Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2022/4249**

Re: **BSMF**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member Dr Linda Kirk**

Date: **12 August 2022**

Date of written reasons: **21 September 2022**

Place: **Sydney**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the reviewable decision made by the delegate of the Respondent dated 20 May 2022 that the mandatory cancellation of the Applicant's visa not be revoked is set aside; and in substitution, the cancellation of the Applicant's Class WE Subclass 050 Bridging (General) visa under s 501(3A) of the *Migration Act 1958* (Cth) is revoked under s 501CA(4) of the Act.

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

Senior Member Dr Linda Kirk

CATCHWORDS

MIGRATION - mandatory visa cancellation - citizen of Iran - Class WE Subclass 050 Bridging (General) visa - failure to pass character test - substantial criminal record - whether there is 'another reason' to revoke mandatory cancellation decision - Ministerial Direction 90 - nature and seriousness of offending - sexual offences against a minor - best interests of minor child - ties to the Australian community - impediments to return - where applicant has made protection visa application - decision set aside and substituted.

LEGISLATION

Migration Act 1958 (Cth)

CASES

CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 69
FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 775
FYBR and Minister for Home Affairs [2019] FCAFC 185
Gaspar v Minister for Immigration and Border Protection [2016] FCA 1166
Jagroop v Minister for Immigration and Border Protection and Another (2016) 241 FCR 461
Jal v Minister for Immigration and Border Protection [2016] AATA 789
Marzano v Minister for Immigration and Border Protection [2017] FCAFC 66
Minister for Home Affairs v Buadromo [2018] FCAFC 151
Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17
PNLB and Minister for Immigration and Border Protection [2018] AATA 162
Saleh and Minister for Immigration and Border Protection [2017] AATA 367
Suleiman v Minister for Immigration and Border Protection (2018) 74 AAR 545; [2018] FCA 594

SECONDARY MATERIALS

Department of Foreign Affairs and Trade, 'Iran', Smartraveller (Web Page, 14 July 2022) <https://www.smartraveller.gov.au/destinations/middle-east/iran?>
Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA
UK Home Office, Country Information and Guidance - Iran: Christians and Christian Converts, (2015).

WRITTEN REASONS FOR DECISION

Senior Member Dr Linda Kirk

21 September 2022

1. The Applicant is a 49 year old citizen of Iran.[1] He first arrived in Australia in December 2012.[2]

CONFIDENTIALITY

2. The Applicant has applied for a protection visa, specifically a Safe Haven Enterprise (Class XE) Visa ('SHEV'),[3] however this application has not yet been finalised. Section 501K of the *Migration Act 1958* (Cth) ('the Act') provides that the Tribunal must not publish any information which may identify a person who has applied for a protection visa or their relatives or dependents. The provision of confidentiality in these circumstances is mandatory under s 501K, and as a result the Applicant and his relatives and dependents have been anonymised throughout these written reasons.

[1] Exhibit R1, G2, 50.
[2] Ibid, 72.
[3] Exhibit R2, SG1, 5-45.

BACKGROUND

3. In February 2019 the Applicant was convicted in the Local Court of New South Wales of two counts of *Indecent assault person under 16 years of age* and was sentenced to imprisonment for two years.[4] In March 2019 the District Court of New South Wales re-sentenced the Applicant to one year and 10 months imprisonment with a non-parole period of 11 months.[5]

4. On 8 May 2019 the Applicant was notified that his Class WE subclass 050 Bridging (General) visa had been cancelled under sub-s 501(3A) of the Act ('Mandatory Visa Cancellation Decision') because a delegate of the Minister ('the Respondent') was satisfied the Applicant did not pass the character test in sub-s 501(6) of the Act as he was considered to have, pursuant to sub-s 501(7)(c), a 'substantial criminal record'.[6] The letter invited the Applicant to make representations to the Minister about revoking the decision to cancel the visa within 28 days of receipt of the letter.[7] At the time, the Applicant was serving a sentence of full-time imprisonment at Metropolitan Special Programs Centre (Long Bay) in New South Wales for an offence against a law in Australia.

5. On 29 May 2019, the Applicant made representations seeking revocation of the Mandatory Visa Cancellation Decision.[8]

6. On 20 May 2022, a delegate of the Respondent decided, under sub-s 501CA(4), not to revoke the Mandatory Visa Cancellation Decision ('the Reviewable Decision').[9]

7. On 27 May 2022, the Applicant applied to the Tribunal for review of the Reviewable Decision under para 500(1)(ba) of the Act.[10]

8. The matter was heard by the Tribunal on 3 and 5 August 2022. The Applicant attended the hearing by video-link from Villawood Immigration Detention Centre and was represented by

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[4] Exhibit R1, G2, 28-29.
[5] Ibid, 30-38; 40-41; 41-42; 85.
[6] Ibid, 64-70.
[7] Ibid, 65.
[8] Ibid, 44-63.
[9] Ibid, 7.
[10] Exhibit R1, G1, 1-6.

counsel. The following persons gave oral evidence and were cross-examined at the hearing:

- The Applicant
- Pastor KP
- Applicant's son, MRAP
- Applicant's son, ARAP
- Applicant's brother, AAP

9. The material before the Tribunal consists of:

- Section 501G-Documents (G1-3, pages 1-193) filed 7 June 2022 – Exhibit R1
- Supplementary G-Documents (SG1-SG3, pages 1-67) filed 18 July 2022 – Exhibit R2
- Bundle of Summons Material filed 18 July 2022 – Exhibit R3
- Statement of the Applicant dated 25 July 2022 – Exhibit A1
- Applicant's Tender Bundle filed on 25 July 2022 – Exhibit A2
- Statement of Pastor KP dated 10 July 2022 – Exhibit A3
- Statement of MRAP dated 23 July 2022 – Exhibit A4
- Statement of AAP dated 26 July 2022 – Exhibit A5
- Statement of AAP dated 23 July 2022 – Exhibit A6
- Expert Report of Ms Pearle Fernandes dated 22 June 2022 – Exhibit A7
- Expert Report of Ms Shan-Lee Mier dated 29 June 2022 – Exhibit A8

10. The Tribunal has reviewed the evidence before it and refers to all relevant materials below.

LEGISLATION

11. Subsection 501(3A) of the Act compels the Minister to cancel a visa in certain circumstances:

(3A) The Minister must cancel a visa that has been granted to a person if:

(a) the Minister is satisfied that the person does not pass the character test because of the operation of:

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) …; and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

12. Paragraph 501(6)(a) of the Act relevantly provides that a person does not pass the 'character test' if the person has a 'substantial criminal record'. Subsection 501(7) of the Act relevantly provides:

*(7) For the purposes of the character test, a person has a **substantial criminal record** if:*

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution.

13. Section 501CA of the Act applies if the Minister makes a decision under sub-s 501(3A) to cancel a visa that has been granted to a person.

14. Subsection 501CA(4) confers on the Minister the discretion to revoke the Mandatory Visa Cancellation Decision under sub-s 501(3A). Subsection 501CA(4) provides:

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

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

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

(ii) that there is another reason why the original decision should be revoked.

15. Paragraph 500(1)(ba) of the Act provides that applications may be made to the Tribunal for review of decisions of a delegate of the Minister under sub-s 501CA(4) not to revoke a decision to cancel a visa.

MINISTERIAL DIRECTION NO. 90

16. The Minister is empowered by sub-s 499(1) of the Act to give written directions to a person or body having functions or powers under the Act. The Direction must be applied by all decision-makers, except for the Minister acting personally, such as the Minister's delegates and the Tribunal.[11]

17. 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 commenced on 15 April 2021 and revoked the previous Direction 79 on the same date.[12]

18. The following principles in paragraph 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 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

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[11] 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).

[12] Direction [2]-[3].

Australian community applies regardless of whether the non-citizen poses a measureable 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.

19. A decision-maker must take into account the considerations identified in paragraphs 8 and 9, where relevant to the decision.

20. Paragraph 8 of the Direction identifies the following 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; and

d) Expectations of the Australian community.

21. Paragraph 9 of the Direction identifies a non-exhaustive list of other considerations:

a) International non-refoulement obligations;

b) Extent of impediments if removed;

c) Impact on victims; and

d) Links to the Australian community, including:

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

(ii) Impact on Australian business interests.

22. Paragraph 7(1) provides that, when taking the relevant considerations into account, '*information and evidence from independent and authoritative sources should be given appropriate weight.*'

23. Paragraph 7(2) states that '[p]*rimary considerations should generally be given greater weight than the other considerations*.' That does not preclude the Tribunal, however, based on the specific circumstances of each case, to give an 'other' consideration the equivalent of or greater weight than a primary consideration.[13] Paragraph 7(3) states that '[o]*ne or more primary considerations may outweigh other primary considerations.*' However, as Kenny and Mortimer JJ stated in their joint judgment in *Jagroop v Minister for Immigration and Border Protection and Another*: '*the weighing process in each case is in substance left, as it must be, to the individual decision-maker exercising the power under s 501'*.[14]

ISSUES FOR DETERMINATION

24. Before the power in sub-s 501CA(4) of the Act to revoke the original decision is enlivened, the decision-maker must be satisfied that the conditions for the exercise of the power have been met.

25. There is no dispute that the Applicant made the representations required by sub-s 501CA(4)(a). The issue is whether the discretion to revoke the Mandatory Visa Cancellation Decision may be exercised. In *Minister for Home Affairs v Buadromo*[15] the Full Court of the Federal Court of Australia made the following observations in relation to sub-s 501CA(4):

> *there has been some discussion in the authorities as to whether s 501CA(4) contains a residual discretion in the decision-maker by reason of the use of the word 'may' in the chapeau of the subsection, or whether the balancing of the factors favouring a refusal to revoke the cancellation is part of the one exercise of determining whether there is another reason the original decision should be revoked. The weight of authority in this Court favours the latter view ...*[16]

26. The issues for determination are:

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

[14] (2016) 241 FCR 461 at [57].

[15] [2018] FCAFC 151.

[16] Ibid, at [21], citing, inter alia, *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166; (2016) 153 ALD 337, [38] (North ACJ); *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66; (2017) 250 FCR 548, [31] (Collier J, with whom Logan and Murphy JJ agreed).

1) whether the Applicant passes the 'character test'; and

2) whether there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked.

27. If the Applicant succeeds on either ground, the Tribunal must find that the Mandatory Visa Cancellation Decision should be revoked.

EVIDENCE BEFORE THE TRIBUNAL

Years in Iran and travel to Australia

28. The Applicant was born in Iran in 1973. He is the second born child in a family of seven children and he has four sisters and two brothers. From an early age, the Applicant was discriminated against because of his Kurdish ethnicity, and his membership of the Yarsani ethnic group who follow the Ahl-e Haqq religion which is not recognised by the Iranian authorities.[17] From 1979 he experienced and witnessed multiple incidents of war-related violence, including bombing and shelling, as a result of the protracted Iran - Iraq war.[18]

29. The Applicant attended school until year 7 and when he was 13 years' old he left school and started work.[19] As a Yarsani, the Applicant experienced discrimination in obtaining employment.[20] He operated his own business as a car painter for 27 years.[21]

30. The Applicant was married to his wife for around 9 years, and they had two sons, MRAP and ARAP, who are currently aged 21 years and 15 years. The Applicant and his wife divorced after he discovered that she and her family were involved in drug trafficking in Iran. Following their divorce, the Applicant received ongoing threats from his wife and her family. The Applicant and his sons fled Iran to escape discrimination and the threats from his wife and in-laws.[22]

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[17] Transcript of proceedings (Transcript), 25.
[18] Exhibit A7, 7.
[19] Transcript, 26.
[20] Transcript, 25.
[21] Transcript, 15; 17.
[22] Exhibit A7, 7.

31. The Applicant and his sons arrived at Christmas Island by boat in December 2012. They were initially detained in immigration detention centres until they were granted bridging visas and were released to reside in the community.[23]

Criminal history in Australia

32. The Applicant's National Criminal History Check dated 26 February 2020 records the Applicant's conviction in Australia.[24]

33. The Applicant's criminal offending occurred on 15 December 2017 when he was using a spa at the Sydney Olympic Park Swimming Centre. The sentencing judge described the Applicant's offending against his 11 year old female victim:[25]

> *Sequentially, the first assault involved the appellant using his foot to touch the buttocks of the complainant, and thereafter, within a short time frame, he took her hand and put it on his penis. This occurred in the Sydney Olympic Park Swimming Centre. …*
>
> *The touching of the buttocks with the foot by the appellant is at the low end of the range of objective seriousness of this offence, I would accept, but taken in context, when it was immediately followed, or at least, within a very narrow timeframe with him taking that girl's hand and putting it on his erect penis in the swimming pool facility at the swimming centre, requires that there be a custodial sentence imposed in respect of that, in addition to the sentence imposed for the more serious example of this offence.*
>
> *The taking of this young girl's hand and putting it on his penis in the circumstances described is a more serious example of the offence…*

34. The Applicant was questioned about this offending during cross-examination at the hearing. He told the Tribunal that he cannot remember taking the victim's hand and putting it on his penis. He stated, *'[t]hat is not who I am.*'[26] The Applicant said that at the time he was '*mentally … in a very bad situation'* and was walking and talking to himself loudly. He was affected by the earthquake that occurred in Iran in November 2017 during which 10 of his family members died. His mental health declined following him receiving news of the death

[23] Exhibit A7, 7.

[24] Exhibit R1, G2, 28-29.

[25] Ibid, 30; 36.

[26] Transcript, 14.

of these members of his family.[27] He was prescribed medication by his doctor, and it was two weeks after he started taking this medication that the incident in the pool occurred.[28]

35. The nature of the offending and the impact upon the victim was summarised by his Honour as follows:[29]

> *It [the swimming pool] is a place where families go with their children and grandchildren to enjoy the facilities that have been provided at a busy swim centre, particularly in the warmer months of course, and conduct such as this must be addressed with the Court having in mind the need to protect children who are often left in circumstances in such an environment not with parents carers immediately at hand, so that they can have the freedom to enjoy their time there…*
>
> *There is a victim impact statement provided by the child, written for the assistance of the magistrate… Unsurprisingly, the joy which she once found in going to the swimming pool for her regular swimming lessons has in significant measure dissipated because of what occurred to her. She has had disrupted sleep, including nightmares and feelings of depression.*

36. At the hearing, the Applicant was questioned about whether he appreciated the effect his offending had on his young victim. He said that he has apologised to the victim and her father and, if the opportunity arises, he would like to apologise to them in person. He understands that '*especially because she is a girl and not a boy … she may not even ever forget that.*'[30]

Responsibility and remorse for offending

37. In his sentencing remarks, Judge Bennett found that the Applicant's remorse at having committed the offences was qualified by his plea of not guilty and his assertion that he was led to act by the victim. His Honour did note however that the Applicant only lodged an appeal against the severity of the initial sentence imposed rather than the conviction.[31]

38. In his statement dated 27 March 2020, the Applicant expressed his remorse for his offending:[32]

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[27] Transcript, 16.
[28] Ibid.
[29] Exhibit R1, G2, 30; 35.
[30] Transcript, 23.
[31] Exhibit R1, G2, 33.
[32] Ibid, 81 at [10]-[11].

> *I deeply regret my actions. I think my behaviour was completely wrong, especially because it was against a child.*
>
> *These actions were completely out of character for me. At the time of the offences, I was very angry and distraught because some of my family members had recently died in an earthquake in Iran and there were ongoing aftershocks that were threatening the lives of my remaining family in Iran. Around 30 minutes before I committed the offences, I had a conversation with my mother and she told me that the night before there had been another earthquake, and I was very much concerned that they were going to die.*

39. In this statement, the Applicant confirmed he has never been charged with any other offences or received any formal warnings in either Australia or Iran.[33]

Conversion to Christianity

40. The Applicant converted to Christianity in 2016 and was baptised in 2017.[34] Before he went to gaol, he would attend church every Sunday and would also attend Bible study classes three times per week.[35] In immigration detention the Applicant watches church services conducted online where passages from the Bible are read and the word of God is spoken. The church services are associated with the church administered by Pastor KP.[36]

Psychiatric report

41. In his report dated 20 March 2018, Dr Prashanth Mayur, psychiatrist, provided his diagnosis of the Applicant:[37]

> *[The Applicant] is being treated for a Major Depressive Disorder (as per DSM-V classification) which has developed over the past 3 months. This has occurred in the context of an earthquake in Iran recently that killed family members and many of his family are homeless and living in tents. He has been understandably very upset. As a part of the depressive disorder he has been irritable and has been exhibiting self-talk as a way of coping. These behaviours are not related to psychosis. He also has been experiencing dissociative fugue states that is related to the low mood. There is a family propensity of a mood disorder.*

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[33] Exhibit R1, G2, 81 at [12].

[34] Transcript, 9; 25.

[35] Transcript, 9; 18-19.

[36] Exhibit A1, at [5].

[37] Exhibit R1, G2, 101.

42. In his sentencing remarks, Judge Bennett stated that he could not see that there was a connection between the Applicant's major depressive disorder and his decision to indecently assault a child at the public swimming centre. However, he recognised that '*there is a state of mental health that must be brought to account, both in terms of the extent to which it might have impaired his judgment.'* His Honour could however '*not find anything more than it had but limited impact …'* on the Applicant's offending.[38]

Psychological reports

43. Pearle Fernandes, psychologist, at NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) conducted a two-hour telephone interview with the Applicant on 22 June 2022 and prepared a written report. She found that the Applicant presented and reported symptoms that are characteristic of Post-traumatic Stress Disorder (PTSD), and Depression. In her opinion the Applicant:[39]

> *is likely to continue to benefit from supportive counselling, which he has reported to be beneficial ... He should be encouraged to continue to engage in his physical exercise routines that he reported as valuable. Once ready and willing to process his difficult past experiences he could maximize the value of specialist trauma counselling.*

44. In her report dated 25 June 2022, Shan-Lee Mier, Social Worker at STARTTS, reported that the Applicant:[40]

> *is in need of ongoing psychological intervention and would benefit from specialised trauma counselling in a community based setting in order to recover from his complex and abundant experiences of trauma.*

45. The Applicant told the Tribunal that since he has been in immigration detention, he has had regular counselling sessions with Ms Mier once and sometimes twice a week.[41] If he is released back into the community, he intends to continue to seek treatment from Ms Mier.[42]

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[38] Exhibit R1, G2, 35.

[39] Exhibit A7, 11.

[40] Exhibit A8, 4.

[41] Transcript, 8.

[42] Transcript, 17; 22-23.

Risk of re-offending

46. In his sentencing remarks, Judge Bennett found that the Applicant:[43]

> *poses an average risk compared with other sexual offenders. This, upon the old scale of the study of 1999 which was used, would have put him in the low risk of reoffending in such matters.*

47. In his statement dated 27 March 2020, the Applicant wrote:[44]

> *I will never act in the same way again because I know that what I did was wrong and I never want to leave my sons without a father again.*
>
> *Since the offences, I have taken time to reflect and have returned to my true character and my Christian faith. The experience and this self-education will protect me from acting in the same way again.*

Applicant's children

48. In his statement dated 27 March 2020, the Applicant explained that he has been the sole carer for both of his sons since he separated from their mother in around 2008 when they were living in Iran. The Court made orders to give the Applicant sole custody of his sons.[45]

49. Since the Applicant has been incarcerated, his children have been without a carer. His elder son, MRAP, looks after his younger son, ARAP, who is a minor.

50. In his statement dated 25 July 2022, the Applicant described his relationship with his sons and his concern for their well-being:[46]

> *… I continue to have a close, loving, and strong relationship with my two sons ([MRAP] and [ARAP]). I speak to my children on the telephone daily. We also speak on FaceTime. I communicate with my children several times in each day, sometimes more. We speak about how the day is going, what is happening in their lives and how I am doing in immigration detention.*
>
> *I speak to my children frequently not only because I love them, but I am also overly concerned for their well-being and safety in the Australian community. My children do not really have any real support in the community. I know that [ARAP] has been really struggling in school and has misbehaved. I am very troubled by this news. Before I was arrested, [ARAP] was a good boy, and I did not have problems with him.*

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[43] Exhibit R1, G2, 34.

[44] Ibid, 81 at [13]-[14].

[45] Ibid at [17].

[46] Exhibit A1, 1 at [7]-[8]; [12].

…

I am absolutely dedicated to my children. They are my number one priority and reason for seeking to be released into the community

51. During his evidence at the hearing, the Applicant told the Tribunal that he is in touch with his children by telephone 15 to 20 times per day.[47] He is very concerned about his youngest son ARAP, because he is not attending school and often does not have enough food to eat.[48]

52. Before the Tribunal are three Summaries of Psychological Treatment, prepared by ARAP's psychologist from STARTTS, Silvana Cannavo, in relation to ARAP, prepared between May and December 2019. These record that ARAP attended treatment sessions to manage anxiety symptomology and assist with his transition from primary to high school. They report that ARAP's anxiety, depression and insomnia have been exacerbated by his separation from his father and inability to visit his father in prison. The summary dated 20 May 2019, notes that ARAP has struggled with grief and loss due to the separation from his father, has acted out at home, lost the motivation to go to school, and was referred for a physical and mental health assessment.[49] A report dated 5 September 2019 states that ARAP requires ongoing counselling sessions to address anxiety due to the separation from his father.[50]

Applicant's brother

53. The Applicant has a good relationship with his brother, AAP, and they speak on the telephone four or five times per day. His brother is very distressed and saddened about the Applicant's current situation.[51]

Family in Iran

54. The Applicant's mother and father and one brother and four sisters live in Iran and he is in contact with them.[52]

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[47] Transcript, 6.
[48] Transcript, 6, 7.
[49] Exhibit R1, G2, 96.
[50] Ibid, 100.
[51] Exhibit A1, at [15]; Transcript, 7.
[52] Transcript, 24.

Future plans

55. If the Applicant is released into the Australian community, he plans to reside with his two sons. It is his intention to continue to provide them with emotional support and guidance and financial and practical support. He plans to establish his own car painting business,[53] but he understands that he first needs to work for another company. He previously worked at a car repair workshop, and he does not know if he would be able to work there again if he is released. The company where his son, MRAP, works is looking for employees and they have said he could work there.[54] He also would like to continue to contribute to the Christian community associated with his church. This includes cooking and other voluntary services.[55]

Impediments on return

56. In his statement dated 27 March 2020, the Applicant wrote that he continues to have grave fears of being returned to Iran. He would not be able to practise his Christianity in Iran.[56]

WITNESS EVIDENCE

Pastor KP

57. Pastor KP provided a written statement dated 10 July 2022 and gave oral evidence at the hearing.[57] He confirmed that he has known the Applicant since September 2016 when he began attending the Pastor's church. The Applicant regularly attended Bible classes and assisted with the preparation of meals and cleaning up at the end of class during the period from 2016 to 2019. He told the Tribunal that he is aware that the Applicant was convicted of assault against a young girl, but he does not know the details of his offending.[58]

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[53] Exhibit A1, at [11].
[54] Transcript, 23.
[55] Exhibit A1, at [12].
[56] Ibid, at [13]
[57] Exhibit A3.
[58] Transcript, 33.

Applicant's son, MRAP

58. MRAP provided a written statement dated 23 July 2022 and gave oral evidence at the hearing.[59] He confirmed that he is currently employed as an apprentice panel beater at a smash repair workshop, and he has worked there for a period of 18 months. He works 5-6 days per week and leaves home at 5am in the morning and returns home at 7pm in the evening. He lives with and is the primary carer of his younger brother ARAP and he is responsible for paying the rent and the household bills. However due to his long work hours he is unable to supervise ARAP and ensure that he attends school on a regular basis. He confirmed that he and ARAP have a very good relationship with their father and they both love him deeply. He calls them multiple times per day by telephone and FaceTime. MRAP has not been in contact with his mother for many years and the Applicant '*has played an instrumental role in [his] development and progression in life.'*

59. In his statement, MRAP described how the Applicant was acting prior to his criminal offending in December 2017:[60]

> *All I can say is that around that time, my father was acting very weird and not himself. My dad seemed to be suffering from depression, as he lost family in Iran from what I understand was an earthquake.*
>
> *Moreover, my dad was doing strange things at the time, like talking to himself. I was very embarrassed as a younger person and did not really know how to deal with the situation. I think my father was not in the right frame of mind at the time when the offences occurred.*

60. In his statement, MRAP described the impact on him and if his brother if the Applicant is not released back into the community:[61]

> *I will be heartbroken. I will continue to suffer significant emotional, financial, and practical hardship. As a 21-year-old young man, it is extremely difficult to take care of my brother with little help from others. I am struggling myself given that I do not get paid much money, owing to the fact I am doing an apprenticeship.*
>
> *I really need my father to come home and assist me take care of my brother. I am extremely concerned for my brother's well-being and educational development. I fear that a negative decision would adversely impact my brother further in a considerable way. We both miss our father greatly and just want him to come home.*

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[59] Exhibit A4.

[60] Ibid at [25]-[26].

[61] Ibid at [22]-[24].

I feel like I am going to have a breakdown. I see all my friends travelling and doing fun things. I cannot go on trips with my friends. I need to stay home and take care of my brother. I feel sad about my life circumstances at the present time and really wish my father could come home.

Applicant's son, ARAP

61. ARAP provided a written statement dated 23 July 2022 and gave oral evidence at the hearing.[62] In his statement he described his relationship with the Applicant:[63]

> *We speak very regularly. I can tell that my father is always concerned about my well-being when he calls. I love my father very much. Equally, I know that my father loves me very much.*

62. ARAP told the Tribunal that he suffers from anxiety and depression and he has recently been suspended from school due to misbehaviour.[64]

63. In his statement, ARAP described the impact on him if the Applicant is not released back into the community:[65]

> *… I will be very upset. I also suspect that my mental capacity and health will go downhill. I really miss my father and want him to come home. I would probably have to go back to counselling and seek treatment for mental health issues.*
>
> *Although my older brother is a good person, I need my dad in my life. I am scared that I will go off the rails without my dad around. My dad has always had a good influence in my life, and he never harmed me at all. … I do not have a relationship with my biological mother.*

Applicant's brother, AAP

64. AAP provided a written statement dated 26 July 2022 and gave oral evidence at the hearing.[66] He has a good relationship with the Applicant and loves him very much. They speak on the phone every day.

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[62] Exhibit A6.

[63] Ibid at [11]

[64] Transcript, 55.

[65] Exhibit A6 at [17]-[18].

[66] Exhibit A5.

65. In his statement, AAP described how the Applicant was acting prior to his criminal offending in December 2017:[67]

> *I recall around the time my brother was arrested for the criminal charges, he was going crazy. He would randomly talk to himself. I would pose this question to him: 'Why are you talking to yourself?' I also recall that he was very agitated around that time.*

66. AAP stated that he is very concerned about the well-being of his nephews who are '*struggling a lot with life'* and are '*very troubled and saddened by the prolonged detention of their father in immigration detention.'* [68] He works six days a week and does not have much time to be physically present for his nephews. They *'really need their father home as a matter of urgency.'*[69]

EXERCISE OF DISCRETION TO REVOKE MANDATORY CANCELLATION

1) Does the Applicant pass the 'character test'?

67. In the representations and documents that the Applicant submitted to the Department and the Tribunal he does not dispute the information in the National Criminal History Check report dated 26 February 2020 recording his criminal conviction and sentence. It records that in February 2019 the Applicant was convicted in the Local Court of New South Wales of two counts of *Indecent assault person under 16 years of age* and was sentenced to imprisonment for two years.[70] In March 2019 the District Court of New South Wales re-sentenced the Applicant to one year and 10 months imprisonment with a non-parole period of 11 months.[71] The Tribunal is satisfied that the Applicant has a 'substantial criminal record' for the purposes of para 501(3A)(a) and sub-s 501(6) of the Act as he has been sentenced to a term of imprisonment of 12 months or more: par 501(7)(c). The Tribunal is also satisfied, for the purposes of para 501(3A)(b) of the Act, that on 8 May 2019 the Applicant was serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the state of New South Wales.

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[67] Exhibit A6 at [10].

[68] Ibid at [9].

[69] Ibid at [14].

[70] Exhibit R1, G2, 28-29.

[71] Ibid, 30-38; 40-41; 41-42; 85.

68. Having found that the Applicant does not satisfy the character test, the Tribunal finds that subparagraph 501CA(4)(b)(i) cannot be invoked to revoke the Mandatory Visa Cancellation Decision.

2) Is there 'another reason' why the Mandatory Visa Cancellation Decision should be revoked?

69. In determining whether, pursuant to subparagraph 501CA(4)(b)(ii) of the Act, there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked, the Tribunal must, in accordance with paragraphs 8 and 9 of the Direction, take into account the relevant 'primary considerations' and 'other considerations'.

PRIMARY CONSIDERATIONS

Primary Consideration 1 – Protection of the Australian community

70. Reiterating the general guidance and principles in the Direction, paragraph 5.2 states:

> *(1) …..*
>
> *(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 measureable risk of causing physical harm to the Australian community.*

71. Paragraph 8.1(2) states that in considering the need for protection of the Australian community, decision-makers should also have regard 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.*

(a) Nature and seriousness of the Applicant's conduct to date

72. Paragraph 8.1.1(1) sets out factors to be considered in determining the nature and seriousness of the non-citizen's criminal offending or other conduct to date. Relevant to the Applicant's conduct, the Tribunal must have regard to the following factors:

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) …

   (ii) crimes committed against vulnerable members of the community …, or government representatives or officials due to the position they hold, or in the performance of their duties.

   (iii) …

   (iv) …

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

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

e) *the cumulative effect of repeated offending;*

f) *…*

g) *...*

73. The Applicant's criminal offending is limited to the two sexual offences committed against an 11 year old girl for which he was convicted in February 2019. Paragraph 8.1.1(1)(a)(i) of the Direction states that sexual crimes are to be viewed very seriously. The sentencing judge characterised the first offence, namely the touching of the girl's buttocks with his foot as being at the '*low end of the range of objective seriousness'*, and the second offence being the taking of the girl's hand and putting it on his penis as '*a more serious example of the offence.'* Having regard to the Direction and the comments of the sentencing judge, the Tribunal finds that the Applicant's offending is very serious.

74. Having regard to paragraph 8.1.1(1)(c) of the Direction, the Tribunal finds that the one year and 10 months sentence of imprisonment imposed on the Applicant for these offences, is an objective indicator of the seriousness of his criminal offending. Sentences involving

terms of imprisonment are a last resort in the sentencing hierarchy, which reflects the objective seriousness of the offences involved.[72]

75. On the basis of the evidence before it, and for the stated reasons, the Tribunal finds that the Applicant's criminal offending is very serious in nature, and this weighs against the exercise of the discretion to revoke the Mandatory Visa Cancellation Decision.

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

76. Paragraph 8.1.2(1) of the Direction states:

> *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.*

77. Paragraph 8.1.2(2) of the Direction provides that in assessing the risk that may be posed to the Australian community, decision-makers must have regard to, cumulatively:

> *a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
>
> *b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> *i) information and evidence on the risk of the non-citizen re-offending; and*
>
> *ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken). …*

78. Having regard to the nature of the harm to individuals or the Australian community if the Applicant were to reoffend in accordance with paragraph 8.1.2(2)(a) of the Direction, the Tribunal finds that any future offending of a similar nature would have the potential to cause physical harm and psychological injury to members of the Australian community, including children. For these reasons, the Tribunal finds that the nature of the harm to individuals should the Applicant engage in similar criminal offending is serious.

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[72] *Jal v Minister for Immigration and Border Protection* [2016] AATA 789 at [24]; *PNLB and Minister for Immigration and Border Protection* [2018] AATA 162 at [22] and *Saleh and Minister for Immigration and Border Protection* [2017] AATA 367 at [50].

79. Having regard to the likelihood of the Applicant engaging in further criminal or other serious conduct in accordance with paragraph 8.1.2(2)(b) of the Direction, the Tribunal accepts the Applicant's evidence that his offending was contributed to by the mental distress he was suffering at the time as a consequence of him learning about the deaths of his relatives following the earthquake in Iran in November 2017. The report of Dr Mayur dated 20 March 2018 records that the Applicant was being treated for major depressive disorder which had developed over the previous three months. In his sentencing remarks, Judge Bennett concluded that it was not clear from the psychological and psychiatric reports that were before the court that there was any connection between the Applicant's major depressive disorder and his offending, and therefore the Applicant's condition had only a limited impact. Accordingly, the evidence does not support a finding that the Applicant was suffering from a mental health condition which contributed to his criminal offending. However, the Applicant's evidence that he was very distressed and talking to himself in the weeks prior to the offending is corroborated by the evidence of MRAP and AAP. This supports a finding that the Applicant was in a state of mental distress, if not suffering from a mental illness, at the time of the offences. Whereas this does not excuse or mitigate his criminal offending, it does support a finding that the risk of the Applicant committing similar offences in future is decreased in circumstances where he is no longer experiencing mental distress due to the loss of family members. In making this finding, the Tribunal has had regard to the evidence that the Applicant has not been charged or convicted of any other criminal offence in Australia or Iran.

80. The Applicant's evidence is that he has undertaken regular counselling sessions in immigration detention, and he intends to continue this counselling when he returns to live in the community. He recognises that if he were to engage in any further criminal behaviour or misconduct in the community, he would face serious consequences, including being returned to immigration detention and being separated from his sons. This evidence further supports a finding that the likelihood of the Applicant re-offending is low.

81. In making its finding in relation the likelihood of the Applicant re-offending, the Tribunal has had regard to the evidence that there are a number of relevant protective factors that will guard against the Applicant engaging in further offending. He will have stable accommodation living with his two sons and he has good prospects of securing employment with his son's employer. He plans to gain experience working in the car repair industry and to eventually start his own business.

82. On the basis of the evidence before it and taking into account available information and evidence of the risk of the Applicant re-offending and his rehabilitation, the Tribunal finds that the likelihood of the Applicant engaging in further criminal or other serious conduct is low. However, in the context of the nature of the potential harm to the Applicant's victims should he engage in the same or similar criminal conduct in the future, the Tribunal finds that this risk is not acceptable.

83. For the reasons above and applying the guidance in paragraphs 8.1.1 and 8.1.2 of the Direction, Primary Consideration 1 weighs against the revocation of the Mandatory Visa Cancellation Decision.

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

84. Paragraph 8.1.1(2) of the Direction prescribes that this consideration is relevant where the non-citizen has been convicted of an offence that involves family violence and/or there is information or evidence from independent and authoritative sources indicating that the non-citizen has been involved in the perpetration of family violence. This consideration does not arise on the material before the Tribunal.

Primary Consideration 3 – The best interests of minor children in Australia affected by the decision

85. Paragraph 8.3(1) of the Direction requires decision-makers to determine whether revocation is in the best interests of the child. This consideration applies only if the child is expected to be under the age of 18 years at the time the decision is made: paragraph 8.3(2).

86. In considering the best interests of the child, paragraph 8.3(4) relevantly requires the following factors be considered:

> *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 the 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 in any way, whether physically, sexually or mentally;

h) …

87. There is one minor child whose interests are relevant to this primary consideration, namely the Applicant's 15 year old son, ARAP.

88. Having regard to the factors in paragraph 8.3(4)(a), the evidence before the Tribunal is that the Applicant has a close, loving, and ongoing relationship with ARAP despite the fact they have been physically separated for more than three years. Prior to his incarceration, the Applicant was ARAP's primary carer, and ARAP's mother has not been a part of his life since he was one year old.[73] The Applicant speaks to ARAP multiple times a day and has a genuine concern and interest in his well-being.

89. In relation to the factors in paragraph 8.3(4)(b), the evidence is that there is approximately three years before ARAP reaches adulthood. Whereas this is a relatively short period of time, there is considerable scope for the Applicant to play a positive role in ARAP's life before he turns 18 years of age. This is particularly so in circumstances where ARAP has been struggling emotionally and suffering the adverse effects of his separation from his father over a prolonged period. As a teenager in his final years of high school, ARAP would greatly benefit from the guidance and advice of his father, and the motivation he could provide for ARAP to complete his secondary education.

90. Having regard to the factors in paragraphs 8.3(4)(d), (e) and (f), the evidence demonstrates that a decision to not revoke the cancellation decision is likely to cause ARAP considerable ongoing emotional distress. ARAP's evidence is that if the Applicant remains in immigration detention his mental state will significantly deteriorate, and he will need further psychological counselling. The Tribunal has had regard to the fact that ARAP is currently in the care of his older brother, MRAP, who meets his daily needs but who can only spend a limited amount of time with ARAP due to his work commitments, and that ARAP's mother has not been present in his life since he was a young boy.

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[73] Exhibit R1, G2, 81-82 at [17]-[19].

91. There is no evidence before the Tribunal relevant to the factors in paragraphs 8.3(4)(g)-(h) of the Direction.

92. Applying the guidance in paragraph 8.3(4) of the Direction, the Tribunal finds that this primary consideration weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision as it is clearly in the best interests of ARAP for the Applicant to have his visa reinstated and be permitted to remain in Australia.

Primary Consideration 4 – The expectations of the Australian community

93. Paragraph 8.4 of the Direction states:

> *(1) 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.*
>
> *(2) In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:*
>
> *(a) acts of family violence; or*
>
> *(b) …*
>
> *(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 …*
>
> *(d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties;*
>
> *(e) …*
>
> *(f) …*
>
> *(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.*
>
> *(4) This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.*

94. The Direction states that the Australian community expects that the Minister can and should cancel a visa if the holder raises serious character concerns through certain kinds of conduct. Relevantly in the case of the Applicant, this conduct is two offences of a sexual

nature committed against a child. As the Applicant engaged in sexual crimes, the Tribunal finds that the community expectation is that the Applicant's visa should remain cancelled.

95. The Full Court of the Federal Court considered paragraph 11.3(1) of Direction 65, which is analogous to paragraph 8.4 of the Direction, in *FYBR and Minister for Home Affairs* ('*FYBR*').[74] The majority (Charlesworth and Stewart JJ) concluded as follows:

- Paragraph 11.3 contains a statement of the Government's views as to the expectations of the Australian community, which operates to impute or ascribe to the whole of the Australian community an expectation that wholly aligns with the expectation of the executive government of the day in respect of its subject matter.[75]

- It is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an applicant's circumstances or evidence about those expectations.[76]

- However, 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 in the ultimate exercise of his or her discretion.[77]

- It is necessary for the decision-maker to assess the applicant's circumstances in order to reach an evaluative assessment of 'appropriateness'.[78]

96. The effect of paragraph 8.4 is that it imputes to the Australian community the expectation that non-citizens who have permission to remain in Australia will obey Australian laws. The question to be addressed does not involve an inquiry into what the Australian community does or does not expect, because that is normatively expressed in the terms of the consideration: paragraph 8.4(4). Rather, the relevant inquiry is '*whether it is appropriate to give more or less weight to a deemed community expectation*' of non-revocation of a mandatory visa cancellation '*that might otherwise arise simply because of the nature of the non-citizen's character concerns or offences*'.[79] As a normative expression, this

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[74] [2019] FCAFC 185.

[75] Charlesworth J at [66]; Stewart J at [91].

[76] Charlesworth J at [67]; Stewart J at [104].

[77] Charlesworth J at [76].

[78] Stewart J at [97].

[79] Charlesworth J at [77].

consideration indicates the likelihood that community expectation will in most cases lead to non-revocation, without dictating an inflexible conclusion. The question for the decision-maker is the weight to be attached to this consideration.

97. Having regard to the expectations of the Australian community as stated in paragraph 8.4 of the Direction, the Applicant committed two sexual offences against a child which the community would generally expect to result in the cancellation of his visa. Having regard to the factors in principle 5.2(4) of the Direction, the Tribunal notes that the Applicant arrived in Australia in December 2012 and has resided here for nearly a decade. The length of time the Applicant has been in Australia supports a finding that there is a higher level of tolerance by the Australian community for his criminal conduct than there would be for a non-citizen who has not lived in the community for an extended period of time.

98. Having had regard to the Government's views in relation to the expectations of the Australian community and giving them appropriate weight, and taking into account the nature, seriousness and impact of the Applicant's criminal offending, and the duration of his residency in Australia, the Tribunal finds that Primary Consideration 4 on balance weighs against revocation of the Mandatory Visa Cancellation Decision.

OTHER CONSIDERATIONS

99. While the primary considerations carry particular weight, the Direction acknowledges at paragraph 9 that 'other considerations' must be taken into account by the decision-maker where relevant. Paragraph 7(2) states that '[p]*rimary considerations should generally be given greater weight than the other considerations.*'

100. The Tribunal notes that these considerations are 'other' considerations, as opposed to 'secondary' considerations. As Colvin J observed in *Suleiman v Minister for Immigration and Border Protection* ('*Suleiman*')[80]

> *Direction 65 [now Direction 90] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are*

[80] [2018] FCA 594 [23].

to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.

101. In *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[81] Wigney J held that this analysis '*tends to overcomplicate or over intellectualise the issue*'. His Honour held that the use of the word 'generally' in clause 8(4) of Direction 79 (the same wording is used in section 7(2) of Direction 90) '*recognises that there may well be cases where the circumstances are such that one or more "other considerations" may be deserving of more weight than one or more primary considerations*'.[82] His Honour also held that the formulation identified in *Suleiman* '*is at least potentially problematic because it tends to suggest that a decision-maker cannot give greater weight to one or more of the "other considerations" in any given case unless they consider that the case is somewhat unusual or out of the ordinary*'.[83]

102. The 'other' considerations relevant to the Applicant's circumstances are considered in the following paragraphs.

International *non-refoulement* obligations

103. Paragraph 9.1 of the Direction relevantly provides:

1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing. Accordingly, in considering non-refoulement obligations where relevant, decision-makers should follow the tests enunciated in the Act.

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[81] [2021] FCA 775 [22].

[82] Ibid at [23].

[83] Ibid.

2) *In making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. In doing so, decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable, and in the meantime, detention under section 189, noting also that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.*

3) *However, that does not mean the existence of a non-refoulement obligation precludes refusal or cancellation of a non-citizen's visa or non-revocation of the mandatory cancellation of their visa. This is because such a decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the non-citizen applies for a protection visa, the non-citizen would not be liable to be removed while their valid visa application is being determined.*

4) *Claims which may give rise to international non-refoulement obligations can be raised by the non-citizen in response to a notice of intention to consider cancellation or refusal of their visa under section 501 of the Act, in a request to revoke under section 501CA the mandatory cancellation of their visa, or can be clear from the facts of the case (such as where the non-citizen holds a protection visa).*

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

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

7) *Where a non-citizen, in responding to a notice for the purposes of section 501 or 501CA, makes claims which may give rise to international non-refoulement obligations as given effect by the Act, and that non-citizen is able to make a valid application for a protection visa, those claims will, if and when the non-citizen makes such an application, be conclusively assessed before consideration is given to any character or security concerns associated with the non-citizen. This process would ordinarily be followed even in the highly unlikely event that consideration of the protection visa application is undertaken by the Minister personally.*

8) If, however, the refusal, cancellation or non-revocation decision is regarding a protection visa, the person will be prevented by section 48A of the Act from making a further application for a protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them - see sections 48A and 48B of the Act). Further, as a result of a refusal or cancellation decision under section 501 or a non-revocation decision under section 501CA, the person will be prevented from applying for any other class of visa except a Bridging R (Class WR) visa (see section 501E of the Act and regulation 2.12AA of the Regulations). In these circumstances, decision-makers should seek an assessment of Australia's international non- refoulement obligations.

104. The Applicant has made an application for a Safe Haven Enterprise (Class XE) Visa ('SHEV'), however this application has not been finally determined. The Applicant has raised the following claims with respect to what might occur if he is returned to Iran:[84]

- he is Christian;
- the Iranian authorities are aware that the Applicant has converted to Christianity;
- because he is Christian, there is a risk that the Applicant will be killed as a result of Islamic laws;
- he is a refugee, and the Iranian authorities will put the Applicant in jail because he left Iran for Australia;
- he fears that he will be imprisoned or face other serious harm from the Iranian authorities, on the basis that he comes from the Ahl-e Haqq religious community and also because he and his sons have been baptised Christians in Australia;
- he fears his ex-wife's family; and
- the Applicant's family has faced problems in Iran because they are part of the Ahl-e Haqq religion, which is not recognised by authorities on the basis that its members are not Muslims. Members of the Ahl-e Haqq religion have restricted access to employment and higher education and are discriminated against. As a consequence of their treatment, members of the Ahl-e Haqq have self-immolated, while others have been sentenced to death or executed.

[84] Exhibit R1, G2, 151; Exhibit R2, SG1, 5.

105. The Respondent informed the Tribunal that a preliminary finding has been made by a delegate of the Minister that the Applicant is owed protection obligations.[85]

106. The Respondent contends that the appropriate course for the Tribunal is to defer an assessment of whether the Applicant's claims engage Australia's non-refoulement obligations under the Act. This course is consistent with the High Court's decision in *Plaintiff M1/2021 v Minister for Home Affairs* (*Plaintiff M1/2021*).[86] The primary question before the High Court in *Plaintiff M1/2021* was whether a delegate, in deciding whether there was 'another reason' to revoke the cancellation of the applicant's visa pursuant to sub-para 501CA(4)(b)(ii) of the Act, was required to consider the representations which raised a potential breach of Australia's international non-refoulement obligations in circumstances where the applicant was able to make a valid application for a protection visa. The High Court by majority, found that:

- the delegate was required to read, identify, understand, and evaluate the applicant's representations that raised a potential breach of Australia's international non-refoulement obligations;[87]

- Australia's international non-refoulement obligations unenacted in Australia were not a mandatory relevant consideration;[88] and

- to the extent Australia's international non-refoulement obligations are given effect in the Act, one available outcome for the delegate was to defer assessment of whether the applicant was owed the non-refoulement obligations on the basis that it was open to the applicant to apply for a protection visa.[89]

107. Whilst it is not obliged to do so, the Tribunal has considered the Applicant's claims that he is owed non-refoulement obligations which may provide 'another reason' why the cancellation decision should be revoked.

108. The Applicant's evidence is that he is a Christian, having converted to that religion in 2016 and baptised in 2017. He has continued to practise his religion in immigration detention.

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[85] Transcript, 72.
[86] [2022] HCA 17.
[87] At [24] per Kiefel CJ, Keane, Gordon and Steward JJ.
[88] At [20], [29].
[89] At [30].

Pastor KP's evidence confirmed that the Applicant regularly attended church, and participated in some 150 Bible classes during the period 2016 to 2019.[90] On the basis of this evidence, the Tribunal is satisfied that the Applicant is a practising Christian.

109. Department of Foreign Affairs and Trade has produced information in respect of Iran on its "Smart Traveller" website. As relevant, this information states:[91]

> *It's against the law to behave in a way that offends Islam, such as encouraging a Muslim to convert.*

110. A report published by the UK Home Office dated December 2015 and entitled "*Country Information and Guidance - Iran: Christians and Christian Converts"* states:[92]

> *Christians who have converted from Islam are at risk of harm from the state authorities, as they are considered apostates - a criminal offence in Iran. Sharia law does not allow for conversion from Islam to another religion, and it is not possible for an individual person to change their religious affiliation on personal documentation. Christian converts face physical attacks, harassment, surveillance, arrest, detention, as well as torture and ill-treatment in detention.*

111. It also refers to sources that indicate:

a) 'Iran's non-tolerance of conversion from Islam (apostasy) was articulated publicly in October 2014 by Ali Younesi, Rouhani's senior advisor on Ethnic and Religious Minority Affairs. During an interview with the conservative news agency, Fars, Younesi declared that "Converting to different sects is illegal in our country" and also that evangelism is illegal for minority faith groups. It has long been known that Iran does not tolerate conversion to minority faiths, nor evangelism, but this interview is the most recent, direct and public affirmation of these policies from a senior figure';[93]

b) 'Muslim converts to Christianity faced harassment, arrest, and jailing. Many arrests took place during police raids on religious gatherings, during which the government confiscated religious property. Iranian officials reportedly raided a house church in

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[90] Transcript, 31.

[91] Department of Foreign Affairs and Trade, 'Iran', *Smartraveller* (Web Page, 14 July 2022) <https://www.smartraveller.gov.au/destinations/middle-east/iran?>.

[92] https://www.refworld.org/docid/565ff7fa4.html, 4, at [2.2.2].

[93] https://www.refworld.org/docid/565ff7fa4.html, 4 at [2.2.2], citing Christians in Parliament, The persecution of Christians in Iran, March 2015 http://www.christiansinparliament.org.uk/uploads/APPGs-report-on-Persecution-of-Christians-in-Iran.pdf.

Tehran August 12 and arrested Christian converts Mehdi Vaziri and Amir Kian. Both were believed to be held at the Ghezel-Hesar Prison at year's end';[94]

c) 'if a convert is active in informal church activities or proselytizing, problems may arise with the authorities. Additionally, if conversion comes to the knowledge of the authorities, an individual might lose his or her job';[95] and

d) 'Converts would have to hide their faith in order to be employed in certain jobs. For many jobs it is necessary to fill out a form in which one's religion is indicated. Overall, there is widespread discrimination against minorities with regard to access to education and employment. The impact of discrimination may vary depending on whether an individual is employed in a private company or a government position…'[96]

112. On the basis of the country information before it, the Tribunal concurs with the finding of the delegate that there is a likelihood that Australia's non-refoulement obligations are engaged in relation to the Applicant, with the country of reference being Iran. The Tribunal considers that a conclusive finding as to whether non-refoulement obligations are in fact owed in respect of the Applicant is not possible without a full and comprehensive assessment of his claims, for example through the protection visa application process. Nevertheless, the Tribunal finds that the likelihood that the Applicant engages Australia's non-refoulement obligations weighs in favour of the exercise of the discretion to revoke the Mandatory Visa Cancellation Decision.

113. In attributing weight to this consideration, the Tribunal has had regard to the fact that the Applicant has applied for a protection visa, specifically a SHEV. Although non-refoulement obligations and the statutory criteria for the grant of a protection visa are not identical the Applicant's fear of harm for reason of his religion if returned to Iran is plainly within the terms of the Refugee Convention, as reflected in s5J of the Act.

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[94] https://www.refworld.org/docid/565ff7fa4.html, 4 at [2.2.2], citing US Department of State, International Religious Freedom Report for 2014, 14 October 2015, Section II Government Practises http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm?year=2014&dlid=238454.

[95] https://www.refworld.org/docid/565ff7fa4.html, 4 at [2.2.2], [date accessed 7 July 2022], citing Danish Immigration Service – Update on the Situation for Christian Converts in Iran – June 2014, 1.1 Consequences of conversion, including obstacles with regard to education, employment and dealings with the authorities, http://www.nyidanmark.dk/NR/rdonlyres/78D46647-A0AD-4B36 BE0AC32FEC4947EF/0/RapportIranFFM10062014II.pdf.

[96] https://www.refworld.org/docid/565ff7fa4.html, 4 at [2.2.2], [date accessed 7 July 2022], citing Danish Immigration Service – Update on the Situation for Christian Converts in Iran – June 2014, 1.1 Consequences of conversion, including obstacles with regard to education, employment and dealings with the authorities, http://www.nyidanmark.dk/NR/rdonlyres/78D46647-A0AD-4B36-BE0AC32FEC4947EF/0/RapportIranFFM10062014II.pdf

114. The Tribunal also has had regard to the practical consequences of its finding that the Applicant is likely owed non-refoulement obligations. If the Mandatory Visa Cancellation Decision is not revoked, the Applicant will remain in immigration detention while his SHEV application is being determined. While this period of on-going detention will not be indefinite, it will be highly detrimental to the Applicant's psychological health and well-being. In making this finding, the Tribunal notes that the Applicant has to date been detained in immigration detention for a period of 32 months.

115. For the reasons outlined above, the Tribunal finds that this other consideration weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

Extent of impediments if removed from Australia

116. The Direction states in paragraph 9.2:

> *(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.*

117. Having regard to the factors in paragraph 9.2(1)(a) and (c) of the Direction, the evidence before the Tribunal is that the Applicant is aged 49 years and, as recently as June 2022, he presented with and reported symptoms of PTSD and depression.[97] As a citizen of Iran, the Applicant would have the same access to any social, medical and economic support as other citizens although such services are unlikely to be of the same standard as those available in Australia. The Direction provides that the extent of any impediments to an applicant in establishing themselves and maintaining basic living standards is to be considered in the context of what is generally available to other citizens of that country.

118. Guided by paragraph 9.2(1)(b) of the Direction, the Tribunal finds that the Applicant will not face language or cultural barriers on his return, as he lived in Iran until the age of 39 years and speaks the language and is familiar with life in his home country. It will take time for

[97] Exhibit A7, 11.

him to readjust to life in Iran and to find suitable employment having not lived there for more than a decade. The Applicant's evidence is that he experienced discrimination as a Yarsani, and this will restrict his access to employment opportunities. He successfully operated his own business as a car painter for 27 years. Given his extensive experience in this industry, he should be able to find similar employment.

119. The Applicant's mother and father and one brother and four sisters live in Iran and he is in contact with them. His family members should be able to provide him with some level of support until he is able to find suitable accommodation and employment. The extent of the hardship that the Applicant may face should he return to Iran will depend on the degree of financial and practical support that he will receive from his family.

120. The Applicant will face considerable emotional hardship if he is removed to Iran by virtue of him being separated from his two sons and brother who reside in Australia and with whom he has close and loving relationships. The emotional distress that the Applicant will suffer due to his separation from his family in Australia will negatively impact on his mental health and affect his ability to obtain employment and re-integrate into the Iranian community.

121. On the basis of the evidence before it, and guided by the factors in paragraph 9.2 of the Direction, the Tribunal finds that this other consideration weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

Impact on victims

122. The Direction states in paragraph 9.3:

> *(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.*

123. There is no evidence before the Tribunal of the views of the Applicant's victim and the impact on her of a decision to revoke the Mandatory Visa Cancellation Decision.

Links to the Australian community

124. Paragraph 9.4 of the Direction requires decision-makers to have regard to paragraphs 9.4.1 to 9.4.2 below.

Strength, nature and duration of ties to Australia

125. Paragraph 9.4.1 requires consideration of the strength, nature and duration of the Applicant's family and social ties to Australia:

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

126. Having regard to paragraph 9.4.1(1) of the Direction, the evidence before the Tribunal is that the Applicant's two sons and brother reside in Australia. His two sons are holders of bridging visas and his brother holds a SHEV. Accordingly, they are not citizens or permanent residents of Australia. Notwithstanding their non-permanent status in Australia, the Respondent accepts that it is appropriate for the Tribunal to consider the impact on these family members of the Applicant being removed to Iran.

127. The evidence before the Tribunal is that should the Applicant be returned to Iraq his sons, MRAP and ARAP, will be devastated as he is their sole carer and they rely on him for emotional and practical support. The Applicant's brother also will be negatively impacted by his removal to Iran. The Tribunal finds that the Applicant's family members, especially his

sons, will experience considerable emotional distress and practical hardship if he is physically separated from them and this weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

Impact on Australian business interests

128. The Applicant does not claim that any Australian business interests would be affected by his removal to Iran. Accordingly, the Tribunal has given the factors in paragraph 9.4.2(3) no weight.

129. On the basis of the evidence before it, and having regard to the factors in paragraph 9.4, particularly the length of time the Applicant has resided in Australia and the devastating impact of his removal on his immediate family members, the Tribunal finds that the Applicant's links to the Australian community weigh heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

CONCLUSION

130. In summary, the Tribunal finds that Primary Consideration 1 weighs against revocation of the Mandatory Visa Cancellation Decision. The Applicant's criminal offending is serious, particularly as it involved sexual offences against a child. The low risk of him committing future criminal offences coupled with the nature and seriousness of the harm this would cause to his future victims and the community is such that the protection of the Australian community is best served by the non-revocation of the Mandatory Visa Cancellation Decision.

131. Primary Consideration 3 weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision. It is clearly in the best interests of the Applicant's son, ARAP, for him to remain in Australia. Primary Consideration 4 weighs against revocation of the Mandatory Visa Cancellation Decision as the expectations of the Australian community are that the Applicant's sexual offences should cause him to forfeit the privilege of remaining in Australia, and this is not outweighed by duration of his residency of Australia.

132. In regard to the relevant Other Considerations, the likelihood that the Applicant engages Australia's non-refoulement obligations, the considerable impediments he will face on return

to Iraq, and the devastating impact of his removal on his family members weigh strongly in favour of revocation of the Mandatory Visa Cancellation Decision.

133. The Tribunal is satisfied that there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked and decides that the Reviewable Decision should be set aside.

DECISION

134. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the reviewable decision made by the delegate of the Respondent dated 20 May 2022 that the mandatory cancellation of the Applicant's visa not be revoked is set aside; and in substitution, the cancellation of the Applicant's Class WE Subclass 050 Bridging (General) visa under s 501(3A) of the *Migration Act 1958* (Cth) is revoked under s 501CA(4) of the Act.

I certify that the preceding 134 (one hundred and thirty - four) paragraphs are a true copy of the reasons for the decision herein of Senior Member Dr Linda Kirk

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

Associate

Dated: 21 September 2022

Date(s) of hearing:	**3 & 5 August 2022**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Respondent:	**Ms E Letcher-Boldt, CLAYTON UTZ**