

¹⁵⁹ Transcript, p.153, lines 5 – 10.

146. The only aspect of a return to New Zealand that might now be beneficial for each of Child A and Child B is the fact that their physical connection with their father the Applicant and their paternal grandparents might thereby be maintained. Even then, there is a distinct prospect that Child A - in particular - may come to resent the fact of his having been compelled to relocate to New Zealand on account of his father, thus having a paradoxical effect and jeopardising the future relationship between the Applicant and Child A. In the Tribunal's view, there are no beneficial aspects whatsoever for Child C, in the event that the Applicant is to be deported.
147. On the basis of the evidence received before it, the Tribunal determines that the best interest of each of Children A, B, and C are better served by the Applicant remaining in Australia, and heavy weight in favour of revocation of the visa cancellation decision is now attached to Primary Consideration 3 by the Tribunal.

Consideration: Primary Consideration 3

148. Taking into account the best interests of the children mentioned above, this Primary Consideration **weighs heavily in favour of the revocation of the cancellation of the Applicant's visa.**

PRIMARY CONSIDERATION 4: THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

149. Paragraph 8.4(1) of the Ministerial Direction provides that the Australian community expects non-citizens to obey Australian laws while in Australia. Serious conduct in breach of this expectation by a non-citizen, or an unacceptable risk of that by a non-citizen ordinarily gives rise to a community expectation that the Government will not then allow the non-citizen to remain in Australia
150. Paragraph 8.4(2) of the Ministerial 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 the offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse

entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

- (a) acts of family violence; or
- (b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;
- (c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;
- (d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or
- (e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or
- (f) worker exploitation.

- 151. Paragraph 8.4(3) of the Ministerial Direction provides that the above expectations of the Australian community apply regardless whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.
- 152. Paragraph 8.4(4) of the Ministerial Direction provides guidance on how the expectations of the Australian community are to be determined. This paragraph states:
- 153. This consideration is about the expectations of the Australian community as a whole. 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.
- 154. 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 ("FYBR") which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or

evidence about those expectations. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Ministerial Direction.

155. Paragraph 8.4 contains a statement of the Government's views as to the expectations of the Australian community, which operates to ascribe to the whole of the Australian community an expectation aligning with that of the executive government which the decision maker must have regard to.
156. The Respondent Minister submits¹⁶⁰ that this primary consideration weighs heavily against revocation and that in accordance with Principles 5.2(2) – (5) of the Ministerial Direction the Australian community would now expect that the Applicant should no longer be allowed to hold a visa.
157. The Applicant concedes that this primary consideration weighs in favour of non-revocation of the visa, yet submits that the question of weight is a matter for the Tribunal,¹⁶¹ and further submits¹⁶² that the weight in favour of non-revocation of the visa cancellation decision that attaches to this primary consideration should be moderated, because the Applicant has been resident in Australia for a considerable period.
158. Previously the Tribunal has recorded its view that the Applicant does not present as an unacceptable risk: Ministerial Direction paragraph 8.4(1).
159. Of the various matters identified in paragraph 8.4(2) of the Ministerial Direction, now only (a), acts of family violence, and potentially (d), crimes against government officials (here in the form police officers) arises on the facts to now require consideration of the question whether, potentially, "serious character concerns" now warrant the continued refusal of a visa for the Applicant. Assessed holistically, the Tribunal is of the view that the Applicant's conduct in each of these realms is not of sufficient magnitude to raise the spectre of serious character concerns.

¹⁶⁰ Exhibit R1, paras [69] – [70].

¹⁶¹ Exhibit A1, para [145].

¹⁶² Exhibit A1, paragraph [147].

Conclusion: Primary Consideration 4

160. Considering all relevant factors, **Primary Consideration 4 weighs heavily against revocation of the cancellation of the Applicant's visa.**

OTHER CONSIDERATIONS

161. It is further necessary to look at the 'Other Considerations' listed at paragraph 9 of the Ministerial Direction. The Tribunal will now hereunder consider each of the four stipulated sub-paragraphs (a), (b), (c) and (d).

(a) International non-refoulement obligations

162. The Applicant does not make any claims with respect to Australia's non-refoulement obligations, and none arise on the evidence. This Other Consideration is not relevant, and thus attracts only neutral weight.

(c) Extent of Impediments if Removed

163. 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 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.

164. The Applicant is a 31 year old male who is apparently able-bodied, yet who otherwise has mental health issues diagnosed as Cannabis Dependency Disorder; Methamphetamine Dependency Disorder, Persistent Depressive Disorder, all against a backdrop of below average intelligence.

165. The Respondent Minister submits,¹⁶³ that the Applicant has spent the first 21 years (and hence the majority of his life) in New Zealand, and that the Applicant has returned to New Zealand on two occasions such that it can hardly now be claimed as a country that is unfamiliar to the Applicant; and that it is unclear how the Applicant's ability to engage in formal rehabilitation, or in appropriate mental health treatment would be reduced in the event that the Applicant is now deported.¹⁶⁴ Further, the Respondent Minister submits that the Applicant retains extensive¹⁶⁵ family connections in New Zealand. Ultimately, the Respondent Minister submits¹⁶⁶ that this consideration does not weigh in the Applicant's favour, and is a neutral¹⁶⁷ consideration; or, in the event the Tribunal finds that it does weigh in favour of revocation of the visa cancellation decision, it now attracts only limited weight, and is not sufficiently compelling to outweigh the primary considerations now weighing heavily against revocation.
166. The Applicant submits that, in the event the mandatory visa cancellation decision is not now revoked, these *'significant health issues will impact the Applicant's ability to assimilate into New Zealand society, gain employment and otherwise settle into [New Zealand]'*.¹⁶⁸ The Applicant further submits that in the event of non-revocation, the Applicant will:
- Suffer significant emotional distress in consequence of separation from his family in Australia;
 - Be likely to impede the Applicant's ability to engage in formal rehabilitation;
 - Be at risk of a compromise to the strong family network otherwise available to him; and
 - Be at risk, in terms of the Applicant's prospects for becoming a productive and law-abiding member of the community, given that in the event that the Applicant is allowed to remain in Australia he already he has a place to stay and a job lined up, and thus the capacity to immediately start to provide income support for his children.

¹⁶³ Exhibit R1, paragraph [73].

¹⁶⁴ Exhibit R1, paragraphs [75] – [76].

¹⁶⁵ Exhibit R1, paragraph [77].

¹⁶⁶ Exhibit R1, paragraph [78].

¹⁶⁷ Transcript, p. 155 lines 40 – 45.

¹⁶⁸ Exhibit A1, paragraph [152].

167. The Applicant also submits that, in contrast to the situation that will be the case in the event the Applicant is now allowed to remain in the Australian community, he will face practical, financial and emotional hardship upon a return to New Zealand due to his lack of immediate family and social and economic support. Moreover, and although the Delegate previously found that the Applicant would have access to the health, welfare and social services in New Zealand commensurate with those that are available to other New Zealand citizens in similar circumstances to aid his transition and reintegration into New Zealand society, the Applicant submits that any reasonable assessment of the material would lead the Tribunal to a conclusion that if the visa cancellation decision remains unrevoked the result will be *“lifelong grief and psychological hardship for a number of people, including the Applicant”*.¹⁶⁹
168. Ultimately, the Applicant submitted during the preparation of the Statement of Facts, Issues and Contentions prior to the Tribunal hearing that this consideration ‘weighs heavily’ in favour of revocation of the mandatory cancellation decision.
169. The oral evidence heard before the Tribunal from members of the Chand family - particularly from Mr Chand senior - was to the effect that in the event that the Applicant is deported from Australia, Mr Chand Senior, Mrs Adelaide Chand and likely also Child A and Child B would relocate to New Zealand, as well.
170. In light of the new oral evidence, during the course of final submissions at the conclusion of the evidence on Friday 15 July 2022 it was then put¹⁷⁰ to Counsel for the Applicant by the Tribunal that the complexion of the question regarding the extent of any impediments that the Applicant may face in the event of his deportation to New Zealand may have materially changed, particularly in light of the evidence given before the Tribunal by Mr Chand Senior. In response to that suggestion Dr Donnelly conceded,¹⁷¹ that the extent of any impediments that the Applicant may face in New Zealand do then largely fall away, yet any diminution in the weight then attaching to a Tribunal determination in favour of revocation of the visa cancellation is then offset by the need in those circumstances for the Tribunal to attach additional weight to a further miscellaneous consideration,¹⁷² in support of revocation of the

¹⁶⁹ Exhibit A1, paragraphs [152]; [154]; [156] & [[157]. Consider also: *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 at [44], per Allsop CJ.

¹⁷⁰ Transcript p.137, lines 20 – 43.

¹⁷¹ Transcript p.138 line 6.

¹⁷² Transcript, p. 138 line 8 and then continuing until p.141, line 43.

visa cancellation. This argument has sufficient strength that it will be dealt with by the Tribunal under a discrete sub-heading, further below.

171. As to impediments, the Tribunal concludes that the Applicant would face far more profound impediments in New Zealand in the event that his parents and children were not to also relocate, yet that does not seem likely to eventuate,
172. In the final analysis the Tribunal determines that this Other Consideration (b), is in favour of the Applicant and now, principally by reason of the evidence of Mr Chand Senior, attracts only **limited weight**, in favour of revocation of the mandatory cancellation.

(c) Impact on victims

173. Paragraph 9.3(1) of the Ministerial Direction relevantly provides:

*“Decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen’s criminal behaviour, and the family members of the victim or victims, **where information in this regard is available** and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.”*

[**emphasis** not in the original, and now included here by the Tribunal]

174. In the Respondent’s Statement of Facts Issues and Contentions, it is submitted that there is ‘no evidence’ as to the impact that either revocation or non-revocation of the decision would have on any victims of the Applicant’s offending, such that this consideration becomes irrelevant to the Tribunal’s deliberation.¹⁷³ So too, and at least initially, by way of the Applicant’s Statement of Facts Issues and Contentions, Counsel for the Applicant submitted¹⁷⁴ that impact on victims did not arise as a relevant consideration as part of the Tribunal’s deliberation.
175. During the hearing, the Tribunal did however receive evidence from the Applicant’s 13 year old son, ‘Child A’, whom had been a victim of the Applicant’s family violence in what had been termed during these proceedings as the ‘Sydney Centrelink incident’:

¹⁷³ Exhibit R1, paragraph [79].

¹⁷⁴ Exhibit A1, paragraph [174].

DR DONNELLY: [Child 'A'], I just want to ask you one or two more questions about that incident at Centrelink and I think you said that Dad had pulled you by the ear and dragged you; do you recall that evidence?---Yes.

Do you forgive your dad for that?---Yes, I do.

And are you scared of your dad at the present time?---No, I'm not scared of my dad.

Okay. Thank you, nothing further.¹⁷⁵

176. There is no other evidence before the Tribunal regarding the impact of the Applicant's offending on victims.¹⁷⁶
177. In light of this oral evidence, Counsel for the Applicant submitted that impact on victims does now become a relevant consideration, citing as authority for that proposition both *PGDX v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs* [2021] FCA 1235 ("PGDX"); and *Bale v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646 ("Bale").
178. In *PGDX*, when speaking in relation to the predecessor of Ministerial Direction No 90, Ministerial Direction No 79, Kerr J said:

[8] *The principal issue in this proceeding concerns whether the terms of cl 14.4 of Direction No 79 – Visa refusal and cancellation under s.501 and revocation of a mandatory cancellation of a visa under s.501CA (Direction No 79) which provides a framework within which decision makers are required to undertake their task when deciding whether or not to exercise the discretion to revoke the mandatory cancellation of a non-citizen's visa, properly construed, excludes the decision maker from having to take into account under that clause the "impact" on a victim of a decision to revoke a visa cancellation where, contrary to the usual position where the victim might want the offender sent out of Australia, the evidence of the victim is that the impact of such a decision on the victim (letting him or her to remain) will be positive.*

[9] *Such a circumstance may be rare, but I explain below that I am satisfied that properly construed cl 14.4 of Direction 79 operates in recognition that an offender's victim is to be given appropriate agency in the decision-making process. That means a victim's interests in respect of the impact of such a decision must be taken into account by the decision maker consistently with the usual position that a relevant consideration may weigh either in favour of, or against, whether or not to revoke the mandatory cancellation of a visa.*

[10] *In the present case I have concluded, notwithstanding the otherwise exemplary attention the Tribunal gave to its task, it omitted to discharge that prescribed responsibility. The impact on the Applicant's victim was not taken into*

¹⁷⁵ Transcript p.91 lines 1 – 10.

¹⁷⁶ Transcript, p.143, line 1.

account by it as cl 14.4 of Direction No 79 required, notwithstanding that his victim (his ex-wife) had given evidence inter alia that she had forgiven him and, that rather than wanting him to have his visa revoked, she needed him to remain in Australia to assist her with the care of their son”.

179. In *Bale*, Perram J said:

[26] “....Where a matter is relevant to two or more mandatory relevant considerations, a decision-maker is not usually required to take the matter into account repetitiously: see Hodgson v Minister for Immigration and Border Protection [2017] FCA 1141 at [40] per Tracey J; RZSN v Minister for Home Affairs [2019] FCA 1731 at 67 ff per Anderson J. And, as [54] of the Tribunal’s reasons show, the Tribunal was well-aware that she was one of his victims.

[27] The only way to outflank that problem would be to submit that there was some aspect of the wife’s evidence as a victim which was different from her evidence as a spouse. Such evidence might be readily enough imagined. For example, in her evidence, Mr Bale’s wife could have addressed the fact Mr Bale had been convicted of common assault following an attempt to throttle her early on the morning of 17 December 2007. She could have said that despite that assault she forgave him and was not concerned that he might assault her again. It may well be that evidence of that kind would have engaged cl 14.4(1) independently of cl 14.2(1)(b).”

180. Child A has forgiven the Applicant, and clearly wishes for the Applicant to remain in Australia to perform the role of father figure, and so as not to disrupt Child A’s settled life in this country. Appropriate agency must now be given to those views. In light of the evidence of Child A, as the only specific evidence of the impact on victims of the conduct of the Applicant this Other Consideration (c) now attracts some, albeit only limited weight in favour of revocation of the Applicant’s mandatory visa cancellation.

Links to the Australian Community

181. In consideration of this Other Consideration, paragraph 9.4 of the Direction requires that decision makers have regard to the following two factors, as set out in paragraphs 9.4.1 and 9.4.2:

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

182. The Applicant, now aged 31, first arrived in Australia in June 1996 and came to reside in Australia on a permanent basis in July 2011, when aged (nearly) 21. Although there is evidence to show that the Applicant then made some return trips to New Zealand and lived

in New Zealand for some further periods, the Applicant has largely remained in Australia since July 2011. The Applicant worked as a forklift driver between 2011 and April 2016 and thereby made a positive contribution to the Australian community and economy, although he has not worked at all since April 2016, due the grip of his drug addiction.

183. The evidence before the Tribunal reveals that the Applicant has a close family relationship and very strong¹⁷⁷ ties with the Australian community, particularly via his parents and sister, and his sister's partner and child and with his own two children, who currently reside with his parents. The Applicant's mother suffers from a long-term medical condition and the Applicant's father has a substantial business to manage and requires the help of the Applicant to care for the Applicant's children and to help with the care of his mother, Mrs Adelaide Chand. The Applicant's sister has expressed her concerns for the hardship that would be caused for herself and her family, in the event that the Applicant is to be deported. The Applicant also has numerous other uncles, aunts, nieces and nephews and cousins living in Australia.¹⁷⁸
184. The Respondent submits that the Tribunal should now categorise the Applicant as having had only a modest¹⁷⁹ employment history in Australia, having been employed only for about four and a half years out of the eleven years¹⁸⁰ the Applicant has been resident in this country. As to the Applicant's family and social links to Australia, the Respondent submits that little weight¹⁸¹ should be attributed to character references¹⁸² given in support of the Applicant by his mother, father, sister and uncle, on the basis of their '*inherent bias in favour of the Applicant*'. Moreover, the Respondent Minister submits¹⁸³ that paragraph 9.4.2(3) of the Ministerial Direction (the impact on Australian Business interests) here attracts little weight in favour of the revocation of the mandatory visa cancellation decision, because an employment link will generally only be given weight where non-revocation would significantly compromise the delivery of a major project or the delivery of an important

¹⁷⁷ Transcript, p.143, line 30.

¹⁷⁸ Exhibit G1, G13 pages 72-86.

¹⁷⁹ Exhibit R1, paragraph [82].

¹⁸⁰ Transcript p.156, line 43.

¹⁸¹ Exhibit R1, paragraph [84].

¹⁸² Exhibit G1, G7, pages 56 - 61.

¹⁸³ Exhibit R1, paragraph [85].

service in Australia. Ultimately, the Respondent Minister submits¹⁸⁴ that that this consideration does weigh in the Applicant's favour, yet submits that it does not outweigh the primary considerations that weigh heavily against revocation. The Tribunal concludes that Other Consideration 9.4.2(3) attracts some, albeit limited, weight in favour of revocation.

185. Ultimately it is concluded that the Applicant has made only very modest personal employment/economic contributions to Australia, yet that he has far stronger family connections. In the final analysis, taking into account the combined effect of matters raised by the Ministerial Direction in relation to this other consideration weighs moderately in favour of revocation of the Applicant's mandatory visa cancellation decision.

Conclusion: Other Consideration (d)

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

Miscellaneous Considerations

187. Counsel for the Applicant submits that a further miscellaneous consideration arises for necessary consideration in this case, specifically because of the evidence of the Applicant's father, Mr Chand Senior.
188. Mr Chand Senior operates an interstate transport company, NGO Transport. The evidence before the Tribunal is that NGO Transport has 21 employees and a payroll of approximately \$50,000 per week, and operates 12 Prime Movers, 16 sets of B-Double Trailers, and a Road Train. More Prime Movers and B-Double Trailers have recently been ordered, creating the potential for employment in the very near term for at least six more drivers.¹⁸⁵ In the event that the Applicant is to be allowed to remain in Australia, the Applicant will be immediately employed by NGO Transport as a yardman, and will reside at the NGO yard at Rocklea - as approved by the Queensland Parole Authorities - and will be subject to regular random workplace drug testing.

¹⁸⁴ Exhibit R1, paragraph [86].

¹⁸⁵ Exhibit G1, G57 pages 238 to 423.

189. In the event that the Applicant is to be deported, Mr Chand Senior informed the Tribunal that he will feel morally compelled to immediately close his business and move back to New Zealand in order to support his son, the Applicant, because Mr Chand Senior perceives that his son will rapidly fail in New Zealand without the supporting scaffold of close family support.
190. Previously, the Delegate when cancelling the Applicant's visa was unprepared to attach weight to the impact on NGO Transport, observing:

"While I acknowledge the support [the Applicant's] parents give to him, I do not consider that [the Applicant] is directly involved in the running of the business. I acknowledge the importance of transport services to the Australian community however I do not accept that a non-revocation decision in relation to [the Applicant] has a direct effect that would significantly compromise the delivery of a major project, or delivery of an important service to Australia as required by the Direction when assessing this consideration".

191. The Applicant now submits¹⁸⁶ that, even if the Delegate's reasoning is correct, at least insofar as the direct consideration of paragraph 9.4.2(3) of the Ministerial Direction, the adverse impact of a non-revocation of the visa cancellation on NGO Transport remains a relevant¹⁸⁷ 'miscellaneous' consideration, beyond the specific content of the Ministerial Direction, as the Tribunal is "*not limited to having regard to the universe of considerations reflected in the direction*", and, more tellingly, to not have regard for a consideration that is generally relevant (but not mandatory), and to treat the latter as if it were an 'irrelevant forbidden consideration'¹⁸⁸ would amount to obvious error, as the Ministerial Direction does not create any such false dichotomy.
192. The Respondent Minister concedes¹⁸⁹ that the impact of a non-revocation of the visa cancellation decision may be raised as a miscellaneous consideration, yet submits¹⁹⁰ that no weight, or at least very little weight ought now attach to it, in favour of the Applicant and a revocation of the visa cancellation.

¹⁸⁶ Exhibit A1, paragraph [170].

¹⁸⁷ Exhibit A1, paragraph [171].

¹⁸⁸ *BOE21 v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs* [2021] FCA 1429 at 55, per Bromwich J.

¹⁸⁹ Transcript, p. 157, line 15.

¹⁹⁰ Transcript, p. 157, line 45.

193. In light of the evidence regarding the plans for the future enunciated by Mr Chand Senior, in the event that his son the Applicant is to be deported, this case gives rise to a fork in the road, inviting two possible future scenarios: either, Mr Chand Senior, together with the Applicant's mother and the Applicant's two children will follow the Applicant back to New Zealand, in which event NGO Transport appears apt to be wound up as a trading entity; or, the Applicant's immediate family will remain in Australia after the Applicant's deportation and instead seek to provide emotional and materiel support for the Applicant in New Zealand from their existing base in Australia. The decision of the Full Federal Court in *Viane v Minister for Immigration and Border Protection*,¹⁹¹ suggests that the Tribunal needs to consider the impact of both scenarios; or at least now to choose a path, and make a finding as to which of these alternate scenarios is the more probable.¹⁹² Of these two available approaches the Tribunal determines the more appropriate is to choose the most likely outcome, in light of the evidence.
194. Ultimately, the Tribunal attaches considerable weight on the evidence of Mr Chand Senior, who was assessed as an impressive and entirely credible witness. Although Mrs Chand equivocated as to whether a final decision had in fact been made for the family to relocate to New Zealand in the event of the Applicant's deportation, Mr Chand Senior - who is clearly the family patriarch – and clearly in control of all 'major' family decisions, was resolute in saying that he and his wife and the Applicant's children would be returning to New Zealand if that were to happen, and that it would not be possible or even practical for him to continue to try and operate NGO Transport in Australia, from a distance away in New Zealand. Similarly, the Applicant's sister Ms Rikeshni Chand's evidence was corroborative of her father's stance, being to the effect that her father would definitely uproot the family, and would immediately relocate to New Zealand in the event of the Applicant's deportation. On that basis, the Tribunal therefore now finds on the balance of probabilities that Mr Chand Senior would relocate to New Zealand, and this would have the knock-on effect of causing the winding up of NGO Transport. In that circumstance the economic and other consequences of the closure of Mr Chand's business do need to be taken up as a relevant miscellaneous consideration during the Tribunal deliberation.

¹⁹¹ [2018] FCAFC 116 at [13].

¹⁹² Transcript, p. 159, line 18.

195. In the event that NGO Transport is wound up as a trading entity there will be an economic impact on the Australian economy and a detrimental impact in terms of a reduction in the availability of freight logistics capacity within what must be recognised as a vital sector of the Australian economy. Moreover, concern must be expressed for the welfare and job security of 21 employees, and their families.
196. Ultimately, the Tribunal determines that moderate further weight in favour of revocation of the visa cancellation must attach because of this miscellaneous consideration.

CONCLUSION

197. In accordance with the foregoing elaboration of reasons, the Tribunal's assessment in accordance with the Ministerial Direction, whilst conscious of the need specified in paragraph 7(2) of the Ministerial Direction to generally attach greater weight to the Primary Considerations than to the Other Considerations, is as follows:

Primary Consideration 1 Protection of the Australian Community

Weights very heavily against revocation.

Primary Consideration 2 Family Violence

Viewed very seriously, yet weighs neutrally

Primary Consideration 3 Best interests of minor children

Weights heavily in favour of revocation

Primary Consideration 4 Expectations of the Australian community

Weights heavily against revocation of the visa cancellation

Other consideration (a) International non-refoulment obligations

Weights neutrally

Other consideration (b) Extent of impediments, if removed from Australia

Limited weight, in favour of revocation

Other consideration (c)

Impact on victims

Limited weight in favour of revocation

Other consideration (d)

Links to the Australian community

Moderate weight in favour of revocation.

Miscellaneous consideration:

Risk of closure of the Applicant's father's business in Australia

Moderate weight in favour of revocation.

198. Although ultimately only a matter marginally in favour of the Applicant, the Tribunal determines that in accordance with s.501CA(4)(b)(ii) of the Act there is now 'another reason' why the original decision to cancel the Applicant's visa should be revoked

DECISION

199. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal sets aside the decision made by the delegate of the Respondent dated 2 May 2022 not to revoke the mandatory cancellation of the Applicant's visa, and substitutes a decision to revoke the mandatory cancellation of the Applicant's visa.

*I certify that the preceding 199
(one hundred and ninety nine)
paragraphs are a true copy of
the reasons for the decision
herein of Member Andrew
McLean Williams*

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

Associate

Dated: 24 August 2022

Date(s) of hearing:	14 and 15 July 2022
Counsel for the Applicant:	Dr Jason Donnelly
Solicitors for the Applicant:	Potts Lawyers
Solicitors for the Respondent:	Ms Cody Allen Sparke Helmore

ANNEXURE A - EXHIBIT LIST

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED
G1	Section 501 G-Documents (G1 to G66 paged 1 to 298)	R	-	20 May 2022
A1	Applicant's Statement of Facts, Issues and Contentions (paged 1 to 36)	A	5 June 2022	13 June 2022
A2	Psychological Report of Mr Matt Visser including Appendix 1 to 3 (22 pages)	A	6 June 2022	13 June 2022
A3	Statement of the Applicant (4 pages)	A	13 June 2022	13 June 2022
A4	Statement of Adelaide Moetu Margaret Chand (3 pages)	A	9 June 2022	13 June 2022
A5	Statement of Anesh Chand (4 pages)	A	7 June 2022	13 June 2022
A6	Statement of Child B (2 pages)	A	9 June 2022	13 June 2022
A7	Statement of Child A (2 pages)	A	9 June 2022	13 June 2022
A8	Statement of Rikeshni Mala Chand (3 pages)	A	13 June 2022	13 June 2022
A9	Applicant's Tender Bundle (paged 1 to 82)	A	-	13 June 2022

A10	Letter from Andrew De Ambrosis Wiser Ways - Completion of Anger Management Program.	A	4 July 2022	5 July 2022
A11	Letter of Support from Queensland Injectors Health Network (QulHN) (1 page)	A	27 June 2022	5 July 2022
A12	Queensland Injectors Health Network (QulHN) Treatment Planner (2 pages)	A	6 May 2022	5 July 2022
R1	Respondent's Statement of Facts, Issues and Contentions (paged 1 to 23)	R	28 June 2022	28 June 2022
R2	Respondent's Tender Bundle (R1 to R10, paged 1 to 573)	R	-	28 June 2022