Administrative Appeals Tribunal

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Mohsen Mehrijafarloo
REPRESENTATIVE:	Dr Jason Donnelly
CASE NUMBER:	2218545
HOME AFFAIRS REFERENCE(S):	CLF2018/13334
MEMBER:	Kate Millar
DATE:	28 December 2022
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 050 (Bridging (General)) visa.

I, Senior Member, K. Millar certify that
this is the Tribunal's statement of decision and reasons

Statement made on 28 December 2022 at 12:29pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. The applicant is a citizen of Iran who arrived in Australia in 2013. He applied for a protection visa on 7 July 2017. His application for a protection visa was refused, and he is currently awaiting the hearing of his application to the High Court for special leave to appeal the refusal of his application.

2. Until 1 March 2018, the applicant held a Subclass 050 (Bridging (General)) ('BVE') visa pending the outcome of his protection visa application. This visa was cancelled on 1 March 2018 because he was charged with criminal offences.

3. On 14 December 2022, the applicant was again notified of the cancellation of his BVE, as the original notification of the cancellation of his visa on 1 March 2018 was defective and as a result the time to apply for a review of the decision to cancel his BVE had not commenced. On 16 December 2022 the applicant has applied to the Tribunal for a review of the decision to cancel his BVE.

4. The applicant appeared before the Tribunal on 22 December 2022 to give evidence and present arguments and was represented in relation to the review.

5. Under s 367 of the *Migration Act 1958* (Cth) (the Act) and r.4.27 of the Migration Regulations 1994 (the Regulations), the decision must be made, and the applicant notified of the decision, within 7 working days after the day on which the application is received. The application was received on 16 December 2022, and the decision and notification are required at the end of 29 December 2022.

6. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

BACKGROUND

7. The applicant is a citizen of Iran. His wife and two children live in Iran. He has not seen his youngest child, who was born after he left for Australia. The history of his time in Iran is the subject of his protection visa application. He does not have any family in Australia.

8. In Iran, he worked as a mechanic for 2 – 3 years in approximately 2008, and from 2010 or 2011 worked as a tailor until he left to come to Australia in 2013.

9. The applicant arrived in Australia by boat in July 2013, and said he was detained for 11 and a half months before being granted a bridging visa in 2014. He went to live in Melbourne, first in a share house and then with his co-accused Ibrahim. After being released from immigration detention he tried to find work with the assistance of Red Cross and Centrelink but was unsuccessful. In 2017 the applicant applied for a protection visa.

10. In February 2018 the applicant was arrested and remanded in custody, and his BVE was cancelled on 1 March 2018. On 13 December 2018, he was convicted of trafficking in a drug of dependence, possession of a drug of dependence, dealing with suspected proceeds of crime and committing an indictable offence while on bail and was sentenced to a term of imprisonment of 11 months.

11. After being released from prison in January 2019 he said was taken into immigration detention at Yongah Hill Immigration Detention Centre (YHIDC) for approximately 2 years,

before being placed on Christmas Island for approximately 15 months. He has been back at YHIDC for approximately two and a half months.

12. His application for a protection visa was refused in 2019. This decision was reviewed by the Immigration Assessment Authority and again refused. In 2021 both the Federal Circuit and Family Court and the Federal Court affirmed the decision to refuse his application for a protection visa.

13. The applicant has applied to the High Court for special leave to appeal the decision to refuse his protection visa. In the course of the hearing, a text message from his lawyer was forwarded to the Tribunal stating that his application for leave to appeal will be listed for oral argument in February 2023.

OFFENDING HISTORY

14. The applicant said at the time of his offending, he was lonely and had depression. He said people came to the house and they became friends, but they were not good friends as they had started using drugs. One day, one of the people said, "let's sell drugs so we can make money", and he made a mistake and fell in with this idea.

15. On asking him to confirm that he sold drugs to make money, the applicant said "yes". He said after a while when he got to know the person, he was offered to sell drugs. He said at the time he was using a lot of alcohol and some drugs and fell in with the idea. The drug he was using was methylamphetamine. At the time of his offending, he was on bail for drink driving and subsequently had his license suspended and was fined.

16. When he came to Australia, he said had not used drugs for 7 years, but started using again 6 months before he was arrested because he had bad friends and bad influences, and was using alcohol to cope with stress and depression.

17. The applicant provided the sentencing remarks of Judge Gaynor in *DPP v Mohsen Mehrijafarloo*[1]. The applicant pleaded guilty to once charge of trafficking in a drug of dependence and one charge of possessing a drug of dependence. He pleaded guilty to two summary offences; one of dealing with suspected proceeds of crime, and one of committing an indictable offence while on bail.

18. The sentencing judge describes the offending as follows:

> *2. On the morning of 15 February 2018, Victoria Police Echo Taskforce members executed a search warrant at your home at* [address]*, and also in relation to your car which was parked in the driveway. You were awoken and answered the front door. Another man, Ibrahim Hashimzade, who had stayed overnight, was found in the living room. While police were there, you helped them to interpret for Mr Hashimzade as to what was happening.*
>
> *3 In your house, police found the following items: (1) next to the front door, a press-sealed bag containing 31.8 grams of methylamphetamine located inside a shoe on a shoe rack, (2) in your bedroom, a press-sealed bag containing 17.5 grams of methylamphetamine concealed in a tissue box, (3) a second presssealed bag in your bedroom, containing 4.6 grams of methylamphetamine concealed in a black box on a chair, (4) another press-sealed bag in your bedroom, containing 1.6 grams of methylamphetamine inside a purple medication box and, (5) $600 in your wallet.*
>
> *4 In Mr Hashimzade's wallet another press-sealed bag containing 0.4 grams of methylamphetamine and $780 in cash was found.*

[1] [2018] VCC 2144 ("Sentencing remarks")

5 *In the kitchen, there were: (1) four vials containing white liquid, found on analysis to be 14.9 grams of a mixed substance containing Stanozolol, an anabolic steroid, (2) a pale yellow liquid in the fridge, found on analysis to be 17.7 grams of a mixed substance containing Methenolone, also an anabolic steroid and, (3) in a grey pouch located on a pantry shelf, 57 blue tablets, found on analysis to contain 7.5 grams of mixed substance containing Methandienone, also an anabolic steroid.*

6 *Inside a beige coloured shoulder bag discovered inside an internal storage compartment in the living room couch, police found: (1) a press-sealed bag containing 56.7 grams of methylamphetamine, (2) a second press-sealed bag containing 44.7 grams of methylamphetamine, (3) four press sealed bags containing a combined total of 96.2 grams of methylamphetamine, (4) a presssealed bag containing a dark brown compressed powder, found on analysis to contain 8.4 grams of a mixture including morphine and, (5) numerous empty press-sealed bags, a box of staples, cotton thread and a silver spoon.*

7 *In the laundry, police found a set of electronic scales on top of the bench. Inside your car, a BMW X3 wagon in the driveway, police found: (1) another presssealed bag containing 4.1 grams of methylamphetamine and, (2) $8222 in the driver's side door pocket. Enquiries with VicRoads revealed that the car was registered to you, with an acquisition date of 16 October 2017 and a disposal date of 5 February 2018, after which the car was registered to one* [name].

8 *You and your co-offender were arrested and taken to Melbourne West police station where, in a record of interview, you made a number of excuses in relation to the items found by police and made no admissions. Ultimately, analysis revealed that the 12 separate bags of methylamphetamine recovered contained a mixture which contained 257.6 grams. The commercial quantity threshold for such a mixture is 250 grams. The trafficable quantity is 3 grams as a mixture.*

9 *The purity of the mixture ranged from 77 to 92 per cent. The weight of pure methylamphetamine across the 12 separate bags was 213.3 grams. The commercial quantity threshold for pure methylamphetamine is 50 grams. You are, however, to be sentenced for trafficking simplicter. Your actions in possessing this amount of methylamphetamine for sale underlie Charge 1 on the indictment, trafficking in a drug of dependence.*

10 *In relation to the other substances discovered, that is the Stanozolol, the Menandienone, the Methenolone and the morphine, their weights were 14.9 grams mixed, 7.5 grams mixed, 17.7 grams mixed and 8.4 grams missed, respectively. The relevant trafficable quantity in relation to each, being 500 grams as a mixture and 8.5 grams mixed in relation to the morphine, the pure morphine content discovered, being less than 2 grams, which was the relevant trafficable quantity.*

11 *Charge 2, as I said, is a rolled-up charge and relates to your possession of the three different types of anabolic steroids, as well as morphine and the tablets. You possession of $8820 underlies the summary charge of dealing with suspected proceeds of crime, and at the time of these offences, you were on bail for a drink driving matter, having entered that bail on 23 January 2018, and this underlies the charge of committing an indictable offence whilst on bail.*

SECTION 375A AND 376 CERTIFICATES

19. The Department file which was received 21 December 2022 contained certificates purportedly issued under s 375A and 376 of the Act. These certificates covered all of the documents on the Department file with the exception of once copy of the notice of intention to cancel the visa, and one copy of the cancellation decision record.

20. A copy of both certificates was provided to the applicant before the hearing, and he was invited to comment on the validity of the certificates.

21. A valid certificate issued under s 376 of the Act has the effect that the Tribunal may have regard to any matter contained in the document or to the information and may, after considering any advice from the Secretary, disclose the information to the applicant or any other person who has given oral or written evidence to the Tribunal.

22. The certificate issued on the applicant's file under s 376 of the Act included documents that had been issued to, or were known to, the applicant. The certificate issued under s 376 of the Act states the disclosure would be contrary to the public interest because it would disclose or enable the person to ascertain the source of confidential information, or and where the information was provided 'in confidence' the provider of the information has not consented to the disclosure of the information.

23. The information and documents covered by this purported certificate included the notification of the cancellation of his visa, and a copy of his passport. Some information from external organisations is not marked as provided in confidence but is instead marked 'official use only'. Information known to the applicant, such as that he was re-notified of the decision to cancel his visa and his signed acknowledgment of the notification of the cancellation of his visa is included. The Department purported to redact names of all Department officers and police officers. The Tribunal does not accept that department officers are confidential sources of information or have a quality of confidence.[2]

24. In these circumstances, the Tribunal does not consider this a valid certificate.

25. A certificate issued under s 375A of the Act allows the Minster to certify in writing that the disclosure of information other than to the Tribunal of any matter contained in the documents or the information would be contrary to the public interest for any reason given in the certificate. The certificate must include a statement that the document or information must only be disclosed to the Tribunal. If a valid certificate is provided, the Tribunal must do all things necessary to ensure that the document or information is not disclosed to any person other than the member of the Tribunal as constituted for the purposes of the review.

26. In a similar fashion to information purportedly covered by the s 376 certificate, information purportedly covered by the certificate issued under s 375A is marked 'sensitive' or 'private' where it relates to the applicant. It is not marked confidential. Information covered by the certificate is information that is known to the applicant such as his own criminal history and court outcomes. Given this information is mixed with other information, the Tribunal does not accept this certificate is valid.

CONSIDERATION OF CLAIMS AND EVIDENCE

27. This is an application for review of a decision dated 14 December 2022 made by a delegate of the Minister for Home Affairs to cancel the applicant's BE under s 116 of the *Migration Act 1958* (Cth) (the Act).

28. Under s 116 of the Act, the Minister may cancel a visa if satisfied a ground in that provision is made out. If satisfied that a ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

[2] See *SZMTA v MIBP* [2017] FCA 1055 at [52]–[54

Does the ground for cancellation exist?

29. A visa may be cancelled under s 116(1)(g) of the Act if the Minister is satisfied a prescribed ground for cancelling the visa applies to the applicant. The prescribed grounds for cancellation are set out in r.2.43 of the Migration Regulations 1994 (the Regulations).

30. Regulation 2.42(p)(ii) specifies that in the case of a holder of a Subclass 050 (Bridging (General)) or Subclass 051 (Bridging (Protection Visa Applicant) visa – that the Minister is satisfied that the holder (among other things) has been charged with an offence against the law of the Commonwealth, a State, a Territory or another country.

31. The applicant held a Subclass 050 (Bridging)(General)) visa. He was charged with several offences against the laws of Victoria on 15 February 2018.

32. The applicant does not dispute he was charged with offences. He has since pleaded guilty and has been convicted of trafficking in a drug of dependence, possessing a drug of dependence, dealing with suspected proceeds of crime, and committing an indictable offence while on bail.

33. At the time his visa was cancelled, the applicant had been charged with offences against the laws of a State, and the ground for cancellation in s 116(1)(g) and r.2.43(p)(ii) exists. As that ground does not require mandatory cancellation under s 116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

34. In considering whether a Bridging E visa should be cancelled because of the prescribed grounds in reg 2.43(1)(p) or (q) the Tribunal must comply with *Direction No.63, Bridging E visas - Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q),* (the Direction) made under s 499 of the Act.

35. The purpose of the Direction is set out in cl.4.1(3) and includes General Guidance at cl.4.2 which states:

> (1) The Government is committed to ensuring that non-citizens given the privilege of living in the Australian community on Bridging E visas behave in a manner that is in accordance with Australian laws and which respects Australia's community values and standards of democracy, multiculturalism, respect, inclusion, cohesion, tolerance, and cooperation. The principles below are of critical importance in furthering that objective.
>
> (2) The Principles in this Direction provide a framework within which decision-makers should approach their task of deciding whether to cancel a non-citizen's Bridging E visa under section 116(1)(g) because a prescribed ground at regulation 2.43(1)(p) or (q) applies to the holder. The relevant factors that must be considered in making such decisions are identified in Part two of this Direction.

36. Clause 4.3 sets out principles, and specifies:

> (1) Mandatory detention applies to any non-citizen who arrives and/or remains in Australia and who does not hold a visa that is in effect.
>
> (2) All non-citizens residing in the community are expected to abide by the law. This is particularly relevant where the Minister for Immigration and Border Protection has used his personal non delegable power to grant a non-citizen in immigration detention a visa in the public interest.

(3) The Australian Government has a low tolerance for criminal behaviour by non-citizens who are in the Australian community on a temporary basis, and do not hold a substantive visa. In the case of a non-citizen who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention, it is a privilege and not a right to be allowed to live in the community while their immigration status is being resolved.

(4) In order to effectively protect the Australian community and to maintain integrity and public confidence in the migration system, the Government has introduced measures that support the education of Bridging E visa holders about community expectations and acceptable behaviour. These measures encourage compliance with reasonable standards of behaviour and support the taking of compliance action, including consideration of visa cancellation, where Bridging E Visa holders do not abide by the law.

(5) Bridging E visa holders who have been found guilty of engaging in criminal behaviour should expect to be denied the privilege of continuing to hold a Bridging E visa while they await the resolution of their immigration status. Similarly, where Bridging E visa holders are charged with the commission of a criminal offence or are otherwise suspected of engaging in criminal behaviour or being of security concern, there is an expectation that such Bridging E visas ought to be cancelled while criminal justice processes or investigations are ongoing.

(6) The person's individual circumstances, including the seriousness of their actual or alleged behaviour, and any mitigating circumstances are considerations in the context of determining whether a Bridging E visa should be cancelled.

How to exercise the discretion

37. Clause 5.1 of the Direction sets out how to exercise the direction and specifies:

(1) Informed by the Principles in paragraph 4.3, a decision-maker must take into account the primary and secondary considerations in Part two of this Direction, where relevant, in order to determine whether a Bridging E visa holder should have their visa cancelled.

(2) Both primary and secondary considerations may weigh in favor (*sic*) of, or against, cancellation of a Bridging E visa.

(3) The primary considerations should generally be given greater weight than any secondary considerations.

(4) One primary consideration may outweigh the other primary consideration.

(5) In applying the considerations (both primary and secondary), information and evidence from independent and authoritative sources should be generally be given greater weight than information from other sources.

Primary considerations

38. The primary considerations are:

- the Government's view that the prescribed grounds for cancellation at reg 2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance against these regulations should be considered for cancellation, in accordance with the discretionary cancellation framework; and

- the best interests of any children under the age of 18 in Australia who would be affected by the cancellation.

The Government's view that the prescribed grounds for cancellation at reg 2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance should be considered for cancellation

39. Clause 6.1 sets out the following:

> (1) In weighing the Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously, decision-makers should have regard to the principle that the Australian Government has a low tolerance for criminal behaviour, of any nature, by non-citizens who are in the Australian community on a temporary basis, and who do not hold a substantive visa. This is particularly the case for non-citizens who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention while their immigration status is being resolved.

40. In this case, the applicant has been charged with several offences. He was convicted of trafficking in a drug of dependence, possession of a drug of dependence, dealing with the suspected proceeds of crime and committing an indictable offence while on bail.

41. It is specified in the Direction that the Australian Government has a low tolerance for criminal behaviour from people who are in the community on a temporary basis. It was conceded, and the Tribunal finds, that this consideration must weigh in favour of cancelling the applicant's visa.

The best interests of any children under the age of 18 in Australia who would be affected by the cancellation.

42. The applicant has children who are in Iran. It is not suggested the best interests of a child under 18 who is in Australia will be affected by the decision.

43. This primary consideration does not apply.

Secondary considerations

44. The secondary considerations are:

- the impact of a decision to cancel the visa on the family unit;
- the degree of hardship that may be experienced by the visa holder if the visa is cancelled;
- the circumstances in which the ground for cancellation arose;
- the possible consequences of cancellation; and
- any other matter considered relevant.

The impact of a decision to cancel the visa on the family unit

45. Paragraph 7(1)(a) provides as an example whether the cancellation will result in the temporary separation of a family unit. This does not apply in this case.

46. The applicant's family are in Iran and include his wife and two children, the youngest of whom he has not met.

47. The applicant said the internet has been suspended in Iran and he finds it more difficult to contact his family as he is unable to speak with them over the internet. He said when they were able to communicate over the internet and his wife and eldest child could see that he was in detention, they were distressed by seeing him in detention. This is no longer possible, and he contacts them when he can by telephone. His access to telephone and to the internet are the same whether or not he is in immigration detention, and he is able to maintain contact with his family by telephone, or over the internet when this is available.

48. He reports his wife has attempted to end her life in the past, and it was submitted on his behalf that this weighs against cancelling his visa. The applicant's younger child was born after he left Iran, and he has not spent any time with his younger child in person.

49. The applicant said he wants to work to provide support for his family in Iran but has not been employed since his arrival in Australia. Her provided a letter from a friend stating he will provide the applicant employment in his carpet laying business, and says he also has another friend who could offer him work. The applicant was last employed in Iran as a tailor and does not have qualifications or experience in carpet laying.

50. The Tribunal finds that the applicant's wife and older child suffer distress due to his detention and would benefit if he is able to provide financial support. If his visa remains cancelled, he will remain in immigration detention, and they will continue to experience this distress. The applicant will lose the opportunity to obtain employment and provide financial support to his family in Iran.

51. As his contact with his family by telephone and over the internet occur whether or not he is in detention, and as he has not worked and provided financial support through working in Australia to his family, this weighs slightly against cancelling his visa.

The degree of hardship that may be experienced by the visa holder if the visa is cancelled

52. If the visa is cancelled, the applicant will remain in immigration detention until his appeal rights are exhausted, or he is granted a visa.

53. The applicant lodged an appeal with the High Court on 27 October 2021, and his application for leave is pending. In the course of the hearing, the Tribunal was advised that the High Court has indicated it will hear oral submissions on his leave application in February 2023. There is little to be gained in speculating about the outcome of the leave application before the High Court. If the matter is ultimately remitted, there may be a lengthy period before the application is finally determined. If special leave is refused, the applicant will be liable to removal from Australia.

54. The decision to cancel his BVE does not itself lead to deportation, nor does the decision to cancel his visa lead to indefinite detention. If the visa remains cancelled, the applicant will be detained until his protection visa application is finally determined.

55. If his visa remains cancelled, the applicant will not be able to apply for a further bridging visa,[3] and will remain in immigration detention until he is either granted a visa or removed from Australia.

[3] Cluse 1305(3)(g) of Schedule 1 to the Regulation specifies that for a valid application for a Class WE (Bridging E) visa, the applicant has not previously held a Bridging E (Class WE) visa that has been cancelled on a ground specified in paragraph 2.43(1)(p) or (q).

56. In looking at the hardship suffered by the applicant by being detained, the applicant claims to suffer from stress and depression which is treated by taking melatonin and seeing a psychologist. He said he was unable to obtain his medical records prior to the hearing.

57. The sentencing remarks state that 6 months prior to being incarcerated he attended a GP for a stomach upset and was prescribed an anti-depressant Lexapro.[4] The sentencing remarks also record the report of a psychiatrist that there was a significant risk with detention and deportation the applicant would suffer an escalation of his depression and anxiety and would potentially be a higher suicide risk. The sentencing judge accepted that any term of imprisonment imposed would weigh more heavily on the applicant than other prisoners because of the depressive disorder he suffers and the prospect of deportation.[5]

58. The sentencing remarks state that the applicant has refused antidepressant medication.[6] The applicant states he was in prison at that time and thought he could manage, but while he has been in immigration detention, he has always seen a psychologist. The applicant said when he was detained on Christmas Island a psychiatrist recommended a stronger medication, which he refused because he said he thinks these are addictive and that the medication would make him sleepy and tired. He said he asked for a sleeping tablet, but this was refused.

59. He currently takes melatonin and says this means he does not get nightmares. He said he saw a nurse came to ask about his mental health the day before the hearing, after being at YHIDC for two and a half months. The concerns of the psychiatrist at sentencing of an escalation of his depression and anxiety and increased suicide risk are not reflected in the applicant's account of his current treatment or therapy. He has seen a psychiatrist but declines medication that is recommended and states he is satisfied with melatonin which prevents nightmares.

60. He has not seen a psychiatrist since returning to Yongah Hill Immigration Detention Centre He states he was offered anti-depressant medication but has refused. It was unclear when he had seen a psychologist or if he had ongoing treatment with a psychologist.

61. While it is accepted that the applicant suffers a degree of depression, his sleep is managed by taking melatonin. It does not appear he has ongoing or regular treatment for his mental health.

62. The applicant's representative noted that the applicant's jaw was broken in an assault while he was in prison. This is also considered by the sentencing judge.[7] The sentencing judge states surgery was required and at that time he experienced numbness over half his face which was likely to last for about 12 months. It is submitted in light of this injury safe and stable accommodation is essential. The applicant said people in detention are not good people and he does not want to stay in detention.

63. The applicant reports his wife and eldest daughter are distressed at seeing him in detention, and his representative submitted it was relevant that his wife has attempted suicide in the past. The Tribunal finds the distress of his wife and children and his inability to provide financial support are likely to cause the applicant distress.

64. The applicant has now been in immigration detention for nearly four years. This may be contrasted with the sentence of imprisonment provide of 11 months.

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[4] Sentencing remarks [50]
[5] At [61]
[6] At [53]
[7] At [40]

65. It is accepted that the applicant suffers depression and anxiety which is exacerbated by being in immigration detention. He was assaulted in prison which may add to this anxiety

66. The Tribunal considers the degree of hardship that may be experienced by the applicant weighs moderately against cancelling his visa.

The circumstances in which the ground for cancellation arose;

67. Paragraph 7(1)(c) requires a decision maker to consider:

> the circumstances in which the ground for cancellation arose (such as whether there are mitigating factors that may be relevant, as well as the seriousness of the offence …).

(i) Mitigating circumstances

68. The applicant refers to mitigating circumstances stated in the sentencing remarks, in particular:

- *I pleaded guilty to one charge of trafficking in a drug of dependence and one charge of possessing a drug of dependence. I also pleaded guilty to two summary charges (one charge of dealing with suspected proceeds of crime and one charge of committing an indictable offence whilst on bail).*
- *I have no prior or subsequent criminal convictions.*
- *I was remanded in custody following my arrest on 15 February 2018.*
- *My pleas of guilty were entered at the first reasonable opportunity.*
- *I have suffered depression and anxiety. I was previously on the antidepressant Lexapro.*
- *I previously had a very serious drug addiction problem.*
- *During my time in prison, I ceased drug use and undertook alcohol and drug programs and other programs such as cleaning operations and occupational health and safety.*
- *During my time in prison, I was the victim of a serious assault from another prisoner in which my jaw was fractured. Surgery was required and I experienced numbness over half my face, which required ongoing medical attention.*
- *I was employed during my time in prison.*
- *The learned sentencing judge found that I had used my time in prison profitably.*
- *The learned sentencing judge noted: '[I have] been through a significant degree of trauma associated with significant mental health difficulties and had suffered from a major depressive disorder'.*
- *Dr Cidoni opined that I had: 'post-traumatic stress disorder symptoms and a history of not insignificant alcohol use and methamphetamine use, saying [I]*

had a disorder with each, as well as a history of methamphetamine induced psychotic disorder'.

- *The sentencing judge found that I trafficked in methamphetamine as a means of supporting my drug habit.*
- *The learned sentencing judge accepted that any term of imprisonment imposed will weigh more heavily upon me (both by reason of the depressive disorder that I suffer and the prospect of deportation) than the normal prisoner.*
- *The learned sentencing judge accepted that I had been the subject of prolonged trauma. The sentencing judge accepted that I had an ice addiction. The sentencing judge accepted I had a good work history.*
- *The sentencing judge accepted that I had "fair prospects of rehabilitation".*
- *The sentencing judge also accepted that I was remorseful for my offending.*

69. Relevant mitigating factors specified in paragraph 7(1)(c) are those that that relate to the circumstances in which the ground for cancellation arose. The ground for cancellation, being charged with a criminal offence, did not arise from his conduct after he was charged with the offences or after he was sentenced. His conduct after being charged and in sentencing, while being mitigating factors for sentencing, are not mitigating factors relevant to the circumstances in which the ground for cancellation arose.

70. Consideration of the circumstances in which the ground for cancellation arose are contained in the sentencing remarks. The sentencing judge stated:

> *… there are number of extenuating circumstances. I am satisfied that you have been subjected to prolonged trauma. Your brother has essentially been on death row for more than decade. You, yourself, were subjected to threats so serious that you were forced to leave your pregnant wife and young daughter.*
>
> *You endured a harrowing sea voyage. On your release in the Australian community, you have had to deal with the knowledge of your wife's distress and your inability to assist her as well as your own inability to find meaningful activity. It is not surprising that the major depressive disorder which you had previously suffered from then recurred.*
>
> *In those circumstances, therefore it is also not surprising that there was a recurrence of the alcohol abuse disorder and then a resumption of the ice addiction from which you had previously freed yourself. Your descent then into drug trafficking in order to support your habit, which had reached such proportions that you developed a psychotic reaction to it, was also not unexpected.*

71. The applicant provided the decision of the Immigration Assessment Authority (IAA). The IAA reviewer did not accept his younger brother has been incarcerated for 13 years or had been threatened with execution. The applicant advises his appeals to the Federal Circuit and Family Court and the Federal Court were dismissed. The applicant did not provide the decision of either Court in his matter. There is at least a doubt about his claimed trauma, and as the IAA is a specialist review body tasked to assess claims for protection, weight is placed on this finding. The applicant's application for special leave to the High Court does not refer to his brother.

72. The IAA review accepted that the applicant had been briefly detained and lashed for drinking alcohol in Iran. It also accepted he was briefly detained and punished for drinking alcohol,

briefly detained on suspicion of involvement in a protest and harassed and questioned on occasion by the *Basij* as many youths are in Iran.

73. On balance the Tribunal accepts that the is a degree of trauma that provides a mitigating factor for his conduct. It is accepted that the distress of his wife placed additional stress on the applicant in the community, and that he turned to the use of drugs and alcohol. It is accepted that he turned to trafficking drugs to support his drug habit.

(ii) Seriousness of the offence

74. The sentencing judge states:

> *The learned prosecutor correctly pointed out that whilst you are only facing a drug of trafficking simpliciter, it nevertheless involved amounts well above (in relation to the methylamphetamine) the commercial quantity applicable to that drug. As is always the situation in cases of this kind, the court must have regard to the havoc and misery wreaked by the criminal distribution of this drug.*
>
> *The prosecution correctly submitted that this was a serious example of trafficking in methylamphetamine, and the general deterrence is a particularly important principle in the sentencing exercise before me.*

75. The amount of methylamphetamine recovered was a mixture 257.6 grams, with a commercial quantity being 250 grams. The trafficable quantity is 3 grams as a mixture.[8] The applicant was found with approximately 85 times the amount that would be a trafficable quantity. The weight of pure methylamphetamine was 213.3 grams and the commercial quantity for pure methylamphetamine is 50 grams. The applicant was sentenced for trafficking.[9] The applicant was also sentenced for possession of stanozolol, menandienone, methjenolone and morphine. The sentencing judge noted the amount of morphine exceeded the trafficking amount.[10] The amount of the substances means that the offending is regarded as vey serious.

76. Having taken into account mitigating factors and the seriousness of the offence, the Tribunal considers the circumstances in which the ground for cancellation arose weighs moderately in favour of the visa being cancelled.

The possible consequences of cancellation

77. Under paragraph 7(1)(d) a decision maker is to consider the possible consequences of cancellation, including but not limited to whether cancellation could result in indefinite detention, or removal in breach of Australia's non-refoulement obligations, noting that a decision to cancel a Bridging E visa does not necessarily represent a final resolution of a person's immigration status.

78. The applicant is unable to apply for a further Bridging Visa E due to the operation of Items 1305(3)(f) and (g) of Schedule 1 of the Regulations and will be detained until he is either granted a visa or removed from Australia.

79. The consequence of the cancellation of the applicant's visa is that he will remain in immigration detention until his protection visa application is finally determined. The consequences of cancellation of his BVE do not include indefinite detention, as his detention turns on his application to the High Court. It is accepted the applicant could be subject to lengthy detention if his appeal is successful and the matter is remitted for reconsideration.

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[8] Sentencing remarks [8]
[9] Ibid [8] – [9]
[10] ibid [10] – [11]

80. If his BVE is not cancelled and special leave is refused or the decision to refuse his protection visa is affirmed, if it is not cancelled his BVE will cease within 28 days.[11]

81. The consequences of a decision to cancel his bridging visa do not include removal in breach of Australia's non-refoulment obligations, as he will not be removed until his application for a protection visa is finally determined. The application for a protection visa includes a determination of non-refoulement obligations as expressed in the Act, and it is the decision on his application for a protection visa that is determinative of whether Australia owes him non-refoulment obligations.[12]

82. The consequences of cancellation are that the applicant will be detained, which is the outcome foreseen by Direction 63 for being charged with or convicted of an offence.

Any other matter considered relevant

83. The applicant, directly or by inference raises several matters in his material about the length of his detention and his health, conduct, accommodation, future work opportunities and Christianity.

Length of detention

84. The applicant has now been in detention since he was released from prison in January 2019, a period of nearly 4 years. This is the context of a sentence of imprisonment of 11 months. It was submitted that the length of his detention left it open to the Tribunal to consider that the primary considerations were outweighed by the countervailing consideration that he has been in immigration detention for a lengthy period.

85. While the Tribunal acknowledges the applicant has been in detention for a lengthy period, it is bound by Direction 63, and in particular the principle in cl. 4.3(5) that BVE holders who have been found guilty of engaging in criminal behaviour should expect to be denied the privilege of continuing to hold a BVE while they await resolution of their immigration status.

Health

86. Apart from his mental health, which is addressed above, the applicant said he has kidney stones and problems with his teeth, which are being addressed while he is in immigration detention.

Conduct

87. The applicant pleaded guilty at his criminal trial. He does not have other criminal offences, but says he was fined and his license suspended for drink driving. He states he does not use drugs or alcohol despite these being available in prison and in immigration detention. The sentencing judge states he has studied English while in prison and it has improved considerably.[13] He was employed in a position of trust in the prison.[14]

88. There is nothing before the Tribunal to suggest his conduct before the Court, in prison or in immigration detention is other than favourable.

Rehabilitation

[11] cl.050.5 of Schedule 2 to the Migration Regulations 1994
[12] See *Plaintiff M1/2021* [2022] HCA 17
[13] Sentencing remarks, [39]
[14] Ibid [41]

89. The applicant points to the comments of the sentencing judge that he had fair prospects of rehabilitation.

90. The applicant provided a certificate of completion of a “ICE and me” dated 31 October 2018. The certificate states it incorporated the following topics:

    a. What is ICE

    b. Effects of ICE use

    c. Triggers for ICE use

    d. Coping Strategies

    e. Harm minimisation

    f. Barriers to reducing ICE use

    g. Relapse prevention strategies

    h. Setting goals for future ICE use

91. The applicant also provided a certificate of completion for “Alcohol and me” with the following topics:

    a. What is alcohol

    b. Problematic Alcohol use

    c. Safe, Abuse and Dependent Alcohol use

    d. Effects of Alcohol

    e. Impacts of Alcohol

    f. Considering Change

    g. Harm minimisation

    h. Treatment options for alcohol abuse

92. These courses were completed in 2018, and the applicant has not undertaken other courses since. He said his mind is now clear of drugs and alcohol. These courses comprised 4 – 5 sessions conducted over a month, with each session 1 – 1 ½ hours. He states he has stayed clean in detention, has learned how to deal with his issues and has learned his lesson.

93. The applicant states he has not used drugs while in prison or in immigration detention despite drugs being readily available. While he acknowledged that he has not been tested for drugs while in immigration detention, it was submitted there is no positive evidence that he has taken drugs and reliance should be placed on his oral evidence.

94. The applicant provided a certificate stating he completed the unit “prepare simple budgets” in 2018 of a Certificate 1 in Access to Vocational Pathways, a certificate showing he completed “participated in workplace safety arrangements” for a Certificate II in Cleaning Operations in

2018, and “Use hygienic practices for food safety” from a Certificate ii in Kitchen operations in 2018.

95. The applicant was subject to a Community Corrections order which has expired. Conditions on this order include that he was to undertake drug and alcohol treating and counselling and treatment for his mental health as specified by a corrections officer. However, as he has been in immigration detention no counselling or treatment have been specified and no testing has been conducted. If released into the community he will not be subject to supervision.

96. The Tribunal accepts the applicant has undertaken limited rehabilitation but now states he is free from alcohol and drugs. He has undertaken some vocational training. Any ongoing needs for rehabilitation or treatment for his mental health will not be supervised if he is released into the community.

Accommodation and support

97. The applicant provided a statement from Ms Somaieh Vafsi and Mr Soheil Ezati, who offered to provide the applicant with accommodation until he has established his life. Mr Ezati states he has known the applicant since they were both children in Iran and they are very close. Mr Ezati states that the applicant is a family man, a decent person and has a vey good character. He states he believes the applicant has learned his lesson and is no danger to society. He states he and his wife are happy to help the applicant in the future, no matter how long it takes.

98. The applicant states that Ms Vafsi and Mr Ezati are aware of his convictions. He said there was some relation with Ms Ezati and Ibrahim, his co-accused, but this was a long time ago. Ms Vafsi and Mr Ezati were not made available to give evidence, however the applicant said they could be contacted.

99. The Tribunal accepts the applicant has been offered accommodation if he is released from immigration detention, but as he did not call Ms Vafsi or Mr Ezati to give evidence it is difficult to know any limitations on their endorsement of his character, their knowledge of the extent of his offending, or the basis on which they have formed their views.

Future work opportunities

100. The applicant provided a statement from Mr Mojtaba Sharifi Targhe who states he has known the application since 2015 and is a close friend. He states he is fully aware of his criminal convictions and believes he is of good character. He states the applicant has been through a difficult time during his prolonged immigration detention and has struggled with his mental health being away from his family and children for almost 10 years. Mr Targhe states he believes the applicant if returned to the community would be an outstanding and contributing member to the community. He states that if the applicant is returned to the community, he will provide him employment in his carpet laying business; and can assist him with accommodation until he establishes himself.

101. The applicant has not worked in carpet laying and has not worked since his arrival in Australia.[15] The Tribunal acknowledges his friend states he can offer work, but against his work history does not consider is strongly in his favour.

[15] At [34]

Christianity

102. The applicant provided a certificate of baptism dated 17 March 2019, and letter from Rev. Katrina Holgate dated stating “he tells us he became Christian during 2018 and then was baptised in 2019. He has been attending our Anglican session fairly regularly during the time he has been at YHIDC (excluding the time he was in CI)”. Rev Holgate continues “it is our hope that Mohsen will be granted a visa and released into the community in Australia”.

103. He also provided a letter from Mr David Shaw and Ms Lorraine Shaw dated February 2020 stating he attended bible meetings. This letter is dated February 2020. It recommends he is released into the community as soon as he can be.

104. The Direction states that primary considerations should generally be given greater weight than any secondary considerations, one primary consideration may outweigh the other primary consideration and information from independent and authoritative sources should generally be given greater weight than information from other sources.

105. Of the other matters raised by the applicant, the Tribunal considers these were somewhat against cancelling his visa.

CONCLUSION

106. The Tribunal has found that the primary consideration regarding the Government’s view weighs in favour of cancelling the applicant’s visa, and the best interests of children in Australia does not apply. In accordance with cl 5.1(3) primary considerations should generally be given greater weight than any secondary considerations.

107. Of the secondary considerations the impact on his family, the hardship experienced by the applicant and the consequences of cancellation weigh against cancelling his visa. The circumstances in which the ground for cancellation arose weighs in favour of cancelling his visa.

108. Other matters issues raised by the applicant include the length of his detention, his conduct, rehabilitation undertaken, future work opportunities, accommodation in the community and his Christianity. The Tribunal considers these matters weigh somewhat against cancelling his visa.

109. Having regard to the circumstances as a whole, and applying the General Guidance in cl.4.2, the principles in cl.4.3 of the Direction and using the instructions on how to exercise the discretion in cl.5.1 of the Direction, the Tribunal has concluded that the applicant’s BVE should be cancelled.

DECISION

110. The Tribunal affirms the decision to cancel the applicant’s Subclass 050 (Bridging (General)) visa.