Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2022/8263**
Re:	**ZCGS**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Member Dr C Huntly**
Date:	**22 December 2022**
Place:	**Perth**

The Reviewable Decision, being the decision of the Delegate dated 21 October 2022, not to revoke the mandatory cancellation of the Applicant's visa, pursuant to 501CA(4) of the Act is set aside and substituted with the decision that the cancellation of the applicant's visa is revoked, pursuant to s 501CA(4)(b)(ii) of the Act.

.....[Sgd].....

Member Dr C Huntly

CATCHWORDS

MIGRATION – Migration Act s 501CA(4) – decision of a delegate of the Minister not to revoke the mandatory cancellation of the Applicant's visa – Direction 90 - whether there is "another reason" to revoke the cancellation of the Applicant's visa – Applicant is a 38-year-old-male citizen of Iraq – sexual intercourse without consent – best interests of minor children – non-refoulement obligations – legal consequences of indefinite detention - Tribunal determined there is "another reason" – reviewable decision set aside and substituted with decision to revoke visa cancellation

LEGISLATION

Migration Act 1958 (Cth)

CASES

BAL19 v Minister for Home Affairs [2019] FCA 2189

Bread Manufacturers of NSW v Evans (1981) 180 CLR 404

BSJ16 v Minister for Immigration and Border Protection [2016] FCA 1181

CPCF v Minister for Immigration and Border Protection (2015) 255 CLR 514

CZCV and Minister for Home Affairs [2019] AATA 91

Drake v Minister for Immigration and Ethnic Affairs (1979) 46 FLR 409

FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 775

FYBR v Minister for Home Affairs (2019) 272 FCR 454

Harrison and Minister for Immigration and Citizenship (2009) 106 ALD 66.

Hovhannisyan and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 3445

James and Minister for Immigration, Citizenship and Multicultural Affairs [2022] AATA 2390

Minister for Home Affairs v HSKJ (2018) 266 FCR 591

MWNX and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] AATA 1450

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

Nigro v Secretary to the Department of Justice [2013] VSCA 213;

NTTH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 1143

Pattison and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 3953

PNBL v MIBP [2018] AAT 162

Rehman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] AATA 4424

Suleiman v Minister for Immigration and Border Protection (2018) 74 AAR 545.

Tanielu v Minister for Immigration and Border Protection [2014] FCA 673

Taulahi v Minister for Immigration and Border Protection (2016) 246 FCR 146

Taylor and Minister for Immigration, Citizenship and Multicultural Affairs [2022] AATA 2889

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

VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 921

WAD 230/2014 v Minister for Immigration and Border Protection (No 2) [2015] FCA 705

SECONDARY MATERIALS

Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction no 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (8 March 2021).

Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79 – Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (20 December 2018).

Minister for Immigration and Border Protection (Cth), *Direction No 65: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* (22 December 2014).

REASONS FOR DECISION

Member Dr C Huntly

22 December 2022

THE APPLICATION

1. The Applicant seeks review of the decision of a delegate of the Respondent (**Minister**) dated 6 October 2022 not to revoke the cancellation of the Applicant's Class XB Subclass 202 Global Special Humanitarian Visa (the **Visa**) pursuant to s 501CA(4) of the *Migration Act 1958* (Cth) (the **Act**).

2. The Visa was cancelled under s 501(3A) of the Act on the basis that the Applicant did not pass the character test, by reason of his substantial criminal record, and that he was serving a full-time term of imprisonment for an offence against a law of a State.

3. The application was made pursuant to s 500(1)(ba) of the Act which allows applications to be made to the Administrative Appeals Tribunal (the **Tribunal**) for review of decisions of a delegate of the Minister, made under s 501CA(4) of the Act.

THE ISSUE FOR DETERMINATION

4. The issue for determination is whether the Tribunal should exercise the power under s 501CA(4)(b) of the Act to revoke the decision to cancel the visa, made under s 501(3A) of the Act. This will require determination of:

   (a) whether the Applicant passes the character test (as defined by s 501 of the Act); and

   (b) if he does not pass the character test, whether there is "*another reason*" why the decision to cancel the Applicant's visa should be revoked.

BACKGROUND

5. The Applicant is a 38-year-old citizen of Iraq. He first came to Australia at the age of 17 years, as part of a family unit that was granted the Visa on 31 January 2003, and he has not departed since.[1]

6. On 1 May 2009 the Applicant was convicted in the District Court of New South Wales (**NSW**) at Campbelltown of *Sexual Intercourse Without Consent*,[2] for which he was sentenced to nine years and four months imprisonment, with a non-parole period of seven years.[3] A subsequent application by the Applicant for an extension of time to appeal against the severity of that sentence was dismissed.[4] As will be discussed below, while this was not the Applicant's first sentence of imprisonment, it was his most serious offending to that point, and was his first term of immediate imprisonment.[5]

7. On 19 May 2015, the Applicant was informed in the prescribed manner that a delegate of the Minister had decided to cancel the visa pursuant to s 501(3A) of the Act (the **original decision**).[6] The Applicant's visa was cancelled the ground that the Applicant had a substantial criminal record, as he had been sentenced to a term of imprisonment of more than 12 months and was serving a sentence of imprisonment on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or Territory.[7] The Applicant was advised that he could request that the cancelation decision be revoked

8. On 29 May 2015 the Applicant submitted a "Request for revocation of a mandatory visa cancellation under S501 (3A)" (**Request for Revocation**),[8] together with a "Personal Circumstances Form" in the standard format.[9]

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1 G3 p 22.

2 *Crimes Act 1900* (NSW) s 61I

3 G3 p 16.

4 G7 p 56.

5 G4.

6 G23 183.

7 Subsections 501(6)(a) and 501(7)(c) of the Act.

8 G8 p 74.

9 G9 p 86

9. On 4 June 2015, the Applicant submitted a further Request for Revocation and supporting statement.[10]

10. On 22 November 2016[11] and 12 January 2017[12] the Applicant provided further letters in support of his Request for Revocation.

11. On 28 March 2017, the Assistant Minister decided under s 501CA(4) of the Act not to revoke the visa cancellation decision (the **first reviewable decision**). The Assistant Minister was not satisfied that there was another reason why the original decision should be revoked.

Protection proceedings and current proceedings

12. Of potential relevance to the present decision, in proceedings that now run in parallel to these proceedings, on 19 May 2017 the Applicant applied for a protection visa in his own right.[13] Ultimately, because of that application the Applicant was found to be owed protection in Australia pursuant to s 36(2)(a) of the Act (refugee protection).[14]

13. On 8 October 2019 a delegate of the Minister refused to grant the applicant a protection visa in his own right pursuant to s 36(1C)(b) ("danger to the Australian community") (the **reviewable s 36(1C)(b) decision**). The Applicant subsequently applied to the Tribunal (differently constituted) for a review of the reviewable s 36(1C)(b) decision. That review application has not been finally determined as at the date of this decision.

14. Between 2 and 14 February 2021, the Applicant lodged an application with the Federal Court of Australia (**Federal Court**) for an extension of time within which to seek judicial review of the first reviewable decision. On 29 July 2021, the Federal Court ordered that:

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10 G10 p 94.

11 G11 p 101 and 12 January 2017.

12 G12p 102.

13 *AHZ21 and Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 884 (Farrell J) at [11]

14 This was following a refusal of an XA-866 Permanent Protection Visa by the Department on 3 August 2017. The Applicant appealed the decision to the Tribunal, who affirmed the delegate's decision on 1 November 2017. The Applicant then appealed that decision to the then Federal Circuit Court. It was remitted to the Tribunal by consent on 20 February 2018. A different Tribunal then remitted the decision back to the Department on 18 January 2019.

(a) the Applicant's application for an extension of time was granted;

(b) the first reviewable decision was set aside; and

(c) the original decision was remitted to the Respondent for determination according to law.[15]

15. On 5 October 2022, a delegate of the Respondent decided, under s 501CA(4) of the Act, not to revoke the visa cancellation decision (the **second reviewable decision**).[16] The Applicant then applied to the Tribunal for review of the second reviewable decision on 10 October 2022.[17] It is that application for review that gives rise to these proceedings.

THE HEARING AND THE EVIDENCE

16. At the time of the hearing, the Applicant was detained at Yongah Hill Detention Centre in Western Australia and appeared before the Tribunal in person on 12 December and 13 December 2022. The Applicant was represented by Dr Jason Donnelly of Counsel and the Respondent was represented by Ms Daphne Jones-Bolla of Sparke Helmore Lawyers. Both representatives appeared via video conference.

17. The following witnesses gave evidence at the hearing:

(a) the Applicant, ZCGS;

(b) the Applicant's brother, HK; and

(c) the Applicant's partner, TN.

18. The following documents were before the Tribunal:

(a) the Applicant's statement of facts, issues and contentions (**SOFIC**), filed 6 December 2022 (**A1**);

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15 G26; *AHZ21 and Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 884 (Farrell J).

16 G3 p 10.

17 G2 p 3.

(b) Witness statement of EL, filed 22 November 2022 (**A2**);

(c) Witness statement of FK, filed 22 November 2022 (**A3**);

(d) Witness statement of ZCGS, filed 22 November 2022 (**A4**);

(e) Witness statement of PK, filed 22 November 2022 (**A5**);

(f) Witness statement of TN, filed 22 November 2022 (**A6**);

(g) Witness statement of HK, filed 22 November 2022 (**A7**);

(h) the Respondent's G documents, filed 28 October 2022 (**R1**);

(i) the Respondent's statement of facts, issues and contentions (**SOFIC**), filed 22 November 2022 (**R2**); and

(j) the Respondent's Summons Bundle, filed 2 September 2022 (**R3**).

19. At the conclusion of the hearing, in lieu of closing oral submissions and pursuant to s 33(2A)(g) of the AAT Act, the Tribunal directed that parties be given leave to file written final submissions of not more than 1200 words, on or before 15:00pm AEST on Friday 16 December 2022.

20. The parties' further submissions were subsequently received on 16 December 2022.

Applicant's history of offending

21. The Applicant's offending history in Australia dates from 8 September 2005.

22. The Applicant's history of convicted offending is detailed in the table at Annexure A. In summary terms, between 8 September 2005 and 17 May 2010, the Applicant received the following convictions:

(a) three convictions for behaviour characterized by disorderly conduct (*Use Offensive Language in/near public place/School; Destroy or Damage Property*; and *Behave in Offensive Manner in/near public place/School*);

(b) three convictions for driving offences (*Never Licensed Person Drive Vehicle on Road*; *Drive with Unrestrained Passenger*; *Drive Motor Vehicle with Person in or on boot of Vehicle*);

(c) six convictions for behaviour characterized by dishonesty (6 x *Obtain Money by Deception*; *Forge or Alter prescription which includes prohibited drug*; and *Goods in Personal Custody Suspected Being Stolen*);

(d) four convictions for violent behaviour (*Maliciously Wound*; *Assault Officer in Execution of Duty*; and 2 separate incidents of *Common Assault*); and

(e) one conviction for *Sexual Intercourse Without Consent*.

23. As a result of those convictions, the Applicant:

(a) was fined a total of $1,250.00;

(b) placed on four good behaviour bonds (all of which were subsequently called up); and

(c) sentenced to terms of imprisonment totalling 151 months, with the sentence for *Sexual Intercourse Without Consent* being for 9 years and 4 months.

24. As indicated above at para [7], while serving his most recent term of imprisonment, the Applicant's visa was mandatorily cancelled by a delegate of the Minister on character grounds, pursuant to s 501(3A) of the Act. The delegate subsequently refused to exercise the discretion to revoke the mandatory cancellation after weighing the considerations at s 501CA(4) of the Act.[18]

LEGAL FRAMEWORK

25. Section 501(3A) of the Act relevantly provides that:

> *T**he Minister must cancel a visa** that has been granted to a person if:*
>
> *(a) the Minister is satisfied that the person does not pass the character test because of the operation of:*

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[18] Supra.

(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or

(ii) ...; and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

26. Section 501(6) of the Act relevantly provides:

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

27. A "*substantial criminal record*" is, relevantly, defined by s 501(7) of the Act as follows:

> *For the purposes of the character test, a person has a **substantial criminal record** if:*
>
> *(a) ...*
>
> *(b) ...*
>
> ***(c) the person has been sentenced to a term of imprisonment of 12 months or more;***
>
> ***(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more;***
>
> *…*
>
> (Original emphasis.)

28. Section 501(7A) of the Act provides:

> *(7A) For the purposes of the character test, if a person has been sentenced to 2 or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.*
>
> *Example: A person is sentenced to 2 terms of 3 months imprisonment for 2 offences, to be served concurrently. For the purposes of the character test, the total of those terms is 6 months.*

29. Section 501CA of the Act relevantly provides:

> *(1) This section applies if the Minister makes a decision (the **original decision**) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.*
>
> *...*
>
> *(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.

(Emphasis added.)

Ministerial Direction 90

30. Section 499(1) of the Act provides that:

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

(1) the performance of those functions; or

(2) the exercise of those powers.

31. Section 499(2A) of the Act provides that, "*A person or body must comply with a direction under subsection (1).*"

32. On 8 March 2021 the Minister, being the relevant Minister for the purposes of s 499 of the Act, made a direction titled "*Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*" (**Direction 90**).[19] The commencement date for operation of Direction 90 was 15 April 2021. Upon its commencement, Direction 90 revoked the operation of "*Direction no. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*" (**Direction 79**).[20]

33. Paragraph 5.1 sets out the objectives of Direction 90. Paragraph 5.1(3) relevantly provides:

(3) Under subsection 501(3A) of the Act, the decision-maker must cancel a visa that has been granted to a person if the decision-maker is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c) or paragraph (6)(e)) and the non-

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19 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction no 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (8 March 2021).

20 Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 79 – Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s 501CA* (20 December 2018).

citizen is serving a sentence of imprisonment, on a fulltime basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory. A non-citizen who has had their visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the decision-maker considering the request is not satisfied that the non-citizen passes the character test, ***the decision-maker must consider whether there is another reason to revoke the cancellation given the specific circumstances of the case****.*

(Emphasis added.)

34. Paragraph 5.2 of Direction 90 sets out the principles which provide the framework within which decision-makers should approach their task of deciding whether to revoke a mandatory cancellation under s 501CA. These principles are as follows:

(a) 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.*

(b) ***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.*

(c) 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 measureable [sic] ***risk of causing physical harm to the Australian community.***

(d) 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 noncitizens 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 noncitizens who have lived in the Australian community for most of their life, or from a very young age.***

(e) ***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 measureable* [sic] ***risk of causing physical harm to the Australian community****.*

(Emphasis added.)

35. Paragraph 6 of Direction 90 provides that, informed by the principles set out in para 5.2, the decision-maker must take into account the considerations in paras 8 and 9 of Direction 90 (where such considerations are relevant) in order to determine whether the cancellation of the visa should be revoked.

36. Guidance in relation to how the relevant considerations are to be taken into account can be found in para 7 of Direction 90 which provides:

> *(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.*
>
> *(2) Primary considerations should generally be given greater weight than the other considerations.*
>
> *(3) One or more primary considerations may outweigh other primary considerations.*

37. Paragraph 8 of Direction 90 provides:

> *In making a decision under section … 501CA(4), the following are primary considerations:*
>
> *(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****;*
>
> *(4)* ***expectations of the Australian community****.*
>
> (Emphasis added)

38. Paragraph 9 of Direction 90 provides:

> *(1) In making a decision under section … 501CA(4), other considerations must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):*
>
> ***a) international non-refoulement obligations;***
>
> *b) extent of impediments if removed;*
>
> ***c) impact on victims;***
>
> ***d) links to the Australian community, including:***
>
> *i)* ***strength, nature and duration of ties to Australia****;*
>
> *ii) impact on Australian business interests.*
>
> (Emphasis added)

CONSIDERATION

Does the Applicant pass the character test?

39. Failure of the character test arises as a matter of law: *Harrison and Minister for Immigration and Citizenship*.[21] The character test is defined in s 501(6) of the Act.[22] Section 501(6)(a) of the Act provides that a person does not pass the character test if the person has "*a substantial criminal record*".

40. Section 501(7)(c) provides that a person will have a substantial criminal record if they have "*been sentenced to a term of imprisonment of 12 months or more*...".[23] Section 501(7)(d) provides that a person will have a substantial criminal record if they have been "*sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more*".[24]

41. As the Applicant does not pass the character test, he cannot rely on the provision in s 501CA(4)(b)(i) for the reviewable decision to be revoked. The issue, therefore, is whether the power under s 501CA(4)(b)(ii) should be exercised, on the basis that there is another reason why the reviewable decision should be revoked.[25]

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

PRIMARY CONSIDERATIONS

First primary consideration: Protection of the Australian community from criminal or other serious conduct (para 8.1)

42. Paragraph 8.1 of Direction 90 provides that when decision-makers are considering the protection of the Australian community, they:

> *(1) ... should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. In this respect,* ***decision-makers should have***

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21 (2009) 106 ALD 66.

22 See above para [26].

23 See above para [27].

24 Ibid.

25 See above para [29].

particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, *will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*

(2) Decision-makers should also give consideration to:

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

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

(Emphasis added.)

Nature and seriousness of the conduct (para 8.1.1 of Direction 90)

43. Paragraph 8.1.1 of Direction 90 provides:

(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:

(a) without limiting the range of conduct that may be considered very serious, ***the types of crimes or conduct described below are viewed very seriously*** *by the Australian Government and the Australian community:*

(i) ***violent and/or sexual crimes****;*

(ii) ***crimes of a violent nature against women or children, regardless of the sentence imposed****;*

(iii) acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

(b) 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, , [*sic*] *or an offence against section 197A of the Act, which prohibits escape from immigration detention;*

(c) *with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above,* ***the sentence imposed by the courts for a crime or crimes;***

(d) ***the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness****;*

(e) ***the cumulative effect of repeated offending****;*

(f) *whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;*

(g) *whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).*

(Emphasis added).

8.1.1 Nature and seriousness of the offending conduct

44. With respect to the Applicant's history of offending, it is the Respondent's contention (outlined in the Statement of Facts, Issues and Contentions dated 6 December 2022) that his offending is "*very serious*", particularly as follows:[26]

> *26. The sentencing remarks of 1 May 2009 reveal the following details of the* [A]*pplicant's conviction for sexual intercourse without consent:*
>
> > …the Offender locked the door... He then tried to kiss the victim and then kneeling on the bed undid his belt and flies and exposed his penis. He asked the complainant to suck his penis which she refused to do. He repeated that request on a number of occasions and on each occasion, the victim refused. There then become [sic] a tussle with the Offender trying to remove the clothing from the victim's lower half, pulling down her pants and underwear. There was a struggle over that. At one stage the victim managed to get to her feet but she was pushed back onto the bed by the Offender. She had been trying to get to the door to get out of the room and the Offender told her at that stage that she could not do anything. Eventually the Offender forced the victim's legs apart, raised each of her legs, one onto each of his shoulders and having pulled down her pants and underpants from her rear area, penetrated her from behind, using the expression explained in evidence by Dr Brennan. The victim said that when he inserted his penis into her vagina, "it really hurt" and she continued to tell him, the Offender, not to do it. However the Offender persisted with thrusting and after a few minutes, ejaculated into her vagina and perhaps partially ejaculated onto the sheets of the motel bed. The Offender made no attempt to wear a condom and on the evidence of the complainant, made no inquiry as to whether she was

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[26] Respondent's SOFIC paras [26]–[31].

> on any form of contraception. The Offender's evidence is to the contrary but clearly the jury did not accept that evidence. After he had ejaculated and withdrawn from the victim's vagina, the Offender said to her, "See, it wasn't that hard, was it?"…

27. *The victim was 17 years old at the time. The* [A]*pplicant was 21 years old. The* [A]*pplicant concedes that this offence was very serious.*

28. *The* [A]*pplicant's conviction for maliciously wound appears to relate to the accidental stabbing of his friend. The transcript of the sentencing hearing on 16 April 2007 reveals the following details of what occurred.*

> ...after their first wrestle and even the victim indicates that the accused were involved in a play wrestle he calls it. That after the initial wrestle the accused went into the kitchen and grabbed a knife and he came back. Then the victim's grabbed a broom handle to defend himself against the accused at which time the accused has placed the knife on the table and [victim] has placed the broom handle on the ground so they then become involved in another wrestle and it's only after that that during the wrestle that the accused picked up the knife from the table and stabbed him once on the left upper thigh… ..He's picked it up and it might have been - your Honour, as it seems to flow through on the facts that during the wrestle picked it up to try to scare him and at that time has recklessly slashed him on the leg…

29. *Violent crimes and crimes of a sexual nature are viewed very seriously by the Australian Government and the Australian community (paragraph 8.1.1(1)(a)(i) of Direction 90). The* [A]*pplicant concedes that his other offending and, in particular, his violent offending "adds some weight:"*.

30. *Regard must also be had to the fact that the applicant has been sentenced to terms of imprisonment for his offending (paragraph 8.1.1(1)(d) of Direction 90). Sentences involving terms of imprisonment are the last resort in the sentencing hierarchy* (referencing PNBL v MIBP (Migration) [2018] AAT 162 at [22])*. Where a Court has sentenced an offender to a term of custodial imprisonment, this should be viewed as a reflection of the objective seriousness of the offences involved. The* [A]*pplicant concedes that the sentences he has received are a further indication of the seriousness of his offending.*

31. *Regard must also be had to the frequency and cumulative effect of the* [A]*pplicant's offending (paragraphs 8.1.1(1)(d) and (e) of Direction 90). Here, the* [A]*pplicant has committed 18 offences over a period of eight years. His offending has trended upwards, from behave in offensive manner in/near public place/school to common assault to maliciously wound to sexual intercourse without consent.*

(References omitted).

45. Relevantly, Counsel for the Applicant substantially concurred with the proposition underlying the Respondent's foregoing submissions on this consideration, albeit somewhat more comprehensively, as follows:[27]

> *22. On 1 May 2009 the* [A]*pplicant was convicted in the District Court of New South Wales at Campbelltown of Sexual Intercourse Without Consent and sentenced to nine years and four months imprisonment, with a non-parole period of seven years.*
>
> *23. The* [A]*pplicant appealed the sentence at the New South Wales Court of Criminal Appeal, but the appeal was dismissed on 6 November 2013.*
>
> *24. The victim was a 17-year-old girl who had met the* [A]*pplicant previously and refused his sexual advances on that occasion. She encountered him again after going to a motel with three other men and being left alone in the room the next day with the* [A]*pplicant.*
>
> *25. The Court found that the* [A]*pplicant had then asked her to suck his penis and, when she refused, locked the door, struggled with her, overpowered her, removed her lower clothing, and had forcible sexual intercourse with her, involving penile penetration.*
>
> *26. The judge described the injury, emotional harm, loss, or damage caused by the* [A]*pplicant's offending behaviour to the victim as 'substantial' and noted that she had suffered a significant personality change because of the experience.*
>
> *27. The Tribunal would consider that this information, and the severity of the sentence imposed, reinforce the view that this was a very serious offence.*
>
> *28. The* [A]*pplicant also had other convictions prior to the sexual offence described above. He was convicted of two public order offences and a dishonesty offence in 2005, for which he was fined. In 2006 he was convicted of Destroy Or Damage Property and Forge Or Alter Prescription Which Includes Prohibited Drug and fined, as well as being convicted of Common Assault, for which he received a bond to be of good behaviour for two years.*
>
> *29. On 16 April 2007 the* [A]*pplicant was convicted of malicious wounding and was imprisoned for 12 months. His sentence of imprisonment was suspended on entering another bond to be of good behaviour for 12 months. The court transcript contains almost no information about this offending but does indicate that it involved some head injuries*.
>
> *30. The 2007 conviction constituted a breach of the 2006 bond, and the* [A]*pplicant's later sexual offence (above), which occurred in October 2007, breached the terms of his April 2007 suspended sentence. The fact that the 2007 offending constituted a breach of a judicial order adds somewhat to its seriousness.*
>
> *31. Subsequent to the 2007 sexual offending, the applicant had a conviction for assault officer in execution of duty in 2008 (bond), minor driving convictions in 2009 and in 2010 convictions for six counts of Obtain Money By Deception,*

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[27] Applicant SFIC paras [22]–[33].

receiving nine months imprisonment on each count, to be served concurrently with the major sentence imposed in May 2009.

32. *The sentences the* [A]*pplicant received are a further indication of the seriousness of the offending. Dispositions involving incarceration of the offender are the last resort in the sentencing hierarchy. For his sexual offence, the* [A]*pplicant was sentenced to nine years and four months imprisonment, a substantial term which reflects the very serious nature of the offence. This sentence was not varied on appeal.*

33. *Overall, the Tribunal would find that the* [A]*pplicant's sexual offence of which he was convicted in 2009 was very serious in nature and that his other offending adds some weight, in particular two or three offences which were of a violent nature.*

(References omitted).

46. The Applicant's history of non-sexual offending has not been characterised by a discernible trend of increasing seriousness, within the contemplation of para 8.1.1(1)(d) of Direction 90. I am prepared to accept that the Applicant remains capable of acts of violence in circumstances that occasionally arise in the highly limiting and pressure-cooker environment of prison and administrative detention.

47. I further find that the cumulative effect of the Applicant's history of offending conduct described above is a significant relevant consideration in this case, in the sense that it is cumulatively very serious offending conduct within the contemplation of para 8.1.1(1)(e) of Direction 90.

48. Further, I note that when the discretion to revoke a decision to cancel a visa is being considered, para 5.2(2) of Direction 90 also identifies as a relevant consideration the principle that: "*Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia*." As required at para 6, this is one of the principles informing the application of considerations required by Direction 90.

49. The Tribunal finds that, on balance, the reasonable assessment required by para 8.1.1 of Direction 90, being a consideration of the nature and seriousness of the Applicant's criminal offending or other conduct to date including those offences referred to above and at Annexure A, leads to the conclusion that it is very serious conduct from which the Australian community is entitled to be protected in the relevant sense.

50. It is not in contention between the parties that the Applicant's offending conduct has been very serious. Indeed, in terms of the crimes of violence and the crimes against a young, vulnerable minor female, his criminal offending is amongst the most serious known to the law. This is a central factor to be weighed by the Tribunal when considering the protection of the Australian community.[28]

8.1.2 Likelihood of reoffending

51. Paragraph 8.1.2 of Direction 90 relevantly provides:

> *(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases.* ***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****.*
>
> *(2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:*
>
> *a)* ***the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or serious conduct****; and*
>
> *b)* ***the likelihood of the non-citizen engaging in further criminal or other serious conduct****, taking into account:*
>
> *i) information and evidence on the risk of the non-citizen re-offending; and*
>
> *ii)* ***evidence of rehabilitation achieved by the time of the decision****, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).*
>
> (Emphasis added).

52. The Tribunal in *CZCV and Minister for Home Affairs*[29](**CZCV**) summarised the task on review as follows at [56]:

> *In summary, the Tribunal is required to assess whether the Applicant poses an unacceptable risk of harm to individuals, groups or institutions in the Australian community. In order to make this assessment, the Tribunal is assisted by the following passage from* Nigro v Secretary to the Department of Justice *[2013] VSCA 213; (2013) 41 VR 359, [111]; [2013] VSCA 213 (which was cited with approval by*

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28 Direction 90 paras 8.1(1) and (2).

29 [2019] AATA 91.

Mortimer J in Tanielu v Minister for Immigration and Border Protection *[2014] FCA 673; (2014) 225 FCR 424 at [95], as well as Gilmour J in* WAD 230/2014 v Minister for Immigration and Border Protection (No 2) *[2015] FCA 705 at [42]- [43]):*

> *An unacceptable risk thus requires consideration of the likelihood of offending and, if it eventuates, what the consequences of such offending are likely to be. Whether a risk is unacceptable will depend not only upon the likelihood of it becoming reality but also on the seriousness of the consequences if it does.*

In BSJ16 v Minister for Immigration and Border Protection[30] *Moshinsky J stated, at [68]:*

> *... there is no statutory constraint on the way that the Minister assesses risk, save that whatever he or she takes into account must be logical and rational.*

53. While the Tribunal and the Court in the above cases (and in the cases referred to therein) were considering visa cancellation in the context of predecessors to Direction 90, given the similarity in the wording of the preceding Directions, the same considerations and principles apply to the present case. I adopt the approach indicated in the above cases.

54. The Respondent's initial submissions on this aspect of Direction 90 were as follows:[31]

> *34. Turning to the likelihood of the* [A]*pplicant engaging in further criminal or other serious conduct, the Minister contends that there remains an ongoing and unacceptable risk of the applicant reoffending for these reasons:*
>
> *(a) While the* [A]*pplicant claims to have completed a Custody-Based Intensive Treatment program directed to the reduction of sexual recidivism, there is no independent evidence of this. The material produced by the Department of Corrective Services under summons indicates that the* [A]*pplicant participated in the "Self-Regulation Program: Sexual Offending" between July 2015 and August 2016. At the conclusion of that program, a report was prepared by Ms Celia Langton, Senior Psychologist in which Ms Langton assessed the* [A]*pplicant's risk of sexual recidivism as "moderate-high".*
>
> *(b) There is no evidence that the* [A]*pplicant has undergone any rehabilitation or counselling specifically directed to sexual offending since Ms Langton's report. The report from Ms Tanjana Bogicevic, Clinical Psychologist, focusses on whether the* [A]*pplicant's reported symptoms are congruent with his experiences in Iraq and Australia. It does not establish any causal link between his reported symptoms and his offending. The* [A]*pplicant's sessions with the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors appear to have been directed to his experiences in detention, rather than sexual offending. The* [A]*pplicant's plea of not guilty, his claim that the victim's allegations against him were*

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30 [2016] FCA 1181.

31 Respondent's Statement of Facts, Issues and Contentions.

financially and racially motivated and Ms Langton's report, suggest that he does not consider that he requires counselling of this kind.

(c) The sentencing judge considered that there were "no mitigating factors" to his sexual offending and that he was "not a person of good character despite the opinion of his friends to the contrary". The sentencing judge noted that the [A]*pplicant had "shown no remorse or contrition" and "still (assigned) base motives to the complainant, the victim of his crime:".*

(d) While the [A]*pplicant has apparently been diagnosed with schizophrenia, bipolar spectrum and anxiety disorders, and was previously prescribed medication for these conditions, there is no evidence from the medical practitioner who made these diagnoses and it appears that the* [A]*pplicant is no longer taking the medication prescribed to him. This is despite Ms Langton's recommendation that he "continue to take his prescribed anti-psychotic medication." The* [A]*pplicant claims he no longer needs to be on medication and that his mental health is "good now". This is difficult to reconcile with IHMS records from September 2019 which indicate that the* [A]*pplicant reportedly swallowed a razor blade when he was scheduled to be transferred to Christmas Island.*

(e) The [A]*pplicant has demonstrated a propensity for violence and aggressive behaviour. This behaviour has continued throughout his incarceration and subsequent detention, despite the applicant having apparently taken "several anger management courses". This indicates that the* [A]*pplicant's attempts at rehabilitation to date have been unsuccessful.*

(f) The [A]*pplicant's recent sentiments of remorse are directed to the impact that his actions have had on his own life, and that of his family. The apologies contained under the heading "plea for forgiveness" in the* [A]*pplicant's statement dated 12 January 2017 do not contain any reference to the victims of his offending. This suggests that the* [A]*pplicant takes no responsibility for his actions and demonstrates a concerning lack of insight into the seriousness of his actions and the impact they have had on his victims. This is consistent with the* [A]*pplicant maintaining that the sexual contact with the victim was consensual and that the victim was financially and racially motivated.*

(g) Previous police and Court intervention has not prevented the [A]*pplicant from committing further offences. Throughout the course of his Self-Regulation Program, the* [A]*pplicant expressed hostile attitudes towards people in positions of authority, including community corrections officers, custodial staff, police and members of the judicial system.*

35. The Minister contends that this primary consideration weighs very heavily in favour of non-revocation.

(References omitted).

55. Counsel for the Applicant made the following submissions of relevance prior to the hearing before the Tribunal:[32]

> *35. Having regard to the nature of the* [A]*pplicant's offending conduct in the past, as outlined above, any future offending of a similar nature would have the potential to cause physical and psychological injury to members of the Australian community.*
>
> *36. In assessing the likelihood of the* [A]*pplicant reoffending in the future, the Tribunal would consider factors that may assist to explain the* [A]*pplicant's past conduct, as well as his more recent conduct, remorse, and rehabilitation.*
>
> *37. First, as to factors contributing to past conduct, the Tribunal would take into consideration the* [A]*pplicant's account of his difficulties settling in Australia. He and one of his brothers were bullied at school, he got into a fight which resulted in him getting suspended from school; he made friends with a group of boys on the street and started to get into trouble. He refers to himself as 'the product of a war-torn country'.*
>
> *38. The* [A]*pplicant states that while in prison he was diagnosed with 'various mental illnesses – schizophrenia, bipolar spectrum and anxiety disorders' and was prescribed 'various medications'. The Court in 2009 observed that the* [A]*pplicant had been prescribed anti-psychotic medication after a brain injury in 2006, but he had not been compliant with that medication or treatment in the past. The Court did not link his offending to any psychological or psychiatric condition.*
>
> *39. The Tribunal would consider the detention health records that show that the* [A]*pplicant has been seen on several occasions by a psychologist while in immigration detention and has stated that this helped him to 'get an understanding' of himself. These records acknowledge the likely existence of Post-Traumatic Stress Disorder because of his childhood experiences.*
>
> *40. Secondly, as to remorse and rehabilitation, the* [A]*pplicant has stated he is ashamed and remorseful for what he has done, and he will become a good and responsible person. He has attended 'several' anger management courses in prison. The Court in 2009 acknowledged that the applicant attended such a course in 2007.*
>
> *41. The Judge's finding in May 2009 held that there were no mitigating factors in the* [A]*pplicant's offending, that he had shown no remorse or contrition and still assigned motives to the victim of the crime. However, of course, the* [A]*pplicant has had many years to reflect since 2009.*
>
> *42. The Tribunal would consider that the* [A]*pplicant states he is keen to go back to TAFE to study a business course and eventually start his own business; and that he attends gym to keep himself busy and engaged. The delegate concluded: '[w]hile these are positive objectives, his capacity to do what he has stated has not yet been tested in the community'.*

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[32] Applicant's SFIC paras [35] – [46].

43. *There are difficulties with the delegate's reasoning. As the Full Court of the Federal Court of Australia recently held in* CKL21 v Minister for Home Affairs [2022] FCAFC 70 *at [79]:*

> *It is a logical fallacy to conclude that a fact has been proved because it has not been disproved…… a finding that the appellant's conduct has not been tested in the community does not establish that the appellant is a risk of reoffending. It is a negative finding about what is not known or established (because the appellant has not been living in the community), rather than a positive predictor of the appellant's future behaviour.*

44. *Thirdly, as to recent adverse conduct, the Conviction, Sentences and Appeals report from the NSW Department of Corrective Services indicates that over his period of incarceration from 2008 – 2015 he incurred 14 disciplinary penalties including seven involving violence such as 'assaults' and 'fight or other combat'.*

45. *Further, since he has been in immigration detention, the* [A]*pplicant has had multiple incidents of abusive and aggressive behaviour and disturbances recorded in the client incident report from 2016 to 2022.*

46. *Finally, in totality, it must be accepted that there are some prospects that the* [A]*pplicant will reoffend. This primary consideration weighs heavily against revocation of the mandatory cancellation decision.*

(References omitted).

56. Following the hearing, counsel for the Applicant made the following relevant final written submissions of relevance to the likelihood of the Applicant reoffending:[33]

> 4. *<u>Likelihood of Re-Offending.</u> There are at least five themes relevant. First, the theme of deterrence from time spent in prison and immigration detention. The* [A]*pplicant said he had been removed from the Australian community for '14 years'. He said detention and prison had a physical and mental impact on him. He said he had been abused 'in every way'. He said detention has caused him a neck injury and a wrist injury. He said he has been hurt in detention. He said he had been cut. He said he had been burned with hot water. He said he did not feel safe in immigration detention. The* [A]*pplicant said he 'was getting jumped because of my charges'. He was not challenged in this evidence.*
>
> 5. *Secondly, next comes the theme of rehabilitation. The* [A]*pplicant confirmed he attended a sex-offender program. He said he had engaged in group sessions. He said he engaged in self-regulation as a sex offender. The* [A]*pplicant said the program helped him to 'make better decisions in life'. The* [A]*pplicant said the course taught him about the 'consequences'. He also said the program taught him to 'set goals' and talk about 'sex in a healthy way'. Otherwise, the applicant also confirmed he undertook counselling in detention to provide him with a level of support (although those sessions, it must be conceded, are dated).*

[33] Applicant's closing submissions paras [35] – [46].

6. *Thirdly, next comes the theme of a new family unit. The* [A]*pplicant gave evidence he has been in a relationship with* [TN] *since about March 2022. That evidence was corroborated by his partner in cross-examination. The applicant said he has built a relationship with* [TN]'s *two children,* [RN]*, and* [EL]*. The* [A]*pplicant said he was playing a father figure to the children. He also said he felt responsible for the children. The* [A]*pplicant's partner largely corroborated that evidence*

7. *Fourthly, next comes the topic of remorse and insight. The* [A]*pplicant said that he 'did such a bad thing'. The* [A]*pplicant said that he was 'really truly sorry for the victim and sorry for the community'. In relation to the sexual assault, the* [A]*pplicant said he accepted the offence. He said: 'I hurt the victim. I hurt her emotionally. Horrible things I done'. He said: 'Really sorry for the victim emotionally hurt her and done such a bad thing'. The* [A]*pplicant explained the potential adverse implications of sex offending, including getting the victim pregnant and making the victim 'sick'. With respect to the malicious wounding offence, the* [A]*pplicant said that he was not 'not proud of the offence'.*

8. *The* [A]*pplicant's brother* [HK] *indicated that the* [A]*pplicant expressed remorse and regret to him. He indicated that this was 'quite a while ago'.*

9. *Fifthly, next is the topic related to the passage of time. It is to be recalled that the applicant's sex offending occurred on 10 October 2007. That reflects a period of over 15 years ago. The* [A]*pplicant said: 'I think differently now'. He also stated: 'I am more mature now'.*

10. *The* [A]*pplicant's brother* [HK] *corroborated this evidence, stating that the applicant was a 'changed person' compared to before. The* [A]*pplicant's brother said he had 'seen him change', in reference to the* [A]*pplicant.*

11. *Sixthly, at a more general level, the* [A]*pplicant said he was 'truly sorry'. He said he accepted 'my actions…I am really sorry'. He further said that he 'deserved what I got'. He also said that he 'felt shame'. He accepted he made 'bad decisions in life'.*

12. *All the preceding support the contention that the* [A]*pplicant is not an unacceptable risk of re-offending.*

57. The Respondent made the following relevant written submissions regarding the Applicant's likelihood of reoffending following the hearing:[34]

    4. *There remains an ongoing and unacceptable risk of the* [A]*pplicant reoffending for these further reasons:*

        a. *the* [A]*pplicant has not completed any rehabilitation or counselling addressing his sexual offending since the "Self-Regulation Program: Sexual Offending" in August 2016. Any counselling he has undertaken since then is to address his time in detention, and separation from his family.*

[34] Respondent's closing submissions paras [4] - [5].

b. *the* [A]*pplicant told the Tribunal a reason for undertaking the above program was so he could be granted parole and released into the community. He said he was forced to do it. This accords with a record dated 12 September 2012 and evidence that:*

   i. *the* [A]*pplicant maintained his innocence from his arrest and throughout his time in prison.*

   ii. *the* [A]*pplicant did not want to attend any programs aimed at sexual offending because of his claimed innocence and maintained his innocence through his time in the program.*

   iii. *the* [A]*pplicant cast himself as the victim in the situation because of his period of incarceration and voiced his resentment.*

   iv. *his behaviour in the program was argumentative and intimidating. He also had several verbal conflicts with group members, and he believed he should not be in the program.*

c. *he did not undertake the program to address his offending or gain any insight into his actions. It was to gain a favourable parole outcome. This is also evidenced in his oral evidence when he told the Tribunal he incorrectly reported using drugs in a psychological assessment to gain a favourable immigration outcome. Similarly, while he now accepts the details of the sexual offending he does not do so with any insight and only baldly asserts that 'whatever the judge said is true'. That is not insight in any real sense and should not be accepted as such in circumstances where he has maintained his innocence for a period of almost 10 years including while undertaking the program. His claims of being remorseful and sorry should also be viewed with caution in circumstances where he has told the Tribunal he reported false information to gain a favourable outcome, given inconsistent evidence to the Tribunal and not been open and forthcoming in his oral evidence – for example when asked about his ex-wife the* [A]*pplicant tried to invoke his right to not answer.*

d. *his time in a custodial setting has not prevented his unacceptable and violent conduct. He has received 11 institutional charges – four for fighting; one for intimidation; two for having unauthorised or prohibited goods; and three related to failure to adhere to correctional centre routine. The Tribunal's comments regarding the weight to be afforded to the records from Corrective Services has been addressed in oral submissions and in addition weight should be given to the records being records from an independent and authoritative source in circumstances where:*

   (a) *the conduct is not a singular event and there are multiple records which evidence a pattern.*

   (b) *there are records from a different institution namely immigration detention which evidence a pattern of repeated verbal abuse towards staff. When these instances were put to him he claimed the records were fabricated and declined to answer. However, he conceded as much when he said he*

was provoked by officers and he raised his voice but never laid a finger on them.

(c) *the conduct is also corroborated by Ms Langton who reported his behaviour in the program was argumentative and intimidating.*

e. the [A]*pplicant has outstanding treatment. Ms Langton made recommendations regarding his release into the community and recommended a referral to forensic psychology services to assess his need for further services also noting that he has outstanding needs in respect of addressing his concrete thinking style and also recommended that he continue to take his prescribed anti-psychotic medication and have regular follow ups with a psychiatrist or general practitioner to monitor his mental health. In 2019 STAARTs recommended engagement with a psychiatrist to review his medication. The records indicate a history of the* [A]*pplicant not adhering to treatment recommendations and the Tribunal should not accept that the applicant will now be complaint if released into the community.*

f. the [A]*pplicant has not been open and honest about his offending to his partner. Ms Nguyen told the Tribunal she was not aware of any orders prohibiting the applicant from having contact with her two minor children. This is contrary to the applicant's evidence where he said he was required to register with the NSW Child Protection register.*

5. An assessment has been made in respect of the risk of re-offending and his risk has been assessed as "moderate to high" in 2016 and remains relevant in 2022 because the [A]*pplicant has not undertaken further treatment aimed at addressing his sexual offending.*

(References omitted).

58. From the foregoing, it appears that, prior to 2016, the Applicant maintained his innocence and sought to place the blame for his personal circumstances (including the cancellation of his visa) on the victim of his sexual assault conviction and sentence. While this may no longer be the case, the Applicant continues to lack insight into the troubling picture that emerges from his escalating pattern of anti-social behaviour and offending conduct as far back as 2005. This was evident at the hearing on 12 December 2022.

59. By way of example, even allowing for the Applicant's emotional lability during questioning, the level of insight and recall associated with the Applicant's reference to his own abusive

experiences in prison and administrative detention can be compared with the Applicant's understanding of his own history of offending:[35]

DR DONNELLY: *All right.* [ZCGS]*, I'm going to ask you some questions now about your time in immigration detention, you addressed this at paragraph 17 to 20 of your statement but I just want you to think about this question before I ask it. And of course, answer truthfully. What has been the impact on you during your time in immigration detention?*

APPLICANT: *The impact - like physically and mentally impact on me and my life in detention. I served - I done my time in prison and it was a really hard journey but detention centre, it's been six and a half years I been detained. You know, prison, it's different. I been in detention for six and a half years and it's been the hardest thing I've ever been through in my life; I don't want anyone - wish upon anyone been through what I been through. I been abused in every way, Member, in every way I've been abused, and I've been - - -*

MEMBER: [ZCGS]*, just take your time. We're not here to retraumatise you. It's important that you give us a sense of what you know, and we're going to be very respectful of your dignity, it's very important that you tell your story as it really is but we don't need to retraumatise you. Just because you've experienced bad things in the past, you're in a safe place.---*

APPLICANT: *Member, do you know what I done because the officers, they tell them, they said I touched little kid, I don't touch little kid - - -*

MEMBER: *Okay, just - there are some tissues?---*

APPLICANT: *These people are sick in the head.*

MEMBER: *Just take it slow, take it slow---*

APPLICANT: *This is not my - you don't do this.*

MEMBER: *Take it slow, take it slow, you're in a safe place here, okay. You don't have to ---*

APPLICANT: *I don't know, like this - put things like that in my head, I don't put through my head, you know.*

MEMBER: *Yes, yes, you don't need to tell us everything all at once, take it one step at a time, okay?*

APPLICANT: *Yes, I understand.*

…

It's been really hard, every day, sometimes I - like even I got a - I been burned with hot water, I been stabbed, I been everything, I been threatened for my life, a lot of things happened but I still try to - sometimes, most time - the officer

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[35] Transcript 1 pp 20 – 23.

caused me this problem, but they cause me because they say it was my charge, only one fight, Member, there's a fight I always walk away from the fight. Most time I get provoked, all the time I get provoked. I get provoked by the officers, I don't - the worse thing I say, I raise my voice, I never have lift my finger to any officer, the worst thing I done because they provoke me so I - -

MEMBER: *Take a moment, take a moment---*

APPLICANT: *I don't know why. They try to even break me and my family, they try to break me and my loved ones, why these people do this, I don't - I have never seen like this - they - I am not saying I am perfect but psychologically picked on by these people, it is draining, you know.*

MEMBER: *Okay, just one moment, I need to talk to Dr Donnelly, okay? Dr Donnelly, I need to speak to you just for a moment. I am going to encourage you to take the evidence you need to take but also, to adopt a trauma informed posture in your questioning, open ended questions are in the nature of examination-in-chief, I do understand, but open-ended questions touching on broad experiences that may be trauma inducing, are not necessarily going to get us through the process.*

DR DONNELLY: *I understand, Member, thank you.* [ZCGS]*, you are okay to continue?*

APPLICANT: *Yes, I am okay, Mr Donnelly, yes.*

DR DONNELLY: ***Okay. You mentioned earlier that one of the impacts of your time in detention has been physical, not just mental but physical?***

APPLICANT: ***Physical, yes.***

DR DONNELLY: ***Could you perhaps give some examples to the* [T]*ribunal of what those physical impacts are for you?***

APPLICANT: *The physical impact is like neck injury, a neck injury and wrist injury, and there's permanent damage on my neck it's - I live with the pain too, and other physical - I don't want to talk as lady is in the room, I don't want to say - it's okay, you know.*

MEMBER: *Dr Donnelly, the* [A]*pplicant has referred to experiencing psychological and physical abuse while in detention, he has done so under oath, if you're asking for him to give a detailed history that would've been appropriate for a written statement. I am happy for you to take him to his written statement. If your client, the* [A] *pplicant, is - it just seems that he is suggesting that there are other things that he hasn't put in his document that may have occurred to him and your question seems to be leading him in that direction, that's problematic, as you know, in a number of respects but it can be dealt with intelligently and I am sure you have a strategy, what is your strategy for eliciting the evidence that you're trying to elicit at the moment?*

DR DONNELLY: *Member, what I was seeking to do, and I appreciate these are always difficult lines of questions, was to just basically put flesh on the bones, so to speak, to borrow the words of Katzmann J in terms of the evidence that he has adduced in writing about the topic of his time in immigration detention. But not really be more forensic than what is set out in the statement but one --*

MEMBER: *All right. No, Dr Donnelly, I am not bound by the same principles that bind you.*

DR DONNELLY: *Of course.*

MEMBER: [ZCGS]*, you have your statement in front of you, can I take you to paragraph 18?---*

APPLICANT: *Yes.*

MEMBER: ***It says there that: You have suffered more trauma and abuse in immigration detention then* [sic] *you were in prison. Are you referring to psychological trauma and abuse?***

APPLICANT: ***Yes, physically to - -*** -

MEMBER: ***Psychological,***

APPLICANT: ***Yes---Psychologically and physically.***

MEMBER: ***Okay. Physically in terms of physical harm to your person, have you been hurt?---***

APPLICANT: ***Yes, I been hurt heaps of time****.*

MEMBER: ***Have you been cut?---***

APPLICANT: ***Yes, I been cut.***

MEMBER: ***Have you been hit with implements?---***

APPLICANT: ***I have been with implement - I been burned with hot water. I do not feel safe****.*

MEMBER: ***Okay, have you experienced sexual abuse?---***

APPLICANT: ***Yes.***

MEMBER: ***Okay, thank you. Dr Donnelly, is there anything else I need to know?***

DR DONNELLY: ***No, Member.***

MEMBER: *Okay, I really do not want to retraumatise this witness.*

DR DONNELLY: *No, I understand, Member. I've almost finished the examination-in-chief, Member, I've just got a couple of other questions that I want to ask him on another topic.*

MEMBER: *Please.*

DR DONNELLY: **[ZCGS]*, reflecting on your criminal history in Australia, do you accept that your offending involves very serious matters?---***

APPLICANT: ***Yes, I do, Mr Jason Donnelly. I know it's horrible, I done very such a bad thing I have done on my past. I am not proud of it and I am really, truly sorry for the victim. I hurt her and I am sorry for her family and I am sorry for the community.*** *I was trying to change my life after - - -*

DR DONNELLY: *One of the important questions that this learned* [T]*ribunal needs to look at is the prospects of you reoffending in the Australian community, do you understand that?---*

APPLICANT: *I understand that's never going to happen, there's no way, there's just no way because I will never put myself through this, and my family, and myself through this - what happened to me, I just want to be safe, in a safe place, I want a normal life. I just want to be close to my family and just start working and start my own family. I am never going to reoffend.*

DR DONNELLY: *Okay, so you make that statement that you're not going to reoffend, can you give any examples to the tribunal of why you say that?---*

APPLICANT: *Because why I - I have goals, I have future, why I need to reoffend? I have made a mistake, I learn from my mistake, I learn from my past. And I think different now from when I was younger, I am - like I'm more mature now. Before I don't think - I trust people too easily, you know, I love people too easily and I trust people too easily but now I understand life differently because I grew up, I know what's consequences of - for what I do, before I don't know what's the consequences. I don't understand. But now I do because I am never going to reoffend, I am never going to do that because it's not - I can't think about it because it's not going to happen, it's impossible.*

DR DONNELLY: *And you say that - well before you didn't know the consequences and now you effectively say you do know the consequences, when did you appreciate the consequences of your actions?---*

APPLICANT: *I had time to think, I had a lot of time to think and I don't know, it just come to me naturally, I don't have time but I think like that after I finish prison, after I done my - served my time in prison.*

(Emphasis added)

60. The Applicant's evidence, taken in its entirety, satisfies me that, at some point between late 2016 and the hearing of this matter, the Applicant has accepted that his dire circumstances (together with the deeply traumatising consequences for both the victims of his offending and those he holds dear) are the result of his own conduct.[36] He also demonstrated some

[36] Transcript 1 pp 23, 68.

insight into the ways in which his history of criminal offending will continue to affect himself and those around him.[37]

61. I acknowledge that the Respondent has submitted that the same evidence referred to above is capable of differing interpretations to reasonable minds. I am satisfied that the passing of time while in administrative detention has, at least, given rise to genuine remorse and regret on the part of the Applicant. As to insight, this may be somewhat impaired in the Applicant's case, given his as-yet undiagnosed constellation of mental health challenges.[38]

62. At the very least, the material before the Tribunal satisfies me that the Applicant is significantly trauma-affected. Given that his family was relocated to Australia from Iraq in 2003 on a humanitarian visa when the Applicant was 17 years of age, such a presentation is, to some extent at least, unremarkable.

63. When weighing the evidence canvassed above as to the Applicant's risk of reoffending, I am mindful of the principles at sub-paras 5.2(4) and (5) of Direction 90 which, among other things, when read together call for the consideration of the length of time an applicant has lived in Australia and the need to take account of the particular conduct of the Applicant in question. For over 19 of his 38 years, the Applicant has lived in Australia. For 16 of his 19 years in this country, the Applicant has been in some combination of prison (having served his full term of imprisonment) and administrative detention.

64. As will be canvassed below, the alternative to revocation of the cancellation of this applicant's visa is not the certain removal of the Applicant to his country of origin. The alternative in this instance is continued indefinite detention until some alternative, and entirely uncertain course of action. It is worth bearing in mind then, that one detention alternative which hypothetically might be considered in the future with respect to the Applicant is detention in the community. Given that such an outcome is among the hypothetical future possible alternative courses of action with respect to this Applicant, it will be seen that the ultimate weighing exercise required under Direction 90 is necessarily complex and dependent on the fact findings of the individual decision maker in question.

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37 Transcript 1 p 58.

38 This was alluded to by the Department in the second reviewable decision, see e.g., G3 p 18.

65. Given my findings above that the Applicant has begun to express remorse and regret for his past criminal conduct, and sorrow for the damage caused to his victims and the people in his life whom he holds dear to him, a reasonable assessment of the available evidence would be that the Applicant poses a low risk of reoffending on release from detention. However, when one factors in the evidence that:

(a) the Applicant remains pre-contemplative of recommended psychological, psychiatric and/or pharmacological treatment for his panoply of mental health challenges;

(b) his lack of offender rehabilitation program completion (beyond the one that was undertaken purely for the purposes of securing release from prison); and

(c) the extent to which he is prepared withhold the full extent of his past criminal history from those closest to him,

I must find that the Applicant poses a real risk to the Australian community by engaging in further criminal or other serious conduct.

66. The Tribunal therefore finds that, on balance, para 8.1.2 of Direction 90, being the risk to the Australian community should the Applicant commit further offences, weighs moderately against revocation of the Cancellation Decision.

67. I further find, in summary, that the first primary consideration should be given moderate weight against revoking the Cancellation Decision.

Second primary consideration: Family violence committed by the non-citizen (para 8.2)

68. Paragraph 8.2 of Direction 90 relevantly 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

…

69. Paragraph 4(1) of Direction 90 relevantly defines family violence as follows:

> ***family violence*** *means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the* ***family member****), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:*
>
> *a) an assault; or*
>
> *b) a sexual assault or other sexually abusive behaviour; or*
>
> *c) stalking; or*
>
> *d) repeated derogatory taunts; or*
>
> *e) intentionally damaging or destroying property; or*
>
> *…*
>
> *j) unlawfully depriving the family member … his or her liberty.*
>
> (Original emphasis and emphasis added.)

70. Neither party made written submissions to the Tribunal on this consideration.

71. Having considered the evidence before it and the parties' submissions, the Tribunal finds that this consideration does not arise and is therefore neutral with respect to the requirements of Direction 90.

Third primary consideration: The best interests of minor children in Australia (para 8.3)

72. Paragraph 8.3 of Direction 90 provides:

> *(1) Decision-makers must make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is, or is not, in the best interests of a child affected by the decision.*
>
> *(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to ... not revoke the mandatory cancellation of the visa, is expected to be made.*
>
> *(3) 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.*
>
> *(4) In considering the best interests of the child, the following factors must be considered where relevant:*
>
> *a) 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);*
>
> *b) 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;*
>
> *c) 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;*
>
> *d) 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;*
>
> *e) whether there are other persons who already fulfil a parental role in relation to the child;*
>
> *f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);*
>
> *g) 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;*
>
> *h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.*

73. The Applicant identifies his partner TN's two minor children as being relevant to this mandatory consideration under Direction 90 as follows:[39]

> *53. The* [A]*pplicant contends that there are two minor children in Australia:*
>
> - [EL] – *aged 15.*
> - [RN] – *aged nine.*
>
> *54. The nature of the relationship between the* [A]*pplicant and the two children is non-parental. However, since about March 2022, the* [A]*pplicant has developed a considerable personal relationship with the two children. The evidence shows that the* [A]*pplicant has developed a meaningful relationship with the children, talking to them regularly on both the telephone and through video calls.*
>
> *55. The* [A]*pplicant has provided the children with emotional support. He has also, on occasion, provided the children with gifts. It can be accepted that there has been limited meaningful contact, given that the* [A]*pplicant is residing in Western Australia (i.e. Yongah Hill Immigration Detention Centre) and the children reside in New South Wales.*
>
> *56. On the current evidence, there is no reason to doubt that the* [A]*pplicant would play a positive role in the lives of the children. The* [A]*pplicant is in a serious relationship with the mother of the children. The* [A]*pplicant is likely to provide emotional, financial, and practical assistance to the children in the future.*
>
> *57. There is no evidence that the* [A]*pplicant has had a negative impact on the children. Conversely, all the evidence points in the opposite direction.*
>
> *58. In circumstances where the decision under review is affirmed, this is likely to result in the children losing out on the considerable emotional and practical assistance that the* [A]*pplicant can provide the children. Naturally, if the* [A]*pplicant remains in immigration detention, the* [A]*pplicant would be able to keep in contact with the children by electronic means.*
>
> *59. The two boys under the sole parental care of their biological mother.*
>
> *60. There is evidence before the Tribunal from the eldest child,* [EL]*. This child said, inter alia, as follows:*
>
> - *I consider* [ZCGS] *to be my stepfather.*
> - *When I speak to* [ZCGS]*, he shows genuine concern in how my day went.*
> - [ZCGS] *has provided my brother and me with considerable emotional assistance since he has come into our lives.*
> - [ZCGS] *is also very supportive of my younger brother, Richard. They talk a lot.*
>
> *61. There is no evidence that the children are at any risk of harm from the* [A]*pplicant.*

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[39] Applicant SFIC paras [55] – [62].

62. *Overall, this primary consideration weighs in favour of revoking the mandatory cancellation decision. This primary consideration weighs moderately in favour of revocation.*

(References omitted).

74. The Minister made the following submissions regarding the best interests of minor children in Australia:[40]

39. *The* [A]*pplicant does not have any biological children. However, he claims that this consideration is engaged in respect of his partner's children:* [EL] *(born 2007) and* [RN] *(born 2013).*

40. *The Tribunal "must" make a determination "about whether" non-revocation is, or is not, in the best interests of a child affected by the decision (paragraph 8.3(1) of Direction 90). The High Court has acknowledged that there may be cases where the evidence is such that the only determination which can be made in obedience of the Direction is that it is neutral so far as the best interests of any minor child are concerned:* Uelese v Minister for Immigration and Border Protection [2015] HCA 15 *at [67]. That is, sometimes the best decision "about" whether non-revocation is, or is not, in the best interests of the child may be that it is neither.*

41. *For the reasons that follow, the Minister contends that non-revocation is neither in, nor contrary to, the best interests of* [EL] *and* [RN]*, and that this consideration weighs neutrally:*

    (a) *It is accepted by the* [A]*pplicant that the nature of his relationship with these children is not parental and it appears that the* [A]*pplicant has only enjoyed a relationship with these children since July or August this year (some 4 or 5 months). The* [A]*pplicant concedes that there has been limited meaningful contact with these children (paragraph 8.3(4)(a) of Direction 90);*

    (b) *Any exposure to violence would no doubt have a negative impact on* [EL] *and* [RN] *(paragraph 8.3(4)(c) of Direction 90);*

    (c) *There is no obvious impediment to the* [A]*pplicant having contact with* [EL] *and* [RN] *via electronic means if he were to return to Iraq (paragraph 8.3(4)(d) of Direction 90); and (*

    d) [EL] *and* [RN] *live with their mother (the* [A]*pplicant's partner), who fulfils the parental role (paragraph 8.3(4)(d) of Direction 90). The* [A]*pplicant does not claim, and there is no evidence to suggest, that* [EL] *and* [RN]'s *mother is fulfilling the parental role ineffectively.*

42. *In the event the Tribunal considers that the best interests of* [EL] *and* [RN] *weigh against non-revocation, the Minister contends that only minimal weight should be placed on this consideration for the reasons set out above.*

(References omitted).

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[40] Respondent SFIC paras [39] – [42].

75. In final written submissions following the hearing, counsel for the Applicant stated as follows:[41]

> *13. On this topic, the* [A]*pplicant's oral evidence was consistent with the written material before the Tribunal. In relation to* [EL] *and* [RN]*, the* [A]pplicant *said he 'love[d] them like my own kids'. He said he has provided 'emotional support' to the children. The* [A]*pplicant said that the children 'call me dad'. The* [A]*pplicant confirmed he spoke to the children on 'phone and videocalls'.*
>
> *14. The* [A]*pplicant conceded that his partner was an 'amazing mother'.*
>
> *15. The* [A]*pplicant's partner confirmed the* [A]*pplicant called her children 'every day'. The* [A]pplicant's *partner said that the biological fathers of* [EL] *and* [RN] *were no longer in the lives of her children.*

76. The mother of the two children, TN, gave evidence at the hearing via teleconferencing with the assistance of an interpreter fluent and accredited in the Vietnamese language. This evidence confirmed that the fathers of her two sons are no longer part of either child's life. She confirmed that she has known the Applicant since approximately 2007 and that their relationship commenced because of telephone contact around March 2022. She has visited the Applicant in administrative detention in regional Western Australia on a number of occasions, travelling from NSW for this purpose.[42]

77. TN and her children have also been regular guests in the family home of the Applicant. While their relationship is clearly genuine and affectionate, TN has no knowledge of the Applicant's offending past or his entry on the NSW Child Protection Register and the resulting restrictions including those limiting and defining the Applicant's access to children. This information has not been disclosed to TN by either the Applicant or his brother, who also gave evidence at the hearing by teleconferencing.

78. Final oral submissions by the parties touched on the Applicant having been placed on the NSW Child Protection Register as follows:[43]

> *MEMBER:* *Yes, let's take that question now. So the suggestion yesterday, it wasn't actually articulated extremely clearly but I want to hear from both of you on this suggestion, what do I make of the suggestion that the* [A]*pplicant may, as a result of being on – if he is on a sex offender's register, and again,*

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41 Applicant's Closing Submissions paras [13] – [15].

42 Transcript 1 and 2 pp 100-102; 107-12; Transcript 2 pp 122-130.

43 Transcript 2 pp 140-142.

I'm happy to be taken to a document, what effect, if any, does that have on my consideration of Direction 90, whether it's the interests of the Australian community in general, or the best interests of these children. Dr Donnelly, you first.

DR DONNELLY: *Member, two points. The first is the* [A]*pplicant remains on the sex offender registry New South Wales, my respectful submission is that that is an important consideration that would moderate, or offset, the* [A]*pplicant's prospects of reoffending because although it's not parole supervision, it would be a deterrent.*

MEMBER: *To a particular kind of offending.*

DR DONNELLY: *To a particular kind of offending and that, of course, is the very serious sex offence that the* [A]*pplicant committed. And that is an important consideration - - -*

MEMBER: *I see the logic of that submission.*

DR DONNELLY: *That the Tribunal should take into account. Certainly, as I understand the legislation in this area - - -*

MEMBER: *That's the purpose of the legislation after all.*

DR DONNELLY: *Yes, yes, indeed.*

MEMBER: *If it is actually serving its purpose then sure, that has a certain logic. Noted.*

DR DONNELLY: *Yes. The second point is that it could potentially be relevant to the primary consideration of best interests of minor children in Australia in that, as I understand it, the* [A]*pplicant would need to disclose the minor children to which he has contact with.*

MEMBER: *He hasn't made a disclosure to his current partner, the mother of the children.*

DR DONNELLY: *No – yes, that is accepted, that must be accepted. And as I understand the statutory regime, it would not prohibit the applicant having contact with those two minor children,* [RN] *and* [EL]*, but it's a matter that the* [T]ribunal *needs to be mindful of in considering the best interests of minor children in Australia. The submission that I would make is that as horrendous, with respect, as the* [A]*pplicant's offending was, it was in a very specific context involving a certain victim of a certain sex and it does not seem to suggest that the* [A]*pplicant has a propensity to engage in sexual offending against young males - - -*

MEMBER: *I've had these conversations with counsel in the past, Dr Donnelly, I personally find it difficult to interpret, and in fact I've actually made a recent decision along these lines; sexualised violence is not necessarily about gender expression. It's easy to make that – to draw that inference – but it's not necessarily the case. Just as sexualised violence against children of a particular gender is not necessarily an*

expression of gender preference. These things are often more clinically associated with personality disorders and expressions of power projection. The objectification of the victim is what sets these offences aside – apart. Certainly, there is gendered violence, I do not discount that. But I think it's – one has to be very careful, does one not, when drawing gender conclusions and inferences from acts of sexual violence?

DR DONNELLY: *Member, I would accept that principle at a broad level of abstraction or generality. What I would say though is looking at all of the historical facts in this case, the victim was a female*

MEMBER: *A minor female.*

DR DONNELLY: *Sorry, a minor female. The* [A]*pplicant's current and previous relationship are females.*

MEMBER: *Which suggests there may be a greater risk with females, yes.*

DR DONNELLY: *The* [A]*pplicant's criminal offending otherwise does not involve indicate offending of sex – sexual offending. And so -*

MEMBER: *I realise that you're choosing your words carefully, Dr Donnelly.*

DR DONNELLY: *Yes, yes, Member, yes. It is unlikely that - - -*

MEMBER: *It's your submission that?*

DR DONNELLY: *It's unlikely, Member, that it could rationally be said that – or reasonably be said that looking at all of the historical facts that the* [A]*pplicant poses a risk of harm to* EL *and/or* RN *by reference to the fact that they are minors.*

MEMBER: *That's your submission, I take it as your submission.*

DR DONNELLY: *Yes, yes, Member. And so, those are the two propositions I would make.*

MEMBER: *Thank you. I think that's giving me some things to think about, thank you. As both counsel are aware, Direction 90 is a many headed hydra and it's not capable of easy analysis, so any assistance I can have from either of you is appreciated. Ms Jones-Bolla, my question about the implications of the* [A]*pplicant's entry on a sex offender's register in New South Wales with respect to the community generally and the children in particular.*

MS JONES-BOLLA: *Yes, so in respect of the children, what we say is that if the Tribunal is minded to give that third primary consideration any weight in favour of revoking or in favour of revocation, then we say very minimal weight should be accorded to it and it should be reduced for the reasons we've already set out in our written submissions and, in addition because the evidence is that the* [A]*pplicant, in compliance with state legislation, is required to register with the child protection register – on the child protection register when he is released*

into the community. There is a further recommendation in the pre-released report, this is the tender bundle page 564 that the [A]*pplicant must not be in the company of a person under the age of 16 unless accompanied by a responsible adult. It should be of concern to the Tribunal that the* [A]*pplicant has not disclosed this to the children's parent, or the children's mother. It should also be of concern that – sorry, it should be of concern – that should be of concern, especially in circumstances where the* [A]*pplicant was clearly aware of the requirement and has, essentially, chosen not to disclose it to the parent. Ultimately, it is a question of weight, Member, and what we say is for the reasons we've set out in our submissions for this additional reason that I've raised in oral opening submissions yesterday and canvased with the applicant. If the Tribunal was minded to give this factor any weight in favour of the* [A]*pplicant then it should be of very limited and very minimal weight.*

MEMBER: By the consideration, you mean the best interests of minor children in Australia, is that correct?

MS JONES-BOLLA: That's correct.

MEMBER: Okay, thank you. "Protection of the Australian community", essentially, you agree with Dr Donnelly's previous oral submissions.

MS JONES-BOLLA: In respect to the likelihood, yes, we say that that factor also goes to an ongoing and unacceptable risk of the applicant reoffending.

MEMBER: And otherwise these registers, presumably, serve little purpose if they don't serve the expressed purpose of the legislature. Good, thank you.

79. In final written submissions following the hearing, counsel for the Respondent relevantly stated as follows:[44]

> *8. If the Tribunal is minded to give this consideration any weight in favour of revocation then the Minister submits that any weight should be reduced for the reasons already outlined and in addition because the evidence is that the applicant in compliance with NSW state legislation is required to register with the NSW Child Protection Register when released into the community. Further the recommendation in the pre-release report is that he must not be in the company of a person under the age of 16 unless accompanied by a responsible adult. It is also relevant that the children's mother is unaware of this requirement.*
>
> (References omitted).

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[44] Respondent closing submissions p 5.

80. The Applicant has clearly formed a genuine, if relatively recent, emotional bond with TN and, through her, with her children EL and RN. This is despite the difficulties of communication presented by his detention on the other side of the continent. There is no reason to question the genuineness of these bonds. There is little to suggest that, in substantial terms, the Applicant currently has anything in the nature of a parental role with respect to TN's children as this term is generally understood. The children have a mother, supported by their maternal grandmother, who performs this function. Cancellation of the Applicant's visa is unlikely to change this situation, at least in the short to medium term.

81. However, there is a possibility that, if the cancellation decision is revoked, the Applicant could take on something of a parental role with respect to the children, who currently have no significant male role model in their lives.[45] Also of relevance to these deliberations is the fact that the Applicant is entered on the NSW Child Protection Register, which, it is accepted, offers some protective supervisory structure in the best interests of the children of TN.

82. This is militated significantly by the fact that the Applicant has not disclosed these legislative restrictions (to which he would become subject on return to his family and community in NSW) to TN. Indeed, the Applicant has not discussed this aspect of his past criminal offending with his own family. This does not bode well for the foundation and durability of his present relationship with TN, and through her, the children in consideration.

83. All of these factors weight differently, and, while there is no clear way of reconciling them in the form of a simple, singular finding, I am satisfied that the factors in favour of revoking the cancellation of the visa are outweighed by the factors against revoking the cancellation of the visa

84. On the basis of these considerations, I find that the third primary consideration, the best interests of minor children in Australia weighs against revoking the decision to cancel the Applicant's visa.

85. I further find that this consideration should be given slight weight.

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[45] This was confirmed during the hearing, see e.g. Transcript 2 p 123.

Fourth primary consideration: Expectations of the Australian community (par 8.4)

86. Paragraph 8.4 of Direction 90 relevantly provides:

> *(1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.*
>
> *(2) In addition ... non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is 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.*
>
> *(3) 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.*
>
> *(4) 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.*

87. I also refer to the principles set out in para 5.2 of Direction 90 as set out in para [34] above.

88. As noted at para [32] above, Direction 90 superseded Direction 79 on 15 April 2021. Senior Member Morris in *NTTH and Minister for Immigration, Citizenship, Migrant Services*

and Multicultural Affairs (**NTTH**)[46] at [194] noted that the provisions of Direction 90 contain generally similar wording to the corresponding provisions in Ministerial Direction No 65 (**Direction 65**),[47] the predecessor to Direction 79. Those corresponding provisions in Direction 65 were considered by the Full Court of the Federal Court of Australia in *FYBR v Minister for Home Affairs* (**FYBR**).[48]

89. Senior Member Morris in *NTTH* summarised the view expressed by the Full Court in *FYBR* and the adoption of some of the language of the judgment in *FYBR* into Direction 90 as follows:

> *195. It was the Court's view that it is not for a decision-maker to make his or her own personal assessment of what the 'expectations' of the Australian community may be. In this respect, the expectations articulated in the Direction are deemed — they are what the executive government has declared are its views, not what a decision-maker may derive by some other assessment or process of evaluation.*
>
> *196. It is significant that the new Direction imports the statement that the expectations of the Australian community are to be considered as a 'norm', which I take to be an acknowledgement of the approach taken by the plurality of the Court in FYBR. ...*

90. I accept the reasoning of Senior Member Morris. In *Pattison and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[49] the effect of the Full Court's judgment in *FYBR* and the current state of the law was summarised as follows:

> *156. ... The Full Court, in effect, found that the narrow approach taken by Mortimer J in YNQY and by Perry J in FYBR is the correct approach. That is the approach that the proper characterisation of this consideration is a 'kind of deeming provision' – expressing "an expectation deemed by the government to be held by the Australian community" (FYBR (FC) at [61] and [80] per Charlesworth J; see also Stewart J at [89]). A thorough analysis of the Full Court decision in FYBR (FC) is set out by Member Burford at [162]-[170] in her decision in* Rehman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs *(Rehman). See also decisions of the Hon. John Pascoe AC CVO, Deputy President in* Hovhannisyan and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs *at [77]-[78].*

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46 [2021] AATA 1143.

47 Minister for Immigration and Border Protection (Cth), *Direction No 65: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* (22 December 2014).

48 (2019) 272 FCR 454.

49 [2020] AATA 3953.

157. *Special leave was sought to appeal the decision in FYBR (FC). On 24 April 2020 the High Court (Kiefel CJ and Keane J) refused special leave.*

91. Justice Stewart in *FYBR* found:

> 89. *It is therefore to be expected that the Government of the day may wish to set the norms by which decisions to refuse or cancel visas are made. Where those norms are expressed, at least in part, as reflecting "community expectations" then, in that sense, they might accurately be understood as "deeming" what the community expectations are. That is because, as indicated, as a matter of practical reality there is no one or even necessarily dominant set of community expectations in this field.*
>
> 90. *However, it is not to be expected that the Government of the day would seek, via the device of "community expectations" or otherwise, to dictate to the statutory decision-maker the outcome of a visa refusal or cancellation in any particular case. That would be inimical to the process of decision-making that has been set up under the Migration Act and it would constitute unlawful dictation to the decision-maker:* Drake v Minister for Immigration and Ethnic Affairs *(1979) 46 FLR 409 at 420-422; 24 ALR 577 at 590-591 per Bowen CJ and Deane J;* Bread Manufacturers of NSW v Evans *(1981) 180 CLR 404 at 429-430 per Mason and Wilson JJ;* CPCF v Minister for Immigration and Border Protection *(2015) 255 CLR 514 at [37] per French CJ and [292] per Kiefel J.*
>
> 91. *The above contextual factors lead to two guiding considerations to the proper construction of Direction 65. First, "community expectations" as expressed normatively are what the Government says that they are, even though in actual fact if they were ascertainable community expectations might be quite different. Second, "community expectations" as expressed by the Government do not speak to the outcome in any particular case — they are to be understood and applied normatively.*
>
> (Emphasis omitted.)

92. Justice Charlesworth also observed:

> 75. *Having regard to all that is said above, cl 11.3 should be understood as expressing a deemed community expectation that all persons who have committed serious criminal offences giving rise to character concerns should have their visa applications refused. The nature of the character test is such that the deemed expectation will arise in most if not all cases falling for consideration under s 501(1) of the Act, having regard to the nature and seriousness of the non-citizen's conduct, assessed in accordance with cl 11.1. The text of the clause emphasises that it may be appropriate to act in accordance with that expectation, so anticipating a class of cases in which it may not be appropriate to do so.*
>
> ...
>
> 79. *... The Tribunal must in all cases determine whether it is appropriate to refuse to grant the visa. In an appropriate case, the Tribunal may make a decision that does not give effect to community expectations as the government has assessed them to be. In such a case, the decision-maker*

would depart from the relative ascription of weight for which cl 8(4) "generally" provides, as he or she is permitted to do. Read as a whole, the reasons of the primary judge should not be understood as suggesting otherwise.

(Emphasis omitted.)

93. Due to the application of the "*norm*", as it is now referred to in sub para 8.4(1) of Direction 90, and the deeming operation of the corresponding Direction as found by the Full Court in *FYBR*, given the nature of the Applicant's criminal offending discussed above this primary consideration weighs against the revocation of the cancellation of the Applicant's visa.

94. The Applicant's submissions on this point were as follows:

> *65. Having regard to the expectations of the Australian community as stated in paragraph 8.4 of the Direction, the* [A]*pplicant has breached Australian law and committed serious offences, which the community would generally expect to result in non-revocation of the mandatory cancellation decision.*
>
> *66. The* [A]*pplicant arrived in Australia on* [date] *and has resided here ever since. Having regard to the factors in principle 5.2(4) of the Direction, particularly the length of time the* [A]*pplicant has been in Australia, this supports a finding that there is a higher level of tolerance by the Australian community for the applicant's criminal conduct than there would be for a non-citizen who has not lived in the community for an extended period of time: see* MWNX and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2022] AATA 1450 *[109].*
>
> *67. Having had regard to the Government's views in relation to the expectations of the Australian community and giving them appropriate weight, and considering the nature, seriousness and impact of the* [A]*pplicant's criminal offending, and the duration of his residency in Australia, the Tribunal would find that this primary consideration weighs moderately in favour of affirming the decision under review.*
>
> (References omitted).

95. Counsel for the Respondent submitted that the expectations of the Australian community should weigh heavily against revocation in the present circumstances as follows:[50]

> *46. Observing the norm stipulated in paragraph 8.4(1), and in accordance with the guidance provided by Principles 5.2(2), (3), (4) and (5) of Direction 90, the Australian community would expect that the* [A]*pplicant should not continue to hold a visa on account of the serious nature of his offending.*
>
> *47. Overall, the Minister contends that this primary consideration weighs heavily against revocation*

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[50] Respondent SFIC.

96. The Tribunal considers that the expectation of the Australian community would be that the Applicant would obey Australian laws whilst he is in Australia. As outlined above when detailing the Applicant's history of criminal offending, the Applicant committed offences that required the mandatory cancellation of his visa because, by operation of law (s 501(3A)) the Applicant does not pass the character test due to his "*substantial criminal record*" as this is defined at ss 501((6)(a) and (7)(c) and (d) of the Act.

97. It is apparent, therefore, that as a "*norm*", the Australian community expects the Government to not allow such a non-citizen to enter or remain in Australia.[51]

98. Applying Direction 90, the Australian community expects that the Applicant would not continue to hold a visa having committed what is properly construed as serious offending. In addition, there is an expectation that non-citizens obey Australian laws and that evidence to the contrary must weigh against the revocation of the Cancellation Decision. However, it remains for the Tribunal to determine the appropriate weight to be given to this consideration. This depends in each case on the Tribunal's assessment of the totality of the relevant considerations including the primary and other considerations.

99. In weighing this consideration, I am guided by the principles in para 5.2 of Direction 90. Sub-paragraph 5.2(2) directs that the Applicant, having engaged in criminal conduct, should expect to forfeit the privilege of staying in Australia. Sub-paragraph 5.2(3) expresses a principle similar to sub-para 8.4(2) with respect to serious character concerns and makes it clear that those concerns are <u>not</u> restricted to circumstances where there is a measurable risk of physical harm to the Australian community.

100. Having regard to the expectations of the Australian community as per para 5.2 and in particular sub para 5.2(4) of Direction 90, the Tribunal accepts that the community may afford a higher level of tolerance for the criminal conduct or other serious conduct by non-citizens who, like the Applicant, have lived in the Australian community for most of their life or from a very young age. As discussed above in the context of the Applicant's risk of reoffending, I am also mindful of the requirement at para 5.2(5) that decision makers are required to "take into account the primary and other considerations relevant to the individual

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[51] Direction 90, para 8.4(1).

case". I take this to mean that the individual case is a key reference point in the weighing exercise required by Direction 90.

101. As previously noted, for over 19 of his 37 years, the Applicant has lived in Australia. For 16 of his 19 years in this country, the Applicant has been in some combination of prison (having served his full term of imprisonment) and administrative detention.

102. As will be canvassed below, the alternative to revocation of the cancellation of the Applicant's visa is not the certain removal of the Applicant to his country of origin. The alternative in this instance is continued indefinite detention until some alternative, and entirely uncertain course of action. These facts are agreed between the parties and, although not relevant to the fourth primary consideration, are elements of the Applicant's individual case.

103. Due to the application of the "*norm*", as it is now referred to in sub para 8.4(1) of Direction 90, and the deeming operation of Direction 90 as found by the Full Court in *FYBR*, this primary consideration weighs against the revocation of the cancellation of the Applicant's visa. In this case, I find that moderate weight should be given to this consideration.

OTHER CONSIDERATIONS

104. Paragraph 9 of Direction 90 sets out the "*Other considerations*" to be taken into account as follows:

> *(1) In making a decision under section ... 501CA(4), other considerations must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):*
>
> *a) international non-refoulement obligations;*
>
> *b) extent of impediments if removed;*
>
> *c) impact on victims;*
>
> *d) links to the Australian community, including:*
>
> *i) strength, nature and duration of ties to Australia;*
>
> *ii) impact on Australian business interests*

International non-refoulement obligations (para 9.1)

105. Paragraph 9.1 of Direction 90 relevantly provides:

1 *A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing. Accordingly, in considering non-refoulement obligations where relevant, decision-makers should follow the tests enunciated in the Act.*

2 *In making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. In doing so, decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable, and in the meantime, detention under section 189, noting also that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.*

3 *However, that does not mean the existence of a non-refoulement obligation precludes refusal or cancellation of a non-citizen's visa or non-revocation of the mandatory cancellation of their visa. This is because such a decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the non-citizen applies for a protection visa, the non-citizen would not be liable to be removed while their valid visa application is being determined.*

…

106. As recently discussed by the Tribunal differently constituted in *NZPC v Minister*[52] (Senior Member Burford), where relevant, the Tribunal is required to take account of Australia's international non-refoulement obligations:

> *196. A non-refoulement obligation is an obligation 'not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm'.*[53] *Australia has obligations under the 1951 Convention relating to the*

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52 19 December 2022 per SM Burford.

53 Direction No 90 para 9.1(1).

Status of Refugees[54] *as amended by the 1967 Protocol Relating to the Status of Refugees*[55] *(together called the* ***Refugees Convention****), under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[56] *(****CAT****) and under the International Covenant on Civil and Political Rights*[57] *and its Second Option Protocol*[58] *(****ICCPR****).*[59]

197. *The Direction states that the Migration Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing and that in considering non-refoulement obligations, where relevant, the Tribunal should follow the tests enunciated in the Migration Act. Subsections 36(2)(a) and 36(2)(aa) of the Migration Act provide the tests for protection on the basis of refugee status and for complementary protection. Particular considerations apply to such applications.*

198. *The Direction requires that the Tribunal carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct.*[60] *Direction No 90 notes that in conducting that weighing exercise:*[61]

    … decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable, and in the meantime, detention under section 189, noting also that section 197C of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

199. *However, the Tribunal notes that the Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth) commenced on 25 May 2021. That Act made amendments to the Migration Act including the introduction of s 197C(3) and a new s 36A relating to 'protection findings' in the context of removal. Under the newly enacted s 197C(3) of the Migration Act, an unlawful non-citizen will not be removed to a country if they have made a valid application for a protection visa that has been finally determined, and in the course of considering that application a 'protection finding' was made. A 'protection finding' includes, but is not limited to, a finding that a person is a refugee (s 36(2)(a) or is owed complementary protection (s 36(2)(aa)).*

200. *Paragraph 9.1(7) of the Direction states that where a person makes a claim which may give rise to international non-refoulement obligations and the*

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54 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

55 Opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

56 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

57 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

58 *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, GA Res 44/128 (15 December 1989, entered into force 11 July 1991).

59 Direction No 90 para 9.1(1).

60 Direction No 90 para 9.1(2).

61 Direction No 90 para 9.1(2).

person is able to make an application for a protection visa, those claims will be 'conclusively assessed' before consideration is given to any character or security concerns associated with the non-citizen. That obligation applying to delegates of the Respondent is also stipulated in Direction No 75: Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), made under section 499 of the Migration Act.

201. Direction No 90 goes on to state that:[62]

(5) International non-refoulement obligations will generally not be relevant to a consideration of the refusal, cancellation, or revocation of a cancellation, of a visa that is not a protection visa, where the person concerned does not raise such obligations for consideration and the person is able to apply for a protection visa in the event of an adverse decision.

(6) It may not be possible at the section 501/section 501CA stage to consider non-refoulement issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of non-refoulement obligations as given effect by the Act. A decision-maker, in making a decision under section 501/section 501CA, is not required in every case to make a positive finding whether claimed harm will occur, but in an appropriate case may assume in the non-citizen's favour that claimed harm will occur and make a decision on that basis.

202. Paragraph 9.1(2) refers to ss 197C and 198 of the Migration Act. These provisions concern the removal of unlawful non-citizens from Australia. The effect of these provisions was recently clarified by the Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (Cth). The effect of the amendments to s 197C of the Migration Act is that a non-citizen cannot be removed to a country under s 198 of the Migration Act if a protection finding has been made in relation to that person and country unless the protection finding decision has been quashed or set aside; the Minister is satisfied that the person is no longer owed protection obligations; or the non-citizen requests voluntary removal.

107. As noted above in the "Background" to this application,[63] on 18 January 2019, a Member in the Migration and Refugee Division of this Tribunal remitted the Applicant's application for a protection visa to the Minister for reconsideration, with the direction that the Applicant satisfies s 36(2)(a) of the Act.[64] The Tribunal found that the Applicant was a member of a number of particular social groups and that the he faces a real chance of serious harm amounting to persecution on return to Iraq for that essential and significant reason.

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62 Direction No 90 paras 9.1(5) and 9.1(6).

63 See above paras [5]–[15].

64 Tribunal Ref: 1807127 (Refugee).

108. Again, as stated above and following remittal to the Department, in a decision dated 8 October 2019 a delegate of the Minister found that, by operation of s 36(1C)(b) of the Act the Applicant should not be granted a protection visa. The Applicant has applied for a review of the refusal decision in the Tribunal, differently constituted. That reviewable s 36(1C)(b) decision application has not been determined as at the date of this decision.

109. Counsel for the Applicant submits that this other consideration (non-refoulment) should be given neutral weight:[65]

> *73. The* [A]*pplicant is a national of Iraq. In his submissions as to why the cancellation decision should be revoked, the* [A]pplicant *made claims about the risk of harm he would face if he is removed to Iraq. In particular, the applicant submits that he would be 'targeted and persecuted' in Iraq because of his Kurdish ethnicity; and Iraq is a war zone. He also submitted a photo of his uncle Salem Kurdiee with former USA president George Bush and claimed this association would have adverse consequences for him if he had to return to Iraq.*
>
> *74. The Tribunal would note that similar and additional claims have previously been assessed comprehensively by the Tribunal in the context of conducting merits review of an earlier decision made by a delegate to refuse to grant the* [A]pplicant *a protection visa. Consistently with the Tribunal's findings, the delegate who subsequently considered the* [A]*pplicant's protection visa application made a protection finding for the* [A]*pplicant with respect to Iraq.*
>
> *75. Having regard to the assessment completed by the Tribunal, the Tribunal would accept that there is a real risk that the* [A]pplicant *will suffer significant harm if returned there. Accordingly, the Tribunal would accept that the* [A]pplicant *is a person in respect of whom Australia has non-refoulement obligations.*
>
> *76. However, according to s197C(3) of the Act, the protection finding made for the applicant means that the removal of the* [A]*pplicant to Iraq is neither required nor authorised by s 198. In this regard, the exceptions under s 197C(3)(c) do not currently apply to the* [A]pplicant*. As such, a decision not to revoke the cancellation of the* [A]*pplicant's visa will not result in his removal in breach of Australia's non-refoulement obligations.*
>
> (References omitted).

110. The Respondent accepts that a protection finding has been made with respect to the Applicant and that he has engaged Australia's non-refoulment obligations. The Respondent further submitted that the Applicant would not be liable for removal due to the protection finding made with respect to him and by virtue of the operation of s 197C(3)(b) of the Act [66]

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65 Applicant's SFIC at [73] – [76].

66 Respondent's SFIC at [52].

111. The Applicant cannot be refouled to Iraq because of the operation of s 197C of the Act. He, therefore, faces the prospect of indefinite detention (or detention with no fixed chronological endpoint). The Tribunal gives further consideration to the legal consequences of a decision to refuse the visa as a separate other consideration below.[67]

112. As the Applicant has no prospect of refoulment to Iraq, given that a final determination has been made in the nature of a protection finding, the non-refoulement consideration does not arise. Accordingly, this consideration has neutral weight in determining the application for revocation of the cancellation of the Applicant's visa.

Legal consequences of the decision and the prospect of indefinite detention

113. As noted in the Respondent's submissions, the Tribunal is required to consider and engage with the immediate legal consequences of its decision.[68] Further, the Respondent also correctly identifies that the Federal Court in has recently stated that the legal consequence of the possibility of indefinite detention should be separately considered to the other consideration of non-refoulement obligations.[69]

114. As noted under the consideration of Australia's non refoulement obligations, if the Tribunal affirms the Respondent's decision, the Applicant cannot be returned to Iraq because of the operation of s 197C of the Act. While he remains in Australia without a visa, the Applicant would continue to be liable to be detained under s 189 of the Act.

115. Accordingly, a consequence of affirming the decision to cancel the Applicant's visa would be that he would be liable to remain in immigration detention until one of the following occurs:

(a) The Minister exercises his non compellable powers under ss 195A or 197AB of the Act (to grant the Applicant a visa, or make a residence determination with respect to the Applicant);

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67 See below paras [113]–[131].

68 *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1*; Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146.

69 *VNPC v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 921.

(b) The Applicant is resettled in a safe third country; or

(c) One of the circumstances referred to in s 197C(3)(c) applies to the Applicant. Those circumstances are:

(i) The decision in which the protection finding was made is quashed;

(ii) The Minister decides that a protection finding would no longer be made with respect to the Applicant; or

(iii) The Applicant requests voluntary removal to Iraq.

116. There is no information before the Tribunal to suggest that any of these options are being considered by the Minister. In any event, the Applicant would remain detained unless and until one of those events occurs.

117. The Respondent accepted that the Applicant's continued detention for an 'unknown period' weighs in favour of revoking the cancellation of the visa. However, the Respondent also contended that this consideration was outweighed by the primary considerations in favour of refusing the visa including the Applicant's offending history.[70]

118. The Applicant submitted that ongoing detention of the Applicant would be seriously detrimental to the applicant (referring to the Applicant's documented mental health challenges discussed above) and submitted that these factors weighed "powerful[ly]" in favour of revocation of the mandatory cancellation decision.[71]

119. The Tribunal considers that it is unlikely the Minister would issue a visa to an applicant in cases such as the present one, having recently cancelled the Applicant's visa on character grounds. Further the Full Federal Court observed in *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[72] that a residence determination seems unlikely when an applicant's visa has been cancelled (or by analogy refused) in circumstances where they have been deemed a risk to the community:

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70 Respondent's SFIC, at [69].

71 Applicant's SFIC at [39] citing *BAL19 v Minister for Home Affairs* [2019] FCA 2189 at [42].

72 [2021] FCAFC 55 at [124].

… it is difficult to see how any delegate acting rationally and reasonably, or the Minister herself or himself acting rationally and reasonably, could decide to grant a visa to a person who a) has had a different visa cancelled and b) has applied for the cancellation to be revoked but has been unsuccessful. To grant or restore a visa in such circumstances would be to return a person to free and lawful residence in the Australian community, an outcome which under a different provision has been determined to pose an "unacceptable" risk to that same community …

120. The Applicant has been in detention for more than six years. Most recently, he has been detained in a state where he is isolated from his family members and receives personal visits very infrequently and at considerable cost and inconvenience to his Australian resident family. As noted earlier in this decision, the Applicant has apparent, and as yet undiagnosed mental health challenges, including baseline trauma-related presentation.[73]

121. He has been professionally recommended for further psychological, psychiatric and pharmacological treatment for which in the context of his present detention he, regrettably, remains pre-contemplative. The causal factors for the Applicant's disinclination in this respect are well-documented in the materials before the Tribunal. There appears to be little reason to expect that the Applicant will accept the recommended therapeutic interventions without the care and support of his family in a subjectively safe environment.

122. Counsel for the Respondent submitted that this disinclination on the part of the Applicant should be viewed as "non-compliant" behaviour. However, as put to counsel for the Respondent at the hearing I do not accept that this characterisation is either warranted, or helpful, based on the available materials before the Tribunal:[74]

MS JONES-BOLLA: Yes, thank you, Member. If I can just firstly address that risk, Member. What you have is Ms Langton's report where she assesses his risk of re-offending as moderate to high. This is after the conclusion of him attending the sexual program and what she says in that report is that she makes recommendations regarding his release into the community and recommends a referral to a forensic psychology service to assess his need for further services, also noting that he has outstanding needs in respect of addressing his concrete thinking style.

MEMBER: And that was what date, 2016, is that correct?

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73 See above para [61].

74 Transcript 2 p 146.

MS JONES-BOLLA: That's correct, yes. So it's after he has undertaken the sexual offending program, that's at tender bundle 2078. She also recommends that he continue to take his prescribed anti-psychotic medication, she also recommends that he have regular follow up with a psychiatrist or general practitioner to monitor his mental health.

MEMBER: Yes, so he's been disinclined to do that, yes.

MS JONES-BOLLA: Yes. He has not been compliant with those treatment recommendations from his treaters, Member, as you have noted. And it should not be - - -

MEMBER: Yes, can I just say, Ms Jones-Bolla, perhaps not being compliant is one way of expressing it. Can I just respectfully suggest that pre-contemplative is probably a more appropriate and less prejudicial use of terminology.

MS JONES-BOLLA: I acknowledge that, Member.

MEMBER: Thank you.

MS JONES-BOLLA: But what we say is that the evidence goes as high as to say that he has not been compliance with his treatment recommendations.

MEMBER: Well, he has chosen not to - - -

MS JONES-BOLLA: I understand - - -

MEMBER: Yes, he's chosen not to – yes, look, I think the point that I tried to make at the outset of this hearing is that one can make one's point in a manner that is – in a way that is trauma informed. And still make one's point. And when we have a trauma-affected applicant, there is nothing to be lost in adopting a trauma informed approach. Anyway, it's not my place to police professional standards, I just make that observation and beseech you to be a little mindful about your use of terminology.

MS JONES-BOLLA: Thank you. Member, there are outstanding treatment needs including further counselling, as recommended in the May 2020 report at exhibit 4. There's also a recommendation for engagement with a psychiatrist to review his symptoms and medications as recommended by Ms Langton in 2016 and in the STARTTS report in 2019, that's at page 34 of exhibit A4.

MEMBER: Thank you.

MS JONES-BOLLA: In these circumstances, the [T]*ribunal cannot be satisfied that the* [A]*pplicant will attend to these outstanding treatment needs in the community when he has failed to do so or when he has not turned his mind or is unable to do so in a custodial, monitored environment.*

MEMBER: And the consequence being?

MS JONES-BOLLA: The consequence being that his risk of reoffending is as reported by Ms Langton, being moderate to high. She had regard to his circumstances at that time, which have

> *relevantly not changed, and she assessed his risk as moderate to high, that should give this* [T]ribunal *significant concern.*

123. As discussed above, sometime after the date of the report of Ms Celia Langton (**Ms Langton**), to which counsel for the Respondent referred, the Applicant accepted that he was experiencing circumstances of his own making and had commenced a process of genuine acceptance of personal responsibility and remorse. This was without the assistance of the recommended treatments and therapeutic interventions recommended by Ms Langton.

124. The underlying premise of the Respondent's submission appears to be that a pre-contemplative decision by a given applicant not to engage in recommended therapeutic interventions (especially where there are genuine grounds to believe that said applicant has significant cognitive and mental health challenges) necessarily amounts to non-compliant behaviour. For the avoidance of doubt, I reject such a proposition.

125. The Applicant has effectively only lived for three of his nineteen years in Australia outside of prison and detention. He has described his experience in detention as having been physically, mentally and sexually abusive. It is true that he was sentenced to a lengthy term of imprisonment for very serious offences and he both received a sentence at the upper limits and his lack of engagement with offender intervention programs while in prison meant that his parole eligibility was viewed unfavourably, He sees a future beyond this where he can be a contributing member of the community enjoying the benefits of a stable and loving family network.

126. Based on the materials before the Tribunal, I consider that the prospect of indefinite detention could have a devastating impact on the mental health of the Applicant, who would see himself as being without a future. Having accepted that the Applicant cannot return to Iraq because of the operation of s 197C of the Act , if the Applicant were to be detained indefinitely, the system designed to protect him from harm would potentially worsen his mental health conditions.

127. I find that this consideration weighs in favour of revoking the Cancellation Decision.

128. The Tribunal notes the Applicant has been detained for over 6 years as at the date of this decision. Australia has been found to owe non-refoulement obligations with respect to the

Applicant, and his eligibility for a protection visa has not been finally determined as at the date of this decision.

129. With respect to para 9.1(2) of Direction 90, the Tribunal has considered the Applicant's criminal offending and finds it is very serious. The Tribunal has found that the nature and seriousness of the Applicant's offending conduct weighs strongly in favour of refusing to revoke the cancellation of the visa. However, Australia owes non-refoulement obligations to the Applicant and a protection finding has been made.

130. These are obligations which Australia takes seriously because the Applicant faces a real chance of serious harm if returned to Iraq. However, that obligation should be viewed in the context that the Applicant will not be refouled to Iraq whilst the protection findings regarding the Applicant for that country remain on foot.[75]

131. Having considered the evidence before it and the parties' submissions regarding the Applicant's particular circumstances, the Tribunal finds that very significant weight should be given to this consideration pursuant to Direction 90.

Extent of impediments if removed (para 9.2)

132. Paragraph 9.2 of Direction 90 provides:

> *(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:*
>
> *a) the non-citizen's age and health;*
>
> *b) whether there are substantial language or cultural barriers; and*
>
> *c) any social, medical and/or economic support available to them in that country.*

133. Properly framed, this consideration is whether, taking into account the considerations identified in sub-paras 9.2(1)(a), (b) and (c), the Applicant would face an impediment or

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[75] Refer to above para [106].

impediments in establishing and maintaining basic living standards in the context of the basic living standards that other citizens of Iraq enjoy.

134. The Applicant is owed protection obligations and faces no relevant prospect of return to Iraq.[76] Having considered the evidence before it and the parties' submissions, the Tribunal finds that this consideration does not arise and is therefore neutral with respect to the requirements of Direction 90.

Impact on victims (para 9.3)

135. Paragraph 9.3 of Direction 90 provides:

> *(1) 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.*

136. Neither party made written submissions to the Tribunal on this consideration.

137. Having considered the evidence before it and the parties' submissions, the Tribunal finds that this consideration does not arise and is therefore neutral with respect to the requirements of Direction 90.

Links to the Australian community (para 9.4)

138. Paragraph 9.4 of Direction 90 provides:

> *Reflecting the principles at paragraph 5.2, decision-makers must have regard to paragraphs 9.4.1 and 9.4.2 below.*

139. This consideration requires the Tribunal to have regard to the strength, nature and duration of the Applicant's ties to Australia and the impact of non-revocation of the visa cancellation decision on the Applicant's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a

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[76] See above para [114].

right to remain in Australia indefinitely. The Tribunal must also consider the strength, nature and duration of any other ties that the Applicant has to the Australian community

Strength, nature and duration of ties to Australia

140. Paragraph 9.4.1 of Direction No 90 states:

> *(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.*
>
> *(2) Where consideration is being given to whether to cancel a non-citizen's visa or whether to revoke the mandatory cancellation of their visa, the decision-maker must also consider the strength, nature and duration of any other ties that the non citizen has to the Australian community. In doing so, decision-makers must have regard to:*
>
> *a) how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:*
>
> *i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and*
>
> *ii. more weight should be given to time the non-citizen has spent contributing positively to the Australian community.*
>
> *b) the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.*

141. Relevantly, the Applicant's written submissions in relation to the extent of the strength, nature and duration of his ties to Australia were as follows:[77]

> *81. First, the* [A]*pplicant has immediate family members in Australia, being his parents and two brothers who are Australian citizens who continue to reside in Australia, as well as a number of nieces and nephews:*
>
> *82. The* [A]*pplicant provided a letter of support from his father and sister-in-law, indicating that he has the support of his family and they would be emotionally affected if he is removed from Australia. The* [A]*pplicant stated that it would 'destroy' his family if he is sent back to Iraq:*
>
> *83. The Tribunal would consider the impact of non-revocation upon the* [A]*pplicant's immediate family in Australia and find that those persons would experience very emotional hardship.*
>
> *84. Secondly, as to other ties, the* [A]*pplicant has other ties to Australia, being his friends. The* [A]*pplicant has submitted letters of support from five friends*

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[77] A1 p 25.

in the community, who broadly submit that he is of good character and his family is respected:

85. The [A]*pplicant has resided in Australia for 19 years, having arrived at the age of 17 years and not since departed. The* [A]*pplicant attended some secondary schooling in Australia (i.e. to Year 10).*

86. The Tribunal would give less weight to this consideration, as the [A]*pplicant began offending soon after arriving in Australia.*

87. Overall, this other consideration weighs moderately in favour of revocation of the mandatory cancellation decision.

(References omitted).

142. The Minister's written submissions in relation to the extent of the strength, nature and duration of the Applicant's ties to Australia were as follows:

57. The length of time the [A]*pplicant has spent in Australia is a factor the Tribunal must bring to account when determining the strength, nature and duration of ties to Australia (paragraph 9.4.1(2)(a) of Direction 90). According to his movement records, the* [A]*pplicant arrived in Australia in* [date] *and has remained in Australia since.*

58. There is nothing to suggest that the [A]*pplicant has made any positive contributions to the Australian community, through employment or otherwise (paragraph 9.4.1(2)(a)(ii) of Direction 90).*

59. As for the strength, duration and nature of any family or social links as contemplated by paragraph 9.4.1(2)(b), it appears that the [A]*pplicant's family network in Australia includes his partner,* [TN]*, his parents, two brothers and an unspecified number of nieces/nephews.*

60. [TN] *has provided a statement attesting to the hardship she would suffer in the event the* [A]*pplicant were to be indefinitely detained. However,* [TN] *has only been in a relationship with the* [A]*pplicant for some nine months. The* [A]*pplicant has been detained for the entirety of their relationship and their relationship has been limited to this setting.*

61. The [A]*pplicant's father, mother and brother have also provided statements attesting to the hardship they would suffer in the event the* [A]*pplicant were to be indefinitely detained. By his statement dated 22 November 2022, the* [A]*pplicant's father claims to be suffering from a number of health issues. While the applicant's parents claim that the* [A]*pplicant could, and would, be able to provide emotional, financial and practical assistance, there is no suggestion that they have been unable to subsist during the* [A]*pplicant's incarceration and subsequent detention.*

62. The [A]*pplicant has also provided statements from his sister-in-law and a number of family friends which attest to his good character: However, none of these statements attest to what impact a non-revocation decision would have on these individuals, and majority of the statements are silent as to the applicant's offending. The statement of* KA *and* NA *only includes a vague reference to the* [A]*pplicant falling in "with a bad crowd" and making decisions "based on peer pressure."*

143. The Applicant's final written submissions also briefly addressed the extent of the strength, nature and duration of his ties to Australia, as follows:

> *16. First, the* [A]*pplicant confirmed in evidence that he arrived in Australia in 2003.*
>
> *17. Secondly, speaking of the* [A]*pplicant's partner, the applicant said she means 'everything to me in my world'. The applicant said he 'love[d] her from my heart'. The* [A]*pplicant said he is 'always on the phone' to his partner. The* [A]*pplicant said his partner was an 'amazing partner'. He confirmed that his partner had visited during his time in immigration detention.*
>
> *18. The* [A]*pplicant's partner confirmed she wants her partner 'to return'. She also confirmed she spoke to the* [A]*pplicant regularly on the telephone: '[e]very day many times in a day if I am not busy'.*
>
> *19. Thirdly, on the topic of siblings, the* [A]*pplicant confirmed he was 'really close to my brothers'. He said that he 'love[d] my brothers'. He said his siblings 'always support' him. The applicant's brother,* [HK]*, said he would be 'completely devastated' if the* [A]*pplicant is not returned to the Australian community. He also confirmed an adverse decision would have an 'effect on me and my parents'.*
>
> *20. Fourthly, on the topic of the* [A]*pplicant's parents, the* [A]*pplicant confirmed he was 'close' to his parents. The* [A]*pplicant said that 'mum and dad they are in a lot of pain'. He said that since he was detained, there has been 'non-stop crying' from his mother. The* [A]*pplicant's partner confirmed the same in her evidence.*
>
> *21. Fifthly, at a more general level, the* [A]*pplicant said his whole story has broken him 'and my family and my loved ones'.*

144. The Applicant also submitted a number of statements that were written on his behalf by members of his family and his personal network.[78] I note that none of these statements evinces a detailed understanding of the Applicant's full record of criminal offending. The Applicant's lack of candour with persons from whom he has sought advocacy in such significant proceedings shows, at the very least, a lack of insight into the effect of his personal conduct on those around him and a willingness to mislead by omission. While this may be understandable at a human level, it is not indicative of a mutually respectful and fully informed relationship between the Applicant and those in his network of support.

145. Of the foregoing potential witnesses, only the Applicant's brother, HK, and the Applicant's partner, TN, gave evidence via teleconference at the hearing. While both witnesses were generally supportive of the Applicant's application seeking revocation of the cancelation of

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[78] Exhibits A2-A3 and A5-A7.

the visa, neither party exhibited a detailed understanding of the Applicant's offending history, the extent of the Applicant's likely mental health challenges on release from detention or the requirements of the NSW Child Protection Register that would be applicable to the Applicant on return to that State. Accordingly, the Tribunal receives these statements and finds that they should be given minimal weight.

146. Based on the foregoing considerations, I am satisfied that the impact of the visa cancellation decision on the Applicant's family of origin and his partner in Australia would be significant.

147. I find that this consideration weighs in favour of revoking the Cancellation Decision. Given the evidence discussed above relating to the Applicant's lack of insight and candour with his network of support, I find that slight weight should be given to this consideration.

Impact on Australian business interests (para 9.4.2)

148. Paragraph 9.4.2 provides:

> *(1) Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.*

149. Neither party made written submissions to the Tribunal on this consideration.

150. Having considered the evidence before it and the parties' submissions, the Tribunal finds that this consideration is neutral with respect to the requirements of Direction 90.

151. I have considered the other consideration "*Links to the Australian Community*" required at Paragraph 9.4 of Direction 90. Cumulatively, I find that this other consideration weighs in favour of revoking the Cancellation Decision. I also find that substantial weight should be given to this other consideration.

THE WEIGHING EXERCISE

152. Direction 90 guides the decision-maker on how to apply the primary and other considerations. Paragraph 7 of Direction 90 sets out the way in which the relevant considerations are to be taken into account. It provides:

(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.

(2) Primary considerations should generally be given greater weight than other considerations.

(3) One or more primary considerations may outweigh other primary considerations.

153. A number of cases have dealt with how the exercise of balancing the considerations is to be undertaken. While some of these cases were looking at that exercise under Direction 65 and Direction 79, the same considerations apply to the exercise required by Direction 90 which is materially in the same terms. I am guided by Colvin J's judgment in *Suleiman v Minister for Immigration and Border Protection*[79] and the Full Court of the Federal Court judgment in *Minister for Home Affairs v HSKJ*.[80]

154. Colvin J's judgment in *Suleiman* was considered by Wigney J in *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.[81] At para [21] Wigney J cited para [23] of Colvin J's judgment, which was as follows:

> *The use by the Tribunal of the term 'secondary' indicates that the 'other considerations' are always of lesser importance. However, Direction 65 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 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****.*
>
> (Emphasis added.)

155. Wigney J then observed at [22]:

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79 (2018) 74 AAR 545.

80 (2018) 266 FCR 591.

81 [2021] FCA 775.

> *It is the last sentence of this paragraph of Suleiman which has given rise to the issue in this case. That issue will be discussed in more detail later. It suffices at this point to note that, with the greatest respect to Colvin J, this analysis of paragraph 8 of the relevant direction tends to overcomplicate or over intellectualise the issue. More significantly, it may lead decision-makers into error. Paragraph 8 of Direction no. 79 is expressed in simple terms. Relevantly, decision-makers must take into account the primary and other considerations that are relevant to the individual case and, when it comes to weighing up the relevant considerations, have regard to three relevant principles: first, both primary and other considerations may weigh in favour of, or against, whether or not to revoke a cancellation of a visa; second, primary conditions should generally be given greater weight than other considerations; and third, one or more primary considerations may outweigh other considerations. It is difficult to see why any further elaboration of those simple principles or propositions is necessary or warranted.*
>
> (Emphasis omitted.)

156. The Tribunal in *CZCV* at [164] summarised the legal position as follows:

> *Thus, when read together, these passages from Suleiman and HSKJ are consistent with guidance to be given in the express wording of Direction no. 65, specifically, in paragraphs 8(3) and (4).* ***The Tribunal must*** *ensure, that in considering the primary and other considerations in Direction no. 65, that it must* ***undertake a genuine weighing exercise during which it is not automatically assumed that primary considerations will always weigh more than other considerations*** *(as the use of the word "secondary" tends to suggest). Although, as a general rule, primary considerations should generally be given greater weight,* ***the Tribunal must not fetter itself against giving an other consideration greater weight than a primary consideration, if in the circumstances of the case it is correct and preferable to do so...***
>
> (Emphasis added.)

157. I adopt the approach directed by the above cases. The Applicant does not pass the character test as defined in s 501(6)(a) for the reasons set out earlier. This enlivens the discretion under s 501(1) of the Migration Act to refuse the Applicant's protection visa application, taking into account the primary and other considerations set out in Direction No 90 when exercising the discretion.

158. Direction No 90 guides the decision-maker on how to apply the primary and other considerations. Paragraph 7 of Direction 90 sets out the way in which the relevant considerations are to be taken into account.[82]

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[82] See above para [152].

In determining the weight to be applied to each consideration, the Tribunal has had regard to the Applicant's offending history and personal circumstances, including the circumstances of his partner and family members in Australia. The Tribunal has considered all the relevant considerations and weighed them according to the guidance provided by Direction No 90 to determine whether the discretion to refuse the visa should be exercised.

IN SUMMARY

Primary Considerations

Primary Consideration 1

159. Looking at the first primary consideration, the protection of the Australian community, the relevant consideration is whether the risk is an unacceptable one, taking into account the nature and seriousness of the harm that would be caused if there was a repeat of the behaviour and the likelihood of that occurring. For the reasons set out in paras [42]–[67] above, the Tribunal assesses the likelihood of the Applicant engaging in further criminal or other serious conduct is real.

160. Considering the significant harm that would be caused to the community if the Applicant were to reoffend; while the Tribunal has found that the likelihood of him reoffending is low, this consideration should be given moderate weight against revoking the cancellation of the Applicant's visa.

Primary Consideration 2

161. Given that the Tribunal has found that the Applicant has not engaged in family violence, for the reasons set out at paras [68]–[71] above, the second primary consideration, family violence does not arise. Accordingly, this consideration has neutral weight in determining the application for revocation of the cancellation of the Applicant's visa. Neutral weight should be given to this primary consideration.

Primary Consideration 3

162. For the reasons set out in paras [72]–[85] above, the third primary consideration, the best interests of minor children weighs in favour of the revocation of the cancellation of the Applicant's visa. Slight weight should be given to this primary consideration.

Primary Consideration 4

163. For the reasons set out at [163]–[178] above, the fourth primary consideration, the expectations of the Australian community, as it must, weighs against the revocation of the cancellation of the Applicant's visa. Moderate weight should be given to this primary consideration.

Other Considerations

International non-refoulement

164. For the reasons set out above in paras [180]–[183], the Tribunal has found that this this consideration does not arise. Accordingly, this consideration has neutral weight in determining the application for revocation of the cancellation of the Applicant's visa.

Legal consequences of the decision and the prospect of indefinite detention

165. As noted above, the Tribunal is required to consider and engage with the immediate legal consequences of its decision.[83] Given that these potentially include the prospect of indefinite detention, the Tribunal has expressly considered this matter and has found that this consideration weighs in favor of revoking the cancellation of the Applicant's visa. For the reasons set out above at paras [113]-[131], in this particular instance, very significant weight should be given to this consideration pursuant to Direction 90.

Extent of impediments

166. With respect to the consideration of the extent of impediments, the Tribunal has found at paras [132]-[134] that this consideration does not arise. Accordingly, this consideration has neutral weight in determining the application for revocation of the cancellation of the Applicant's visa.

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83 *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146

Impact on victims

167. The consideration of the impact on victims as directed by para 9.3 of Direction 90, for the reasons set out above at para [135]-[137] the Tribunal finds that this other consideration does not arise and has neutral weight in determining the application for revocation of the cancellation of the Applicant's visa.

Links to the Australian community

168. The consideration of the strength, nature and duration of the ties and the Applicant's links to the Australian community, particularly with respect to his family of origin and his partner in Australia, involves many finely balanced and contradictory factors. This consideration weighs in favour of the revocation of the cancellation of the visa. For the reasons set out above at paras [138]–[151], slight weight should be given to this other consideration.

Impact on Australian business interests

169. Neither party made written submissions to the Tribunal on this consideration. Having considered the evidence before it and the parties' submissions, the Tribunal finds that this consideration is neutral with respect to the requirements of Direction 90.

CUMULATIVELY

Primary Considerations

170. The Tribunal has found that three 'primary considerations' – being protection of the Australian community, best interests of children in Australia and expectations of the Australian community - weigh in favour of refusing to revoke the cancellation of Applicant's visa under s 501(1) of the Migration Act. Although finely balanced in this case, the third primary consideration, being the best interests of minor children affected by the decision, weighs slightly against revoking the cancellation of the Applicant's visa. One primary consideration, being family violence, does not arise in this application and is of neutral weight.

171. In this regard, the Tribunal concluded that the protection of the Australian community consideration weighed moderately in favour of refusing the visa, balancing a low risk of

reoffending against the very serious nature of the offences for which the Applicant was convicted.

172. The second primary consideration, family violence, does not arise in the context of this decision and has neutral weight against revocation of the cancellation of the Applicant's visa. Neutral weight should be given to this primary consideration.

Other Considerations

173. The Tribunal has had regard to the relevant other considerations listed in Direction No 90, including non-refoulement obligations, the legal consequences of the decision, the impediments to the Applicant's removal and the Applicant's links to the Australian community.

174. As the Applicant is the subject of a 'protection finding' and is not liable for removal to Iraq, the considerations regarding non-refoulement obligations and impediments to removal to that country weigh less heavily than may otherwise be the case. The Tribunal recognises that these considerations are relevant in the Applicant's circumstances but are unlikely to eventuate given the legal consequences of the 'protection finding'. The Tribunal has found that these considerations have a neutral weight regarding the revocation of the cancelation of the Applicant's visa.

175. The Tribunal also considered the legal consequences of the decision and the prospect of indefinite detention. The Applicant faces the prospect of indefinite detention, which may reasonably be expected to be significantly detrimental to his mental health. The Tribunal has found that this other consideration weighs very heavily in favour of revoking the decision to cancel the Applicant's visa.

176. The remaining 'other considerations' neither weigh for nor against refusing the Applicant's visa application, or are not relevant to the Applicant's circumstances.

CONCLUSION

177. Cases such as the Applicant's present a difficult challenge. There can be no doubt that his offending was very serious. The circumstances of the offending speak for themselves.

178. Any repetition of such offending would cause serious harm to individuals and to the Australian community.

179. As noted above, the Applicant cannot be refouled to Iraq because of the operation of s 197C of the Migration Act. He, therefore, faces the prospect of indefinite detention (or detention with no fixed chronological endpoint). The likely worsening of the Applicant's mental health challenges if indefinitely held in detention gives rise to the consequence of grave adverse consequences in and of themselves. In the Tribunal's assessment, given the Applicant's particular vulnerabilities and the non-refoulement obligations owed with respect to him, these are considerations which must be weighed very seriously.

180. In weighing these considerations against one another, the Tribunal finds that although there are strong considerations that weight moderately against revocation of the cancellation of the Applicant's visa, the countervailing considerations which favour revocation, in particularly the impact of the legal consequences of the decision on the Applicant, outweigh those considerations in the Applicant's case.

181. With regard to his links to the community, the Tribunal found that, while the Applicant has close ties to Australia, principally through his family members here, including his partner involves many finely balanced and contradictory factors. This consideration weighs in favour of the revocation of the cancellation of the visa. Further, while the Applicant was only in the Australian community for a short time prior to imprisonment, The Tribunal did not consider the impact on Australian business interests to be relevant in the Applicant's circumstances. Overall, The Tribunal has found that this other consideration weighs slightly in favour of revoking the decision to cancel the Applicant's visa.

182. As noted by Deputy President Boyle in *James and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs,*[84] whether a consideration does or does not

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[84] [2022] AATA 2390 [112].

outweigh any other particular consideration (or considerations) is not the relevant test. In weighing the considerations, primary and other, the exercise is not one of comparing one against another; rather of giving weight to each of the considerations, weighing those for and those against revocation and determining which have the greater weight in total.

183. Having weighed the relevant considerations in favour of and against the revocation of the cancellation of the Applicant's visa, the Tribunal finds that the considerations in favour of revocation outweigh those against revocation. Accordingly, the Tribunal finds that there is another reason why the Reviewable Decision should be revoked.

DECISION

184. The Reviewable Decision, being the decision of the Delegate dated 21 October 2022, not to revoke the mandatory cancellation of the Applicant's visa, pursuant to 501CA(4) of the Act is set aside and substituted with the decision that the cancellation of the Applicant's visa is revoked under s 501CA(4)(b)(ii) of the Act.

I certify that the preceding 184 (one hundred and eighty-four) paragraphs are a true copy of the reasons for the decision herein of Member Dr C Huntly

.....[Sgd].....

Associate

Dated: 22 December 2022

Date of hearing:	**12 December 2022**
Applicant:	**Dr Jason Donnelly**
Counsel for the Respondent:	**Ms D Jones-Bolla**
Solicitors for the Respondent:	**Sparke Helmore Lawyers**

Annexure A

Applicant's Offending History

Court	Court Date	Offence	Court Result
NSW Court of Criminal Appeal	6 November 2013	Sexual Intercourse Without Consent	Appeal Dismissed
Liverpool Local Court	17 May 2010	Obtain Money by Deception (6 charges)	Convicted on each charge. Imprisonment for 9 months to be served concurrently.
Campbelltown District Court	1 May 2009	Sexual Intercourse Without Consent	Convicted. Imprisonment for 9 years and 4 months commencing 3 Jun 2008 and concluding 2 Oct 2017. Non-parole period with conditions: 7 years commencing 3 Jun 2008.

Court	Court Date	Offence	Court Result
Liverpool Local Court	27 January 2009	Never Licensed Person Drive Vehicle on Road Drive with Unrestrained Passenger Drive Motor Vehicle with Person in or on boot of Vehicle	Convicted on each charge. Fined $100.
Liverpool Local Court	29 September 2008	Maliciously Wound (call-up) Common Assault (call-up) Assault Officer in Execution of Duty	Convicted. Imprisonment for 12 months commencing 7 November 2007. Convicted. Imprisonment for 6 months commencing 7 November 2007. Convicted. Bond to be of good behaviour for 12 months.
Liverpool Local Court	16 April 2007	Common Assault Maliciously Wound	Convicted. Bond to be of good behaviour for 12 months Convicted. Imprisonment for 12 months suspended upon entering bond to be of good behaviour.

Court	Court Date	Offence	Court Result
Liverpool Local Court	20 February 2006	Forge or Alter prescription which includes prohibited drug	Convicted. Fined $500
		Common Assault	Convicted. Bond to be of good behaviour for 2 years
		Destroy or Damage Property	Convicted. Fined $300
Liverpool Local Court	8 September 2005	Goods in Personal Custody Suspected Being Stolen	Convicted. Fined $200
		Use Offensive Language in/near public place/School	Convicted. Fined $100
		Behave in offensive manner in/near public place/School	Convicted. Fined $50