Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2022/7191**
Re:	**XRZG**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Raif**
Date:	**22 November 2022**
Place:	**Sydney**

The decision under review, dated 31 August 2022, is affirmed.

....

Senior Member Raif

CATCHWORDS

MIGRATION – mandatory cancellation of visa – special category (subclass 200) temporary visa – where visa was cancelled under subsection 501(3A) because Applicant did not pass the character test – substantial criminal record – Ministerial Direction No. 90 – primary considerations – protection of the Australian community – seriousness of offending and future risk – family violence – best interests of minor children – expectations of Australian community – other considerations – extent of impediments if removed – links to the Australian community – decision under review affirmed.

LEGISLATION

Migration Act 1958 (Cth) ss 499, 501, 501CA

CASES

Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17

SECONDARY MATERIALS

Direction No. 90 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under section 501 and revocation of mandatory cancellation of a visa under section 501CA (15 April 2021)

REASONS FOR DECISION

Senior Member Raif

22 November 2022

1. This is an application for review of a decision of the delegate of the Minister for Immigration, Citizenship and Multicultural Affairs not to revoke the cancelation of a Class XB Refugee (Subclass 200) visa held by the Applicant.

2. The Applicant was born in Iraq in 1983. He first travelled to Australia in January 2005 as a holder of the Refugee visa. Between 2006 and 2020 the Applicant was convicted of multiple offences, described below. In February 2010 the applicant was warned that further

offending may affect his visa. In May 2011 the Applicant was advised that consideration is being given to the cancellation of his visa. In July 2011 a delegate of the Minister decided not to cancel the Applicant's visa under s. 501 and the Applicant was provided with a formal warning that his visa may be cancelled if he continues to offend.

3. The Applicant was convicted of additional offences following that time. In January 2021 his visa was mandatorily cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) (the **Act**) because it was determined that the Applicant had a substantial criminal record. The Applicant was invited, and made multiple representations about the revocation of the decision to cancel his visa. On 31 August 2022 a decision was made under subsection 501CA(4) not to revoke the mandatory cancellation decision. The Applicant is seeking review of that decision.

4. For the following reasons, the Tribunal has concluded that the decision not to revoke the cancellation of the Applicant's visa should be affirmed.

RELEVANT LAW

5. Subsection 501(3A) of the Act relevantly states:

> *The Minister must cancel a visa that has been granted to a person if:*
>
> *(a) the Minister is satisfied that the person does not pass the character test because of the operation of:*
>
> *(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or*
>
> *(ii) paragraph (6)(e) (sexually based offences involving a child); and*
>
> *(b) the person is serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.*

6. Subsection 501CA(3) provides that as soon as practicable after making a decision under subsection 501(3A) the Minister must, among other things, notify the person of the decision, provide particulars of relevant information and invite the person to make representations to the Minister, 'within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision'.

7. Subsection 501CA(4) allows for a revocation of a decision under subsection 501(3A) and relevantly states as follows:

The Minister may revoke the original decision if:

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

(b) the Minister is satisfied:

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

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

8. Subparagraph 501CA(4)(b)(ii) of the Act requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision. If the Tribunal is satisfied that the cancellation should be revoked following that evaluative exercise, the Tribunal must revoke the original visa cancellation decision.

9. The 'character test' is defined in section 501(6) of the Act. Relevantly, paragraph 501(6)(a) provides:

> *(6) For the purposes of this section, a person does not pass the **character test** if:*
>
> *(a) the person has a substantial criminal record (as defined by subsection (7)) …*

10. Paragraph 501(7)(c) relevantly provides that a person has a 'substantial criminal record' if the person has been sentenced to a term of imprisonment of 12 months or more.

11. On 15 April 2021 the Minister issued *Direction no. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**) under section 499 of the Act. Direction 90 is binding on the Tribunal in performing its functions, or exercising powers under section 501 of the Act.

12. Direction 90 sets out the principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to refuse to grant a visa or revoke mandatory cancellation decisions. The principle set out at clause 5.2(2) of Direction 90 states that:

> *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.*

13. The primary considerations which are set out in clause 8 of Part 2 of Direction 90 are:

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

b) Whether the conduct engaged in constituted family violence;

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

d) Expectations of the Australian community.

14. The other considerations, which are not exhaustive, are set out of clause 9 in Direction 90:

a) International non-refoulement obligations;

b) Extent of impediments if removed;

c) Impact on victims;

d) Links to the Australian community including:

- Strength, nature and duration of ties to Australia;
- Impact on Australian business interests.

15. Decision-makers should 'generally' give greater weight to primary considerations than other considerations.

16. In this case, it is not in dispute that the Applicant has made representations about the revocation of the cancellation of his visa. The requirements of paragraph 501CA(4)(a) are met. The issues before the Tribunal are:

(a) Does the Applicant pass the character test, as defined by section 501 and, if not,

(b) Is there another reason why the original decision should be revoked.

DOES THE APPLICANT PASS THE CHARACTER TEST?

17. The character test is defined in subsection 501(6) of the Act. Relevantly, paragraph 501(6)(a) states that a person does not pass the character test if the person has a substantial criminal record, as defined in subsection 501(7). Paragraph 501(7)(c) provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

18. Information before the Tribunal indicates that the Applicant has been convicted of the following offences:

Date	Offence	Sentence
24/03/06	- Use of vehicle not comply with standard: tyres, - fail to display L as required, - learner not accompanied by driver	Fined $125, Fined $175 Fined $65
06/11/06	- drive contrary to direction of traffic - drive on road while license suspended	Fined $100 Fined $1000 Disqualification 12 months
11/04/07	- drive while disqualified from holding a license	2 year bond and 2 year disqualification
03/04/08	- drive while disqualified from holding a license	6 months detention and 2 year disqualification
04/11/09	- driver use hand-held mobile when not permitted - driver not wear seatbelt properly adjusted / fastened	Fined $200 Fined $200
21/12/09	- Drive while disqualified from holding a license - Negligent driving and Class C M/v exceed speed	2 months imprisonment and disqualification for 2 years
12/02/10	Drive while disqualified from holding a license	4 months imprisonment and 2 year disqualification
24/03/11	- Driver state false name / address - Drive while disqualified from holding a license	12 months imprisonment
03/10/12	- Fail to appear in accordance with bail undertaking - Obtain prescription by false representation (2 counts) - Goods in personal custody suspected of being stolen	Fined $100 and $50
19/06/13	- Prohibited weapon in airside areas	Fine $100
16/10/13	- Possess implements to enter / drive conveyance - Take and drive conveyance without consent of owner - Drive while disqualified from holding a licence - Driver state false name / address - Use unsafe /unserviceable vehicle on road - Drive while disqualified from holding a license - Common assault - Steal from the person - Shoplifting value <= 2000 - Obtain / attempt to prescribed restricted substance	16 months imprisonment

	- Possess prohibited drug - Goods suspected stolen on premises (3 counts) - Unlawfully possess number plates	
01/08/14	- Possess implements to enter / drive conveyance - Take conveyance without consent of owner - Destroy / damage property <= 2000 - Drive while disqualified from holding a license - Common assault - Steal from the person - Shoplifting - Obtain / attempt to prescribed restricted substance (2 counts) - Possess prohibited drug - Good suspected stolen on premises (3 counts) - Possess forged prescription	18 months imprisonment
18/12/15	- Carriage service to menace / harass offend - Stalk / intimidate intend fear of physical harm (domestic)	2 year good behaviour bond
19/06/17	- Police pursuit -non stop – drive dangerously - Drive motor vehicle during disqualification period - Negligent driving - Class A vehicle displaying unauthorised number place - Take and drive conveyance without consent of owner - Possess prohibited drug	16 months and 2 years imprisonment and fines (reduced on appeal to aggregate of 2 years imprisonment)
04/10/17	- Dispose m/v part – theft	Imprisonment 13 months and 9 days
18/05/18	- Use carriage service to menace / harass / offend	2 months imprisonment
10/02/20	- Drive motor vehicle during disqualification period - Police pursuit – not stop – drive dangerously	18 months and 2 years imprisonment
09/12/20	- Police pursuit not stop drive dangerously - Drive motor vehicle during disqualification - Call up take and drive conveyance without consent	18 months and 2 years imprisonment

19. The Tribunal finds that the Applicant has been sentenced to a term of imprisonment of 12 months or more. The Tribunal finds that the Applicant has a substantial criminal record as defined in paragraph 501(7)(c) of the Act. As the Applicant has a substantial criminal record,

he does not pass the character test. The requirements of subparagraph 501CA(4)(b)(i) are not met.

IS THERE ANOTHER REASON WHY THE ORIGINAL DECISION SHOULD BE REVOKED?

20. In his evidence to the Tribunal the Applicant states, essentially, that the correct and preferable decision is to exercise the discretion in his favour and, in particular, that the primary considerations of protection and expectations of the community are outweighed by other considerations such as the best interests of children, the extent of impediments if removed and links to the Australian community, which can and should be given considerable weight in favour of the Applicant.

21. The Respondent submits that the Applicant's offending is serious and the risk to the community, if the Applicant was to reoffend, is very serious given his disregard for the Australian community. The Respondent submits that primary considerations 1, protection of the Australian community, and 4, expectations of the Australian community, weigh strongly against the Applicant and outweigh other considerations that weigh in his favour.

22. The Tribunal's considerations are set out below with regard to Direction 90.

Primary considerations

Protection of the Australian Community

23. Sub-clause 8.1 of Direction 90 provides as follows:

> ***8.1 Protection of the Australian community***
>
> *(1) When considering protection of the Australian community, decision-makers should keep in mind that the government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens*….
>
> *(2) Decision-makers should also give consideration to:*
>
> *a) the nature and seriousness of the non-citizen's conduct to date; and*
>
> *b) the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.*

24. In considering the nature and seriousness of the Applicant's conduct to date, the Tribunal has had regard to the information in the NSW Police Facts Sheets and sentencing remarks that are before the Tribunal, as well as the Applicant's own evidence.

25. The Tribunal has considered the sentencing remarks by Magistrate Tsavdaridis on 9 December 2020 in relation to the Applicant's offending that took place on 30 May 2019 and in September 2020. The Magistrate refers to the Applicant as someone who is said to have a long history of illicit substance abuse including ice and cannabis and is reported to have been aware of the potential risks to the community as an unlicensed driver but who justified his need to drive.

26. The Magistrate describes one of his offences as follows. The Applicant was being pursued by police through the streets of Cabramatta. He crossed onto the wrong side of the road and accelerated, heavily achieving speeds of 90 to 100 km/h in a 50 km/h zone and 80-90 km/h in a 50 km/h zone. He accelerated through roundabouts and placed road users at risk of injury and risked potential damage to property. It is stated that he gave an incorrect name to police.

27. The Tribunal has considered the comments made by Judge Sides in the District Court of NSW in July 2017 in relation to the offences committed in January 2017. It is stated that the Applicant was observed driving a black Lexus which he did not have permission to drive. He noticed an unmarked police vehicle, went through a roundabout, and collided with a vehicle. He went on driving above the speed limit and continued to drive after the police activated their warning devices. It is stated that when the Applicant was arrested, there was 6.9 grams of cannabis, and the vehicle was stolen. The Applicant admitted he was disqualified and in possession of drugs but denied any knowledge that the car was stolen. The Judge refers to the Applicant coming to Australia as a refugee, his mother's mental health issues and his previous offending. It is stated that the first custodial sentence by way of periodic detention occurred in 2008 and the Applicant had the benefit of a Drug Court program. He was also assessed to participate in the MERIT program.

28. The Tribunal has had regard to the NSW Police Facts Sheet in relation to the April 2017 offences. It is recorded that while stationary at an intersection, the police observed the Applicant in a car and positioned their vehicle behind the Applicant's. The police activated warning signals and sirens and the Applicant had accelerated with the police initiating pursuit. The Applicant drove at speeds well above the prescribed speed limits and the police terminated the pursuit when it was deemed the Applicant's actions were dangerous. The registered owner of the vehicle stated that he had lent the car to an employee 'C' (who had the same address and phone number as the Applicant). When the police spoke to the

Applicant on the phone, he denied being the driver of the car, and attempted to evade arrest by hiding at this partner's apartment.

29. In relation to the October 2015 offences, the police Facts Sheet indicates that these related to the Applicant's former partner of 7 months. (The parties seem to agree that there was no domestic relationship between them at the time.) It is stated that the Applicant had contacted the victim on her mobile phone several times and left messages using threats and offensive language. When interviewed by the police, the Applicant agreed that he left the voicemail but denied that he intended to scare the victim. He claimed he was angry.

30. The Tribunal has had regard to the sentencing remarks of Judge Barnett made in August 2014. These indicate that the Applicant engaged in Drug Court Program which was terminated by the Court on 1 May 2014 after the Applicant failed to attend drug tests and failed to engage in the program. Barnett J describes the circumstances of assault and larceny. It is stated that the Applicant entered a BP service station and took two cans of energy drink. The victim approached him near the car and asked him to put the drinks back. It is stated that the Applicant swung his fist towards the victim's face. He also told the victim to 'f*** off from his car'. When interviewed, the Applicant stated that he could not remember the incidents because of his heavy drug use at the time.

31. The Judge notes that the Applicant has had very little engagement in the Drug Court Program and while some of his tests were clean, with respect to other tests, he either did not attend or failed to provide or these showed the results of methylamphetamine use. That is, the Applicant had used methylamphetamine throughout the time he was with the Drug Court but would not admit to it. The Judge refers to another instance of dishonesty when the Applicant claimed he could not attend a drug test due to having a procedure in hospital but the hospital advised the court that it had no record of him. The Judge refers to this being a 'sad case' where the Applicant did not engage and was not readily available to his parole officer and even though he did attend counselling, there was very limited engagement. The Judge notes that the Applicant was not prepared to get into this program because he was too interested in drug use.

32. There are before the Tribunal the sentencing remarks of Senior Judge Dive of the Drug Court in relation to the April 2013 offences. The Judge describes the incident at the BP station, driving while disqualified and using an unauthorised number plate.

33. The Judge notes that in February 2013 the Applicant attended a chemist at Merrylands to obtain oxycontin. The script was seen to be suspicious and the police were called. The doctor stated that he had never issued the script for oxycontin.

34. In relation to the shoplifting offence, it is stated that the Applicant had attended the Myer store with others and took some items of clothing. The loss prevention officers were suspicious and placed the Applicant under arrest. He acknowledged that he had stolen a number of items of clothing to the value of $349.

35. In relation to the April 2013 offences the Judge notes that police responded to a report of people sleeping in a car and found the Applicant there. The search of the car revealed two car stereos and a mag light, which was suspected of being stolen or unlawfully obtained. It is noted that the car had the wrong number plates on it and at the time the Applicant admitted that the oxycontin tablets were his and that he did not have a script for those.

36. A few days later on 13 April witnesses observed the Applicant banging against a steering column of the car and when the police arrived, the Applicant was found to have a multi-tool on his key ring. The police found damage to the ignition barrel. The owner told the police his car was locked and secured.

37. Other offences are described by the Judge. It is stated that the police observed a car being driven with the vision heavily obscured by a shattered window. When the car was stopped, the Applicant provided false information about his name, but he was nonetheless identified by the police. It is noted that the Applicant was disqualified at the time. The Judge notes that the offending was aggravated by the fact that it was committed while the Applicant was on bail.

38. The Tribunal considers the Applicant's offending to be significant, given its repeated nature. This is particularly so in relation to the driving offences which occurred frequently and over many years. It appears that the disqualification from driving has had no effect on the Applicant whatsoever and he chose to ignore it, repeatedly, rather than comply with the law.

39. The Tribunal also notes the conviction for common assault. The circumstances were such that the Applicant had committed theft from the shop and when confronted by the employee, the Applicant chose to raise his fist towards that person rather than return the goods.

40. Given the repeated nature of the offending, the fact that the offences occurred over the lengthy period of time, and the potential harm that arises from driving offences (some of these included speeding and police pursuits), conduct that is influenced by drugs and the other offences, including an offence against a woman, the Tribunal has formed the view that the offending was serious. The Applicant concedes that his offending was serious.

41. The Tribunal has considered the risk to the Australian community, should the Applicant commit further offences or engage in other serious conduct.

42. When making the revocation request, the Applicant states that while his criminal history is not minimal, there is a pattern to his offending which indicates his struggles with drug use and mental health, and he notes that most of his offences are driving related or crimes of dishonesty and theft. The Applicant notes that there were a minimal number of offences where a victim was threatened or harmed and many of the offences were dealt with in the Parramatta Drug Court, indicating that he was 'in the throws [sic] of serious drug addiction'.

43. The Tribunal is mindful, however, that there were at least two offences involving threats of harm against a person, one relating to the BP incident and the other when the Applicant made significant threats on the phone to his former girlfriend. The fact that no one was physically harmed does not diminish the possibility of harm, nor the fact that fear and apprehension may have been caused by the Applicant's conduct. The Tribunal also views the Applicant's driving offences very seriously. As noted above, some of the driving offences involved police chasing the Applicant and the Applicant driving at very high speeds, potentially endangering others. It would seem that it was only a matter of luck that no physical harm was done to others in such circumstances and the potential for harm arising from such conduct is high.

44. The Applicant states that his offending increased in 2010 when his addiction to ice (methylamphetamine) was worsening and when he was dealing with the return of his father, whom he had believed to be dead. The Applicant states that his criminal history results from a long history of untreated mental illness and he refers to the report of Mr Albassit (which is addressed more fully below) who refers to symptoms of PTSD and substance dependence. The Applicant's representative submits that the Applicant has expressed "deep sorrow and remorse" for his actions and has commenced rehabilitation programs such as an Opioid Addiction Program and the Safe Drivers course. The Applicant submits that since his

incarceration, he has been given the opportunity to 'get clean' and has been provided with a comprehensive treatment plan to address his mental health and drug addiction program. The Applicant claims he feels 'incredible guilty from his past criminal history and receiving the Notice of Cancellation has brought home the seriousness of offending and he has committed to rehabilitating himself'.

45. The Applicant submits (by reference to the psychological report of Mr Albassit) that he been exhibiting symptoms of PTSD but had never been treated. He claims he began using drugs to escape the mental difficulties and developed a substance dependence problem. The Applicant states that he is dedicated to rehabilitation, hopes to do a course at TAFE, has secured employment and hopes to reconnect with his biological children and to marry his partner. (The Applicant has now expressed a desire to marry another person.) The Applicant submits that these plans, the comprehensive treatment plan, the support network of the family, secure employment and the possibility that he may never see his children again all mitigate the risk of reoffending. (Notably during the hearing, when asked if he was familiar with the treatment plan, the Applicant told the Tribunal that he was not.)

46. In oral evidence the Applicant told the Tribunal that the chances of his reoffending are 'zero' because his licence would soon be reinstated and he would not drive unlicensed. However, the Tribunal is mindful that that in the past the Applicant lost his licence on multiple occasions and continued to drive. The fact that his licence will be reinstated does not preclude, in the Tribunal's view, the possibility of reoffending. The Tribunal also notes that driving offences are not the only offences for which the Applicant was convicted.

47. He told the Tribunal that he started using drugs when he was with a 'wrong girl' but he has not used drugs for over two years, despite being offered drugs in jail and in immigration detention. The Applicant states that being in jail has been a 'wake up call' for him and he understands that what he did is wrong. The Tribunal does not accept that evidence. The Tribunal is mindful that the Applicant had also spent time in jail in the previous years, on more than one occasion, and his jail time did not appear to have had the same effect on the Applicant as he continued to offend each time he was released from jail. The Tribunal does not consider the possibility of further jail time would act as a significant deterrent preventing the Applicant from reoffending. As for the Applicant being now being older, the Tribunal notes that the most recent offending occurred less than three years ago and the Tribunal

does not consider that such a short period of time would be significant in rendering the Applicant more mature.

48. All of the Applicant's siblings who gave oral evidence to the Tribunal (and their partners) and his parents expressed the view that the Applicant has now seen the error of his ways and would not reoffend. The Tribunal acknowledges that they may genuinely hold those views, however the Tribunal finds such observations unpersuasive. The Applicant has in the past made similar undertakings but continued to offend. The Tribunal does not accept that the Applicant is now more mature and more aware of the consequences of his conduct because the Tribunal has formed the view that the Applicant did appreciate such consequences in the past. The Tribunal is also somewhat concerned that despite the claimed closeness of their relationship, the Applicant's siblings were unaware of the Applicant's multiple convictions (they all referred to driving offences but had little knowledge of the others) and some did not know about his drug use. In circumstances where family members are not fully cognisant of the Applicant's past offending, the Tribunal is not convinced that their assessment of the Applicant's rehabilitation is necessarily accurate.

49. The Tribunal considers it significant that the Applicant had previously been given the opportunity to engage in the drug rehabilitation program by the Drug Court. As noted above, the judge found that the Applicant had failed to meaningfully engage in the program and his participation had been minimal before he had disengaged from the program. The Applicant must have recognised, through his involvement in the criminal justice system, that he had a drug problem which was affecting his behaviour. Yet, the Applicant had done nothing to change it, nor to accept help that was offered to him. In these circumstances, the Applicant's claim to the delegate that since his incarceration he has been given the opportunity get clean to be not entirely accurate. He had been given that opportunity before, on more than one occasion, and chose not to take it and not to engage in the rehabilitation programs that were offered to him.

50. The Applicant told the Tribunal that he was young at the time and did not know what he was doing but he is more mature now and has a better understanding and he is now more positive. He also states that he was subject to bad influences (including from his former partners) which are not there now. As noted above, the Tribunal finds that evidence unpersuasive. The Tribunal does not accept that the relatively short period of time that has since the more recent offending changed the Applicant's perception of his behaviour. As for

bad influences, the Applicant has not presented persuasive evidence that he will avoid negative influences in the future.

51. The Applicant states that everything is good for him now, he has an offer of employment, his license would be reinstated and he has a relationship, wants to get married and have children and has the support of his family. The Tribunal is mindful that during the past offending the Applicant also had the opportunity to maintain employment and the support of his family and he had past relationships. None of these factors acted to prevent his reoffending. That is, despite the presence of the same factors that the Applicant now claims would mitigate the risk of reoffending, the Applicant continued to offend and has committed a large number of offences over the years.

52. Neither does the Tribunal accept the Applicant's evidence that receiving the Notice of Cancellation has 'brought home the seriousness of his offending'. It is highly significant in the Tribunal's view that the Applicant was previously warned of the possibility of his visa being cancelled if he continued to reoffend. He had been issued with two formal warnings in 2010 – 2011. It cannot be said, in these circumstances, that it was only after receiving the cancellation notice that the Applicant recognised the seriousness of his offending. In the Tribunal's view, he would have recognised its seriousness when sentenced on multiple occasions, particularly when receiving custodial sentences, and he would have recognised the potential for the visa cancellation and removal from Australia (and removal from his family and others in Australia) as a consequence of his conduct when the earlier warnings were issued, and since that time.

53. In these circumstances, the Applicant's present assurances that he has now reformed and understands the seriousness of his conduct and will not reoffend are, in the Tribunal's view, unpersuasive. The Tribunal finds the Applicant's comments opportunistic.

54. The Tribunal has had regard to the report prepared by Mr Sam Albassit, a psychologist, dated 18 February 2021. It indicates that Mr Albassit reviewed a number of documents relating to the Applicant's convictions and conducted a telephone assessment with the Applicant in February 2021 (that is, when the Applicant was preparing a submission to the delegate concerning the cancellation of his visa) and the interview lasted for approximately 1.5 hours. The Tribunal has some concerns with the veracity and the probative value of any evidence supplied by the Applicant for the purpose of the visa process because the Tribunal

considers such evidence to be self-serving. It is also difficult to see, with the greatest respect, how a thorough assessment of the Applicant's circumstances and a diagnosis of his condition could have been completed as a result of a 1.5 hour telephone interview.

55. Mr Albassit states, in part, that the Applicant began an intimate relationship in 2008 and his partner was using drugs. He began using drugs with her, initially using cannabis daily and within a few years he was using ice. It is stated that the Applicant reported the use of drugs helped him suppress his emotions and help deal with triggers. It is stated that the Applicant began to offend and his substance dependence worsened. He was referred to the Drug Court in 2014 and spent a year in the program and was abstinent for about a year. (The Tribunal is mindful that this contradicts the comments of Barnett J, set out above, which indicate that the Applicant had minimal engagement in the drug program, did not submit or pass the drug tests as required and disengaged before the program was completed.)

56. Mr Albassit states that the Applicant returned to using drugs. He had participated in counselling in 2017 for about five weeks before he ceased participating. Mr Albassit refers to the Applicant reporting that the trauma associated with the circumstances surrounding his father's incarceration, his own incarceration in Lebanon, his failed relationship and being ostracised from his children, led to years of depression and poor self-worth. The Applicant reported that he suffered from suicidal ideation and numbed emotional pain with continued illicit substance use. As noted above, the Tribunal gives the Applicant's evidence very limited weight because it considers such evidence (in the context of his visa cancellation) to be self-serving.

57. Mr Albassit refers to conducting a Depression Anxiety Stress Scale (DASS) questionnaire which determined the symptomatology presented to be consistent with dual diagnoses of PTSD and Substance dependence. The Tribunal is mindful that DASS is a self-reporting questionnaire and, for the reasons set out above, the Tribunal does not consider the Applicant's self-reported symptoms, in the particular circumstances of this case, to be accurate. Mr Albassit states that the Applicant has been exhibiting symptomatology of PTSD for about 20 years and of substance dependence for about 12 years. It is stated that due to the trauma experienced in childhood, teens and adulthood, the Applicant had developed a maladaptive pattern of substance use.

58. Mr Albassit has expressed an opinion that there is a direct and significant correlation between the Applicant's offending behaviour and his ongoing chronic psychiatric/psychological condition. Mr Albassit refers to the various events, stating that the Applicant began to self-medicate through substance use and, during his offending, was under the influence of illicit drugs which had significantly impaired his judgment. It is stated that the Applicant acknowledged his behaviour was wrong, was 'appalled' by his actions and expressed regret and remorse and Mr Albassit states that the Applicant's comments and attitude towards his offending behaviour reflected a person who is aware of his behaviour, has taken full responsibility for his actions and wanted to make changes and it is stated that the Applicant had demonstrated an insight into the relationship between the illicit drug use and offending behaviour.

59. Again, the Tribunal considers that evidence somewhat problematic because the Applicant would have expressed remorse for his offending and an undertaking not to reoffend in the past. For example, his mother's oral evidence to the Tribunal is that the Applicant did express the same views during his past convictions and incarcerations. It may be that the Applicant considers the expression of remorse and an undertaking not to reoffend as helpful to him during sentencing and, in this instance, to reinstate his visa. Despite expressing the same sentiments in the past, the Applicant continued to reoffend at the same frequency.

60. Significantly, in his report Mr Albassit states that the Applicant has not received any psychiatric and psychological treatment of any significance that would have addressed his mental health conditions and has not received consistent psychological therapy, nor pharmacotherapy treatment to treat his condition. In his submission to the delegate dated 3 March 2022 the Applicant confirms, through his representative, that his criminal history supports Mr Albassit's diagnosis and reflects the behaviour of an individual with serious, untreated drug and mental health condition. Importantly, the Applicant states that while in detention, he has not been able to undergo the serious treatment he requires (but was able to 'get clean'). The Applicant's oral evidence to the Tribunal is that he undertook some programs while in detention but in terms of mental health treatment, he had only recently made arrangements to see a psychologist and is yet to see one. That is, while it is stated that the Applicant's conditions remain untreated, and given the claimed correlation between his condition and the offending behaviour, the conclusion must be drawn that the Applicant's offending behaviour is likely to continue if he is released into the community, at least initially and until treatment is received.

61. The Applicant's evidence to the Tribunal is that he had contact with Mr Albassit initially when the report was provided and once he moved to VIDC to inform him of his move, and once the second report was written. That is, he had two counselling sessions at the time of (and it seems for the purpose of) the reports being written. The Applicant told the Tribunal that he had not engaged in counselling because he thought he had to be out of detention. This seems an odd statement, given his evidence that his consultation with Mr Albassit was effective and resulted in the diagnosis. The Tribunal is not satisfied there was any reason the Applicant could not, or that he was unable to engage with Mr Albassit to seek treatment for PTSD, which he submits was, at least in part, a cause for his addiction. The Applicant told the Tribunal that he has spoken to a counsellor while in detention, but his evidence is that he has done so on three occasions only. The Tribunal is not satisfied that three counselling sessions are sufficient to address the Applicant's mental health issues, given the information in Mr Albassit report. The Tribunal has formed the view that the Applicant has not actively sought help for his stated mental health issues and PTSD and the Tribunal is not satisfied the Applicant has a genuine interest in doing so.

62. Mr Albassit states in his report that it typically takes up to 24 months of intensive therapy to treat PTSD and to achieve optimal results and it is stated that due to the nature and severity of his substance dependence, the Applicant has not been able to participate in treatment consistently. Mr Albassit expressed an opinion that abstinence from the use of substances will create greater compliance with treatment for the symptomology of PTSD and that ongoing and intensive psychiatric and psychological therapy will greatly improve the Applicant's ability to make sound judgments, educate him to strategies with decision-making and impulse control. It is stated that a substantial part of the Applicant's presenting issue is the inability to control impulses and to identify triggers before they become problematic. However, there is little evidence before the Tribunal to indicate that to date, the Applicant did engage intensive psychiatric and psychological therapy to which Mr Albassit refers. The Applicant has not completed the 24 months of intensive therapy to treat the symptomology of PTSD. The Applicant told the Tribunal that he had completed some counselling while in jail, as well as undertaking driving courses and receiving drug injections to treat his addiction, but he concedes that he has not undertaken any treatment for PTSD and his involvement in counselling while in detention has not been extensive. The Applicant has not completed the treatment recommended by Mr Albassit and the evidence in the psychologist's report indicates that in the absence of such treatment, the Applicant has difficulty making sound judgements and is unable to control impulses and identify triggers

before they become problematic. The Tribunal is not satisfied on the evidence before it that the Applicant has gained the skills to deal with the issues identified by Mr Albassit (whether or not he returns to using drugs).

63. The Applicant's evidence is that "everything is good with him now" and he understands what is at stake, that he may lose his family and the possibility of getting married and having children. He states that being in the detention centre brought it home for him that he could be returned to Iraq and lose everything. As noted above, the Tribunal does not accept that evidence, given that the Applicant had been given a Notice more than ten years ago that his visa may be cancelled and that he could return to Iraq, because he had been given multiple warnings when sentenced for the multiple offences and because he did spend time in jail in the past.

64. The Applicant's evidence to the Tribunal is that he had completed some drug and alcohol courses previously, but he concedes that he had reoffended after having completed these courses. He also concedes in oral evidence that he has not completed sufficient drug and alcohol courses to be effective in managing his substance dependence.

65. Mr Albassit states that based on an 'extensive assessment conducted on [the Applicant] (as noted above, the Tribunal does not consider a 1.5 hour telephone interview to constitute an 'extensive' assessment), the likelihood for further reckless and irrational behaviours is minimal *'should the Applicant participate in long term psychiatric and psychological treatment'* (emphasis added). As noted above, there is little evidence that the Applicant has participated in, or completed adequate treatment and while the Tribunal acknowledges that there is in place a treatment plan with respect to the Applicant, his participation in it and his completion of it cannot be assumed, particularly given the Applicant's past lack of involvement with the Court Drug Program.

66. The Applicant states that the cancellation of his visa has been a 'wake up call' for him and that he is fearful of returning to Iraq. The Tribunal does not accept that evidence because, as noted elsewhere, the Applicant did receive a warning in the past that his offending conduct may lead to the cancellation of the visa and the possibility that he might have to leave Australia. The Applicant had also spent time in jail prior to the most recent offending. The Tribunal does not accept that the cancellation of the visa now had acted as a 'wake up

call' for the Applicant and would act as a deterrent for future reoffending when it has had no effect on his conduct in the past.

67. The Applicant told the Tribunal that if he is released from detention, he would seek treatment for his mental health and return to his family who are very supportive of him. The Tribunal acknowledges that evidence but is also mindful that the Applicant had not done so before. The Tribunal is concerned that the Applicant's present undertakings are merely an attempt to state what he believes would be beneficial to his case.

68. In his evidence to the Tribunal the Applicant claims there are a number of factors indicating that he is not an unacceptable risk to the Australian community but acknowledges that there remains a risk that he would reoffend, given the past criminal history. These include a sustained period when the Applicant was not part of the community, including a period in immigration detention which he had not experienced before, which he considers to be 'a massive wake-up call'. He submits that being away from his family has given him time to think about his past and where he wants to be in the future. As explained earlier in these reasons, the Tribunal does not accept that evidence, given the Applicant's past periods of incarceration which failed to act as a deterrent from reoffending. The Applicant submits that there is also some evidence of sustained remission from drugs with the assistance of drug injections. The Tribunal accepts this is so but is mindful that the ongoing involvement in the drug substitution program in the community would require greater will-power and a strong desire to engage. Given the Applicant's past failure to engage, the Tribunal cannot be satisfied that on this occasion, the Applicant will continue to engage with the program if he is in the community.

69. The Applicant submits that there is strong family support and the support network in the community will help him to stay away from offending. Noting that such support was available in the past and did not prevent offending, the Tribunal does not accept that this is so. The Applicant refers to his relationship with his current partner. He states that one of the factors leading to his past drug use was the influence of his partner who was also taking drugs and this is no longer an issue as his present partner does not take drugs. The Tribunal is mindful that the Applicant's relationship with his former partner ended long ago, with the Applicant continuing to use drugs.

70. The Applicant refers to his ongoing rehabilitation and his intention to engage in further treatment but admits that his rehabilitation is not complete and is a 'work in progress'. The Applicant also submits that his licence would be reinstated in February 2023 and he had undertaken not to drive without a licence. Given the frequency of the Applicant's driving offences in the past, and the fact that his licence was suspended on multiple occasions, the Tribunal does not find that undertaking very persuasive.

71. In his March 2022 submission to the delegate the Applicant acknowledges that he had previously received a warning but states that he had significant mental health problems and at the time he signed the acknowledgement, he was 'in the throws' of significant addiction to ice and cannabis, as well as PTSD and was unable to understand the consequences of his offending or the significance of his actions and is unlikely to have understood the provisions of s. 501 of the Act (which is consistent with the statement by Mr Albassit). The Tribunal finds that evidence unpersuasive. The Applicant had been given a warning and had signed an acknowledgement. He had extensive family support who could have assisted him in recognising what these documents meant. He had extensive dealings with the criminal justice system and had adequate appreciation of what was happening to be able to enter pleas, lodge appeals and otherwise deal with his matters reasonably effectively. The Tribunal does not accept that, despite the claimed mental health conditions, the Applicant lacked an understanding (after having been given the formal warning and having engaged with the Department at that time) that his continuing offending may result in the cancellation of his visa. The basis for Mr Albassit's findings that the Applicant did not understand the implications of the initial warning is unclear, given that Mr Albassit's first contact with the Applicant occurred over ten years later and given the fairly limited contact he has had with the Applicant.

72. Mr Albassit states in his first report, prepared on 15 February 2021, that the Applicant poses a minimal risk to the public safety if he is released to receive treatment and he refers to the Applicant's motivation to engage in treatment, noting that he has been abstinent from the use of illicit substances since September 2020. As noted above, Mr Albassit's assessment seems to be based on the Applicant's engagement in treatment and the Tribunal cannot be completely assured that the Applicant will participate in the full treatment in the future, should he be released into the community. In particular, and importantly, the Tribunal is not satisfied that the Applicant is motivated to engage in treatment, given his failure to engage

in effective treatment since the initial diagnosis made my Mr Albassit in 2021. As noted above, the Applicant's engagement in treatment since that time has been minimal.

73. Mr Albassit prepared a second report on 1 March 2022. The Applicant's evidence to the Tribunal is that in that period he had only one contact with Mr Albassit to inform him of his transfer to VIDC. That is not consistent, in the Tribunal's view, with the Applicant's claimed desire to seek treatment and rehabilitate himself. The Applicant's very limited contact with Mr Albassit appears to be purely for the purpose of report preparation. Mr Albassit refers to the symptoms of PTSD and substance abuse and the correlation between traumatic experience and criminal behaviour. Mr Albassit states that the Applicant's ability to comprehend and retain information has been significantly diminished by his long-standing PTSD and substance addiction and it is stated that his condition significantly affected his capacity to adequately understand the nature and consequences of his actions. It is stated that the Applicant had lacked insight into his offending behaviour. Mr Albassit states that he does not believe the Applicant had completely understood the provision of s. 501 of the Migration Act and its impact on his life. As noted above, no explanation is offered as to how Mr Albassit had reached that conclusion, particularly given Mr Albassit's very limited time spent with the Applicant and the fact that their first contact occurred more than ten years after the Applicant was issued with the first warning. For these reasons, the Tribunal considers Mr Albassit's statement concerning the Applicant's cognition at the time of the first visa cancellation process to be of very limited value. The Tribunal places significant weight on the fact that the Applicant was previously issued with a formal warning that his visa may be cancelled and that it did not act as a deterrent from further offending.

74. The Tribunal also acknowledges Mr Albassit's statement in the 2021 report that the Applicant has been drug-free since September 2020. In his 2022 report Mr Albassit also expressed the view that the Applicant has good prospects of rehabilitation, should he be given the opportunity, noting that he has not reoffended since the earlier assessment and that he has been able to learn adequate coping strategies and remained substance-free despite not receiving any psychological or psychiatric treatment in detention and not following the treatment plan. The Tribunal gives Mr Albassit's observations some, but limited weight, given the short period of time he has spent with the Applicant and the fact that he was consulted, it seems, for the purpose of preparing reports to Immigration.

75. The Applicant told the Tribunal that has been receiving injections for his drug dependence and has not used drugs for two years. He claims that drugs are available in jails and in Villawood. While that may be the case, the Tribunal does not consider that drugs are as readily available in detention as they are in the community. Thus, the Applicant's abstinence from drugs during his incarceration cannot, in the Tribunal's view, evidence his ability to abstain from drug use when living in the community.

76. In his own declaration dated 23 February 2021 the Applicant states that in the past he had struggled with a serious drug abuse problem which had negatively impacted his behaviour and attitude. He states that since incarceration, he has attempted to rehabilitate himself by completing the Traffic Offenders Rehabilitation Program and a drug treatment program and he is on the Opioid Treatment Program. The Applicant states that in the past he knew 'there as something wrong with him' psychologically but his dependence on drugs stopped him from seeking help. In the Tribunal's view, that is not an entirely accurate statement because the Applicant did have the opportunity to engage in the program through the referral of the Drug Court and he chose not to participate in the treatment.

77. In his declaration dated 19 October 2022 the Applicant states that he is on a program for the substance abuse disorder, which provides him with 'considerable relief' in relation to this addiction. He states that he would undertake rehabilitation for the PTSD and substance abuse disorder, will live with his parents and will provide them with emotional and practical assistance. The Applicant refers to his relationship with his family, stating that their support will assist with his rehabilitation. The Applicant's family members gave oral evidence about the support they are willing to provide to the Applicant, should he remain in the community and his father gave evidence that he would take the Applicant to work and make sure he does not reoffend.

78. As noted above, the Tribunal accepts that these factors may contribute to the Applicant's rehabilitation but the Tribunal does not consider these to be strong preventative factors, given that many of these existed during the past repeated offending.

79. Mr Albassit's report suggests that the Applicant's offending is linked to his PTSD and a drug dependence disorder. The Tribunal is prepared to accept his professional opinion. The Tribunal is not satisfied that these conditions have been adequately treated. The evidence before the Tribunal is that the Applicant received minimal, and inadequate, treatment for his

mental health issues since the diagnosis in 2021 and while he is on a drug substitution program, the Tribunal is mindful that the Applicant had abstained from drugs in the past and had reoffended. The Applicant's resolve and ability not to use drugs has not been tested in the community when drugs, bad influences and other life stressors may be more readily available.

80. If the Applicant was to be released into the community, the Tribunal considers there remains a risk that the Applicant may resume the drug-intake and that he may re-engage in offending conduct because he would be subjected to the same stressors as before and because he may not have the skills to deal with those. That is, the Tribunal is of the view that the risk of reoffending, should the Applicant be released into the community, remains and that risk is not insignificant.

81. The Tribunal considers that the harm to the community, should the Applicant reoffend, could be very serious, given the nature of offending (repeated driving offences including dangerous driving, theft of motor vehicles, drug use and assault). The Tribunal has formed the view that the protection of the Australian community weighs heavily against the revocation.

Expectation of the Australian Community

82. Clause 8.4 of Direction 90 provides that the Australian community expects non-citizens to obey Australian laws while in Australia. Clause 5.2(3) of the Directions sets out the government's view in relation to community expectations:

> *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.*

83. The Applicant states in his written evidence that while the community expects him to abide by the Australian laws, he also strongly believes in the Australian value of a 'fair go', embracing compassion for those in need and equality of opportunity for all. The Applicant notes that he came to Australia as a refugee in need of a safe home. He refers to the traumatic events he experienced in Iraq and Lebanon, which had an effect on him and he states that the Australian community, if aware of his family history and struggles, would give him a second chance.

84. The Tribunal accepts the suggestion that the Australian community may act with a degree of compassion and acknowledgement of all of the Applicant's circumstances. However, the Tribunal is also of the view (which is supported by the Direction) that the Australian community does have an expectation that those who live in Australia abide by the Australian laws. The Applicant has failed to do so over a lengthy period of time and his conduct, such as multiple driving offences, assault, car theft and drug use, jeopardised the safety and security of members of the community.

85. The Applicant submits that the Australia community, cognisant of his circumstances, would give him a second chance. However, the Tribunal is of the view that the Applicant has already been given a second chance. He was informed more than ten years ago that his visa may be cancelled if he continued to reoffend. That, in the Tribunal's view, constitutes a second chance. The Applicant was put on notice that his conduct was unacceptable and what the consequences of his conduct may be (cancellation of the visa and the possibility of the Applicant being removed from Australia). The Applicant did not use that opportunity to reform or rehabilitate himself but continued with the offending conduct. The fact that the Applicant had already been given a second chance but did not change his conduct would further the community's expectation that a non-citizen who commits serious crimes should not be able to remain in Australia.

86. The Tribunal has formed the view that, given the seriousness and repeated nature of the Applicant's conduct over a lengthy periods of time, and the fact that the Applicant had been given ample opportunities to rehabilitate but failed to engage, the community expectations would weigh heavily against revocation.

Whether the conduct engaged in constituted family violence

87. In his submission to the delegate the Applicant claims that he has never been accused of any family violence by his partners, has not been charged with any acts of family violence nor has had any family violence ever been alleged. The Facts Sheet in relation to the December 2015 offences suggests that the Applicant and the victim had been in a relationship for about 7 months but had ended a month previously at the time the offences were committed. The Applicant submits (and the Respondent agrees) that there was no domestic relationship between them at the time, and thus, this offence cannot constitute

family violence and there are no other offences that amount of family violence. This consideration is neutral.

The best interests of minor children in Australia

88. The Applicant has two minor children who are Australian citizens. He does not have custody of these children and they have been in foster care since shortly after birth. In his submission to the delegate the Applicant explains that when he separated from his partner around 2014, she took the children with her and he has not seen them since that time. The Applicant states that he made several attempts to see the children as they have been placed in foster care but he has no involvement in their lives. (The Tribunal has been provided with copies of court orders placing the children in the care of the Minster.) The Applicant states that he hopes to apply for custody and to resume his relationship with his children but there is no evidence that he has initiated the process or that he would be successful in that process. His evidence to the Tribunal is that he has made contact with the children's mother to inquire whether he can make contact with the children, but he has not yet taken any steps yet to contact the children.

89. The Tribunal accepts that if his visa remains cancelled, which may result (but need not necessarily result) in the Applicant leaving Australia and being unable to obtain another visa in the future, the Applicant will have a more limited opportunity 'of regaining his connection with the children'. However, in the circumstances where the Applicant has not had any connection with the children since their births and where the Applicant had made little effort of establishing that connection to date, the Tribunal has formed the view that the best interests of the Applicant's children will not be adversely affected by the decision not to revoke the cancellation of the visa.

90. The Applicant claims that even if he does not play a parental role in relation to his children, he feels that the children need to know their father and paternal family, and would benefit from a relationship with them. The Applicant states that he had not had the opportunity to be a positive influence for the children. Given the Applicant's criminal and anti-social conduct, including, on his own admission, frequent drug use, it cannot be unequivocally said in the Tribunal's view, that the children would benefit from a relationship from him, particularly if the children have been living in a stable and caring environment of a foster family. It may be the case that there would be benefit in the

Applicant establishing a parental relationship with his children but in the Tribunal's view, that is not a given, and that fact has not been established by the Applicant to the satisfaction of the Tribunal.

91. The Tribunal is also of the view that connection may be established through electronic means and is not limited to physical contact. Overall, the Tribunal finds that the best interests of the Applicant's Australian children are unaffected by the cancellation of his visa.

92. The Applicant refers to his nieces and nephews and to his relationship with these children. In his statement to the Tribunal the Applicant refers to his four nieces and nephews and he states he has a good relationship and is in regular contact with them and to the activities he had undertaken with the children prior to his incarceration, which he is missing out on because of his detention. He told the Tribunal that he used to take the children out a few times a week (he has not met his youngest niece who was born during his incarceration) and the various statements from the children's parents supports that the Applicant has had meaningful and frequent interactions with the children. The Tribunal is prepared to accept that the Applicant had such a relationship with his nieces and nephews and the Tribunal is prepared to accept that it is in the best interests of these children that the Applicant remains in Australia and that the cancellation of his visa is revoked.

93. In his submission to the delegate the Applicant refers to the child of his (then) partner, stating that he plays a big role in the child's life. He states that he lived with his partner and her child prior to his incarceration and they planned to get married. The Applicant refers to his interactions with the child (playing a parental role) and states that he also provided financial support to his partner. The Applicant states that he has been closely involved in this child's life and it would be in the child's best interests if the cancellation of the visa is revoked to enable the Applicant to continue to provide financial and practical support to his partner. The Applicant's former partner provided a declaration to the delegate in which she refers to her son's close relationship with the Applicant, stating that her son would be devastated if the Applicant was deported from Australia.

94. The Applicant's evidence to the Tribunal is that this relationship had ended in early 2022 and soon after he developed a relationship with another person. The Applicant

states that he still has some contact with the child and checks on him, but that the child also spends time with his biological father. The Tribunal is prepared to accept that the Applicant maintains some contact with the child but in the circumstances where the Applicant's contact with Louis appears to be limited to some phone calls, the Tribunal does not accept that at present, the Applicant continues to have a parental role, or a significant role in the child's life. The Tribunal does not consider that the best interests of this child would be adversely affected if the Applicant's visa remains cancelled.

95. As the Tribunal has found that it is in the best interests of the Applicant's nieces and nephews for the cancellation of the Applicant's visa to be revoked, the Tribunal finds that his consideration weighs strongly in favour of the revocation.

International non-refoulement obligations

96. The Applicant claims that he has been granted a protection visa and faces a high risk of persecution if deported to Iraq. In his evidence to the delegate the Applicant describes his circumstances (being a Christian and obviously recognised as one due to his religious tattoos), his father's circumstances during his residence in Iraq and the fact that he would be recognised as a returnee and perceived as a traitor. (The Applicant told the Tribunal that some of the claims made in the earlier submissions are no longer pursued.) The Applicant provided the Tribunal country advice regarding the situation of Christians in Iraq and he refers to the killings of Christians in Iraq.

97. The Tribunal finds that the Applicant's evidence raises non-refoulement claims. The Applicant submits that this Tribunal should consider the claims, rather than defer consideration and delay the assessment. However, the Tribunal is of the view that the assessment of the Applicant's claims can be more appropriately undertaken as part of a protection visa application that the Applicant is eligible to make in the future (cf *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 at [29]-[30])

> *Where the representations do include, or the circumstances do suggest, a non-refoulement claim by reference to unenacted international non-refoulement obligations, that claim may be considered by the decision-maker under s 501CA(4). But those obligations cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error – they are not part of Australia's domestic law.*

Where the representations do include, or the circumstances do suggest, a claim of non-refoulement under domestic law, again the claim may be considered by the decision-maker under s 501CA(4), but one available outcome for the decision-maker is to defer assessment of whether the former visa holder is owed those non-refoulement obligations on the basis that it is open to the former visa holder to apply for a protection visa.

98. In the present case, there is nothing preventing the Applicant from making an application for a protection visa in the future where his claims would be assessed.

99. In his submission to the Tribunal the Applicant acknowledges that he could apply for a protection visa but states he does not know how to do that without help and it would be difficult to get money from the family for legal fees. The Tribunal does not accept that evidence. Firstly, the Tribunal does not accept that legal representation is necessarily needed to make an application for a protection visa (noting, in particular, that the Applicant is fluent in English and had considerable exposure to Australia's immigration system through the present cancellation process). Secondly, there are agencies that provide free immigration advice that the Applicant may be able to approach. Thirdly, the Applicant's evidence to the Tribunal is that his family have been paying for his immigration lawyers to date, but his family can no longer afford to pay for immigration advice. The Applicant has not presented satisfactory evidence regarding his family's financial circumstances, and it is not readily apparent why the funds that had been available to date are no longer available. Indeed, the Applicant's parents and siblings confirmed in their oral evidence that his father is able and willing to provide the Applicant with financial support for visa issues. The Tribunal has formed the view that the Applicant will have the ability and the means to make an application for a protection visa in the future.

Extent of impediments if removed

100. In his submission to the delegate the Applicant states that he does not know anyone in Iraq and his entire family live in Australia and are Australian citizens. There is no one in Iraq who would be able to assist him if he returns to Iraq. In his evidence to the Tribunal the Applicant also states that he has not lived in Iraq since the 1990s and has nobody there and no support.

101. There is little probative evidence about the prospects of the Applicant finding employment overseas even though he claims he would not be able to support himself. Nevertheless, the Tribunal acknowledges that due to the length of the Applicant's absence from Iraq, it may be difficult for him to find employment and re-settle, at least initially.

102. The Applicant submits that if he was to return to Iraq and be without social support network and without the support of his family, there is a possibility that he would relapse into drug use which would put him at risk. The Tribunal accepts that is so.

103. The Applicant also states that returning to Iraq would significantly affect his and his family's mental health. The Applicant refers to his parents' various health issues and the evidence before the Tribunal is that if the Applicant was to leave Australia, his parents' health would suffer. The Applicant's parents, siblings and their partners, who gave oral evidence to the Tribunal, all refers to the hardship that the family in Australia would suffer if the Applicant were to leave Australia, including emotional hardship and withdrawal of physical and practical support. The Tribunal accepts that this is a real possibility.

104. In his declaration the Applicant states that he has no social support in Iraq and has not had any contact with anyone since he left in 2004. He has no family and no other support and no place to live. The Tribunal accepts that evidence. The Applicant also states that he has no place to work and no means of earning an income. However, he presented no probative evidence to the Tribunal about employment options that may be available to him and has not satisfactorily explained why employment may not be available to him.

105. The Applicant's siblings gave evidence to the Tribunal that the Applicant would help them care for their parents (given their significant health concerns) and help with domestic chores if he is released into the community. The Tribunal is mindful that two of the children already receive Carer pensions from Centrelink to care for the parents and also that other siblings have been providing support and care during the lengthy period of the Applicant's incarceration and detention. The Tribunal accepts that the Applicant could provide help with family chores if he remains in Australia but the Tribunal is also of the view that in the absence of the Applicant's contribution, such help could be provided by others.

106. The Tribunal acknowledges that if the Applicant were to be removed from Australia, there may be a significant impediment to him, as he may be returned to the country where he

may face persecution. The Tribunal accepts that the Applicant would have no family connection and no support if he was to return to Iraq (with his entire immediate family living in Australia), that he would be separated from his partner, parents and siblings and nieces and nephews, as well as his biological children.

107. The Applicant told the Tribunal that his parents have health problems, his brother also has a health problem and that he helps with all the family chores while others are working. The Applicant concedes that his two siblings who live in the family home can also provide assistance to his parents outside of their work commitments and the evidence before the Tribunal is that the Applicant's siblings receive a Carer allowance to care for the parents. Nevertheless, the Tribunal accepts that the Applicant provides help to his family members including his parents (and the Tribunal accepts the evidence about their health issues) and that he intends to continue to live with his family and to provide such help in the future if released.

108. The Tribunal accepts that there may be considerable impediment to the Applicant and his family members if he is removed from Australia. This consideration also weighs strongly in favour of the revocation.

Impact on victims

109. There is no evidence before the Tribunal concerning any impact on victims. This consideration is neutral.

Links to the Australian community

110. The Applicant claims that he has been living in Australia for over 15 years, since 2005, has two children who are Australian citizens, and has a relationship with an Australian citizen. (The Tribunal acknowledges extensive evidence the Applicant presented to the delegate about his relationship with Ms S and her child but that relationship has now ended, even if the Applicant has limited contact with the child.)

111. The Applicant refers to the presence of his parents and four siblings in Australia, as well as nieces and nephews. In oral evidence the Applicant states that he has a close relationship with his family and speaks to them daily. He states that he has no family in Iraq and Australia is the only country in which he has familial ties. The Tribunal accepts that evidence.

112. The Applicant presented to the delegate a statement from his father Mr K. Mr K refers to his and the family's background and the reasons the family left Iraq. He states that he and his wife are of ill health and their two children act as carers. Mr K refers to his son's offending behaviour and drug use. He states that the Applicant's persistent reoffending has had negative effect on his and his wife's health. Mr K refers to his son's mental health problems and the fact that he has not been diagnosed by a psychologist or received adequate treatment for his mental health problems. Mr K expressed fear for his son's wellbeing if he is deported (explaining the reasons). He also states that the Applicant would have no family or friends in Iraq and he would not have any support, which, he claims, would affect the Applicant's mental health even further. The Tribunal accepts that Mr K genuinely holds the views expressed in his statement. The Tribunal also acknowledges Mr K's oral evidence that his son will not reoffend and that he would ensure his son does not reoffend but the Tribunal considers this to be of limited value, as Mr K may not be able to control his son's behaviour.

113. The Applicant also provided to the Tribunal a number of written statements from various family members who were also available to give oral evidence to the Tribunal. The Applicant's father in his statement to the Tribunal refers to the close knit family and he states that he cannot imagine his son being deported from Australia where he would not survive. The Applicant's father also states that he would be heartbroken and shattered and his wife will be distraught if his son is not successful, and his other children would also suffer 'immeasurable pain' if the Applicant cannot return to the Australian community.

114. The Applicant also provided to the delegate a statement from his mother Ms Y, which substantially repeats the evidence of her husband. Ms Y states that the Applicant was closest to his father and after his father's arrest he became withdrawn, depressed and angry. Ms Y refers to the family fleeing to Lebanon, news of her husband's death and the Applicant's arrest in Lebanon where he had spent over a year. Ms Y expressed the view that the Applicant's behaviour was an escalation of his mental health issues he began displaying as a teenager and also that the time in Lebanon where he was subjected to abuse and assault caused him to mistrust law enforcement. Ms Y states that she believes her son needs treatment and therapy which would not be available to him in Iraq. She refers to lack of support and concerns about her son's safety if he was to live in Iraq. Ms Y told the Tribunal that the Applicant is now fine and does not need further help, that he is happy and not using drugs.

115. The Applicant provided to the delegate statements from his siblings with substantially the same information. The Applicant's brothers and sister gave oral evidence about the close family relationship they share with the Applicant and the support they provide to each other. All who gave oral evidence have expressed the view that the Applicant has 'learned his lesson' and would not reoffend. The Tribunal generally accepts that those who provided statements genuinely hold the views expressed in these statements.

116. The Tribunal heard oral evidence from members of the Applicant's family, including parents and siblings. The Tribunal generally accepts their evidence although finds some problematic that most of the family members had no knowledge of the Applicant's offending other than driving offences, despite the claimed closeness of their relationship. There are multiple statements before the Tribunal from the Applicant's siblings and siblings in law, who refer to the close family relationships with the Applicant and the Applicant having good relationships with his nieces and nephews. The Tribunal accepts that evidence.

117. There is also a statement from the Applicant's current partner who states that he has been respectful towards her and genuinely remorseful and that she supports him despite his criminal history. Her oral evidence to the Tribunal is that the relationship has lasted for a 'couple of months' and is serious and they plan to get married when he comes home. She states that she suffers from depression (no medical evidence on this issue is before the Tribunal) and that he cheers her up and makes her feel better. In the Tribunal's view, if the Applicant is able to support his partner and make her feel better through telephone contact, he would be able to do that irrespective of what visa he holds and where he lives.

118. The Tribunal accepts that the length of the Applicant's residence in Australia is significant and that during that residence he has established strong ties to Australia, including strong family and social ties. These factors weigh heavily in favour of the revocation.

Other factors

119. The Applicant has put forward a number of reasons why he cannot return to Iraq, including claims that may give rise to Australia's non-refoulement obligations (no assessment has been made whether Australia's obligations arise in this case) and also the general degree of violence and lack of security in Iraq, lack of support, effect on his and his family's health, etc. Some of these claims are addressed above and the Tribunal accepts that these matters

may be taken into consideration in addition to the factors set out in Direction 90. For the reasons stated above, the Tribunal accepts much of the Applicant's evidence in relation to the harm that he and his family may experience if he was to return to Iraq. The Tribunal also accepts that if the Applicant was to leave Australia, it could adversely affect his relationship with his present partner. The Tribunal accepts that these matters weigh heavily in favour of the revocation.

120. The Tribunal acknowledges that the Applicant is able to make an application for a protection visa. Despite the Applicant's written claim that he could not fund that application, the evidence of his father and his family members is that funds would be made available and therefore the Tribunal finds that this option is available to the Applicant. Should the Applicant make that application, the Tribunal acknowledges that there is a real prospect of prolonged detention while that process takes place.

CONCLUSION

121. The Tribunal has found that the Applicant has a substantial criminal record and that he does not pass the character test. The Tribunal has considered if there is another reason why the decision to cancel his visa should be revoked.

122. The Tribunal has formed the view that the Applicant had committed serious offences over a long period of time. The Applicant does not dispute that his offending was serious. The nature of his past offending is such that the Applicant's conduct is against the expectations of the Australian community. The Tribunal has formed the view that the protection of the Australian community and the expectations of the Australian community weigh heavily against the revocation. These are primary considerations and the Tribunal gives these significant weight.

123. The other primary consideration, the best interests of minor children in Australia, weighs strongly in favour of the revocation. In this case, the Tribunal accepts that the Applicant has a close relationship with nieces and nephews and a relationship with the child of his former partner. The Tribunal has formed the view that it is in the best interests of these children that the cancellation of his visa is revoked.

124. With respect to the other considerations, the Tribunal accepts that the Applicant has significant ties to Australia and that all of his immediate family, including parents, siblings,

nieces and nephews and his partner all live in Australia. The Applicant had previously held a job and the Tribunal accepts that he has employment and social ties in Australia, in addition to his family ties. The Tribunal accepts there would be strong impediments if the Applicant is removed from Australia, given his lack of ties and support in Iraq and the extent of his ties in Australia. The Tribunal accepts that impediment arising from removal would be not only to the Applicant but also to members of his family. These are strong reasons why the cancellation of the visa should be revoked.

125. Overall, the Tribunal acknowledges that there are factors in favour of the revocation, most significantly the best interests of the children in Australia, links to the Australian community and the impediment of removal. However, in the particular circumstances of this case, the Tribunal has decided to give greater weight to the primary considerations of protection of the Australian community and the expectations of the Australian community.

126. The Tribunal has formed the view that the Applicant has engaged in serious and repeated conduct and that there remains a risk of reoffending. The Tribunal has formed the view that such a risk is unacceptable, given the serious harm that could be caused to members of the community by the type of conduct the Applicant had previously engaged in.

127. The Tribunal has decided that, in all the circumstances of this case, these two primary considerations should be given greatest weight. The Tribunal has decided that the decision under review should be affirmed.

DECISION

128. The Tribunal affirms the decision not to revoke the cancelation of a Class XB Subclass 200 Refugee visa held by the Applicant.

I certify that the preceding 129 (one hundred and twenty-nine) paragraphs are a true copy of the reasons for the decision herein of Senior Member Raif

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

Associate

Dated: 22 November 2022

Date(s) of hearing:	**8 & 9 November 2022**
Counsel for the Applicant:	**Dr Jason Donnelly**
Solicitors for the Applicant:	**Mr Andrew Anoih**
Solicitors for the Respondent:	**Ms Gabrielle Ho**