Administrative Appeals Tribunal

**DECISION AND REASONS FOR DECISION**

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| Division: | GENERAL DIVISION |
| File Number(s): | **2022/9408** |
| Re: | **MSD** |
| | APPLICANT |
| And | **Minister for Immigration, Citizenship and Multicultural Affairs** |
| | RESPONDENT |

**DECISION**

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| Tribunal: | **Senior Member K Raif** |
| Date: | **30 January 2023** |
| Place: | **Sydney** |

The Tribunal affirms the decision not to revoke the cancellation of the Five Year Resident Return Class BB Subclass 155 visa held by the Applicant.

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

Senior Member K Raif

**CATCHWORDS**

***MIGRATION*** *– mandatory visa cancellation – failure to pass the character test – whether there is another reason why the visa cancellation should be revoked – Ministerial Direction No. 90 – nature and seriousness of offending conduct – risk of reoffending – protection of the Australian community – expectations of the Australian community – family violence committed by the non-citizen – best interests of minor children in Australia – international non-refoulement obligations – impediments to removal – impact on victims – strength, nature and duration of ties to Australia –– decision under review affirmed.*

**LEGISLATION**

*Migration Act 1958 (Cth)*

**CASES**

*Viane v Minister for Immigration and Border Protection [2018] FCAFC 116*

**SECONDARY MATERIALS**

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

**REASONS FOR DECISION**

**Senior Member K Raif**

**30 January 2023**

1. This is an application for review of a decision of the delegate of the Minister for Immigration, Citizenship and Multicultural Affairs not to revoke the cancellation of a Class BB Subclass 155 Five Year Resident Return visa (**RRV**) held by the Applicant.

2. The Applicant is a national of Türkiye, born in July 1978. He first travelled to Australia in 2001 holding a Student visa and he was subsequently granted a permanent visa. Between 2003 and 2021 the Applicant was convicted of multiple offences, described below. On 19 January 2022 the RRV held by the Applicant had been cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) (the **Act**) because it was determined that the Applicant had

a substantial criminal record. The Applicant was invited and made multiple representations about the revocation of the decision to cancel his visa. On 15 November 2022 a decision was made under subsection 501CA(4) not to revoke the mandatory cancellation decision. The Applicant is seeking review of that decision.

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

**RELEVANT LAW**

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

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

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

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

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

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

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

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

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

10. On 8 March 2021 the Minister issued *Direction no. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (**Direction 90**) under section 499 of the Act. Direction 90 is binding on the Tribunal in performing its functions or exercising powers under section 501 of the Act.

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

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

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

    (a) Protection of the Australian community from criminal or other serious conduct;
    (b) Whether the conduct engaged in constituted family violence;
    (c) The best interests of minor children in Australia; and
    (d) Expectations of the Australian community.

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

    (a) International non-refoulement obligations;
    (b) Extent of impediments if removed;

(c) Impact on victims;

(d) Links to the Australian community including:

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

(ii) Impact on Australian business interests.

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

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

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

(b) is there another reason why the original decision should be revoked?

**DOES THE APPLICANT PASS THE CHARACTER TEST?**

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

17. The Tribunal has been provided with the Applicant's Criminal History Check which relevantly indicates that the Applicant has been convicted of the following offences:

| Date | Offence | Sentence |
|---|---|---|
| 09/12/21 | Contravene prohibition / restriction in AVO (domestic) | Imprisonment 4 months |
| 08/11/21 | Contravene prohibition / restriction in AVO (domestic) | Imprisonment 4 months |
| 01/10/21 | 1. Common assault (DV) – T2<br>2. Destroy or damage property > $2000 <= $5000 (DV) – T2<br>3. Contravene prohibition / restriction in AVO (domestic)<br>4. Drive motor vehicle while licence suspended – 1st off | Imprisonment (aggregate) 9 months |
| 01/06/21 | Drive motor vehicle while licence suspended – 1st off | Conditional release order without conviction 20 months |

| | | |
|---|---|---|
| 17/09/20 | 1. Common assault – T2<br>2. Contravene prohibition / restriction in AVO (domestic) | Community correction order 2 years<br>Fine $3000 |
| 11/11/13 | Contravene prohibition / restriction in AVO (domestic) | Fine $600 |
| 14/08/09 | Supply a prohibited drug (2 counts) | 16 months imprisonment |
| 19/02/09 | 1. Common assault (DV) – T2<br>2. Contravene prohibition / restriction in AVO (domestic)<br>3. | Conviction confirmed |
| 18/12/08 | 1. Unlicensed driver (not licensed for 5 years) – 1st offence<br>2. Contravene prohibition / restriction in AVO (domestic)<br>3. Take and drive conveyance without consent of owner – T2<br>4. Common assault (DV) – T2<br>5. Contravene prohibition / restriction in AVO (domestic)<br>6. Stalk / intimidate intend fear of physical / mental harm – T2<br>7. Contravene prohibition / restriction in AVO (domestic) | Fine $500<br>Imprisonment 3 months<br>Imprisonment 4 months<br>Imprisonment 5 months<br>Imprisonment 5 months<br>Imprisonment 2 months<br>Imprisonment 3 months |
| 23/09/08 | Unlicensed driver/rider (not licensed for 5 years) – 1st offence | Fine $400 |
| 08/12/05 | Contravene ADVO | s. 9 bond – 2 years |
| 01/04/04 | Possess prohibited drug (2 counts) | Dismissed s. 10 |
| 12/12/03 | 1. Common assault – T2 (4 counts)<br>2. contravene ADVO | s. 9 bond 12 months<br>s. 9 bond – 2 years |

18. The Tribunal finds that the Applicant has been sentenced to a term of imprisonment of 12 months or more in August 2009. The Tribunal finds that the Applicant has a substantial criminal record as defined in paragraph 501(7)(c) of the Act. As the Applicant has a substantial criminal record, he does not pass the character test. The requirements of subparagraph 501CA(4)(b)(i) are not met.

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

19. In his evidence to the Tribunal the Applicant concedes that he does not pass the character test and also concedes that his past offending was very serious. However, the Applicant argues that other considerations, most notably his links to the Australian community, the

extend of impediments if removed and community expectations, which, he claims, weigh in favour of the revocation and outweigh other considerations that weigh against the revocation.

20. The Respondent submits that the Applicant does not pass the character test and the primary considerations, which should be given greater weight, outweigh other considerations.

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

**Primary considerations**

***Protection of the Australian Community***

22. Paragraph 8.1 of Direction 90 provides as follows:

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

23. In considering the nature and seriousness of the Applicant's conduct to date, the Tribunal has had regard to the information in the NSW Police Facts Sheets and sentencing remarks that are before the Tribunal, as well as the Applicant's own evidence.In his submission to the delegate the Applicant explains the circumstances of the assault offence in 2020. He states that he was driving after having dinner with his wife and both had drunk. His wife started to 'act heretically' and he was afraid of losing control of the car, so he struck his wife to get her away from him out of shock of losing control of the car while driving. After he stopped the car, the had a scuffle. The Applicant states that he was concerned about his wife leaving the car and stepping onto the busy road and he was trying to keep her in the seat. The Applicant states that a video showed he punched his wife but there was no punching, he was only trying to stop her from running away while drunk.

24. The Applicant states that in June 2021 he attended the house for his stepson's birthday (in breach of the AVO) and had an argument with his wife and the police was called. In his submission to the delegate the Applicant states that he attended his son's birthday at his wife's home and they had an argument and said things to each other, the Applicant states that his wife was angry and 'acted heretical'. He tried to calm her down but nothing worked. He states he wanted to go upstairs and had accidentally knocked a vase with his knee, which 'pissed [him] off' so he grabbed the vase and threw it on the floor out of frustration. The Applicant states that the vase was owned by both of them but he paid for it.

25. In his evidence to the Tribunal the Applicant explained that the incident when the vase was broken indicates that he learned from his counselling sessions, stating that the damage and the violence could have been worse. The Applicant appears to suggest that a breach of the law is justified if there was no violence involved.

26. The Applicant states that his wife called 000 only to scare him, there was no physical conduct or intent and there was 'no scenario to hurt' his wife. The Applicant seems to suggest that the breach of the AVO by attending the premises is insignificant if there was no physical violence involved.

27. The Tribunal has considered the sentencing remarks by Magistrate Stewart on 1 October 2021 who referred to the agreed set of facts that had been tendered to the court. It is stated that the victim is LD, the Applicant's partner of about five years. The Applicant had been issued with an interim AVO in February 2021 which prohibited the Applicant from approaching Ms D or damaging her property. It is stated that on 5 June [2021] the police were called to the sound of smashing glass and observed that several vases appeared to had been smashed. The victim told the police that the Applicant informed her there was no AVO as his lawyer had 'taken care of it'. The Applicant presented himself to the police and admitted to smashing the vase that cost about $2500. The magistrate noted that at the time the Applicant was on bail for domestic violence related matters and has been on bail since February 2021.

28. The magistrate noted that the Applicant had a lengthy record of family violence offences dating back to 2003. The magistrate noted that the Applicant had presented a psychological report that he had previously relied on in the earlier proceedings. In it, it is stated that the

Applicant had gained significant insight into his anger issues and the negative impact these had on his life and that he had sought psychological treatment.

29. The magistrate was not satisfied that the contravention of the AVO offence was at the low end objective seriousness because the breach occurred in three ways – contact, being at the premises the Applicant was expressly excluded from and damaging property at the victim's home.

30. The Tribunal has had regard to the remarks of Magistrate Boulos on 8 November 2021 who outlined the background to the offending conduct as follows. On 18 February the police were called as it was reported by a friend that the Applicant had hit his partner and may have a gun. When the police attended the premises, it is stated that the Applicant was initially aggressive but allowed the officers to enter. An officer interviewed the victim (the Applicant's spouse) who was said to be intoxicated but she refused to provide a statement to the police. However, the court was provided with a series of text messages between the Applicant's partner Ms LD and a friend in which Ms D repeatedly stated that she was scared of him and thought she might not be alive, she refers to abuse. She provided photos of bruising on her arm. Ms D subsequently gave evidence that she was drunk at the time and could not recall the events. Ultimately, the charges had been dismissed.

31. However, the Applicant plead guilty to the contravention of the AVO. In the sentencing remarks Magistrate Boulos noted that there were aggravating features to the offence, as the Applicant had charges pending in court and had bail refused. It was stated that the Applicant had contravened a condition of making no contact with the victim by making calls to her, having made 1500 calls to her while in custody between June and August 2021. It was noted that this was not the first time the Applicant had breached orders as he was placed on a bond in 2003 and also in 2005 for similar type of offending, and he had contravened an AVO in 2008. The magistrate noted there was a history of violence, a history of domestic violence and a history of contravention of AVOs.

32. In his statement the Applicant claims that while in prison, he made calls to his wife to make sure she was okay and he had to make sure she could run their business while he was away. The Applicant stated that he breached the AVO by contacting his wife but they needed to talk to keep the company running. It is not entirely clear to the Tribunal why the

Applicant believes his concern for the business was more important to him than his obligation to comply with the Australian laws.

33. The Tribunal has had regard to the remarks made by Judge O'Brien on 9 December 2021 who dealt with the appeal against the severity of the sentence imposed in November 2021 by Magistrate Boulos. Judge O'Brien noted the numerous phone calls that were made by the Applicant to his wife, contrary to the prohibition on contact that was expressly made in the AVO, noting that the Applicant 'took the view that domestic violence orders, did not apply to him'. The Judge accepted hat the Applicant appeared to have gained some insight while in custody as to the need for him to resolve issues arising from his relationship and that he has had an opportunity to undertake programs while in custody. His Honour dismissed the appeal.

34. In his submission to the delegate concerning the above remarks, the Applicant stated that he was aware that his wife was 'doing extremely poor' in her life and his absence was a shock and anxiety to her and at the time they both had concerns about what they had built together. The Applicant also refers to the ongoing business of the company, noting that he was the main breadwinner. He stated that he called his wife to give her support and comfort as he was concerned about his wife's well-being. Whatever the reasons for the extensive number of calls made by the Applicant (and it appears that the ongoing management of the company and financial stability was at least part of the Applicant's motivation for making calls), the Tribunal is of the view that in the circumstances where the Applicant was aware he was not allowed to make contact with his wife, such a persistent breach of the AVO shows his complete disregard for the law.

35. The Tribunal considers the Applicant's offending to be significant, given its repeated nature and the lengthy period of time over which the offending conduct took place. The Tribunal notes the multiple convictions relating to domestic violence and multiple breaches of the AVOs when the Applicant would have been well aware that his conduct constituted a beach (having been convicted of similar breaches on more than one occasion). In the Tribunal's view, the multiple domestic violence offences and the repeated breaches of the AVO indicate the Applicant's complete disregard for the welfare of others, as well as his disregard for the law.

36. The Tribunal also notes the convictions for assault in 2003 and 2009. The fact that the Applicant had engaged in conduct that posed a threat to others also indicates his disregard for the safety and welfare of those around him. These are serious offences.

37. In August 2009 the Applicant was convicted of supplying a prohibited drug. This is also a serious offence, given the harmful effect that drugs can have on the community. The fact that the Applicant was given a sentence of imprisonment of 16 months emphasises the serious nature of his conduct.

38. The Tribunal has formed the view that the Applicant's offending has been extremely serious. Given the repeated nature of the offending (for example, multiple convictions for breaching of AVO, suggesting that the Applicant had learned little from his conduct and the sentences he had served), the fact that the offences occurred over the lengthy period of time, and the serious harm that could be caused by offences involving violence, domestic violence and drug offending, the Tribunal has formed the view that the offending was very serious.

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

40. When making the revocation request, the Applicant states that he is 'established with a wife', has a reputable company and has been in the country for 21 years. (The Tribunal is mindful that most or all of these factors were present when the past offending occurred, and these did not prevent the repeated nature of the offending conduct. The Tribunal does not consider the presence of his wife or of the business in Australia would act as a deterrent for the Applicant not to reoffend. Indeed, the Applicant's relationship with his wife seems to have contributed to much of his domestic violence offending). The Applicant claims that he understands the triggers for his 'uncharacteristic behaviour'. Given the number of offences, their frequency and their occurrence over a period of exceeding 10 years, the Tribunal does not consider that his conduct can be said to be 'uncharacteristic'.

41. The Applicant states in his submission to the delegate that having completed a domestic violence course, he believes his poor coping mechanisms led to offences and patterns. The Applicant refers to having a 'toxic' previous relationship and to the abuse and violence he had experienced in his previous relationship, stating his wife was arrested and charged with assault. The Applicant notes that his wife and children left Australia in 2014 and he has not

seen his sons since that time. The Applicant states that he has taken his fears and post-traumatic stress into his next relationship. The Applicant's partner Ms D has also expressed the view that the Applicant suffered from the trauma of being in a toxic relationship previously, which affected his conduct in their relationship. The Applicant also refers to having anger management issues.

42. The Tribunal does not accept the Applicant's evidence. Firstly, the Applicant did previously receive counselling (there are several reports before the Tribunal with one prepared by Ilknur Aytugrul dated as early as 2009) and would have had the opportunity to recognise the stressors and his claimed 'poor coping mechanisms'. As the multiple convictions occurred over a number of years, the Applicant would have had ample time to continue with the treatment which his interactions with health professionals had recommended. Secondly, and importantly, the offending conduct is not limited to domestic violence. The Applicant committed other offences including a drug offence and driving offences.

43. In his submissions to the delegate the Applicant states that he had taken steps to manage unresolved anger. In his evidence to the Tribunal the Applicant refers to the counselling he has undertaking while in detention and his intention to engage in another program (he claims he is presently on a waiting list to commence the program). The Tribunal accepts that the Applicant had completed some programs but does not necessarily accept that the completion of these programs will change the Applicant's behaviour in the future.

44. The Tribunal has had regard to the psychological reports prepared by Mr Ramsey Andrews. One report is dated 10 August 2020 and deals with the circumstances of the 2020 assault offence. It is stated that the Applicant had expressed significant remorse and a strong motivation to engage in a treatment plan which addresses his unsolved anger issues and poor impulse control. It is stated that he feels able to rationalise and consider the factors that caused and contributed to the charge. Mr Andrews concludes that the Applicant meets the criteria for adjustment disorder and also experiences unresolved anger issues. Mr Andrews has expressed the view that the Applicant would require ongoing psychological treatment in order to sustain his efforts to reduce the likelihood of reoffending behaviour and it would be necessary for him to have continuing and ongoing treatment.

45. In his August 2021 statement Mr Andrews states that he had been seeing the Applicant from October 2020 to March 2021 and provided cognitive behaviour therapy for

management of his anger issues and it is said that the Applicant appeared to be well engaged in counselling. Mr Andrews states that the Applicant reported benefit from treatment and demonstrated that he was effectively regulating his emotions and engaging in constructive behaviours.

46. There are also before the Tribunal reports by Relationship Counsellor Le Hoang. Ms Hoang also refers to eight counselling sessions between July 2020 and August 2020 to deal with anger management.

47. The Tribunal has had regard to the report prepared by Ilknur Aytugrul in 2009 who states that the Applicant had received counselling since May 2009. The report indicates that the Applicant has insight into his emotional life and the causes, that he is making good progress and is continuing to work on his personal and psychological issues he had experienced. It is stated that the Applicant reported he would continue to have counselling.

48. Mr Andrew's report indicates that the Applicant had received counselling since September 2020. Given the number of the Applicant's convictions in 2021 (and it appears the most recent offending occurred around mid-2020), when the Applicant had already been receiving counselling from Mr Andrews and Ms Hoang, Mr Andrew's assessment (referring to the Applicant's self-reported ability to manage his emotions and engage in constructive behaviour) appears to be somewhat questionable.

49. The Applicant's evidence is that the earlier counselling was to help him become a more responsible person and overcome his alcohol and other addictions. The Tribunal accepts that it may have been somewhat effective, for a period of time, given the absence of convictions between 2013 and 2020. However, the Tribunal does not accept the Applicant acquired the skills and the ability to deal with these issues, give his return to criminal conduct from 2020.

50. The Applicant claims he understands the triggers for his conduct. He presented communication from Mr Thiris, Manager of the Offender Services and Programs at Corrective Services NSW written in September 2021. Mr Thiris refers to the Applicant completing the DV program on a voluntary basis and states that the Applicant 'appears more aware of his triggers and risks and able to better regulate his emotions'.

51. There is before the Tribunal evidence that the Applicant had completed a Traffic Offender course. He repeatedly states that he now understands the significance of domestic violence and takes responsibility for his poor past attitude. The Applicant refers to the 'rehabilitation steps' he has taken and states that he is not a risk to anyone. The Applicant states that his absence has had adverse effect on his partner and her children who want to see their mother happy and has also causes financial hardship as he is no longer able to operate his company.

52. In oral evidence the Applicant claimed he is extremely remorseful for his conduct and appreciates the impact his offending has had on others, including his wife. The Applicant states that his imprisonment and immigration detention have also had an impact on him, his wife and business and his relationships in Australia. The Applicant states that he has taken steps to educate himself, realises the consequences of reoffending and these matters will act as a deterrent not to reoffend. The Applicant stated that his earlier offending was due to his being immature and his drug and alcohol use while the cancellation of his visa has been a wakeup call. As noted elsewhere, the Tribunal accepts that the prospect of the visa cancellation is a serious concern for the Applicant and would act as a significant deterrent but the Tribunal does not accept that would be sufficient.

53. The Applicant claims in his evidence to the Tribunal that the cancellation of his visa has had a 'massive impact on [his] mental state' and he recognises that his visa may be cancelled if he were to commit any further offences, which would act as a significant deterrent against him reoffending. The Tribunal acknowledges that this may be the case. The Applicant also states that if he is to remain in Australia, he would obtain a mental health treatment plan, take medication, recommence his business and his relationship with his stepchildren, practice his new faith and comply with the conditions of his AVO (which expires in September 2023). The Applicant states that having the AVO would act as a significant deterrent against reoffending but given the multiple breaches of the AVOs in the past, the Tribunal does not accept that would be the case.

54. The Applicant's partner Ms D provided a declaration to the delegate, sworn on 8 February 2022. Ms D refers to the Applicant suffering from a post-traumatic stress and states that he is getting an understanding of his bad behaviour caused by his violent ex-wife. It is of considerable concern to the Tribunal that the Applicant's behaviour is sought to be explained (if not justified) due to the Applicant being a victim in another relationship.

55. In his statement to the delegate the Applicant states that he understands the wrong nature of his conduct and takes responsibility. He states that being in prison has been an 'eye opener' for him and he is ashamed of his actions. In his evidence to the Tribunal the Applicant also repeatedly refers to his wrong-doing and states that he understands that what he did was wrong. The Tribunal finds the Applicant's evidence unpersuasive, as it appears that the Applicant blames at least some of his conduct on others. Thus, the 2020 assault conviction occurred because his wife tried to leave the car onto a busy road and he restrained her to protect her (he denies having punched his wife). The 2021 breach occurred because he had an argument with his wife who was acting 'heretical', got upset and smashed the vase. The multiple phone calls from prison were also made in breach of the AVO out of his concern for his wife's well-being. It appears from the Applicant's explanations that he is seeking to justify his behaviour by suggesting others were responsible for causing or contributing to it.

56. As for the Applicant's claim that prison and immigration detention have been an 'eye opener' for him, the Tribunal does not accept that is so, noting that the Applicant had previously served time in prison and continued to reoffend after that. The Tribunal does not accept that having spent time in prison, or the likelihood of further incarceration would act as meaningful incentives for the Applicant not to reoffend in the future.

57. The Applicant presented several character references to the delegate and the Tribunal and the Tribunal accepts that those who provided references believe the Applicant to be a good person and a hard-working businessman.

58. The Tribunal accepts that the Applicant has completed several programs, including recently during his detention, and accepts that he has 'undertaken considerable rehabilitation in more recent times compared to the past'. The Tribunal accepts that he has expressed remorse and desire to change. However, the Tribunal is not persuaded by the Applicant's claim that he is now rehabilitated. This is because the Applicant had in the past engaged in counselling and other programs and it cannot be said that the previous programs would have been entirely ineffective compared to the more recent programs. The fact that the Applicant continued to reoffend despite completing programs in the past gives rise to a real possibility that despite the programs he had completed more recently, there remains a real risk that the Applicant will not acquire the skills to enable him to avoid the same conduct in the future.

59. The Tribunal places some weight on the fact that some of the offending was not relating to the Applicant's anger management issues or substances use. Thus, he was convicted of driving without a licence (he justifies it by referring to his work commitments), he refers in oral evidence to having a few speeding tickets and he admits that when he attended his stepson's birthday party, he was not allowed to attend his wife's premises. The multiple calls he made to his wife from prison also indicates a calculated decision that the breach of the law as justified in his circumstances. This conduct was not a 'spur of the moment' inability to manage his emotions but a reasoned and (in the Applicant's mind) justified breach of the law. The Tribunal has formed the view that the Applicant has a general disregard for the law that is not influenced by his anger management, anxiety disorder, alcohol and drug use or any other issues.

60. The Tribunal accepts there are strong protective factors, most significantly the risk of having to leave Australia if he is to reoffend and the prospect of future imprisonment, and the Tribunal accepts that these factors will act as a strong deterrent for the Applicant not to reoffend. However, despite these factors, the Tribunal is of the view that the risk of reoffending remains high because the Tribunal is not satisfied that the Applicant is now better able to control his anger and act differently to the way he did in the past.

61. The Tribunal considers that the harm to the community, should the Applicant reoffend, could be very serious, given the very serious nature of offending (involving family violence). The Tribunal has formed the view that the protection of the Australian community weighs heavily against the revocation.

***Expectation of the Australian Community***

62. Clause 8.4 of Direction 90 provides that the Australian community expects non-citizens to obey Australian laws while in Australia. Relevantly, paragraph 8.4(2) states that:

> *… 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 …*

63. The Direction provides that the above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

64. The Applicant refers to the length of his residence in Australia, stating that there is a higher level of tolerance by the Australian community for his criminal conduct than there would be for a non-citizen who has not lived in the country for long. That may be the case but in the Tribunal's view, a higher level of tolerance is not without limits. While it may be that the Australian community will feel a degree of sympathy for a person who has lived in Australia for over 20 years and may be required to leave the country, the community would not have a high level of tolerance who, over that 20 year period, had persistently breached the Australian laws and committed serious offences.

65. The Applicant had committed multiple family violence offences over many years. He was also convicted of a drug offence. The Tribunal has formed the view that, given the seriousness and repeated nature of the Applicant's conduct over a lengthy periods of time, the community expectations would weigh heavily against revocation.

***Whether the conduct engaged in constituted family violence***

66. Direction 90 states at paragraph 8.2 that

> *The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia.*

67. The Direction states that in considering the seriousness of the family violence engaged by the non-citizen, the following factors must be considered where relevant:

> *1) the frequency of non-citizen's conduct and/or whether there is any trend of increasing seriousness;*
> *2) the cumulative effect of repeated acts of family violence;*
> *3) rehabilitation achieved… since the person's last known act of family violence …*

68. The Applicant has been convicted of multiple offences involving family violence. He had been issued with the Domestic Violence Orders which he had breached multiple times. The Applicant had been convicted of contravening AVOs in 2003, 2005, 2008, 2009, 2013, 2020 and 2021 and it can only be said that his conduct has been frequent. The earlier family violence offending resulted in section 9 bonds while the more recent ones resulted in a community corrections order in 2020 and imprisonment in 2021. It may be that the more significant penalty reflects the increasing seriousness of the conduct.

69. The Applicant states that he has completed a family violence course and is able to identity the triggers for his conduct. He states that he intends to continue with counselling as soon as he is released from detention. In oral evidence the Applicant referred to the various courses he completed while in detention and the counselling he has undertaken. The Applicant described what he has learned from these courses. As noted above, given the Applicant's engagement in various programs in the past, and the little deterrent effect these have had on him in the past, the Tribunal is not convinced that the completion of the courses would necessarily change his future conduct and prevent further offending.

70. The Tribunal considers that the Applicant did engage in family violence offences. This consideration weighs heavily against the revocation.

***The best interests of minor children in Australia***

71. The Applicant stated in his revocation request that he has two children, now aged 16 and 18, who live with their mother in England. He also has two stepchildren in Australia, both over the age of 18. The Applicant does not have minor children in Australia. The Tribunal does not consider that there are any minor children in Australia whose interests would be affected by the decision concerning the Applicant's visa. This consideration is neutral.

***International non-refoulement obligations***

72. The Applicant does not claim that Australia's non-refoulement obligations are engaged in this case. This consideration is neutral.

***Extent of impediments if removed***

73. The Applicant is 44 years of age. He would not have substantial language or cultural barriers if he was to be removed to Türkiye.

74. In his revocation request the Applicant states that he has nothing to return to in Türkiye and it is a different country to the one where he lived for 20 years ago. The Applicant also submits that due to his religion, he would not be accepted by his family in Türkiye and may become homeless. Given the length of his residence in Australia the Tribunal accepts that the Applicant has limited links (if any) in Türkiye and that he would have to readjust to life

in a country where he has not lived for a lengthy period of time. The Tribunal is prepared to accept that the Applicant may not be able to live with his family in Türkiye but it is not apparent whether or not he would be able to arrange independent living (for example, by leasing a place to live).

75. In his submission to the Tribunal the Applicant refers to his poor mental health as a result of his prolonged detention. He has been diagnosed with anxiety and adjustment disorder, he refers to having diabetes and high cholesterol and has been prescribed medication for these conditions. The Tribunal accepts that evidence.

76. The Applicant states in his evidence to the delegate that if he is removed from Australia, this could impact his financial support for his children if he is to lose his business. The Tribunal does not accept that claim on the basis of the very limited evidence before it concerning the Applicant's assets and ability to earn funds if he is to live in Türkiye or elsewhere. It is not sufficient to state that if the Applicant is to leave Australia, his financial situation (and his ability to support his children) would be impacted. The Applicant has not presented evidence of what employment he may have in Türkiye (if any) or what other means of support he may have or acquire. In his submission to the Tribunal the Applicant states that it would be difficult for him to find employment in Türkiye given his extensive criminal record in Australia and the lengthy absence from Türkiye. The Tribunal accepts that these matters, as well as the Applicant's mental health and particular characteristics may affect his future employment prospects but that does not necessarily mean that the Applicant will be unable to obtain gainful employment in Türkiye. The Applicant also submits that he would not be eligible for any government support in Türkiye and may be homeless but, as noted above, the Tribunal is not satisfied on the limited evidence before it that the Applicant may not be able to access gainful employment. Nevertheless, the Tribunal acknowledges there is a real possibility that the Applicant would have difficulty with obtaining employment and supporting himself in Türkiye. The Tribunal accepts that the Applicant will experience significant hardship, for a variety of reasons, if he is to return to Türkiye.

77. The Tribunal accepts the evidence that the Applicant has been paying child support to his children (and he provided a number of statements evidencing the payments), although the Tribunal is mindful that the Applicant has not paid child support since his incarceration and one of his sons has now turned 18. However, the Tribunal is not prepared to accept that if

the Applicant is to leave Australia, he would not be able to provide the financial support to his children.

78. Further, the Applicant has not presented satisfactory evidence to indicate that his children rely on the Applicant's support. There is little information before the Tribunal about the children's other sources of income (for example, from their mother, their own employment, government payments, support from other relatives, etc). The Applicant has not established that even if the financial support from the Applicant is withdrawn as a result of his visa being cancelled, this would adversely affect his children's financial circumstances.

79. The Applicant also states that if the cancellation of his visa is not revoked, this would 'mentally impact the children'. it is not clear to the Tribunal why that would be the case, given the Applicant's evidence that he and the children have been living in different countries since 2014 and there being no in-person contact between them since that time.

80. The Applicant states in his submission to the delegate that if he is to lose everything he had worked for, his wife and business and 'all credibility' and to be 'thrown on the streets of another country' with nothing would be devastating for his wife and family members. The Tribunal acknowledges that this may be the case, although it is also possible that his wife and family members would be devastated by the Applicant's repeated offending, as much as by the cancellation of his visa.

81. The Applicant's partner provided a number of statements, outlining the close relationship the Applicant has with her, her children and her father. She refers to her reliance on the Applicant and the support he provides for her and the devastating effect his departure from Australia would have on her. The Applicant told the Tribunal that if he is required to leave Australia, his wife will not travel to Türkiye with him, as she has lived her entire life in Australia, and his marriage would be destroyed, which would be devastating to him. Ms D also told the Tribunal that if the Applicant is to leave Australia, she would not travel with him. (This appears to contradict the Applicant's written comment to the delegate in his email correspondence of 6 August 2022 in which he seems to suggest that he and his wife can continue their lives overseas.)

82. The Applicant claims that his departure from Australia would cause significant emotional harm to his wife. Ms D told the Tribunal she would be 'shocked' and 'messed up' if the

Applicant was required to return to Türkiye, particularly given the other difficulties she has recently experienced in her life. The Tribunal acknowledges that may be the consequence if the Applicant's visa remains cancelled.

83. The Applicant also refers to the financial impact on his wife if he is removed from Australia and the business cannot continue. While the Tribunal accepts that if the Applicant is to leave Australia, his business is unlikely to continue operating, the Tribunal does not accept, on the limited evidence before it, that it would have adverse financial impact on his wife. In particular, the Applicant has not presented evidence that his wife is financially reliant on him and there is no evidence before the Tribunal how she has been able to meet her financial needs while the Applicant has been in detention. Indeed, Ms D's evidence to the Tribunal is that she has received financial support from her children. Similarly, the Applicant states that his business partners would be affected if his visa is cancelled but there is little independent probative evidence before the Tribunal to support that claim.

84. The Applicant told the Tribunal that if his children choose to return to Australia (being Australian citizens), he would not be able to play a role for them in Australia. Other than the Applicant's claim, there is no other evidence before the Tribunal to indicate that the Applicant's children intend to return to and live in Australia and the Applicant's evidence appears to be mere speculation. The Tribunal is also mindful that the Applicant claims to have maintained a meaningful relationship with his children, despite living in different countries since 2014. If that is the case, the Tribunal is of the view that the Applicant will be able to maintain the relationship even if they do not live in the same country.

85. The Tribunal acknowledges that if the Applicant were to be removed from Australia, there may be a significant impediment to him, as he has established himself in Australia and has little in Türkiye. Departure from Australia is likely to result in the closure of his business and in his submission to the Tribunal he suggests that it may also cause the end of his marriage, which he claims would be devastating to him.

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

***Impact on victims***

87. Ms D provided statements to the delegate, supporting the Applicant and his contribution to the marriage. She states that she needs the support of her husband and relies on him when she is stressed. Ms D states she does not want to 'lose everything'. Ms D provided a detailed declaration to the Tribunal in which she outlines the hardship she has experienced as a result of her separation from the Applicant and the effect that separation has had on her mental and general health. Ms D refers to her forgiveness of her husband and notes his remorse. She states that she would be 'shattered and heartbroken' if the Applicant was deported and would be concerned about his prospects in Türkiye, his mental health and his ability to support himself. Ms D refers to the financial and emotional hardship if her husband was deported.

88. The Applicant refers to the reasoning in *Viane v Minister for Immigration and Border Protection* [2018) FCAFC 116 emphasising the hardship that the cancellation of his visa would cause to his wife. The Tribunal accepts Ms D's evidence and generally accepts that significant hardship would be caused to her if the Applicant's visa is cancelled, particularly as it may lead to the break-up of the family unit.

89. There is no other evidence before the Tribunal concerning other victims of the Applicant's conduct including his first partners or others (if any) who may have been affected by his drug offending and his driving offending.

90. This consideration weighs somewhat in favour of revocation.

***Links to the Australian community***

91. The Applicant's immediate family in Australia comprises his partner and her children. His father in law passed away in August 2022. His biological children live in the UK and his parents live in Türkiye. The Tribunal accepts that the Applicant has meaningful family links to Australia.

92. The Applicant has been living in Australia for a period exceeding 20 years. He has been managing his business and refers to having made positive contribution to Australia (for example, he refers to doing voluntary work on the construction of a mosque). The Applicant presented several documents relation to the operation of his business which the Tribunal

accepts. The Tribunal accepts that the Applicant has business and social links in this country.

93. The Applicant refers to his relationship with his partner. In his revocation request the Applicant states that he met his partner in 2016 and they married in March 2017 and they plan to have children together. The Tribunal accepts that the Applicant continues to have a spousal relationship with his partner and that they intend to live together and hope to have children.

94. In his revocation request the Applicant refers to his contact with his two children (whom he had not seen since 2014) and he states that he provides the children with emotional and financial support. In the Tribunal's view, if the Applicant had been able to maintain a meaningful relationship with his children despite living in different countries and having no personal contact for eight years, he would be able to maintain the same type of contact whether he lives in Australia or elsewhere.

95. The Applicant has presented financial and other records relating to his business operations and refers to his voluntary work and the contribution he has made to the community. The Tribunal accepts that evidence. The Applicant states that he had employed several staff in his business but had to let them go due to Covid. He states that if he cannot remain in Australia, he would lose his business. The Tribunal is prepared to accept that evidence and accepts that the Applicant's Australian business is likely to be adversely affected if the Applicant is to leave Australia. There is nothing to suggest that the non-revocation of the visa would significantly compromise the delivery of a major project or of an important service in Australia.

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

97. The Applicant has raised a number of other issues in his written and oral evidence. The Tribunal has considered these claims, and the totality of the Applicant's circumstances, under the headings above.

## CONCLUSION

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

99. The Applicant concedes that his past offending was very serious and the Tribunal has formed the view that the Applicant did engage in serious offending, given the type of the offending and its repeated nature over a period of time. The Tribunal has formed the view that the protection of the Australian community, the expectations of the Australian community and the fact that offending involved family violence, all weigh against the revocation. That is, three of the primary considerations weigh against the revocation while the fourth one (best interests of the children) is neutral.

100. With respect to the other considerations, the Tribunal accepts that the Applicant has formed significant family, social, business and other ties to this country. The Tribunal acknowledges that the Applicant's wife and stepchildren remain in Australia. He has significant business links and intends to resume the operations of his business. These relationships will be affected by the Applicant's departure from Australia and for the reasons set out above, the Tribunal has found that there would be significant detriment to the Applicant and others if his visa remains cancelled. The Tribunal finds that the detriment if removed, and the links to the Australian community are factors that weigh strongly in favour of the revocation.

101. The Applicant also claims that the impact on victims (namely his present wife) is a factor that weighs in favour of the revocation, noting Ms D's evidence of her reliance on the Applicant and the hardship she would experience if he is to leave Australia. The Tribunal is prepared to accept that evidence and gives it considerable weight in favour of the revocation.

102. Overall, the Tribunal acknowledges that the other considerations are such that they favour the revocation. However, in the circumstances of this case, the Tribunal has decided to give greater weight to the three primary considerations of protection of the Australian community, the expectations of the Australian community and the fact that the repeated offending involved family violence. The Tribunal has determined that these weigh against the revocation. The Tribunal has decided that, in all the circumstances of this case, these primary considerations should be given greatest weight.

103. The Tribunal has decided that the decision under review should be affirmed.

**DECISION**

104. The Tribunal affirms the decision not to revoke the cancellation of the Five Year Resident Return Class BB Subclass 155 visa held by the Applicant.

*I certify that the preceding 104 (one hundred and four) paragraphs are a true copy of the reasons for the decision herein of Senior Member K Raif*

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

Associate

Dated: 30 January 2023

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|---|---|
| Date(s) of hearing: | **24 January 2023** |
| Counsel for the Applicant: | **Dr J Donnelly** |
| Solicitors for the Respondent: | **Ms S Hardie, HWL Ebsworth Lawyers** |