Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number	2022/5391
Re:	Viliami Tauataina Faingataa
	APPLICANT
And	**Minister for Immigration, Citizenship, and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member George**
Date of Decision:	**16 September 2022**
Date of Written Reasons:	**26 October 2022**
Place:	**Adelaide**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the reviewable decision made by the delegate of the Respondent dated 24 June 2022 that the mandatory cancellation of the Applicant's Class WC Subclass 030 Bridging C visa not be revoked under subsection 501CA(4) of the *Migration Act 1958* (Cth) is affirmed.

[Sgnd]

Senior Member George

CATCHWORDS

MIGRATION – Class WC Subclass 030 Bridging C visa – where Applicant does not pass the character test – consideration of Ministerial Direction No. 90 – offending very serious – decision under review affirmed

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth)

Migration Act 1958 (Cth)

CASES

Afu v Minister for Home Affairs [2018] FCA 1311

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

Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 162

FYBR v Minister for Home Affairs [2019] FCAFC 185

Uelese v Minister for Immigration and Border Protection [2016] FCA 348

YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

SECONDARY MATERIAL

Direction No. 90 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA

REASONS FOR DECISION

Senior Member George

25 October 2022

INTRODUCTION

1. Mr Faingataa ("the Applicant"), a citizen of the Kingdom of Tonga, was born in June 1962 and is aged 60 years.[1] The Applicant first arrived in Australia in July 1988,[2] where he has substantially resided since.[3]

2. On 1 June 2010, the Applicant was granted a Class WC Subclass 030 Bridging C visa.[4] On 19 October 2021, following criminal offending and a resultant term of imprisonment, the Applicant's visa was cancelled under s 501(3A) of the *Migration Act 1958* (Cth) ("the Act") as he failed the "character test".[5] The Applicant made representations to have his visa cancellation revoked under s 501CA of the Act on 29 October 2021.[6]

3. On 24 June 2022, a delegate was not satisfied that the Applicant passed the "character test" and that there was not another reason why the cancellation decision should not be revoked.[7] This is the reviewable decision.

4. The Applicant lodged an application for review of the reviewable decision before the Tribunal on 30 June 2022.[8] The Tribunal has jurisdiction to review that decision pursuant to s 500(1)(ba) of the Act.

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[1] Exhibit R2, G-Documents, G10, Attachment E, page 81; Exhibit A1, page 25, paragraphs [77]-[79]; page 26, paragraph [80].

[2] Exhibit R2, G-Documents, G10, Attachment E, page 83.

[3] Exhibit R2, G-Documents, G9, Attachment J, pages 75-80.

[4] Exhibit R2, G-Documents, G14, Attachment K, page 102.

[5] Exhibit R2, G-Documents, G14, Attachment K, pages 102-103.

[6] Exhibit R2, G-Documents, G10, Attachment E, pages 81-96.

[7] Exhibit R2, G-Documents, G3, Attachment 3, pages 13-21.

[8] Exhibit R2, G-Documents, G1, pages 1-2.

5. The hearing proceeded on 14 and 15 September 2022 by audio-visual means.

6. On 14 September 2022, the following witnesses gave evidence:

   (a) the Applicant;

   (b) Pastor Jim Reidy, the Applicant's former prison chaplain;

   (c) Ms Lisa Alam, a psychologist;

   (d) Ms Hulita Vakapuna, the Applicant's daughter;

   (e) Mr Luke Legge, the Applicant's friend;

   (f) Ms Luisa Vakapuna Toetuu, the Applicant's youngest sister;

   (g) Mr Tevita Toetuu, the Applicant's brother-in-law; and

7. On 15 September 2022, the following witnesses gave evidence:

   (a) Ms Dawn A Dale Fancesca Fungalei, the Applicant's estranged partner;

   (b) Ms Destiny Vakapuna Faingataa, the Applicant's daughter;

   (c) Mr Louis Faingataa, the Applicant's adult son.

8. The Applicant was represented by Dr Donnelly of Counsel instructed by Westside Legal. The Respondent was represented by Mr Bavin of Hunt & Hunt.

9. The Tribunal received the written evidence that is listed in the Exhibit Register marked "Annexure A".

LEGISLATIVE FRAMEWORK

10. Under s 501CA(4)(b) of the Act, there are two alternate conditions precedent to the exercise of the discretion to revoke the mandatory cancellation of the Applicant's visa: either the Applicant must be found to pass the character test; or the Tribunal must be satisfied that there is another reason, pursuant to Direction No. 90 ("the Direction"),[9] to revoke the cancellation.

Does the Applicant Pass the Character Test?

11. The character test is defined in s 501(6) of the Act. Under s 501(6)(a), a person will not pass the character test if they have "*a substantial criminal record*". This phrase, in turn, is relevantly defined in s 501(7)(c), which provides that a person will have a substantial criminal record if they have "*been sentenced to a term of imprisonment of 12 months or more*".

12. On 12 December 2011, the Applicant was found guilty by a jury in the District Court of New South Wales at the Sydney Downing Centre after standing trial before Frearson SC DCJ. The indictment contained a single count against the Applicant, and his co-accused, being:

> *Between about 31 December 2008 and 2 December 2010 at Sydney in the State of New South Wales and elsewhere conspired with each other, Jorge Elicier Henao Palacio and divers others to import a substance, the substance being a border controlled drug, namely cocaine, and the quantity being a commercial quantity.*[10]

13. The Applicant was sentenced to a term of imprisonment of 18 years and one month, with a non-parole period of 10 years and 11 months.[11]

14. The operational effect of ss 501(6)(a) and 501(7)(c) of the Act is such that the Tribunal finds that the Applicant has a "*substantial criminal record*" and, therefore, he does not pass the character test.

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[9] *Direction No. 90 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA.*

[10] Exhibit R2, G-Documents, G5, page 60.

[11] Exhibit R2, G-Documents, G7, page 72.

Is there another reason why the refusal of the Applicant's visa application should be revoked?

15. In considering whether to exercise its discretion, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No. 90 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* has application.[12]

16. For the purposes of deciding whether to refuse or cancel a non-citizen's visa, or whether or not to revoke the mandatory cancellation of a non-citizen's visa, paragraph 5.2 of the Direction contains several principles that must inform a decision-maker's application of the considerations identified in Part 2 of the Direction where relevant to the decision.

17. The principles that are found in paragraph 5.2 of the Direction are stated as follows:

    (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.

    (2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

    (3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

[12] On 15 April 2021, the former applicable direction, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 90.

(4) *Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age.*

(5) *Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.*

18. Paragraph 6 of the Direction provides that:

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

19. Paragraph 8 of the Direction sets out four Primary Considerations that the Tribunal must take into account, and they are:

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted family violence;

(3) the best interests of minor children in Australia; and

(4) expectations of the Australian community.

20. Paragraph 9 of the Direction sets out five Other Considerations which must be taken into account. These considerations are:

(a) international non-refoulement obligations;

(b) extent of impediments if removed;

(c) impact on victims; and

(d) links to the Australian community, including:

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

(ii) impact on Australian business interests.

21. Paragraph 7(2) of the Direction provides that the "*primary considerations should generally be given more weight than the other considerations*". Paragraph 7(3) provides that "*[o]ne or more primary considerations may outweigh other primary considerations*."

BACKGROUND AND OFFENDING

22. The Applicant grew up in a village in Tonga in a Christian family where both of his parents were missionaries. The Applicant was one of nine children and came to Australia in 1988.[13]

23. In December 1989, at the Local Court of New South Wales at Newtown the offence of behaving in an offensive manner was proved and dismissed.[14]

24. Prior to his incarceration, the Applicant had a relatively strong employment history and prospects of re-employment if released into the Australian community.[15]

25. Between 1990 and 2000, the Applicant worked as a manager at various licensed premises.[16] In August 1990, a charge of assault was proved against the Applicant at the Local Court of New South Wales at Newtown for a fight with an intoxicated patron whilst at work.[17] Similarly, in December 1996, the Applicant was fined for an assault at the Local of Court of New South Wales at Parramatta for another fight with an intoxicated patron whilst

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[13] Exhibit R2, G-Documents, G10, Attachment E, page 96.
[14] Exhibit R2, G-Documents, G8, Attachment A, page 74.
[15] Exhibit R2, G-Documents, G27, Page 172; Exhibit R2, G-Documents, G28, Page 173.
[16] Exhibit R2, G-Documents, G10, page 92.
[17] Transcript, page 25, line 33; Exhibit R2, G-Documents, G8, Attachment A, page 74.

at work.[18] Whilst working as a hotel manager, the Applicant came into contact with Outlaw Motorcycle Gangs.[19]

26. Between 2000 and 2004, the Applicant was employed as an assistant to a finance broker.[20] He completed a Diploma of Business Administration and a Graduate Certificate of Marketing during this time.[21] The Applicant's duties included helping clients' complete forms for loans.[22] In November 2004, at the Local Court of New South Wales at Fairfield, the Applicant was fined for the offences of "*Disobey no right turn sign-motor vehicle*", "*Never licensed person drive vehicle on road-1st offence*", *"Possess thing like Australia driver licence w/i to deceive*", and "*Driver/rider state false name or address*".[23] The Applicant's explanation for this offending is that he was using his cousin's licence as he "*had to drop off all the applications to a lawyer in Fairfield*" in the course of his employment.[24] The Applicant denied that this offending was related to his lack of a visa at that point in time.[25]

27. The Applicant has travelled to and from Australia on numerous occasions following his assault and driving offences. The Applicant completed incoming passenger cards on 3 March 2008, 2 June 2008, 21 August 2008, 5 March 2009, 30 April 2009, 15 June 2009, 20 August 2009, 1 October 2009, 12 November 2009, and 18 January 2010. On each occasion the Applicant answered "No", when asked "*Do you have any criminal conviction/s?*".[26] The Applicant's explanation for this was apologetic,[27] as he had previously been of the view that "*a criminal record means going to gaol, not a fine*".[28]

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[18] Transcript, page 26, lines 36-38; Exhibit R2, G-Documents, G8, Attachment A, page 74.
[19] Exhibit A7, Annex A, page 65.
[20] Exhibit R2, G-Documents, G10, page 92.
[21] Exhibit R2, G-Documents, G15, Attachment H, pages 116-119.
[22] Transcript, page 24, lines 21-31.
[23] Exhibit R2, G-Documents, G8, Attachment A, page 74.
[24] Transcript, page 27, lines 6-9.
[25] Transcript, page 28, lines 6-11.
[26] Exhibit R2, G-Documents, G15, Attachment I, pages 120-131.
[27] Exhibit R2, G-Documents, G12, Attachment F, page 98.
[28] Transcript, page 28, lines 29-30.

28. Coinciding with the Applicant's overseas travels between about 31 December 2008 and 2 December 2010, and his "*residing in Tonga at the time the offence was committed*",[29] the Applicant conspired to import a commercial quantity of a border controlled drug, namely cocaine.[30] The Applicant was associated with Outlaw Motorcycle Gang members at this time.[31]

29. Following his trial, and during sentencing, His Honour found:

> ***The quantities involved here, once you include the 500 kilograms, were enormous.*** *I am mindful of the role of each of the offenders, I am mindful of the degree of organisation, the number of persons who were involved in the agreement, the number of countries that were involved and mindful of the actual roles played by each of the offenders in giving effect to the conspiracy.*[32]
>
> *I do make certain conclusions on the totality of the evidence and I conclude beyond reasonable doubt, a number of things. One is that pursuant to the agreement, an agreement which at all times involved Colombians and Tongans, including the offenders,* ***four to six kilograms was imported into Australia by March 2010****. ... I am prepared to sentence on the basis that I am satisfied beyond reasonable doubt it was at least four.* ***That cocaine I am satisfied beyond reasonable doubt was in fact sold by Mr Faingataa*** *in conjunction with Mr Telefoni and not accounted for to the Colombians.*
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> *Two, that pursuant to the agreement arrangements were made to extract the leftover from Tonga and those arrangements involved the Colombians and the Tongans and all the offenders. The only reasonable inference from the evidence is that whatever the quantity left in Tonga it involved tens of kilograms of cocain**e**. …* ***my conclusion is that the amount left in Tonga was in the order of at least forty kilograms.***
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> *Three, pursuant to the agreement that involved the Colombians and the Tongans and the three offenders,* ***arrangements were made to import 500 kilograms of cocaine***

[29] Exhibit A5, page 1.
[30] Exhibit R2, G-Documents, G5, Attachment C, page 60.
[31] Exhibit A5, pages 2-3.
[32] Exhibit R2, G-Documents, G5, Attachment C, page 65.

> ***from South America into Australia via Tonga. I conclude that all the offenders were parties to a genuine agreement in relation to the 500 kilograms***.[33]
>
> *[Emphasis added]*

30. His Honour also found the manner of criminal execution lack sophistication and efficiency, but that:

> *This is a case where inefficiency does not actually substantially undermine the gravity of this offence because the gravity primarily depends upon the nature of the agreement rather than the manner of execution.*[34]

31. The Applicant's sentence of 18 years and one month of imprisonment commenced on 2 December 2010.[35] The Applicant was granted parole on 1 November 2021 and that parole period ends on 1 January 2029.[36] Several conditions attach to the Applicant's parole, including not associating with "*anyone who uses, possesses, manufactures, traffics or sells a dangerous drug or precursor*", assessment for "*psychological counselling*", and "*financial counselling as directed by your parole officer*".[37] Upon the granting of parole, the Applicant was released into the custody of the Department of Immigration and Border Protection.[38]

32. Whilst imprisoned, the Applicant completed several courses and was consistently a positive influence on other inmates.[39] A New South Wales Corrective Services Case Note Report dated 31 August 2011 states:

> *Inmate has been a good asset to the other islander inmates. He appears to have a large amount of control over their behaviour. Inmate is deeply religious. Is always polite to staff and has presented with nil issues*.[40]

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[33] Exhibit R2, G-Documents, G5, Attachment C, page 63.
[34] Exhibit R2, G-Documents, G5, Attachment C, page 63.
[35] Exhibit R2, G-Documents, G6, Attachment D, page 69.
[36] Exhibit A5, page 10.
[37] Exhibit A5, page 11.
[38] Exhibit A5, page 9.
[39] Exhibit A7, pages 1-2.
[40] Exhibit A7, Annex A, page 10.

33. The Applicant was repeatedly reported upon as being a positive influence during his incarceration, including the following report made on 24 October 2013:

> *Inmate is still employed as a leading hand in the print unit. Inmate is an exceptional worker who can work with minimal supervision. Inmate is diligent and takes pride in the quality of all jobs in the unit. Inmate performs tasks such as storeman, Guillotine operator, workshop co ordinator. FAINGATAA is also a positive influence on other inmates and has helped difuse a few situations which could have got out of control.*[41]

34. Consistent with earlier case notes, on 26 October 2021 it was reported that:

> *Inmate Faingataa shows great leadership skills in his wing when ever officers attend, Faintgataa will always ask what we want and get the inmate needed or job done. Faingataa is always very respectful to all staff when he addresses them. I have noticed every interaction Faingataa has with other inmates is always polite met with a hand shake and smile ...*[42]

35. Pastor Jim Reidy mentored the Applicant for four years.[43] Pastor Reidy observed that the Applicant was able to mentor other inmates in a "*very sensible way*".[44] Mr Luke Legge, a friend of the Applicant from prison, gave evidence that corroborated this observation,[45] where:

> ***All he showed there to everyone was the right way by example, by experience, and by words***. *There was never ever in the whole time that I was there, the tiniest amount of violence. Me and the boys in the wing we used to have a little joke,* ***we used to call Uncle Vili a correctional officer in green***. *And for a lot of inmates they don't want to be referred to that because there's the whole stigma of that side and this side. But the reason why I say that is because he day-to-day did all he could to make that wing or make that gaol that he was only in control of that wing, he was the sweeper as peaceful as harmless as possible. You know what I mean. And he never did that by*

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[41] Exhibit A7, Annex A, page 30.
[42] Exhibit A7, Annex A, page 80.
[43] Transcript, page 36, lines 38-39.
[44] Transcript, page 37, line 44.
[45] Exhibit A4.

violence, he never did that by anger. It was always by - what I've explained, sitting down with someone, talking to them, listening to them - you know.[46]

[Emphasis added]

36. In immigration detention, the Applicant's good conduct has continued, and he has been described as a "*great role model*".[47]

37. The Applicant currently has numerous relatives overseas.[48] These include two brothers and two sisters in Tonga,[49] and their families.[50] The Applicant financially supported his siblings in Tonga until he was incarcerated.[51] The Applicant also has a daughter in New Zealand.[52]

38. The Applicant has two adult sons who reside in Tonga, although one son is currently in Australia on a work visa.[53]

39. The, sometimes disordered, evidence before the Tribunal indicates that the Applicant has two adult daughters, two adult sons, and an adult stepson in Australia.[54]

40. The Applicant has one minor child in Australia, Master Sione Fungalei,[55] who resides with his mother Ms Dawn A Dale Fancesca Fungalei.[56] The Applicant has only spoken to Master Fungalei two or three times in the last 10 years.[57] The Applicant has five grandchildren through his daughter Ms Hulita Vakapuna.[58]

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[46] Transcript, page 64, lines 3-14.

[47] Exhibit R2, G-Documents, G29, page 174; Exhibit A3.

[48] Exhibit R2, G-Documents, G10, Attachment E, page 89.

[49] Exhibit A8, page 1, paragraph [1].

[50] Transcript, page 30, line 4.

[51] Exhibit A8, page 2, paragraph [8].

[52] Transcript, page 30, line 14.

[53] Exhibit R2, G-Documents, G10, Attachment E, page 89.

[54] Ms Hulita Vakapuna, Ms Destiny Vakapuna-Faingataa, Mr Louis William Faingataa, Mr Michael Fungalei, Mr Hayden Lowe. Exhibit R2, G-Documents, G10, Attachment E, pages 84, 89, 90; Exhibit A1, page 32, paragraph [99]; Transcript, page 19, lines 7-10; Transcript, page 17, lines 32-33; Transcript, page 28, line 3; Transcript, page 88, lines 35-47.

[55] Transcript, page 88, line 47.

[56] Exhibit R2, G-Documents, G10, Attachment E, page 84; Transcript, page 88, line 42.

[57] Exhibit R2, G-Documents, G10, Attachment E, page 86; Transcript, page 89, lines 40-43.

[58] Exhibit A6, page 1, paragraph [8].

41. Ms Hulita Vakapuna gave evidence of her close relationship with the Applicant. In her statement, she wrote:

> *I have a very loving and close relationship with my father. He is my rock. During my father's time in prison, I visited him physically. However, when my father was moved outside Sydney, it was exceedingly difficult to see him physically. It is to be recalled that I am the mother of five children in Australia. I have the sole custody of those children. I am single.*
>
> *I have stayed connected with my father otherwise by telephone and video communication on FaceTime. I love my father very much and do not know what I would do without him. My five children have also developed a special warm relationship with their grandfather.*[59]

42. Ms Hulita Vakapuna's five children are all minors.[60] She does not receive assistance from their father.[61] The Applicant has described himself as his daughter's "*primary support person"*.[62] Ms Hulita Vakapuna's evidence is that, given her financial difficulties, she would be unable to travel to Tonga to visit the Applicant were he removed there.[63]

43. Ms Hulita Vakapuna's five children visited the Applicant whilst he was incarcerated.[64] She has expressed concerns about maintaining contact with the Applicant were he removed to Tonga. She wrote that "*without a job or social welfare in Tonga, it is questionable how my father would even get access to the Internet*".[65]

44. A 2011 policy paper before the Tribunal states that social welfare schemes are not available in Tonga, and community support networks arising from family ties and communal living, provide the critical role of a safety net.[66] Contained in that paper is the following research:

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[59] Exhibit A6, page 1, paragraphs [6]-[7].
[60] Exhibit A6, page 1, paragraph [8].
[61] Transcript, page 54, line 35.
[62] Exhibit R2, G-Documents, G10, Attachment E, page 89.
[63] Exhibit A6, page 2, paragraph [12].
[64] Transcript, page 31, lines 34-47; page 32, lines 1-2.
[65] Exhibit A6, page 3, paragraph [14].
[66] Exhibit A5, page 82.

> *The highest ranking type of support network came from 'religious organizations' followed by 'family/ relatives', 'friends' and 'other deportees'.*
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> *At present in Tonga there are two organizations dedicated to working with deportees. In Nukualofa (capital city of Tonga) the Foki ki 'Api – Deportation Reconnection program through the Tonga Lifeline Crisis Ministry of the Free Wesleyan Church provides support (Lilo, 2009). In Vava'u (archipelago in northern Tonga) the Ironman Ministry Incorporated, a rehabilitation center that provides accommodation and cultural identity programs is the main support organization (Ironman Ministry, 2005).*[67]

45. Because of his criminal record, the Applicant believes he would be shunned were he to return to his village in Tonga.[68]

46. Ms Destiny Vakapuna Faingataa, one of the Applicant's adult daughters, gave the following evidence of her father:

> *I fear that my father will not survive in Tongan, even though he was born and raised there, Australia is where he has spent most of his Adulthood and going back after many years will not only affect him socially but mentally. He would feel out of touch and helpless towards his loved ones here.*[69]

47. A similar sentiment was expressed by Mr Louis Faingataa,[70] one of the Applicant's adult sons, who is trying to rebuild his relationship with his father after years of absence.[71]

48. Ms Luisa Vakapuna Toetuu, the Applicant's youngest sister, gave evidence that "*My brother will not be able to survive as a criminal deportee from Australia. The community will look down on him and he will feel humiliated in Tonga*".[72] Her husband, Mr Tevita Toetuu, similarly wrote *"My brother will not be able to survive as a criminal deportee from Australia. The community in Tonga will look down upon him and he will feel humiliated*".[73]

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[67] Exhibit A5, page 81. The Applicant's submissions are also noted at Exhibit A1, page pages 26-31.
[68] Exhibit R2, G-Documents, G10, Attachment E, page 94.
[69] Exhibit A13, page 2, paragraph [13].
[70] Exhibit A14, page 2, paragraph [13].
[71] Transcript, page 96, lines 41-45.
[72] Exhibit A8, page 3, paragraph [24].
[73] Exhibit A9, page 2, paragraph [17].

49. Mr and Ms Toetuu have financially supported the Applicant whilst incarcerated.[74] The Tribunal notes that Mr and Ms Toetuu have two minor children,[75] however little of substance is known of their individual relationships with the Applicant. Were the Applicant to return to Tonga, he would be able to speak with the Toetuus by telephone.[76]

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

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

51. In determining the weight applicable to Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to give consideration to:

> *a) The nature and seriousness of the non-citizen's conduct to date; and*
>
> *b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.*

The Nature and Seriousness of the Applicant's Conduct to Date

52. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction specifies that decision-makers must have regard to a number of factors, which the Tribunal will now turn to addressing.

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[74] Transcript, page 77, lines 44-47.

[75] The Tribunal notes the Respondent's submission that the evidence of these minor children should be excluded by operation of s.500(6H) of the Act; Transcript, page 122, lines 8-10.

[76] Transcript, page 78, lines 2-3.

53. **Sub-paragraph (a)** of paragraph 8.1.1(1) of the Direction provides that, without limiting the range of conduct that may be considered very serious, violent and/or sexual crimes; crimes of a violent nature against women or children (regardless of the sentence imposed); or acts of family violence (regardless of whether there is a conviction for an offence or a sentence imposed) are viewed very seriously by the Australian Government and the Australian community.

54. The Applicant conspired to import a commercial quantity of a border-controlled drug, namely cocaine, into Australia. The quantity exceeded 500 kilograms, which is enormous. Accordingly, the Applicant's conduct is viewed very seriously by the Tribunal.

55. **Sub-paragraph (b)** of paragraph 8.1.1(1) of the Direction provides that without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

    (i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

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

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

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

56. The evidence before the Tribunal does not indicate that the Applicant's offending was of a type contemplated by this sub-paragraph. Accordingly, the Tribunal does not regard this consideration to be relevant.

57. **Sub-paragraph (c)** of paragraph 8.1.1(1) of the Direction directs a decision-maker (subject to sub-paragraphs (a)(ii), (a)(iii) or (b)(i) of paragraph 8.1.1(1) of the Direction) to the sentence(s) imposed by the courts for a crime or crimes of a non-citizen/applicant. The imposition of a custodial term is regarded as the last resort in any reasonably and correctly applied sentencing process. Custodial terms are viewed as a reflection of the objective seriousness of an Applicant's offending.[77]

58. The Applicant was sentenced to a term of imprisonment of 18 years and one month, with a non-parole period of 10 years and 11 months.[78] This is a significant custodial sentence, which reflects the objective seriousness of his offending.

59. **Sub-paragraph (d)** of paragraph 8.1.1(1) of the Direction points a decision-maker to the frequency of a non-citizen's offending and whether there is any trend of increasing seriousness.

60. The Applicant first offended in 1989, when he behaved in an offensive manner. In 1990 and 1996, the Applicant had charges of assault proven against him. In 2004, the Applicant committed a series of driving offences. In 2012, the Applicant was convicted and imprisoned for a conspiracy to import a commercial quantity of border-controlled drugs.[79]

61. The Applicant has offended periodically following his arrival in Australia in 1988. The Applicant's offending has increased exponentially in seriousness from his first offence in 1989 through to his most recent offending in 2012.

62. **Sub-paragraph (e)** of paragraph 8.1.1(1) of the Direction concerns itself with an examination of the cumulative effect of an Applicant's repeated offending.

63. The Respondent has submitted that the Applicant's antecedents, prior to his conspiracy to import a commercial quantity of cocaine, must be given some weight and not dismissed as

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[77] *Pavey and Minister for Home Affairs* [2019] AATA 4198, [44].

[78] Exhibit R2, G-Documents, G7, Attachment B, page 72.

[79] Exhibit R2, G-Documents, G8, Attachment A, page 74.

minor offences.[80] Although the Tribunal does not dismiss these antecedents as minor offences, there is an insufficient link between the time and place of the Applicant's repeated offending for this offending to have an observable cumulative effect. Accordingly, the Tribunal does not regard this consideration to be relevant.

64. **Sub-paragraph (f)** of paragraph 8.1.1(1) of the Direction points to an inquiry as to whether a non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending.

65. Mistakenly or otherwise, the Applicant provided false and misleading information to the Department on his Incoming Passenger Cards on 3 March 2008, 2 June 2008, 21 August 2008, 5 March 2009, 30 April 2009, 15 June 2009, 20 August 2009, 1 October 2009, 12 November 2009, and 18 January 2010.

66. **Sub-paragraph (g)** of paragraph 8.1.1(1) of the Direction looks for evidence about whether the non-citizen has re-offended since being formally warned about the consequences of further offending in terms of the non-citizen's migration status. The Tribunal notes that the absence of a warning should not be considered to be in the non-citizen's favour.

67. There is no evidence before the Tribunal that the Applicant has re-offended since being formally warned about the consequences of further offending in terms of the non-citizen's migration status. Accordingly, the Tribunal does not consider this consideration to be relevant.

68. The Tribunal does not consider factors (b), (e) and (g) of paragraph 8.1.1(1) of the Direction apply to the Applicant's offending or circumstances. The remainder of the relevant sub-paragraphs of paragraph 8.1.1(1) of the Direction, in their totality, weigh heavily against revocation of the cancellation of the Applicant's visa.

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[80] Transcript, page 118, lines 13-15.

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

69. Paragraph 8.1.2(1) provides that, 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.

70. 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.

71. Paragraph 8.1.2(2) provides that in assessing the risk that may be posed by the non-citizen 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).

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

<u>Nature of harm should the Applicant engage in further criminal or other serious conduct</u>

72. The assessment of the nature of the harm to individuals or the Australian community, were the Applicant to engage in further criminal or other serious conduct, is properly informed by the nature of his offending to date, including any escalation in his offending. This assessment is also informed by the provision in the Direction which stipulates that the

Australian community's tolerance for harm becomes lower as the seriousness of the potential harm increases.

Likelihood of engaging in further criminal or other serious conduct

73. The Applicant has submitted that collectively, and upon all the evidence before the Tribunal, that he "*is no more than a low risk of reoffending, and at best a remote prospect of reoffending*".[81] The Applicant says that "*I do not pose a low risk of reoffending"*,[82] which the Tribunal interprets to mean that the Applicant is committed to not reoffending at all.

74. In his personal circumstances form, the Applicant gave the following information as to what he believed to be his risk of offending in the future:

> *I do not believe there is any risk of re-offending for the following reasons:- (1) as per judge's sentencing comments there was limited planning as evidenced by how quickly I was arrested*
>
> *2) I have been seeing offenders coming in & out of prison and the one thing I have constantly witnessed is the number of offenders who have an addiction – this also gave me some insight in why the community are anti-drugs*
>
> *3) The devastation and horror my family have suffered because of my thoughtless, selfish behaviour.*[83]

75. To the extent that the Applicant has "changed", his evidence is consistent with that of his family members.[84] It is also consistent with that of Pastor Reidy,[85] and Mr Legge.[86] Ms Allam observed that the Applicant "*seems authentic in his report of becoming a changed man due to his devotion to his religion*".[87]

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[81] Transcript, page 102, lines 35-36. Also, page 105, lines 11-12, 34; page 109, lines 31-32.

[82] Exhibit A7, page 6, paragraph [27].

[83] Exhibit R2, G-Documents, G10, Attachment E, page 91.

[84] Transcript, page 118, lines 17-19; Transcript, page 53, lines 35-37; Transcript, page 76, line 16; Exhibit A6, page 3, paragraphs [15]-[17]; Exhibit R2, G-Documents, G13, Attachment G, page 101.

[85] Transcript, page 36, lines 41-42; page 37, lines 16-26.

[86] Transcript, page 61, line 4.

[87] Exhibit A11, page 7.

76. The Applicant's "change" due to his religion was viewed differently by psychologists Ms Dragicevic and Ms Terry. To assist risk management of the Applicant and his reintegration into the community, they made the following recommendation:

> *Given Mr Faingataa's present fixation and perception of himself as an agent of change, he would benefit from ongoing access to Chaplaincy services to assist him to critically evaluate and understand religious material.*[88]

77. Nonetheless, Pastor Walter Pospelyj believed the Applicant's "*teachings, opinions and ideas are consistent with reformed evangelical protestant theology and contained nothing that constituted 'radicalisation'.*"[89] The Applicant also has the enduring "*support, encouragement and mentoring*" of Pastor Reidy,[90] with a view of the Applicant obtaining a theological degree,[91] noting however that Pastor Reidy has unfortunately been "*very sick*".[92]

78. Ms Allam concludes that the Applicant "*has a low risk of reoffending and is a low risk of harm to the Australian community*".[93] This assessment is based on testing including the administration of the Depression Anxiety Stress Scale ('DASS 21'), Personality assessment Inventory ('PAI'), and the Violence Risk Appraisal Guide – Revised ('VRAG-R'). Ms Allam's assessment of a risk of reoffending is in reference to a low risk of reoffending by conspiring to import drugs.[94]

79. In the Applicant's pre-release report dated 19 July 2021, Corrective Services New South Wales has assessed the Applicant as at a Medium-Low risk of reoffending, according to the Level of Service Inventory – Revised ('LSI-R').[95] This assessment seems to be based on testing completed in 2012.[96] In that same report, the Applicant is also referred to possessing a "*low risk rating*".[97]

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[88] Exhibit R2, G-Documents, G19, page 154.
[89] Exhibit R2, G-Documents, G21, page 159.
[90] Exhibit R2, G-Documents, G23, page 168.
[91] Transcript, page 37, line 10.
[92] Transcript, page 38, line 16.
[93] Exhibit A11, page 6.
[94] Transcript, page 47, lines 35-40.
[95] Exhibit A5, page 6.
[96] Exhibit A7, Annex A, page 19; Exhibit R2, G-Documents, G19, page 150, paragraph [55]-[56].
[97] Exhibit A5, page 7.

80. Considering the evidence before it, the Tribunal accepts the evidence that the Applicant has a low risk of reoffending by conspiring to import drugs. However, 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. Given the gravity of the Applicant's offending, the Tribunal regards the Applicant's risk of engaging in further criminal or other serious conduct as unacceptable. This consideration weighs heavily against revocation of the cancellation of the Applicant's visa.

Conclusion: Primary Consideration 1

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

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

82. Paragraph 8.2(1) of the Direction informs the Tribunal of the Government's serious concern about conferring on non-citizens who have engaged in family violence the privilege of remaining in Australia. That concern is proportionate to the seriousness of the family violence engaged in by the non-citizen as referred to in paragraph 8.2(3).

83. Family violence does not arise on the evidence before the Tribunal, and therefore this consideration is not relevant.

Conclusion: Primary Consideration 2

84. Primary Consideration 2 is not relevant.

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

85. Paragraph 8.3(1) of the Direction compels a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA, is in the best interests of a child affected by the decision. Paragraphs 8.3(2) and 8.3(3), respectively, contain further stipulations. The former provides that, for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when

a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

86. The Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia. The Tribunal will now turn to addressing these considerations.

87. **Sub-paragraph (a)** of paragraph 8.3(4) of the Direction requires the Tribunal to consider 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).

88. The Applicant has one minor child in Australia, Master Fungalei. He resides with his mother Ms Dawn A Dale Fancesca Fungalei.[98] The Applicant has only spoken to Master Fungalei two or three times in the last 10 years.[99] The Tribunal is not satisfied that the Applicant currently has a meaningful relationship with Master Fungalei.

89. The Applicant has five grandchildren through his daughter Ms Hulita Vakapuna.[100] These children have developed a special and warm relationship with the Applicant.[101] If the Applicant were released into the Australian community, the Tribunal is satisfied that the Applicant would support his daughter Ms Hulita Vakapuna in raising these grandchildren.

90. The Tribunal has noted that Mr and Ms Toetuu have two minor children. Little of substance is known of their individual relationships with the Applicant. The Tribunal is not satisfied that the Applicant currently has a meaningful relationship with these children.

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[98] Exhibit R2, G-Documents, G10, Attachment E, page 84; Transcript, page 88, line 42.
[99] Exhibit R2, G-Documents, G10, Attachment E, page 86; Transcript, page 89, lines 40-43.
[100] Exhibit A6, page 1, paragraphs [8].
[101] Exhibit A6, page 1, paragraphs [6]-[7].

91. **Sub-paragraph (b)** of paragraph 8.3(4) of the Direction causes a decision-maker to examine 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.

92. The evidence before the Tribunal suggests that the Applicant is likely to play a more meaningful role in the lives of all the minor children in Australia with whom he is related if he is released into the Australian community. In the absence of their biological father, it is likely that the Applicant would play a paternal role in the upbringing of Ms Hulita Vakapuna's five children. It is also likely that the Applicant would play a paternal role, at some level, in Master Fungalei's life prior to him entering adulthood.

93. **Sub-paragraph (c)** of paragraph 8.3(4) of the Direction points to 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.

94. There is no evidence before the Tribunal that the Applicant's prior conduct, and any likely future conduct, has, or will have, a negative impact on any minor children. Accordingly, the Tribunal does not regard this consideration to be relevant.

95. **Sub-paragraph (d)** of paragraph 8.3(4) of the Direction causes a decision-maker to consider the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways. Where the evidence indicates that there may be ongoing harm to a child caused by separation from the non-citizen, the decision-maker should evaluate the significance of the harm, its quality and character.[102]

96. There is no objective evidence that any ongoing harm would be caused to any minor children were they to be separated from the Applicant.

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[102] *Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 162, [44].

97. On the evidence before it, the Tribunal is satisfied that if the Applicant were returned to Tonga that he would be able to maintain contact by telephone with minor children in Australia.

98. **Sub-paragraph (e)** of paragraph 8.3(4) of the Direction points to whether there are other persons who already fulfil a parental role in relation to the child.

99. The evidence is clear that all minor children in Australia presently have persons who already fulfil a parental role in relation to each of those children.

100. **Sub-paragraph (f)** of paragraph 8.3(4) of the Direction causes a decision-maker to examine any known views of the child (with those views being given due weight in accordance with the age and maturity of the child).

101. No minor children gave evidence during these proceedings. The evidence variously provided through the evidence of Ms Dawn A Dale Fancesca Fungalei, Ms Hulita Vakapuna, Ms Luisa Vakapuna Toetuu, and Mr Tevita Toetuu is lacking in detail as to the individual views of the relevant minor children in Australia. Nevertheless, considering the evidence wholistically, the Tribunal is satisfied that the relevant minor children would prefer the Applicant to be released into the Australian community and to play a meaningful role in their lives.

102. **Sub-paragraph (g)** of paragraph 8.3(4) of the Direction causes the Tribunal to consider any evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally.

103. There is no evidence before the Tribunal that any child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally. Accordingly, the Tribunal does not regard this consideration to be relevant.

104. **Sub-paragraph (h)** of paragraph 8.3(4) of the Direction causes the Tribunal to consider any evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

105. There is no evidence before the Tribunal that any child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct. Accordingly, the Tribunal does not regard this consideration to be relevant.

106. The Tribunal does not consider factors (c), (g), (h) of paragraph 8.3(4) of the Direction apply to the Applicant's offending or circumstances. The remainder of the relevant sub-paragraphs of paragraph 8.3(4) of the Direction, in their totality, weighs moderately in favour of revoking the Applicant's mandatory visa cancellation.

Conclusion: Primary Consideration 3

107. Primary Consideration 3 weighs moderately in favour of revoking the Applicant's mandatory visa cancellation.

PRIMARY CONSIDERATION 4 – THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

108. In making the assessment for weight to be allocated to Primary Consideration 4, paragraph 8.4(1) of the Direction provides that the Australian community expects non-citizens to obey Australian laws while in Australia. The Tribunal should consider whether the Applicant has breached, or whether there is an unacceptable risk that he would breach, this expectation by engaging in serious conduct.

109. Paragraph 8.4(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry

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

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

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

111. Paragraph 8.4(4) of the Direction provides guidance on how the expectations of the Australian community are to be determined. This paragraph states:

> *This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.*

112. Paragraph 8.4(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185, which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or

evidence about those expectations. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.[103]

113. Paragraph 8.4 contains a statement of the Government's views as to the expectations of the Australian community, which operates to ascribe to the whole of the Australian community an expectation aligning with that of the executive government, which the decision-maker must have regard to.

Analysis – Allocation of Weight to this Primary Consideration 4

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

(a) The Applicant moved to Australia in 1988 and is now aged 60 years.

(b) The Applicant maintains strong family connections in Australia.

(c) The Applicant's has a reasonable employment history in Australia, although he has committed criminal assaults and driving offences in the course of his employment.

(d) The Applicant has committed a criminal act of conspiracy to import a commercial quantity of cocaine into Australia.

(e) The Applicant has been imprisoned for his offending.

(f) The Applicant's crimes are very serious and raise character concerns.

115. The Tribunal is satisfied that the Applicant has breached the Australian community's expectations of him to obey Australian laws while in Australia by engaging in serious conduct. This breach of the Australian community's expectations weighs heavily against revocation of the cancellation of the Applicant's visa.

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[103] See *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; *Afu v Minister for Home Affairs* [2018] FCA 1311; *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466; and *FYBR v Minister for Home Affairs* [2019] FCA 500.

Conclusion: Primary Consideration 4

116. Primary Consideration 4 weighs heavily against revocation of the cancellation of the Applicant's visa.

OTHER CONSIDERATIONS

117. It is necessary to look at the Other Considerations listed at paragraph 9(1) of the Direction. The four stipulated sub-paragraphs are considered at (a), (b), (c) and (d), respectively.

(a) International non-refoulement obligations

118. The Applicant does not pursue claims with respect to Australia's non-refoulement obligations and no claim arises on the evidence. Accordingly, a consideration of Australia's non-refoulement obligations is not relevant.

(b) Extent of Impediments if Removed

119. As a guide for exercising the discretion, paragraph 9.2 of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

(a) the non-citizen's age and health;

(b) whether there are any substantial language or cultural barriers; and

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

120. The Applicant is aged 60 years old and there is no evidence before the Tribunal that he is in ill-health.

121. The Applicant was born and raised in Tonga. He returned to Tonga on several occasions prior to his incarceration. There are no significant language barriers to the Applicant

returning to Tonga. However, the Tribunal accepts that the Applicant may be shunned by Tongan society for his criminal record were he to be removed there. This, in turn, may affect his employment prospects.

122. The Applicant has immediate family members in Tonga. He is religious. The evidence before the Tribunal is that *"The highest ranking type of support network came from 'religious organizations' followed by 'family/ relatives', 'friends' and 'other deportees'."*[104] Nevertheless, the Tribunal is satisfied that the level of social, medical, and economic support available to the Applicant is higher in Australia than in Tonga.

123. On the balance of this consideration, the Tribunal is satisfied that the Applicant will face some impediments if removed and therefore places moderate weight in favour of revoking the Applicant's mandatory visa cancellation.

(c) Impact on victims

124. This Other Consideration 9(1)(c) requires that decision-makers must consider the impact of the s 501 or s 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.

125. There is no current evidence before the Tribunal as to the views of any victims. Accordingly, this Other Consideration is not relevant.

(d) Links to the Australian Community

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

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[104] Exhibit A5, page 81. The Applicant's submissions are also noted at Exhibit A1, page pages 26-31.

(a) the strength, nature, and duration of ties to Australia; and

(b) the impact on Australian business interests.

The strength, nature, and duration of ties to Australia

127. The Tribunal is bound to consider the impact of its decision on the Applicant's immediate family members in Australia, where those family members have citizenship, permanent residency, or an indefinite right to remain in Australia. In guarding against repetition in considerations, there is limited scope for the Tribunal to take into account the considerations of an Applicant's family where family members are also the Applicant's victims.[105]

128. The Applicant has substantially resided in Australia since 1988, although he commenced offending in 1989. The Applicant has made positive vocational contributions to Australia since his arrival, also noting, however, that he variously offended in the course of that employment.

129. The Applicant has acted as a positive influence on his peers during his lengthy period of imprisonment and detention.

130. The Applicant has extensive family links in Australia, almost all of whom seem to have citizenship, permanent residency, or an indefinite right to remain in Australia.

131. The Applicant has submitted that removal of the Applicant to Tonga "*would cause significant emotional and practical hardship for the applicant's daughter Hulita Vakapuna (who has five Australian citizen children)"*.[106] The Tribunal accepts this submission and is further satisfied that the Applicant's removal would cause significant emotional hardship to his other family, in particular his daughter, Ms Destiny Vakapuna Faingataa, and son, Mr Louis Faingataa.

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[105] *Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646, at [26]-[27].

[106] Exhibit A1, page 32, paragraph [100].

132. Given the strength, nature and duration of the Applicant's ties to Australia, the Tribunal places moderate weight in favour of revoking the Applicant's mandatory visa cancellation.

Impact on Australian business interests

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

CONCLUSION

134. Under s 501CA(4)(b) of the Act, there are two alternate conditions precedent to the exercise of the discretion to revoke the mandatory cancellation of the Applicant's visa: either the Applicant must be found to pass the character test; or the Tribunal must be satisfied that there is another reason, pursuant to the Direction, to revoke the cancellation. As noted, and as found above, the Applicant does not pass the character test.

135. In then considering whether there is another reason to exercise the discretion afforded by s 501CA(4) of the Act to revoke the mandatory visa cancellation decision, the Tribunal has had regard to the totality of the evidence and those considerations referred to in the Direction. Accordingly, the Tribunal finds:

(a) Primary Consideration 1 – Protection of the Australian community: weighs heavily against revocation of the cancellation of the Applicant's visa.

(b) Primary Consideration 2 – Family violence: is not relevant.

(c) Primary Consideration 3 – Best interests of minor children: weighs moderately in favour of revoking the Applicant's mandatory visa cancellation.

(d) Primary Consideration 4 – Expectations of the Australian community: weighs heavily against revocation of the cancellation of the Applicant's visa.

(e) Other Consideration (a) – International non-refoulement obligations: is not relevant.

(f) Other Consideration (b) – Extent of impediments if removed: weighs moderately in favour of revoking the Applicant's mandatory visa cancellation.

(g) Other Consideration (c) – Impact on victims: is not relevant.

(h) Other Consideration (d) – Links to the Australian community: weighs moderately weight in favour of revoking the Applicant's mandatory visa cancellation.

136. The Tribunal has considered all of the Considerations in the Direction and the totality of the evidence. The combined weight of Primary Consideration 1 and Primary Consideration 4 weigh against the revocation of the mandatory cancellation of the Applicant's visa.

137. Consequently, the Tribunal does not exercise the discretion to revoke the mandatory cancellation of the Applicant's visa.

DECISION

138. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the reviewable decision made by the delegate of the Respondent dated 24 June 2022 that the mandatory cancellation of the Applicant's Class WC Subclass 030 Bridging C visa not be revoked under subsection 501CA(4) of the *Migration Act 1958* (Cth) is affirmed.

I certify that the preceding 138 (one hundred and thirty-eight) paragraphs are a true copy of the reasons for the decision herein of Senior Member George

.....[sgnd].....

Associate

Date of Decision:	16 September 2022
Date of Written Reasons:	25 October 2022
Date of Hearing:	14 and 15 September 2022
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Mr P Rama Westside Legal
Solicitor for the Respondent:	Mr C Bavin Hunt & Hunt

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED	DATE TENDERED
A1	Statement of Facts, Issues and Contentions	A	02.09.2022	05.09.2022	**14.09.2022**
A2	1. Statement of Walter Pospelyj dated 13 October 2021 2. Statement of Viliami Faingataa – undated 3. Support statement from Pastor Jim Reidy dated 14 October 2021 4. Character reference from Senior Pastor Sione Tuavao Ma'ake dated 8 October 2021 5. Letter from Hulita Vakapuna - undated 6. Character reference from Joe Dahibe dated 14 October 2021 7. Character reference from Sarah Veiru dated 6 October 8. Character reference from Anthony Bourke dated 5 October 2021	A		15.07.2022	
A3	Letter from Registered Clinical Counsellor David Czitter dated 8 August 2022	A	08.08.2022	08.08.2022	
A4	Letter from Luke Legge dated 23 August 2022	A	23.08.2022	23.08.2022	
A5	Tender Bundle	A		05.09.2022	
A6	Statement of Hulita Vakapuna dated 31 August 2022	A	31.08.2022	05.09.2022	

A7	Statement of Viliami Tauataina Faingataa dated 2 September 2022 – with annexures	A	02.09.2022	05.09.2022	
A8	Statement of Luisa Vakapuna Toetuu	A	Undated	08.09.2022	
A9	Statement by Tevita Toetuu	A	Undated	08.09.2022	
A10	Statement of Luke Legge dated 7 September 2022	A	07.09.2022	08.09.2022	
A11	Lisa Alam Psychologist report dated 6 September 2022	A	06.09.2022	08.09.2022	**14.09.2022**
A12	Statement of Dawn a Dale Francesca Fungalei	A	Undated	09.09.2022	**15.09.2022**
A13	Statement of Destiny Vakapuna Fungalei	A	Undated	09.09.2022	
A14	Statement of Louis William Faingataa	A	Undated	09.09.2022	

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED	DATE TENDERED
R1	Statement of Facts, Issues and Contentions	R	11.08.2022	11.08.2022	**14.09.2022**
R2	G-documents	R	13.07.2022	13.07.2022	
R3	Supplementary G-documents	R	11.08.2022	11.08.2022	