Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

DH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 4309 (19 November 2021)

Division: GENERAL DIVISION

File Number: **2021/6315**

Re: **DH**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member A. Nikolic AM CSC**

Date: **19 November 2021**

Place: **Melbourne**

The Tribunal affirms the decision under review.

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

Senior Member A. Nikolic AM CSC

CATCHWORDS

MIGRATION *– Mandatory visa cancellation – citizen of the United Kingdom – Class BB Subclass 155 Five Year Resident Return visa – failure to pass good character test – substantial criminal record – very serious drug offences – family violence – whether another reason to revoke the mandatory cancellation – Ministerial Direction No. 90 applied – decision affirmed*

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth)

Crimes (Domestic and Personal Violence) Act 2007 (NSW)

Family Law Act 1975 (Cth)

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)

Drug Misuse and Trafficking Act 1985 (NSW)

CASES

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

Brown v Minister for Immigration and Citizenship (2009) 112 ALD 67

Brown v Minister for Immigration and Citizenship (2010) 183 FCR 113

Bullmore v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1106

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

CVN17 v Minister for Immigration and Border Protection (2019) 163 ALD 101

FYBR v Minister for Home Affairs (2019) 272 FCR 454

FYBR v Minister for Home Affairs and Anor [2020] HCA Trans 56

DH v R [2018] NSWCCA 214

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

K & S Lake City Freighters Proprietary Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309

Leau and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 3090

McLachlan v Assistant Minister for Immigration and Border Protection [2018] FCA 109

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

QDQY v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1394

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

Viane v Minister for Immigration and Border Protection (2018) 263 FCR 531

Vu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] 276 FCR 516

Yemshaw v Hounslow London Borough Council [2011] 1 WLR 433

SECONDARY MATERIALS

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

Ray Finkelstein and David Hamer (eds), *Concise Australian Legal Dictionary* (Lexis Nexis Butterworths, 5th ed, 2015)

The Utility of Level of Service Inventory – Revised (LSI-R)

Don Andrews and James Bonta, *The Level of Service Inventory–Revised* (Multi-Health Systems Inc. 1995)

REASONS FOR DECISION

Senior Member A. Nikolic AM CSC

19 November 2021

BACKGROUND

1. The Applicant seeks review of a decision by a delegate of the Respondent not to revoke the mandatory cancellation of his Class BB Subclass 155 Five Year Resident Return visa.

2. The hearing was held on 10 and 11 November 2021 by videoconference. The Applicant was represented by Dr Donnelly of counsel. The Respondent was represented by Ms Donald, a solicitor from Sparke Helmore Lawyers.

3. For the following reasons the Tribunal affirms the decision under review.

FACTS

4. The Applicant is a 45-year-old citizen of the United Kingdom[1] who migrated to Australia in March 1986 with his mother, stepfather, and older brother.[2] Apart from seven brief international departures between 2006 and 2014[3] he has lived in Australia since. The Applicant has never applied for Australian citizenship.[4]

5. The Applicant was educated to Year 11[5] and has consistently worked as a concreter.[6] He met his current de facto partner in 2007[7] and they have two infant children.[8] The Applicant also has a child with a previous de facto partner.[9]

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[1] Exhibit R1, 114; 117.
[2] Ibid 80.
[3] Ibid 80.
[4] Ibid 99.
[5] Ibid 94.
[6] Ibid 53; 94.
[7] Ibid 54.
[8] Ibid 105; 231.
[9] Ibid 119.

6. The Applicant's criminal history discloses significant offending,[10] including the possession and supply of large quantities of illicit drugs. He has been in custody since early 2015 and in 2016 was sentenced to ten years' imprisonment with a seven-year non-parole period.[11] The Applicant's appeal against this sentence was dismissed by the New South Wales Court of Criminal Appeal in 2018.[12] He is eligible for parole in early 2022.[13]

7. On 16 March 2017, the Respondent wrote to the Applicant advising that his visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (**the Act**).[14] The delegate invited the Applicant to make representations to have the cancellation decision revoked, which were made in March 2017,[15] July 2019,[16] and in 2021.[17]

8. On 31 August 2021, a delegate of the Minister decided not to revoke the mandatory cancellation decision[18] and the Applicant was advised the following day.[19] On 7 September 2021 the Applicant asked the Tribunal to review the non-revocation decision.[20]

9. Under s 500(6L) of the Act, the Tribunal must decide this application within 84 days of the Applicant being notified of the reviewable decision. These reasons are provided on 19 November 2021, which is five working days after the conclusion of the hearing and within the permissible 84-day period.

LEGISLATIVE FRAMEWORK

10. Section 25(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**) and s 500(1)(ba) of the Act are the sources of the Tribunal's jurisdiction in this matter.

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[10] Ibid 33-36.
[11] Ibid 58.
[12] Ibid 60; Exhibit R2, 262-264; *DH v R* [2018] NSWCCA 214.
[13] Exhibit R1, 52; 58.
[14] Ibid 83.
[15] Ibid 89.
[16] Ibid 319-321.
[17] Ibid 238-308.
[18] Ibid 29.
[19] Ibid 7.
[20] Ibid 1.

11. Section 501(3A) of the Act, read in conjunction with ss 501(6) and 501(7), obliges the Minister to cancel a person's visa if the Minister is satisfied the person does not pass the character test and is serving a full-time sentence of imprisonment.

12. The '*character test*' is defined in s 501(6) of the Act and a person does not pass if they have a '*substantial criminal record*' as defined by s 501(7). This includes if they have been sentenced to a term of imprisonment of 12 months or more: s 501(7)(c).

13. Under s 501CA(3) of the Act, the Minister is obliged to give notice of a cancellation decision as soon as practicable after it is made, and to invite the affected person to make representations about revocation. Provisions relating to the form and process of those representations are found in reg 2.52 of the *Migration Regulations 1994* (Cth).

14. Section 501CA(4) of the Act confers a discretionary power upon the Minister to revoke the original decision, if the person whose visa has been cancelled makes representations in accordance with the invitation, and the Minister is satisfied that the person passes the character test, or there is another reason why the original decision should be revoked.

Ministerial Direction 90

15. The Minister is empowered by s 499(1) of the Act to give written directions to a person or body having functions or powers under the Act. On 8 March 2021, the Minister signed *Direction no. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**the Direction**). The Direction must be applied by all decision-makers (except for the Minister acting personally).[21]

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

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will*

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

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 measureable risk of causing physical harm to the Australian community.

17. Clause 6 of the Direction provides that, informed by the principles in cl 5.2, a decision-maker must have regard to clauses 8 and 9, where relevant to the decision.

18. Clause 8 of the Direction identifies as primary considerations:

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

(b) Whether the conduct engaged in constituted family violence;

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

(d) Expectations of the Australian community.

19. Clause 9 of the Direction sets out a non-exhaustive list of other considerations:

(a) International non-refoulement obligations;

(b) Extent of impediments if removed;

(c) Impact on victims;

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

20. Clause 7(1) provides that appropriate weight should be given to '*information and evidence from independent and authoritative sources.'*

21. Clause 7(2) states that '*Primary considerations should generally be given greater weight than the other considerations.'* This does not preclude the Tribunal, however, from giving an '*other*' consideration the equivalent of or greater weight than a primary consideration.[22]

22. Clause 7(3) states that *'One or more primary considerations may outweigh other primary considerations.'* The weighing process, however, is left to individual decision-makers.[23]

ISSUE TO BE RESOLVED

23. It is common ground the Applicant fails the character test. As such, s 501CA(4)(b)(i) of the Act does not provide a basis to revoke the reviewable decision. The issue to be determined, therefore, is whether there is '*another reason'* for revocation. This task was considered by the Full Court of the Australian Federal Court (**FCAFC**) in *Viane*:[24]

> *There is no statutory power to revoke under s 501CA(4)(b)(ii) unless the Minister is satisfied that there is a reason, other than a conclusion that the person concerned passes the character test, which means that the original decision 'should be' revoked. It is not enough that there is a matter that might be considered or may be said to be objectively relevant. It must be a reason that carries sufficient weight or significance to satisfy the Minister entrusted with the responsibility to consider whether to revoke the visa cancellation that the decision should be revoked. Only a reason of that character enlivens the statutory power to revoke. It is the absence of such a reason that will result in a decision not to revoke a visa cancellation.*

EVIDENCE

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

[23] *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461, [57].

[24] *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, [64] (Colvin J).

Documentary evidence

24. The following documents were tendered into evidence:

(a) A six-page statement from the Applicant dated 10 October 2021;[25]

(b) A five-page statement from the Applicant's current de facto partner dated 10 October 2021, and a further six-page supplementary statement from her dated 5 November 2021, attaching a medical certificate dated 2 November 2021.[26] The Tribunal will refer to the Applicant's current de facto partner as '**HP**';

(c) A five-page statement dated 10 October 2021 from the Applicant's brother.[27] The Tribunal will refer to the Applicant's brother as '**SH**';

(d) A three-page statement dated 5 November 2021 from the Applicant's former de facto partner,[28] who the Tribunal will refer to as '**KR**';

(e) A three-page statement from the Applicant's mother dated 9 October 2021;[29]

(f) A two-page statement from a friend and former work colleague of the Applicant dated 5 November 2021;[30]

(g) A 108-page tender bundle lodged by the Applicant;[31]

(h) G-documents[32] from the Respondent numbering 377 pages;[33]

(i) Tender bundle from the Respondent numbering 715 pages.[34]

Applicant's evidence

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[25] Collectively Exhibit A1.

[26] Exhibit A2.

[27] Exhibit A3.

[28] Exhibit A4.

[29] Exhibit A5.

[30] Exhibit A6.

[31] Exhibit A7.

[32] G documents are so named because they are provided under s 501**G** of the *Migration Act*. They consist of documents in the possession or control of the Respondent relevant to the making of a reviewable decision. They usually accompany the Minister's written notice regarding a visa cancellation, refusal, or non-revocation.

[33] Exhibit R1.

[34] Exhibit R2.

25. The Applicant adopted his latest statement as true and correct. The Tribunal has also considered his previous written submissions.[35]

Family

26. The Applicant said he does not have '*a big extended family*' in Australia but they are very close and '*do a lot for each other*'. He described his relationship with HP as '*loving and caring*'. He spoke with affection about his children, the eldest of whom is approaching adulthood and lives with KR and her family. The younger children live with HP and were born with IVF assistance during the Applicant's imprisonment.

27. The Applicant said he has played a continuing parental role for his children despite imprisonment during the last seven years. He talks with HP and their youngest children daily and contributes to family decision-making. Prior to COVID-19 restrictions, HP and the children visited him frequently. His imprisonment has placed a heavy strain on HP, who runs a business, raises the children, and helps support the Applicant's ageing mother. HP's parents, sister, and others help her care for the children when they are able.

28. The Applicant's stepfather died in 2017 and he talks to his mother frequently by telephone. If released, he wants to help her with things like shopping, mowing lawns, and attending appointments. SH and other family members currently attend to these needs.

29. The Applicant said he is very close to SH, who has a de facto partner and three children. The Applicant said he is particularly close to his oldest nephew, who is now '*14 or 15*'. He is also developing a bond with SH's two younger children who were born since his imprisonment. He wants to play a more prominent avuncular role if released.

Life in Australia and future intentions

30. The Applicant said he worked consistently after leaving school at 17 as a concreter. He engaged in community activities that included coaching an Under-nines football team his eldest child played for but is not sure of the team's name because it '*was a long time ago*'. He and HP purchased a block of land in 2009 and subsequently built a house on it in

[35] Exhibit R1, 89-102, 124-125, 202, 206; Exhibit R2, 219-223.

2010. The Applicant said that if released he wants to immediately return to work and help HP raise their children, because she is '*just hanging on*' in his absence.

Drug use

31. The Applicant said he first started using cocaine in December 2014 '*due to stress from the IVF*' and '*just the general stress of life – anxiety, different pressures*'. He used cocaine '*sometimes on weekends and sometimes day-to-day – depending*'. When asked by Ms Donald how he paid for the cocaine, he responded: '*I was storing stuff at home for* [a] *friend*'. When asked what he stored, the Applicant responded it was: '*glassware, some chemicals, and methamphetamine*', which commenced from December 2014. When asked what he meant by '*glassware*,' the Applicant said it was three boxes but he '*didn't know what was in it*'. When asked how many chemicals he stored, the Applicant responded: '*one bag of chemicals*'. He claimed to be unaware what the chemicals were or what they were used for. When asked if his agreement to store this material could have been earlier than December 2014, the Applicant responded '*No*,' insisting he had only done so from December 2014 until February 2015.

Offending and rehabilitation

32. When asked about alcohol and intoxication as recurring themes in the evidence, the Applicant agreed much of his past misconduct was alcohol related. He claimed alcohol was a '*big reason*' he could not recall past incidents. But after so long in prison, he had '*no interest in abusing alcohol anymore*'.

33. The Applicant's evidence about his offending can be summarised as follows:

(a) <u>Driving offences</u>. When asked by Dr Donnelly about multiple driving offences, the Applicant said his past conduct on the roads was '*stupid*' and he could not believe the way he acted. He stated: '*my charges are pretty much all motor vehicle charges except for one charge of assault'*';

(b) <u>Behave in offensive manner in public place</u>. The Applicant was asked about a police report from 8 January 2000 in which it was alleged he was removed from a hotel, tried to fight security guards, threatened to '*shoot the security staff with a gun*,' and was observed by police punching the bonnet of a car. The Applicant responded: '*Can't recall – too long ago and I was intoxicated'*. When asked if the

incident could have happened, the Applicant responded '*Yes*'. When asked if he punched the bonnet of the car, the Applicant asked: '*Is there footage of that*?' When told that police reported witnessing this act, the Applicant stated: '*I can't remember so I don't know*'. When asked if he acted in an aggressive and offensive manner towards police, the Applicant responded: '*Can't recall*'. When asked about the police claim that SH was also in attendance and similarly aggressive towards police, the Applicant responded: '*Cannot recall*'. When Ms Donald pointed out the Applicant was arrested, charged, and appeared to have pleaded guilty to offensive behaviour, he responded: '*I cannot remember this incident – I don't understand the charge – what is offensive*?';

(c) Involvement in 'brawl'. The Applicant was asked about a police report regarding a '*brawl*' erupting in a public bar on 3 October 2005. The Applicant said he recalled being involved. When asked if SH was also involved, the Applicant responded: '*Yes*'. When asked if he was intoxicated at the time, the Applicant responded '*Yes*';

(d) The Applicant was asked why his early offending and attendant court appearances and non-custodial punishments did not deter more serious offending. He said that he wished he had received a custodial sentence earlier, which would have acted as a '*kick up the backside*'. He did not know why the earlier non-custodial penalties failed to direct him towards a law-abiding life.

(e) Drug offending. Much of the Applicant's cross-examination focussed on his drug offending, relating to the supply of significant quantities of illicit drugs to an undercover police officer. This evidence can be summarised as follows:

(i) The Applicant said his drug offending started when one of his co-workers asked if he knew anyone who could '*source some pills*'. The Applicant made enquiries and claimed the situation evolved from there to dealing the drugs himself. He stated:

> *'I'm not a drug dealer – it just snowballed. I've never sold anything before, this is my first time. That three-month period has given me seven years in prison…I've never been caught doing anything illegal…It started as helping out a mate and snowballed into this big thing and I got caught in the middle….'*

(ii) The Applicant claimed he agreed to supply drugs concurrently with agreeing to store them for a friend at his home, insisting this was not prior

to December 2014. When pressed, he claimed his decision to supply was only '*a day before the first offence*' on 1 December 2014. When challenged about the plausibility of this evidence, the Applicant insisted he only ever supplied drugs to the undercover police officer from December 2014 to February 2015;

(iii) The Applicant explained that his drug offending arose from financial pressures and he thought it '*would help pay the bills*'. He said HP ran her own business '*for a long time*', but he only got paid as a concreter when work was completed. He said inclement weather in late 2014, with heavy rain, was a '*bad time of year*' and caused him financial stress. This included having to pay for expensive IVF treatments. The Applicant recalled committing his first drug offence with the undercover officer on the same day as HP underwent successful IVF treatment for their first child. He claimed the decision to become involved in the drug enterprise was made: '*without thinking about the situation – I just went and done it*'. He said his drug offending was '*definitely serious*' and imprisonment '*made* [him] r*ealise the effects of drugs on members of the community*', which he had not seen '*on the outside*';

(iv) The Applicant was challenged about his evidence that he only stored a bag of chemicals for a friend, given two 25 litre drums of a precursor used in the manufacture of methylamphetamine were located at his home after arrest.[36] The Applicant responded: '*I'm not too sure what it was…I thought it was in a bag but it was in buckets. It was so long ago I can't remember…I didn't know anything about these kind of things*'. When asked if he also stored a bag of chemicals as referred to earlier, the Applicant responded: '*No*'. The Applicant agreed that electronic scales were found at his home during the police search, which he used for weighing drugs;

(v) When asked how much he was paid for participating in the drug enterprise, the Applicant responded: '*It was like $3000*,' which approximated the $3300 recovered by police during the search warrant executed at his home.[37] He

[36] Exhibit R2, 178 [14].
[37] Ibid 195 [135].

stated: '*I was getting $1 for every pill and $500 extra for storing the stuff at home*'. He claimed to have also received cocaine as payment but was unsure how much;

(vi) The Applicant confirmed he was legally represented at trial, was taken through a Statement of Facts by his lawyer, and gave instructions to plead guilty on that basis.[38] The Applicant agreed his first drug transaction related to the provision of 1000 MDMA pills on 1 December 2014, when he arrived to meet his co-offenders and an undercover agent in a Lexus sedan that HP owned.[39] He attended a subsequent meeting on 11 February 2015 relating to the supply of a kilogram of cocaine in a '*Range Rover sports vehicle*',[40] which was his car. In his oral evidence, the Applicant thought the Lexus was purchased for around $60,000 and the Range Rover for around $90,000 but could not recall when or where they were purchased. He claimed they were not paid for outright but could not recall repayment details. He claimed to have '*traded in a ute*' when purchasing the Range Rover, which meant the final price '*wasn't a big amount*';

(vii) The Applicant agreed that, at the first transaction with the undercover office on 1 December 2014, he arranged a subsequent meeting alone because of a mistake in the size of the transaction. He provided a second phone number for the purchaser's future use. It was put to the Applicant that it was implausible he only agreed to store and supply drugs from December 2014, given at the first transaction on 1 December 2014 he already had authority to conclude a significant transaction involving 1000 pills and to be personally contacted to negotiate future orders. The Applicant insisted his involvement in drug supply was only from December 2014 to February 2015 and the only drugs he ever supplied were those requested by the undercover officer. The Applicant was further pressed that the discovery of scales at his home and his agreement he was actively involved in the weighing and selling of significant quantities of drugs suggested otherwise.

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[38] Ibid 177-196.

[39] Ibid 181 [36]; 183 [47].

[40] Ibid 193.

He insisted, however, that the only illicit drugs he ever sold were to the undercover officer;

(viii) The Applicant was asked about meeting the undercover officer a week later and agreed he sold him 900 MDMA pills. He also agreed that he met the officer ten days later and organised a further sale of 500 pills. When asked about a conversation with the undercover officer during which the Applicant stated he could provide '*shitloads of the tablets*' and had '*thousands and thousands and thousands*,'[41] the Applicant could not recall. When referred to the recorded nature of this conversation, the Applicant responded: '*If that's in the Statement of Facts*'. When asked about his claim that he could supply 10,000 pills,[42] the Applicant stated: '*I do not recall these conversations'*. When pressed if he agreed this is what he said based on the agreed Statement of Facts, the Applicant responded: '*At the time I might have – I'm not too sure*'. The Applicant agreed he told the undercover officer he could supply a kilogram of ice but could not recall if the cost he referred to was $150,000.[43] In response to further questions he accepted this sounded about right. When asked about telling the officer he could supply '*ten or fifteen kilos of ice*,' which would be '*too easy*',[44] the Applicant responded: '*I'm not too sure – I don't know – can't recall*.' He accepted in response to follow-up questions that he said this if in the Statement of Facts;

(ix) The Applicant was challenged by Ms Donald that his claim about only ever supplying drugs to the undercover officer and only what he was asked to supply, was inconsistent with his recorded claims about being able to sell substantial additional amounts. The Applicant responded: '*I can't recall conversations, I don't know what was said at the time*'. The Applicant referred to his role as that of a '*middleman*' who always referred decisions to his unnamed supplier: '*I was being told what to do…but never made any decisions on my own'*. When pressed by Ms Donald that his recorded

[41] Ibid 185 [65].
[42] Ibid 288 [25].
[43] Ibid 186 [66].
[44] Ibid 186 [67].

conduct suggested he was not just passively following orders, the Applicant insisted his actions were always '*at the direction of someone else*';

(x) The Applicant was taken through other drug transactions he undertook with the undercover officer on 8 January 2015 for 1000 pills,[45] and on 28 January 2015 where he claimed to be able to supply *'20 kilograms* (of cocaine) *without a problem*'.[46] The Applicant said he could not recall this conversation but did not deny it was correct. He could not recall telling the officer he could supply six kilograms of cocaine at $220,000 per kilogram,[47] or being able to supply much larger amounts. At one point the Applicant bristled: '*I only got arrested for 1 kilogram not 20*'. When pressed by Ms Donald that he consistently told the officer he could supply more drugs than requested, the Applicant responded: '*It's been that long I can't remember'*;

(xi) The Applicant agreed that on 11 February 2015 he told the undercover officer that one kilogram of cocaine would be supplied at a time and after the first kilogram was paid for, he would retrieve and deliver the second one.[48] He also agreed that he claimed to be making $5,000 for each kilogram of cocaine sold.[49] When Ms Donald asked him if he now agreed that he received more than the $3000 he earlier claimed from drug sales, the Applicant responded: '*No because I didn't sell any kilos of cocaine in that period*' and insisted he only received around $3000 from his participation;

(xii) During re-examination, the Applicant was asked by Dr Donnelly about his claims to the undercover officer about supplying much larger quantities of drugs. The Applicant said this did not mean he could '*source that amount*' and claimed to be exaggerating: '*you big note and try to make things sound better than what they actually are*'.

(f) <u>Assault occasioning actual bodily harm</u>.

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[45] Ibid 187.
[46] Ibid 188.
[47] Ibid 189 [95].
[48] Ibid 193 [119].
[49] Ibid 190 [96]

(i) The Applicant said he met KR '*maybe in 2002*.' They subsequently began a relationship and lived together in the same house for about three years. Their child was born about a year after starting to live together. The Applicant attributed his physical assault against KR to discovering she was unfaithful during their relationship. He claimed the relationship ended six or seven months prior to the assault, but they were still living in the same house and sleeping in separate bedrooms. The Applicant opined this was '*maybe…a toxic environment*,*'* but said their son was only about two-and-a-half years of age and KR had '*nowhere else to go*'. The Applicant said he had already commenced a relationship with HP at the time he assaulted KR;

(ii) When asked about the police record from the assault referring to him as KR's '*partner*', the Applicant responded: '*No – we were broken up because of the cheating scandal*.' Despite living in the same house and co-parenting their child, the Applicant said he did not consider KR '*family*': '*She's just the mother of my son but she's definitely not my family*'. When asked what family violence is, the Applicant responded: '*Never put a hand on women no matter what*'. When asked if it was just about physical contact, the Applicant responded: '*No – it's physical or mental abuse – lots of things can hurt*';

(iii) When asked why he assaulted KR because of purported infidelity if their relationship had ended six or seven months previously and he was in a new relationship with HP, the Applicant said he still '*loved and cared*' for KR. The Applicant conceded the things he said to KR were '*not nice things*' and accepted they were '*abusive*'. When challenged that he was splitting hairs to say his conduct against her was not family violence, the Applicant said it was a '*hard situation*,' but in his eyes they were not in a relationship. He stated: '*I can love my animals, my dogs in exactly the same situation, but I don't want to spend the rest of my life with her*';

(iv) The Applicant initially described his conduct against KR as '*only a minor incident*,' stating: '*it was not a beating or a vicious attack*'. He claimed to have been immediately remorseful and apologised. When asked what kind of relationship he now has with KR, the Applicant responded: '*we've always*

had a good relationship.' He referred to amicable co-parenting arrangements between them and said KR helps HP with '*lots of things*'. When asked what *'things*,' he was '*not sure exactly*';

(v) When referred to the police record of his assault against KR, the Applicant could not recall if he told police there was an argument between them but not an assault. He agreed that most aspects of the police record were correct, including that he demanded to see KR's mobile telephone, took it from her after she failed to relinquish it, and read her text messages. As she tried to recover her telephone, he kicked her, after which he claimed she '*sat on the lounge*'. When challenged that KR had not '*sat on the lounge*' but fell onto it after being kicked, the Applicant agreed. When put to him the kick must have been quite strong to cause a fall, redness, and bruising as described in the police record, the Applicant replied: '*Not excessively strong but it caused bruising*'. When challenged about his earlier claim this was a '*minor incident*', the Applicant responded: '*It was physical harm but not to the extent of serious injury if you know what I mean*'. When asked about the reference in the police report to KR telling police she feared for her safety and the Applicant had previously been violent, the Applicant stated: '*I've never been violent to her in the past. We might have had the odd argument but never physical harm*';

(vi) The Applicant agreed that interim and final 12-month intervention orders were issued against him after the assault against KR. When put to him this was not the first time that he committed violence against a domestic partner, he responded: '*Not too sure – can't remember to be honest*;'

(vii) The Applicant was asked about a police report relating to an incident late on 2 September 2005, in which he was reportedly out drinking, following which an argument ensued with KR and he took their child to SH's house.[50] The police report states KR attended to collect her child where SH abused her. The Applicant recalled this incident as occurring on '*Grand Final night at Panthers*.' He agreed he took their child after the argument and SH '*probably*' told KR to '*get fucked*'. He explained: '*This is where it all started*

[50] Ibid 18.

from [KR] *cheating with my friend. This is the reason why we broke up*'. The Tribunal inferred from the Applicant's remarks he was still in a relationship with KR when this incident occurred;

(viii) The Applicant was asked about a police report relating to an incident on 5 November 2007 at the home he shared with KR.[51] He agreed there was an argument and he again took their child from the home, but subsequently returned. The Applicant said he could not remember the incident but accepted it must have happened because it was two days before the assault against KR. He said '*tensions were high because of* [KR's] *cheating*'; and

(ix) The Applicant was asked about a police report dated 4 April 2008 regarding his purported breach of the Apprehended Violence Order (**AVO**) taken out by KR, which stated that he and KR refused to provide statements and the matter was not proceeded with. The Applicant could not recall this incident.

(g) <u>Other police records</u>.

(i) The Applicant could not recall an incident in 1998 where he purportedly initiated a fight with a service station attendant at approximately 4am, before punching the victim and running off.[52] When asked if he could not recall or denied the incident occurred, the Applicant responded: '*I don't think this happened at all…I definitely do not remember this*';

(ii) When asked about a police report dated 21 September 1999 referring to an AVO,[53] the Applicant said he could not recall the reason for this AVO;

(iii) When asked about a police report dated August 2001 regarding unwanted calls purportedly made to KR,[54] the Applicant stated: *'I do not recall*'. When asked if he remembered police telling him it was inappropriate to make calls to KR at that time of the night, the Applicant responded: '*Can't recall*'. When pressed, he denied the conduct occurred;

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[51] Ibid 17.
[52] Ibid 22.
[53] Ibid 21.
[54] Ibid 20.

(iv) The Applicant was asked about a lengthy police report dated 16 November 2009 relating to alleged violence at around 2:00am against HP.[55] He responded: '*I have no recollection of this at all*'. In response to the allegation in the police report that HP told police he previously committed physical assaults against her, the Applicant responded: '*Never happened*.' The Applicant could '*not recall*' a verbal argument with HP or if SH grabbed HP around the neck with both hands. He could not recall confronting HP at their home, running towards her and forcing her to the ground, dragging her by the hair through the house and into the rear yard, or punching HP to the head and chest. The Applicant said it was '*definitely not true*' that he inflicted a '*vicious beating*' on HP. When asked about the police report stating blood was smeared around HP's face, that she was '*crying and shaking uncontrollably*', pleading for police help in removing her to somewhere safe, and had to be taken to hospital, the Applicant responded: '*I don't recall…If this was an incident there should be a charge'*. When asked if he denied the incident occurred, the Applicant responded: '*I cannot recall it'*. When asked if he and SH were '*extremely aggressive*' and uncooperative towards police, the Applicant could not recall. When asked if he accepted that he was arrested in relation to this incident, the Applicant responded: '*Yes*. *I was questioned by police and let go. This incident didn't occur. I cannot recall me ever being involved in this. It's ridiculous. I've never been charged with this at all*'. He could not recall an urgent AVO being sought by police to protect HP or being served with it. The Applicant was asked about the reference in the police report to HP refusing to make a statement or to accept any further police assistance, but stated he had no comment to make about this;

(v) The Applicant was asked about a police report dated 20 September 2010 referring to a de facto partner and the de facto partner's mother being harassed by the Applicant's telephone messages.[56] The Applicant could not recall if this report referred to KR and could not recall the circumstances outlined in the police report;

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[55] Ibid 13-15.

[56] Ibid 12.

(vi) The Applicant was taken through a police report dated 25 April 2011 referring to an incident where he was allegedly aggressive at a bar after seeing HP talking with another man, resulting in an argument with HP.[57] They were reportedly on holiday at the time and the police report stated HP told hotel staff she did not want the Applicant allowed entry to their room. The Applicant reportedly became angry when hotel staff attempted to comply with her wishes. HP is noted to have subsequently refused to speak with police. The Applicant could not recall this incident;

(vii) The Applicant was asked about an incident on 31 March 2012 where HP and two friends were interviewed by police at a hospital after HP presented with a bruise on her chin and a broken front tooth.[58] The police report stated she '*disclosed to her friends that she has been assaulted*' by the Applicant, but subsequently denied this to police, stating '*she was having an argument*' with the Applicant '*when she was in the shower and has slipped and fallen*'. HP and her friends are reported to have been unwilling to provide statements. The Applicant said he recalled an argument with HP but did not assault her. He remembered she was '*upset, fell and hurt her tooth on the corner of the shower, but at no point was there anything sinister*'. The Applicant could not recall what the argument was about;

(viii) The Applicant was asked about a police report regarding an incident on 24 November 2012, where he is reported to have been drinking, disorderly, and was asked to leave a hotel but subsequently attempted to regain entry. The Applicant was reportedly arrested and released. The Applicant said he had no recollection of this incident but accepted it occurred;

(ix) The Applicant was asked about a police report regarding an incident on Christmas Day 2013, where he is reported to have caused two holes in the glass panel of a front door at another person's home.[59] HP is reported to have been in attendance at the home but unwilling to provide police with information. The owner of the premises is reported to have told attending

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[57] Ibid 11.
[58] Ibid 10.
[59] Ibid 8.

police that the Applicant smashed the glass door. Police stated they did not have sufficient evidence to proceed with any criminal action and the Applicant denied smashing the door. The Applicant could not recall an altercation with HP on this day, could not recall if he travelled to this location on Christmas Day, and did not know if the owner was lying to police in claiming he smashed the door;

(x) The Applicant was asked about a police report regarding an incident on 18 October 2014, where a security guard's shirt was torn and CCTV footage reportedly showed the Applicant pushing and then throwing a punch at the victim.[60] The police report stated that neither the victim nor Applicant were willing to make a statement and the matter was not proceeded with. The Applicant could not recall this altercation or being questioned by police, but accepted it could have happened.

Incoming Passenger Cards (IPC)

34. The Applicant was asked about his failure to disclose criminal offending in two IPC in 2013 and 2014.[61] He had been to court on at least six occasions by 2013 but claimed he thought it was only necessary to mark the '*Yes*' box if he received custodial sentences rather than for '*minor offences'*. When asked where on the IPC it distinguished between types of offending, the Applicant said this was his interpretation, but acknowledged his '*error*' and stated: '*it won't happen again*.'

Recidivism risk

35. When asked by Dr Donnelly what his likelihood of reoffending is, the Applicant said it was '*highly unlikely*'. He stated that after so many years in prison and the cancellation of his visa, he has '*so much to lose*' by putting himself '*in the same situation ever again*'. He referred to a risk assessment undertaken after his arrival in prison, which assessed him as a '*low chance of reoffending*'.

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[60] Ibid 7-8.

[61] Exhibit R1, 81-82.

36. The Applicant said he has '*good case notes*' in custody reflecting a willingness to work. He had avoided relapse into drug or alcohol use while imprisoned despite their ready availability. He referred to consistent clean urinalysis results from unannounced testing. He also invoked several protective factors that would assist him in remaining abstinent and law-abiding if released. These included stable accommodation, an immediate return to work, the interests of HP and their children, and prospect of future visa cancellation if he reoffends.

Health

37. The Applicant said there was no impediment to him immediately returning to work if released. He claimed to need '*keyhole surgery*' for his shoulder and took '*Naprosyn*', which is an over-the-counter pain reliever.

Impact of removal

38. The Applicant said he would be devastated if removed from Australia and did not know if he could cope in the United Kingdom. He considers himself Australian and has never returned to the United Kingdom. He said HP and their children would be '*left behind*,' because he '*can't expect* [her] *and the kids to give everything up*'. He referred to HP running her own business and one of his children had commenced kindergarten. He said it '*would be selfish…to expect them to come*,' but claimed he had not yet discussed this with HP: '*I don't want her to make a decision unless she has to*'.

Evidence of HP

39. HP adopted her latest statement as true and correct. The Tribunal has also considered her previous written submissions in evidence.[62] Her oral evidence is summarised as follows:

(a) HP has a loving relationship with the Applicant, who she has been with since October or November 2007. She has no personal knowledge of the assault against KR and the Applicant had not told her what he did. HP insisted the Applicant and KR were not '*family*' at the time of the assault '*because they weren't together*

[62] Exhibit R1, 128-129; 228-237; Exhibit R2, 224-229.

anymore.' She agreed, however, they were still living in the same house and co-parenting their child. When asked if the Applicant still cared for KR at that time, HP responded: '*I don't think he cared for her but that's the mother of his child*'. When pressed whether that made KR '*family*', HP responded: '*There was a lot of animosity between both parties…technically they were not family at that point – it's his son's mother – that's it*'. When asked whether she considered KR part of their family now, HP responded: '*Yes – a part of the extended family'*;

(b) HP said the Applicant's eldest child resided with them from 2011 until early 2016 and they had amicable and informal custody arrangements with KR. HP said the Applicant's relationship with his eldest child had '*deflated in a sense*' during recent years because of the length of his imprisonment. She did not see this child very much anymore because he lives with KR and her family and had started work. She communicates with him primarily by telephone;

(c) HP and the Applicant have two children who were conceived with IVF assistance and born during the Applicant's imprisonment. She said the Applicant has a '*great relationship*' with their two children and they talk daily by telephone. The eldest child has commenced kindergarten. The Applicant talks to this child about football and they share a very close bond. The Applicant sings to the youngest child during telephone calls and helps with developmental activities like learning colours;

(d) HP said the relationship between the Applicant, his mother, SH, SH's de facto partner and their children is '*supportive and they love each other*'. HP sees the Applicant's mother about once a month and her children have a good relationship with their paternal grandmother. Because the Applicant's mother has retired from work and does not drive, she relies on HP, SH, and other family members. The Applicant's mother would be '*devastated and shattered'* if the Applicant could not remain in Australia. SH and his family '*would also be really crushed*';

(e) HP runs a business and finds it '*very challenging*' to concurrently raise the children. She receives help from her parents and sister, but her parents work fulltime and the capacity of others to assist is limited. HP does '*meal prep*' every Sunday and is '*exhausted mentally and physically*' but considers their children a '*great blessing*'. She is relying on the Applicant returning home to assist her;

(f) HP and the Applicant have discussed his offending. She stated: '*he obviously knows it was serious and won't put our family in this position again*'. She felt the Applicant had '*re-built himself and is willing to be the family man he's meant to be*' by making up for lost time if released;

(g) When asked whether she and their children would return to the United Kingdom with the Applicant if his application was unsuccessful, HP equivocated: '*It's a difficult topic. I don't understand how I'd take the kids away from their grandparents, football, school – I don't think I'd be able to do it. I wouldn't even have a job over there*';

(h) HP's evidence about police records referring to her is summarised as follows:

(i) When asked about a police record dated 16 November 2009 recording her claim that the Applicant previously assaulted her, HP responded: '*That's false…I said it, but it didn't happen*'. The Tribunal advised HP she had a right to silence and privilege against self-incrimination in relation to answers tending to incriminate her, which she understood. HP subsequently exercised her rights, which the Tribunal draws no adverse inference from, but also tried to exercise them on occasions that did not give rise to self-incrimination, which the Tribunal did not permit;

(ii) During cross-examination, HP said she could not recall an argument with the Applicant on 16 November 2009, or whether SH grabbed her around the neck with both hands. When asked by Ms Donald to clarify if she could not remember or denied these events, HP said: '*It never happened*.' She also denied the Applicant ran towards her in their home, forced her to the ground, dragged her through the house by her hair into the backyard, punched her to the head or chest several times, or attacked her physically in any way. She also denied SH covered her mouth to stop her screaming. HP denied calling police but recalled their attendance. When asked about police observing blood smeared around her face and that she was crying and shaking uncontrollably, HP claimed to have fallen over. When it was suggested by Ms Donald that HP was trying to protect the Applicant, she responded: '*No*'. HP claimed not to recall pleading with police to be taken somewhere safe, or complaining about pain to her stomach, or being taken

to hospital. She did recall an AVO being issued against the Applicant and SH and subsequently telling police she did not want to proceed with any action against either. She agreed this was because she wanted to salvage her relationship with the Applicant. When it was again put to HP that she feared physical abuse by the Applicant and SH, she denied telling police this and stated: '*I tried to have it all dismissed*'. When asked if she ever discussed the AVO with SH, she claimed not to recall. When referred to SH's evidence that he remembered discussing the AVO with her and she told him it was taken out because she was '*scared*', HP responded: '*Maybe he's got a better memory than me*';

(iii) HP was asked about the police report relating to an incident on ANZAC Day 2011. She recalled having an argument with the Applicant but denied it was because he saw her at the bar talking to another man. She stated: '*we had a verbal argument*' but claimed not to recall what it was about. She then denied the Applicant became aggressive because '*it wasn't a really big argument*'. When asked how she could remember it was not a big argument if she could not remember what it was about, HP attempted to exercise her right to silence. HP said she was '*intoxicated*' and made the incident '*bigger than it was*'. When asked about the police report stating she told hotel staff not to allow the Applicant into her room, HP responded: '*I don't remember that*.' She also claimed not to remember police turning up, or refusing to talk to police, or becoming aggressive;

(iv) HP was able to recall an incident in 2012 where she drove herself to hospital with a cut chin and broken front tooth. She recalled being met at the hospital by two friends, following which police were called. She denied telling these friends the Applicant assaulted her, insisting she slipped in the shower. When asked if there was an argument with the Applicant causing her to slip in the shower, HP said the argument was '*probably before I got in the shower*'. When asked if there was any reason why the Applicant did not drive her to hospital, HP responded: '*I can't recall*'. When challenged by Ms Donald that she drove herself to hospital and was met there by two friends because the Applicant caused her injuries, HP insisted she slipped in the shower;

(v) When asked about an incident at a friend's house on Christmas Day 2013, when a glass panel on the front door was smashed, HP could not recall. When challenged that a police attendance on Christmas Day at a friend's house was likely to have been memorable, HP insisted she could not recall and had '*no idea*' why a police record was raised.

Evidence of KR

40. KR adopted her latest statement as true and correct.[63] The Tribunal has also considered her previous statements in evidence.[64] KR said she has known the Applicant for about 15 years and they had a child together '*about a year*' after moving in together. KR was 17 years of age and the Applicant was 26 when they started living together. KR said they shared a home for a total of '*three or four years*' and their relationship broke down in about 2007 when their child '*was just over one*.' They continued living together for about six months after the relationship ended, following which KR moved out.

41. KR recalled the Applicant's assault against her in 2007 while they were still living together and co-parenting their child. She was no longer attracted to the Applicant and described living in separate parts of the house. She said their situation was '*not ideal*'. When asked if they were separated but a family nevertheless, KR responded: '*Yes*.' When asked about an earlier statement referring to being part of a '*blended family*' with the Applicant and HP, KR agreed, stating she and HP had done everything possible for the children in recent years. During re-examination, KR was asked by Dr Donnelly whether she considered the Applicant '*family*' at the time of his assault against her. She responded: '*I was still a baby. I was 21 and didn't know what life was. He was just* [child's name redacted] *dad to me*'.

42. KR was asked about other police reports in evidence, including an incident in October 2005 when the Applicant took their child from the home after an argument. She recalled this incident and said she went to SH's house to recover her child, where SH verbally abused her and threatened to cut her out of her own son's life. She said the Applicant was present at the time. KR said police were called because she used a knife to cut the front

[63] Exhibit A4.

[64] Exhibit R1, 227; Exhibit R2, 249.

door screen to try and recover her child. She was angry about her child being taken and the abuse that directed at her and determined to get her child back.

43. KR said there was subsequent friction with the Applicant after the assault against her. She recalled showing security guards the AVO when the Applicant attended venues she was at, which on reflection was immature and intended to '*antagonise*' him. She said there were '*probably*' occasions, however, when the Applicant contacted her while the AVO was in place when she did not wish to be contacted.

44. KR described her current relationship with the Applicant as '*good*'. She said his removal would have a '*big impact*' on her because of the effect on their son and because she would lose a '*good friend*'. KR said the relationship between the Applicant and their son was now '*a little bit distant*' and mainly by telephone. Prior to the Applicant being imprisoned seven years ago, the relationship between them was much closer. The Applicant coached their son's Under-nines soccer team and they '*did everything together*'. Their son had now left secondary school, was working full-time for KR's family business, and intended to do further study in 2022. KR has been in a new de facto relationship for about year and recently moved in with this partner, with whom she runs an interstate business.

45. KR said prior to the Applicant's imprisonment, he was very good at paying his share of their son's private school fees and other costs like uniforms, extra-curricular activities, holiday money, clothes, and '*anything* [KR] *needed*. Since his imprisonment, HP continued to contribute to private school fees, clothes, and other costs.

Evidence of SH

46. SH adopted his statement as true and correct. The Tribunal has also considered his earlier supportive statements.[65] SH said he and the Applicant are only a year apart in age and '*best friends*'. He would be devastated if the Applicant was removed to the United Kingdom, which his family would find '*traumatising*'. He is concerned the Applicant has no connections in England, which could affect his mental health. SH said it would be very

[65] Exhibit R1, 118.

difficult financially for him to visit the Applicant in the United Kingdom and did not think he could.

47. SH's eldest child, who is 14 years old, is very close to the Applicant. The two younger children were born since the Applicant's imprisonment but have met him during visits and '*love him very much*'. The Applicant communicates with the children by telephone, which SH said continues their '*very strong connection*'. SH and his family have a good relationship with HP and her children, which he described as '*close – no dramas*.' The two families live nearby, and he had last seen her a fortnight ago for one of the children's birthdays. His de- facto partner and HP also get together '*around every second week'*.

48. SH said he used to see the Applicant's eldest child quite often, but less so since the child moved back to KR's family and commenced full-time work. They had last seen each other about a year ago.

49. SH said he sees his mother weekly and assists her, including by '*taking her where she needs to go'*.

50. SH said prison had '*done wonders*' for the Applicant. He did not think the Applicant would reoffend and was ready to '*show everyone he's a new man*.'

51. SH was taken through several police reports mentioning him. His evidence is summarised as follows:

    (a) SH could not recall a 2000 incident in a hotel where he and the Applicant reportedly became aggressive to police and were arrested, following which the Applicant was convicted of behaving in an offensive manner in a public place;

    (b) SH could not recall any involvement in a bar brawl in October 2005. He said they were watching the Grand Final and stated: '*There were no charges against any of us – we just had to be questioned before anyone left*';

    (c) SH was asked about an incident on the same evening as the Grand Final above, where he is reported to have verbally abused KR because of infidelity. He could not recall KR arriving at his house and demanding the return of her child or him telling KR to '*get fucked*' and return to her own house. He said: '*That was a long*

time ago – I didn't think there was enough proof that she was having an affair'. He recalled the Applicant and KR subsequently '*had a bit of fallout over allegations of cheating*';

(d) SH initially said he could not remember an incident on 16 November 2009 where he reportedly grabbed HP around the throat with both hands after an evening of drinking, then stated: '*no I didn't do that*'. He could not recall covering HP's mouth to stop her screaming or being aggressive towards attending police:

> *No, this didn't - I don't know what this story is, this is not true. I cannot recall that at all, that is - this is not true, there was no police report on me over that, I was - never had any kind of incident over that at all.*

(e) SH recalled an AVO being served on him by police to protect HP in 2009 but claimed he did not know the reason for it and '*was very confused*'. He could not recall the AVO conditions. When asked if he subsequently clarified the reason for the AVO with HP, SH said he did and she stated to him: '*I'm scared, I'm scared*'. He said HP subsequently tried to '*withdraw the AVO*' because she '*over-reacted*' and made a '*mistake*'. When asked what HP overacted to, SH responded: '*she was…in some sort of fear from me*'. He thought police may have '*forced* [HP] *to take out the AVO*'. He claimed that after HP told him she overreacted and made a mistake, he told her not to '*worry about it*' because it was '*only a three-month thing*,' and '*they had a laugh about it*'. When asked why there were quite specific references to his involvement in the police report dated November 2009, and how this could be if he was not even there, SH responded: '*I don't know – it's all news to me*'.

Other documentary evidence

52. The statement of the Applicant's mother was accepted into evidence unchallenged.[66] Her previous supportive statements have also been considered.[67]

53. The statement of the Applicant's former employer was accepted into evidence unchallenged.[68] His earlier supportive statement has also been considered.[69]

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[66] Exhibit A5.

[67] Exhibit R2, 244-245; Exhibit R1, 123.

[68] Exhibit A6.

54. The Tribunal has considered documentary evidence from family, friends, and others.[70]

TRIBUNAL CONSIDERATION OF THE EVIDENCE

55. The Tribunal found KR's oral evidence to be honest and forthright. She spoke openly and her testimony traversed incidents reflecting unfavourably on her past conduct. This included using a knife to cut open the front screen door of SH's house to recover her child, and acting immaturely to '*antagonise'* the Applicant after an AVO was taken out against him.

56. In contrast, aspects of the Applicant's evidence and that of HP and SH were variously evasive, inconsistent, unpersuasive, or less than forthright. Examples include:

(a) The Applicant, HP, and SH were frequently unable to recall what should have been memorable events. Aspects of their evidence were inconsistent. For example, SH recalled HP telling him she took out the AVO in November 2009 because she was '*scared*,' but HP claimed not to recall this and insisted her injuries were caused by falling over. On another occasion the Applicant said he and SH were involved in a pub brawl but SH subsequently denied any involvement;

(b) The Applicant's oral evidence about the chronology and extent of his involvement in the drug enterprise was unpersuasive. It sits uneasily with the recorded conversations that convey a level of knowledge and confidence in negotiating the sale and supply of very large quantities of illicit drugs, rather than someone who had only just decided to store drugs to help a friend. The Tribunal also does not accept the Applicant's evidence that '*my charges are all pretty much motor vehicle charges except one charge of assault*,*'* or that he was previously '*never caught doing anything illegal*,' or that he is '*not a drug dealer*,' which minimise his past crimes;

(c) The Tribunal finds the Applicant's evidence about financial pressures contributing to his offending and '*without thinking about the situation* [he] *just went and done it,*' to be unpersuasive. The evidence discloses he and HP purchased land, built a

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[69] Exhibit R2, 256.

[70] Exhibit R1, 120-123, 126-127, 130, 224-226; Exhibit R2, 230-233; 246-248; 250-255; Exhibit A7.

house, and committed to a significant mortgage[71] and expensive IVF treatment – including for a second child after the Applicant's imprisonment. They contributed funds to KR for private school fees and the care and maintenance of the Applicant's oldest child, purchased a new Lexus and Range Rover, and went on regular overseas holidays to places like Thailand, Bali, Fiji, and the United States. This is not persuasively reflective of financial pressures explaining the Applicant's involvement in serious crimes, particularly for the approximately $3000 he claimed to have received;

(d) The Applicant's inability to recall his recorded comments in the agreed Statement of Facts for offences he pleaded guilty to, came across as evasive. His drug-related conduct does not present as impulsive or isolated but extended over several months and reflected complexity and planning. The Tribunal does not accept the Applicant only did what he was told '*to do by my friend but never made any decisions on my own'*. There is persuasive evidence in the recorded conversations that he enjoyed considerable freedom of action in negotiating and supplying large quantities of drugs to an undercover officer;

(e) The Tribunal finds the Applicant's evidence about what he stored at home for his unnamed friend to be inconsistent with other evidence. That includes his initial claim about storing a '*bag*' of chemicals, which he later accepted was two 25-litre drums of precursor chemicals and no '*bag*';

(f) Given the Applicant supplied a kilogram of cocaine and commercial amounts of methamphetamine, his claim that he was only '*big noting*' when offering to supply much larger quantities of drugs did not ring true;

(g) The Tribunal does not accept the Applicant's evidence that he only became aware of the adverse effects of drugs after imprisonment. At the time of his offending, he was approaching 40 years of age and would have known the supply of such large quantities of drugs could potentially cause significant harm;

(h) The Tribunal does not accept the Applicant's initial evidence that his violence against KR was '*only a minor incident*' because '*it was not a beating or vicious*

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[71] Exhibit R2, 210.

attack'. The Tribunal was left with the impression on occasions he was attempting to minimise his culpability for violent conduct;

(i) The Applicant's denial of family violence against KR rests on a distinction that she was not '*family*' because their relationship ended six months earlier. The Tribunal finds that submission unpersuasive and self-serving, for reasons discussed later;

(j) The Applicant's rejection prior to the hearing of conduct attributed to him in police records not leading to convictions, is at odds with his concessions during oral evidence that he was involved in some of the incidents detailed in these reports. For others he accepted possible involvement but could not recall because of intoxication;

(k) The Applicant's explanation for failing to correctly complete his IPCs after returning from international travel was unpersuasive at best. He is responsible for the accuracy of documents lodged in his name and by the time he completed these records had been convicted of multiple offences that were not only driving offences;

(l) Aspects of HP's evidence were confused, inconsistent, and unpersuasive. She claimed to have made a false report to police when alleging violence by the Applicant. Her inability to recall several police attendances where she was observed to be injured and required hospital treatment, did not ring true. The same can be said for her claims that she fell over in the back yard and shower. Several police reports were on memorable occasions such as Christmas at a friend's house, or while holidaying with the Applicant and police attended their hotel. Moreover, there are several references in the police reports to HP withdrawing complaints, or refusing to provide statements, or to cooperate with police, or becoming aggressive during police attendance. Her explanations for doing so often came across as confused and evasive attempts to protect the Applicant;

(m) SH did not come across as a witness of particular credit and could not recall most occasions he was named in police reports. The Tribunal considers aspects of his evidence were less than forthright.

PRIMARY CONSIDERATIONS

Tribunal consideration: Protection of the Australian community from criminal or other serious conduct

57. Clause 8.1 of the Direction states:

> *(1) When considering protection of the Australian community, decision-makers should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) Decision-makers should also give consideration to:*
>
> *a) the nature and seriousness of the non-citizen's conduct to date; and*
>
> *b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.*

Tribunal consideration: The nature and seriousness of the conduct

58. Clause 8.1.1 of the Direction provides that the following factors are to be considered in determining the nature and seriousness of the non-citizen's criminal and other conduct to date:

> *(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 197 A 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 reoffended 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).

59. The Applicant's convictions in the decade between January 1997 and November 2007 attracted relatively minor non-custodial penalties like fines, licence disqualification of increasing duration, and court-directed courses and counselling. This included convictions for low-range drink driving in 1997, offensive behaviour in 2000,[72] and other driving offences in 2001 that included driving in a menacing manner. In 2007, he was convicted of *Assault occasioning actual bodily harm*. In 2003, he was convicted, fined, and placed on a two-year supervised bond for further driving offences.[73]

60. In the period between November 2011 and May 2016, the Applicant's offending became more serious. He was again convicted of drink-driving (middle range prescribed concentration of alcohol).[74] Of particular concern is the Applicant's drug possession and supply offences as reflected in the May 2016 sentencing remarks of the District Court of New South Wales.[75] Judge Buscombe noted the Applicant pleaded guilty to four principal offences in supplying drugs to an undercover police officer as follows:

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[72] Exhibit R2, 107-109.

[73] Ibid 136.

[74] Ibid 114; 117; 125-126.

[75] Exhibit R1, 39-59.

(a) 1.0849 kilograms of cocaine between 28 January 2015 and 11 February 2015, which was not less than a large commercial quantity, and for which the maximum penalty is life imprisonment and/or a fine equivalent to 5,000 penalty units;[76]

(b) 715.7 grams of methylamphetamine on 11 February 2015, which was not less than a commercial quantity, and for which the maximum penalty is 20 years' imprisonment and/or a fine equivalent to 3,500 penalty units;[77]

(c) 395.47 grams of 3 4-methylenedioxy methylamphetamine between 1 December 2014 and 11 February 2015, which was not less than a commercial quantity, and for which the maximum penalty is 20 years' imprisonment and/or a fine equivalent to 3,500 penalty units;[78]

(d) 163.97 grams of 3 4-methylenedioxy methylamphetamine between 1 December 2014 and 8 January 2015, which was not less than a commercial quantity, and for which the maximum penalty is 20 years' imprisonment and/or a fine equivalent to 3,500 penalty units.[79]

61. His Honour also considered four comparatively lesser crimes under what is known as a Form 1 process. These related to the Applicant supplying .58 grams and offering to supply a further .81 grams of methylamphetamine to an undercover officer. He was also found to be in possession of 50 litres of a prescribed precursor used in the manufacture of methylamphetamine, and $3,300 in cash that was the proceeds of crime.[80]

62. Judge Buscombe found the Applicant acted for '*financial gain*' and was a trusted '*middle man*' with authority to '*negotiate quantities and prices within certain parameters*.'[81] He stored drugs at his premises, facilitated their delivery to buyers, and his offending over several months resulted from '*considerable planning*'. The cocaine supplied was of '*a high purity*,' which was assessed as '*just below the mid-range of objective seriousness*'.[82] The commercial quantities of other drugs supplied by the Applicant were considered by Judge

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[76] *Drug Misuse and Trafficking Act 1985* (NSW), s 25(2).
[77] Exhibit R1, 39-59.
[78] Ibid.
[79] Ibid.
[80] Ibid 47.
[81] Ibid 51.
[82] Ibid.

Buscombe to be within the mid-range or just below the mid-range of objective seriousness. The sentence awarded at first instance was undisturbed on appeal, with the Court similarly assessing the Applicant's collective offending as '*objectively very serious*'.[83]

63. The Applicant has previously explained responses he gave about his criminal offending on two IPCs in 2013 and 2014.[84] The first followed a holiday to Fiji on 18 May 2013, with the Applicant ticking the '*No*' box in response to the question '*Do you have any criminal convictions*'. On returning from a holiday to Hawaii on 3 March 2014, the Applicant placed a cross in the '*No*' box responding to the same question. He explained in a letter dated 17 July 2019:

> *When I completed my incoming passage card on return from holidays, I was not aware that my Driving fines were listed as criminal offences, as at the time I was issued with fines and no jail time was entered, thus in my ignorance I said no.*
>
> *If I had known this fact, in hindsight, I would have done so.*[85]

64. The Tribunal notes the Applicant had more than '*Driving fines*' on his criminal record by 2013-2014, including *Assault occasioning actual bodily harm*, and *Behave in offensive manner in a public place*.

65. In terms of the contemporaneous police records in evidence, Dr Donnelly submitted prior to the hearing they had the status of '*mere allegations*,'[86] which were insufficient to prove the Applicant behaved in the way claimed. Dr Donnelly accepted during the hearing the Tribunal could have regard to '*other conduct*' under the chapeau of cl 8.1.1(1) of the Direction when assessing the nature and seriousness of the Applicant's offending. Of the incidents put to the Applicant during the hearing, Dr Donnelly properly accepted during closing submissions it was open for the Tribunal to conclude the Applicant may have been involved in several incidents referred to in the police reports that did not lead to charges or convictions. These included: the hotel incident on 8 January 2000; October 2004 incident when a security guard's shirt was ripped; club 'brawl' incident on 3 October 2005; taking his child from the house he shared with KR after arguments; contacting KR when she did

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[83] Ibid 74 [56].
[84] Ibid 81-82.
[85] Ibid 206.
[86] Applicant's Reply Submissions 3 [11], [13]; 5 [19]; 6 [27].

not wish to be contacted in breach of an AVO; and the licenced premises incident in November 2012. Dr Donnelly submitted, however, that for several other incidents the Tribunal could not be satisfied of the Applicant's involvement due to insufficient evidence. This included the alleged domestic violence incident on 16 November 2009, because of HP's explicit denials and '*other hypotheses*' potentially supporting the Applicant's innocence.

66. The Respondent submitted the Applicant's drug offending was his most serious and:

> *…was also carried out in relation to the activities of an outlaw motorcycle gang…Notwithstanding the applicant's assertion that he had no knowledge that his criminal offending was carried out in relation to the activities of an outlaw motorcycle gang, the Tribunal should treat these statements with caution and should consider the seriousness of this offending coupled with the relation to the gang overall amplifies its objective seriousness*.[87]

Tribunal findings: The nature and seriousness of the conduct

67. Amongst the Applicant's convictions, those relating to the procurement and supply of commercial quantities of drugs for financial gain are extremely serious. Illicit drugs in these quantities promote human misery, can destroy users lives, and cause other negative societal effects. The objective seriousness of this offending was affirmed on appeal.

68. The Applicant has repeat motor vehicle and driving offences, which include drink-driving (low-range) in 1997, menacing driving in 2001, and a repeat drink-driving offence in 2011 (mid-range). Although these occurred many years ago, they are undeniably serious and could have resulted in significant injury or death to other road users. It is noteworthy that the court appearances and non-custodial penalties received by the Applicant for these comparatively minor offences did not dissuade him from much more serious offending.

69. It is acknowledged the Applicant's convictions in 2016 were his first custodial sentence, but the imposition of an aggregate sentence of ten years' imprisonment reflects the objective seriousness of his crimes: cl 8.1.1(1)(c) of the Direction. That is so irrespective of whether the sentences were below the maximum available for these crimes.

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[87] Respondent's Statement of Facts, Issues, and Contentions (**'RSFIC'**), 7-8 [23.c].

70. There are noteworthy gaps in the Applicant's convictions, including between 2011 and 2014. That said, it is of concern he consistently reoffended since 1997, with the last seven years spent in prison. His record discloses more than 20 offences of increasing seriousness: cl 8.1.1(1)(d) of the Direction. The cumulative effect of his repeated offending is very serious and has imposed considerable costs on the community.

71. The Applicant's explanation for providing false responses on the two IPCs in 2013 and 2014 is not accepted. On returning from overseas in 2013 and 2014, the Applicant was aware of his non-driving convictions in 2000, an assault conviction in 2007, and a mid-range alcohol conviction in November 2011. The Tribunal is satisfied he provided false or misleading responses on these two documents within the meaning of cl 8.1.1(1)(f) of the Direction.

72. In terms of the probative weight to be given to police records, this material routinely forms part of the evidence in mandatory visa cancellation cases. The documents are usually obtained under summons and do not assume the status of evidence until tendered and admitted. Their value is frequently tested during questioning. The Tribunal is not bound by the rules of evidence[88] and although police records may not have been substantiated in court, there is nothing preventing the Tribunal from considering them under the chapeau of '*other conduct*.' Witnesses must be afforded procedural fairness, however, by having the records put to them for response. It is not accepted that procedural fairness requires the authors of police records to be cross-examined for weight to be placed on these reports.[89]

73. It is a noteworthy feature of this case that the Applicant, HP, and SH were frequently unable to recall many police attendances or reports. Past intoxication was invoked by the Applicant and HP as a reason for not recalling some of these. On other occasions the Applicant did recall and accepted his involvement in incidents like the club 'brawl,' during which he implicated SH. SH, in contrast, denied any involvement.

74. The Tribunal considers there is no discernible motive for the police officers who raised these reports to have recorded other than what they saw or was conveyed to them by the

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[88] AAT Act, s 33(1)(c).

[89] *Bullmore v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1106 [53], [69] (Anderson J).

people they interviewed. That is reinforced by the Applicant's acceptance he was involved in some incidents in the terms police described. Moreover, there are recurringly consistent themes in the alleged conduct, despite multiple officers authoring these reports on different dates over a long period. Nevertheless, absent agreement by a witness that police reports not leading to charges or a conviction are accurate or likely to be accurate, they must be treated with caution.

75. As Kenny J has pointed out, the Tribunal should treat '*police service files*' carefully and acknowledge the '*limits to the material before it that was said to evidence such conduct, including its cogency and reliability*'.[90] Anastassiou J has similarly expressed the need for care about '*reaching a view that criminal conduct has occurred, absent a prosecution and conviction*'.[91] In the present matter, the Tribunal often found the police reports more persuasive than the recollections of the Applicant, HP, and SH. That said, and out of an abundance of caution, the Tribunal has only given weight to police records that either resulted in a conviction or where the Applicant conceded his involvement or likely involvement. Despite the Tribunal's heightened suspicions about aspects of the Applicant's, HP's and SH's evidence, the prejudicial impact of relying on police reports that are explicitly denied and untested in court, or not corroborated by other probative evidence, is too great.

76. The Tribunal is satisfied the Applicant has been convicted of violent offending and accepts his concessions about other aggressive or violent conduct in public places not resulting in charges or convictions. The Tribunal is not satisfied, however, the Applicant had any active or intentional links to an outlaw motorcycle gang ('**OMCG**') as submitted by the Respondent. The sentencing remarks and agreed Statement of Facts draw that connection with the Applicant's co-offenders,[92] but not the Applicant himself. It is noteworthy there is no reference in any of the available police records dating back over twenty years to any such association, until the Applicant's arrest on 11 February 2015.[93]

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[90] *CVN17 v Minister for Immigration and Border Protection* (2019) 163 ALD 101, [98]-[100].

[91] *QDQY v minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1394, [74], citing *Brown v Minister for Immigration and Citizenship* [2009] 112 ALD 67, [85] (Edmonds J) and echoed by the Full Court on appeal in *Brown v Minister for Immigration and Citizenship* [2010] 183 FCR 113, [128] (Nicholas J, with whom Moore and Rares JJ agreed).

[92] Exhibit R1, 64 [10], Exhibit R2, 177 [1], [4]; 204; 278 [40]; 286 [26].

[93] Exhibit R2, 7.

The Applicant has consistently denied any OMCG association,[94] which the Tribunal accepts on these facts.

77. The Tribunal finds the totality of the Applicant's offending and other misconduct to be extremely serious.

Tribunal consideration: Risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

78. Clause 8.1.2(1) of the Direction provides:

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

79. Clause 8.1.2(2) of the Direction states that in assessing the risk the non-citizen poses to the Australian community, decision-makers must take into account, cumulatively:

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

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

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

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

Sentencing remarks and expert evidence

80. Reference was made during sentencing in 2016 to a psychologist's report, which caused Judge Buscombe to conclude the Applicant had '*excellent prospects for rehabilitation*' and the prospect of him reoffending is '*very limited*'.[95] The report underlying this assessment

[94] Ibid 85.

[95] Exhibit R1, 56.

was written by psychologist Mr Phil Gorrell[96] and has been considered by the Tribunal. Mr Gorrell assessed the Applicant's '*desire for popularity, in conjunction with his use of cocaine, was the stimulus*' for his offending. The report also referred to the Applicant's acceptance that '*he will need to undertake drug counselling to ensure that he addresses his difficulties rather than relapses to drug use*'.[97]

Reasons for offending and remorse

81. In his 2017 revocation submissions, the Applicant attributed his offending to financial pressures arising from not being able to complete concreting jobs in late 2014 when it rained.[98] He stated that he intends to engage the services of a financial advisor if released to mitigate the possibility of future financial pressures leading to poor decision-making.

82. The Applicant expressed remorse for his conduct on several occasions. He said imprisonment had exposed him to offenders whose lives were impacted by the sort of drugs he supplied, which afforded him '*massive insight*' into the adverse impact of addiction. He stated there is '*no chance of him reoffending*' because he had gained a greater appreciation for his personal freedom and the importance of family.[99]

Conduct in custody

83. The Applicant has been a compliant prisoner with an excellent work ethic.[100] His only misconduct in custody relates to a report dated 26 May 2020, referring to him being in possession of a '*non-issued item*,' for which he was reprimanded and placed on a three-month Management Contract.[101] The Applicant stated in respect of the internal prison process following this misconduct, that he had the item (a watch) since 2017 and didn't know it wasn't allowed.[102] He explained it was a memento from his stepfather's funeral. Another report on 3 August 2020 provides a rare negative perspective[103] compared to the vast majority of reports referring positively to the Applicant working '*well with minimal*

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[96] Exhibit R2, 208-218.
[97] Ibid 215.
[98] Exhibit R1, 93.
[99] Ibid.
[100] Ibid 145-149; 203-205; 207-223; Exhibit R2, see for example 55-57; 74.
[101] Exhibit R2, 76; 90; 97.
[102] Ibid 98.
[103] Ibid 78 [3 August 2020].

supervision and without having to be told what to do', and that he '*appears to take some pride in his work and ownership of his responsibilities*.'[104] The Applicant was also reported in January 2020 to be an '*exceptional*' worker who '*motivated other inmate work peers*'.[105] An indicator of the trust prison authorities have in the Applicant is the approval he received to attend his stepfather's funeral and the birth of his youngest child.[106]

84. Records in evidence state the Applicant willingly provided samples for urinalysis on several occasions in 2020. There is no evidence of positive results being recorded.[107]

Risk and rehabilitation

85. In a pre-sentence report dated 26 April 2016, the Applicant is recorded as having an '*LSI-R*' assessment of a '*medium-low risk of reoffending*'.[108] This assessment is based on an internationally validated actuarial tool used in custodial settings to assess an offender's recidivism risk and identify their criminogenic needs.[109] The Applicant is identified as having needs relating to '*Alcohol / drug problems*'. Mr Gorrell's report also refers to the Applicant's need for drug counselling. During oral evidence, the Applicant referred to alcohol abuse being a persistent problem for him prior to his arrest for the drug offences.

86. A record in evidence refers to the Applicant asking prison authorities in December 2016 whether his risk profile indicated a need to '*do any courses regarding his offending behaviour*'.[110] Subsequent records by prison authorities on 7 December 2016 stated: '*his LSIR score is low to medium*'[111] and '*he is not eligible for programs*'.[112] The situation remained unchanged in early 2019, with periodic summary reports stating he was ineligible and precluded from rehabilitative programs.[113]

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[104] Exhibit R2, 50 [16-23 January 2017].
[105] Ibid, 72.
[106] Ibid 53; 67.
[107] Ibid 101-102.
[108] Exhibit A7 [5].
[109] The Utility of Level of Service Inventory – Revised (LSI-R).
[110] Exhibit R2, 48.
[111] Ibid.
[112] Ibid 54; Exhibit R1, 149.
[113] Exhibit R2, 63; 66.

87. The Applicant has made requests to undertake vocational training like a forklift course.[114] His oral evidence, however, is that his LSI-R and visa status do not permit him to undertake either rehabilitative or vocational courses.

88. Dr Donnelly submitted in closing that the Applicant is '*not a material risk of reoffending*' and it was '*highly unlikely*' he would do so if released. Submissions were also made about protective factors like the availability of employment, and the three children the Applicant now has compared to one child at the time of his offending. Dr Donnelly emphasised the Applicant's visa had not previously been cancelled and the fear of returning to his current situation were strong incentives to remain abstinent and law-abiding. Dr Donnelly said this primary consideration weighed no more than moderately against revocation.[115]

89. Ms Donald submitted in closing that the Respondent relied on submissions in the Respondent's Statement of Facts, Issues, and Contentions ('**RSFIC**') and highlighted the deleterious impacts of the drug '*ice*' on users and society.[116] She also referred to the harm of family violence on victims and its broader societal costs.[117] Ms Donald said inconsistencies in the Applicant's evidence and past failure of comparable protective factors meant the Tribunal should have little confidence in his latest undertakings. She contended this primary consideration weighs heavily against revocation.

Tribunal findings: Risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

90. Offences such as drink-driving or *Assault occasioning actual bodily harm* have the potential to cause serious physical or psychological harm, or death. Although the Applicant's last drink-driving conviction was in November 2011, the Tribunal is concerned this repeated an earlier offence but with a higher blood alcohol reading. There are also earlier offences relating to menacing driving and other comparably minor offences, which nevertheless reflect persistent disrespect for Australian laws. Rather than learning from these experiences and moderating his conduct, the Applicant's offending worsened.

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[114] Exhibit R1, 62.
[115] Applicant's Statement of Facts, Issues and Contentions ('**ASFIC**'), 18 [72].
[116] Exhibit R3, 330, 350, 353-355.
[117] Ibid 609.

91. In relation to the Applicant's drug offending, the harm that can be caused encompasses very serious physical, psychological, or financial harm, the death of users, and broader societal costs. The Tribunal accepts the Respondent's submission that '*ice*' is an extremely powerful and addictive stimulant causing extensive community harm.[118]

92. The Tribunal acknowledges the Applicant's evidence about the salutary experiences of imprisonment and his regret and embarrassment for his past conduct. It is accepted he has been a compliant prisoner and has engaged in consistent work while in custody. But, for the reasons previously adduced, the Tribunal has continuing concerns about aspects of his evidence regarding the reasons for and extent of his offending. His drug offending was not isolated or impulsive but reflects considerable freedom of action in negotiating the sale of significant quantities of illicit drugs over several months. Aspects of his current evidence came across as less than forthright and continued to minimise past conduct. This tempers his assurances about insight and recidivism risk.

93. The Applicant blamed alcohol abuse for not being able to recall some of his past conduct and this appears to be a more longstanding problem than his later cocaine use. It is accepted that alcohol and illicit drugs are available in custodial settings, and there is no evidence the Applicant has been other than abstinent from both during the last seven years. But the strictly controlled and supervised prison environment is not comparable to when a person is at complete liberty in the community. The unannounced urinalysis testing referred to by the Applicant and other significant constraints on movement and ability to contact others is evidence of this. It was while at liberty in the community that the Applicant was unable to resist heightened alcohol abuse and started using cocaine.

94. The Tribunal accepts the Applicant has good prospects of rehabilitation, but the evidence shows he has not previously undertaken offence-specific rehabilitation relating to alcohol, drug, or anger issues. The Tribunal accepts his unchallenged evidence that he is precluded from doing such courses because of his visa status and LSI-R assessment but remains agreeable to doing them. That said, decisions should not be delayed for rehabilitative courses to be undertaken: cl 8.1.2(2)(b)(ii) of the Direction.

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[118] RSFIC, 12.

95. The protective factors invoked by the Applicant if released are comparable to those of the past. These include stable accommodation, consistent employment, the interests of minor children, and strong support from family and friends. It is not persuasive in the Tribunal's view that multiple minor children are more of a protective factor than a single minor child. Similar protective factors did not previously prevent the Applicant from resorting to increased alcohol abuse, using cocaine, and more serious offending.

96. The Tribunal considers the Applicant's recidivism risk is in the '*low to medium*' range.[119] The extremely serious nature of his past offending and significant risks of harm from any repeat, are such that a low to medium risk of recidivism is unacceptable. This primary consideration weighs very substantially against revocation.

Tribunal consideration: Family violence committed by the non-citizen

97. Clause 8.2(1) of the Direction reflects the Australian government's concerns about conferring on non-citizens who commit acts of family violence the privilege of coming into or staying in Australia. Clause 8.2(2) provides that this consideration is relevant 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.

98. In considering the seriousness of family violence engaged in by a non-citizen, the Direction requires the following factors at cl 8.2(3) to be taken into account 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:*

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[119] Exhibit A1, 118; Exhibit R2, 28 [13 April 2018]; 48, 63, 66, 85.

i. the extent to which the person accepts responsibility for their family violence related conduct;

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

iii. efforts to address factors which contributed to their conduct; and

d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement 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 noncitizen's migration status, should the non-citizen engage in further acts of family violence.

99. The parties disagree whether this primary consideration is enlivened. Dr Donnelly contends the Applicant's conduct is not family violence within the meaning of the Act and Direction. Ms Donald submitted the Applicant has not only committed family violence against KR, but also against HP and this should weigh substantially against him.

Police records and KR's evidence

100. The Tribunal notes a police record disclosing that the Applicant's conviction for *Assault occasioning actual bodily harm* related to violence on 7 November 2007 against KR.[120] He was subsequently released on condition that he not assault, molest, harass, threaten or otherwise interfere with KR as the '*protected person*'.[121] The New South Wales Police Facts Sheet to which the Applicant pleaded guilty refers to him as KR's '*partner*':[122]

> *At 6.40am on the 7th of November 2007, Police attended* [address redacted] *and spoke to the Victim*…[who]…*alleged to police that she had been* ***assaulted by her partner*** *the ACCUSED…after having an arguement over a mobile phone.*
>
> *…*
>
> *The Victim…then showed police her left thigh which had a red mark on it. Police then asked* [victim name redacted] *to provide a statement in relation to the incident, [victim name redacted] then told police that she could not as she had just started a new job and had to leave for work. Police told* [victim name redacted] *that she could attend Penrith Police station at a later time and make a statement, [victim name redacted] then left.*
>
> *Police then spoke to the ACCUSED DH who confirmed that there had been an arguement however* ***did not beleive that he had assaulted her****..*

[120] Exhibit R2, 147.

[121] Ibid 150-154.

[122] Ibid 155-157.

Police then left the scene, and at 10.30am on the same day police recieved a faxed copy of a statement made by the VICTIM…at Granville Police Station.

In the VICTIM statement she states that at 5.20am on the 7th of November 2007, she recieved a phonecall on her mobile phone from the ACCUSED, The ACCUSED then arrived at the location a short time later and demanded to see her phone. The VICTIM refused at which point the ACCUSED has taken her phone from her and began to read her text messages whilst walking around the house. The VICTIM has followed and demanded her phone back, the ACCUSED refused.

The VICTIM then began to get dressed for work, the ACCUSED then followed the VICTIM around yelling at her. Both then argued and whilst in the loungeroom the ACCUSED has kicked the VICTIM in the upper left thigh causing her to fall.

At 12.30pm police returned to [address redacted] *and informed the ACCUSED that* ***his partner****…had made a statement in relation to the incident. The ACCUSED was then informed he was under arrest for assault, the ACCUSED was then cautioned. . Police then conveyed the ACCUSED back to Penrith Police station where he was introduced to the custody manager.*

After Being read Part 9 of Lepra the ACCUSED participated in an electronically recorded interview.

During the interview the ACCUSED Told police that he had been arguing with the VICTIM as he wanted to see her mobil phone. The ACCUSED states that whilst he was trying to take the VICTIMS mobile phone whilst she was sitting on the lounge, she began to kick her legs out to keep him away, the ACCUSED then stated that he "Kicked her legs out of the way and picked up he mobile phone."

As a result of the incident the VICTIM has redness and bruising to her left thigh. The VICTIM also states that she has ongoing fears for her safety as she alleges the ACCUSED has been violent towards her in the past.

[Errors in original, emphasis added].

101. In addition to oral evidence, the Tribunal has considered an undated letter provided by KR, referring to herself as being part of a '*close blended family*' with the Applicant, HP, and their three children.[123] This letter makes no reference to the Applicant's assault against her. In her most recent November 2021 statement, however, KR stated:

…

The 13 November 2007 Offence

6. It can be accepted that I was the victim of the assault occasioning actual bodily harm offence committed by Dean, for which Dean was convicted on 13 November 2007.

7. In my capacity as a victim of the offence mentioned above, I expressly forgive Dean for that offending. I hold no fears that Dean would commit any further offences against other women or me if released into the Australian

[123] Exhibit R1, 227.

community. Respectfully, I strongly support Dean being permitted to remain in Australia.

8. Concerning the assault offence described in paragraph [6] above, Dean and I were no longer in a relationship at that time. We were not married. We were not in a de facto relationship. At best, we were friends who maintained the connection (at the time) because we are both parents to [child's name redacted]*.*

9. Accordingly, at the time that Dean committed the assault offence against me, we were not family. Notwithstanding that, I sincerely forgive Dean for assaulting me at the relevant time. I know that Dean was (and is) remorseful for committing that assault offence against me.

10. When Dean was sentenced concerning the assault offence, we attended Court together. Dean was also the subject of an apprehended domestic violence order. Dean complied with the terms of that order. I have absolutely no other recollection of domestic violence incidents between Dean and myself.

Applicant's submissions

102. Dr Donnelly submitted this primary consideration is not relevant in circumstances where the Applicant and KR were no longer in a relationship when he assaulted her:

> *There is no evidence that the applicant has engaged in conduct that constitutes family violence as defined in the Direction. As such, this primary consideration is not relevant in these proceedings.*[124]
>
> *Even in circumstances where the applicant and victim were living together at the time of the offending does not make the parties, so properly characterised, as members of the person's family'. The applicant and the victim were not otherwise in a de facto relationship at the time of the offending. It follows that the applicant's offending concerning the victim, although serious, does not amount to family violence.*[125]

103. Dr Donnelly submitted that even though the Applicant and KR continued to live in the same home after their relationship ended, this '*might be considered a domestic relationship*' but they were not '*family at that point in time*.' Dr Donnelly referred the Tribunal to a recent decision (*Leau*[126]), where the decision-maker declined to find the victim was a member of the perpetrator's family for the purpose of the Direction. Dr Donnelly conceded in closing submissions, however, that the Applicant's concession about not saying '*nice things*' to KR, verbally abusing her about infidelity, and other

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[124] ASFIC, 18 [75];

[125] Applicant's Reply Contentions, 2-3 [7]-[9].

[126] *Leau and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 3090.

conduct while they were still in a relationship, '*could fall within the scope of family violence*'

104. In relation to the Respondent's submissions that the Applicant has also engaged in serious domestic violence and criminality against HP,[127] Dr Donnelly submitted:

> *11. First, the applicant respectfully denies engaging in the alleged conduct that forms part of the COPS records.*
>
> *12. …Not only are the allegations hearsay evidence, but the evidence is also unsworn, was never the subject of criminal charges (let alone being lawfully challenged in a criminal court), and otherwise is of little probative value.*
>
> *13. Thirdly, the Tribunal would not be satisfied that there is information or evidence from independent and authoritative sources indicating that the applicant is, or has been, involved in the perpetration of family violence or other serious conduct by reference to the COPS records. The evidence recounts no more than mere allegations. Merely recording a serious allegation of criminality does not, by itself, translate the allegation into probative fact: Sarimsaklio and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 1622 [75]; Wightman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 1208 [66]; Anderson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 205 [FN41].*
>
> *14. Fourthly, the relevant police who authored the impugned evidence do not appear to be available for cross-examination: Leota and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 1826 [67].*
>
> *15. Fifthly, in Anderson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 205 at footnote [41], Senior Member C.J. Furnell held:*
>
>> *While the police records are usually contemporaneous records, I attribute little probative value to them largely because they usually comprise representations that are prejudicial hearsay made by persons not called to give evidence. Moreover, to do otherwise would run counter to the principle derived from the Briginshaw v Briginshaw & Anor [1938] HCA 34; (1938) 60 CLR 336 decision, a principle applicable in the context of Tribunal decision-making. (Sullivan v Civil Aviation Safety Authority [2013] FCA 1362 at [37] (Briginshaw); LLSY and Minister for Immigration and Citizenship [2011] AATA 334 at [50], citing Briginshaw. See the discussion of these cases in HSCK v Minister for Home Affairs [2019] AATA 4392 at [141]- [147]; see also NADB of 2001 v Minister for Immigration and Multicultural Affairs [2002] FCAFC 326 at [41].) As so applied, the more serious the allegation, the less likely it is that the Tribunal ought be satisfied of its validity on the basis of "inexact proofs, indefinite testimony or indirect inferences." (In Briginshaw at 361-362, it was suggested that a state of satisfaction ought not be "...*

[127] RSFIC, 15 [36] – 16 [38].

attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters reasonable satisfaction should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

16. Respectfully, the Tribunal should apply the reasoning of Anderson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 205 as outlined above.

17. Sixthly, in paragraph 23(f) of the RSFIC, the Minister contends that the applicant was identified as the accused in the records. It is further contended that the applicant's failure to acknowledge his violence towards his partner is 'most troubling'.

18. …Regardless, independent of the assault conviction in 2007, there is written evidence from [HP] *that she has not been the subject of domestic violence offending from the applicant. Otherwise, the evidence of* [KR] *is that she does not recall any other domestic violence offending from the applicant.*

19. Seventhly, in paragraph 23(g) of the RSFIC, the Minister contends that the COPS records detail a number of other serious allegations of violent offending. Once again, the applicant denies these serious allegations. Otherwise, for reasons already given, the Tribunal would not be satisfied that the alleged offences occurred based on the evidence before the Tribunal.

Respondent's submissions

105. Ms Donald relied on the Respondent's written submissions.[128] In closing she highlighted the Applicant's reference to his violent conduct against KR as a '*minor incident*.' She said the Applicant was violent against KR in the house they continued to share with their son, which resulted in a provisional and final AVO. Ms Donald said the Applicant's conduct in taking their child from the home in 2005 and 2007 following arguments with KR constituted family violence, as did the '*very serious*' incidents against HP in 2009, 2011, 2012 and 2013. Ms Donald submitted that HP's evidence about these incidents was inconsistent, implausible, and should be rejected in favour of the contemporaneous police records.

[128] RSFIC, 15 [36].

Statutory provisions and other materials

106. The Tribunal notes that provisions in the Act and other statutes on comparable subject matter, construe the meaning of '*family member*', '*family violence*,' and '*domestic violence*' broadly. The latter two are often used interchangeably.

107. Section 5G of the Act relates to relationships and family members. It does not limit who is a family member or relative of a person. Under s 5G(2), the members of a person's family can include:

> *(a) a defacto partner of the person;*
>
> *(b) someone who is the child of the person, or of whom the person is the child…;*
>
> *(c) anyone else who would be a member of the person's family or a relative of a person if someone mentioned in paragraph (a) or (b) is taken to be a member of the person's family or a relative of the person.*

108. Clause 4(1) of the Direction defines family violence to mean: '*violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful.'* This description is in the same terms as s 4AB(1) of the *Family Law Act 1975* (Cth).

109. Clause 8.2 of the Direction casts a wide net as to what constitutes family violence. This encompasses findings of guilt, convictions, or where a person has '*charges proven, howsoever described, that involve family violence*.' This clause also includes circumstances where information is available from independent and authoritative sources indicating a non-citizen's involvement '*in the perpetration of family violence*', providing the non-citizen is afforded procedural fairness.

110. The *Family Law Act 1975* (Cth) does not expressly define what '*family*' means but interprets family violence and the behaviour constituting it broadly. In its ordinary usage, '*family*' routinely encompasses people in a single household who are related to each other, especially parents and children living as a social unit. It can also include people otherwise united by blood, marital, adoptive, or other intimate ties. '*Family*' has been defined in a legal context as:

> *Parents and children, and others related by blood or marriage; often including people linked through cohabitation and mutual support*.[129]

111. The term '*domestic relationship*' at s 5(1)(b) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and comparable Victorian legislation encompasses a person who '*is or **has been** a de facto partner of that other person*' or '*has or **has had** an intimate personal relationship with the other person*…'. Section 5(1)(2) provides that:

> *(2) Two persons also have a domestic relationship with each other for the purposes of this Act if they have both **had** a domestic relationship of a kind set out in subsection (1)(a), (b) or (c) with the same person.*
>
> (Emphasis added)

112. A domestic violence offence in s 11 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), is defined to mean '*an offence committed by a person against another person with whom the person who commits the offence has (**or has had**) a domestic relationship'*.

(Emphasis added)

Recent authority

113. The Full Court of the Federal Court of Australia in *Vu*[130] considered an applicant's violence against his wife in the context of an earlier Direction. Their Honours' reasoning encompassed consideration of a 2011 case in the Supreme Court of the United Kingdom,[131] which considered the meaning of the phrase '*domestic violence or other violence*.' The Full Court referred with approval at [55]-[58] to the reasoning of Baroness Hale JSC, who wrote the lead judgement in allowing Ms Yemshaw's appeal. Her Ladyship observed that:

> *"'[v]iolence' is a word very similar to the word 'family'. It is not a term of art. It is capable of bearing several meanings and applying to many different types of behaviour"*.[132]

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[129] Ray Finkelstein and David Hamer (eds), *Concise Australian Legal Dictionary* (Lexis Nexis Butterworths, 5th ed, 2015) 250.

[130] *Vu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] 276 FCR 516, [54]-[55].

[131] *Yemshaw v Hounslow London Borough Council* [2011] 1 WLR 433.

[132] Ibid 443 [27].

114. Although not binding on the Tribunal, a report tendered by the Respondent titled '*Family, domestic and sexual violence in Australia: continuing the national story 2019*,'[133] defines family and domestic violence as follows:

> *Family violence refers to violence between family members, typically where the perpetrator exercises power and control over another person…*
>
> *For this report,* ***domestic violence is considered a subset of family violence*** *and typically refers to violent behaviour between* ***current or previous intimate partners****. In some data collections, domestic violence is used more broadly and can include violence between any family members.*
>
> (Emphasis added)

Tribunal findings: Family violence committed by the non-citizen

115. If the Applicant's narrow interpretation of '*family*' is to be accepted, the presence or absence of a continuing intimate relationship determines whether conduct constitutes '*family violence*' within the meaning of the Act and Direction. While accepting his child with KR has always been a family member[134] the Applicant contends KR was not at the time he assaulted her, because they were not in a relationship and only sharing the same house.

116. Section 5G of the Act invites a broad construction of the meaning of '*family member*' and must be read as a whole and in its context.[135] Understanding the statutory context and resolving ambiguity about the meaning of family violence can be assisted by having regard for other statutes on comparable subject matter that are *in pari materia*. This broader enquiry supports a reliable conclusion that there is no persuasive basis to ground the meaning of '*family*,' and whether conduct constitutes '*family violence*', solely on the existence of a continuing intimate relationship between a perpetrator and their victim.

117. At the time of the Applicant's violence against KR they were still living in a house they shared for several years and were co-parenting their child. Some form of personal relationship continued between them, an aspect of which appeared to be trying to keep things as normal as possible for their infant child. The Applicant gave oral evidence that

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[133] Exhibit R3, 2.

[134] Section 5G(2)(b) of the Act.

[135] *K & S Lake City Freighters Proprietary Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315 (Mason J).

he '*still loved and cared*' for KR at this time, and it is clear she had an expectation of safety from abuse, aggression, and violence in this shared domestic setting.

118. Although the Applicant could not recall telling Police he '*did not beleive* (sic) *he had assaulted her*', the Tribunal has no reason to doubt police recorded what he stated. It is acknowledged, however, the Applicant subsequently pleaded guilty to the assault. Despite Police references to the Applicant being KR's '*partner*' at the time of the assault, it is accepted from the oral evidence of the Applicant and KR that they were no longer in a de facto relationship.

119. The Tribunal has some concerns about the Applicant's oral evidence where he likened the love he claimed to still have for KR at the time of his assault as akin to loving his '*dogs in exactly the same situation, but I don't want to spend the rest of my life with her*.' He also initially referred to the assault as '*only a minor incident*' because '*it was not a beating or a vicious attack*'. When challenged he stated: '*it was physical harm but not to the extent of serious injury if you know what I mean*'. It is also not to the Applicant's credit that he initially claimed KR '*sat on the lounge*' after he kicked her, when it was the force of his kick that caused her to fall onto the lounge. When put to Applicant this was not the first time he committed violence against a domestic partner, he responded: '*Not too sure – can't remember to be honest*.' The Tribunal is not satisfied from the Applicant's responses that he has complete insight into the impact of his family violence behaviour. His efforts to minimise his violence against KR and to characterise his conduct against her as other than family violence, came across as self-serving.

120. The facts of each case require careful consideration, but the sort of indicia that may individually or collectively inform assessments of whether violence constitutes '*family violence*', could include whether the perpetrator and victim:

(a) are current or former intimate partners;

(b) have a child/children together and/or care together for the child/children;

(c) reside together in the same domestic setting or the perpetrator has agreed access to the victim's home;

(d) have a continuing connection founded on support or reliance; or

(e) have a relationship reflecting a power imbalance based on factors like age, mental capacity, or financial circumstances.

121. The Tribunal has considered Dr Donnelly's invitation to apply the reasoning in *Anderson*[136] and *Leau*. But there is no doctrine of *stare decisis* or comparator to judicial comity in the Tribunal and each case turns on its own facts. In relation to *Anderson*, the Applicant's reference prior to the hearing about '*alleged conduct*' in police records, evolved during oral testimony to accepting involvement in some of the conduct reflected in these records. As discussed at [72] above, the Tribunal does not consider the authors of police records need to be available for cross-examination. The FCAFC has also previously held there is no error in the Tribunal having regard to conduct for which there is evidence supporting a factual finding, even though no conviction resulted. Their Honours held this does not have '*anything to do with Briginshaw*.[137]

122. In relation to the Applicant's reliance on *Leau*, it is clearly distinguishable on the facts. *Leau* related to whether a '*dating*' or '*casual romantic relationship*' fell within the ambit of family violence at cl 8.2 of the Direction. There was no sexual intimacy or reciprocation of affection apparent. The perpetrator and victim did not live together or have a child. It is a different factual matrix to the relationship between the Applicant and KR.

123. The Tribunal is satisfied the Applicant's assault against KR was family violence within the meaning of the Act and Direction. The Tribunal is also satisfied some of the Applicant's other past conduct against KR, which he conceded in oral evidence, falls within the meaning of family violence. This includes verbally abusive and aggressive behaviours regarding her suspected infidelity, removing their child from the home after arguments, and unwanted contact with KR while an AVO was in place

124. In terms of the police documents referring to the Applicant's violence against HP, there is no evidence these reports led to charges or convictions. The police reports state HP routinely withdrew complaints and declined to cooperate. When regard is had for the Applicant's inability to recall some past conduct due to intoxication, coupled with the inconsistent and unsatisfactory evidence of HP, the Tribunal's suspicions are heightened

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[136] *Anderson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 205.

[137] *Vu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] 276 FCR 516, .

that there may have been occasions where the Applicant's conduct towards HP also constituted family violence. This is despite HP's explicit denials. The Tribunal was unpersuaded, for example, that the incidents where HP was found by police with blood smeared on her face and a cut chin and broken tooth, both of which required hospital treatment, resulted from innocent falls in the backyard or shower. Because of her denials, however, and the absence of charges or convictions, the Tribunal is unable to make reliable findings about these events and places no weight on them.

125. There is no evidence the Applicant has undertaken any offence-specific rehabilitation regarding family violence against KR. As discussed earlier, however, it is accepted his inability to undertake such rehabilitation is not within his control.

126. For the reasons adduced earlier under *Nature and seriousness of conduct*, most weight is placed on the Applicant's conviction for assaulting KR. The Tribunal accepts KR's evidence that the Applicant verbally abused her in relation to suspected infidelity while they were still in a relationship, removed their child without her consent causing her to be fearful, and contacted her while an AVO was in place when she did not wish to be contacted. Such conduct falls within the meaning of family violence. The assault conviction and this other conduct against KR, without regard for any family violence that may have been committed against HP, enables a reliable finding that this primary consideration weighs moderately against revocation.

Tribunal consideration: Best interests of minor children in Australia affected by the decision

127. Clause 8.3 of the Direction requires decision-makers to determine, where relevant, whether revocation is in the best interests of any minor children in Australia. This provision applies only if the child is, or would be, under 18 years old at the time when the application is decided. If there are two or more relevant children, the best interests of each child affected by the decision whether to revoke cancellation of a visa should be given individual consideration, to the extent that their interests may differ.

128. In considering the best interests of the child, the Direction requires the following factors at cl 8.3(4) to be considered where relevant:

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

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

(c) the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

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

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

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

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

(h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

129. The Applicant and HP have two infant children together.[138] He also has another child from a previous relationship with KR who is approaching adulthood.[139] The Applicant has maintained a close bond and parenting role with his children through pre-COVID visits, regular '*AVL calls*' that he said were '*a lot more interactive*', and through HP's updates about the younger children's activities and progress.[140] He has less frequent contact with his eldest child.

130. The Tribunal acknowledges frequent references in the prison records to visits and calls between the Applicant and his family. This includes a function for children on 19 December 2018, where a prison staff member wrote:

> *Observations revealed a positive father-child interaction and close/warm bonds with his two* [children].
>
> *CMO interacted with Dean and the children for a short while and they were very receptive to their father's interactions. Dean displayed affection by cuddling,*

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[138] Exhibit R1, 231.

[139] Ibid 96; 119.

[140] Ibid 97.

> *holding hands and sitting close with his children; encouragement-motivating them to participate in activities and engage in tasks, he shared achievements and showed regular praise; he indicated responsiveness-attended to the children when they were upset or hurt themselves and provided emotional security; he was playful and engaged in different activities together, making the children smile and laugh. Overall, Dean appeared to have a very positive experience and he took pride in taking on fatherly role during the time he had with them.*[141]

131. SH's evidence is that his three children '*love their uncle*'.[142] The Tribunal has also considered evidence relating to the relationship between the Applicant and his three nieces and nephews, as well as the relationship between these children with HP and the Applicant's biological children.

Tribunal findings: Best interests of minor children in Australia affected by the decision

132. By virtue of his imprisonment during the last seven years, there have been long periods of absence and limited meaningful contact between the Applicant and the children whose interests he invokes. HP referred to being forced to do '*two people's roles*' during the Applicant's absence. Less weight is therefore given to this primary consideration. The Tribunal accepts, however, that the Applicant and his family members have done their best to maintain a close relationship between the Applicant, his three biological children, and with SH's children.

133. Based on the evidence of KR, HP, and others, the relationship with the Applicant's eldest child has become less prominent after that child started living with his mother and her family, commenced work, and is now approaching adulthood. There is no evidence from this child who turns 18 relatively soon, but KR's evidence persuasively conveys that the emotional hardship experienced by this child following the Applicant's imprisonment would only be exacerbated in the event of an adverse decision.

134. The interests of the Applicant's two younger children can be differentiated from those of their older half-sibling. The Applicant has done his best to maintain a close and supportive

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[141] Exhibit R2, 58.

[142] Exhibit R1, 118.

parental role in their lives. The Tribunal is satisfied that absent a repeat of his past offending, the Applicant is likely to play a positive parental role if released.

135. The Applicant and HP would understandably prefer to remain in Australia with their children, although they are yet to decide what HP and the children might do in the event of an adverse decision. They both point to significant disruption to enable a life together in the United Kingdom. There are likely to be significant adverse effects on the Applicant's youngest children in the event of non-revocation, irrespective of the choices HP and the Applicant make. If HP decided to accompany the Applicant to the United Kingdom, this would uproot the children from their established life in Australia, including schooling plans and other opportunities. The family would need to re-establish themselves in a foreign country, although the United Kingdom is comparable in many respects with Australia. What is not comparable, however, is the absence of the same level of emotional and practical support available to the Applicant and his family in Australia, business opportunities for HP, and the employment network established by the Applicant. The children would be separated from grandparents, their older half-brother, and other relatives and friends.

136. If the Applicant and HP decide she and the children will remain in Australia, this would continue the Applicant's almost decade-long separation from his family and result in considerable emotional distress. There is no evidence about the Applicant's finances, but it would take time for him to re-establish himself in the United Kingdom and earn an income. Contact with his family in Australia would continue via telephone, video calls, and infrequent visits. This is a poor substitute for the close and supportive family environment in Australia they envisaged at the conclusion of the Applicant's prison sentence. Given the stress experienced by HP since the Applicant's incarceration,[143] denial of her expectation that he will return to help and support her, may cause great emotional distress with concomitant impacts on her ability to continue caring for the children alone.

137. In terms of nieces and nephews, the Tribunal accepts the Applicant has developed a close relationship with SH's eldest child and some relationship with the younger children born during his imprisonment. It is accepted he aspires to play a more prominent avuncular role. It is also evident the children from the Applicant's and SH's families enjoy

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[143] Exhibit A2 (Annexure A).

regular interaction and a close relationship. Less weight is placed on the Applicant's relationships with SH's children, however, given that others perform the parental role.

138. The Tribunal accepts that revocation is in the best interests of the Applicant's biological children and his nieces and nephews. This primary consideration carries very substantial weight in favour of revocation irrespective of the decision the Applicant and HP might make in the event of an adverse decision.

Tribunal consideration: Expectations of the Australian community

139. Clause 8.4 (1) of the Direction provides:

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

140. Clause 8.4(2) of the Direction states that visa cancellation, refusal or non-revocation may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. Serious character concerns are raised because of conduct in Australia or elsewhere, of the following kind:

> *(a) acts of family violence;*
>
> *(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;*
>
> *(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;*
>
> *(f) worker exploitation.*

141. Clause 8.4(3) provides that the above expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community. As

per cl 8.4(4), this consideration is '*about the expectations of the Australian community as a whole',* and decision makers are to proceed on the basis of the Government's views as articulated in the Direction, without independently assessing the community's expectations in the particular case.

142. Clause 8.4(4) of the Direction correlates with the reasoning of the Full Court of the Australian Federal Court (**FCAFC**) in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454 (***FYBR***). Notwithstanding the different pathways in judicial reasoning, the plurality in *FYBR* held that *Expectations of the Australian community* is a deeming provision with normative principles, ascribing to the community an expectation aligning with that of the executive government.[144]

143. The reasoning in *FYBR* establishes that the '*deemed community expectation*' will in most cases call for cancellation, but '*the question of whether it is appropriate to act in accordance with the deemed community expectation is in all cases left for the decision-maker to determine*'.[145]

144. The Tribunal notes the High Court of Australia refused an application for special leave to appeal from the orders in *FYBR*, holding at [301]–[303] that '*there is no reason to doubt the correctness of the decision of the majority of the Full Court of the Federal Court*.'[146]

145. Dr Donnelly submitted that although this primary consideration weighs against revocation, its weight is moderated by virtue of the Applicant's long residence in Australia, consistent employment, and long-established family, social, and employment links.

146. Ms Donald submitted this primary consideration weighs substantially against revocation.

Tribunal findings: Expectations of the Australian community

147. The Applicant has not been law-abiding in Australia since 1997 and the extremely serious nature of his offending is such that he should expect to forfeit the privilege of staying here: cls 5.2(1)-(2). That is despite him spending most of his life in Australia and the other

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[144] *FYBR* (2019) 272 FCR 454, at 471–2 [66] (Charlesworth J), and 476 [91] (Stewart J).
[145] Ibid at 473 [75]–[76] (Charlesworth J).
[146] *FYBR v Minister for Home Affairs and Anor* [2020] HCA Trans 56.

positive aspects of his case. This primary consideration weighs very substantially against revocation.

OTHER CONSIDERATIONS

Tribunal consideration: International non-refoulement obligations

148. The Applicant submitted that this other consideration '*is not relevant*'.[147] The Tribunal has not identified any evidence relevant to it.

Tribunal findings: International non-refoulement obligations

149. This consideration is not enlivened and carries no weight.

Tribunal consideration: Extent of impediments if removed

150. Clause 9.2 (1) of the Direction provides:

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

151. The Applicant stated in his documentary evidence he has no diagnosed medical or psychological conditions and takes no medication.[148] In the ASFIC, however, it stated he is '*generally in good health*,' but experiences a '*right shoulder problem*' requiring '*keyhole surgery*,' with an '*MRI scan about 18 months ago*' disclosing '*that the bone is grinding and he has cartilage issues*'.[149] There is no expert medical corroboration of this claim. The Applicant confirmed during oral evidence there is no health-related reason preventing his immediate return to work in his previous labour-intensive role.

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[147] ASFIC, 26 [113].
[148] Ibid 101.
[149] ASFIC, 27 [115].

152. The Applicant made no claims about language impediments but submitted that after more than 30 years living in Australia he does not '*know the UK culture*' and '*to the best of his knowledge*' has no current sources of practical or emotional support.[150] He has never returned to the United Kingdom. The Applicant conceded he could access health, welfare and other services in the United Kingdom, but Dr Donnelly submitted '*the standard and ease of access may not be of the same high standard and as widely available*'[151] as the services available to the Applicant in Australia.

Tribunal findings: Extent of impediments if removed

153. It is accepted that after a lifetime spent in Australia, removing the Applicant to a country he last saw as a ten-year-old child would cause considerable emotional hardship and require some cultural adaptation. There is no evidence of comparable sources of practical or emotional support for him in the United Kingdom, but there is also no evidence he would be treated any differently to other citizens there,[152] or could not access adequate medical or other support, including for his shoulder condition. There is no evidence to advance the differences referred to between support services in the United Kingdom and Australia, which the Tribunal found speculative. Moreover, consideration is required of '*what is generally available to other citizens*' of the United Kingdom rather than comparisons with Australia.[153]

154. There are considerable challenges for the Applicant in re-establishing himself in the United Kingdom. The evidence discloses, however, that the Applicant has worked consistently in Australia prior to arrest. He is a relatively young man at 45, in generally good health, and with a strong work ethic. There is no evidence he could not competitively apply for work and re-establish himself in the United Kingdom. It is accepted he has no family support or current friendship or employment networks to rely upon, but given his consistent work history, past ability to form strong friendship networks, and familiarity with international environments through overseas travel, these impediments are not considered insoluble.

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[150] Ibid 27 [116]-[117].
[151] Ibid 28 [121].
[152] *McLachlan v Assistant Minister for Immigration and Border Protection* [2018] FCA 109 [37].
[153] Clause 9.2(1) of the Direction.

155. The impediments confronting the Applicant are significant but not insurmountable. On balance this consideration weighs moderately in favour of revocation.

Tribunal consideration: Impact on victims

156. Clause 9.3 (1) of the Direction states:

> *(1) Decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.*

157. It was submitted on the Applicant's behalf prior to the hearing that:

> *There is now express evidence before the Tribunal from* [KR]*, a victim of the applicant's prior offending. The evidence is to the effect that she forgives the applicant, does not hold any fear that she will be the subject of further offending, and strongly supports the applicant's ability to remain in Australia.*
>
> *38. With respect, the evidence of* [KR] *should be given significant weight in the applicant's favour (such that this other consideration weighs heavily in favour of revocation of the mandatory cancellation decision).*
>
> *39. At paragraph 58 of the RSFIC, the Minister contends that this consideration 'cannot weigh in favour revocation'. With respect, such submission is likely to lead the Tribunal into error: see PGDX v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1235. It should, with respect, be rejected.*[154]

158. Dr Donnelly cited *PGDX*[155] as authority for his submissions regarding the Tribunal's consideration of the impact on victims.

Tribunal findings: Impact on victims

159. The Tribunal accepts KR now maintains a close relationship with the Applicant as father of their child and has forgiven him for any past criminal or other misconduct. KR spoke

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[154] Applicant's Reply Submissions 9 [37]-[39].

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

convincingly about the loss their son would feel if the Applicant was removed and that she would lose a friend. She believes the Applicant should be given another chance. Balanced against that support, however, is the Tribunal's concerns about the Applicant's evidence regarding the extent of his past violence and aggression against KR.

160. On balance, the Tribunal finds this consideration weighs moderately in favour or revocation.

Tribunal consideration: Links to the Australian community

161. Clause 9.4 provides that a decision-maker must have regard to cl 9.4.1 to 9.4.2 of the Direction, which includes consideration of the strength, nature and duration of any ties the non-citizen has to the Australian community and the impact on Australian business interests in the event that the non-citizen is not allowed to remain in Australia. The Tribunal has considered the evidence of the Applicant's previous employer,[156] but there is no evidence that Australian business interests are enlivened within the meaning of the Direction. This consideration carries neutral weight.

Tribunal consideration: The strength, nature, and duration of ties to Australia

162. Clause 9.4.1 of the Direction provides:

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

[156] Exhibit A6.

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

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

163. The Applicant was predominantly educated in Australia and has lived and worked here since the age of ten. He and HP own a home and other assets.[157] The Applicant has never returned to the United Kingdom and said his removal would be devastating for his family, who will experience financial and emotional hardship.[158] No evidence was provided of his or his family's financial circumstances and, for the reasons adduced earlier, financial hardship is not discernible from the available materials.

164. It is further submitted the Applicant's other close family members and friends in Australia will be disappointed and saddened, including SH, an uncle, aunt, three nieces and nephews, and two cousins.[159] As detailed earlier, the Tribunal has considered the statements in evidence from relatives and others supporting the Applicant. There is no dispute the authors fall within the meaning of cl 9.4.1(2)(b) of the Direction.

165. In terms of positive contributions while living in Australia, the Applicant invokes his consistent employment,[160] paying taxes, supporting charitable causes, and coaching an under-nines indoor soccer team.[161] During the hearing he also referred to fundraisers during which he purchased sports memorabilia.

Tribunal findings: The strength, nature, and duration of ties to Australia

166. The Tribunal accepts the Applicant's family and close friends in Australia would be devastated by an adverse decision. The Applicant is an apparently loving father and has developed considerable family, social, work, and other ties during his life here. He has contributed through consistent employment, as a family member, and as a friend. He has paid taxes and been involved in community activities.

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[157] Exhibit R1, 131-135.

[158] Ibid, 94.

[159] Ibid, 98.

[160] Ibid 94.

[161] Ibid 94.

167. As previously discussed, the Applicant and HP are yet to decide what they will do in the event of a non-revocation decision, although there are adverse consequences irrespective of the decision made. Even if HP and the children accompany the Applicant, the family would experience serious emotional hardship by separating from their established life in Australia. This is a personal choice for the Applicant and HP to make but would still be emotionally and practically wrenching.

168. The Applicant's mother is ageing, does not drive, and would have to continue to rely on SH and others for support. It is likely the Applicant's mother would find it very difficult to visit the Applicant in the United Kingdom due to cost, her age, and attendant difficulties in travelling internationally. The Tribunal accepts an adverse decision would be devastating for her, the Applicant's only brother, and his brother's family.

169. This consideration weighs very substantially in favour of revocation.

Additional considerations

170. No additional considerations were advanced by the parties and the Tribunal has not identified any '*other considerations*' under the non-exhaustive list at cl 9(1) of the Direction.

CONCLUSION

171. Because of the combined effects of ss 501(6)(a) and 501(7)(c) of the Act, the Applicant does not pass the character test. In determining whether there is '*another reason*' why the visa cancellation should be revoked, the Tribunal has applied the Direction to the specific circumstances of this case. The Tribunal sees no reason to depart from the guidance in the Direction that greater weight '*should generally be given*' to the primary considerations than other considerations.

172. The totality of the Applicant's offending is extremely serious and has either caused harm or had the potential to cause grave harm to the community. This particularly includes very significant drug offending and family violence against KR. The protective factors invoked by the Applicant are comparable to those previously existing, which did not prevent his most serious offences. He has shown a persistent disrespect for Australia's law

enforcement framework. Notwithstanding his long residence in Australia and the other positive features of his case, the Australian community would not expect the mandatory cancellation of his visa to be revoked.

173. Approaching the end of his seventh year in prison, it is commendable the Applicant has not committed any serious misconduct or relapsed into alcohol or illicit drug use. Despite his circumstances, he has also managed to stay meaningfully engaged as a parent and uncle. Revocation is clearly in the best interests of the minor children in his life.

174. Of the other considerations in this matter, the Applicant is confronted by significant but not insoluble impediments if returned to the United Kingdom. This would separate him, and potentially HP and the children, from their principal sources of support in Australia.

175. Having weighed all relevant considerations individually and cumulatively, the Tribunal finds there is not another reason why the mandatory cancellation of the Applicant's visa should be revoked. That is because the primary considerations '*Protection of the Australian community*,' '*Family violence committed by the non-citizen*', and '*Expectations of the Australian community*,' considerably outweigh the combined weight to be given to the primary consideration '*Best interests of minor children in Australia*' and the other countervailing considerations.

DECISION

176. It follows that the Tribunal affirms the decision under review.

I certify that the preceding one hundred and seventy-six paragraphs (176) paragraphs are a true copy of the reasons for the decision herein of Senior Member A. Nikolic AM CSC

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

Associate

Dated: 19 November 2021

Date of hearing:	**10 and 11 November 2021**
Advocate for the Applicant:	**Dr Jason Donnelly**
Advocate for the Respondent:	**Ms Mia Donald**
Solicitors for the Respondent:	**Sparke Helmore Lawyers**