Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2022/5678**
Re:	**Christopher Harper**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**The Hon. Dennis Cowdroy AO KC, Deputy President**
Date:	**26 September 2022**
Place:	**Sydney**

The Tribunal finds that the correct and preferable decision is that the decision under review be set aside and in substitution a decision be made that the original decision to cancel the Applicant's visa be revoked.

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

The Hon. Dennis Cowdroy AO KC, Deputy President

Catchwords

MIGRATION – mandatory visa cancellation – failure to pass the character test – whether there is another reason why the visa cancellation should be revoked – Ministerial Direction No. 90 – nature and seriousness of offending conduct – risk of reoffending – protection of the Australian community – family violence committed by the non-citizen – best interests of minor child – expectations of the Australian community – strength, nature and duration of ties- decision set aside and substituted.

Legislation

Migration Act 1958 (Cth)

Cases

Folau v Minister for Immigration and Border Protection [2016] FCA 1149

FYBR v Minister for Home Affairs [2019] FCAFC 185

JNMK v Minister of Immigration Citizenship Migrant Services and Multicultural Affairs [2021] FCA 762

Minister for immigration and Multicultural Affairs v SRT [1999] 91 FCR 234

NBMZ v Minister for Immigration and Border Protection [2014)] 220 FCR 1

Ngo v The Queen [2017] WASCA 3

R v Harper [2015] QCA 273Y

RQRP v Minister of Immigration Citizenship Migrant Services and Multicultural Affairs [2021] FCA 266

NQY v Minister of Immigration and Border Protection [2017] FCA 1466

Secondary Materials

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

REASONS FOR DECISION

The Hon. Dennis Cowdroy AO KC, Deputy President

26 September 2022

1. The Applicant seeks review by the Tribunal made pursuant to section 500 (1) (ba) of the migration act 1958, of a decision made by a delegate of the respondent (the Minister) dated 1 July 2022. By that decision, the delegate decided not to revoke the mandatory cancellation of the applicant's Class TY Subclass 444 Special Category (Temporary) Visa made pursuant to section 501CA (4) of the act. The applicant was notified of the delegate's decision on 5 July 2022. The applicant applied to the Tribunal for review of such decision on 11 July 2022.

2. A delegate of the Minister was satisfied that the Applicant did not pass the character test on the basis that he had a "substantial criminal record" as a result of being sentenced to a term of imprisonment for 12 months or more: section 501(3A)(a)(i) of the Act.

3. The hearing before the Tribunal was held on 12 September 2022 using the Microsoft Teams platform.

Relevant Law and Policy: Direction No. 90

4. Section 501CA of the Act applies if the Minister decides under s 501(3A) to cancel a visa that has been granted to a person.

5. Subsection 501(3A) of the Act states that the Minister must cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test due to the operation of subsections 501(6) and 501(7).

6. Section 501(6)(a) of the Act provides that a person does not pass the "character test" if the person has a "substantial criminal record". Section 501(7)(c) also provides that a person has a substantial criminal record if the person has been sentenced to a term of 12 months imprisonment or more.

7. The Minister may revoke the original cancellation decision pursuant to subsection 501CA(4) of the Act which provides that:

> *(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.*

8. Section 500(1)(ba) of the Act provides the Tribunal with the power to review decisions of a delegate of the Minister under subsection 501CA(4) not to revoke a decision to cancel a visa.

9. The Minister has made a written direction pursuant to s 499 of the Act to guide decision-makers in the exercise of power under subsection 501CA(4). The relevant direction is *Direction no. 90 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* ("the Direction" or "Direction 90").

10. The Direction sets out a number of preliminary matters, general guidance, and principles for decision-makers. In particular, paragraph 5.2 of the Direction sets out a number of principles that the Tribunal has considered. It relevantly provides:

> *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.*

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.

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.

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.

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 type of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

11. Part 2 of the Direction sets out primary and other considerations that must be considered by the decision-maker, where relevant, when deciding whether to exercise the discretion to revoke the mandatory cancellation of a non-citizen's visa. Primary considerations should generally be given greater weight than the other considerations, and one or more considerations may outweigh other considerations. However, other considerations should not be viewed as "secondary" as, in certain cases, other considerations may outweigh

primary considerations. In applying either type of the considerations, information and evidence from independent and authoritative sources should be given appropriate weight.

12. The primary considerations (paragraph 8 of the Direction) are:

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

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

    (c) best interests of minor children in Australia ("Primary Consideration C"); and

    (d) expectations of the Australian community ("Primary Consideration D").

13. The Tribunal must also consider various other considerations (paragraph 9 of the Direction), where relevant. The other considerations include but are not limited to:

    (a) international non-refoulement obligations;

    (b) extent of impediments if removed;

    (c) impact on victims; and

    links to the Australian community: including the strength, nature and duration of ties to Australia and the impact on Australian business interests.

Facts

14. The Applicant, who is 63 years of age, was born in New Zealand on 30 April 1959. The Applicant is a citizen of New Zealand. The applicant arrived in Australia in 1977 and subject two short periods outside the country, he has remained in Australia since his arrival

Evidence

Statements

15. The Tribunal has had regard to the statements and character references, namely:

a) statement of applicant dated 13 August 2022

b) statement of D.T, mother of the applicant dated 13 August 2022

c) statement of JAC, daughter of the applicant, dated 13 August 2022

d) statement of MAH, brother of the applicant dated 14 August 2022

e) letter of GH, supplier to the applicant's business, dated 22 July 2022

f) G documents which includes references from persons who have dealt with the applicant whilst the applicant has conducted a transport business. Such references have been provided by T. D dated 6 October 2021; SJT dated 7 October 2021; D. H dated 8 October 2021; S WP dated 8 October 2021;

g) References provided in support of the applicant's special leave application including references from T. C. Dated 24 February thousand 22; T. S. Dated 27 March 2022; S. H. Dated 28 March 2022; M. C. Dated 28 March 2022; S. A. Dated 11 April 2022; P. G. Dated 17 April 2022.

Oral evidence

16. The Tribunal heard oral evidence from the Applicant.

Medical evidence

17. A psychologist's report of Dr Emily Kwok dated 30 August 2022 was provided to the Tribunal.

The Applicant's Background

18. The material provided to the Tribunal records of the applicant was born in Auckland and was the elder of two children in his family. His father was born in New Zealand and his mother was born in Australia. It appears that the family had an unremarkable childhood,

with both parents being employed in the family enjoying many recreational activities. The applicant denied any criminal record in New Zealand.

19. The applicant was educated at a private school in New Zealand. The Applicant left school after Year 11 to join the workforce. He assisted his father on a part-time basis on building sites for a period of about 12 months

20. The applicant relocated from New Zealand to Australia with his family to settle in Australia permanently in 1977. It appears that his parents were divorced and his father returned to New Zealand. His father passed away on 21 December 2021.

21. Upon arriving in Australia the applicant undertook part-time work for about 12 months with his father whilst he remained at school. Shortly after arriving in Australia he became an apprentice carpenter/joiner and worked in the construction industry in Queensland before involving himself in a trucking business. The trucking business was highly successful and according to the oral evidence of the applicant, prior to his incarceration referred to hereunder, the business made $1 million in a year. Such revenue was derived from the fact that he owned several trucks which were used in the construction of gas pipelines in Western Queensland. The business was closed following his involvement with the law but his mother continued to trade by hiring our trucks whilst the applicant worked in the construction industry in 2012 and 2013. The applicant has not worked in the community since he was imprisoned in 2014.

Applicant's Criminal History

22. On 21 February 2014 the applicant was found guilty by a jury and convicted in the Supreme Court of Queensland Criminal Jurisdiction of the following offences:

    a. One count of trafficking in the dangerous drug of methylamphetamine, contrary to section 5 of the Drugs Misuse Act 1986 (QLD).

    b. Three counts of possessing a thing for use in connection with producing a dangerous drug namely hypo phosphorus acid, contrary to section 10 (1) (a) of the Drugs Misuse Act 1986 (QLD).

c. As a consequence, on 27 February 2014 the Applicant received a sentence of 10 years imprisonment for the trafficking offence and concurrent sentences of five years for each of the counts of possessing hypo phosphorous acid.

d. In respect of the sentence for the trafficking count, a declaration was made by the Supreme Court of Queensland In Its Criminal Jurisdiction that the applicant was convicted of a serious violent offence.

23. The applicant appealed against his conviction. Such appeal was heard by the Supreme Court of Queensland, Court of Appeal at Brisbane: *R v Harper* [2015] QCA 273. The Court of Appeal dismissed the appeal and refused leave to appeal against the sentence. The applicant then sought special leave to appeal to the High Court of Australia from the decision of the Full Court's decision. Such application was dismissed by the High Court of Australia on 12 May 2022.

Sentencing observations

24. The Tribunal has considered sentencing observations in relation to these convictions.

25. On 27th February 2014 in the Supreme Court of Queensland, Criminal Jurisdiction, Dalton J referred to the fact that the chemical used by the applicant required the applicant to sign a false declaration as to its use and also to expressly disavow any intention to use it for the purpose of making drugs. His Honour said: "… So that in each case, the acquisition of the chemical involved lies to defeat the purpose of the legislation which tries to allow legitimate use of the chemical and not illegitimate use".

26. His Honour referred to the fact that the applicant was first charged in 2005 and that there had been an unusually long delay between that time and the matter coming to trial. The applicant was placed on bail on what His Honour described as conditions which were not "overly onerous". His Honour also observed that the offending was not repeated after the applicant was charged. He referred to the fact as follows:

> *There is a weapons charge in 2002, which as I said earlier, really came about because of searches undertaken in connection with these matters. There is an unlawful possession of a stolen truck in 2007. There is no conviction recorded in relation to that and you were fined $2000. So I don't see that as terribly significant*

in terms of my sentence and that lack of offending, both before and after this offending, must be relevant."

27. A chronology of all the applicant's convictions is listed here under:

Offence	Date of offence(s)	Court dates	Court	Penalty imposed
Drugs Misuse Act 1986 (Qld) (DMA), s 5(A): Trafficking in dangerous drugs - schedule 1	Between 20/02/2001 and 31/10/2003	Convicted: 21/02/2004 Sentenced: 27.02.2014 Appeal against conviction and sentence in the Queensland Court of Appeal: Heard 04/06/2015 Determined 15/12/2015	Brisbane Supreme Court	Conviction recorded Imprisonment: 10 years Declaration that conviction be that of a serious violence offence
DMA, s 10(1)(A): possessing anything for use in the commission of crime defined in part 2	3 charges on: 19/02/2003 17/09/2003 22/10/2003	Convicted: 21/02/2004 Sentenced: 27.02.2014 Appeal against conviction and sentence in the Queensland Court of Appeal: Heard 04/06/2015	Brisbane Supreme Court	On all charges: Conviction recorded Imprisonment: 5 years All terms of imprisonment to be served concurrently

		Determined 15/12/2015		
Fail to make/file statement of affairs; furnish copy to trustee (bankruptcy)	17.09.2008	10.11.2009	Toowoomba Magistrates Court	Convicted Fined: $300 Court costs: $71.70
Unlawful possession of motor vehicles, aircraft or vessels with intent to deprive	12.12.2004	10.08.2007	Brisbane District Court	No conviction recorded Fined: $2000 I/D Imp. 30 days
Unlawful possession of weapons whilst not being the holder of a license	04.11.2002	17.12.2002	Toowoomba Magistrates Court	No conviction recorded Fined: $560 I/D Imp. 11 days

Speeding by more than 30km/hr but less that 40km/hr	Unknown	02.04.1987	Norseman Court of Petty Sessions	Fined: $80
Speeding by more than 30km/hr but less that 40km/hr	Unknown	04.03.1987	Norseman Court of Petty Sessions	Fined: $140
Drive motor vehicle whilst blood alcohol content was .12%	01.04.1984	02.04.1984	Ipswich Magistrates Court	Fined: $200

Issues for determination

28. The Tribunal may revoke the original decision if the Tribunal is satisfied that:

(a) the Applicant passes the character test as defined by subsections 501(6)(a) and 501(7)(c) of the Act: section 501CA(4)(b)(i); or

(b) there is another reason why the original decision should be revoked: section 501CA(4)(b)(ii).

29. The Applicant does not pass the character test because he has a substantial criminal record as defined by the Act. Therefore, the sole issue for determination by the Tribunal is whether there is another reason why the original decision should be revoked.

30. The Tribunal now turns to assess the primary considerations as relevant.

Primary Considerations

Primary Consideration A: Protection of the Australian community from criminal or other serious conduct

31. The Tribunal must have regard to the protection of the Australian community from criminal or other serious conduct. Under paragraph 8.1(1) of the Direction, it is stated that decision-makers should:

> *When considering protection of the Australian community, 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. Decision-makers should also have particular regard to the principle that entering or 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.*

32. Pursuant to paragraph 8.1(2), that consideration requires an assessment of the nature and seriousness of the Applicant's conduct and the risk that the Applicant presents to the community.

Nature and seriousness of the conduct

33. The Tribunal has had regard to paragraph 8.1.1(1)(a) of the Direction. The crimes for which the Applicant was convicted were serious crimes committed with a clear intent to subvert the applicable legislation There is no doubt that such conduct is serious.

34. The Tribunal notes significant matters relative to the consideration of the protection of the Australian community:

(a) the legislation required that the chemicals purchased would not be used other than for legitimate purpose in the public interest;

(i) The applicant obtained such chemicals using a false declaration and was engaged in trafficking of illicit drugs.

(ii) It is not evident that the applicant has demonstrated any remorse for his criminal conduct.

Risk to the Australian community should the Applicant reoffend or engage in other serious conduct

35. The Tribunal has had regard to paragraph 8.1.2 of the Direction.

Finding on Primary Consideration A

36. Given the factors discussed above, the Tribunal finds that this consideration weighs against revocation of the original decision.

Primary Consideration B: Family violence committed by the non-citizen

37. Paragraph 8.2(1) of the Direction provides that the Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns are proportionate to the seriousness of the family violence engaged in by the non-citizen.

38. Paragraph 4(1) 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*".

39. This consideration is not relevant, as there is no offence committed by the respondent relating to family violence

Finding on Primary Consideration B

40. The Tribunal finds that this consideration is neutral.

Primary Consideration C: Best interests of minor children in Australia affected by the decision

41. Paragraph 8.3(1) of the Direction provides that decision-makers must make a determination about whether revocation is, or is not, in the best interests of a child affected by the decision (where that child is, or would be, under 18 years old at the time of the decision to revoke or not revoke the mandatory cancellation decision is expected to be made).

42. Paragraph 8.3(3) provides that the best interests of each child should be given individual consideration to the extent that their interests may differ.

43. Paragraph 8.3(4) provides a list of factors to be considered in determining the best interests of the child, which includes:

a) the nature and duration of the relationship between the child and Applicant. 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) (sub-paragraph 8.3(4)(a));

b) the extent to which the Applicant 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 (sub- paragraph 8.3(4)(b));

c) the impact of the Applicant's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child (sub- paragraph 8.3(4)(c));

d) the likely effect that any separation from the Applicant would have on the child, taking into account the child's or Applicant's ability to maintain contact in other ways (sub-paragraph 8.3(4)(d));

e) whether there are other persons who already fulfil a parental role in relation to the child (sub-paragraph 8.3(4)(e));

f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child) (sub-paragraph 8.3(4)(f));

g) evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the Applicant, or has otherwise been abused or neglected by the Applicant in any way, whether physically, sexually or mentally (sub-paragraph 8.3(4)(g)); and

h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the Applicant's conduct (sub-paragraph 8.3(4)(h)).

44. The Applicant has. no infant children. He has a minor grandson and granddaughter each of whom reside with their parents. They are three years of age and one year of age respectively. It is claimed that the applicant speaks to the three year old by telephone and by face time and that the child is always excited to tell his grandfather of the events in his life and it is claimed that there is a strong connection between the applicant and the three year old. There is little evidence of any communication between the granddaughter but bearing in mind that she is only one years of age, this is understandable. However, it is obvious that the applicant is not in loco parentis with such children.

45. The applicant also has two minor great-nephews and a minor great-niece. These children also have parents who are fulfilling the parental role. There is no evidence of any strong connection between the applicant and such children. The applicant claims to have "a connection" with a great-nephew (AH) who is eight months of age; and with a great-niece (TH) (aged one year of age); and with another great, great-nephew, FH who is aged one. It became apparent in oral evidence that the connection is remote and the applicant did not submit that it was otherwise.

Finding on Primary Consideration C

46. The Tribunal considers that the best interests of the minor children weighs only slightly in favour of revocation of the decision.

PRIMARY CONSIDERATION D: Expectations of the Australian community

47. Paragraph 8.4(1) of the Direction provides that:

> *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 not to allow such a non-citizen to enter or remain in Australia.*

48. Paragraph 8.4(2) also provides that non-revocation of the cancellation of a non-citizen's visa may be appropriate simply because the nature of the character concerns or offences committed is such that the Australian community would expect that the person should not be or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

(a) acts of family violence; or

(b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;

(c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in the context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial, abuse/material exploitation or neglect;

(d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or

(e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or

(f) worker exploitation.

49. The above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community (sub-paragraph 8.4(3)).

50. 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 (sub-paragraph 8.4(4)).

51. This consideration has been the subject of extensive judicial discussion and is ultimately determinative (see *FYBR v Minister for Home Affairs* [2019] FCAFC 185 at [75] per Charlesworth J). That is, it is not for the decision-maker to assess the expectations of the Australian community for the purpose of applying this consideration. The expectations of the Australian community that decision-makers are required to consider are those set out in Direction 90 at paragraph 8.4. Although these principles are discussed in relation to the former Direction No. 79, those principles are relevantly analogous in principle with respect to Direction 90.

52. It has further been held that the consideration is “in substance … adverse to any applicant”: see Mortimer J in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [76].

Evidence of applicant

53. The Applicant states that he came to Australia in 1977 and has resided in Australia thereafter. He states that the whole of his family reside in Australia comprising of an elderly mother (aged 83 years), a brother MH who is aged in his 60s and was suffering from a life-threatening illness; a daughter JC who is married and her two children HC and CC. The applicant states that he also has a close relationship with his son in law.

54. The applicant states that he was on bail from 2005 to 2014 and states that during his time on bail, he was not involved in criminal conduct but rather, he has been a law-abiding citizen and has been an exemplary prisoner and has contributed to the success of a prison farm where he was located. During his time in prison he undertook educational courses for his development. He maintains a good relationship with his family. The applicant states that he has been taken into detention since 3 August 2022 which he has found to be very confronting.

55. The applicant relies upon the fact that his mother is an Australian citizen and that his grandfather served with the Australian Defence Force in World War II. He states that the impact would be catastrophic if he were removed from Australia.

Evidence of DT

56. DT is the mother of the applicant and is an Australian citizen and almost 83 years of age. She states that she has a very good relationship the applicant and that if he were deported to New Zealand, she would suffer significant emotional hardship. She stated that the applicant, has a particular good relationship with his brother, daughter, grandchildren, son-in-law and other extended family and that he has always been a good son to her. She stated that, if released, the applicant, could live with her. She states that she has numerous health problems including rheumatoid arthritis, osteoporosis, a heart condition, migraines, and vertigo and has recently had cataracts removed from her right eye. She states she needs the applicant's physical support for grocery shopping, taking her to medical appointments

and doing household tasks. She also states that the applicant has been a good father to his daughter, JC and provided her with a private school education.

57. Medical evidence has been provided concerning the health of DT. The Tribunal accepts that DT is in need of continuing medical assistance and support of her family.

Evidence of JAC

58. JAC is 31 years of age and is an Australian citizen. She is mother of CC (three years of age) and a daughter HC (one year of age). She maintains that her father has a good relationship as referred to above with her children. She states that if her father were removed to New Zealand, she would not have the financial capacity to travel to New Zealand. She states that her father has provided her with emotional, financial and practical assistance through the course of her life and is a particularly good father. She states that the applicant will be provided accommodation with her if he is released into the community and that she is concerned that if deported, the applicant's mental health will be considerably challenged.

Evidence of MAH

59. MAH is a 61-year-old brother of the applicant who is a permanent resident in Australia. He states that he has a very good relationship with the applicant and that they had a good upbringing together. He is strongly supportive of his brother remaining in Australia and states that his brother (the applicant) has always enjoyed a positive and good relationship with his family.

60. MAH states that he has a serious illness for which he is having chemical treatment and has memory issues because of involvement in previous serious car accidents. He states the applicant would provide him with emotional, financial and practical assistance and would assist in caring for their mother. MAH states that has been increasingly difficult for him to care for their mother because of his ill health and that his mother's health is declining.

Evidence of Dr Emily Kwok

61. Dr Kwok has prepared a report based upon a 1.5 hour interview on 18 July 2022. Such interview was conducted by video. Dr Kwok obtained the background history the applicant and of his offending. She states that the applicant was reported feeling more stressed in immigration detention and in prison and was currently worried about his mother's deteriorating health.

62. Psychometric assessment revealed that the applicant had a pattern and magnitude of psychological symptoms which was considered to be in the clinical range. The report states inter alia:

> *He reports on the SCL – 90/R that is symptomatically distress levels are moderate to high-moderate, and his level of depression is elevated. His levels of obsessive-compulsive symptoms are found to be in the clinical range, which may be secondary to depressive symptoms rather than a true obsessive-compulsive syndrome. There are isolated symptoms of anxiety and Mr Harper's test protocol; however, these do not appear to represent clinically significant experiences. His level of paranoid ideation is slightly elevated, but not of a sufficient magnitude to be clinically noteworthy. There is also evidence of an above-average degree of social alienation, which may be due to him having spent almost the last 10 years in prison and immigration detention. Mr Harper stated that his scores on the SCL-90/R may be elevated because he was worried about his brother's illness at the time of completing the test.*

63. Dr Kwok considered that the applicant presents with a low risk of re-offending. She states*:*

> *He does not have an extensive criminal history to suggest an underlying pattern of antisocial attitudes or behaviours. He does not present with an attitude that condones behaviours that involves illicit drugs. Upon the condition that he reconnects with his pro social support system in the community, engages in employment through one of his contacts and regains financial independence, he would likely to be a low risk/danger/threat to the Australian community.*

64. Dr Kwok considered that the applicant does not suffer from a mental disorder or illness that requires treatment. The report added*:*

He does, however, present with depressed affect due to his worries about his mother and his brother. His symptoms may worsen if you remain separated from his family, such as if he remains in detention or is forced to leave the country.

65. Dr Kwok concluded*:*

This report is prepared for the purpose of exploring Mr Harper's offending and his risk of recidivism. On the basis of my assessment, it is concluded that:

- *Upon the condition that Mr Harper reconnects with his prosocial support system in the community, engages in employment and regains financial independence, he presents with a low risk of re-offending and is a low risk/danger/threat to the Australian community.*

- *Mr Harper does not suffer from a mental disorder or illness that require treatment. He does, however, present with depressive symptoms that are insufficient to meet full criteria for a depressive disorder. His symptoms will likely worsen if he remains separated from his family.*

66. It should be noted that the applicant's conviction on 10 November 2009 for failing to make/file a statement of affairs and the penalty of $300 was referred to in the text of Dr Kwok's report. However, this factor seems to been overlooked in Dr Kwok's assessment when she considered the likelihood of the applicant to commit criminal offences. In her conclusion on this aspect Dr Kwok stated*:*

On the balance of the protective and risk factors, and a consideration of Mr Harper did not have criminal offences while he was on bail between 2007 and 2014, it is my opinion that he presents with a low risk of re-offending if he is permitted to return to the community.

Observations Concerning the applicant's character

Lack of insight or remorse

67. The offences for which the applicant was convicted were a particularly serious kind and were directly contrary to the interests of the Australian community. The applicant, as referred to above, has demonstrated no remorse for his offending nor has he demonstrated any insight into his offending. The sentencing judge noted that the applicant's motives were "entirely cynical and financial". The Application for Special Leave to appeal to the High Court of Australia filed on 10 November 2021 claimed that the applicant was "*an ordinary man who managed to get caught up in extraordinary circumstances that in the end were completely out of his control due to overzealous policing aiming for performance targets*…".

68. The applicant demonstrated during his oral evidence that he does not accept the guilty verdict of the court. However, as was pointed out to the applicant, the Tribunal is not able to impugn the conviction: see *Minister for immigration and Multicultural Affairs v SRT* (1999) 91 FCR 234 at [25].

69. The transcript of the Queensland Supreme Court Criminal Jurisdiction records that Count 1 alleged that the applicant between 20 February 2001 and 31 October 2003 carried on the business of unlawfully trafficking in the dangerous drug methamphetamine. Particulars supplied with such allegations included the fact that the business of producing and selling methamphetamine was conducted either as the applicant's own business or as a party to the production and selling of methyl amphetamine by others. At the trial the charge of being involved in the production of methyl amphetamine was not upheld. Accordingly, the applicant was imprisoned for the offence of trafficking and possession. The records show that the hearing extended to 2 and half weeks, and the prosecution was put to proof on every point. The trial judge observed that there was nothing to indicate in remorse for the offending.

70. Whilst maintaining his innocence of the charges before this Tribunal, the applicant belatedly acknowledged before the Tribunal that he had committed the offence of trafficking. Such concession suggests that the appeal to the Queensland Court of Appeal and the special leave application to the High Court was baseless. It further demonstrates the unusual conduct by the applicant. In the sentencing remarks, Dalton J also observed:

> *As well, there is nothing before me which indicate any remorse for the offending. The trial ran for some 2 ½ weeks in the Crown was put to proof in every point. For what purpose, I don't know. Uncontroversial chemical experts and police witnesses*

really gave evidence proving things point by point, or photograph by photograph, for hours on end when, in fact, there was little cross examination of them timewise and little point of substance put to them. I think clearly enough, the jury rejected the points attempted to be made the Crown witnesses about the alternative uses to which hypo phosphoric acid should be put. And really having regard to the evidence of Mr Bennett, in particular, submissions about some of those things verged on the ridiculous.

Harm to the Australian Community

71. The applicant appears to pay no regard to the impact of his methylamphetamine manufacturing and distribution to members of the Australian community. As was stated in *RQRP v Minister of Immigration Citizenship Migrant Services and Multicultural Affairs* [2021] FCA 266, the critical feature of the conduct of the type engaged in by the applicant attracts criminal sanctions because the commission of them "*creates a greater risk that much more serious conduct that does cause direct and significant harm could result*": see [48] per McKerracher J. (cited in *JNMK v Minister of Immigration Citizenship Migrant Services and Multicultural Affairs* [2021) FCA 762 at [44] per Colvin J).

72. Further, it should be observed that the Western Australian Court of Appeal described the drug trade in *Ngo v The Queen* [2017] WASCA 3 at [63] as follows:

> *… [t]he illicit drug trade is a scourge. It inflicts very significant damage on the people who consume the drugs. Also, the deleterious effects of illicit drug consumption extend to the families, friends and associates of the consumers and society generally.*

73. The nature of the harm to individuals and community has been described in Australia's National Drug Strategy 2017 – 2026 as a serious problem which causes direct and indirect harms to the Australian community including mental health trauma, violence and other crimes. It also states that in 2017 alone there were 1795 drug-induced deaths in Australia.

Other considerations

74. The applicant has also claimed that he "clearly demonstrated during that period [his period of bail between 2005 to 2014] that I was a law-abiding and contributing member of the Australian community".

75. The applicant failed to disclose in his statement and in his Application for Review that he failed to complete and file a statement of affairs and furnish a copy of such statement to the trustee of his bankrupt estate, contrary to section 54 (1) of the Bankruptcy Act 1966 and that he was convicted of such offence in the Magistrates Court of Queensland on 10 November 2009.

76. Such offence constitutes a criminal offence. However, the submission was made on behalf of the applicant, and the Tribunal accepts, that this type of offending is in a different category to that involving the usual subject matter of crimes and that the conviction was thereby overlooked. Since there was no call up of his bail conditions, the Tribunal accepts that it was not regarded as sufficiently serious to warrant action being taken by the Queensland authorities. Further, the Tribunal notes that the conviction was disclosed to Dr Kwok that apparently regarded by her as being of little significance in her conclusion.

Dishonest conduct

77. The Tribunal also notes that in establishing his methamphetamine manufacturing, the applicant engaged in dishonesty by making false declarations as to the use of chemicals involved in the process. Whilst the applicant denied, before the Tribunal, making a false declaration, the fact is that it was an integral aspect of the findings made against him by the Court. The Dalton J said in the sentencing remarks:

> *It's very difficult to get such a chemical, and to get it you had to sign a false declaration as to its use, and also expressly disavow any intention to use it for the purpose of making drugs, so that any chance, the acquisition of the chemical involved lies to defeat the purpose of the legislation which try to allow legitimate use of a chemical and not illegitimate use.*

Finding on Primary Consideration D

78. In this case, the Tribunal accepts that the Australian community's expectations would weigh against the Applicant.

Other considerations

79. The Tribunal now turns to assess the other considerations (paragraph 9 of the Direction) as relevant.

International non-refoulement obligations

80. No issue of non-refoulment has been raised. Accordingly, this consideration is not relevant in this matter.

Extent of impediments to the applicant if removed from Australia

81. Paragraph 9.2(1) of the Direction provides that 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.

82. The Applicant is 63 years of age. He claims to suffer from asthma and has previously had operations for hernia. He also has had nasal polyps. The applicant asserts that his mental health will be greatly impacted if removed away from his family. However, there is no evidence of any serious illness from which the applicant is suffering. It is apparent from the witness statements that the applicant would be expected to play a major role in the care for the applicant's mother by undertaking household chores, taking her to appointments and other activities. There is no medical evidence to suggest that the applicant is suffering from any significant illness.

83. There are no language barriers between New Zealand and Australia and the facilities available for medical and other treatment if needed would be similar to that in Australia.

84. The Tribunal finds that this consideration weighs against revocation of the decision.

Impact on victims

85. Paragraph 9.3(1) of the Direction provides:

> *Decision-makers must consider the impact of the s 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.*

86. This consideration, whilst there is no evidence of any direct impact of the applicants conduct, there exists a real possibility of indirect impact as been referred to above concerning the effect of illicit drugs in the community.

Links to the Australian community

87. The Tribunal must have regard to the Direction at paragraphs 9.4.1 (strength, nature and durations of ties to Australia) to 9.4.2 (impact on Australian business interests).

Strength, nature and duration of ties to Australia

88. Under paragraph 9.4.1 of the Direction:

(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.

b) 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.

89. The Applicant has resided in Australia for more than 20 years. He states that all of his family reside in Australia. The evidence confirms that his Australian mother who is in excess of 80 years and who is in ill health, lives in the same country town as the applicant had lived; as does the applicant's brother. The applicant has a close relationship with his daughter and her partner/husband and her children and it would be expected that if the applicant remained in Australia he would develop a close relationship with the grandchildren in their formative years. The applicant stated that he is very close to his daughter, JC and have FaceTime contact twice a day as well as exchanging texts.

90. Whilst other nieces and nephews exist in Australia, there is no evidence of any close association with them. In oral evidence became apparent that these are nephews and nieces of the applicant's former wife's sister. However there seems to be no contact with them since 2012.

91. The applicant's brother MAH claims to be close to the applicant and asserts in his statement that if the applicant were released into the Australian community "he would be able to provide me with emotional, financial and practical assistance". In fact, the applicant has not

seen MAH since 2011, although the applicant in his oral evidence described the relationship with MAH as being “pretty good”. MAH never visited the applicant whilst he was in prison. The applicant has never provided financial support to MAH. Accordingly, the basis for the assertions as to the close relationship between the applicant and his brother is questionable.

92. The applicant has established that his mother, daughter and her husband have a very close relationship with the applicant and that the removal from Australia of the applicant would be to their detriment, and to the detriment of the applicant’s grandchildren being the issue of the applicant’s daughter.

93. The applicant submitted that the Tribunal should consider the applicant's "strong historical links to Australia including his maternal grandfather's military service” the applicant stated that in World War II his maternal grandfather who had been a farmer in Queensland became a member of the Australian Defence Force and was stationed in northern Australia. It appears that the applicant last saw him in the year 2000 and that the grandfather passed away in 2002.

94. The Tribunal acknowledges that the applicant may have had an association with the grandfather, and that the grandfather’s war service was noteworthy. However, the extent of such relationship has not been provided in detail. Also, there is no indication that the grandfather’s war service impacted upon the applicant, and for this reason such war service is given little weight.

95. The Tribunal considers the strength, nature and duration of the ties to Australia are such as to weigh strongly in favour of revocation of the original decision.

Impact on Australian business interests

96. The applicant appears to have always been in employment whilst he has been in Australia. Further, the material establishes that he was sufficiently enterprising to establish a transport business which operated nine trucks, two of which were leased from a bank. The trucks were paid off and the applicant stated that the business produced $1 million in 12 months because of his contracts to supply transport to the gas pipelines and infrastructure in Western Queensland. The applicant stated that he is skilled at administration and the

operation of such a business and that he will be able to work in the industry immediately if he is permitted to remain in Australia.

Overall Assessment

Applicant's Offending

97. The applicant has demonstrated that he can lead a life without breaching the law. Having arrived in Australia, he did not commit any offences, subject to minor traffic offences until 2002 that is, for more than 40 years he was able to lead a crime free life.

98. The motor traffic offences of driving whilst blood alcohol content was in excess of the limit was committed in 1984; two speeding offences then followed in 1987. However, these traffic offences do not establish an attitude of disregard of or defiance to the law as was considered in *Bartlett and Minister of Immigration and Border Protection* [2017] AATA 561 at [45].

99. In respect of the 2002 offence of unlawful possession of weapons whilst not being the holder of a licence and the 2004 offence of unlawful possession of a motor vehicle, whilst the applicant was convicted in each case, no conviction was recorded thereby indicating that there may have been some mitigating circumstance concerning such offending.

100. The most significant offence was that of 2014 as already referred to. However, the Tribunal is mindful of the following considerations:

> (a) the applicant was on bail from 2005 until 2014, namely a period of nine years. Subject to the failure to file a statement of affairs, the applicant was not convicted nor charged with any other offences; nor was there any bail infringements;
>
> (b) the material before the Tribunal establishes that throughout his 10 years of sentence the applicant has had no incidents for which he was responsible. Indeed, he appears to have been regarded as a trustworthy prisoner, so much so that having served four years in a high security facility, he spent the following four years at a farm because he was regarded as a low risk. The farm was closed in 2019 due to Covid and he returned to a high security institution but worked fought the following

two years in a camp. During his period of incarceration he was put in charge of cattle which successfully won prizes in rural shows.

(c) there is material to show that the applicant has participated in many worthwhile community events prior to his incarceration and that he had taken an active role in assisting many groups in the community. He took an interest in local clubs, making donations for prizegivings. He made employment possible for a boxer and established or participated in establishing, a boxing club to help children. During the 2011 Toowoomba floods the applicant assisted the community.

(d) the applicant has vowed that he will not offend again, and that he would, if released into the community, live with his mother to care for her and also would renew his interest in becoming involved in the transport industry, initially undertaking bookwork and possibly thereafter resume actual driving vehicles. Whilst the psychologist, Dr Kwok, considers that there is a risk of reoffending if he returned to his family's transport business, taking into consideration the deterrent effect of further prison sentences, the Tribunal does not regard the risk of recidivism as high.

Risk Assessment

101. The Tribunal is mindful of the applicant's age; of his long sentence which he served successfully, and the nine-year period prior to the commencement of his sentence when the applicant committed no offences. Whilst the personality of the applicant is clearly puzzling, he not accepting his guilt, the Tribunal must consider is the primary matter, the risk to the Australian community.

102. The Tribunal notes the observation of Dr Kwok that the risk of recidivism is low. Based upon the above circumstances, the Tribunal accepts such assessment. The Tribunal is reinforced in its consideration by the fact that the deterrent effect of the prospect of further prison sentences and action by the Minister would almost certainly deter the applicant from engaging in criminal conduct in the future in Australia.

Conclusion

103. In weighing the competing considerations and the weight to be given to all relevant considerations, the Tribunal considers that the findings in respect of primary consideration A and D weigh against revocation of the decision. Primary consideration B is neutral and primary consideration C weighs slightly in favour of revocation. Of the secondary considerations, only one weighs in favour of revocation namely the links to the Australian community.

104. It has been said that the Australian community's "expectations" are defined in the Direction "*only in one particular way: namely, that the Australian community "expects" non-revocation where a person has been convicted of serious crimes of a certain nature. That is, this is not a consideration dealing with any objective or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she, and the executive government of which he or she is a member, wish to articulate community expectations, whether or not there is any objective basis for that belief. That is the structure of this part of the Direction*.": see *YNQY v Minister of Immigration and Border Protection* [2017] FCA 1466 at [76]

105. However, the Tribunal retains a discretion despite the rigid expectation referred to above. In particular, the Tribunal must take into consideration its obligation to consider the future. In *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1 [192], Buchanan J referred to the fact that:

> … *The discretion to be exercised under section 501 is fundamentally forward, rather than backward, looking. It concerns the future, not the past.*

106. Further, the observation of Pagone J in *Folau v Minister for Immigration and Border Protection* [2016] FCA 1149 at [11] is pertinent when his Honour said:

> *It is well-established that the Minister cannot regard Visa cancellation as a form of punishment for past events*

107. The Tribunal is satisfied that there is a reason why the original decision to cancel the Applicant's visa should be revoked, namely that the risk of recidivism is negligible; the applicant has demonstrated his ability to be law-abiding; if removed, the adverse impact on the applicant's family would be substantial and detrimental to his grandchildren. Further, the

applicant has already paid a heavy penalty for his offending. The applicant claims to identify himself as an Australian and states that he was unaware that he did not have Australian citizenship status until he made application for a passport to visit the Solomon Islands for a work-related matter in 2007, namely subsequent to the offences with which he was charged and which did not come to court until 2014.

108. If the decision to cancel the visa is not revoked, such cancellation could be tantamount to punishment.

Decision

109. The Tribunal finds that the correct and preferable decision is that the decision under review be set aside and in substitution a decision be made that the original decision to cancel the Applicant's visa be revoked.

I certify that the preceding 109 (one hundred and nine) paragraphs are a true copy of the reasons for the decision herein of The Hon. Dennis Cowdroy AO KC, Deputy President

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

Associate

Dated: 26 September 2022

Date of hearing: 12 September 2022

Counsel for the Applicant: Dr Jason Donnelly, Barrister

Solicitor for the Applicant: Ms Maria Zarifi, Zarifi Lawyers

Counsel for the Respondent: Mr Luca Moretti, Barrister

Solicitor for the Respondent: Mr Hervee Dejean, Australian Government Solicitors