Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

LLL and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 3527 (15 September 2020)

Division: GENERAL DIVISION

File Number(s): **LLL**

Re: **LLL**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member K Millar**

Date: **15 September 2020**

Place: **Adelaide**

The Tribunal affirms the decision under review.

Senior Member K Millar

CATCHWORDS

MIGRATION – mandatory cancellation of applicant's visa – applicant has substantial criminal record – whether discretion to revoke mandatory cancellation should be exercised – serious drug offences – protection of the Australian community

LEGISLATION

Crimes (Sentencing Procedure) Act 1999

Migration Act 1958 (Cth)

CASES

Dolan v Australian and Overseas Telecommunications Corporation (1993) FCR 206

FYBR v Minister for Home Affairs [2019] FCAFC 185

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16 [2019] FCA 2033

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

SECONDARY MATERIALS

Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA, 20 December 2018

REASONS FOR DECISION

Senior Member K Millar

INTRODUCTION

1. X came to Australia from New Zealand when she was 23 years old. She worked as a graphic designer, however fell into drug use and ultimately the distribution of drugs with her then partner X.

2. On 28 February 2019, she was convicted of eight charges of supplying a prohibited drug, one charge of knowingly dealing with the proceeds of crime, and one charge of knowingly participating in a criminal group. At sentencing, a further 15 matters were taken into account at her request in accordance with the Form 1 procedures in the *Crimes (Sentencing Procedure) Act 1999.* She was sentenced to a term of imprisonment of four years and two months, with a non-parole period of two years.

3. This resulted in the mandatory cancellation of her visa by a delegate of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.

4. X sought revocation of the cancellation of her visa, and this was refused on 24 June 2020. She has applied for a review of this decision.

CIRCUMSTANCES OF THE OFFENCES

5. The circumstances of the offence are drawn from the sentencing remarks of Acting Judge Conlon SC.

6. In summary, on attending a report of cars being damaged and items stolen at a private car park, police found prohibited substances, cash to the value of $74,950, packaging for a number of SIM cards and items consistent with the supply and use of drugs as well as information regarding the supply of drugs.

7. This supply involved a system where a text message was sent to a database of at least 200 to 300 customers every few weeks. It provided the current mobile number through which drugs could be purchased and was the “run phone” or “work phone” used by the runners employed by X and X.

8. The runners would obtain bags of cocaine and MDMA capsules to sell for X and X. They generally collected 10 bags of cocaine at the start of a shift and then restocked if needed. The runners would receive messages on the run phone and respond by delivering bags of cocaine to the customers.

9. Police commenced interception of the mobile numbers sent to the customer database on 15 September 2016, and between this date and 19 November 2016, police intercepted several thousand SMS and calls. Listening, tracking and surveillance devices were

installed in the car used by the runners. In this period, the runners supplied at least 200 grams of cocaine on behalf of X X.

10. On 18 November 2016, the runners were arrested after they met X and X who had supplied them with 30 bags of cocaine and nine MDMA capsules. The runners were interviewed and made full admissions to participating in a criminal group. They nominated X and X as directing the group.

11. The same evening, a search warrant was obtained to access X and X apartment. On entry X was standing at the sink attempting to flush the contents of a clear plastic bag down the sink. The bag was found to contain amphetamine. During a search of the apartment, 41 grams of cocaine, 583.3 grams of gamma butyrolactone and 29.2 grams of alprazolam were found together with cash and a large quantity of paraphernalia associated with the supply of prohibited drugs. A USB storage device was located containing a list of approximately 500 mobile phone numbers, which was identical to the list found in the car. This was found to be the database of customers to whom X and X would supply drugs.

12. The sentencing judge found X and X were running a sophisticated and well organised drug supply business servicing a large database of customers and employing three runners. The runners sold around 20 bags of cocaine each weekend, and a total of around 60 bags per week. The amounts of cash were found to be significant with $74,950 found in the car and further amounts of $2,850 and $9,000 at their premises.

13. At the time of offending X had a significant and longstanding drug addiction and a substantial drug debt. The sentencing judge stated that the quantities of cash found would unlikely to be explained solely by reference to any such debt. The criminality involved in the offences was found to be persistent and deliberate.

14. X had only one prior conviction for drug use, and the sentencing judge accepted X was initially responsible for introducing the database to X. He found the gravity of the offending fell at about the mid-range for offences of its type.

15. The sentencing judge noted that X parents apparently battled alcoholism, but she nevertheless completed a Bachelor of Visual Arts in 2000 and a Diploma in Graphic

Design in 2001. Her drug use became a solution to problems after being in a violent relationship. She fled that relationship when she came to Australia but was involved in further abusive relationships leading to depression and more drugs. Throughout this, she was able to maintain continuous employment in the graphic design industry.

16. Regarding her relationship with X, the sentencing judge quoted X submission that her confidence and insecurities were at their worst at the time and that attempting to keep this to herself fed her addiction. She said that staying in the relationship made more sense than dealing with being alone, and at the time of the offences she was living in a bubble she had created to protect herself from events that haunted her. She referred to hourly GHB abuse to self-medicate anxiety.

17. The sentencing took into account X period of admission for four weeks to The Sydney Clinic for detoxification and her abstinence from drugs at this time. She stated she was committed to her rehabilitation, returning to her career in graphic design and her relationship with her new partner.

18. Evidence was given of X's attendance at the addictions program while remanded in custody. The sentencing judge states:

> *In many respects X story is a familiar one. That is by virtue of a range of unfortunate lifestyle circumstances and on some occasions choices. She has involved herself in abusive relationships and ultimately sought some relief in the world of drug usage. I accept that she had a very longstanding drug addiction problem. I am satisfied that the offender's expressions of remorse are genuine. Whilst I have already noted that her life has been characterised by abusive relationships and drug dependency quite remarkably she has also shown an ability to secure and remain in employment. Accordingly I am therefore satisfied that she does have very good prospects of rehabilitation.*

19. X was sentenced to an aggregate term of imprisonment of four years and three months with an aggregate non-parole period of two years.

LEGISLATIVE FRAMEWORK

20. Section 501(3A) of the *Migration Act 1958* ("the Act")states the Minister must cancel a visa that has been granted to a person if satisfied the person does not pass the character test because he or she has a substantial criminal record, and is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth, a State or a Territory.

21. A person does not pass the character test if he or she has a 'substantial criminal record'.[1] According to s 501(7)(c) of the Act, a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

22. The decision to cancel the visa can be revoked if the Minister, or the Tribunal in the place of the Minister, is satisfied either that the person passes the character test, or there is another reason why the original decision should be revoked.[2]

23. In looking at whether there is another reason to revoke the cancellation of the visa, the Tribunal is bound by written directions given by the Minister.[3] The Minister has given written directions about the exercise of the power to revoke the cancellation of the visa in *Direction No. 79, Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA* ("the Direction").

24. The issues to be decided in this case are whether X does not pass the character test; and, if so, whether there is another reason the decision to cancel the visa should be revoked.

DOES THE APPLICANT PASS THE CHARACTER TEST?

25. X was sentenced to a term of imprisonment of four years and two months and does not dispute that she does not meet the character test.

26. The remaining question is whether there is another reason the decision to cancel the visa should be revoked.

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[1] *Migration Act 1958* s 501(6)(a).

[2] s 501CA(4).

[3] Under s 499 of the Act, the Minister may give written directions that are consistent with the Act or regulations about the exercise of powers under the Act. These directions bind this Tribunal (s 499(2A) of the Act).

IS THERE ANOTHER REASON THE CANCELLATION SHOULD BE REVOKED?

27. In considering whether the cancellation of X visa should be revoked, the Tribunal is required to apply the Direction.

28. The Direction specifies that a decision-maker, informed by the principles in Paragraph 6.3, must take into account the considerations in Part C of the Direction in determining whether the mandatory cancellation of a non-citizen's visa should be revoked.[4]

Principles that inform the decision-maker

29. Paragraph 6.3 of the Direction sets out principles to inform the decision-maker, and they are:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
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> *(2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.*
>
> *(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against women or children or vulnerable members of the community such as the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
>
> *(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.*
>
> *(5) Australia has a low tolerance of any criminal or other serious conduct by people 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 in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.*

[4] Paragraph 7(1)(b) of the Direction.

> *(6) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people be allowed to come to, or remain permanently in, Australia.*
>
> *(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.*

30. Of these principles, of note is that:

- X arrived in Australia on 20 September 2003 when she was 23 years of age. She spent her childhood and early adult life in New Zealand and has now been in Australia for 17 years.

- On 11 May 2015 she was charged with and subsequently pleaded guilty to possessing a prohibited drug and dealing with property suspected to be the proceeds of crime. She was sentenced to a good behaviour bond for two years. On 13 October 2016 she was charged with, and subsequently convicted of, using fabricated evidence to mislead a judicial tribunal.

- The offences of supplying a prohibited drug, dealing with the proceeds of crime and participating in a criminal group are dated 13 October 2016. After being released on bail, she was given a warning on 7 April 2017 about breaching bail.[5] On 10 July 2017 X was charged with two counts of possessing a prohibited drug and was fined for each of these counts. She was warned that if she breached her bail again it was likely to be revoked.[6] On 12 July 2018 she was arrested for breaching bail[7] by contacting a witness.

- X held a Subclass 444 visa, which allowed her to remain in Australia while she is a citizen of New Zealand. While this is a temporary visa, the Tribunal has had due regard to this visa being ongoing effect while she is a citizen of New Zealand as it does not limit the time she can remain in Australia. X has been employed while she has been in Australia and has made a positive contribution to the Australian community through her work. She does

[5] TB1/14.
[6] TB1/14.
[7] TB1/15.

not have family members in Australia. She submits that it is in the best interests of the daughter of her friend that she remain in Australia.

The Primary and Other Considerations

31. Paragraph 8 provides guidance on how to take into account the Primary and Other Considerations, with information from independent and authoritative sources to be given appropriate weight, that both Primary and Other Considerations may weigh in favour of or against cancelling the visa, that Primary Considerations should generally be given greater weight than Other Considerations, and that one or more Primary Considerations may outweigh Other Considerations.

32. Paragraph 13(2) of Part C of the Direction provides three Primary Considerations, which are:

    a) *Protection of the Australian community from criminal or other serious conduct;*
    b) *The best interests of minor children in Australia; and*
    c) *Expectations of the Australian community.*

33. The Other Considerations which must be taken into account are provided in a non-exhaustive list in Paragraph 14(1) of the Direction, and are:

    a) *International non-refoulement obligations;*
    b) *Strength, nature and duration of ties;*
    c) *Impact on Australian business interests;*
    d) *Impact on victims; and*
    e) *Extent of impediments if removed.*

34. In *Suleiman v Minister for Immigration and Border Protection*[8] Colvin J, in applying the identical condition to Paragraph 8(3) from Direction 65 stated, at [23], that while generally Primary Considerations should be given greater weight, the Direction:

> *… requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.*

[8] [2018] FCA 594.

35. This means an evaluation of the factors occurs in the context of the circumstances of the individual case, and while the Primary Considerations should generally be given greater weight than Other Considerations in accordance with paragraph 8(4), Other Considerations can outweigh Primary Considerations in the particular circumstances of the case.

THE PRIMARY CONSIDERATIONS

Protection of the Australian community

36. In looking at this consideration, the Tribunal must have regard to the principle of protecting the Australian community from harm, and that remaining in Australia is a privilege conferred in the expectation that the person is law abiding and will not cause harm to individuals or the Australian community. Decision makers are to consider the nature and seriousness of the person's conduct to date, and the risk to the Australian community should he or she commit further offences or engage in other serious conduct.

(i) Nature and seriousness of conduct to date

37. Paragraph 13.1.1 of the Direction provides a list of factors to be considered in determining the nature and seriousness of a non-citizen's criminal offending or other conduct to date.

38. X has been convicted of very serious offences. However, the factors that relate to violent or sexual offences, offences involving violence against women and children, and offences committed while in immigration detention or during escape from immigration detention do not apply to X. While it could be argued that supplying drugs can involve an element of targeting those with vulnerabilities, there is no specific information before the Tribunal that crimes were committed against vulnerable members of the community, or against government officials due to the position they hold or in the performance of their duties. Further, there is nothing before the Tribunal to indicate X has provided false or misleading information to the Department. X had not been formally warned about the consequences of further offending in terms of her migration status.

39. Of the remaining factors, the sentenced imposed by the court of four years and three months is significant and displays the gravity of the offending. A term of imprisonment is a sentence of last resort and this is a lengthy term of imprisonment.

40. After pleading guilty to a charge of possession of a prohibited substance and dealing with property suspected to be the proceeds of crime in 2015, X was subject to a good behaviour bond. The offences of supplying a prohibited drug, dealing with the proceeds of crime and participating in a criminal group were committed when she was subject to this bond. She was arrested and released on bail after being charged with these offences, and while she was on bail she was charged with, and subsequently convicted of, a further two counts of possession of a prohibited substance. She was also found to have breached bail by contacting a witness.

41. The Tribunal considers offences committed while subject to a good behaviour bond and while on bail to show a disregard for Australian laws and the liberty extended to her. This Tribunal has had regard to this in the cumulative effect of repeated offending.

42. An effort was made in cross-examination to look to her conduct prior to the offences for which she was charged. X was warned that she did not have to answer questions that may tend to incriminate her. She exercised this right in looking at police records from 2014. No adverse inference can be drawn from her exercising her privilege against self-incrimination.[9] The matters to which she was taken involve events for which she was charged in 2014, however those charges are withdrawn. The reason for the charges being withdrawn is not before the Tribunal. In these circumstances the Tribunal does not consider any conclusion can be drawn from this material and has had no further regard to it.

43. X acknowledges she had a longstanding drug problem. However, a distinction can be drawn between her drug addiction and funding this addiction, and the activities involved in running a criminal group for profit.

44. X stated she was aware of Mr Townsend's involvement in the supply of drugs from the start of 2011 but was not involved in the process for many years.

45. X agreed that she had been involved in this process for some time, but later denied being involved in this process from 2015, and said:

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[9] *Dolan v Australian and Overseas Telecommunications Corporation* (1993) FCR 206.

… it was said on the stand by [X] *when he was in court, that he handed me over the business when he um when he went to jail.*

… He was arrested and then um so it would have been a third of the way through 2016

46. Given this statement, X was herself conducting the supply of drugs in what is described by the sentencing judge as a sophisticated drug supply business with a large database of users after Mr Townsend was imprisoned. As noted by the sentencing judge, the financial gain of X was greater than could be explained by her own drug use. Her involvement in, and eventual running of the criminal enterprise shows an increasing trend of seriousness that is not solely related to her drug use.

47. The pre-release report of 20 May 2020 states her current offences show an escalation of her offending behaviour in terms of scale and association.[10]

48. The escalation from drug use to involvement in a criminal enterprise to supply drugs shows an increasing trend of seriousness in her offending. Her disregard of her bond and her bail conditions and subsequent offending while on bail, including for approaching a witness, shows a lack of respect for Australian law and is contrary to the expectation of the Australian community that she will be law abiding and respect important institutions. Significant weight is accordingly placed on this consideration.

(ii) Risk to the Australian community

49. Paragraph 13.1.2 of the Direction provides factors to be considered in determining the risk to the Australian community should the Applicant commit further offences or engage in other serious conduct and requires a consideration of the nature of the harm if she engages in further criminal or other serious conduct, and the likelihood of her engaging in further criminal or other serious conduct.

[10] TB3/109.

(a) Nature of the harm

50. The harm involved in the supply of prohibited substances to individuals and the community is significant. The Australian Institute of Health and Welfare 2020 web report on the alcohol, tobacco and other drug use in Australia[11] lists the long-term effect of drugs such as methamphetamine, MDMA and cocaine. Effects include memory and cognitive impairment, cardiovascular problems, stroke, depression, paranoia and anxiety, psychotic symptoms and cocaine-induced psychosis.

51. X and X were supplying large quantities of prohibited drugs to a great many people, with their database recording 500 mobile numbers, and police identifying at least 200 to 300 customers. The potential harm is increased by the quantity of prohibited substances and the number of people identified as customers.

52. The nature and harm involved in the use of these substances is significant and results in a concomitant burden on the health, welfare and criminal justice system.

(b) Likelihood of engaging in further criminal or other serious conduct

53. X has undertaken a substantial number of courses while on remand, in the community prior to sentencing, and in prison. She relies on her remorse, her rehabilitation for drug use, her identification of the effect of past trauma and entering counselling for this trauma, protective factors from her friends, partner and employment if released to show that there is no or reduced likelihood of her reoffending.

54. In looking at the factors raised by X, it is useful to first look at the Rehabilitation she has undertaken and the assessments that have been conducted of the risk of her reoffending.

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[11] TB3/123.

Rehabilitation

55. While on remand X participated in the Remand Addictions Group, attending eight sessions.

56. She undertook a detoxification program at The Sydney Clinic in February 2017 under the supervision of X as required by the conditions of her bail. During her admission she consistently returned negative test results for illicit substances.[12] Ongoing rehabilitation as an outpatient was recommended and her bail conditions were varied to allow her to attend The Sydney Clinic as an outpatient, but there are no reports before the Tribunal about her participation in outpatient rehabilitation. This appears to have been as a result of issues with her eligibility for Medicare.

57. While she was in prison, X completed:

- An EQUIPS Foundation course covering issues such as why we are here, how thoughts influence behaviour, emotions and choices.
- EQUIPS module in addiction.
- William Wilberforce Foundations Recovery Course.
- RUSH (Real Understanding of Self Help).
- The Recovery Course weekly in prison over the period of a year, which is a 12-step program for addiction. X attended and eventually facilitated this program.
- "Out of the Dark" program for victims of domestic violence.
- Mothering at a Distance.
- Exploring the seasons of loss and grief.

[12] TB4/148.

- "In Charge of My Money".
- The Salvation Army Positive Lifestyle program.
- "Getting out, Staying Out".
- The Book of Me Program.

58. X was employed in the prison and was described as a good worker who was willing to try new things.[13] She was employed in the Food Services and HIPU departments. She was also given the role as an inmate mentor to assist other prisoners.

59. Rev. Deacon Mike Williams has provided several statements in support of X and also gave oral evidence. He states she has been a regular attendee at chapel services for a year and that she has an active prayer life.

60. A letter from clinical psychologist X states X has voluntarily attended trauma focussed counselling through Victims Services from 30 October 2019 to the date of the letter which is 9 April 2020.[14]

Risk assessments

61. X, a forensic psychologist, provided a report dated 21 November 2019[15] in which she assessed X as being in the low range for a risk of reoffending, and states she has addressed her main risk factors through treatment while in prison. Ms North states X low risk of reoffending can be managed should she continue to engage in appropriate treatment, and notes X has indicated an intention to engage in the twelve-step recovery program on discharge from custody.

62. X saw X on two occasions for a total of two and a half to three hours. There were some documents that were not provided to X and this included the sentencing remarks. As a

[13] TB3/112.
[14] G29/202.
[15] G46/223.

result, X was not aware of the comments of the sentencing judge on the circumstances of the offending. Ms North was not provided the full decision record of the delegate.

63. X current relationship with her partner X was considered a protective factor by X, however she was unaware that X has also had a past conviction relating to possession of a prohibited substance. X said had she been aware of his conviction, she would have discounted him as a protective factor, but as X friends remain, this would not change the overall rating.

64. X was not aware X had offended again after being arrested and bailed and stated this would increase the risk slightly, but it would remain in the low range.

65. X described a low risk of reoffending as a 10% risk of reoffending in the first year following release and said this could be compared to a high risk, which is a 76% chance of reoffending.

66. X assessment of the risk of X reoffending was based on her completing a scoring mechanism after the interview which assesses actuarial risk of reoffending. Her knowledge of the risk factors, as noted above, was incomplete. X acknowledged statistical norms are the basis of the scale, which is a useful but limited indicator of future conduct and said that past behaviour is the best predictor of future behaviour.

67. Other than the concerning lack of complete information before X, a real concern about X report is that while X offending in relation to the use of drugs could be explained in relation to her diagnosis of PTSD and depression as perhaps could some offending in order to fund her drug use, it does not explain trafficking in such a large quantity of drugs, assisting to run and then solely running the business and profiting from the sale of drugs to others. As stated by the sentencing judge, the quantities of cash found would be unlikely to be explained solely by reference to a drug debt. This aspect of her offending, as opposed to her trauma and drug use, is not addressed to any significant level in the report, and as such I did not find it useful to assess her risk of this type of offending in the future. X assessed the risk of X relapsing into drug use in relation to her underlying mental health, which was stated to directly contribute to her offending. I am not satisfied this report addresses the aspect of her offending that relates to running a criminal organisation for profit.

68. The pre-release report of 20 May 2020 states X has a medium risk of re-offending. This assessment was conducted using the same assessment tool as that used by X, a forensic psychologist. It was submitted that this assessment was conducted by a Community Corrections Officer and should therefore be accorded lesser weight despite being more recent than the report of X. The Tribunal acknowledges X qualifications, however deficits in the information before X result in the Tribunal placing less weight on her assessment. Both reports have been taken into account in considering the likelihood of X engaging in further criminal or other serious conduct, with slightly more emphasis placed on X.

Remorse

69. It is submitted X has taken full responsibility for her criminality in Australia and is remorseful for her offending. This is reflected in her statement to the sentencing judge dated 8 February 2019. It was accepted by the sentencing judge that she is remorseful. In her statement of 23 August 2019, she states she is not at risk of reoffending and can 'guarantee I pose no risk to the community'.

70. X has a history of stating matters that will best suit her case. Her written statement dated 12 October 2016 provided to the Court for sentencing for the 2015 offences indicates that she had not known of X offending and was shocked, angry and felt betrayed. This is at the time when she was supplying prohibited substances and running a criminal enterprise with X. Her reported shock and betrayal are not consistent with, and are in stark contrast to, the offences with which she was charged. Her repetition at hearing that she was not aware of the extent of X's addiction cannot be explained as other than a fabrication. Other matters in this statement, such that she came from a loving home and has a close relationship with her mother she now resiles from, stating she was shy and insecure as a teenager because her parents suffered from alcoholism and she now has a distant relationship with them. Her claim at that time that she had seen the phial in her handbag which contained drugs, but not for a long time, and had taken drugs recreationally on occasion is inconsistent with the long term and substantial drug use she now claims.

71. X friends, both those who provided written statements and those who gave oral evidence, state that she is remorseful and is looking to a future without drugs.

72. In circumstances where X has provided statements that suit her proposes at the time, the Tribunal places little weight on her expressions of remorse as showing that she is unlikely to offend or engage in other serious conduct in the future.

Rehabilitation for drug use

73. X relies on her record of testing negative for drugs while she was in prison and says she has not taken drugs in prison or in immigration detention despite their ready availability. It is accepted that she has been drug free while in prison and immigration detention, which is a significant achievement given her 17 – 20[16] year history of drug use prior to incarceration. She said that since being in custody she has gained insight into the harm drugs cause to women and children.

74. X engagement in drug rehabilitation weighs in her favour. X acknowledges she will require long term rehabilitation to remain drug free. While the risk of relapsing into drug use is significantly reduced through the rehabilitation she has undertaken and the extensive period of which she has been drug free during her time in prison and immigration dentition, it remains a reduced but real risk. If she relapses into drug use, the likelihood of her engaging in further criminal or other serious conduct increases.

Trauma

75. X says she left New Zealand due to domestic violence. While in Australia she says she was first on the scene at the murder of a friend and had to identify him. She said she has twice been the victim of a home invasion, on one occasion was tied up and blindfolded and had a gun held to her head. X diagnosed X as suffering post-traumatic stress disorder in addition to depression, and X has been funded by Victim Support Services for trauma counselling.

76. The Tribunal accepts the link between exposure to trauma and substance use as set out in an article from the International Society for Traumatic Stress Studies.[17] It also accepts

[16] G19/180.
[17] G14/118-122.

X has been subject to trauma. X states she can now identify the link between her behaviour and past trauma and has been learning alternate ways to cope.

77. X treatment and counselling for trauma is ongoing. Her experience of trauma remains a risk factor for relapsing into substance use.

Protective factors

78. X lists as protective factors against her re-offending; her relationship with God, her relationship with X, her close circle of friends, her employment, sentencing being a specific deterrent, and the prospect of future visa cancellation.

79. Rev. Deacon Mike Williams provided statements and gave oral evidence. He has had contact with X while she has been in custody. He reports her deep concern about being returned to New Zealand. She has attended church and has had an active prayer life while in prison. He states she has expressed a deep remorse for her offences and has been a mentor to others.

80. In her letter dated 19 August 2019, X says her time in custody had led to her finding her relationship with God and being received into full communion with the Catholic Church at Wellington Correctional Centre. She describes her faith as an invisible force, an inspiration and the driving power to change.

81. X relationship with X commenced approximately three years ago while she was on bail, and they lived together before she was incarcerated. They describe a close and loving relationship, with X visiting X in prison.

82. X was asked about his own offending history. Dr Donnelly took objection to this line of questioning, and relied on *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16*[18] in stating it was not relevant as the Tribunal could not look to a different factor for cancellation. This is not the case in this matter as there is no suggestion of a provision of the Act other than the revocation of the cancellation of X visa

[18] [2019] FCA 2033.

under s.501CA(4) of the Act, and it was noted by the Minister that it was X who raised her relationship with X as a protective factor that would reduce her risk of reoffending.

83. While the Tribunal does not lightly look to the criminal history of a witness, in this case it was relevant to the risk of re-offending should X remain in Australia.

84. X acknowledged he had been charged with possession of a prohibited substance approximately three years ago and was sentenced to a two-year good behaviour bond with which he has complied. The date of his offence is proximate to the time his relationship with X commenced. He also has convictions for non-drug related offences from over 10 years ago, and the Tribunal did not require him to answer questions on non-drug related offences many years in the past, as they have little relevance to the environment in which X would live in the future if the cancellation of her visa is revoked.

85. X acknowledged having previous substance abuse problems and having psychotherapy as a result. As X has a history of drug use, X said she would discount him as being a protective factor, and the Tribunal concurs that the degree to which this relationship would act as a protective factor is too uncertain to place any weight on it.

86. In her statement of 12 October 2016, X stated she had a well-established life in Australia and a wonderful supportive network of friends. This predates her more serious offences and did not prove to be a factor that prevented her offending. Her supportive network of friends has not prevented her drug use and criminal enterprise in the past. Her friend X said during the worst period of X offending she had a more distant relationship with her. X said she appeared reserved in this period. X also provided statements from other friends expressing their support for her and attesting to her character. The Tribunal accepts she has a close and supportive group of friends who are concerned for her wellbeing and would assist her if released into the community.

87. X relies on a job offer from a company that performs remedial work on buildings.[19] This is a start-up company jointly owned by the husband and cousin of her friend, X. It employs the two directors and X, who works as the office manager, and is run from X home. The security of employment was not as certain as it first appeared, with X stating that X would

[19] G30/203.

initially be offered full time work as a graphic designer, but the position would then devolve into a lower paid position as an office assistant to X. As a result, while it is an offer of employment and a factor that leads to a reduced risk of recidivism, this will not provide a certain financial basis for X in the community.

88. X has stated she needed the funds from her criminal activity for her own illicit substance use and denied it was for further financial gain.[20] She has also said it was to pay X drug debts.[21] This was not accepted by the sentencing judge, who found the quantities of cash involved unlikely to be explained by a drug debt.

89. X has completed the "In charge of My Money" program while in prison, however at hearing was vague about an $80,000 credit card debt.[22] She said she had seen a legal aid lawyer and assumed they had contacted the bank to place some hold on the payment for this debt. She could not say what this debt was currently. She said she had borrowed money to pay for her legal representation. Her current partner X is unemployed and renting a room for accommodation, and they would need to find accommodation if she is released from immigration detention. She says she does not have the money to even transport her computer equipment to New Zealand to re-establish herself in her career if she is removed from Australia. In these circumstances, she will be under considerable financial pressure, and this is a factor which goes to the likelihood of her engaging in criminal or other serious conduct in the future.

90. X submits that one of the aims of sentencing is to act as a deterrent, and this has been the case for her. She also submits that the prospect of her visa being cancelled if she again offends also acts as a deterrent to further offending. The Tribunal accepts these factors act as a deterrent.

91. To her credit X has taken the opportunity for rehabilitation while she has been in prison and has abstained from drug use. She was viewed as a model prisoner and according to the prison Chaplin has supported and was respected by other prisoners and has benefitted from the trauma counselling she has received. She has been received into the

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[20] TB3/110.
[21] TB3/118.
[22] TB3/121.

Catholic Church and has been undertaking treatment and counselling for her mental health. She has the support of her friends and X and well as an offer of a job if released from immigration detention. If the cancellation of her visa is revoked, she will live in Australia with the spectre of cancellation of her visa for any further criminal activity and having been to prison, which will act as a deterrent for her.

92. Nevertheless, she requires ongoing rehabilitation for her drug use and counselling for trauma as well as treatment for her mental health. She will be subject to financial pressure on release. The aspects of her criminal offending that relate to participating in a criminal group for profit have not been addressed to a substantial degree. The Tribunal considers there remains a likelihood of further criminal offending or serious conduct, which has reduced due to her efforts for rehabilitation, but is nonetheless real.

93. The nature of the risk to the Australian community must be considered cumulatively with the likelihood of reoffending. In this case the nature of the harm to the Australian community is significant, given the scale of the offending. While I do not accept that the likelihood of her committing further offences or engaging in other serious conduct is as low as predicted by X, even if relatively low likelihood of reoffending is accepted, cumulatively this factor weighs against X and in favour of not revoking the cancellation of the visa.

The best interests of minor children in Australia

94. Paragraph 13.2 of the Direction sets out the Primary Consideration of the best interests of the child.

95. X cites her involvement with X daughter. X has had limited contact with X daughter who was three months old when X was imprisoned. X said she has a photograph of X near her bed and she talks to her daughter about X. Both X and X said they wanted X to have a relationship with X daughter; however at least to X, this was dependent on X abstaining from drugs.

96. X daughter is young, and while there is a potential for X to have a long term positive, albeit non-parental role, this is predicated on her abstaining from drugs.

97. X does not currently play a parental role in relation to X daughter and has had little contact with her. Given the limited affect her absence would have and her ability to develop a

relationship in other ways, for example by telephone or electronic communication, the Tribunal places little weight on this factor in favour of revoking cancellation of the visa.

Expectations of the Australian Community

98. Paragraph 13.3(1) of the sets out the third of the Primary Considerations and provides:

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the mandatory visa cancellation of such a person. Non-revocation 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 hold a visa. Decision-makers should have due regard to the Government's views in this respect.*

99. The equivalent provision in relation to revoking the mandatory cancellation of a visa has been considered by the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185. Justice Charlesworth at [67] and [68] clarifies this provision as meaning that 'it is not for the decision maker to make his or her own assessment of the community expectations' and that this provision 'concerns what the government has deemed the community's expectation to be'. Justice Stewart agrees that the effect of this provision is to deem what community expectations are, and that it is not for the decision maker to decide what community expectations are.

100. X has been convicted of several offences, and this consideration weighs in favour of not revoking the cancellation of the visa, as it is intended to do. In deciding what weight to give to this factor, I have taken into account the seventeen years X has been in Australia, and her employment history reflecting a positive contribution to the Australian community.

101. In the circumstances of this case, the scale of the offences and the organisation involved in committing the offences result in this factor weighing heavily against X and in favour of not revoking the cancellation of her visa.

THE OTHER CONSIDERATIONS

102. In deciding whether to revoke the mandatory cancellation of a visa, Other Considerations must be taken into account where relevant. These considerations, as set out in paragraph 14(1) of the Direction, include (but are not limited to):

(1) International non-refoulement obligations;

(2) Strength, nature and duration of ties;

(3) Impact on Australian business interests;

(4) Impact on victims; and

(5) Extent of impediments if removed.

International non-refoulement obligations

103. X acknowledges non-refoulement obligations do not apply to her circumstances.

The strength, nature and duration of ties to Australia

104. Paragraph 14.2(1) of the Direction provides that decision-makers must have regard to the length of time the non-citizen has been in Australia with less weight given where the person started offending shortly after arriving in Australia, and more weight given to the time spent positively contributing to Australian society.

105. The nature of the ties to Australia looks to the strength, duration and nature of family or social links with Australian citizens, permanent residents or people who have an indefinite right to live in Australia and immediate family in Australia.

106. X arrived in Australia on 20 September 2003 when she was 23 years of age. She was charged with possession of a prohibited substance in 2015, over 12 years after she arrived. She has acknowledged a history of drug use from the age of 18 and describes herself as a high functioning drug user, as she continued to work in her field of graphic design. She has contributed to the Australian community through her work.

107. In terms of impact on other members of the community, X has provided statements from friends and her partner in support of revoking the cancellation of her visa. Her friends X, X and X as well as her partner X gave evidence that they would feel sad if she were to leave Australia and hold concerns for her welfare in New Zealand.

108. X has been in a relationship with X for approximately 3 years and has spent two of these in prison. This relationship commenced when she was on bail, and they lived together for approximately a year. She has been in prison and immigration detention since 31 July

2018 and X has visited her in prison. He has been unable to visit her in immigration detention due to COVID-19 restrictions.

109. X said he would be unable to relocate with X to New Zealand as he provides care to his elderly parents. He described this care as helping his mother get his father to medical appointments by getting him down the stairs and into the car, and tasks around the house such as gardening and housework. His sister lives close to his parents but is of slight build and does not have the physical strength of X.

110. X says she will lose the opportunity to become a mother if she is separated from X as he does not intend to relocate to New Zealand. She has undertaken a parenting course while in prison. X is currently unemployed and renting a room in a property. His ties to Australia are his care of his parents. He will have a difficult choice to make if X is removed from Australia, however it would be possible for him to relocate.

111. The Tribunal accepts X friends and X will be affected and feel sad if X is removed from Australia. It also accepts there will be an impact on X desire to become a mother. X is able to maintain her contact with her friends but will be unable to see them in person unless they visit New Zealand.

112. X family are all in New Zealand.

113. While X has long history of drug use, she has also contributed to the Australian community through her employment and was not charged with any offences for a lengthy period after she arrived in Australia. She has ties in Australia with friends, her partner and a job offer. Overall, this weighs somewhat in favour of revoking the cancellation of her visa.

Impact on Australian business interests

114. Paragraph 14.3(1) of the Direction requires a consideration of the impact on Australian business interest in the context that an employment link is only given weight where non-revocation would significantly compromise the delivery of a major project or delivery if an important service in Australia. X has provided a letter stating she would be employed post-release, however as this is not for a major project or important service, this is not given any weight.

Impact on victims

115. Paragraph 14.4(1) of the Direction provides that decision-makers must have regard to the impact a decision not to the revoke the cancellation would have on members of the community, including victims or their family members.

116. As no information is available on the impact on victims or their families, this has not been considered further.

Extent of impediments if removed

117. Paragraph 14.5(1) of the Direction provides that decision-makers must have regard to the extent of any impediments faced if removed from Australia to their home country in terms of maintaining basic living standards, taking into account the person's age and health, language or cultural barriers, and any social medical and/or economic support available to them in that country.

118. At a superficial level, X could access support from her parents, and would have access to health, social security and other services available to New Zealand citizens. She does not have language or cultural barriers to returning. She is tertiary educated and experienced as a graphic designer and has the skills to obtain work.

119. X identifies other factors that may be an impediments to her return, being her history of experiencing domestic violence, her relationship with her parents, unemployment in New Zealand, the COVID-19 pandemic, access to trauma counselling and her ability to obtain work without her equipment.

120. X states she left New Zealand to escape domestic violence. This is now 17 years ago and in the absence of any evidence that her ex-partner has sought to contact her or her family, I do not accept she would continue to be at risk from this relationship if she returns to New Zealand.

121. X claims her mental health will deteriorate as she would return to the location where she suffered domestic violence. While I accept that returning to New Zealand would result in stress and a potential deterioration in her mental health, I do not accept this would be to the extent that she would be unable to function or unable to seek work to support herself.

Despite her experiences of trauma in Australia and escalating drug use, X has maintained work at some level in Sydney.

122. Her parents, brother and her brother's three children are in New Zealand. She has now lost contact with her brother and his children and says he has disowned her due to her offending.

123. The nature of X relationship with her parents is vague. In her pre-sentencing statement of 12 October 2016, she states that she comes from a loving home and that leaving her parents and brother was hard. She states she is very close to her mother. Since she arrived in Australia, X has returned to New Zealand to visit her parents, however, has not done so since 2012. She now says she has a distant relationship with her parents, a view which was supported by her friends. X acknowledged her parents would provide her with some support if she were to return to New Zealand.

124. Her parents live some distance from Auckland, and it was implied her employment prospects would be poor from their location. While she states re-locating to Auckland would be difficult due to her experience of domestic violence, given the passage of time since she left I do not accept she would be at risk from her ex-partner or that she would be unable to relocate elsewhere in New Zealand because of these experiences.

125. I have taken into account an article from ABC news provided by X to the Tribunal about unemployment in New Zealand, and specifically how superficially better unemployment rates hide reduced participation in the workforce. It predicts unemployment will rise following the end of the wage subsidy for coronavirus. However, at the least, if she returned to New Zealand, she will have some support from her parents. She will also have access to New Zealand social security and housing system. X is tertiary educated and experienced in graphic design and has skills with which to obtain work if it is made available to her.

126. An article from the Sydney Morning Herald cites a likely increase in reported cases of COVID-19 in New Zealand. Given New Zealand has had fewer overall cases, and this has not occurred to the time of writing this decision, this does not point to difficulty re-establishing herself in New Zealand.

127. X has stated that if she is removed from Australia, she will lose the benefit of access to funding from Victim Support Services to continue her trauma counselling. While the funding from this service would be lost, there is no information before the Tribunal about the lack of services available to her in New Zealand. She has maintained her work history in Australia despite the trauma she has suffered and her drug use. She could seek employment in New Zealand without the need for the equipment necessary for self-employment or could potentially access government or welfare services to continue with her counselling. I do not consider this would prevent her re-establishing herself in New Zealand.

128. X said that she will not be able to afford to remove her computers and other equipment to work as a graphic designer to New Zealand and will not be able to convey her work. The Tribunal does not accept that she would not be able to transport her work electronically or that she would be deprived of the opportunity to gain work in New Zealand. If her equipment has been stored over the last two years while she has been in prison, it can remain stored until she had gathered the resources to have it transported to New Zealand.

129. X has been in Australia for a considerable period of time and will be separated from her friends and partner if removed from Australia. She states she will lose the possibility of becoming a parent. X has family in New Zealand and the skills with which to obtain work. Mental health services and welfare support are available in New Zealand.

130. Overall, X has some impediments to re-establishing herself in New Zealand, however these are not insurmountable, and this factor weighs slightly in favour of revoking the cancellation of her visa.

CONCLUSION

131. Two of the Primary Considerations; the protection of the community and the expectations of the community weigh against revoking the cancellation of X's visa, with the expectation of the community weighing heavily against revoking the cancellation of the visa.

132. The best interests of the child weigh slightly in favour of revoking the cancellation of her visa.

133. Of the Other Considerations, X ties to Australia and the impediments to her returning to New Zealand weigh slightly in favour of revoking the cancellation.

134. Primary Considerations are generally to be given greater weight than the Other Considerations, and the Tribunal sees no reason to depart from this in the circumstances of this case. As a result, the Tribal affirms the decision not to revoke the cancellation of X visa.

DECISION

135. the Tribunal affirms the decision not to revoke the cancellation of X visa

I certify that the preceding one hundred and thirty-five [135] paragraphs are a true copy of the reasons for the decision herein of Senior Member Millar.

.....[Sgnd].....
Administrative Assistant Legal

Dated 15 September 2020

Dates of hearing:	3 and 4 September 2020
Applicant's Representative:	**Dr J Donnelly of Counsel.**
Respondent's Representative:	**Mr K Eskerie, Sparke Helmore.**