Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: 2022/7895

Re: Jose Ricardo Caires De Andrade

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member Hon. J Rau SC**

Date: **12 December 2022**

Place: **Adelaide**

The decision under review is set aside and substituted with a decision that the cancellation of the Applicant's visa is revoked

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

Senior Member Hon. J Rau SC

CATCHWORDS

MIGRATION – mandatory cancellation of Class BF Transitional (permanent) visa under section 501(3A) – whether the Applicant does not pass the character test when sentence reduced on appeal – whether the Applicant has substantial criminal record— whether the discretion to revoke the visa cancelation under section 501CA (4) should be exercised – Applicant resident since infancy – consideration of Ministerial Direction No. 90 – decision under review is set aside and substituted with a decision that the cancellation of the Applicant's visa is revoked.

LEGISLATION

Migration Act 1958 (Cth)

CASES

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

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

Afu v Minister for Home Affairs [2018] FCA 1311

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

FYBR v Minister for Home Affairs [2019] FCA 50

BJT21 v Minister for Home Affairs (No 2) FCA 24

XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs. (2022) FCAFC 6

Plaintiff B65/2020 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2021) HCA Trans 118

Minister for Immigration and Border Protection v Makasa [2021] HCA 1.

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

SECONDARY MATERIAL

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

REASONS FOR DECISION

Senior Member Hon. J Rau SC

12 December 2022

INTRODUCTION

1. The Applicant seeks a review of the decision by a delegate of the Minister for Home Affairs ("the Respondent") made under section 501CA (4) of the *Migration Act 1958 (Cth)* ("the Act") on 30 September 2022, not to revoke the mandatory cancellation of his Class BF Transitional (permanent) visa ("the Visa"). His visa was cancelled on 23 June 2021 under section 501 (3A) on the basis that he did not pass the character test.

2. Sections 501(6)(a) and 501(7)(c) of the Act provide that a person does not pass the character test if they have been sentenced to a term of imprisonment of 12 months or more. The Applicant failed the character test on account of being sentenced to an aggregate of 12 months imprisonment for various offences on 9 June 2021.

3. The Applicant quite properly concedes that he did not pass the character test on 23 June 2021.[1] The issue before the Respondent was whether the Applicant "*passes the character test (as defined by section 501); **or** there is another reason why the original decision should be revoked" pursuant* to s 501CA(4)(b)(i) and (ii) of the Act.

4. The Applicant in this case has submitted that the Tribunal must consider both limbs of s 501CA(4)(b). The Applicant also contends in substance, that he passes the character test. The Applicant further contends that if this latter submission is accepted, there is no need to consider the second limb, namely, whether there is '*another reason'* to revoke the

[1] Exhibit 3, G2, Attachment L, p 98.

mandatory visa cancellation pursuant to s 501CA(4)(b)(ii) of the Act. These submissions are discussed in some detail below.

5. The hearing was held on 2 and 5 December 2022. The Applicant was represented by Dr Jason Donnelly of Latham Chambers and the Respondent was represented by Mr Tal Aviram of Clayton UTZ Lawyers

6. The written evidence received by the Tribunal is set out in annexure A.

7. The Applicant gave evidence by Microsoft Teams. He generally presented as a credible witness. He frequently became very tearful when speaking about his family, or his prospects if he were to be returned to Portugal. He gave the impression of a person in a fragile state of mental health, consistent with the expert opinion before the Tribunal. He expressed remorse and contrition for his actions. There is a clear connection between his serious offending and an addiction, post 2015, to methamphetamine. I have no doubt that he is genuine in his desire not to reoffend. His capacity to achieve this, is inextricably bound to his capacity to remain drug free.

8. The Applicant called his wife Lydia and his adult daughter Haylie to give evidence. They both gave evidence by Teams. Their evidence was very helpful. Both women identified drug use as the primary risk factor in the Applicant's life. Both spoke of his fragile and deteriorating mental health. Both would be devastated if he were to be removed to Portugal. Neither would follow him there for various reasons. In the case of Haylie, she is an Australian citizen who has all of her connections and employment here. The same is true of Lydia, who also has a medical condition that would make travel hazardous.

Background Facts

9. The Applicant was born in Portugal on 18 January 1969. He is a citizen of that country.

10. The Applicant came to Australia with his family[2] (parents plus then 7 siblings) as a 1-year-old. He arrived here on 15 August 1970. He is now 52 years old.[3] So far as he is concerned, he knows only Australia as his home.

11. The Applicant reports having been raped by his older brother E when he was 7 years old. E died just before Christmas in 2020.[4]

12. The Applicant attended Leichard High School completing year 10.[5]

13. The Applicant unsurprisingly has extensive connections here, with all his friends and family in Australia.[6]

14. In about 1984, the Applicant commenced a de facto relationship with DN. There were two children from this relationship. This relationship ended in about 2009.[7]

15. On 11 June 1987, the Applicant was convicted in the Lidcombe Local Court of aid and abet and various offences motor vehicle related offences. He was fined and disqualified from driving for 3 months.[8]

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[2] Ibid, G2, Attachment L, p 100.
[3] Ibid, G2, Attachment I, p 73.
[4] Ibid, G2, Attachment I, p 78, 138.
[5] Ibid, G2, Attachment I, p 79.
[6] Ibid, G2, Attachment I, p 73-88, 121, 141; G9, Attachment K1, p 310.
[7] Ibid, G2, Attachment Q, p 140.
[8] Ibid, G2, Attachment A, p 39.

16. On 11 March 1988, the Applicant was convicted in the Newtown Local Court of certain motor vehicle offences being, failure to stop and give particulars, stating a false name and driving whilst disqualified. He was fined and disqualified from driving for 6 months.[9]

17. On 16 September 1989, the Applicant's son Sean was born. The Applicant says that he has maintained a good relationship with Sean. Sean is single.[10] Sean did not provide a statement and he did not give evidence.

18. On 27 March 1990, the Applicant was again convicted for driving offences of driving while cancelled, negligent driving and failure to stop and give particulars. He was fined and disqualified for a further 6 months.[11]

19. On 26 March 1991, the Applicant was convicted in the Balmain Local Court of 3 counts of assault. He was fined.[12] The Applicant says that he was set upon by three men and that he was acting in self-defence. This is the only crime of violence in his record.

20. On 31 July 1991, the Applicant's daughter Haylie was born. He has maintained a relationship with her. Haylie is single.[13] As previously mentioned, she gave evidence before the Tribunal and has provided statements in support of her father.

21. On 28 January 1994, the Applicant was again convicted of driving offences being, not producing a license, dangerous driving and PCA. He was fined and disqualified from driving for 3 years.[14]

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[9] See ibid.
[10] Ibid, G2, Attachment I, p 77; G2, Attachment N0, 121.
[11] Ibid, G2, Attachment A, p 39.
[12] See ibid.
[13] Ibid, G2, Attachment I, p 77.
[14] Ibid, G2, Attachment A, p 39.

22. On 26 May 1994, the Applicant was convicted of breaking offences and fined.[15]

23. On 20 May 1998, the Applicant was convicted of a high range PCA offence. He was fined and disqualified from driving until 1 January 2001.[16] The Applicant told the Tribunal that it was after this offence, that he stopped drinking to excess. He has had no alcohol at all since 2009.

24. The Applicant did not reoffend until 2015.

25. On 9 November 2011, the Applicant's daughter, Child A, was born. Her mother is DW who was at that time, in a casual relationship with the Applicant.[17] The Applicant has no relationship with DW or Child A. Child A lives with her mother in QLD. The Applicant has never met Child A. The Applicant has paid child support for Child A in accordance with his legal obligations.[18] There is some independent evidence of such contributions before the Tribunal.[19]

26. On 30 July 2012, the Applicant married his wife, Lydia.[20] She is an Australian citizen. They have no children.

27. In 2014 the Applicant was involved in a motor vehicle accident. He sustained various injuries, including to his lumber spine and right elbow. He has suffered with pain and other symptoms as a result of these injuries. He has not been able to return to his pre-injury work since then due to his injuries.

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[15] See ibid.
[16] Ibid.
[17] Ibid, G2, Attachment I, p 76; G2, Attachment Q, p 140.
[18] Ibid, G2, Attachment I, p 76-77.
[19] Ibid, G2, Attachment N8, p 119-120.
[20] Ibid, G2, Attachment N2, p 110.

28. In about 2015-16, the Applicant began using methamphetamine. He says that this helped him deal with his persistent pain. He says that he became involved in crime to feed this habit, which was costing him $100-200 per day.[21] He told the Tribunal that he was also prescribed pain medication by his GP, but that did not do the job properly. He also was prescribed medication for his depression. He has not taken any of this medication for some time.

29. On 10 November 2015, the Applicant committed various offences related to breaking and entering.[22]

30. The Applicant's wife Lydia told the Tribunal that she was not initially aware of the Applicant's drug use and offending.

31. On 18 November 2015, the Applicant was arrested and released on bail.[23]

32. The NSW Police Fact Sheet regarding this offending relates to a period commencing on 10 November 2015. It relevantly states as follows:

> "***ANTECEDENT***
> *The Accused in this matter has had no previous interactions with police except for a traffic infringement.*
>
> *He is currently receiving Centrelink benefits of $1000 a fortnight between himself and his wife. The Accused pays $470 a week in rent.*

[21] Ibid, G2, Attachment Q, p 139.
[22] Ibid, G4, p 281
[23] Ibid, G4, p 280, 284

The Accused has no dependants and is just required to support himself and his wife who is also unemployed.

The Accused has other outgoings like mobile phone, food, car expenses and other general house expenses.

FULL FACTS

The Facts of the matter are,

The Accused in the matter is Jose ANDRADE who resides at 14 Ophelia Place, Oakhurst. The Accused lives at the property with his wife Lydia ANDRADE and currently rents the property. On the 10th November 2015 the Accused along with the co-Accused Trevor HIPPETT have entered a white Ford Territory registration plate CTE 22J who belongs to the Accused's wife. The Accused who was driving at the time has driven himself and the co accused from 14 Ophelia Place Oakhurst to Karrabee Avenue, Huntley's Cove. Here they have parked upon the street and exited the white Ford Territory.

Around 1:24am on the 10th November 2015 the Accused and the co-Accused have forced open the garage sliding gate doors to the underground garage unit complex. The Accused and the co-Accused have both squeezed through a gap in the gate to gain entry.

Upon entering the underground garage unit complex the Accused and the co-Accused have searched around the different caged garage units. The garage units consist of metal wire cages with a lever style pivot opening door. All garage doors were locked and secured at the time.

The Accused along with the co-Accused have forced open the garage doors. The Accused and the co-Accused have both entered the garage cages and begun searching through the cages and removing items. The Accused and the co-Accused

have walked the items out to the waiting white Ford Territory parked in Karrabee Avenue, Huntley's Cove.

Items that were stolen include:
Unit 205/6 - Remote control and security FOB - for entry into the units totalling $100.

Unit 202/8 - Wool Blankets x 2 and a Television Panasonic THP50X10A 50 inch Viera totalling $1,700.

Unit 104/6 - Men's bicycle and two tool Box's Including various tools totalling value $1000.

204/16 - Motor cycle racing boots black and red size 44, Compression motor cycle clothing(skins), Motor cycle back protector, White red/blue full motor cycle leathers, Black nylon luggage bag with wheels, Two motor cycle helmets Gary McCoy replica and Four Motor cycle visors totalling $7,200.

Unit G02/18 - Currency, Maui Sunglasses, Sony Blu Ray recorder, Sony television, Three Kites, Navman GPS totalling $800.

On the 12th November 2015 the Accused and the male have returned to Karrabee Avenue, Huntley's Cove. The Accused and the male have gone to the next underground carpark complex which is located upon Karrabee Avenue, Huntley's Cove. The Accused who was driving the vehicle at the time has entered the underground carpark complex through an open roller door.

The Accused has parked the vehicle CTE 22J a white Ford Territory which is shown on Closed Circuit Television and exited the vehicle. The Accused and the male have then begun to search for garage cages. The Accused and the male have forced

open the garage doors. The Accused and the male have entered the caged areas and begun searching and removing items from the garage units.

Items that were stolen include,
Unit 201/18 Ozito biscuit Joiner, Ozito Angle Grinder, Makita flat plate sander, Ozito power plane, Ryobi reciprocating saw, Triton router, GMC belt sander, Hitachi power drill, Ryobi jigsaw, Black and Decker mouse sander, Ryobi router, Grosset 1999 Polish Hill Riesling, two Rockford Basket Press Shirax, Hardy's 2012 Tintara Shiraz, Yalumba 1998 The Signature Cab/Sav/Shiraz, Hardy's 1997 Tintara Shiraz, Sepelt Sparkling Shiraz, Primo Estate The Joseph Sparkling Shiraz, Kendal Jackson 2012 Kendel Jackson Pinot Noir, Penfolds 2000 BIN 707 Cab/Sav Magnum, Dalwhinnie 1996 Cab/Sav, Rockford Sparkling Black Shiraz Magnum, Wynns 2008 Cab/Sav and a Grossett 2000 Polish Hill Riesling totalling a value of $3400.

Unit 105/14 - Bosch Power saw totalling the value of $90.

Unit 3/8 - Norco Racing bicycle mens, Mens Giant bicycle OR3, and Maui Tortoise shell womens sunglasses totalling $2250.

On the 18th November 2015 Police attended 14 Ophelia Place, Oakhurst to perform a Form of Demand upon the registered owner of vehicle CTE 22J. The owner of vehicle CTE22J a white Ford Territory stated that her husband, which is the Accused, had possession of the vehicle at that time.

Police have requested that the Accused come to the front door. The Accused was asked questions in relation to the break and enters of the underground garage complex. The Accused has made admissions at the scene and admissions as to knowing who the other male was in the vehicle with him at the time.

Police have asked permission from the Accused and his wife to search the white Ford Territory. Upon searching the vehicle a variety of house breaking implements were located, including bolt cutters, tin snips and a metal pole. Police have also located a distinctive base ball cap which the Accused was wearing at the time. Police have asked the Accused if he could produce the clothing he was wearing at the time of the incident. The Accused has entered his house and brought out to police a bright orange and blue jumper. All these items are visible on Closed Circuit Television from inside the underground garage unit complex.

Police have again asked the Accused if it was possible to take a look into the garage.

The Accused has agreed and allowed police access to a locked garage door. Upon entering the garage police were able to locate a number of items and questioned the Accused over them to which he made admissions from receiving them off the male that was with him at the time of the break and enter.

On the 18th December 2015 after oral and written permission from the Accused and his wife Lydia ANDRADE police have seized a number of items from the house at 14 Ophelia Place, Oakhurst. Items that were seized by police are believed not to belong to the Accused. Whilst there the Accused was asked questions in relation to the items located. The Accused stated to all of the products that he obtained them from Trevor his Co-Accused.

The Accused has made admissions to receiving all the property off the other male that was accompanying him at the break and enter.

Police complied with the safeguards relating to the Law Enforcement (Powers and Responsibilities) Act, 2002.

About 1:00pm on the 18th November 2015 the Accused was cautioned and placed under arrest.

The Accused was conveyed to Mount Druitt Police Station where she was introduced to the Custody Manager and read his rights under Part 9 of Law Enforcement (Powers and Responsibilities) Act 2002.
The Accused participated in an electronically recorded interview where he has made admissions to entering the underground garage complex upon Karrabee Avenue Huntley's Cove and removing items from garage units and placing them inside the Ford White Territory CTE 22J and removing those items from the location.

Upon conviction police request that photographs be taken of the Accused.

The Accused is now charged with the matter before the Court."[24]

33. In January and February 2016, the Applicant committed further breaking offences.[25]

34. On 16 June 2017, the Applicant was sentenced in the District Court of NSW Criminal Division in relation to the various offences committed between November 2015 and February 2016. He was sentenced to 5 years imprisonment commencing on 9 March 2016, being eligible for parole on 8 September 2018. This decision relevantly states:

"*The offending, as I said, occurred in two sequences. The first array of offences was charged under sequence H357888292. He was granted bail for those offences and whilst subject to bail he engaged upon the further offences before me which are charged under sequence H60221735.*

…

[24] Ibid, G2, Attachment D, p 48-52.
[25] Ibid, G4, p 286-7

The misconduct commenced on 10 November 2015 and it continued in the first sequence until his arrest on 18 November 2015, and thereafter when subject to bail he resumed his criminal conduct on 7 January 2016 which persisted until he was arrested and taken into custody on 9 June 2016.

…

***At this stage I would simply observe that he came to this lifestyle relatively late in his life as a consequence of having suffered injury in a motor vehicle collision in 2014, from which he had continuing pain that was not properly managed, according to the evidence before me, in response to which he resorted to the use of methylamphetamine, suffered addiction, and thereafter to fund a habit that was costing him up to $400 a day became a thief*.**

…

I shall now turn to the facts. As I said, they are separated into the sequences of offences.

…

First of all, sequence H357888292. ***On 10 November 2015 around 1.24am*** *closed-circuit television captured Trevor Hippett, who is also known as Trevor Dean Cubbi, the co-offender, outside an underground car park in Karrabee Avenue, Huntleys Cove. The television also captured the presence of a white vehicle thought to be a Ford Territory. These premises consist of 90 home units with an underground car park for use by residents, accessed by a motorised sliding gate which requires either a swipe card or a remote control to open it. Within the car park there are individual garage cages for the residents. These are of metal wire with what is described as a lever-style opening door. Each cage has its own individual secure door.*

The co-offender approached the locked gate to the car park at 1.25am. He reached through the bars to the machinery box and manipulated it. He then forced open the sliding gate doors. He squeezed through the open gate and then began to open numerous garage cages. He was carrying a small dark backpack at the time. He was followed three minutes later by Andrade. He entered the various open garage cages and removed a number of items intending to permanently deprive the owners of them.

The television system installed captured the offenders in these endeavours. The crimes were discovered by the various victims later that day.

Sequence 10 in this series, 357888282, is a charge of larceny. The particulars of the charge are that the offenders stole property to the value of $23,075. The individual items were tools, model cars, bicycles, wine, a television, a Navman, a remote control, a key hob, blankets, another television, motor cycle gear; this property belonged to various individuals. This is a rolled up charge drawing upon the individual thefts in sequences 1 to 8 in this series.

Sequence 6 is an offence of aggravated enter with intent to steal. It is included on a Form 1 which attaches to sequence 1, an aggravated enter with intent to steal to which I shall come. This offence, sequence 6, is with regard to the entry of the garage of Shirley Bagwell. She was the owner of the remote control and security hob, the subject of the larceny charge sequence 10.

Sequence 7 is an offence of aggravated enter with intent to steal that is also included on the Form 1 attaching to sequence 1. This offence relates to the entry into the garage cage of Amy Laxton from which there was stolen a blanket and a television. This property was included in the rolled up larceny charge sequence 10.

Sequence 1 is an aggravated enter with intent to steal upon which sentence is to be imposed taking into account the additional offences to which I have referred and another to which I am to come. This offence relates to the entry into the garage cage of Sam Rizk. Within that garage there was stolen a tool box and model cars; total value of these items $800; that property was included in the rolled up larceny charge. The owner of the property was specified in the particulars to that charge as Veronica Rizk.

Sequence 2, aggravated enter with intent, is on the Form 1 attached to Sequence 1. David Vanlook discovered his garage had been broken into and from it were taken a racing bicycle, another bicycle, a tool kit and assorted tools. The total value of those items is $1,790. It is not specified in this part of the statement of facts who owned the individual items though they appear to be part of the property subject of the rolled up larceny charge Sequence 10. David Vanlook does not appear in that charge as one of the owners of the property stolen, although there are two bicycles specified to the value of $1,290 which corresponds with the particulars in the facts in relation to Sequence 2.

The co-offender's fingerprints were identified from impressions taken by forensic services officers who attended the premises on 10 November 2015.

***On 12 November 2015 both offenders returned to this location**. They entered the underground car park by unknown means but were captured walking around the car park on the closed-circuit television system. The offender was depicted shining a torch into garage cages. The co-offender then proceeded to open up garage cages; Andrade entered the open cages and removed items. The closed-circuit television captured a white Ford Territory registration CTE 22J driven from the car park. Later that day the victims of these crimes found their garages to have been broken into and items stolen.*

Sequence 3 is an offence to be taken into account when I sentence the offender for Sequence 8. Sequence 3 is aggravated enter with intent. Hing Sing Shun found his garage cage broken into and that there had been taken a trolley, a router, a router table, a drill press-stand, an Epron programmer, a circular saw, and an electric massager.

Sequence 4, aggravated enter with intent on a Form 1 attaching to Sequence 8 was in respect of the garage of John Gillhesby; he found stolen a biscuit joiner, an angle grinder, a flat plate sander, a power plane, a reticulating saw, a router, a belt sander, a power drill, a jigsaw, a mouse sander, another router and 14 bottles of wine.

Sequence 5 is aggravated enter with intent to steal. Frances Murdoch found her garage cage had been broken into and a television, sunglasses and a Navman GPS had been taken.

Sequence 8, aggravated enter with intent upon which I am to sentence the offender taking into account the additional offences to which I have referred, concerned Sarandos Spyrakis who found his garage cage had been broken into; taken were two motor cycle helmets, a motor cycle leather suit, gloves, visors, a back protector, a compression suit, a black gear bag on wheels and a rolling tool box containing tools.

The items that were stolen in the Sequences 3, 4, 5 and 8 respectively again were included in the rolled up larceny charge sequence 10.

This is the first sequence of offending upon which the offender engaged.

He was arrested in respect of these crimes on 18 November 2015.

…

The offender was cautioned and arrested and taken to Mt Druitt Police Station where he was introduced to the custody manager and the provisions of the Law Enforcement (Powers and Responsibilities) Act 2002 were addressed. He participated in an interview; he confirmed that he was the driver of the vehicle at the time and that the co-offender was his passenger. He said that he was instructed by the co-offender to pick up some stuff; he agreed that he assisted and he agreed that he returned on the second occasion to provide further assistance. When asked about the first occasion in this series of offences he is attributed with, "The gate was opened and I thought, well, it's not locked, the gates opened, so he must have opened it". He identified himself on closed-circuit television. He agreed that he took some items to the co-offender's house, he said he did not know what happened to the items left with the co-offender, and he said he got nothing from it.

With regard to the second occasion in this series of offences he reiterated that the roller door was already opened and that he was following the instructions of the co-offender. ***He was charged and granted bail****.*

While subject to bail he embarked upon a second series of crimes that are the subject of H60221735.

Sequence 1 is break, enter and steal. It attaches Sequence 4 upon which sentence is to be imposed. ***Around 3.30am on 7 January 2016*** *the offender broke and entered the secure carpark at 377 Barrenjoey Road Newport. He took a mountain bike, he was captured on closed-circuit television, he was wearing a gold chain and a baseball cap with a logo that was identifiable, and he also exposed a large tattoo on his right bicep which was captured.*

Sequence 2, also to be taken into account when I sentence the offender for Sequence 4, occurred ***in the early hours around 12.45am on 8 January 2016****. He broke and entered the same carpark at Newport, he removed a set of golf clubs in*

their box and items belonging to a person named Dean McCormack. He was wearing comparable items on this occasion captured on the closed-circuit television.

Sequence 13 is aggravated enter with intent to steal. ***Around 4.30am on 12 January 2016*** *he entered the basement carpark of premises at 93-95 North Steyne, Manly in company with an unknown male. They were captured on closed-circuit television leaving the carpark with two mountain bikes. They had been kept in the victim's garage that was not closed at the time. Again the offender was wearing distinctive items.*

Sequence 14 is the charge of larceny arising in respect of that event. Sequence 4 in respect of which I am to take into account additional offences, some of which I have discussed and others which are to come, occurred ***between 12 midnight and 1am on 13 January 2016.*** *The offender was with another male; he entered the carpark at 93-95 North Steyne, Manly; they were captured on closed-circuit television; they stole four mountain bicycles, purchased for $15,000.*

Sequence 5, break enter and steal to be taken into account when I sentence with Sequence 4, occurred between ***10pm on 24 January 2016 and 8pm on 25 January*** *2016. The offender entered the underground carpark at 6-12 Pacific Street, Manly; he was captured on closed-circuit television stealing two mountain bicycles. They were in a garage that was secured by a panel lift door which had been closed. These bicycles were purchased for $2,600. Again, the offender wore distinctive items of clothing.*

Sequence 6, a break enter and steal. This is an offence to be taken into account when I sentence the offender for Sequence 12.

Sequence 10 is break enter with intent, also to be taken into account when I sentence for Sequence 12. ***Around 2.30am on 20 February 2016*** *the offender*

entered the underground carpark at 20 Mooramba Road, Dee Why. He was captured on closed-circuit television footage stealing a pushbike; it had been originally purchased for $649, and was stored in the private garage the roller door of which was closed. The offender was captured opening the roller door of another private garage however he left that garage without stealing; that is the subject of the break and enter with intent as I perceive it. Again he was wearing distinctive clothing.

Sequence 12 is aggravated break enter and steal in respect of which I am to take into account the offences I have rehearsed and other offences to which I shall come. Around ***1.45am on 29 February 2016*** *the offender and an unknown male entered the underground carpark at 28 Brookvale Avenue, Brookvale opening a closed door. Inside they stole a specialised mountain bicycle purchased for $300 originally and a mountain bicycle belonging to another purchased for $1000. Once again the offender was wearing distinctive clothing.*

Around ***2.30am on 9 March 2016 the police stopped the offender as he was driving the White Ford Territory; he was with two other males. The vehicle was searched and the following offences arose as a consequence of the search of the vehicle.***

First there is Sequence 7, goods in custody, to be taken into account when I sentence for Sequence 12. There were two mountain bicycles and a camping fridge found in the vehicle.

Sequence 8 is possession of housebreaking implements to be taken into account with Sequence 12. The police found a black tool bag with a jemmy bar, a pair of bolt cutters, two torches and some WD-40 and white cloths. They also found a jemmy bar, another torch and a headlamp.

Sequence 9 is possession of a prohibited drug to be taken into account on the Form 1 attaching to Sequence 12. The offender's wallet was found to contain a small resealable bag with what was presumptively analysed and found to be 1.28 grams of methylamphetamine.

He was arrested and at the Auburn Police Station; the Law Enforcement (Powers and Responsibilities) Act provisions were addressed; he declined the opportunity to be interviewed and he was charged.

Sequence 11 upon which sentence is to be imposed is a charge of goods in custody arising from the subsequent search of the offender's premises; that was after this arrest. Police found various mountain bicycles, a helmet and a camp fridge. The owners of these items were identified. Notwithstanding what appears to be a set of circumstances from which more serious charges could have been preferred, the offender has been charged with goods in custody in respect of these items. There was a mountain bicycle originally purchased for $5,200, another originally purchased for $2,799, another originally purchased for $700, another originally purchased for $900. The camp fridge was purchased for $1,199 and another mountain bicycle was originally purchased for $1,200.

The facts specify a specialised mountain bicycle that was stolen during Sequence 12; it is not entirely clear whether that was one of the bicycles summarised in the section of the facts dealing with that offence.

The police found items of clothing that were distinctive and matched the images captured on closed-circuit television.

The offences that are to be taken into account listed in the Form 1 documents include aggravated enter dwelling with intent to steal for which the maximum penalty is imprisonment for 14 years, goods in custody for which the maximum penalty is

imprisonment for six months and a fine of five penalty units, breaking and entering a dwelling house or building and stealing, for which the maximum penalty is imprisonment for 14 years, breaking and entering with intent to steal which has a maximum penalty of imprisonment for ten years, the possession of housebreaking implements which has a maximum penalty of seven years' imprisonment, and the possession of the prohibited drug methylamphetamine which has a maximum penalty of imprisonment for two years with a fine should the Court be minded to impose one.

To summarise -

The structure upon which the sentence is to be determined the offence charged in Sequence 8 of the series H357888292 is one of aggravated enter dwelling with intent to steal; I am asked to take into account three additional offences, namely Sequences 3, 4 and 9 in that series; these are respectively aggravated enter dwelling with intent to steal; another aggravated enter dwelling with intent to steal and goods in custody.

…

The offender gave evidence when the matter was first before me on 2 March 2017. I found him to be a witness upon whom I could rely as both credible and accurate. I accept his expressions of remorse. I accept that the evidence provides a firm basis upon which to find that there are strong prospects for rehabilitation. I accept the explanation he has given for his commission of these offences, namely, as a consequence of the motor vehicle accident in which he as injured in 2014. When medication he was prescribed was inadequate he resorted to the use of methylamphetamine for pain relief which sent him on a spiral downwards to become addicted to that drug, the cost of

which reached such proportions that he embarked upon crime to fund his perceived need.

***That explains his offences but at the same time one needs to not overlook that he made the choice not to pursue other legitimate avenues of treatment and medication to assist with his problem and care is required to ensure that one does not attribute too much significance to his decision to take that path in the amelioration of what would otherwise be appropriate punishment*.**

He also called to give evidence his wife who is strongly supportive of him; he also called his sister-in-law who gave her support for the offender and is prepared with her husband to provide accommodation for the offender once he is released into the community.

…

The Court then heard submissions from the Crown who identified as part of the factual matrix upon which to determine sentence that there was a measure of planning involved in these crimes. He does have a record of comparable offence in the past. ***The Crown conceded that the property taken was not substantial****, the Crown conceded that the standard non-parole period offences were below midrange, the Crown pointed to the need for appropriate weight to be given to general and specific deterrence.* ***The Crown conceded that there are special circumstances and did not want to be heard against the proposition that there are strong prospects of rehabilitation.***

Mr Peluso made his submissions drawing upon the explanation for the misconduct including the spiral into the misuse of 'Ice'. I was reminded of his history of hard work up until the motor vehicle collision and the difficulties that arose thereafter, the recent misuse of drugs relatively late I life, and I would agree with the proposition advanced

that it is unusual to see someone of his age involved in the misuse of these substances. I was reminded of the ready response to police on the first occasion and the admissions made; the explanation for the second sequence of offending was that he was unable to cope, still burdened by the poison that he had been ingesting, and thus embarked upon further crime to fund access to the substance.

…

I impose an aggregate sentence; it shall commence on 9 March 2016.

…

I specify a non-parole period of two years and six months commencing on 9 June 2016 that shall expire on 8 September 2018. I specify a further period of imprisonment to commence at the expiration of a non-parole period of two years and six months that shall expire on 8 March 2021. I will repeat these dates: 9 June 2016 to 8 September 2018 to 8 March 2021. Being a sentence of more than three years, the offender is entitled to be considered for parole at the expiration of the non-parole period. The parole will be supervised, but the conditions for parole will be a matter for the parole authorities to assess at the relevant time.

…

All right, Mr Andrade, just stand up so I can explain to you what has happened. I imposed a sentence of five years overall. I have commenced that on 9 March 2016. You will be eligible for parole on 8 September 2018 and thereafter, assuming parole is granted, you will be subject to parole until 8 March 2021. I should add that I have taken into account your record of antecedents but I have attributed to them limited weight because predominately they are for driving offences. The comparable offence that is on your record was in May 1994, an offence of break, enter and steal

for which you were given 150 hours community service; the balance of the offences, serious though they are within the context of driving, they bear marginally if at all upon my assessment of your background for the purposes of the present matters."[26]

35. On 20 July 2018, the Applicant was advised that his visa was being cancelled under s 501(3A) of the Act.[27] This cancellation was based on this 16 June 2017 sentence. The Applicant acknowledged this in writing on 3 August 2018.[28]

36. He was released from prison on 8 September 2018 but was then detained in Villawood Detention Centre until his release in February 2019.[29]

37. On 13 February 2019, the Applicant was advised as follows by the Respondent:

"*13 February 2019*

Notification of decision to revoke visa cancellation under section 501CA(4) of the Migration Act 1958

On 30 July 2018, your BF Transitional (Permanent) visa was cancelled (original decision) under s501(3A) of the Migration Act 1958 (the Act). You were invited to seek revocation of the original decision and you made representations to the decision-maker about why the original decision should be revoked.

After consideration of your response, the decision-maker has decided to revoke the original decision to cancel your visa.

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[26] Ibid, G4, p 278-302.
[27] Ibid, G2, Attachment Y1, p 196-201.
[28] Ibid p 202.
[29] Ibid, G2, Attachment Q, p 138; G4, p 301.

Section 501CA(5) of the Act provides that if the decision to cancel your visa is revoked the original decision is taken not to have been made. Accordingly, you hold a BF Transitional (Permanent) visa which authorises your continued stay in Australia.

***Warning: if you engage in further criminal or other serious conduct, this may again result in your visa being cancelled on character grounds*.**"[30]

38. The Applicant acknowledged this warning in writing on 14 February 2019.[31]

39. The Applicant's brother E died just before Christmas in 2020.[32] He says that this led to him recalling the unresolved trauma of him having been raped by his brother as a child. He said that this led to him returning to drug use.[33] He resumed offending.

40. The NSW Police Fact Sheets regarding this offending relates to 29 December 2020 and 23 March 2021. They state as follows:

"***ANTECEDENT***

Jose Andrade, is currently unemployed, he is married and resides with his wife in the Campbelltown area. He has three children, two of which are between 29 - 32. His third child is 10 years of age, however resides with the biological mother in Queensland. he pays child support for this child.

Andrade is known to police and the courts. He has been Charged and convicted of

[30] Ibid, G2, Attachment Y2, p 203, 78.
[31] Ibid p 210.
[32] Ibid, G2, Attachment I, p 78, 138.
[33] Ibid, G2, Attachment Q, p 138-140.

Aggravated breaking offences and has served at least 5 years imprisonment term. On the 8th of March he finished his term of parole. Adrade has informed police he has a drug addiction and is easily persuaded by people.

Andrade is a risk to the community and police are of the belief he will continue to commit property offences.

If Andrade is granted bail police seek the following conditions:

- Not to be under the influence of drugs and alcohol unless prescribed by a medical practitioner. - Not to contact / associate with co accused Robert Hunter. - Not to enter the North Shore Police Area Command - Not to contact or go near prosecution witnesses.

- Curfew between 6:00pm to 6:00am. - Report twice daily to his local police station

FULL FACTS

The accused in the matter is Jose (Richard) Ricado Andrade, born 18 January 1969. The co accused in the matter is Robert Albert Hunter, born 20 March 1979.

About 12:00am on Tuesday the 23rd of March 2021, the accused Jose Andrade left his Campbelltown residence in a black Ford Focus hatch back motor vehicle bearing New South Wales registration plates DA78PC after receiving a phone call from co accused Robert Hunter. Andrade drove the vehicle to Hunter's residence in the suburb of Mount Druitt and picked him up. Hunter told Andrade to drive to his mates' house in the suburb of North Sydney to collect power tools.

About 3:30am, witness Mr Francis O'Connor observes Andrade and Hunter outside of unit complex 33 Reynolds Street, Cremorne. The witness observed a torch being

utilised as the light was shining into parked motor vehicles. The witness called police.

About 4:00am Police arrived and observed the black Ford Focus motor vehicle bearing New South Wales number plate DA78PC. Police activated all warning lights and devices to indicate to the driver to stop. The vehicle continued to drive for a short period of time. Police vehicles corralled the vehicle in order from him escaping.

Police approached the driver's side door and observe Andrade occupying the driver's seat. Hunter was seated in the front passenger seat. Andrade produced his New South Wales driver's license 108916596, with a coloured picture of Andrade on the front. Andrade appeared nervous and he was shaking and not speaking in complete sentences. This interaction was captured on police body worn video.

Police looked into the back of the vehicle and saw a number of power toolboxes, a dismantled mountain bike, a Webber branded barbecue amongst other items of interest. Further enquiries were made with Andrade about the ownership of the tools and why they were in the suburb of Cremorne. Andrade informed police he was in Cremorne to drop off his girlfriend, and that he was a builder by trade. Andrade was unable to provide an address or a name of his girlfriend and place of work.

Police suspected the property inside of the motor vehicle was stolen. Andrade and Hunter were told them and their vehicle were going to be searched. Soon after they were requested to exit the vehicle. Upon Andrade opening the driver's side door police observed a jemmy bar tucked beside the driver's seat. Andrade was asked further questions about the jemmy bar and denied knowledge of it being there.

A search of the motor vehicle was conducted, and police located the following items:

6 x Various baseball caps brands inclusive of Chicago Bulls, Sox, Lakers, Calloway, Ford and A. 1x Bosch branded laser level 10 x Pairs of assorted reading and sunglasses 3 x Head torches 3 x Handheld torches 1 x Brown leather men's wallet with New South Wales drivers' licence in the name of Corey Lucas and other personal cards in the name of Cory Lucas. 3 x Pairs of material and rubber gloves 2 x Glass smoking pipes that appeared to be used 1x King Chrome spanner set 1 x Makita brand hand blower 1x Makita brand cordless drill 1x Makita brand Torch 1 x Webber brand barbeque with cover 1 x Makita brand Angle grinder 1 x Key ring with a remote, a tag with a phone number engraved, 3 small keys and a small Stanley knife attached. 1x Black garage remote 7 x Spanners 1 x Makita brand hand planer 1 x Makita brand sander 1x Rural fire service duffle bag 1 x Mini toolbox 1x Makita brand concrete drill 2x Makita brand reciprocating saw 1x Makita brand circular saw 4 x Crow bars, assorted handheld tools, small Nike backpack 1 x Paslode nail gun 1 x Makita brand radio 1 x Makita brand handheld jig saw. 2 x Small empty clear resealable zip lock bags with a clear crystalline residue.b [sic]

1 x Box Muscle Chef brand frozen meals in the name of Joshua Kitson from a Gerard Street, Cremorne address. The meals were still cold upon seizing. Police estimate the property contained within the vehicle is worth approximately $5,000.

Andrade was cautioned and asked further questions in relation to the located property. This was captured on police body worn video, Whilst Andrade and Hunter were being spoken to, witness O'Connor told police his vehicle had been broken into and his power tools predominantly Makita branded were stolen. Police have identified the tools inside of the vehicle belonging to O'Connor.

O'Connor outlined his vehicle had been parked in underground parking and secured when he left the vehicle earlier that evening.

Andrade and Hunter were placed under arrest and conveyed back to Chatswood Police Station. Andrade was introduced to the custody manager and read his part 9 rights as per Law Enforcement (Powers and Responsibilities) Act 2002. Andrade was given the opportunity to speak with a legal representative and declined. Andrade was given the opportunity to participate in an electronically recorded interview and accepted. R0688336 relates.

Prior to the interview police made some observations. Andrade's eyes were glassy, the whites of his eyes were light pink, he complained of dry mouth. Andrade was able to speak and understand directions by police. Police asked the Andrade if he was under the influence of any drugs or Alcohol. Andrade stated he did not consume any alcohol however said he smoked "Meth" a few hours prior.

During the interview Andrade stated he earlier lied to police about his movements in the early hours of the morning. Andrade stated he suspected Hunter was going to pick up stolen goods. He denied breaking into properties and motor vehicles. Andrade stated to police that he smoked the "Meth" a few hours prior to being stopped.

Andrade consented and participated in a forensic procedure by way of BUCCAL swab and photographs, XPS00129503 relates.

In regards to the Commit section 114 offence, both the accused and co accused have previously been convicted of an indictable offence. In committing these new offences on the 23rd of March 2021, the accused and the co accused have also committed an offence under section 115 of the Crimes Act,1900.

The matter is now before the courts.

ANTECEDENT

The accused person charged before the courts is Jose ANDRADE, born the 18th of January 1969 (52 years of age). He is currently residing at 1 Waminda Avenue, CAMPBELLTOWN NSW 2560. He is currently unemployed but receiving Centrelink payments of $700 a fortnight and has 1 child who he pays child support to. The accused has no other financial commitments such as loans or mortgage other than approximately $300 a week for bills.

FULL FACTS

The accused in this matter is Jose ANDRADE, born on the 18th of January 1969 (52 years of age).

The victim in this matter is Apurva MISHRA, born on the 28th of June 1982 (39 years of age).

The accused and the victim are not known to each other.

The victim resides in a unit at an apartment block located at 1-5 Network Place, NORTH RYDE NSW 2113. This apartment block has a shared car park with a secure bicycle storage area.

The victim had his bicycle locked and secured in the secure bicycle storage area on level B1 of the shared car park. This bicycle is described as a Norco Sight A3 bicycle valued at $3250. The bicycle had a Knog Lil Cobber light set on it worth $124. The bicycle was secured to the bicycle racks by two Abus Bordo Lite 6055 85cm locks worth $142 each. At about 01:48h on 29/12/2020, the accused, Jose ANDRADE entered the building situated at 1-5 Network Place, NORTH RYDE NSW 2113. Using physical force and tools, the accused has then gained entry to the bicycle storage area on level B1. The accused was wearing a black baseball cap, blue surgical face mask, black singlet with black jacket, grey pants, and black shoes at the time of the offence.

After the accused entered the bicycle storage area, he has walked around, looking, and touching several bicycles that were in the bicycle storage area. The accused has picked up a bicycle and pushed it around the bicycle storage area before putting down the bicycle and changing his attention to another bicycle nearby. The accused tried to remove the second bicycle from the racks however it was secured to the racks with a locked chain. The accused has then removed the chain by cutting it and damaging it, freeing the bicycle from the racks. The accused has then pushed the bicycle out of the bicycle storage area along with a bicycle helmet.

At about 02:05h, the accused exited the building through the rear fire stairs. As the accused opened the door to leave, a security officer was conducting checks at the same door and ran into the accused. The accused pushed past the security officer, however, was then chased after by the security officer towards Rennie Street.

The accused placed the bicycle in the back of his vehicle with NSW registration CK75PO, a 2010 White Ford Territory SUV, and drove away towards New link Road.

The accused did not have permission to take the bicycle.

The entire offence was captured by CCTV.

Police were contacted and attended on 04/01/2021 to collect the CCTV footage from the building manager. Crime scene officers also attended the scene to collect fingerprints and DNA from a prybar used by the accused to force entry as well as the handlebars of the other bicycle he touched. This resulted in a DNA match to the accused.
Police obtained relevant details and a statement from the victim. Investigations let to the accused being identified.

PROPERTY: Norco Sight A3 bicycle valued at $3250. Bicycle and helmet have been recovered by the victim, however the lights on the bicycle are still missing and the two locks were destroyed by the accused. The victim is seeking compensation for the light set ($124) and two locks ($142 each).

The accused has not been photographed or fingerprinted in relation to this offence.

The accused is now charged with the matter before the Court."[34]

41. On 23 March 2021, the Applicant returned to prison.[35]

42. On 9 June 2021, the Applicant was convicted in the Manly Local Court of various offences relating to breaking and entering and motor vehicle offences. He was sentenced to 12 months' imprisonment with a 6 month non parole period (i.e., release on 22 September 2021).[36]

43. The sentencing remarks of Magistrate Guy are relevantly as follows:

"*Wednesday 9 June 2021*

HIS HONOUR: The defendant is for sentence on a number of matters. The more serious obviously is enter building with the intent, goods in custody, or the larceny, so if the dollar amount was significant. ***The pleas of guilty have been entered, 25% obviously is afforded to those, the larceny in my view the low mid, the enter building again the low, goods in custody is the lower end, the larceny I note in the papers ending 201, the property has been returned.***

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[34] Ibid, G2, Attachment E-F, p 54-60.
[35] Ibid, G2, Attachment Q, p 138
[36] Ibid, G2, Attachment A, p 30-32; Attachment G, p 61-63

The subjective case has been identified on the defendant's behalf and the documents the report from the psychologist the pre-sentence report ***there has been a longstanding difficulty with drugs, drugs no doubt in part from the issue involving an accident and then trauma within the family.***

The report from psychologist identifies a number of mental conditions or disorders, like everything it is a balance there are no automatic consequences that apply because someone has a mental condition or a disorder, like everything it depends. ***I accept that issues about culpability and general deterrence have a lesser role to play. Balanced against that it cannot be said that the defendant did not appreciate what he was doing or what he was doing was in fact wrong****.*

As to his record obviously it is a significant one that a significant sentence was imposed for matters of dishonesty. The head sentence that expired a short time prior to these matters occurring, he had finished, as I remembered, he had been, he finished his parole. The record obviously does not increase the objective seriousness of the offending, that said, it certainly does not entitle to him or disentitles him from any leniency that would otherwise apply, and it goes then to the issue of terms of protection of the community. ***There is an assessment by Community Corrections that Mt Andrade is of medium high risk of re-offending, that is undoubtedly the case. Whilst there is and remains an issue involving drug addiction, the prospect of further offences will loom large.*** *I am conscious of s 66 and the debate that is going on in the high courts about how one interprets it. I do not share the view that the matter could be adequately addressed by way of an intensive corrections order. I do because of the seriousness of the matters, I do however, intend to vary the head sentence and non-parole periods significantly, and there will be a modest extension of the existing period in the scheme of things.*

THERE WILL BE AN AGGREGATE SENTENCE. THE DISCOUNT WILL HAVE BEEN APPLIED TO THE INDICATIVE SENTENCES. ON PAPER ENDING 201 INDICATIVE SENTENCE THREE MONTHS IN PAPERS ENDING 156, THE LARCENY, FIVE MONTHS, ENTER BUILDING, NINE MONTHS, GOODS IN CUSTODY TWO, HOUSEBREAKING IMPLEMENTS SEVEN, ***AGGREGATE SENTENCE 12, NON-PAROLE SIX TO DATE FROM 23 MARCH 2021, MAKING THE DEFENDANT ELIGIBLE FOR RELEASE ON PAROLE SUBJECT TO SUPERVISION BY THAT SERVICE ON 22 SEPTEMBER*****.***"[37]

44. On 23 June 2021, the Applicant's visa was cancelled under s 501(3A) of the Act.[38]

45. On 21 July the Applicant made representations seeking the revocation of the cancellation of his visa.[39] These were supplemented by various further submissions, including from lawyers acting on his behalf.[40]

46. The Applicant appealed the sentence imposed by Magistrate Guy, to the District Court of NSW Criminal Division.

47. On 18 August 2021, this sentence was the subject of a successful appeal. His sentence was reduced to an aggregate of 10 month's imprisonment commencing on 23 March 2021, with a 5 month non parole period to expire on 22 August 2021.[41] The decision of Judge Huggett was as follows:

"*18 AUGUST 2021*

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[37] Ibid, G2, Attachment C, p 42-46.
[38] Ibid, G2, Attachment Z, p 211-217.
[39] Ibid, G2, Attachment I, p 69-82.
[40] Ibid, G2, Attachment K1-M2, p 83-104.
[41] Ibid, G2, Attachment A, p 29-31.

> *HER HONOUR:* ***I propose to allow the appeal to set aside the orders of the Magistrate. Having regard to the personal circumstances of the appellant as well as the objective gravity of the two sets of offences, which in my view is low****, the appellant is sentenced to an aggregate term of imprisonment of ten months to date from 23 March 2021, which is to expire on 22 January 2022 with a non-parole period of five months to date from 23 March 2021, which is to expire on 22 August 2021 on which date, at the expiration of the non-parole period, the appellant is to be released to parole.*
>
> *I recommend strongly that the appellant be supervised for the entirety of his parole period and assistance given to him in relation to psychological counselling and substance abuse problems."*[42]

48. The Applicant's history of offending was put to him in cross-examination. He did not deny it, but he generally had no memory of the relevant events. He says that this was due to his drug use and long periods without sleep. He accepted that he has a serious criminal record.

49. It is very concerning that the Applicant has a demonstrated propensity for breaking and entering. This offending has been committed in company and has involved premeditation and planning, albeit of an unsophisticated nature.

50. On 21 September 2022, the Applicant was advised of the decision not to revoke the decision to cancel his visa.[43]

51. On 27 September 2022, the Applicant lodged an application for review of the decision not to revoke his visa cancellation. It is this application that is presently before the Tribunal.[44]

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[42] Ibid, G2, Attachment B, p 40.
[43] Ibid, G2, p 9-28.
[44] Ibid, G1, p3-8.

52. The Applicant has, aside from his periods of incarceration, usually been a contributor to society, being employed and providing voluntary assistance to others.[45] This was the case for a lengthy period, from the time of his PCA conviction on 20 May 1998 up until his MVA in 2014. Since then, his life has taken a very different course.

53. The Applicant has some physical impairments as a result of that MVA. He reports a damaged lumbar spine, foot drop, damage to his right elbow, pain, and leg numbness. He also reports mental health issues with PTSD, depression and anxiety. He also has a history of substance abuse.[46]

54. The Applicant has undertaken various drug and alcohol courses when in prison in 2016 and 2019. He has not however followed these up, post release in the past.[47] Any credit to be given to him for these efforts, is greatly diminished by the fact that he resumed his drug use and his offending in 2021.

55. The Applicant had an AV interview with Mr Sam Borenstein, psychologist on 4 June 2021. Mr Borenstein produced a report dated 5 June 2021 which relevantly states:

> "*Mr Andrade relapsed when his older brother died prior to Christmas 2020. Mr Andrade said if [sic] his older brother, "he raped me. I was 6 or 7. He did it a couple of times. I've only just talked about it now. I've never spoken about it before. I feel so ashamed, and I feel dirty".*
>
> *Mr Andrade states following his brother's death, "it all came back to me. It was always there, and after he died, I could not get of the thoughts. I didn't care, I started*

[45] Ibid, G2, Attachment I, p 79; Attachment F1-F4, p 126-136.
[46] Ibid, G2, Attachment I, p 80; Attachment L, p 100; Attachment Q, p 137-148.
[47] Ibid, G2, Attachment Q, p 138.

doing silly things. I was speeding, I lost points on my licence. I went back to taking 'ice' and got into what I did to supply my 'ice' habit".

Mr Andrade states he had completed the EQUIPS Foundation and EQUIPS Drug and Alcohol courses when in prison between 2016 and 2019, ***however when released from prison, he did not undertake any follow up psychological or drug and alcohol counselling.***

I enquired about Mr Andrade's drug history. Mr Andrade was involved in a serious motor vehicle accident in 2014, when driving on the Harbour Bridge his vehicle was involved in a high speed rear end collision, "it wrecked my whole life. It damaged my back, I was off work for eight months. I tried to go back, but I couldn't last more than four days. I haven't been able to work since".

Prior to the accident in 2014, Mr Andrade worked as a rigger, erecting transmission towers on a fly in/fly out basis. Mr Andrade had no drug history prior to the 2014 accident.

Mr Andrade is left with chronic back pain, impacting his left leg, left foot drop and sciatic pain impacting his right leg.

Mr Andrade also suffers frequent and debilitating, headaches.

Mr Andrade's psychological state was severely impacted as a result of losing independence, and unable to work and support his wife.

Mr Andrade described symptoms of depression, which included sleep disturbance, anhedonia, amotivation, social withdrawal/isolation, and feelings of worthlessness. Mr Andrade was treated with Tramadol for pain relief, and he was also prescribed

antidepressant medication (A vanza), however he could [sic] tolerate their side effects.

Mr Andrade also suffered with symptoms of traumatic stress, viz. fear of recurrence of accident, and intrusive recollections/flashbacks, and nightmares of the accident. Mr Andrade reported triggered or cued response to the Harbour Bridge, which activated symptoms of anxiety, i.e. elevated heart rate, breathlessness, muscle tension/tightness and perspiration.

Mr Andrade commenced 'ice' for the very first time in 2015/2016, "I was offered it from this new friend I made. It took my pain away. I didn't realise he was a criminal. I drove him around, and that's how I got charged with aggravated break and enter. I only did it, so I could get 'ice', otherwise I couldn't afford it. It cost between $100 and $200 a day for the amount of 'ice' I was using. It ruined my life, and now I'm back here again".

As Mr Andrade made this comment during interview, he suppressed emotion and tears.

Mr Andrade states his wife has organised an admission to 'The Glen', for inpatient drug rehabilitation. Mr Andrade states he is very keen to pursue intensive inpatient drug rehabilitation and to ensure he remains abstinent from drugs, which motivated the offending behaviours.

Mr Andrade has been married to his wife, Lydia, since 2011, and she acts as Mr Andrade's carer. They have no children together, and Lydia has no history of childbirth.

Mr Andrade describes his marriage to Lydia as supportive, caring and loving. Mr Andrade commented, "before all this, my depression interfered with our sex life. I

didn't have any interest". Mr Andrade described reduced libido and erectile dysfunction, since suffering chronic back pain and depressed mood.

Mr Andrade also reports memory disturbance and impaired concentration. Mr Andrade's mother died with dementia. Mr Andrade fears he might be dementing, which compounds symptoms of depression and anxiety. Mr Andrade achieved relief from mixed symptoms and improved pain management, when taking 'ice', which motivated the offending behaviours.

Mr Andrade notes a deterioration in his physical and mental health since coming to goal, particularly when subject to the bashing, and now being held in protection.

Results on the Depression Anxiety Stress Scale (DASS 21), confirms extremely severe symptoms of depression, which includes inability to experience any positive feelings at all, finding it difficult to work up the initiative to do things, feeling he has nothing to look forward to, feeling down hearted and blue, unable to become enthusiastic about anything, and feeling he is not worth much as a person.

DASS 21 results confirm extremely severe symptoms of anxiety, which includes dryness of mouth, elevated heart rate in the absence of physical exertion, trembling, worrying about situations in which he might panic and make a fool of himself, feeling close to panic, elevated heart rate in the absence of physical exertion, and feeling scared without good reason.

DASS 21 results confirm extremely severe symptoms of stress, which include difficulty winding down, tending to over react to situations, feeling he is using a lot of nervous energy, ease of agitation, difficulty relaxing, reduced tolerance to frustration and increased interpersonal sensitivity.

Results on the Post Traumatic Stress Disorder Checklist, confirms Mr Andrade suffers with moderate to severe symptoms of PTSD, which includes repeated disturbing memories, thoughts or images of being sexually abused, repeated disturbing dreams/nightmares of the abuse, feeling distressed when reminded of the abuse, avoiding activities or situations that remind him of that abuse, feeling distant and cut off from others, experiencing memory and concentration difficulties, and triggered/cued response to the abuse.

Mr Andrade's diagnosis is that of Major Depression (recurrent type), chronic and severe Post Traumatic Stress Disorder, and Chronic Pain of Known Medical Cause.

In addition to Mr Andrade suffering with Major Depression and PTSD, he satisfies the diagnostic criteria for Substance Use Disorder, currently in remission due to incarceration.

Mr Andrade's wife has organised for an admission to The Glen inpatient rehabilitation program.

Mr Andrade impressed as motivated to enter into an inpatient drug rehabilitation program, and to learn more effective ways of managing breakthrough symptoms of depression, PTSD and chronic pain and avoid relapsing into using 'ice' as a form of self medication, as was the case leading up to and during the offending period.

Successful management of chronic pain, PTSD and Major Depression, together with specific input with regards relapse prevention (methamphetamine), will, in my opinion, mean the likelihood of Mr Andrade reoffending will be significantly reduced."[48]

[48] Ibid, G2, Attachment Q, p 137-149.

56. The Applicant reports that he does not speak Portuguese and that he has no family or other support networks in Portugal.[49] He says that he would be depressed and terrified if he were to be returned there.[50] He states in his application dated 21 July 2021:

> "*I would be so depressed and terrified of what lies ahead in a country I haven't grown up in. Don't know anyone there at all.*
>
> *Please Mr Minister or Delegate. Give me another chance to prove that I am a reformed person. I have all my family here in Australia. My mum and dad are buried here. My brothers Emmanuel and sister Lubulia are also buried here in Sydney Australia. I have no one or no where to live in Portugal. I promise to all Australians that I will never cause a silly crime that's nearly destroyed my relationship with my wife. I hope that you will consider giving my visa back. I will fix up all of the mistakes that I made here in Australia. It's all redeemable. My crimes were not life threatening. I stole some things from a garage. I also drove on drugs. I have repayed [sic] the victims monetarily & said sorry. Been in Australia for 51 years. I started working when I was 17 I've been paying tax for 30 years or more for this country. I have ben voting for this country since the age of 18 years. Please give me another chance to prove my self that I'm a changed man. I have been in jail for 5 months and I was going to be released this year on August 22. My sentence was reduced to 10 months! I'm so devastated I received the cancellation of visa letter, I'm so stressed! I can't bear that I'm going to be in detention centre that's full of bad people that are on drugs, and who knows what else happens here. I don't want to be here because I have health issues, depressed, even more mental health problems. I might be forced to take drugs again or might get*

[49] Ibid, G2, Attachment I, p 80.
[50] Ibid p 81.

hurt by someone. I could end up committing suicide! Please let me go home to my own house so I can gin [sic] get back to living my life with my wife and family. Parole has already granted me release there. I will also enrol in rehab & counselling. Thanks for reading this letter Sir-Mrs. I'm not very good at writing letters so I don't blame you if you don't understand what I wrote.

Kind regards,

Jose Ricardo Andrade"[51]

57. The Applicant was released on parole on 22 August 2021 and taken into immigration detention.[52]

58. On 31 August 2021, the Applicant's wife wrote the following letter of support:

"*To Whom it may concern:*

This is a letter of support for Jose [Caires de] Andrade.

My name is Lydia Andrade (nee Roberts) and I am the wife of Jose. I am an Australian born citizen. Jose and I have been married for 9 years. Jose has had a very difficult life, has suffered extensively both physically and psychologically, and unfortunately because of these factors, he has made some bad decisions over time, using drugs and subsequently getting on the wrong side of the law. I cannot excuse his behaviour, but I do believe that this time he has truly reformed and has learnt his lesson and if given one last chance he will prove to all the community and the

[51] Ibid, G2, Attachment I, p 81-82.
[52] Ibid, G2, Attachment K4, p 97

government that he is a changed man. He is not a bad person; he's just made mistakes.

Jose is very much an Australian, and has been here since he was 1 year old. He has no ties to Portugal, and it would be absurd and nonsensical to deport him back to a foreign country.

Jose and I are planning to move to Queensland upon his release from the immigration detention centre (after his permanent visa is reinstated) and buy a house and a small farm, live an independent, self-sustainable life on the land, and also contribute to the community in a positive and generous way.

Thank you for giving him a chance to commence a fresh start in life.

Regards,

Lydia Andrade"[53]

59. She has written several further representations in support.[54]

60. There are numerous other statements in support of the Applicant from friends and family.[55]

61. On 6 November 2022, the Applicant produced a statement in these terms:

"***Statement of Jose Ricardo Caires De Andrade***

[53] Ibid, G2, Attachment S2, p 163.
[54] Ibid, G2, Attachment S3, p 164-5; Attachment S4, p 166; Attachment S5, p 169-70; Exhibit 4.2
[55] Ibid, G2, Attachment S1-V4, p 162-186; G9, p 310.

Introduction

1. My name is Jose Ricardo Caires De Andrade.

2. I am the applicant in proceedings currently before the Administrative Appeals Tribunal (the Tribunal).

3. On 6 November 2022, I had a conference with Dr Jason Donnelly (my barrister). As a result of that conference, I produce this witness statement for my appeal proceedings currently before the Tribunal.

5. I am currently detained at the Yongah Hill Immigration Detention Centre. I have been in immigration detention since about August 2021.

Continuing Relationships

6. I continue to maintain a close and loving relationship with my wife, Lydia Andrade. We speak daily on the telephone and videocalls, especially in the evenings. I am extremely grateful that Lydia has remained in my life and supported me during my time in immigration detention.

7. If I am returned to the Australian community, I will reside with my wife at 6 Calgaroo Avenue, Muswellbrook, NSW, 2333. This means that I will not be in Sydney. I will be able to focus on my wife and satisfactorily reintegrate into the Australian community.

8. I otherwise continue to maintain a beautiful relationship with my daughter, Haylie Andrade. When I was in the community, we would regularly go for coffee and keep connected. During my time in immigration detention, I have kept in contact with my daughter by telephone. Haylie lives in Sydney. I love her very much.

9. I also to continue to maintain a relationship with my son, Shaun Andrade. My son resides in Sydney. We keep in contact by telephone. My son works in the IT industry. Like my daughter, I love my son very much. My children mean the world to me.

10. I also have a minor child (Child A) I have provided substantial financial assistance to (Child A) over the years. If I am released from immigration detention, I would like to take steps to establish face to face contact with (Child A). If I am deported to Portugal, I will never be able to connect with (Child A).

11. I also continue to maintain a relationship with my siblings: Maria Fernandez (sister); Anna Duarte (sister) and Julie Santas (sister). My nephew, Jason Andrade, also has continued to maintain ongoing contact with me. Jason is the son of Maria.

12. I love all my immediate and extended family in Australia greatly. They are my everything. If I am released back into the Australian community, I will have the full support of my family.

Implications if Deported

13. If I am deported to Portugal, I believe that I will die. I am extremely concerned that I would commit suicide either by drug overdose or jumping off a cliff. My mental state at the present time has been significantly compromised during my time in immigration detention. I am not in close proximity to my family.

14. The living conditions at the Yongah Hill Immigration Detention Centre are very poor.

15. I do not speak the Portuguese language. I have no support network whatsoever in Portugal. My family are all in Australia. I have been informed by my barrister that

I do not qualify for unemployment benefits in Portugal. I have no accommodation and ability to live if I am deported to Portugal.

16. Sending me to Portugal would effectively end my life. I have lived in Australia my entire life and have not left since arriving as a baby. Seeking to deport me has greatly impacted my mental health. My wife and other family members in Australia would also be absolutely devastated if I was deported. They would suffer lifelong misery and sadness.

Conclusion

17. I am extremely remorseful for my criminal offending in Australia. I am extremely remorseful that I became addicted to the destructive drug, 'ice'. It is a highly addictive drug that took away my ability to be normal. Thankfully, since my time in both prison and immigration detention more recently, I have been in complete remission from illicit drugs.

18. Drugs are easily accessible in both prison and immigration detention.

19. I plea with the Tribunal to restore my visa to me.

Jose Ricardo Caires De Andrade

6 November 2022"[56]

62. If the Applicant were to be released into the community, he plans to live with his wife in a property that she purchased about a year ago in Muswellbrook. Muswellbrook is a rural town of some 18,000 inhabitants in the Upper Hunter region of NSW. It is about 3 hour's

[56] Exhibit 4.1

drive from Sydney and about 1.5 hour's drive from Newcastle. The Applicant's wife has a job there as a carer and is settled in the community. She told the Tribunal that getting away from Sydney and his old friends would help the Applicant to make a new start. She told the Tribunal that there are medical and psychological support services available there, or in Newcastle. She wants to support the Applicant to make a fresh start.

63. The Applicant said that he would seek work, possibly doing lawn mowing, gardening and odd jobs. He would make child support payments to Child A and possibly seek to establish a relationship with her. Given the history of his complete absence from her life and a poor relationship with her mother, this is highly unlikely.

64. There is a tension between the Applicant being kept away from Sydney and his often-repeated statements to the Tribunal that he would have no problem driving there to see his family and to help them out. I note that his wife mentioned that it was his nephew's friend who had introduced the Applicant to drugs in the first place.

65. The Applicant has an extensive criminal history. A copy of his record of convictions is annexed hereto and marked "B".

LEGISLATIVE FRAMEWORK

Does the Applicant Pass the Character Test?

66. The Applicant was sentenced in the Local Court of NSW at Manly, to a term of imprisonment of 12 months on 9 June 2021.

67. At the time of the Applicant's visa cancellation, on 23 June 2021, the Applicant had a "*substantial criminal record*" as defined and he therefore did not pass the "*character test*". The mandatory cancellation of his visa occurred under s 501 (3A). There was at that time

no evaluative assessment of whether the Applicant failed to pass the "*character test*" as would have been required for example, under s 501(6)(c) or (d).

68. The Applicant does not dispute that this cancellation was valid.

69. This sentence was later the subject of a successful appeal on 18 August 2021 and the term of imprisonment was reduced to 10 months.

70. S 501(10) sets out very limited circumstances in which a sentence, once imposed, is to be disregarded for the purposes of the character test.

> *(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:*
>
> *(a) the conviction concerned has been quashed or otherwise nullified; or*
>
> *(b) both:*
>
> *(i) the person has been pardoned in relation to the conviction concerned; and*
>
> *(ii) the effect of that pardon is that the person is taken never to have been convicted of the offence.*

71. The Applicant's circumstances do not come within s 501(10).

72. In this instance, the task of the Tribunal is to review the Respondent's decision of 21 September 2022 not to revoke the Applicant's visa cancellation under s 501CA (4). This decision was predicated on the antecedent fact of a mandatory visa cancellation under s 501(3A). The Delegate said:

> "*1. This statement relates to my decision under s501CA(4) of the Migration Act 1958 (the Act) not to revoke the cancellation of the Class BF transitional (permanent) visa*

previously held by Mr CAIRES DE ANDRADE. That visa was mandatorily cancelled on 23 June 2021 by a delegate under s501(3A) (cancellation decision).

2. Section 501CA(4) of the Act enables me, as a delegate of a Minister administering the Act, to revoke a decision made under s501(3A) to cancel a person's visa if:

> *(a) the person makes representations in accordance with the invitation given under s501CA(3)(b) about revocation of the cancellation decision; and*
>
> *(b) I am satisfied:*
>
> > *(i) that the person passes the character test (as defined by s501); or*
> >
> > *(ii) that there is another reason why the cancellation decision should be revoked.*

REPRESENTATIONS IN ACCORDANCE WITH INVITATION

3. On 21 July 2021 Mr CAIRES DE ANDRADE made representations seeking revocation of the cancellation decision Attachment I. These representations were made within the period and in a manner set out in the regulations. Thus, I find that Mr CAIRES DE ANDRADE has made representations in accordance with the invitation, as required under s501CA(4)(a) of the Act.

CHARACTER TEST

4. On 23 June 2021 Mr CAIRES DE ANDRADE's visa was cancelled under s501(3A) as a delegate was satisfied he did not pass the character test because of the operation of s501(6)(a) (substantial criminal record) on the basis of s501(7)(c) and because he was serving a sentence of imprisonment, on a full-time basis in the

Bathurst Correctional Centre in New South Wales for an offence against a law in Australia.

5. Section 501(7)(c) provides that for the purpose of the character test a person has a 'substantial criminal record' if the person has been sentenced to a term of imprisonment of 12 months or more.

6. Mr CAIRES DE ANDRADE's National Criminal History Check dated 4 September 2021 indicates that ***on 9 June 2021 Mr CAIRES DE ANDRADE was convicted in the Local Court of New South Wales*** *of;*

- *possess housebreaking implements,*
- *larceny value >$ 5000 & <=$15000, enter building/land w/i commit indictable offence,*
- *goods in personal custody suspected being stolen (m/v),*
- *commit s114 offence, having previous conviction, drive vehicle under influence of drugs-1st off and*
- larceny value >$ 2000 & <=$ 5000

7. Mr CAIRES DE ANDRADE was sentenced to an aggregate of 12 months imprisonment for these offences. Mr CAIRES DE ANDRADE appealed the severity of the sentence and on 18 August 2021 the District Court of New South Wales varied the sentence to an aggregate of 10 months imprisonment Attachments A and C.

8. I have considered the representations made by Mr CAIRES DE ANDRADE and the documents he has submitted in support of his representations Attachments C and I to W2.

9. In the representations/documents that Mr CAIRES DE ANDRADE submitted, he does not dispute the information in the National Criminal History Check dated 4 September 2021 regarding his criminal convictions and sentences, or that he did not

satisfy the character test at the time of his visa cancellation. Mr CAIRES DE ANDRADE representative believes that as Mr CAIRES DE ANDRADE's sentence of imprisonment was varied by the District Court of New South Wales from 12 months to ten months that Mr CAIRES DE ANDRADE no longer fails the character test Attachment K2.

10. Mr CAIRES DE ANDRADE representatives submitted that while they understand that Mr CAIRES DE ANDRADE's request for revocation is being progressed, they note he is being held unlawfully in detention pending the decision of the Minister. The representatives requested Mr CAIRES DE ANDRADE be released as per the Court Order Notice of 18 August 2021 and that Mr CAIRES DE ANDRADE be permitted to wait for the outcome of his request for revocation from his residential address Attachment K3.

11. At the time Mr CAIRES DE ANDRADE's visa was cancelled he did not meet the character test and as such it was a valid cancellation. The District Court varying the sentence to less than 12 months does not negate the validity of the cancellation and the usual process of requesting a revocation of the visa cancellation is maintained, including consideration of the decision by the District Court."[57]

73. The decision explored only whether there was "*another reason*" why the decision should be revoked. The initial revocation under s 501 (3A), which was based on the facts as they were at that time, was not considered and is not reviewable in these proceedings.

74. In this context I note the High Court decision in **Plaintiff B65/2020 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**,[58] Stewart J

[57] Ibid, G2, Attachment 3, p 15-16.
[58] [2021] HCATrans 118.

considered whether the validity of a mandatory cancellation decision made under s 501(3A) could be affected by subsequent events:

> "*37. Section 501(3A) of the Migration Act is mandatory in its terms.* ***The Minister does not possess a discretion to decide not to exercise the power once she or he is satisfied that the necessary jurisdictional facts are present****. The power is relevantly predicated upon a state of satisfaction about the existence of two facts. The first fact is that the person "has been sentenced to a term of imprisonment of 12 months or more". The use of the past tense here mandates the prior existence of such a sentence at the time the Minister must exercise the power conferred by s 501(3A)*
>
> *As Middleton, Reeves and Anderson JJ said in Ketjan v Assistant Minister for Immigration and Border Protection (a case concerning s 501(3A)): "[A]s evident from the text of the provisions, para (a) requires a 'positive state of satisfaction' on the part of the Minister (Falzon v Minister for Immigration and Border Protection [2018] HCA 2; (2018) 262 CLR 333 (Falzon) at [46] per Kiefel CJ, Bell, Keane and Edelman JJ)*
>
> *38. In other words, when the power in s 501(3A) of the Migration Act is engaged, the Minister's state of satisfaction looks to the past ("has" the person "been sentenced" for the relevant period) … Neither fact is expressed to depend on the person's valid conviction of the crime that has led to her or his imprisonment. The Minister is not obliged to second- guess the past conviction or sentencing; nor is she or he required to confirm the validity of any ongoing imprisonment.*
>
> …
>
> *40. In judicial review proceedings, the issue before the Court concerns the legality of an exercise of power or the performance of a duty. The question to be posed is*

whether the decision maker has stayed within the limits of the decision-making authority conferred by an Act of Parliament. ***Events which take place after an exercise of power can play no part in assessing whether that decision contained an error (or errors) when it was made.***

41. Here, the plaintiff candidly conceded that when the Minister decided to cancel his visa, that decision was, at that time, entirely valid. He did not dispute that, at that time, each of the matters upon which a lawful exercise of the power conferred by s 501(3A) of the Migration Act depended were then in existence. That being so, that is the end of the matter. The legal efficacy of a decision cannot be undone by events which did not exist when the decision was made."

75. **Plaintiff B65** was considered by the Federal Court (Rangiah J) in **BJT21 v Minister for Home Affairs (No 2)**[59]. In that case, Rangiah J, said the following:

"*14.* ***On 11 March 2020, a delegate of the Minister cancelled the applicant's visa under s 501(3A) of the Act on the basis that the applicant had been sentenced to a term of imprisonment of 12 months or more and was serving a sentence of imprisonment on a full-time basis in a custodial institution for offences against State laws: see ss 501(3A)(b), 501(6)(a) and 501(7)(c) of the Act****.*

15. The Minister's delegate invited the applicant to make representations about the revocation of the cancellation decision, and the applicant did so on 20 May 2020.

16. On 11 June 2020, the applicant was successful in an appeal to the County Court of Victoria against his sentence. The Magistrates' Court's orders were set aside. The

[59] [2022] FCA 24 (BJT21).

applicant was resentenced to a term of 10 months' imprisonment, which was backdated to 15 January 2020.

17. On 5 October 2020, the applicant was invited to comment on further information received by the Department, including a transcript of the County Court appeal proceedings. The applicant, through his legal representative, made further representations to the delegate on 2 November 2020.

18. ***On 4 December 2020, the delegate declined, under s 501CA(4), to revoke the cancellation decision. Although the delegate accepted that the applicant passed the limb of the character test in ss 501(6)(a) and 501(7)(c), the delegate was not satisfied that the applicant passed the limbs in s 501(6)(d)(i) and (v), nor that there was "another reason" to revoke the cancellation decision pursuant to s 501CA(4)(b)(ii).***

19. On 7 December 2020, the applicant sought review of the delegate's non-revocation decision in the Tribunal pursuant to s 500(1)(ba) of the Act. On 1 March 2021, the Tribunal affirmed the non-revocation decision. The Tribunal's reasons for its decision will be discussed later in these reasons.

…

71. ***The language and context of s 501(3A) does not indicate that a decision by the Minister under s 501(3A) may be retrospectively vitiated by subsequent events****.* ***The Minister's obligation is to cancel a visa upon satisfaction that the holder: does not pass the character test because of s 501(6)(a) taken with s 501(7)(c) (substantial criminal record)… When that state of satisfaction is lawfully reached, the Minister's obligation to cancel the visa is absolute****.*

72. The legislative scheme recognises, in s 501(10), that an appeal or a pardon may affect the basis of a cancellation decision under s 501(3A), but does not require the Minister to await the determination of any appeal or any application for a pardon. ***The purpose of s 501(3A) creates an imperative of timing since the Minister must act while the person is still serving a sentence of imprisonment on a full-time basis in a custodial institution:*** *cf. Parker at [59].* ***The broad purpose of the provision is protection of the Australian community against harm from criminal acts****. The provision recognises a risk that persons who have committed criminal offences in Australia serious enough to attract a term of imprisonment of at least 12 months, or sexual offences involving a child, may offend again if released into the Australian community. In XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 619, Burley J observed at [69] that a legislative purpose of s 501(3A) is, "to establish a scheme whereby a person in custody who does not pass the character test will not be released from detention until that person is removed from Australia or their immigration status is otherwise resolved". Accordingly, the Minister is not required to await the outcome of any appeal or application for a pardon before cancelling a visa under s 501(3A).*

73. ***Sections 501(3A) and 501CA must be considered together. Section 501CA(4) provides some amelioration of the harshness of mandatory cancellation under s 501(3A). If a person is successful in an appeal against a conviction or sentence, or an application for a pardon, the provision may operate to permit the Minister to revoke the cancellation decision. <u>The Minister may be satisfied that a person passes the character test for the purposes of s 501CA(4)(b)(i) in consequence of a successful appeal that sets aside a conviction (see s 501(10)) or reduces a sentence of imprisonment to below the 12-month threshold</u>; or in consequence of the grant of a pardon. The Minister may also be satisfied that such a reduction of sentence contributes to the establishment of "another reason" for revocation within s 501CA(4)(b)(ii).***

74. The measure of protection provided under s 501CA(4) is far from absolute for a person in the applicant's position. ***The condition under s 501CA(4)(b)(i) is that the Minister is satisfied that, "the person passes the character test (as defined by section 501)". That draws in the full spectrum of the "character test" under s 501(6), and is broader than s 501(3A) which is confined to, first, s 501(6)(a) taken with s 501(7)(c) (substantial criminal record) and, second, s 501(6)(e) (sexually based offences involving a child): see XJLR at [61]. Accordingly, even though a person may no longer have a "substantial criminal record" by the time s 501CA(4) is considered, the Minister may nevertheless fail to be satisfied that the person passes the character test because of a different limb of s 501(6). Further, the Minister may fail to be satisfied that the reduction of the sentence, considered together with other relevant factors, sufficiently contributes to the establishment of "another reason" for revocation of the cancellation decision****.*

75. The construction of s 501(3A) contended for by the applicant is that a decision to cancel a visa under that provision is invalid if an appeal process results in the reduction of a sentence to below 12 months' imprisonment. However, such a construction is not warranted by the potential harshness of the consequences of a contrary construction. The clear language of ss 501(3A) and 501CA(4) and their purpose (preventing release of the person into the Australian community unless and until the cancellation decision is revoked) allow no room for that construction.

76. The reduction of the applicant's sentence on appeal does not have the consequence that, at the time that the power in s 501(3A) was exercised, the formation of the Minister's delegate's state of satisfaction was affected by jurisdictional error. Accordingly, Ground 1 must be rejected."

76. The Applicant had a "*substantial criminal record*" as defined, on 23 June 2021 and, therefore, he did not then pass the character test. His visa cancellation was accordingly valid.

77. The Respondent was required to make a decision not under s 501(3A), but under s501CA (4). This relevantly provides:

> "*(4) The Minister may revoke the original decision if:*
>
> *(a) the person makes representations in accordance with the invitation; and*
>
> *(b) the Minister is satisfied:*
>
> *(i) that the person passes the character test (as defined by section 501); or*
>
> *(ii) that there is another reason why the original decision should be revoked.*"

78. There are two limbs to this provision. The first concerns whether the Applicant passes the character test. If he does, then the revocation must be cancelled. If he does not, then consideration is required of whether there is nevertheless, "*another reason why the cancellation should be revoked*".

79. In *Minister for Immigration and Border Protection v Makasa* the High Court said:

> *"7. Each of the powers conferred by s 501(1) and by s 501(2) can be delegated by the Minister under s 496 of the Act. Where a delegate of the Minister exercises the power conferred by s 501(1) to refuse to grant a visa to a person, or exercises the power conferred by s 501(2) to cancel a visa that has been granted to a person, s 500(1)(b) of the Act allows the person to apply to the AAT for review of the decision of the delegate. Subject to the need for the AAT, no less than the delegate, to comply with directions about the exercise of the powers conferred by s 501(1) and s 501(2) given by the Minister under s 499, and subject to procedural modifications effected*

by s 500(6A)-(6L) of the Act, the powers of the AAT in the conduct of the ensuing review are those authorised to be exercised by the AAT Act.

8. Section 43(1) of the AAT Act provides:

> *For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:*
>
> *(a) affirming the decision under review;*
>
> *(b) varying the decision under review; or*
>
> *(c) setting aside the decision under review and:*
>
> *(i) making a decision in substitution for the decision so set aside; or*
>
> *(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.*

9. Section 43(6) provides:

> *"A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes ... be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect."*

…

23. At first instance in Brown[60]*,* ***Colvin J took the view that, once exercised in respect of facts constituting a failure to pass the character test to decide not to cancel a visa, the power conferred by s 501(2) of the Act cannot be re-exercised in respect of the same failure to pass the character test to decide to cancel the visa****. On appeal in Brown, Allsop CJ, Kenny and Banks-Smith JJ took a more limited view. Their view was that the power conferred by s 501(2) of the Act becomes incapable of being re-exercised to cancel a visa in respect of a failure to pass the character test only upon the making by the AAT of a decision under s 43(1)(c)(i) of the AAT Act setting aside a decision made by a delegate and substituting a decision that the visa should not be cancelled.*

…

27. As will become apparent, the approach of Besanko and Bromwich JJ must be rejected. ***The approach of Colvin J is to be preferred*** *to the approach of Allsop CJ, Kenny and Banks-Smith JJ. To the extent that Parker contains reasoning to the contrary, that reasoning is not to be followed.*

…

34. Bearing centrally on the construction of s 501(2) of the Act is recognition that s 501(2) confers a single power that is exercised by the Minister or a delegate in the first instance, and that is re-exercised by the AAT under s 43(1) of the AAT Act on review, according to a two-stage decision-making process.

35. The first stage of the decision-making process begins with the decision-maker forming a reasonable suspicion that the visa holder in question does not pass the character test. By operation of s 501(6), a person either passes the character test or does not. The person does not pass the character test in any one or more of the circumstances exhaustively enumerated in s 501(6). Otherwise, the person passes the character test.

36. Reasonable suspicion is a state of mind − "a state of conjecture or surmise" − that is based on "sufficient grounds reasonably to induce that state of mind"[15]. The necessary precondition to the decision-maker forming a reasonable suspicion that the visa holder does not pass the character test is therefore the existence of

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[60] *Brown v Minister for Home Affairs* [2018] FCA 1722.

facts sufficient to induce a reasonable person to surmise that one or more of the circumstances exhaustively enumerated in s 501(6) has occurred.

37. The decision-maker having formed a reasonable suspicion that the visa holder does not pass the character test, the first stage of the decision-making process is completed by the decision-maker making a binary decision either to be satisfied by the visa holder that he or she passes the character test or not to be so satisfied and in consequence to maintain the reasonable suspicion.

38. Satisfaction too is a state of mind − an "actual persuasion of [the] occurrence or existence"[16] of the thing in issue. Implicit in the statutory placing of the onus on the visa holder to satisfy the decision-maker that he or she passes the character test is a requirement of procedural fairness that the visa holder be given notice and an opportunity to make representations before the first stage of the decision-making process can be completed. Implicit in the statutory need for satisfaction or non-satisfaction is that the satisfaction or non-satisfaction is to be reasonably based on the totality of the facts then known to the decision-maker[17].

39. If the outcome of the first stage of the decision-making process is that the decision-maker is satisfied by the visa holder that he or she passes the character test, the only decision open to the decision-maker is not to cancel the visa. The decision-making process necessarily ends with the making of that decision.

40. The second stage of the decision-making process is reached only if the outcome of the first stage is that the decision-maker, not being satisfied that the visa holder passes the character test, maintains a reasonable suspicion that the visa holder does not pass the character test by reason of the occurrence of one or more of the circumstances set out in s 501(6). The second stage then involves the decision-maker, reasonably[18] and in compliance with applicable directions given under s 499, exercising a discretion the outcome of which is the making by the decision-maker of a further binary decision either to cancel the visa in the exercise of discretion or not to cancel the visa in the exercise of discretion.

41. Accordingly, exercise of the power in every case begins with the decision-maker forming a reasonable suspicion that a visa holder does not pass the character test and exercise of the power in every case ends with a decision either to cancel the visa or not to cancel the visa. The decision that constitutes the end point of the exercise of the power, if it be to cancel the visa, can only have come about because the decision-maker has not been satisfied by the visa holder that he or she passes the character test and has gone on to exercise discretion to cancel the visa. If the decision be not to cancel the visa, the decision can have come about either because

the decision-maker has been satisfied by the visa holder that he or she passes the character test or because the decision-maker has gone on to exercise discretion not to cancel the visa.

42. Whether the decision is to cancel the visa or not to cancel the visa, the decision is therefore the end point of an exercise of the power conferred by s 501(2) of the Act. That is so of a decision to cancel or not to cancel reached by the Minister or a delegate in an initial exercise of the power. And it is so of a decision to cancel or not to cancel reached by the AAT on review in a re-exercise of the power under s 43(1)(c)(i) of the AAT Act.

43. The consequence is that, if the Minister or a delegate is to make a subsequent decision to cancel a visa under s 501(2) of the Act, superseding a decision of the Minister or a delegate in the first instance or of the AAT on review not to cancel the visa, that subsequent decision can only occur through a re-exercise of the power conferred by s 501(2) of the Act.

44. The determinative question therefore becomes whether, and if so when, the power conferred by s 501(2) of the Act, having once been exercised by the Minister or a delegate in the first instance or re-exercised by the AAT on review not to cancel a visa, can be re-exercised by the Minister or a delegate to cancel the visa. The answer turns on an examination of whether, and if so to what extent, there appears sufficiently for the purposes of s 2 of the AI Act an intention contrary to the application of the general prescription in s 33(1) of the AI Act that a statutory power "may be exercised ... from time to time as occasion requires.

…

50. Looking to the generic operation of the AAT Act, an intention not to allow further re-exercise of a power by a primary decision maker after re-exercise of that power by the AAT under s 43(1)(b) or (c)(i) of the AAT Act on review of an earlier exercise of power by the primary decision-maker is inherent in the nature of the merits review function for which it is the design of s 43 of the AAT Act to make provision. ***The merits review function of the AAT is "to stand in the shoes of the decision-maker whose decision is under review so as to determine for itself on the material before it the decision which can, and which it considers should, be made in the exercise of the power or powers conferred on the primary decision maker for the purpose of making the decision under review" . The function of the AAT, in other words, is "to do over again" that which was done by the primary decision maker . The function would be reduced to a mockery were the subject matter of the decision made by the AAT on review***

able to be revisited by the primary decision-maker in the unqualified re-exercise of the same statutory power already re-exercised by the AAT in the conduct of the review.

…

56. The result, in short, is that a decision of a delegate or the AAT not to cancel a visa made in the exercise of the power conferred by s 501(2) of the Act on the basis of facts giving rise to a reasonable suspicion that a visa holder does not pass the character test is final, subject only to ministerial override in the exercise of the specific power conferred by s 501A.

57. The Minister or a delegate can re-exercise the power conferred by s 501(2) to cancel the visa if subsequent events or further information provide a different factual basis for the Minister or a delegate to form a reasonable suspicion that a visa holder does not pass the character test at the first stage of the requisite two stage decision-making process. But neither the Minister nor the delegate can rely on subsequent events or further information simply to re-exercise the discretion to cancel the visa at the second stage of the decision-making process."[61]

80. I do note that *Makasa* involved an exercise of the power conferred upon the Minister by s 501(2), not a mandatory cancellation under s 501(3A).

81. The character test as defined by s 501 (6), is central to the exercise of the Minister's power under s 501(2). This of course includes s 501(6) (a) and therefore, s 501(7) (c). In other words, s 501(3A) mandates a visa cancellation, in a narrow class of cases which would, but for that section, still enliven the Minister's power to cancel a visa under s 501(2).

82. Plaintiff B65 was considered by the Federal Court (Rangiah J) in BJT21 v Minister for Home Affairs (No 2).[62]

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[61] [2021] HCA 1.

[62] [2022] FCA 24 (BJT21).

83. In *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs,*[63] the Full bench of the Federal Court said:

> "*11.* ***It is important to note that the character test in s 501A(3)(a) is narrower (the narrower character test) than that under s 501(6), which applies more generally. The criterion in s 501(3A)(a) is established if the Minister is satisfied that the person does not pass the narrower character test*** *in any one of four objective ways under s 501(6)(a) or (e) on the basis* ***that he or she has been****, first,* ***sentenced to*** *death****, life imprisonment or to a term of imprisonment of 12 months or more (s 501(7)(a), (b), (c))*** *or, secondly, convicted, found guilty or been proved to have committed, a sexually based offence involving a child (s 501(6)(e)).*
>
> *…*
>
> *25.* ***The primary judge found that the requirement that the Minister be satisfied that the visa holder does not pass the narrower character test as specified in s 501(3A)(a) was cognate with the requirements in s 501(2)(b) which the High Court held in Makasa 386 ALR at 207 [37]–[39] was the first stage of the decision-making process under s 501(2)****. His Honour said that if the person was also serving a sentence of imprisonment as defined in s 501(3A)(b), no further consideration by the Minister was possible because he was obliged to cancel the visa.* ***He held that the Tribunal had no power to review a decision under s 501(3A), but that s 501CA created a discretion, if the visa holder made representations in accordance with its terms, to revoke the cancellation. He noted that the Tribunal's power under s 501CA was different from that of the decision maker under s 501(3A).***
>
> *…*
>
> *33. The sole ground in the notice of appeal asserted that the primary judge erred in construing s 501CA(1) as being capable of operating on a s 501(3A) decision not to*

[63] [2022] FCAFC 6.

revoke a s 501(3A) decision that was legally ineffective. The ground posited that his Honour should have held that s 501CA(1) made the existence of a legally effective s 501(3A) decision an objective jurisdictional fact and an essential precondition to the exercise of the discretion in s 501CA(4) to revoke the cancellation of a visa.

…

35. The Minister submitted that s 501CA(1) prescribes a jurisdictional fact that a decision has been made "under" s 501(3A), regardless of whether the decision is legally effective. In other words, the Minister argued, all that s 501CA(1) requires so as to enliven the procedure that s 501CA prescribes, is that the Minister (or a delegate) has made a s 501(3A) decision in fact, regardless of its legal efficacy.

…

39. The Minister's arguments should be rejected. ***I am of opinion that s 501CA(1) depends on the existence of a legally effective decision under s 501(3A) as a precondition for the exercise of the power under s 501CA and cannot be exercised more than once in respect of the same failure to pass the character test in s 501(3A)(a).***

…

45. In construing s 501(3A) it is important to have regard to the circumstances in which it operates. Those include the following. First, it imposes an imperative duty on the Minister (in contrast with the conferral of a discretion in s 501(2)). Secondly, the criteria in pars (a) and (b) are objective facts (Falzon 262 CLR at 348 [48]). Thirdly, s 501(5) excludes the rules of natural justice and the procedures in Subdiv AB of Div 3 of Pt 2 of the Act (namely, in ss 51A–64) which is headed "Code of procedure for dealing fairly, efficiently and quickly with visa applications". Fourthly, the performance of the duty has the consequence that the visa holder loses his or her existing rights and status as a lawful non-citizen (Falzon 262 CLR at 349 [56]). Moreover, even if one or more of the conviction, sentence or finding, by reason of which the Minister is satisfied under s 501(3A)(a), or the sentence of imprisonment that the visa holder is serving, at the time that attracts the operation of s 501(3A)(b),

is later set aside, or a verdict of acquittal is entered, the person has no right under the Act to have the visa restored. Instead, he or she must seek the exercise of the Minister's discretion to revoke the cancellation of the visa under s 501CA(4), provided that he or she first complies with the strict requirements of s 501CA(3)(b) and (4)(a).

46. Those indicia support a construction of s 501(3A) as imposing imperative duties and inviolable constraints on the Minister's performance of the duty that it creates so that any decision to cancel a visa must be legally effective: Plaintiff S157 211 CLR at 506 [76]. This is because the Minister's legal capacity under s 501CA to revoke a cancellation decision "is premised upon the prior exercise of the power of cancellation conferred by s 501(3A)": Viane (2021) 395 ALR 403 at 406 [12]. As Gleeson CJ explained (Plaintiff S157 211 CLR at 488–489 [20]) a judicial determination that legislation has imposed what the Court describes as a duty that is imperative, or a restraint that is inviolable, is "the result of a process of statutory construction, rather than a reason for adopting a particular construction; but it explains the nature of the judgment to be made". The Chief Justice recognised that this process involves the Court attempting to reconcile whether the presence of a privative clause (like s 474(2)) is to give to an exercise of power or the performance of a duty done in breach of the provision validity, in the particular statutory context.

47. Of course, the delegate and the Tribunal had to form a view whether the precondition in s 501CA(1) had been met, which was a jurisdictional fact. However, that issue could only be authoritatively determined by a court as an exercise of the judicial power of the Commonwealth: cf: Minister for Immigration and Border Protection v SZMTA (2019) 264 CLR 421 at 438 [18] per Bell, Gageler and Keane JJ. As their Honours noted, in the course of the regular administration of the Act, a decision maker in the position of the delegate or the Tribunal could be expected to treat the s 501(3A) decision as a sufficient basis on which to proceed in accordance

with s 501CA (at 445 [47]). But the legal consequences of those administrative processes being followed can only be authoritatively determined by a court."[64]

84. In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16*[65] (2019) FCA 2033 Rares J said:

> *"17. On 7 September 2018, the delegate made his decision that the applicant:*
>
> > ***has not satisfied me that [she] passes the character test**. I have decided to exercise my discretion under subsection 501(1) of the Act to refuse her application for a visa. I hereby refuse her application for a Protection (Class XA) visa. My reasons for this decision are set out in the attached Statement of Reasons[.]*
> >
> > *(emphasis added)*
>
> *18.* ***The delegate's statement of reasons at [4] commenced by setting out only the criterion in s 501(6)(d)(i) of the character test*** *and stated at [5]:*
>
> > *Accordingly, I have had regard to [the applicant's] criminal conduct and considered the risk of her offending in the future if she were allowed to remain in Australia.*
>
> *…*
>
> *40. Importantly,* ***the Tribunal then considered whether the Minister could broaden the scope of the review before it to include consideration of whether the applicant failed the character test in respect of s 501(6)(c), even though the criteria in that provision had formed no part of the delegate's decision.***

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[64] [2022] FCAFC 6.
[65] [2019] FCA 2033.

The deputy president concluded that the function of the Tribunal on review was to decide the same questions in issue under s 501(6) (viz: under s 501(6)(d)(i)) as were before the original decision-maker, and no more. He referred to the reasoning in Frugtniet v Australian Securities and Investments Commission (2019) 93 ALJR 629 at 633 [15] per Kiefel CJ, Keane and Nettle JJ, and at 641 [51] per Bell, Gageler, Gordon and Edelman JJ.

41. The deputy president found that the delegate was required to address no more than he decided to address, namely whether the applicant had satisfied him that she passed the character test in respect of s 501(6)(d)(i) and ought be granted a protection visa under s 501(1). ***The Tribunal found that the delegate's reasons dealt with, and only with, the issue of whether the applicant passed the character test under s 501(6)(d)(i). He noted, correctly, that, the delegate, in his reasons, had made no reference to any other provision of s 501(6).***

42. The Tribunal considered that one aspect of the statutory context governing the consideration of an application for a visa or the refusal or cancellation of a visa under s 501 was that the visa applicant had two chances to have his or her application assessed on its merits. The Tribunal observed that the Minister's delegate might decide, on any ground, that the applicant did not pass the character test, and that if such a decision were made, the visa applicant could seek merits review of that decision in the Tribunal. He reasoned that, however, if, in its review, the Tribunal elected to proceed on a new and different ground (not before the delegate) to determine whether the character test was passed and decided that question adversely to an applicant, there could be no merits review of the Tribunal's decision. The deputy president observed that that possibility raised the question whether the Parliament's intention to provide merits review of adverse administrative decisions would be frustrated if new grounds, adverse to an applicant for review, could be relied on in the review that were not before, or considered by, the original decision-maker. He noted, particularly, that different factual questions arose under s

501(6)(c) from those in s 501(6)(d)(i), notwithstanding that the same ultimate question for the decision-maker was whether to refuse to grant the visa under s 501(1) for failure to satisfy the decision-maker that the applicant passed the character test.

43. The Tribunal concluded that it should refuse the Minister's application to include in the review the issue whether the applicant did not pass the character test in respect of s 501(6)(c). He found that such an expansion of the review would not be consistent with Frugtniet 93 ALJR 629.

44. The Tribunal then considered the Minister's reliance on the ***April 2019 decision*** *of a* ***senior member****, who had affirmed a delegate's refusal of an earlier bridging visa application, on the basis that the applicant did not pass the character test in s 501(6)(c) and 501(6)(d)(i). The Tribunal said that it was not apparent from the decision record that the senior member had given consideration to Frugtniet 93 ALJR 629 or that he had taken into account matters that the deputy president had considered as critical to the current decision. He noted that the senior member's review had been on the papers and had not involved an assessment of the applicant in the witness box, the benefit of which the deputy president had had together with the other evidence before him of the applicant's good character and credit. Accordingly, the deputy president did not consider that the senior member's decision was normative in relation to the issue of the risk that the applicant posed were she to be released.*

45. ***The deputy president found that the correct or preferable decision was that the applicant did not fail the character test under s 501(6)(d)(i) and that there was no other question properly before him on the review****. He then stated (at [67]):*

> *I have decided to make a decision in substitution for the decision, for several*

reasons:

(a) The applicant is at risk in detention of injury as a result of the very circumstances which led to the finding that non-refoulement obligations are owed in respect of her, and remission of the matter would keep her in a dangerous environment.

(b) If the matter (assumed to mean the application for a protection visa) were remitted for reconsideration, and even if the delegate found the question arising under s 501(6)(c) adversely to the applicant, that would have the effect of enlivening [the] discretion. The delegate, acting property, would follow normative decisions of this Tribunal, in accordance with authorities referred to in Azizi and Minister for Home Affairs (Migration) [2018] AATA 2561. That should lead him or her not to refuse the protection visa on discretionary grounds. I would have done so for reasons indicated in [20] above. Direction 79 makes a non-exhaustive number of considerations mandatory for a decision-maker and some of those also favour the grant of the visa. However, the considerations I have mentioned in [20] above are all relevant and would outweigh any consideration tending the other way.

(c) The decision which I have decided will be set aside was, as I have found, one which is incorrect and no occasion arises to refer it for reconsideration.

…

58. ***Here, the delegate confined the inquiry as to whether the applicant could satisfy him that she passed the character test, within the meaning of s 501(1), solely to the consideration of the criterion in s 501(6)(d)(i). I reject the Minister's argument that other criteria in s***

501(6) remained open to consideration on a review of the delegate's decision. It is apparent from the terms of s 501(6) that the delegate had eliminated from the scope of his consideration any other potentially adverse criteria, because, it should be inferred, he had considered that they could not, or did not, arise.

59. The evidence before the Tribunal showed that the delegate's view was that the only matter in s 501(6) about which he required the applicant to satisfy him was that under s 501(6)(d)(i). In that factual context, the delegate had informed (at least by necessary implication) the applicant that she did not need to address specifically any criteria in the character test other than s 501(6)(d)(i), for the purposes of satisfying the delegate that she passed that test. It was obvious on the material before the delegate that there was no need to ask the applicant; e.g. whether she had a substantial criminal record as a result of being sentenced to imprisonment for more than 12 months, as provided in s 501(6)(a), because she had received only the one sentence of imprisonment of 28 days. Likewise, many of the other criteria in s 501(6) could not have applied to her on the facts; e.g. she had not been the subject of an adverse security assessment by the Australian Security Intelligence Organisation within the meaning of s 501(6)(g).

60. ***It may have been arguable that other criteria in s 501(6) could have applied to her, including, it is safe to infer, as the Minister sought to agitate in the Tribunal, s 501(6)(c). However, the delegate had eliminated from the issues about which the applicant needed to satisfy him all criteria in the definition of the character test in s 501(6) other than s 501(6)(d)(i).***

61. Thus, I infer that only the question about which the delegate required the applicant to satisfy him was whether, under s 501(6)(d)(i), there was a risk,

if she were allowed to remain in Australia, that she would engage in criminal conduct. The delegate gave reasons to support his conclusion that she had not satisfied him that there was no such risk and refused to grant the visa under s 501(1) on ***that*** *ground. The applicant sought review of* ***that*** *decision, namely, that she should be refused a visa under s 501(1) because the delegate had found that she had not satisfied him that she passed the character test only on the basis that there was a risk that she would engage in criminal conduct in Australia were she allowed to enter or remain, within the meaning of s 501(6)(d)(i).*

…

63. Kiefel J (with whom Crennan J agreed on this issue) said (Shi 235 CLR at 319 [116]-[117], 327-328 [142]):

> *In considering what is the right decision,* ***the Tribunal must address the same question as the original decision-maker was required to address*** *[Hospital Benefit Fund (1992) 39 FCR 225 at 234].* ***Identifying the question raised by the statute for decision will usually determine the facts which may be taken into account in connection with the decision****. The issue is then one of relevance, determined by reference to the elements in the question, or questions, necessary to be addressed in reaching a decision. It is not to be confused with the Tribunals general procedural powers to obtain evidence.* ***The issue is whether evidence, so obtained, may be taken into account with respect to the specific decision which is the subject of review****.*
>
> *(emphasis added)*

64. ***None of the justices in Shi 235 CLR 286 suggested that the Tribunal was at large to consider, on the review, the grounds that the decision-maker could***

have, but did not, determine adversely to the person seeking the review*, although this possibility did not appear to have been expressly in issue before the High Court. As Kiefel J said (Shi 235 CLR at 324 [133] and see also at 301-302 [48] per Kirby J):*

> *…it is not possible to apply s 43(1) to the facts of any case without determining, first of all,* ***what is the decision under review. It may therefore be appreciated that the decision, and the statutory question it answers, should be identified with some precision, for it marks the boundaries of the review****.*
>
> *(emphasis added)*

65. Her Honour added (Shi 235 CLR at 329 [146]-[147]):

> *146.* ***The question*** *which here arose for the Authority under s 303(1), which it answered,* ***was whether it should exercise its powers, under paras (a) to (c) of the sub-section, because the grounds in paras (h) and (f) were established****, in particular because the appellant had breached the Code of Conduct. That part of the decision which comprises the finding, that the ground in para (h) had been made out, was referable to conduct which had occurred to a point in time. That is the nature of the finding required by the provision.* ***It follows that the Tribunal was restricted to a consideration of events to that point and not those occurring later, in determining for itself whether there had been non-compliance with the Code****. The appellant accepted as much in his submissions.*
>
> *147. […] The question for the Tribunal is* ***not whether there has been a breach by the appellant of the Code in any respect, but whether those identified by the Authority are established****. It may use its own evidence-gathering powers to further inform itself about those matters,* ***but those powers do not translate to general investigatory powers and cannot***

be used to ascertain other, inculpatory, conduct.

(emphasis added)

66. ***I am of opinion that the Tribunal's task in determining, on a review, what is the correct or preferable decision must be connected to the grounds of the decision to exercise the statutory power the subject of the review, as exposed in the statement of the delegate's findings and reasons, so that the character of the review can be shaped by that consideration****. Once the challenged ground for the decision-maker's exercise of his or her power is identified, the Tribunal must make its decision having regard to the evidence, submissions and factual context at the time of its decision: Shi 235 CLR at 329-330 [146]-[149].*

67. Here, the delegate exercised the power under s 501(1) to refuse to grant a protection visa on the ground that the applicant had not passed the criterion in s 501(6)(d)(i) of the character test. He made the material findings supporting his decision to refuse to grant her the visa that, if she were allowed to remain in Australia, there was a risk that she would engage in criminal conduct within the meaning of s 501(6)(d)(i). He addressed the forward-looking question posed by s 501(6)(d)(i) that related, at the time of his decision, to the existence of the risk that she would so offend in the future. In its review of the delegate's decision, it was open to the Tribunal to have regard to any conduct or circumstances affecting the question under s 501(6)(d)(i) that occurred or came to light after the delegate's decision and up to and including the time of its own decision, in considering whether to exercise the discretion to refuse to grant the visa under s 501(1) if she failed the character test in respect of s 501(6)(d)(i).

…

> *70. Accordingly, once the Minister or his delegate has decided that a statutory ground in s 501(6) exists, in respect of which an applicant has not satisfied him that he or she passed the character test, then the discretion under s 501(1) is enlivened. It would not fulfil the statutory purpose or be consistent with Shi 235 CLR 286 or Graham 263 CLR at 30 [57] that the grounds for the decision under review could be expanded in the review without any further new facts emerging. If the Tribunal, on a review, found that it was satisfied that a visa applicant had passed the character test, unless a new fact occurred subsequently, the delegate or the Minister could not revisit later every other ground or criterion in s 501(6) at will, while detaining the person in immigration detention under the authority of the Act for, relevantly, the purpose of determining whether or not he or she should grant the visa: cf. Minister for Immigration and Border Protection v SZSSJ (2016) 259 CLR 180 at 206 [78]-[79] per French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ.*"[66]

85. In summary then, the Tribunal is confined to determining the first limb of s 501CA(4)(b) by reference to "*the grounds of the decision to exercise the statutory power the subject of the review, as exposed in the statement of the delegate's findings and reasons, so that the character of the review can be shaped by that consideration.*"[67]

86. A consideration of those grounds exposes a line of reasoning based upon s 501(6)(a) and s 501(7)(c). There is no suggestion that the delegate relied upon, or even considered other broader, evaluative provisions such as s 501(6) (c) or (d).

87. In this case, the Respondent does not rely upon the 2017 conviction as the "*legally effective decision under s 501(3A) as a precondition for the exercise of the power under s 501CA*".

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[66] [2019] FCA 2033.
[67] Ibid.

The respondent relies on what the Applicant concedes, was a then valid cancellation based on the 2021 conviction.

88. The Respondent does however, now rely entirely on the 2017 conviction as the basis for a finding that the Applicant does not pass the character test under s 501CA(4)(b)(i). This is the same conviction which was relied upon by the Respondent as a basis for the Applicant's visa cancellation under s 501(3A), on 20 July 2018. The Respondent subsequently decided to revoke that cancellation on 13 February 2019.

89. Having regard to the authorities cited above, I have come to the view that the Respondent cannot reuse the 2017 conviction in this case, as a basis for a finding that the Applicant does not pass the character test under s 501CA (4) (b) (i), having previously used that same conviction as a basis for a cancellation of the Applicant's visa under s 501 (3A) on 20 July 2018.

90. As a result, there is no need to consider the second limb of s 501CA (4). The decision to cancel the Applicant's visa should therefore be revoked.

91. If I had come to a different view about the proper application of s 501CA (4) (b) (i), it would have been necessary to consider whether there was another reason why the original decision should be revoked.

92. In that circumstance, I would have come to the same conclusion, for the reasons set out below.

Is there another reason why the original decision should be revoked under section 501CA(4)?

93. In considering whether to exercise this discretion, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("the Direction") has application.[68]

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

95. The principles that are found in paragraph 5.2 of the Direction may be briefly stated as follows:

> "(*1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*

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

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

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

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

96. Paragraph 6 of the Direction provides that:

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

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

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

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

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

(4) expectations of the Australian community.

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

a) international non-refoulement obligations;

b) extent of impediments if removed;

c) impact on victims; and

d) links to the Australian community, including:

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

ii) impact on Australian business interests.

99. I note the importance of the Other Considerations being "*other*" considerations, as opposed to "*secondary*" considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*:[69]

> *"…Direction 65 [now Direction 90] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other*

[69] [2018] FCA 594.

considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply."[70]

OFFENDING HISTORY

100. The Applicant's criminal record as produced by the Australian Criminal Intelligence Commission is outlined at Annexure B.[71]

101. The Applicant's offending commenced in 1987 when he was 18 years of age. It is discussed in some detail above. The Applicant conceded that he has a serious criminal record.

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

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

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[70] Ibid, [23].

[71] Exhibit 3, G2, Attachment A, p 29-39.

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

a) The nature and seriousness of the non-citizen's conduct to date; and

b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

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

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

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

106. There is no history of such criminal conduct, other than an assault conviction in 1991. This resulted in a fine of $150 on each of 3 counts. There is no suggestion of criminal conduct against women, children, or acts of family violence. The Applicant has however committed serious criminal trespass offences and property offences. His driving offences are also serious.

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

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

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

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

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

108. The Applicant correctly concedes that his offending has been serious.

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

110. The Applicant has served two terms of imprisonment as set out above.

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

112. The Applicant's behaviour has sharply deteriorated since late 2015. He has continued to offend despite having served time in prison. This corresponds to his drug addiction. This is very concerning. If the Applicant were to resume using drugs, his chance of reoffending is very high.

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

114. The cumulative effect of all of the Applicant's offending has been serious. He has disregarded the law and shown disrespect for the property of others. He has consumed resources in policing and corrections. He has been a burden on the community.

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

116. Neutral.

117. **Sub-paragraph (g)** of paragraph 8.1.1(1) of the Direction looks for evidence about whether the non-citizen has re-offended since being formally warned about the consequences of further offending in terms of the non-citizen's migration status.

118. As has been set out above, the Applicant has had his visa cancelled before and was warned in the clearest terms of the consequences of reoffending. This weighs very heavily against him.

119. I do not consider factors (a) and (f) of paragraph 8.1.1(1) of the Direction apply to the Applicant's offending or circumstances. The rest of the relevant sub-paragraphs of paragraph 8.1.1(1) of the Direction, point to very serious offending in their totality, weigh heavily against revocation of the cancellation of the Applicant's visa.

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

120. Paragraph 8.1.2(1) provides that in considering the need to protect Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

121. Paragraph 8.1.2(2) provides that in assessing the risk that may be posted by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

(a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct;

(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account (i) information and evidence on the risk of the non-citizen re-offending; and (ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence; and

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

Nature of harm should the Applicant engage in further criminal or other serious conduct

122. The assessment of the nature of the harm to individuals or the Australian community were the Applicant to engage in further criminal or other serious conduct, is properly informed by the nature of his offending to date, including any escalation in his offending. This assessment is also informed by the provision in the Direction which stipulates that the Australian community's tolerance for harm becomes lower as the seriousness of the potential harm increases.

123. If the Applicant were to resume offending, his history suggests that he would be likely to return to crimes of dishonesty and theft. These are not victimless crimes. The community expects to be protected from thieves and robbers. Any return to this behaviour would be very serious.

Likelihood of engaging in further criminal or other serious conduct

124. The Applicant was a relatively minor offender prior to 2015. He was for about 17 years generally a contributing member of society. He has not been a lifelong criminal. His motor vehicle accident injuries in 2014 and his subsequent addiction to methamphetamine have totally changed his offending trajectory.

125. The risk of the Applicant reoffending is difficult to assess. I am persuaded that he has no wish to re-offend. He has abstained during from drugs during his incarceration since March 2021. This is, however, very different to the uncontrolled environment he would experience living in the community. He has no concrete plans for support and treatment if released. Mr Borenstein stated this to be a very important factor in minimising his prospects of reoffending.

126. The Applicant must by now appreciate, that if he were to have his visa returned for a second time, any further offending would be unlikely to be tolerated. I accept that he is willing to

seek out appropriate support. I accept that his wife will assist him and that he would attempt to be away from his former associates. His likely visits to see family in Sydney are a concern.

127. On the other hand, he has been through the process of visa cancellation before. He was warned what might happen if he reoffended. He swore that he would never take drugs again and that he would not reoffend. In spite of this experience, that included a period in immigration detention, and the support of his wife, the stress of his brother's death in 2020, set him off down a path of drug taking again. He reoffended. He now pleads for "*another chance*". He has already had that chance.

128. The Applicant is not on parole, or subject to any supervision. The Tribunal cannot impose parole like conditions or grant a conditional visa. The Applicant, if his visa is restored, would enjoy unconditional and unsupervised liberty.

129. I am very concerned that the Applicant will, despite his best intentions relapse if stressed. I assess him as being at least a medium risk of reoffending.

Conclusion: Primary Consideration 1

130. Primary consideration number one weighs heavily against revocation of the Applicant's visa cancellation.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

131. Paragraph 8.2 of the Direction provides:

> *(1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).*
>
> *(2) This consideration is relevant in circumstances where:*

a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or

b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.

(3) In considering the seriousness of the family violence engaged in by the non- citizen, the following factors must be considered where relevant:

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

b) the cumulative effect of repeated acts of family violence;

c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:

i. the extent to which the person accepts responsibility for their family violence related conduct;

ii. the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);

iii. efforts to address factors which contributed to their conduct; and

d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non- citizen's migration status, should the non-citizen engage in further acts of family violence.

132. There is no evidence of family violence.

Conclusion: Primary Consideration 2

133. This consideration is neutral.

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

134. Paragraph 8.3(1) of the Direction compels a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA

is in the best interests of a child affected by the decision. Paragraphs 8.3(2) and 8.3(3) respectively contain further stipulations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

135. The Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia. Those include, relevantly:

- the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);
- the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;
- the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;
- the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;
- whether there are other persons who already fulfil a parental role in relation to the child;
- any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);
- evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;
- evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

136. Child A is the Applicant's daughter. The Applicant has never met Child A who is now aged 11 years. He has made some modest financial contributions to her. As discussed above. If he were to remain here and obtain work, child support payments would help Child A. There is nothing to suggest that there is any prospect of the Applicant having any relationship at all with Child A, before she turns 18.

137. Although he did not mention it in any of his statements or previously filed documentation, the Applicant revealed to the Tribunal, the existence of two other children under 18 with whom he claims to have a relationship.

138. Child B is the youngest Daughter of his sister, M. She is 14 years of age.

139. The Applicant has never performed a parental role for Child B. Before he went to prison, he would see Child B about once a week when he went to cut the lawns for M. Given where the Applicant intends to live, Child B will be about 3-4 hour's drive away from the Applicant, if he is returned to the community.

140. Child C is the son of one of the Applicant's nieces. He is about 5-6 years old. He lives with his mother, (J) and M.

141. The Applicant has never performed a parental role for Child C. Before he went to prison, he would see Child C about once a week when he went to cut the lawns for M. Given where the Applicant intends to live, Child B will be about 3-4 hour's drive away from the Applicant, if he is returned to the community.

142. Having regard to all of the above, primary consideration 3 weighs very slightly in favour of revocation of the Applicant's visa cancellation

PRIMARY CONSIDERATION 4 – THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

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

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

(a) acts of family violence; or

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

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

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

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

(f) worker exploitation.

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

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

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

147. Paragraph 8.4(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 ("FYBR") which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or evidence about those expectations. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.[72]

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

Analysis – Allocation of Weight to this Primary Consideration 4

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

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

(a) the Applicant's criminal record as set out in Annexure B.

(b) The fact that the Applicant has had his visa cancelled before and has been warned about the consequences of reoffending.

(c) The other matters set out above

Conclusion: Primary Consideration 4

150. Primary consideration 4 weighs against revocation of the cancellation of the Applicant's visa.

OTHER CONSIDERATIONS

151. It is necessary to look at the Other Considerations listed at paragraph 9 of the Direction. I will now consider each of the four stipulated sub-paragraphs (a), (b), (c) and (d).

(a) International non-refoulement obligations

152. This is not relevant in this case.

153. This consideration is neutral.

(b) Extent of impediments if removed

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

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

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

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

155. The Applicant has lived in Australia since he was one year old. He knows no other way of life.

156. The Applicant has physical impairments that restrict his capacity for work. He is 52 years of age. He has mental health problems that would be exacerbated by the stress associated with being returned to Portugal.

157. Given his health and lack of language skills, it is hard to see how he would obtain employment in Portugal.

158. The Applicant does not speak Portuguese. He has no familiarity with the cultural facets of life in Portugal. If he were returned there, his experience would probably be indistinguishable from that of any randomly chosen Australian citizen, landing in that foreign environment.

159. The Applicant has no family or social supports in Portugal. He would be reliant on the social services of that country.

160. The Applicant would suffer serious impediments if removed.

161. This consideration weighs heavily in favour of revocation of the visa cancellation.

(c) Impact on victims

162. This Other Consideration (c) requires that decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims

of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.

163. There is no evidence on the impact on victims.

164. This Other Consideration (c) is neutral.

(d) Links to the Australian Community

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

- the strength, nature, and duration of ties to Australia; and
- the impact on Australian business interests.

<u>The strength, nature, and duration of ties to Australia</u>

166. The Applicant's entire life, but for his first year, has been spent in Australia.

167. The Applicant's wife, children, surviving siblings, extended family and friends, all live in Australia.

168. For most of the time that the Applicant has been in Australia, he has been a positive contributor. He has worked and paid his taxes. It was only at the age of about 45 years, that he began to seriously offend and to be a burden on the community.

169. This Other Consideration (d), paragraph 9.4.1 of the Direction, weighs very heavily in favour of revocation.

Impact on Australian business interests

170. There was no evidence on this topic so this consideration is neutral.

171. This Other Consideration (d), paragraph 9.4.2 of the Direction, weighs very heavily in favour of Revocation of the Applicant's visa cancellation.

Sentence reduction

172. It was also put by the Applicant's counsel that, a reduction of sentence, as in this case contributes to the establishment of "*another reason*" for revocation within s 501CA(4)(b)(ii).

173. In the abstract, I accept that this may be so.[73] In this case I do not however think that the extent of the reduction translates into a consideration which carries any weight.

Findings: Other Considerations

174. The application of the Other Considerations in the present matter can be summarised as follows:

(a) international non-refoulement obligations: neutral
(b) extent of impediments if removed: weighs heavily in favour of revocation
(c) impact on victims: neutral

[73] [2022] FCA 24 (BJT21).

(d) links to the Australian community including the strength, nature, and duration of ties to Australia weighs very heavily in favour of revocation; and

(e) the impact on Australian business interests: neutral

CONCLUSION

175. It is necessary to weigh up all of the primary and other considerations.

176. Primary consideration 1 weighs heavily against revocation of the visa cancellation.

177. Primary consideration 2 is neutral.

178. Primary consideration 3 weighs only slightly in favour of revocation of the visa cancellation.

179. Primary consideration 4 weighs against revocation of the visa cancellation.

180. Other considerations, (a) and (c) are neutral.

181. Other consideration (b) weighs heavily in favour of revocation of the visa cancellation.

182. Other consideration (d) weighs very heavily in favour of revocation of the visa cancellation.

183. In this case, the Applicant has committed serious offences. He has even done so, after a visa cancellation and an explicit warning from the Respondent about the possible consequences of reoffending. This weighs very heavily against him. Such warnings should not be taken lightly or disregarded. A warning is a second chance, not to be squandered. The Applicant has already had his second chance.

184. On the other hand, the nature of the Applicant's offending is not such that it involves family violence or crimes against women or children. It is not offending of a kind explicitly mentioned in Direction 90 paragraph 8.1.1(1)(a), 8.2 or 8.4(2).

185. In this case, paragraphs 5.2(4) and 9.4.1 require the Tribunal to weigh the fact of the Applicant having lived here virtually all his life and his lengthy period of positive contribution. This weighs heavily in the Applicants favour.

186. In my view, if it were necessary for the Tribunal to consider s 501CA(4)(b)(ii), the proper application of Direction 90 would favour the Tribunal exercising the discretion to revoke the cancellation of the Applicant's Visa. I would find that there is "another reason" pursuant to s501CA (4)(b)(ii) to revoke the original decision.

DECISION

187. The decision under review is set aside and substituted with a decision that the cancellation of the Applicant's visa is revoked.

I certify that the preceding one hundred and eighty-seven (187) paragraphs are a true copy of the reasons for the decision herein of Senior Member J Rau SC.

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

Legal Associate

Dated:	12 December 2022
Date of hearing:	2 & 5 December 2022
Advocate for the Applicant:	Dr Jason Donnelly
Advocate for the Respondent:	Tal Aviram Clayton UTZ

Annexure A – List of Exhibits

Exhibit no.	Lodged by	Document
1	Applicant	Statement of Facts, Issues and Contentions dated 6 November 2022
2	Respondent	Statement of Facts, Issues and Contentions dated 10 November 2022
3	Respondent	G-Documents dated 11 October 2022
4	Applicant	Bundle of Documents filed 6 November 2022, containing: 4.1 Statement of Jose Ricardo Caires De Andrade (the Applicant) (06.11.2022) 4.2 Statement of Lydia Andrade (Applicant's wife)
5	Applicant & Respondent	Applicant and Respondent's submissions for 22/11/22 TDH Applicant's – filed on 17.11.22 and 22.11.22 and Respondent's filed on 18.11.22

Annexure B – Applicant's Offending History

Source	Court	Date	Offence	Result
NSW	DOWNING CENTRE DISTRICT COURT	18/08/2021	Possess housebreaking implements-T2	H 79368156: ORDER VARIED : IMPRISONMENT (AGGREGATE) : 10 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/01/2022 NON PAROLE PERIOD WITH CONDITIONS : 5 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/08/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 5 MONTHS 2021/00081702-001 (002) 5 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-002(003) 6 MONTHS (H150281201) 2021/00090823-001 (001) 3 MONTHS. I RECOMMEND THAT HEIS TO BE SUPERVISED FOR THE ENTIRETY OF HIS PAROLE PERIOD. COMMUNITY CORRECTIONS TO ASSIST WITH PSYCHOLOGICAL COUNSELLING AND ADDRESSING HIS SUBSTANCE ABUSE PROBLEMS. COURT CASE REFERENCE NUM BER 2021/00081702
NSW	DOWNING CENTRE DISTRICT COURT	18/08/2021	Larceny value >$ 5000 & <=$15000-T1	H 79368156: ORDER VARIED : IMPRISONMENT (AGGREGATE) : 10 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/01/2022 NON PAROLE PERIOD WITH CONDITIONS : 5 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/08/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 5 MONTHS 2021/00081702-001 (002) 5 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-002(003) 6 MONTHS (H150281201) 2021/00090823-001 (001) 3 MONTHS. I RECOMMEND THAT HEIS TO BE SUPERVISED FOR THE ENTIRETY OF HIS PAROLE PERIOD. COMMUNITY CORRECTIONS TO ASSIST WITH PSYCHOLOGICAL COUNSELLING AND ADDRESSING HIS SUBSTANCE ABUSE PROBLEMS. COURT CASE REFERENCE NUM BER 2021/00081702
NSW	DOWNING CENTRE DISTRICT COURT	18/08/2021	Enter building/land w/i commit indictable offence-T1	H 79368156: ORDER VARIED : IMPRISONMENT (AGGREGATE) : 10 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/01/2022 NON PAROLE PERIOD WITH CONDITIONS : 5 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/08/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 5 MONTHS 2021/00081702-001 (002) 5 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-002(003) 6 MONTHS (H150281201) 2021/00090823-001 (001) 3 MONTHS. I RECOMMEND THAT HEIS TO BE SUPERVISED FOR THE ENTIRETY OF HIS PAROLE PERIOD. COMMUNITY

				CORRECTIONS TO ASSIST WITH PSYCHOLOGICAL COUNSELLING AND ADDRESSING HIS SUBSTANCE ABUSE PROBLEMS. COURT CASE REFERENCE NUM BER 2021/00081702
NSW	DOWNING CENTRE DISTRICT COURT	18/08/2021	Goods in personal custody suspected being stolen (m/v)	H 79368156: ORDER VARIED : IMPRISONMENT (AGGREGATE) : 10 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/01/2022 NON PAROLE PERIOD WITH CONDITIONS : 5 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/08/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 5 MONTHS 2021/00081702-001 (002) 5 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-002(003) 6 MONTHS (H150281201) 2021/00090823-001 (001) 3 MONTHS. I RECOMMEND THAT HEIS TO BE SUPERVISED FOR THE ENTIRETY OF HIS PAROLE PERIOD. COMMUNITY CORRECTIONS TO ASSIST WITH PSYCHOLOGICAL COUNSELLING AND ADDRESSING HIS SUBSTANCE ABUSE PROBLEMS. COURT CASE REFERENCE NUM BER 2021/00081702
NSW	DOWNING CENTRE DISTRICT COURT	18/08/2021	Larceny value >$ 2000 & <=$ 5000-T2	H 150281201: ORDER VARIED : IMPRISONMENT (AGGREGATE) : 10 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/01/2022 NON PAROLE PERIOD WITH CONDITIONS : 5 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/08/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 5 MONTHS 2021/00081702-001 (002) 5 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-002(003) 6 MONTHS (H150281201) 2021/00090823-001 (001) 3 MONTHS. I RECOMMEND THAT HE IS TO BE SUPERVISED FOR THE ENTIRETY OF HIS PAROLE PERIOD. COMMUNITY CORRECTIONS TO ASSIST WITH PSYCHOLOGICAL COUNSELLINGAND ADDRESSING HIS SUBSTANCE ABUSE PROBLEMS. COMPENSATION : $408 COURT CASE REFERENCE NUM BER 2021/00090823
NSW	MANLY LOCAL COURT	09/06/2021	Possess housebreaking implements-T2	H 79368156: IMPRISONMENT (AGGREGATE) : 12 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/03/2022 NON PAROLE PERIOD : 6 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/09/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 7 MONTHS 2021/00081702-002 (003) 9 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-001(002) 5 MONTHS

				(H150281201) 2021/00090823-001 (001) 3 MONTHS. SEVERITY APPEAL LODGED : (LCRT 16895)
NSW	MANLY LOCAL COURT	09/06/2021	Larceny value >$ 5000 & <=$15000-T1	H 79368156: IMPRISONMENT (AGGREGATE) : 12 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/03/2022 NON PAROLE PERIOD : 6 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/09/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 7 MONTHS 2021/00081702-002 (003) 9 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-001(002) 5 MONTHS (H150281201) 2021/00090823-001 (001) 3 MONTHS. SEVERITY APPEAL LODGED : (LCRT 16895)
NSW	MANLY LOCAL COURT	09/06/2021	Enter building/land w/i commit indictable offence-T1	H 79368156: IMPRISONMENT (AGGREGATE) : 12 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/03/2022 NON PAROLE PERIOD : 6 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/09/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 7 MONTHS 2021/00081702-002 (003) 9 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-001(002) 5 MONTHS (H150281201) 2021/00090823-001 (001) 3 MONTHS. SEVERITY APPEAL LODGED : (LCRT 16895)
NSW	MANLY LOCAL COURT	09/06/2021	Goods in personal custody suspected being stolen (m/v)	H 79368156: IMPRISONMENT (AGGREGATE) : 12 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/03/2022 NON PAROLE PERIOD : 6 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/09/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 7 MONTHS 2021/00081702-002 (003) 9 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-001(002) 5 MONTHS (H150281201) 2021/00090823-001 (001) 3 MONTHS. SEVERITY APPEAL LODGED : (LCRT 16895)
NSW	MANLY LOCAL COURT	09/06/2021	Commit s114 offence, having previous conviction-T1	H 79368156: S10A CONVICTION WITH NO OTHER PENALTY :
NSW	MANLY LOCAL COURT	09/06/2021	Drive vehicle under influence of drugs -1st off	H 79368156: S10A CONVICTION WITH NO OTHER PENALTY : DISQUALIFICATION - DRIVER : 12 MONTHS COMMENCING 09/06/2021
NSW	MANLY LOCAL COURT	09/06/2021	Larceny value >$ 2000 & <=$ 5000-T2	H 150281201: IMPRISONMENT (AGGREGATE) : 12MONTHS COMMENCING 23/03/2021 CONCLUDING 22/03/2022 NON PAROLE PERIOD : 6 MONTHS COMMENCING 23/03/2021 CONCLUDING 22/09/2021 INDICATIVE: (H79368156) 2021/00081702-004 (005) 7 MONTHS 2021/00081702-002 (003) 9 MONTHS 2021/00081702-003 (004) 2 MONTHS 2021/00081702-001(002)

				5 MONTHS(H150281201) 2021/00090823-001 (001) 3 MONTHS. SEVERITY APPEAL LODGED : (LCRT 16891)
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 357888292: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Goods suspected stolen in/on premises (m/v)	H 357888292: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 357888292: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 357888292: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 357888292: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 357888292: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING 09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001(001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013) 1 YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 357888292: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING 09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS COURT CASE REFERENCE NUM BER 2015/00340062

				AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) COURT CASE REFERENCE NUM BER 2015/00340062 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001(001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) COURT CASE REFERENCE NUM BER 2015/00340062 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013) 1 YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS NON PAROLE PERIOD COURT CASE REFERENCE NUM BER 2015/00340062 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO COURT CASE REFERENCE NUM BER 2015/00340062 SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, COURT CASE REFERENCE NUM BER 2015/00340062 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 357888292: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING 09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS COURT CASE REFERENCE NUM BER 2015/00340062 AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) COURT CASE REFERENCE NUM BER 2015/00340062 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001(001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) COURT CASE REFERENCE NUM BER 2015/00340062 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013) 1 YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS NON PAROLE PERIOD COURT CASE REFERENCE NUM BER 2015/00340062 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NON PAROLE PERIOD 1 YEAR AND

				9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO COURT CASE REFERENCE NUM BER 2015/00340062 SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, COURT CASE REFERENCE NUM BER 2015/00340062 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Larceny-T2	H 357888292: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001 (001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013)1 YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NONPAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 357888292: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2015/00340062
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Break & Enter house etc steal value <= $60,000-T1	H 60221735: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Break and enter dwelling-house etc with intent (steal)-T1	H 60221735: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Possess housebreaking implements-T2	H 60221735: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2016/00074476

NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Break & Enter house etc steal value <= $60,000-T1	H 60221735: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Break & Enter house etc steal value <= $60,000-T1	H 60221735: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Aggravated enter dwelling w/i - offender in company-SI	H 60221735: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING 09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001(001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013) 1 YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Larceny value >$ 2000 & <=$ 5000-T2	H 60221735: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING 09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001(001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013) 1 YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN

				INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Agg B&E & commit serious indictable offence-in company-SI	H 60221735: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING 09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001 (001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013) 1YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Agg B&E & commit serious indictable offence-in company-SI	H 60221735: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING 09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS COURT CASE REFERENCE NUM BER 2016/00074476 AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) COURT CASE REFERENCE NUM BER 2016/00074476 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001(001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) COURT CASE REFERENCE NUM BER 2016/00074476 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013) 1 YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS

				NON PAROLE PERIOD COURT CASE REFERENCE NUM BER 2016/00074476 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO COURT CASE REFERENCE NUM BER 2016/00074476 SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, COURT CASE REFERENCE NUM BER 2016/00074476 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Goods suspected stolen in/on premises (not m/v)	H 60221735: IMPRISONMENT (AGGREGATE) : 5 YEARS COMMENCING 09/03/2016 CONCLUDING 08/03/2021 NON PAROLE PERIOD WITH CONDITIONS : 2 YEARS AND 6 MONTHS COMMENCE 09/03/2016 CONCLUDE 08/09/2018. INDICATIVE: (H357888292) 2015/00340062-010 (010) 2YEARS 2015/00340062-008 (008) 2 YEARS 2015/00340062-001(001) 2 YEARS 2015/00340062-005 (005) 1 YEAR AND 9 MONTHS (H60221735) 2016/00074476-011 (011) 4 MONTHS 2016/00074476-013(013) 1 YEAR AND 9 MONTHS 2016/00074476-012 (012) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-004 (004) 3 YEARS NON PAROLE PERIOD 1 YEAR AND 9 MONTHS 2016/00074476-014 (014) 1 YEARRELEASE SUBJECT TO SUPV SPECIAL CIRCUMSTANCES FOUND FORM 1 MATTERS TAKEN INTO ACCOUNT: H357888292 002,006, 007 TAKEN INTO ACCOUNT ON 001. 003, 004, 009 TAKEN INTO ACCOUNT ON 008 H60221735 001, 002, 005TAKEN INTO ACCOUNT ON 004. 006, 007, 008, 009, 010TAKEN INTO ACCOUNT ON 012 COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Goods in personal custody suspected being stolen (not m/v)	H 60221735: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Possess prohibited drug	H 60221735: TAKEN INTO ACCOUNT ON FORM 1 : COURT CASE REFERENCE NUM BER 2016/00074476
NSW	PARRAMATTA DISTRICT COURT	16/06/2017	Break & Enter house etc steal value <= $60,000-T1	H 60221735: TAKEN INTO ACCOUNT ON FORM 1 : COURT

				[redacted] CASE REFERENCE NUM BER 2016/00074476
NSW	BALMAIN LOCAL COURT	20/05/1998	High Range PCA - drive motor vehicle	H 2525797: FINE : $1,500 COSTS - COURT: $51 DISQUALIFICATION : CONCLUDING 01/01/2003 (LC 22702)
NSW	WYONG LOCAL COURT	26/05/1994	1. BE&S	H 999992343046: 1. 150 HRS CSO COMP $150 CC $46
NSW	BLACKTOWN LOCAL COURT	28/01/1994	1. MID PCA	H 999992343045: 1. 100 HRS CSO CONC DISQ 2 YRS
NSW	BLACKTOWN LOCAL COURT	28/01/1994	2. DANGEROUS DRIVING	H 999992343045: 2. 150 HRS CSO CONC DISQ 3 YRS
NSW	BLACKTOWN LOCAL COURT	28/01/1994	3. NOT PRODUCE LIC	H 999992343045: 3. FD $100 CC $46
NSW	BALMAIN LOCAL COURT	26/03/1991	1. ASSAULT (S.61) (3 COUNTS)	H 999992343044: 1. ON EACH COUNT $150
NSW	BALMAIN LOCAL COURT	27/03/1990	1. DRIVE WHILST CANCELLED	H 999992343043: 1 & 2. ON EACH CHARGE FD $100
NSW	BALMAIN LOCAL COURT	27/03/1990	2. NEG DRIVE	H 999992343043: 1 & 2. ON EACH CHARGE FD $100
NSW	BALMAIN LOCAL COURT	27/03/1990	3. NOT STOP & GIVE PARTICULARS	H 999992343043: 3. FD $100 LIC DISQ 6 MTHS
NSW	NEWTOWN LOCAL COURT	11/03/1988	1. DRIVE WHILIST DISQUALIFIED	H 999992343042: 1. RECOG S558 SELF AND SURETY $500 GB 2 YEARS FD $ 800
NSW	NEWTOWN LOCAL COURT	11/03/1988	2. STATE FALSE NAME	H 999992343042: 2. $500 DISQ 6 MONTHS (C/R 256398)
NSW	LIDCOMBE LOCAL COURT	11/06/1987	1. AID AND ABET MIDDLE RANGE PRESCRIBED CONCENTRATION OF ALCOHOL	H 999992343041: 1. $100 OR 48 HOURS DISQUALIFIED 3 MONTHS
NSW	LIDCOMBE LOCAL COURT	11/06/1987	2. OWNER PERMIT UNLICENCED	H 999992343041: 2 3 & 4. ON EACH CHARGE $20 OR 24 HOURS
NSW	LIDCOMBE LOCAL COURT	11/06/1987	3. OWNER PERMIT UNREGISTERED	H 999992343041: 2 3 & 4. ON EACH CHARGE $20 OR24 HOURS
NSW	LIDCOMBE LOCAL COURT	11/06/1987	4. OWNER PERMIT UNINSURED	H 999992343041: 2 3 & 4. ON EACH CHARGE $20 OR 24HOURS