Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2019/0235**
Re:	**Narada Nathanson**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Theodore Tavoularis**
Date of decision:	**2 March 2023**
Date of written reasons:	**31 March 2023**
Place:	**Brisbane**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **sets asides** and **substitutes** the decision made by the delegate of the Respondent dated 8 January 2019 to not revoke the cancellation of the Applicant's visa with a decision that the Tribunal exercises the discretion conferred by section 501CA(4) of the *Migration Act 1958* (Cth).

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

Senior Member Theodore Tavoularis

Catchwords

MIGRATION – Non-revocation of a mandatory cancellation of Applicant's Class TY (Subclass 444) Special Category (Temporary) visa – where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 90 – decision under review set aside and substituted

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)
Family Law Act 1975 (Cth)
Migration Act 1958 (Cth)
Migration Regulations 1994 (Cth)

Cases

PGDX and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1235
Tera Euna and Minister for Immigration and Border Protection [2016] AATA 301
Walker v Minister for Home Affairs [2020] FCA 909

Secondary Materials

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

REASONS FOR DECISION

Senior Member Theodore Tavoularis

31 March 2023

INTRODUCTION AND BACKGROUND

1. Narada Nathanson ('the Applicant') is a 39-year-old male, born in Zimbabwe in November 1983. He is a citizen of New Zealand. The Applicant arrived in Australia on 11 May 2010.[1] He spent about three weeks outside of Australia between 18 September 2013 and 7 October 2013, but apart from that, all the rest of his time since his initial arrival has been spent in Australia.[2]

2. The procedural history of the matter appears thus:

- 7 October 2013: the Applicant was granted the subject visa;[3]
- 6 August 2018: the Applicant's visa was mandatorily cancelled;[4]
- 23 August 2018: the Applicant sought revocation of the mandatory cancellation decision;
- 8 January 2019: a delegate of the Respondent[5] refused to revoke the mandatory cancellation decision;[6]
- 15 January 2019: by application to this Tribunal, the Applicant sought review of the decision refusing to revoke the mandatory cancellation of his visa;
- 4 April 2019: following a hearing held on 21 March 2019, this Tribunal (differently constituted) affirmed the delegate's decision and refused to revoke the mandatory cancellation decision;

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[1] Exhibit G1 (Remittal bundle (G1 – G13; H – H33) G11, page 118.

[2] G1, p 118.

[3] Class TY Subclass 444 Special Category (Temporary) visa. Hereinafter referred to as '*the visa'*.

[4] Pursuant to s 501(3A) of the *Migration Act 1958* (Cth). Hereinafter referred to as '*the Act'*.

[5] The Minister for Immigration, Citizenship and Multicultural Affairs (hereinafter referred to as *'the Minister'* or '*the Respondent'*).

[6] Pursuant to s501 CA(4) of the Act.

- 17 August 2022: the High Court of Australia made orders remitting the matter back to this Tribunal.

3. The instant remittal Hearing proceeded before me on 16 and 17 January 2023. The Tribunal received both oral and written material. The written material was reduced to an agreed exhibit list.[7] A true and correct copy of that list is attached to these Reasons and marked **'Annexure A'**. The instant hearing also received oral evidence from (1) the Applicant; (2) his mother (Ms Miranda Bernadette Nathanson); (3) his father (Mr Leonard Nathanson); (4) his sister (Ms Aslyn Nathanson); and (5) his brother (Mr Cleedon Nathanson).

LEGISLATIVE FRAMEWORK

4. Revocation of the mandatory cancellation of visas is governed by s 501CA(4) of the Act. Relevantly, this provides that:

> *4 The Minister may revoke the original decision if:*
> *the person makes representations in accordance with the invitation; and*
> *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.*

5. I am satisfied that the Applicant made the representations required by s 501CA(4)(a) of the Act. Thus, the issue is whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised.

6. There are therefore two issues presently before the Tribunal:

(a) whether the Applicant passes the character test; and

(b) whether there is another reason why the decision to cancel the Applicant's visa should be revoked.

[7] See Transcript, p2, lines 28 -38.

Does the Applicant pass the character test?

7. The character test is defined in s 501(6) of the Act. Under s 501(6)(a), a person will not pass the character test if they have a, '*substantial criminal record*'. This phrase, in turn, is defined in s 501(7), which relevantly provides that a person will have a substantial criminal record if:

> *'…*
> *(c) the person has been sentenced to a term of imprisonment of 12 months or more;*
> *…'*

8. The parties do not cavil with the proposition (and finding) that the Applicant does not pass the character test.[8] By virtue of his convictions that have resulted in imposition of head custodial terms approximating three years, the Applicant has compiled a '*substantial criminal record*'. He does not pass the character test and cannot rely on s 501CA(4)(b)(i) of the Act for the mandatory cancellation of his visa to be revoked.

Is there another reason for the revocation of the cancellation of the Applicant's visa?

9. In considering whether to exercise the discretion in s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) of the Act to comply with any directions made under the Act. In this case, *Direction No. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ('Direction' or 'Direction 90') has application.[9]

10. The Direction provides guidance for decision-makers on how to exercise the discretion. Relevantly, it states that:

> *'Informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.'*[10]

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[8] See Applicant's Statement of Facts, Issues and Contentions ('SFIC'), p3, [10]; see also Respondent's SFIC, p7, [22].

[9] Direction 90 commenced on 15 April 2021. It replaces *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*.

[10] Direction 90, [6]. See also Direction, para [4(1)] which provides that a, *"decision-maker"* includes the Administrative Appeals Tribunal in making a decision under s 501 or 501CA of the Act.

The principles in paragraph 5.2

11. Paragraph 5.2 of the Direction is designed to, *'provide a framework within which decision-makers should approach their task'* under s 501 or 501CA (as the case may be). The principles are:

> *1 Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement frameworks, and will not cause or threaten harm to individuals or the Australia community.*
>
> *2 Non-citizens who engage, or have engaged in, criminal or other serious conduct should expect to be denied the privilege of coming to, or forfeit the privilege of staying in, Australia.*
>
> *3 The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they have engaged in conduct in Australia or elsewhere that raises serious character concerns (regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community).*
>
> *4 Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age.*
>
> *5 Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.*

The Primary and Other Considerations

12. Paragraphs 8 and 9 of the Direction respectively stipulate four *'Primary Considerations'*, and four *'Other Considerations'* by which I must be guided in making my decision.

13. The Primary Considerations I must take into account are:

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

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

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

(4) expectations of the Australian community.'[11]

14. The Other Considerations which, where relevant, I must take into account, *'include but are not limited to'*:

'a) international non-refoulement obligations;

b) extent of impediments if removed;

c) impact on victims;

d) links to the Australian community, including:

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

ii) impact on Australian business interests'[12]

15. Paragraph 7 of the Direction also provides guidance as to how to take into account each Primary and Other Consideration. Briefly summarised, the Direction instructs decision-makers that:

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

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

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

16. I will now turn to addressing the abovementioned Primary and Other Considerations.

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

17. In considering this Primary Consideration 1, paragraph 8.1(1) of the Direction compels decision-makers to keep in mind the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that this country confers on non-citizens in the expectation that they are, and have been, law abiding, that they will respect important

[11] Paragraph 8 of the Direction.

[12] Paragraph 9(1) of the Direction.

institutions and that they will not cause or threaten harm to individuals or the Australian community.

18. The Applicant has compiled a history of offending both here and in New Zealand.[13] The totality of his history can be summarised as follows:[14]

Jurisdiction	Date	Offence	Result
NZ	August 2008	Breath Alcohol Level Over 400 Mcgs/Litre of Breath Blood/Breath = 475	Convicted and Sentenced Fine - $400 Court Costs - $130 Disqualification from driving 6 Months
WA	September 2010	Assault occasioning bodily harm	Fine - $1,000
WA	January 2017	No authority to drive	Fine - $2,000 (global)
WA	January 2017	Possessed a prohibited weapon	Fine - $2,000 (global)
WA	January 2017	Possess a controlled weapon	Fine - $2,000 (global)
WA	January 2017	Unlicensed person possess firearm/ammunition	Fine - $2,000 (global)
WA	January 2017	Unlicensed person possess firearm/ammunition	Fine - $2,000 (global)
WA	January 2017	Possessed drug paraphernalia in or on which there was a prohibited drug or plant	Fine - $2,000 (global)
WA	January 2017	Possess a prohibited drug (methylamphetamine)	Fine - $2,000 (global)
WA	January 2017	Possess a prohibited drug (cannabis)	Fine - $2,000 (global)
WA	January 2017	Possess firearm with circumstances of aggravation	Fine - $2,000 (global)
WA	January 2017	Being armed or pretending to be armed a in a way that may cause fear	Fine - $2,000 (global)
WA	April 2017	Possess a prohibited drug (methylamphetamine)	Fine - $1,500 (global)
WA	April 2017	Knowingly possessed counterfeit money	Fine - $1,500 (global)

[13] G1, pp 29-32.
[14] G1, pp 27-31.

Jurisdiction	Date	Offence	Result
WA	April 2017	Criminal damage or destruction of property	Fine - $1,500 (global)
WA	May 2017	Possess a prohibited drug (cannabis)	Fine - $200
NT	September 2017	Assault a worker victim not suffer harm	Convicted Sentence: 14 days
NT	September 2017	Breach of bail	Convicted Sentence: 2 days
NT	May 2018	Deprive a person of personal liberty	Convicted Sentence: 18 months Suspended after 1 year operative 18 months Supervised with conditions
NT	May 2018	Stealing	Convicted Sentence: 1 month cumulative suspended after 1 year operative 18 months supervised with conditions Restitution: $250 Sentence: 3 months
NT	May 2018	Driving a vehicle in a dangerous manner	Convicted 5 months cumulative suspended after 1 year operative 18 months Supervised with conditions Sentence: 8 months
NT	May 2018	Aggravated assault	Convicted Cumulative suspended after 1 year operative 18 months supervised with Conditions (Harm – Defenceless – Weapon) Sentence: 6 months
NT	May 2018	Breach of bail	Convicted Sentence: 2 days

19. We are therefore talking about an offending history committed in two countries spanning the period August 2008 until August 2017. It is a history that involves the commission of some 23 offences that were dealt with at eight separate sentencing episodes. The offending has been punished by both custodial and non-custodial sentences. Sentencing courts have imposed fines for the offending on at least 16 occasions and have imposed custodial

sentences on seven occasions. The totality of fines amounts to $26,100. In terms of cumulative custodial time, sentencing courts have imposed a total amount of 35 months and 18 days - a period of virtually three years.

20. In determining the weight allocable to this Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to consider:

(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.

21. I will consider each in turn.

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

22. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction specifies that decision-makers must have regard to the following:

> *(a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:*
>
> *(i) violent and/or sexual crimes;*
>
> *(ii) crimes of a violent nature against women or children, regardless of the sentence imposed;*
>
> *(iii) acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;*
>
> *(b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:*
>
> *(i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;*
>
> *(ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;*
>
> *(iii) any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));*

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

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

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

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

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

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

Paragraph 8.1.1 Considerations

23. **Paragraph 8.1.1(1)(a)** of the Direction refers to the types of crimes that are viewed very seriously by the Australian Government and the Australian community. In the Applicant's SFIC it is readily conceded that

> *'The applicant has committed violent offences in Australia that have resulted in considerable harm to the Australian community. The applicant has received substantial sentences of imprisonment for his offending. The Tribunal would find the applicant's offending to be very serious.'*[15]

24. This written concession had its echo during oral closing submissions when the Applicant's representative told the Tribunal that:

> *'…the only safe finding that could actually be made is a finding of very serious offending. Notwithstanding the short compass of the applicant's offending, that is very serious and, indeed, in examination-in-chief yesterday the applicant accepted, in a question put by myself, that his offending was very serious.'*[16]

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[15] A1, p11, [38].

[16] Transcript, p 57, lines 41-45.

25. There are several instances in the Applicant's criminal history that clearly and obliviously engage the auspices of paragraph 8.1.1(1)(a)(i) of the Direction. First, on 12 April 2017, the Applicant deprived his victim of their liberty for 12 hours. He stole the victim's car and was very violent towards him by '*hitting the victim, throwing objects at him, slapping him with a thong and [the Applicant's] hand, and the degrading and humiliating act of spitting on him.'*[17] The learned Chief Justice of the Supreme Court of the Northern Territory who sentenced the Applicant[18] accepted '…*the Crown's submissions in relation to the high level of objective seriousness of this offending.'*

26. As also noted by the learned Chief Justice, this offending episode contained two additional aggravating features: (1) after unlawfully commandeering the victim's vehicle, the Applicant became involved in a high-speed pursuit with police while the victim was in the vehicle. Pursuit speeds reached 190 kph at which time police abandoned the pursuit in the interests of public safety; and (2) at the time of this offending, the Applicant was on bail for an offence involving the assault of a worker.

27. Second, on 3 May 2017, the Applicant committed the abovementioned offence involving an assault on a worker. The victim provided a statutory declaration contemporaneous with the offending incident. The victim reported the following in his statutory declaration:

> *'I called 000, as I got off the phone from 000 the male opened the door up and he asked who was on the other side of the other door. He was talking about the maintenance room. There was no one in this room but the male was insistent that there was someone locked in the room. I was trying to reassure him that there was no one in there, he was insistent that there was someone in there. He said, "if you don't open the door I'll fucken stab you"*
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> *He had a towel with him, either wrapped around him or something I am not sure as I was watching his face. All of a sudden I saw a knife appear, he pulled the knife out and was holding the knife in his right hand, and the knife was pointing directly at me. All I could see of the knife was a silver blade and looked about 4 or 5 inches to me.*
>
> *I backed away and I really thought that he was going to stab me, his eyes were wide and dilated, he was staring straight at me and I feared for my safety. The male walked towards me and lunged at me, it was like a stabbing motion with the knife in my direction.*

[17] G1, p38.

[18] His Honour Chief Justice Grant.

I backed away from him and told the night porter to back away. I called police assistance, I could see the male going back up the stairs with the towel wrapped around him."[19]

28. Third, on 19 October 2016, the Applicant was convicted of offences that did not result in the infliction of violence upon a victim in a physical sense but nevertheless had the effect of causing the victim to apprehend that violence was imminent. He was (on 17 January 2017) convicted of (1) '*possess firearm with circumstances of aggravation';* and (2) '*being armed or pretending to be armed in a way that may cause fear.'* I am satisfied that although this offending did not result in actual physical harm upon a victim, a conviction(s) for conduct giving rise to an intentional apprehension of violence does fall within the auspices of paragraph 8.1.1(1)(a)(i) of the Direction. The relevant police document records the following:

'On Wednesday 19th October 2016 at about 12.30am Police attended outside [address redacted in original] in response to the accused and an unknown female involved in a disturbance in the street and the accused pointing a firearm at the unknown occupants of a V8 vehicle.

As Police arrived outside the house an unknown vehicle left the scene at speed. As it did so the accused emerge from the bush and threw a cocked black replica handgun into a Blackboy plant."[20]

29. Fourth, on 30 May 2010, the Applicant committed the offence of '*assault occasioning bodily harm'.* At the previous ventilation of this matter, the Applicant was taken to the circumstances of the subject incident and he seemed to readily accept those circumstances. He confirmed that (1) he was the only person who was charged as a result of this incident; and (2) that he thought his conduct comprised a serious criminal matter:

MR BURGESS: Can you explain to the tribunal what factual circumstances led to you being charged with assault occasioning bodily harm?

THE APPLICANT: Um, from what I recall, we went out. It was my first time going out in – in Australia. We were under the influence of alcohol, and prior to that, the events, I'm not that clear as to what was taking place. All that I really can recall was being removed from a night club where we got into an altercation with a couple of Aboriginals and there was one bloke in particular that was sort of attacking us and then, yeah, we all got kicked out of the night club and it escalated outside the night club where there was a numerous amount of – of people that got into altercations and yeah, I must have got into an altercation with one particular person where I think I was probably the last person to attack this person or whatever, yeah, I can't recall

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[19] G1, p255, [16]-[19].

[20] G1, p225.

exactly what took place, but out of everyone we were with, I was – I was the one who – who got in trouble for it.

MR BURGESS: So you were arrested that night?

THE APPLICANT: Yeah. Yeah, I was. I was arrested that night. There was not just myself, there was about four – four, five of us that got arrested that night, yeah.

MR BURGESS: And were you the only one charged?

THE APPLICANT: Yes.

MR BURGESS: Now, if I can take you to p.46, and before I do that – before I do that?

THE APPLICANT: Yes.

MR BURGESS: You consider that to be a serious criminal matter?

THE APPLICANT: Yes[21]

30. I am therefore satisfied that the four abovementioned instances of violent offending do engage the operative effect of paragraph 8.1.1(1)(a)(i) of the Direction and are strongly militative of a finding that the Applicant's conduct has been of a very serious nature.

31. **Paragraph 8.1.1(1)(b)** of the Direction refers to the types of crimes that may be considered serious by the Australian Government and the Australian community. There is no evidence before the Tribunal that any of the Applicant's conduct engages the auspices of sub-paragraphs 8.1.1(1)(b)(i), (iii) or (iv). However, it is not possible for the Applicant to escape a finding that the circumstances of his abovementioned deprivation of liberty (and associated conduct) committed on 12 April 2017, squarely engages sub-paragraph Paragraph 8.1.1(1)(b)(ii). In his sentencing remarks the learned Chief Justice Grant noted that:

> *'The victim was a diminutive 70 year old. The attack was unprovoked. The victim was unknown to either you or [name of co-accused redacted]. He had gone to the beach for his afternoon walk. The period of deprivation, as I have said, was for almost 12 hours, over which the victim was subjected to the insults to his person which I have already described. You threatened the victim's life. You involved the victim in a high-speed pursuit with police while the victim was in the vehicle. The victim suffered physical injury as a result of your conduct.'*[22]

32. I am therefore satisfied that the crimes which the Applicant committed on 12 April 2017 for which he was convicted on 15 May 2018, were crimes committed against a vulnerable

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[21] G1, p700, lines 28 – 46; p701, lines 1-3.

[22] G1, p38.

member of the community. As such, paragraph 8.1.1(1)(b)(ii) must be applied to the instant facts such that the totality of his offending must be found to be at least serious, more likely very serious.

33. **Paragraph 8.1.1(1)(c):** in applying this particular sub-paragraph, I am precluded from taking into account sentences imposed on this Applicant for:

    (i) any violent offending he may have committed against women;[23]

    (ii) acts of family violence;[24] and

    (iii) any sentence he received relating to conduct whereby he caused a person to enter into (or to become a party to) a forced marriage.[25]

34. The Applicant does not have any convictions for offending in the realms of the above categories. Put simply, this means that I can have regard to the totality of the sentences imposed on this Applicant. As mentioned earlier, his offending has resulted in the imposition of fines on 16 separate occasions totalling some $26,100. He has also been sentenced to custodial terms on seven occasions cumulatively representing 35 months and 18 days.

35. It is well-established that the imposition of a custodial term is seen as the last resort in the sentencing hierarchy. The Applicant's criminal history demonstrates that none of the custodial terms imposed upon him did not result from precluded offending for the purposes of the Direction. It is therefore safe to find that the sentences imposed by the courts for the crimes of this Applicant clearly and obviously militate in favour of a finding that his offending has been very serious.

36. **Paragraph 8.1.1(1)(d)** compels an inquiry into the frequency of a non-citizen's offending and/or whether there is any trend of increasing seriousness. The Applicant came to Australia in May 2010 as a 27 year old. He has a conviction for drink-driving in New Zealand dating from August 2008. He committed his first offence barely two weeks after arriving here. He was sentenced for that first Australian offence four months later in September

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[23] Paragraph 8.1.1(1)(a)(ii) of the Direction.
[24] Paragraph 8.1.1(1)(a)(iii) of the Direction.
[25] Paragraph 8.1.1(1)(b)(i) of the Direction.

2010. In terms of the balance of his criminal history there followed his commission of an additional 21 offences that were dealt with at an additional six sentencing episodes.

37. The Applicant's pattern of offending is interesting. He has the abovementioned conviction in September 2010 but his next conviction was in January 2017. Between the January 2017 and May 2018, the Applicant was dealt with for the commission of 21 offences that were punished at an additional six sentencing episodes. This means that the significant majority of the Applicant's offending was (in sentencing terms) committed across a period of 16-17 months, yet he had been in Australia for eight years by the time he received his final sentence. Does this '*backfilled'* type of sentencing history displace any finding about its frequency?

38. I am of the view that it does not. Put simply, this Applicant was a member of the Australian community for eight years from May 2010 to May 2018. During that time, he committed 22 offences and his offending was dealt with at seven separate sentencing episodes. This equates the commission of almost three offences per year and almost one sentencing episode for each year of his time in the Australian community. It is plainly and obviously frequent offending.

39. Does the offending contain a trend of increasing seriousness? I think there can be no question that it does. Apart from the abovementioned assault conviction in 2010, the next sequence of offences (i.e those dealt with at the sentencing episodes in January, April and May 2017) were primarily non-violent in nature. The offending involved unlawful conduct in relation to possession of illicit drugs, unlicenced firearm possession as well as one conviction involving counterfeit money.

40. From the sentencing episodes commencing in May 2017 and running through September 2017 and into May 2018, it is clear the nature of the offending significantly escalates in seriousness. At the sentencing episode in May 2018 the Applicant was dealt with for assault-type offending. The offending dealt with in May 2018 concerned the significantly more serious conduct involving the Applicant depriving the elderly person-victim of his liberty. I am satisfied that the Applicant's conduct therefore betrays a trend of increasing seriousness. This sub-paragraph strongly militates for a finding that the Applicant's unlawful conduct has indeed been of a very serious nature.

41. **Paragraph 8.1.1(1)(e):** this paragraph looks for any cumulative effects resulting from the Applicant's repeated offending. The criminal history demonstrates a number of cumulative effects. First, the nature of the Applicant's offending is demonstrative of a person whose moral compass had been so significantly skewed and distorted by illicit drugs that, in turn, caused him to be unable to delineate between the unlawful things he did and the law that militated against or prohibited such conduct. It culminated in the Applicant resorting to depriving another person of their liberty for something like 12 hours and, for all intents and purposes, unlawfully commandeering that victim's life for that period. This involved exposing the victim to significant personal risk of harm by causing that victim to be a passenger in a vehicle driven by the Applicant involved in a police pursuit with speeds reaching 190kph.

42. Second, this distortion of the Applicant's moral compass can also be seen in his refusal to respect the lawful authority governing things as diverse as (1) prohibited weapons; (2) prohibited drugs; (3) an order compelling him to comply with specific conditions of bail; and (4) the destruction of other people's property. Another facet of this failure to respect lawful authority can be seen in his commission of the abovementioned assault offence in May 2010 barely two weeks after arriving here. Third, the Applicant does not seem to have developed any measure of respect for the personal space of other people around him. He has, on a number of occasions, sought to violently impose himself into a given situation. This has occurred by way of direct physical attacks on others, by pretending to be armed in a way intended to cause fear and by depriving a person of their liberty for 12 hours.

43. Fourth, and perhaps most concerning, is the Applicant's apparent failure to experience any deterrent effect from non-custodial sentences that were imposed on him leading up to his sentencing episode in May 2018. Prior to that sentencing episode, 16 of the 18 sentences imposed on him involved the imposition of fines and the imposition of relatively short custodial terms of fourteen and two days, respectively. It seems he took nothing from these primarily non-custodial sentences. For his offending punished at the sentencing hearing in May 2018, he was sentenced to head custodial terms of 35 months which is almost three years. Clearly, the learned Chief Justice Grant thought the Applicant needed a significant custodial term(s) to be imposed on him because he had learnt nothing from the previous regime of sentencing. Indeed, His Honour said the following in the sentencing remarks at the May 2018 sentencing episode:

> *'You have a history of violent offending, although relatively minor. Minor though it may be,* ***you clearly have not learned from the punishments that have***

> ***previously been imposed on you, and you are not entitled to the leniency that might be extended to a person of otherwise good character.*** *That is a matter that you are going to have to deal with for the rest of your life.'*[26]
>
> [My emphasis]

44. I therefore find that this sub-paragraph strongly militates in favour of a finding that the totality of the Applicant's offending has indeed been very serious.

45. **Paragraph 8.1.1(1)(f)**: the material contains copies of two incoming passenger cards. They are respectively dated 6 September 2013 and 11 May 2010.[27] In both of these cards the following question appears: '*if you are NOT an Australian citizen, do you have any criminal conviction/s?'* In both of these cards the Applicant marked the '*No*' answer.[28] Both answers are patently incorrect because the Applicant had at least one conviction in New Zealand on the date he filled in the first card. By the date he filled in the second card he had the abovementioned conviction for assault imposed on him in September 2010, for an offence committed barely two weeks after his arrival here.

46. The Applicant was not taken to these passenger cards during the oral evidence of the matter ventilated before me. However, reference to these cards appears in the Applicant's SFIC in these terms:

> *'Further, the applicant entered Australia on 11 May 2010 and failed to declare a conviction in New Zealand for drink driving. He again entered Australia on 6 September 2013 and failed to declare criminal convictions, including his conviction for assault occasioning bodily harm on 28 September 2010 in Australia. The applicant's failure to declare his convictions on his incoming passenger cards indicates a disregard for immigration law.'*[29]

47. Given this concession in the Applicant's material, it is safe to find that this sub-paragraph does militate in favour of a finding that the Applicant's offending in this country has been of a very serious nature.

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[26] G1, pp 38-39.

[27] Note: p 45 of Exhibit G1 contains a copy of this earlier incoming passenger card. The right side of the first page of the card is, as it were, 'cut off' such that the date appears as 11/05/20. This date must be incorrect because the Applicant's movement records (see G1, p 118) have no reference to the Applicant re-entering Australia on 11 May 2020. Quite obviously, the part of the date that was 'cut off' in the copy in the material are the digits '10' that should appear after the digits '20' that currently appear under the 'Year' heading. Therefore, the date of this first incoming passenger card must be consistent with the date of the Applicant's initial arrival in Australia which was 11 May 2010.

[28] Ibid, pp 45-46.

[29] A1, p 15, [65].

48. **Paragraph 8.1.1(1)(g):** there is no suggestion in the material that the Applicant has received a written warning or notification from the Respondent about the consequences of further offending on his visa status to remain here. This sub-paragraph can be put to one side for present purposes.

Conclusion about the nature and seriousness of the Applicant's conduct

49. I have applied each of the relevant paragraphs appearing in paragraph 8.1.1(1) of the Direction. The relevant paragraphs applicable to the instant facts have safely led me to the conclusion (and finding) that the totality of this Applicant's unlawful conduct in this country can be readily characterised as '*very serious*'.

The risk to the Australian community should the Applicant commit further offences or engage in other serious conduct

50. **Paragraph 8.1.2(1)** of the Direction provides that in considering the risk to the Australian community, a decision-maker should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk of it being repeated may be unacceptable.

51. **Paragraph 8.1.2(2)** provides that in considering the risk to the Australian community, a decision-maker must have regard to the three following factors on a cumulative basis:

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

(2) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

(i) information and evidence on the risk of the non-citizen re-offending; and

(ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence; and

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

The nature of the harm to individuals or the Australian community were the Applicant to engage in further criminal or other serious conduct

52. Paragraph 8.1.2(2)(a) compels an assessment of the nature of the harm to individuals or the Australian community in the event of this Applicant engaging in further criminal or other serious conduct. The Applicant has compiled a relatively disparate offending history in Australia. In terms of his offences involving the infliction of actual or potential violence on victims, there is no getting around the reality that those victims would again suffer either physical harm or psychological harm arising from a fear of what may happen to them.

53. In the context of this Applicant's offending, were he to again involve himself in conduct involving the depravation of another person's liberty, it is plainly obvious that such a victim would suffer physical harm, psychological harm and potentially catastrophic harm. Any victim (let alone an elderly and vulnerable victim) of such offending would have serious fears about their own physical safety especially in circumstances where they were forced to sit in a vehicle as an unwilling passenger involved in a police chase reaching speeds of 190kph and where the police abandoned that chase out of a concern for public safety. If the police were concerned about the safety of other road users, it logically follows that this Tribunal can accept that the unwilling passenger-victim would have been extremely concerned about his own safety.

54. There are two convictions for conduct involving material or quantifiable loss to victims. They are (1) '*Knowingly possess counterfeit money*' (conviction in April 2017); and (2) '*Criminal damage for destruction of property*' (conviction in April 2017). There is little or nothing to cavil with the proposition that this offending most likely caused (or was intended to cause) financial harm to actual or potential victims.

55. I am satisfied that were this Applicant to re-commit offences of the type he has committed thus far, the harm to individuals and/or the Australian community would be *very serious* and would likely involve physical, psychological and quantifiable economic harm to its victims including, quite conceivably, harm to a catastrophic level.

56. The conduct that came up for sentencing in May 2018 (before Chief Justice Grant) is of such severity that it leads this Tribunal to conclude such conduct is something that the Australian community should not be reasonably expected to tolerate. This type of brazen and utterly lawless behaviour is, to my mind, so significant that any repetition of it in either

identical or similar terms, and the harm that would result from it, is so serious that any risk of its re-commission is totally unacceptable to the Australian community.

The likelihood of the non-citizen engaging in further criminal or other serious conduct (paragraph 8.1.2(2)(b))

57. The Respondent propounds a position that there remains a significant and ongoing risk of the Applicant returning to his offending ways.[30] This contention is grounded on the following elements:

- the Applicant's lengthy criminal history in Australia, including the commission of significantly violent offending;
- the Applicant's failure to experience any deterrent effect from the large number of non-custodial sentences that were imposed on him for his offending prior to that which was dealt with by the learned Chief Justice Grant in May 2018;
- the Applicant being '*a long-standing user of methylamphetamine*';[31]
- the comments of Chief Justice Grant in sentencing remarks dating from May 2018 wherein His Honour observed that:

  '… Your prospects for rehabilitation, given the length of your addiction and your conduct during it, must be considered as marginal unless you receive some effective intervention to deal with your drug addiction. That is a necessary consideration in the sentencing exercise.'[32]
- this contention about the Applicant's unconvincing prospects of rehabilitation are grounded on the following:
  - the fact that Chief Justice Grant referred to the Applicant's addiction in the subject sentencing remarks;
  - the fact that Chief Justice Grant noted the Applicant had checked himself into a residential rehabilitation program but left that program before it was completed. Although, it should be noted that His Honour also noted that

[30] R1, p 10, [37].
[31] Ibid, p 11, [37.4].
[32] G1, p 39.

'*Since you [the Applicant] have been in custody you have been re-assessed as suitable to re-enter the program.*';[33]

- the Applicant's level of rehabilitation relating to drug addiction is said to be '*limited*';[34]
- whether the Applicant can abstain from illicit drug abuse has not been tested outside of the controlled environment of either prison or immigration detention;[35]
- that on 22 October 2018, following a search of the Applicant's room at the Yongah Hill Immigration Detention facility, Serco officers detected a strong cannabis odour coming from his room. Those officers also found '*…3 x cigarette pouches containing remnants of a green leafy substance*.'[36]

- now-claimed protective factors in the form of the Applicant's wife, children and employment have, in the past, failed to constitute sufficient protective factors against his recidivist risk. The Respondent, however, accepts that Chief Justice Grant nevertheless accepted that the Applicant did come from a supportive family environment. Indeed, Chief Justice Grant noted the following:

  'They say that you come from a stable, caring and loving home. They say that you were, up until your addiction took hold, a model son and brother. They say that you have been a loyal and devoted husband and father. They say that you were courteous, kind and compassionate. They say that you are a polite and respectable young man, and were as a boy when growing up.'[37]

58. On the above bases, the Respondent contends '*…there remains an unacceptable risk that the Applicant will reoffend*.'[38]

59. The question for this Tribunal is whether, by reference to the evidence, this Applicant can now be said to represent a sufficiently low or otherwise acceptable level or recidivist risk such as to justify his return to the Australian community. During closing submissions, the Applicant's representative helpfully identified a series of '*themes*' which were propounded

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[33] G1, p 37.
[34] R1, p 11, [37.5].
[35] Ibid.
[36] Exhibit R1.1.
[37] G1, p 38.
[38] R1, p 12, [38].

to speak favourably towards the Applicant's recidivist risk. I will separately deal with each of those themes below.

60. **Remorse and accountability**: in matters of this type it is all too easy to dismiss an Applicant's expressions of remorse and accountability as tritely made and self-serving. There is no question that the Applicant has accepted total responsibility for his wrongdoing and that he is clearly remorseful for his offending and the dire circumstances in which it has now placed him. This position was supported by other witnesses who gave evidence at the Hearing such as his father, Mr Leonard Nathanson who has a very close relationship with the Applicant.

61. Mr Leonard Nathanson told the Hearing before me that he speaks to the Applicant on a weekly basis either by telephone or video call. He also said that he visits the Applicant every fortnight at the detention centre and that their relationship '*is so good*'.[39] The Applicant's father told the Hearing that '*…we are a very close family and we keep in touch all the time. We love one another and we respect one another that way.*'[40] The Applicant's father also told the Hearing that while visiting the Applicant in prison and immigration detention, the Applicant '*…did apologise to us…for misusing drugs and, you know, going off the rail [sic] and, you know, so he did admit that to us.*'[41]

62. The Applicant's expression of remorse can also be seen in the oral evidence provided by his brother, Mr Cleedon Nathanson, at the Hearing. This witness described their brotherly relationship as:

> *'I would say it's always been a really close relationship. I will always look after my brother. I've always looked after him and I always will. And we are a really close family. So we keep in contact all the time, every week – video calls, messages, text messages and yes, I'd say we're very close. Very, very close.'*[42]

63. They have discussed the Applicant's criminal offending and the brother said that the Applicant has '*actually broken down to me a couple of times about the things he's done and he actually can't…come to terms how he's managed to do such things*.'[43] There appears to

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[39] Transcript, p 39, line 27.
[40] Ibid, lines 27-29.
[41] Ibid, p 40, lines 17-19.
[42] Transcript, p 50, lines 30-33.
[43] Ibid, p 52, lines 4-6.

be a level of palpable remorse and acceptance of responsibility by this Applicant, for his history of criminal offending in Australia it can be safely accepted that he has communicated this remorse to both his father and brother who, in turn, communicated it to this Tribunal via their evidence.

64. **Rehabilitation:** it cannot be said the Applicant's level of rehabilitation has been of a demonstrably extensive nature. The evidence contains a reference to his completion of rehabilitative courses while in prison including (1) the Alcohol and Other Drugs Program; and (2) the Safe, Sober, Strong Program. There is, of course, the reference in Chief Justice Grant's sentencing remarks that the Applicant left the Sunrise Residential Rehabilitation Program after entering it in November 2015. That observation must be tempered against what appears in the documents before the Tribunal. The relevant discharge summary notes the following:

- '*[the Applicant] has shown the ability to absorb the content of the material and not only reflect on what has been taught, but apply it to his current situation.*'[44]
- *'[the Applicant] has demonstrated a high capacity to utilise his internal motivation for change and made positive life choices.*'[45]
- *'[the Applicant] participated immensely while he was attending Sunrise. He was on time to every class and participated in group discussion. There was a lot of self-disclosure of his own personal barriers and issues that the discussed in class.*'[46]

65. The course administrator notes in a letter dated 13 February 2018 that the Applicant:

> *'…was assessed on 07/12/2017 for the Sunrise Centre 12 week residential Rehabilitation Program. Following an intake meeting, Narada's assessment was found to be suitable for the program and he has been accepted.*
> *This letter is to confirm her [sic] acceptance into the program.*'[47]

66. During his time in both prison and immigration detention, the Applicant has not remained idle. The evidence discloses that during his time in prison he became a '*Quicksmart*' Assistant Tutor with responsibility for supporting students to attain basic skills in numeracy

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[44] G1, p 76.
[45] Ibid.
[46] Ibid.
[47] G1, p 78.

and literacy. In this role the Applicant also assisted with the individual learning needs of students and as well as management of classroom resources.[48] At the Hearing before me, the Applicant's sister spoke of the Applicant's role in leading a Bible study group during his time in immigration detention. She said:

> *'He always sends us prayers and good wishes. He's also, I believe, leads the Bible study group at the detention centre, which other detainees attend as well. He's very remorseful, he's always like apologising to us, you know, saying how sorry he is for everything and he's also become really close with God as well.'*[49]

67. In terms of the Applicant's physical wellbeing, both his father and sister confirmed that he seems in good and robust physical health. His father said the Applicant '*…has put on weight, he's looking well, and I did notice a lot of change in him.*'[50] His sister said '*…when we visit him I can physically see the change in him. He's put on weight, he is looking healthy and just speaking to him as well, he's very positive.*'[51]

68. It can be accepted that the Applicant's level of rehabilitation is not optimal. But that is not to suggest that he has not experienced or undergone any form of rehabilitative impact during the period of his removal from the Australian community. He is clearly a person who is receptive towards and willing to engage in a process of rehabilitation. On the negative side, he spent about four weeks in the Sunshine program in late 2015 only to return to the community and re-offend. On the positive side, there is written confirmation of his re-acceptance into that rehabilitative program.

69. Perhaps more significant is the Applicant's capacity to, as it were, self-rehabilitate. It can be safely found that he has both confronted and come to terms with his past wrongdoing. This can be seen in what he has told his family and his encouraging pre-disposition to not remaining idle and of no assistance to others in either prison or immigration detention. In both of those facilities he has assumed teaching/rehabilitative-type roles to assist others. If he has formed the view to assist and rehabilitate others one can assume he has likewise formed an intention to rehabilitate himself.

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[48] Ibid, p 72.
[49] Transcript, p 45, lines 27-31.
[50] Ibid, p 39, lines 35-46.
[51] Ibid, p 45, lines 25-27.

70. I accept that the Applicant's level of rehabilitation is not perfect nor that it displaces every possibility of a relapse. Even a '*perfect*' rehabilitative program would not achieve that. I am, nevertheless, satisfied that this Applicant has reached a state of realisation that, at 39 years of age and with a wife and young family, his life is at an existential crossroads. He surely understands that if he fails to successfully negotiate that crossroad by relapsing into illicit drug use and very serious offending, his life as a productive member of the Australian (and indeed any other) community would, for all intents and purposes, be at an end because he would be removed from any such community.

71. **Time in immigration detention**: this third theme propounded on behalf of the Applicant was said to be '*a very, very significant one…*'. The essence of the submission is that this is said to be '*a very uncharacteristic case*' because it involves an Applicant who has spent just over a year in criminal custody but has gone on to spend five times that amount of time in an immigration detention environment. This theme and the circumstances of its manifestation is not the fault of anyone. The state is, of course, charged with responsibility to punish criminal offending and to imprison guilty parties based upon prevailing sentencing principles and legislation. The state is likewise entitled to implement whatever process it is empowered to implement when it comes to dealing with the treatment of non-citizens who very seriously offend.

72. That said, the stark reality is that the net effect of the superimposition of the criminal justice process and the character-based immigration process on the circumstances of this Applicant is that he has been in immigration detention for a period comprising five times the amount of custodial time he was sentenced to serve for his criminal offending. I think there is traction in the argument that such a prolonged period in immigration detention has caused the Applicant to have a very significant period of time on the nature and extent of his offending and its impact on his own circumstances, those of his immediate and extended family and that of the broader Australian community against whom his offending was perpetrated. In his written statement he said the following:

> *'Given my extensive time in immigration detention, it has given me further time to reflect on my criminal history and previous drug addiction. I will never return to drugs or crime ever again. I truly am remorseful for the full extent of my wrongdoing in Australia.'*[52]

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[52] A5, p 3, [17].

73. During his evidence-in-chief, the Applicant spoke of the impact of his prolonged time in immigration detention and how it has adversely affected both himself and members of his family:

> *'DR DONNELLY: Now, you've spoken about the emotional impact in particular that your visa cancellation has had and being in detention. You said a moment ago that your father has been in tears and I think the expression used was "crying like a baby". Has that made you think about your criminal offending and your drug taking?*
>
> *APPLICANT: Most definitely. Most definitely. It's made me reflect on everything and I've had - I've had an immense amount of time to reflect on my actions and my wrongdoings that I have done in the Australian community.*
>
> *DR DONNELLY: So just bear with me?*
>
> *APPLICANT: And in saying that, you know, when we flip things - like you asked me about my old man, you know, if - it's made me reflect even more because if it's doing that - if certain things I've done in my past, you know, are causing certain things, it's made me reflect, you know, even more on my kids. If the heartache and pain that it's causing to my old man, imagine what it's doing to my children, which just - which - yep.'*[53]

74. This particular theme does, to my mind, run parallel with the Applicant's level of self-rehabilitation. There is nothing to cavil with a finding that the Applicant's time in immigration detention compared to the time he spent in prison, surely gives rise to an extraordinary disparity. Can this extraordinary period of time now be found to speak positively to his level of recidivist risk? I think it can due to the sheer size of the gulf in time the Applicant has had to take proper stock of his offending and its dreadful impact on himself and his family. It logically follows if he has thought about the past and present impact of his offending, he has likewise given strong consideration to the impact of any future offending. On this basis, I think (and find) that the Applicant's evidence about positive elements to be taken from such a long period of self-reflection can be accepted as a factor positively speaking to his level of recidivist risk.

75. **Drug and alcohol remission:** the Applicant is clear and consistent in his evidence that he has not abused any substance – illicit or otherwise – during the time of his removal from the Australian community which, as mentioned, is something in the order of six years. In his written statement he said:

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[53] Transcript, p 10, lines 1-15.

> *'First, I have been in immigration detention for over five years. That is a very considerable period. During my time in immigration detention, I have avoided drugs and illicit substances. I should add, drugs are accessible in immigration detention.*
>
> *However, given my commitment to avoiding drugs, I have been in remission from drugs for many years. This is clear evidence that I have overcome my previous addiction to drugs (keeping in mind that drugs are easily accessible in immigration detention).'*[54]

76. This evidence had its echo in his oral evidence-in-chief when he spoke of returning to the Australian community and living a life free of substance abuse:

> *'DR DONNELLY: Now, what confidence could the tribunal have that if you return to the Australian community, for example, and stresses past your life that you won't return to drugs. What would you say to that?*
>
> *APPLICANT: I'd say they could have all the confidence they need. In saying that it's been so many years now that I've been completely off any drugs or alcohol. I've never been in any trouble with any drugs, never been caught with any drugs and in saying that I am sure that the tribunal is fully aware that in the immigration detention centres it is very accessible to get drugs and alcohol in the sort of facilities that we are living in and I've stayed clear away from that. Not only have I not been on drugs but I've also been - I've done courses on drugs and alcohol as well, so it's pretty clear evidence that I am not going to touch drugs again.'*

77. To what extent can this Tribunal be satisfied that the Applicant has successfully navigated (and will be safely able to in future navigate) a course for his life away from a systemic and destructive pattern of substance abuse? It is often propounded in matters like this that past behaviour is a good indicator of future behaviour. This Applicant has, to my mind, two eras of '*past*' behaviour. The first of those is the era running from his arrival here in mid-2010 to the point of his most recent removal from the Australian community, some six years ago. That era was replete with, and dominated by, illicit (and other) substance abuse. This era does not speak favourably to any satisfaction around his successful navigation of substance abuse avoidance in his future.

78. However, there is a second '*past*' era referrable to the Applicant's relationship with substance abuse. That past era is to be found in the six years he has spent removed from the Australian community. With regard to a vast number of human endeavours, six years is a long time. With specific reference to a person's capacity to reliably demonstrate remission from substance abuse, six years is, to my mind, a sufficient period of time. Here, the

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[54] A5, p 1, [6]-[7].

Applicant says, and there is little to cavil with it, that he has not engaged with illicit drugs or alcohol since he was last in the community. That evidence is to be accepted and the singular contrarian element in the evidence is to be rejected.

79. That singular contrarian element refers to the abovementioned alleged incident that is said to have occurred In October 2018. This incident involved Serco officers conducting a welfare check on the Applicant and apparently detecting '*a strong cannabis odour*' coming from the room in which the Applicant was located. It is unsafe for this Tribunal to arbitrarily impute a finding that the Applicant was engaged in the consumption of any illicit substance at that time. The evidence appears in a 10-line summary in an email from the relevant detention facility. There were two other individuals with the Applicant in the same room from which the odour was said to be coming from. Neither of those two individuals have asserted the Applicant was consuming cannabis (or any other substance). Neither of those two individuals have asserted the Applicant was the sole owner of the three cigarette pouches containing remnants of a green leafy substance.

80. There is no evidence to suggest that the subject room from which the odour was said to emanate was the Applicant's room. Indeed, the Applicant said in evidence '*…that wasn't my room. That wasn't me living in my room where they've smelt a bit of cannabis.*'[55] There was no testing of the green leafy substance and we simply do not know what it was. The evidence around this alleged incident rises no higher than mere suspicion. It cannot be found to have a sufficiently probative nature such that this Tribunal can be sufficiently and safely satisfied that the Applicant was at that, or any other time, while in immigration detention engaged in the consumption of illicit drugs. The alleged circumstances of this incident do not displace the Applicant's evidence (and my finding) that he has not engaged in the consumption of illicit drugs since he was last in the community.

81. **Family support**: as mentioned earlier, the Respondent has taken the position that now-claimed protective factors including the Applicant's wife, children and employment have not been sufficient to cause him to refrain from offending in the past. Two things can be said about that. First, the learned Chief Justice Grant did note that the Applicant comes from '*…a stable, caring and loving home*.' Second, the evidence of members of the

[55] Transcript, p 28, lines 35-37.

Applicant's family at the Hearing before me was that of people who genuinely loved and cared for the Applicant and who have maintained a consistent pattern of conduct with him even though he has been physically absent from their lives for a very long time. The family members have not abandoned him and still regard him as '*one of their own*.'

82. There is little or nothing to cavil with the finding that having regard to the totality of the evidence from the family members, the Applicant will have the benefit of a safe and available '*landing pad*' if returned to the Australian community. He will be accommodated at the home of his parents in Perth. His father is in the same line of work as the Applicant in the trade of diesel fitting and mechanical repair. His father gave evidence that his considerable time in this trade will speak favourably to his ability to find employment for the Applicant.

83. The Applicant's mother gave evidence at the Hearing. She is in a precarious state of health having undergone three separate brain operation procedures in a relatively short space of time. Despite her dire physical health, she has managed to visit the Applicant on a fortnightly basis while he has been in immigration detention. She and her husband also visited the Applicant while he was in prison. She has been married to the Applicant's father for 40 years and he goes to work everyday. He was originally a fly-in-fly-out worker but since her illness he has had to stop working remotely and has now taken a local job so he can be home with her every evening. During her evidence-in-chief she was asked about the Applicant's plans in the event of his return to the Australian community. She said this:

> *'DR DONNELLY: If Narada was to be returned to the Australian community do you know what his plans are?*
>
> *MS MIRANDA NATHANSON: Definitely his first and foremost plan was to build his relationship with his immediate family. His children are very close to him and have been affected with this time of him being away for so long. He does want to go back to work and provide for his family. And I just think for Narada to be back in our lives would make a massive difference.'*[56]

84. She also spoke of the nature of the Applicant's relationship with the family before he was taken into prison:

> *'DR DONNELLY: Can I put this proposition to you; would you say that you were close to Narada before he went to prison?*
>
> *MS MIRANDA NATHANSON: Definitely, we've always been close. You know, just to tell you how close we are, when Narada was still home in the house as a scholar*

[56] Transcript, p 32, lines 20-25.

- I've always suffered with health issue, and he'll always run to the room and say, "Yes, mum." And I'll be like, "I was going to call you but I didn't call you." But that's the connection we have. And if I'm not well he just automatically handles the others and takes charge and, you know, always is there for me.'[57]

85. It was also put to the Applicant's mother, no doubt in anticipation of the Respondent's submission about the past incapacity of the now-claimed family support to moderate the Applicant's offending, that the Applicant had offended in the past despite the closeness of the family. This is what she said in reply:

> *'DR DONNELLY: So it's in your evidence that you've had a very long-term close relationship with your son. With that fact in mind, is it a fair assessment that, notwithstanding the closeness of that relationship in the past, it didn't stop Narada from committing criminal offences, though? Very serious offences in Australia?*
>
> *MS MIRANDA NATHANSON: I do know that we had moved to Darwin and Narada was still in Perth and we were away at the time. And I do admit that we do acknowledge and know that Narada has gone off the rails extremely. But I can see the difference in Narada when we visit him, when we talk to him. I talk to Narada daily, FaceTime or normal calls. But we do correspond daily, and I can see the change in Narada. And I do admit that he's done wrong, but I feel he's paid enough for what he's done…'*[58]

86. The Applicant's brother resides in Darwin and has done so for about seven years. He lives there with his partner and his two infant children. He has taken his family back to Western Australia to visit the extended family '*about two years ago…*'. He was asked whether he would again travel to Western Australia to see the Applicant if he is returned to the Australian community and he replied with: '*Most definitely. Most definitely*.'[59] In his written statement he speaks of the closeness between the Applicant and his family:

> *'I have lived in the Northern Territory for about seven years. I moved here for work. I am married to Sarah Snowball. Sarah is 34 years of age. We are the parents to two children in Australia:*
>
> *[Child KY] (DOB: [DOB redacted]) (aged 4); and*
>
> *[Child KA] (DOB: [DOB redacted]) (aged four months).*
>
> *My brother, Narada William Nathanson [the Applicant], has a relationship with both of my children. Narada speaks to [Child KY] on the telephone and through video calls. He understands that Narada is his uncle. Narada and [Child KY] enjoy speaking with each other.*

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[57] Transcript, p 32, lines 38-45.

[58] Ibid, p 33, lines 1-11.

[59] Ibid, p 51, line 28.

Naturally, given the young age of [Child KA], Narada is not able to engage in conversation with his niece. However, I know that my brother loves my children very much. It is important to emphasise that I want my brother to play an important uncle role to my children in the years to come.

I am extremely close to my brother. Given that relationship, I want my brother to play an important role in the lives of my children. I have been impacted (in an emotional sense) by my brother's absence from our lives. Given my brother's time in prison and immigration detention, he has not physically met my children yet. However, I really hope he gets the opportunity to do that soon.

I keep in regular contact with my brother. I speak to him through a video call at least once a week; sometimes more. I always looked up to my brother as a role model for myself. My brother has a good heart and loves his family very much. It was extremely sad to see my brother assume a drug addiction problem and engage in criminal offending in Australia.

I otherwise keep in contact with my brother through normal telephone calls and text messages. My partner also knows my brother and they have a respectable relationship. It must be emphasised that our whole family unit is close. My brother has a close relationship with our parents, our sister and other family members living in Australia."[60]

87. To what extent can it now be safely found that the Applicant's family will reliably act as a protective factor against his future recidivist risk? The first requirement in addressing this question is to deal with the family's past failure to prevent the Applicant from offending. This explanation is to be found in the extent to which the Applicant's past difficulties with illicit (and other) substance abuse skewed and distorted moral compass. When he was in such a state, the evidence indicates that he was living alone in Perth and the remainder of the family was residing in the Northern Territory. True it is that the Applicant committed the very serious offences that came before Chief Justice Grant in May 2018 after he was reunited with his family in the Northern Territory. By then, his methylamphetamine addiction had usurped whatever protective and supportive element the family presented. In short, the Applicant's life was run by an addiction and not by any sense of responsibility to either himself, his family or the broader community.

88. Now, the Applicant can re-commence a life in the Australian community reliably free from the destructive shackles of addiction. He will be able to engage with his family on a significantly more equal footing than before when he was the only drug addict in a family of otherwise responsible, hardworking and genuine '*salt of the earth*' people. The call to be made by this Tribunal in the circumstances of this case is whether the Applicant will join his

[60] A2, pp 1-2, [6]-[11].

family as a member of the '*salt of the earth*' or whether he will return to the destructive degeneracy created by substance addiction. Because he is starting from a position where drugs no longer dominate his life and moral compass, there is a strong prospect that his family can be found to be a strong protective factor against his recidivist risk.

89. **Structured plan if returned to the community**: the evidence makes plain the Applicant has people around him who are ready, willing and able to ensure the safest of all possible returns for this Applicant to the Australian community. His loving parents will readily and immediately provide him with safe and stable accommodation. Both parents gave clear evidence that they would oversee and facilitate his engagement with healthcare professionals to ensure he obtained the support and assistance he required.

90. The need for vigilance and constant monitoring of the Applicant's condition was something touched upon by Chief Justice Grant who noted that the Applicant's prospects for rehabilitation '*…must be considered as marginal…*' unless he received some effective intervention to deal with it. These remarks were, of course, made some five years ago. The Applicant (as I have found) has not engaged with either illicit substances or alcohol for the past six years. In addition to that abstinence, the Applicant will have the abovementioned support of his family to facilitate engagement with healthcare and other necessary supports to avoid a relapse.

91. Analogous to the theme of establishing some kind of structured plan or modality of loving his life upon a return to the community, I put certain questions to the Applicant. After all, he is a 39-year-old man with a young family and a capacity to immediately return to remunerative employment in a trade in which he has a demonstrated previous work history. I wanted to know whether he had reached the point in his life that (1) stupid and very serious offending was behind him and that he was prepared to re-engage with his wife and children; and (2) he was willing and prepared to return to remunerative employment as a means of providing support for them; and (3) that if confronted with life's inevitable difficulties, he would not again seek refuge in the destructive world of substance abuse. This is what he said:

> *'SENIOR MEMBER:[…]if you come back into the community it's correct, isn't it, to say that you would probably go back to working at the mines on a fly-in fly-out basis which will keep you away from the lives of the children. But that's just how it has to be, I suppose, so that you can earn the best amount of money to support them and support yourself. You'd agree with that?*

APPLICANT: Yes, sir.

SENIOR MEMBER: You're 39, Mr Nathanson, and you're at a stage of your life when very often life's most challenging difficulties present themselves. In the past you'd agree that you haven't done a really satisfactory job of dealing with life's difficulties, have you, and stressors and things like that because you've resorted to drugs, abusing drugs, alcohol, and acting in a very serious criminal way in the community. You'd agree with that?

APPLICANT: Yes, sir.

SENIOR MEMBER: So my point to you or the question to you is if you come back into the community and there's fresh challenges and fresh difficulties, for example[…]there's a serious issue with someone close to you. And I've seen the very serious issues that your mother has gone through in the last 12 months. Say there's a serious issue with one of your children. Say your wife turns very nasty on you and prevents you from seeing the children and that requires ugly and difficult Family Court proceedings. All of those things are stressful things. How can I be confident that if those stressors are thrown back at you again - as they do to all of us in our lives - how can I be sure that you're not going to go back to resorting to what you've previously found to be the comfort of methamphetamine and cannabis?

APPLICANT: Well, you can be sure, sir, because for one I'm going through that sort of stress and all that hardship right now, struggling. And I am quite capable of consuming methamphetamine or any other drugs in the facility where I am quite presently residing at, which I haven't. I haven't touched any drugs or alcohol in so many years. And it's not going to be any different when I'm on the outside in the community as I am in here as an escape - as me residing to drugs, you know, because of a bit of stress or pressure that I'm going through."[61]

Conclusions about risk

92. I have had regard to the totality of the evidence, both that of the Applicant and his family members. True it may be that there is no definitive and independent clinical report providing an explanation of any factors behind the Applicant's offending. As I have found, there are two past eras of substance abuse in this Applicant's life. The first of those was squarely behind and causative of his offending. The second era relates to the six years during which he has been removed from the community. This second era has afforded him an opportunity to demonstrate a level of rehabilitation from a pre-disposition towards substance abuse.

93. I am of the view (and I find) that this six-year period of claimed and demonstrated abstinence from illicit drugs is sufficient to allocate a recidivist risk profile to this Applicant that would not act as an impediment towards his return to the community. In the absence of clinical support, it is difficult for me to allocate a specific level or category of recidivist risk to this

[61] Transcript, p 27, lines 41-46; p 28, lines 1-26.

Applicant. I am content to find that his recidivist risk profile can now be safely found to be the same as he has demonstrated it to be across the abovementioned second era of his time in both prison and immigration detention during which he has been drug-free. On this demonstrated basis, I am of the view (and I find) that the level of the Applicant's recidivist risk is sufficiently low such as to facilitate a return to the Australian community.

Paragraph 8.1.2(2)(c)

94. The Direction also contains a reference to paragraph 8.1.2(2)(c). With reference this specific paragraph, this matter does not involve a '*refusal to grant a visa to a non-citizen*'. It involves an application for the '*revocation*' of a decision refusing to revoke the earlier mandatorily cancellation of the Applicant's visa. This specific paragraph is not relevant to the determination of this application.

Conclusion: Primary Consideration 1

95. With reference to the weight attributable to this Primary Consideration 1:

(a) I have found that the nature and seriousness of the Applicant's conduct to date has been, '*very serious'*;

(b) I have found that that were this Applicant to re-commit offences of the type he has committed thus far, the harm to individuals and/or the Australian community would be *very serious* and would likely involve physical, psychological and quantifiable economic harm to its victims including, quite conceivably, harm to a catastrophic level.

(c) in terms of recidivist risk, I am content to find that his recidivist risk profile can now be safely found to be the same has he has demonstrated it to be across the abovementioned second era of his time in both prison and immigration detention during which he has been drug-free. On this demonstrated basis, I have consequently found that the level of the Applicant's recidivist risk is sufficiently low such as to facilitate a return to the Australian community.

96. My analysis of the material leads me to a finding that this Primary Consideration 1 confers *a certain, but not determinative*, level of weight against revocation of the mandatory cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

97. Paragraph 8.2 of the Direction provides:

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

Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).

(2) This consideration is relevant in circumstances where:

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

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

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

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

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

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

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

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

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

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

98. Prior to any application of this paragraph 8.2 to the material, it is necessary to address the two questions it poses. I must determine:

(a) who was a member of the Applicant's family; and

(b) whether any of the Applicant's conduct against those family member(s) amounts to family violence. I will now address each question in turn.

Who are members of the Applicant's family?

The two alleged relevant incidents

99. There are two relevant incidents. The first occurred in June 2012. There is a *'Detected Incidents Report*' prepared by Western Australia Police appearing in the material.[62] The parties comprise the Applicant as the '*Person of Interest*' and his wife. The document specifically provides that '*Relationship between parties: Husband & Wife*'.[63] The second incident occurred on 8 May 2016. Again, it is described in a '*Detected Incidents Report*' prepared by Western Australia Police.[64] In this report the '*suspect*' is recorded as the Applicant. The '*victim'* is recorded as the spouse of the Applicant. The narrative in the document says that the victim and the Applicant '*…have been married for 8 years and have 3 children together, aged 6, 4 and 5 months.*'[65]

Was the victim of the two abovementioned incidents a member of the Applicant's family?

100. I refer to the Direction. While it contains a definition for '*family violence*', it does not contain a definition for '*member of the person's family*' or the word '*family*'. That said, the Direction's definition of '*family violence*' is, verbatim, taken from the definition of that phrase in the *Family Law Act 1975* (Cth) ('*FLA*').[66] The *FLA* goes on to provide at s 4(1AB) that:

> *'For the purposes of:*
>
> *…*
>
> *(aa) section 4AB[67],*
>
> *…*
>
> *a person (the* ***first person****) is a* ***member of the family*** *of another person (the* ***second person****) if:*
>
> ***the first person[68] is or has been married to, or in a de facto relationship with, the second person[69];***
>
> *…'*

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[62] G1, pp 181-182.

[63] Ibid, p 181.

[64] Ibid, pp 183-186

[65] Ibid, p 183.

[66] See *Family Law Act 1975* (Cth), sections 4AB(1)-(2).

[67] That is, the definition of "*family violence*" in the *FLA.*

[68] That is, the victim wife of the Applicant.

[69] That is, the Applicant.

[The words in bold appear in the original; the words in bold and underlined have been marked as such by me]

101. Given the verbatim reproduction of the *FLA's* definition of '*family violence*' in the Direction, I am comfortable with adopting the *FLA's* definition of '*member of the family*' for the purposes of this application. Therefore, with specific reference to the recounted circumstances of the incident that occurred on 20/21 June 2012 and 8 May 2016, it is important to note that in both '*Detected Incident Reports*' the victim is recorded as the married spouse of the Applicant. The abovementioned definition in s 4AB of the FLA contemplates a marital or de-facto spouse who, is or has been in such a relationship with the other person. Therefore, it is safe to find that the aggrieved spouse (or victim) described in the subject '*Detected Incident Report*' was a member of the Applicant's family on the date of the incidents, being on 20/21 June 2012 and 8 May 2016.

Did any of the Applicant's conduct constitute family violence?

102. As alluded to, *"family violence"* is defined in the Direction. It is defined as, *"violent, threatening, or other behaviour by a person that coerces or controls a member of the person's family (the* ***family member****) or causes the family member to be fearful."*[70] To my mind, therefore, the definition poses two separate questions:

- was the Applicant's conduct violent, threatening or other behaviour that coerced or controlled a member of his family?
- was the Applicant's conduct violent, threatening or other behaviour that caused a family member to be fearful?

103. Prior to making the analysis required by this paragraph, it is prudent to record the difference between the analysis under paragraph 8.1 of the Direction, and this paragraph 8.2. The former compels an analysis of the totality of the Applicant's conduct, generally proven through criminal convictions. This paragraph 8.2, however, directs decision-makers to look at, '*independent and authoritative'* evidence establishing that an Applicant perpetrated, '*family violence*' relevant to this paragraph 8.2, even if no criminal conviction was recorded. Put another way, this paragraph 8.2 requires decision-makers to consider both (a) criminal

[70] Paragraph 4 of the Direction.

convictions which involved family violence; '*and/or'* (b) incidents of family violence proven by other means, if those means are independent and authoritative.

104. The next inquiry involves a determination of whether the material before me satisfies either or both of the criteria described at 8.2(2)(a) and (b). I have earlier said that both of the subject incidents are described in '*Detected Incident Reports*' prepared by Western Australia Police. Both of these reports were prepared by an '*Investigating Unit'* of the Western Australian Police Force. In terms of my immediate inquiry, I am satisfied that both of these '*Detected Incident Reports*' are sufficiently '*independent and authoritative'* for the purposes of 8.2(2)(b) of the Direction. They are both made contemporaneously with the two subject incidents.

105. The two '*Detected Incident Reports*' are independent because their content contains nothing to suggest that the author of these reports was anything other than independent of the circumstances of both incidents. To whatever extent the Applicant may now purport to deny of ameliorate the circumstances of these two incidents, his evidence is to be rejected. I cannot find any competing document in the material even remotely approaching the independence and authority represented by the two '*Detected Incident Reports*'. I am satisfied that the author(s) of these two reports recorded independent and authoritative information of the events described as having occurred on 20/21 June 2012 and 8 May 2016.

106. My second task involves a determination of whether the Applicant's involvement in these two incidents have caused him to become involved in the perpetration of family violence for the purposes of 8.2(2)(b) of the Direction. I have earlier found that the victim named in both '*Detected Incident Reports*' was a member of the Applicant's family at the relevant time. I am satisfied that the Applicant's conduct, as described in the *'Detected Incident* Reports', does amount to violent, threatening, or other behaviour that sought to coerce or control the aggrieved person. I make a similar finding to the effect that the Applicant's behaviour caused the aggrieved to be fearful.

107. Both of these incidents constitute family violence by the identified perpetrator who, of course, is the Applicant.

Assessment of the seriousness of the Applicant's family violence

108. I will consider each of the factors in paragraph 8.2(3)(a)–(d) in turn.

109. **Sub-paragraph 8.2(3)(a)**: the material contains references to incidents in 2012 and 2016. Deplorable though any act of domestic violence may be, in the context of the Applicant's time in Australia and in the further context of the Applicant's marriage to his wife/victim,[71] it cannot be safely found that two incidents across something like a decade constitutes frequent domestic violence. As they are described in the subject '*Detected Incident Reports*', both incidents appear to be – at least in factual terms – on '*all fours*' with each other. It would be trite to suggest that one incident is more serious than the other.

110. **Sub-paragraph 8.2(3)(b)**: the cumulative effect of the Applicant's two acts of domestic violence has not been such as to drive the victim/spouse away from the relationship. In his evidence-in-chief the Applicant said that his wife will have little or no objection to him re-introducing himself into the lives of his children. He also mentioned that there is a genuine possibility of his relationship with her restarting.[72]

111. In the '*Detected Incident Report*' dealing with the first-in-time incident, a notation is made that the victim/spouse was '*unsure to make assault complaint*'.[73] In the second-in-time report, it is noted that '*She stated she did not want to make a complaint regarding the matter and wanted help to sort things out between her and [the Applicant]. She signed a Police notebook confirming that she did not want to make a complaint*.'[74] As best as I have understood the material, neither of the incidents resulted in formal charges were ever being proffered against the Applicant.

112. I am therefore satisfied that there are no discernible cumulative effects of the Applicant's family violence conduct speaking to its seriousness.

113. **Sub-paragraph 8.2(3)(c)**: the Applicant makes the valid point that there is no independent evidence of the Applicant having undertaken any rehabilitation directed to the issue of family

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[71] They were married on 7 November 2009 – see G1, p 63.
[72] See generally, Transcript p 25, lines 20-47; p 26, lines 1-15.
[73] G1, p 182.
[74] Ibid, 183.

violence.[75] At the Hearing before me, the Applicant refused to respond to questions about his domestic violence conduct put to him in cross-examination.[76] He purportedly did so out of caution against the risk of incriminating himself. On that basis he sought to exercise his right to silence. It is therefore very difficult for this Tribunal to ascertain whether the Applicant accepts responsibility for his family violence related conduct.[77]

114. Likewise, the Applicant's refusal to respond to questions about his domestic violence conduct made it very difficult for this Tribunal to gauge any extent to which the Applicant understands the impact of his behaviour on the victim of that conduct.[78] It was also difficult to gauge whatever efforts the Applicant may have taken to address any causative factors behind his domestically violent conduct.[79] This sub-paragraph 8.2(3)(c) must be put to one side and rendered neutral for present purposes. The Applicant's position of silence is curious in circumstances where (1) the victim never made a complaint about his conduct to police resulting in the proffering of any formal charges against him; and (2) she is welcoming of an opportunity for him to re-immerse himself in the lives of their three minor children.

115. **Sub-paragraph 8.2(3)(d)**: requires me to look at whether the Applicant has, *'re-offended since being formally warned, or otherwise since being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence'*. I am mindful that a Restraining Order was made against the Applicant shortly after the second-in-time incident on 8 May 2016. The terms of that order appears in the material.[80] The text of that document does not contain any formal warning to the Applicant about the consequences of his commission of further acts of family violence. In any event, there is no reference to any further acts of family violence post-dating this restraining order that was issued on 13 May 2016. I am therefore not comfortable with allocating any level of weight to this sub-paragraph (d) in relation to any finding about the level of seriousness of the Applicant's family violence conduct in the two subject incidents.

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[75] R1, p 13, [45].
[76] Transcript, p 16, lines 18-20.
[77] Paragraph 8.2(3)(c)(i) of the Direction.
[78] Paragraph 8.2(3)(c)(ii) of the Direction.
[79] Paragraph 8.2(3)(c)(iii) of the Direction.
[80] G1, pp 229-230.

Conclusion: Primary Consideration 2

116. I am satisfied that the two subject incidents constitute respective acts of domestic violence for the purposes of the Direction. In terms of paragraph 8.2(3) of the Direction, I'm satisfied that the Applicant's family violence conduct has not been frequent and is not otherwise indicative of a trend of increasing seriousness. I am further satisfied that there are no discernible cumulative effects of the Applicant's two acts of violence.

117. Primary Consideration 2 weighs *moderately*, *but not determinately*, against revocation of the mandatory visa cancellation of the Applicant's visa.

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

118. Paragraph 8.3(1) of the Direction compels a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is in the best interests of a child affected by the decision. Paragraphs 8.3(2) and 8.3(3) respectively contain further stipulations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

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

(a) the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);

(b) the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;

(c) the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

(d) the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;

(e) whether there are other persons who already fulfil a parental role in relation to the child;

(f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

(g) evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;

(h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

Identification of the relevant minor children

120. The starting point for identification of the Applicant's minor children is his personal circumstances form ('PCF'). There, the Applicant identifies three minor children who are the biological children he has had with his wife, Ms SN.[81] The three biological children are identified in the PCF thus:

- Child T, a son, born November 2009, currently aged 13 years;
- Child L, a son, born December 2011, currently aged 11 years;
- Child G, a daughter, born January 2016, currently aged seven years.

121. The PCF is silent about any nieces and/or nephews.[82] In his latest statement made on 15 December 2022,[83] he says:

> *'Future*
>
> *If I am released into the Australian community, I have the following plans:*
>
> *…*
>
> *Continue to develop a relationship with my nephew, [Child KY] (DOB: [day redacted] September 2018). Also, continue to develop my relationship with my young niece, [Child KA] (DOB: [day redacted] August 2022). I speak regularly to [Child KY] on the*

[81] G1, p 66.
[82] Ibid.
[83] A5.

telephone and through video calls. I would like the opportunity to develop my relationship further with my niece and nephew in Australia.

…'[84]

122. During the Applicant's oral evidence, the Applicant spoke of the nature of his relationship with his wife with particular reference to her being open to a gradual re-introduction into their lives. He told the Tribunal that she would most certainly want him to assume a fatherly/parental role in the lives of the children. He said that he was not aware of any objection from her to this occurring, although he did agree that she has acted as the primary caregiver for the children during the period of his absence:

> *'DR DONNELLY: That's all right. So just go back a step. You said your wife has full-time custody of the children, and of course that's obviously true and obvious common sense because you're not available obviously where you are now. So she has the full-time care of the children. So my question arising from that is if you come back into the community will your wife raise any objection to you restarting a pattern of spending time with the children?*
>
> *APPLICANT: No, not at all. She would - that's what we want is me in their lives.*
>
> *DR DONNELLY: Fair enough. So she will say to you - well, is she likely to say, for example - and we don't know because we haven't heard from her. But is she likely to say, "Look, take it steady. Reintroduce yourself back into the children's lives gradually," or do you think it will just be full on from the beginning?*
>
> *APPLICANT: No, I think she would - it would be gradually. She would want to - she would want me to do it, you know, just because of everything they've been through and, you know, the trauma and what it's been causing. And, yes, she would probably - it would be gradually.*
>
> *DR DONNELLY: But at the moment you're not aware of any objection from her where she would try and prevent you from reconnecting in a physical sense with the children, is there? There's nothing that she's told you that would prevent you in that regard?*
>
> *APPLICANT: No, no, not - - -*
>
> *DR DONNELLY: In terms of possibly your coming back into the community, I think your evidence was that you're going to reside with your parents. That's right, isn't it?*
>
> *APPLICANT: Yes, sir.*
>
> *DR DONNELLY: So you won't be going back to reside with your former wife - well, not former wife - with your wife until you get a chance to get that relationship up and running again and, as I think you mentioned, resurrect it or get it restarted. So you're going to live with your parents. That's right, isn't it?*
>
> *APPLICANT: Yes, sir.*

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[84] A5, p 3, [18(e)].

DR DONNELLY: So even if you come back into the community your wife will remain the primary caregiver for the children, at least in the short to medium term?

APPLICANT: Yes, sir.'[85]

123. The evidence of the Applicant's brother appears to dovetail with that of the Applicant insofar as minor children as concerned. With particular reference to his own children, the Applicant's brother said the following:

> *'My brother, Narada William Nathanson, has a relationship with both of my children. Narada speaks to [Child KY] on the telephone and through video calls. He understands that Narada is his uncle. Narada and [Child KY] enjoy speaking with each other.*
>
> *Naturally, given the young age of [Child KA], Narada is not able to engage in conversation with his niece. However, I know that my brother loves my children very much. It is important to emphasise that I want my brother to play an important uncle role to my children in the years to come.'*[86]

124. Further in his statement, the Applicant's brother talks about the nature of the relationship between the Applicant and the relevant minor children with whom he is connected in Australia in these terms:

> *'My brother absolutely adores and loves his children in Australia. I know that one of the key reasons my brother wishes to stay in Australia is to be with his children. My brother wishes to obtain work upon release from immigration detention and provide for his children.*
>
> *Putting aside my brother's criminal history for a moment, my brother truly is an excellent father and good person.'*[87]

125. In his oral evidence, the Applicant's brother spoke about the nature of the relationship between the Applicant and [Child KY]. He also spoke of the proposed nature of the relationship that would likely transpire between the Applicant and both of the children KY and KA in the event of the Applicant's return to the community. He also spoke of the likely physical contact that would occur between the Applicant and the children KY and KA given that the Applicant's brother and his family reside in Darwin and the Applicant is most likely to settle and reside in the Perth area if returned to the community:

> *'DR DONNELLY: Starting with - what's the oldest child's name again?*
>
> *CLEEDON NATHANSON: [Child KY].*

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[85] Transcript, p 25, lines 32-47; p 26, lines 1-19.

[86] A2, p 1, [7]-[8].

[87] Ibid, [12]-[13].

DR DONNELLY: Right. Starting with your son, what can you tell the tribunal about the relationship between your brother and [Child KY]?

CLEEDON NATHANSON Well, like I said we always video call my brother every week and he always runs to the phone to have a chat to his uncle. He loves - he loves his uncle and they always talk and have a laugh on the phone whenever we video call. So he knows that and that's his uncle. But he honestly hasn't met his uncle yet because my brother has been away for so long. But, yes, they've got a really good relationship and he can't wait to meet his uncle.

DR DONNELLY: All right. Now if your brother is returned to the Australian community what kind of relationship do you want your brother to have with your child, [Child KY]?

CLEEDON NATHANSON: Well, Dr Jason, to be honest both my son and my daughter is my brother's only niece and nephew so I would like him to be there for them as much as possible. And I'd like them to have a really close relationship as our family does. Yes, it would be devastating if he doesn't get to meet them. So it would play a big part.

DR DONNELLY: How long have you been living in Darwin for?

CLEEDON NATHANSON: I've been in Darwin now for about seven years.

DR DONNELLY: All right. And have you gone back to visit your family in Western Australia?

CLEEDON NATHANSON: Yes, I have. I've taken my partner and my first born and we went for Christmas and in New Years, about two years ago now. So not too long ago.

DR DONNELLY: Yes. And do you think that if your brother gets is visa back you would travel to Western Australia to see him?

CLEEDON NATHANSON: Most definitely. Most definitely.

DR DONNELLY: All right. You spoke about it being very devastating if your son and daughter didn't get to meet their uncle. Is there any reason why they couldn't meet him in New Zealand?

CLEEDON NATHANSON: It's that I wouldn't really want to take them to New Zealand at this age anyway but maybe later on in life if we had to, yes, I definitely would take them to New Zealand to meet their uncle."[88]

126. In the Applicant's SFIC, the three abovementioned biological children are identified and, following an application of the factors appearing at paragraph 8.3(4) of the Direction, the following conclusion is reached in relation to the three biological minor children:

> *'The Tribunal would find that a decision to not revoke the mandatory cancellation of the applicant's visa will involve significant hardship for all three children. The Tribunal would find that this primary consideration weighs very heavily in favour of revocation of the mandatory cancellation decision."*[89]

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[88] Transcript, p 50, line 47; p 51, lines 1-34.

[89] A1, p 20, [86].

127. Further in the Applicant's SFIC, there is reference to the abovementioned minor nephew and niece. Following an application of the factors at paragraph 8.3(4) of the Direction, the following conclusion is reached in relation to the best interests of these minor children:

> *'Overall, it is in the best interests of both [Child KY] and [Child KA] for the mandatory cancellation decision to be revoked. Respectfully, the Tribunal should attribute at least moderate weight in relation to these minor children in Australia.'*[90]

The respective contentions about minor children

128. As was noted earlier, the Applicant's SFIC – with specific reference to the Applicant's three minor biological children – contends that this Primary Consideration 3 '*…weighs very heavily in favour of revocation of the mandatory cancellation decision.*'[91] With reference to the minor niece and nephew, the Applicant's SFIC contends, following an application of the relevant paragraphs at paragraph 8.3(4) of the Direction that '*it is in the best interests of both [Child KY] and [Child KA] for the mandatory cancellation decision to be revoked.*'[92] The Tribunal is urged to '*…attribute at least moderate weight…*' in relation to the minor niece and nephew.[93]

129. In its SFIC, the Respondent contends – with specific reference to the Applicant's three minor children – that '*…it is in the best interests (for those three children) for the cancellation decision to be revoked…*'[94] With reference to the minor niece and nephew, the Respondent contends that '*…very limited weight…*' should be allocated to the best interests of those two children because (1) the Applicant's relationship with them is non-parental; (2) the children are cared for by their parents; and (3) the Applicant has never met those two children in a physical sense due to the time he has spent removed from the community.

Application of factors in paragraph 8.3(4) of the Direction to the relevant minor <u>biological</u> children

130. **Sub-paragraph (a)**: the duration of the Applicant's relationship with his minor children – in a physical sense – has obviously been adversely impacted by his physical removal from

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[90] Ibid, p 21, [92].
[91] A1, p 20, [86].
[92] Ibid, p 21, [92].
[93] Ibid.
[94] R1, p 14, [48].

their lives. That said, there is nothing to cavil with the proposition that he does have a strong relationship with them which is something that is actively promoted by his family and in respect of which the Applicant's wife will not stand in the way of. It can be accepted that due to his incarceration the nature of his relationship with these three minor children has been non-parental and that there have been long periods of absence of him from their lives.

131. But that is not to suggest that the nature of his relationship with them is not palpable and strong. We know from the evidence that the Applicant tries to contact the children on a frequent basis and that they become emotional when faced with the prospect of communicating with him only over the telephone and not in person. There are no existing court orders (or equivalent) restricting meaningful contact between him and the three biological children. Indeed, the Applicant confirmed in his oral evidence that his wife would not stand in the way of him resuming his fatherly role. This sub-paragraph strongly weighs in favour of a finding that it is in the best interests of the Applicant's three minor biological children for his visa status to remain in Australia being restored to him.

132. **Sub-paragraph (b)**: there is a convincing tone to the evidence pointing towards a very likely extent to which the Applicant will play a role in the lives of the three minor biological children. The Applicant's family – as found by Chief Justice Grant – provided him with a stable, caring and loving home. They (his family members) want to resume that scenario in the event of the Applicant's return to the community. There is little to cavil with the proposition that the Applicant wants to do the same thing with regard to his own biological children if returned to their lives in a physical sense. There is significant remaining parenting time until each of the three children attain the age of 18 years. There is a total of 23 cumulative parenting years during which the Applicant can re-establish and play a positive parental role. With nothing impeding this intention, this sub-paragraph strongly weighs in favour of a finding that it is in the best interests of the Applicant's three minor biological children for his visa status to remain in Australia being restored to him.

133. **Sub-paragraph (c)**: there is reference in the Applicant's SFIC to:

> *'The applicant tries to call [the biological children] everyday and they cry every time he speaks to them. He states that finding out about his visa cancellation has broken*

their hearts and has traumatised them emotionally. He states that they also face questions at school about why their father has not come home.'[95]

134. Can this be regarded as an example of how the Applicant's prior conduct has impacted the children? The answer is, most probably, in the negative. Rather, the above quoted scenario is more the result of the *consequences* of the Applicant's unlawful conduct impacting the children. There is no denying his physical absence has equally both impacted the children in a negative way, embarrassed them and confused them. It is very likely a similar scenario would apply if he were to re-offend and again be physically removed from their lives. But this is not and cannot be construed as any type of negative impact on the children as a result of the Applicant's conduct. This sub-paragraph should be put to one side and rendered neutral for present purposes.

135. **Sub-paragraph (d)**: in her evidence, the biological mother of the children, Ms SN, confirms the following:

> *'Narada had always been the soul [sic] provider of our family. The best father to our 3 children who miss him so much who are finding it all very emotionally hard to cope. They have formed a healthy bond that father and children should form. Narada has always been an integral part of our life by providing the support and guidance of a good father and husband. Our favourite time spent was going fishing, fixing cars along side their dad, swimming at the beach, reading books before bed, fixing and making things together, BBQs at nanas, picnics at the park.*
>
> *Our sons look up to their dad a great deal and I honestly can not imagine our boys and daughter without their father. It has and Is continuing to affect them. By separating our beloved family it would cause deeper devasting effects not only with our children but myself and my husband.'*[96]

136. The corollary of Ms SN's above evidence is that the children (certainly the two eldest children) are certainly of an age to experience adverse effects as a result of any prolonged separation from their father. As against that, there is the contemporary reality of people communicating with each other on a range of telephonic and electronic platforms. The difficulty with that contention is that despite his physical absence, the Applicant has remained an emotional '*presence*' in the lives of his three minor biological children. This is consistent with the paradigm in which the relationship with his parents and siblings has operated and continues to operate. This sub-paragraph strongly weighs in favour of a

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[95] A1, p 19, [77].
[96] G1, p 105.

finding that it is in the best interests of the Applicant's three minor biological children for his visa status to remain in Australia being restored to him.

137. **Sub-paragraph (e)**: the Applicant readily conceded that his three minor biological children are primarily parented by Ms SN, their biological mother. Further, he agreed that any return by him to the community would result in a gradual and progressive re-introduction into the lives of those children. It is not as though he will leave immigration detention and simply walk through the front door of where Ms SN and the three minor biological children reside and immediately resume a fulsome fatherly parental role having equal parental status with Ms SN. It is clear Ms SN primarily parents the children. This sub-paragraph should be put to one side and rendered neutral for present purposes.

138. **Sub-paragraph (f)**: I have checked the material and cannot locate any statements or other paperwritings made by the children in which they speak about their relationship with the Applicant. It suffices to say there is adequate and convincing evidence before the Tribunal suggestive of a reality that the children (especially the two eldest children) do feel an emotional void arising from the Applicant's ongoing physical absence from their lives. It can be safely found that the known views of the children (albeit that such views are express by people around the children) are strongly supportive of a finding that it is in their best interests for the Applicant's visa status to remain in Australia being restored to him.

139. **Sub-paragraph (g)**: unfortunately for the Applicant, there is evidence before the Tribunal about the children having been exposed to family violence perpetrated by him. In the '*Detected Incidents Report*' of the incident that occurred in June 2012,[97] there is plain and obvious reference to the children being present while the Applicant perpetrated that particular act of domestic violence. Indeed, at the time of the Applicant physically administering the violent conduct upon Ms SN, it is noted that '*During this time [Child T] was present, crying and shouting for [the Applicant] to stop*.' Also unfortunately for the Applicant, the '*Detected Incidents Report*' for the incident occurred in May 2016 there is reference to '*3 x Children present*' under the heading of '*Other Relevant Information*' in that report.

[97] G1, pp 181-182.

140. It is therefore safe to find that the children were (at the very least) present while the Applicant perpetrated these two acts of family violence. It is not known whether any or all of the children were traumatized or otherwise adversely impacted by the Applicant's conduct, although it is not a stretch of the evidence to suggest that during the first incident Child T must have experienced some kind of apprehended fear or concern about the Applicant's conduct otherwise he would not have felt compelled to tell the Applicant to cease his conduct towards Ms SN. There is nothing in the balance of the material to suggest that the Applicant has adversely dealt with any of the relevant minor biological children in any of the ways contemplated by this sub-paragraph. It does not assist the Applicant and must be applied to temper any weight in his favour pursuant to this Primary Consideration.

141. **Sub-paragraph (h):** likewise, I am not able to glean anything from the material pointing to any of the three relevant minor biological children experiencing any of the trauma contemplated by this sub-paragraph as a consequence of the Applicant's unlawful conduct. This sub-paragraph is therefore also not relevant, and no weight can be safely allocated to it.

Application of factors in paragraph 8.3(4) of the Direction to the relevant minor <u>niece and nephew</u>

142. **Sub-paragraph (a)**: due to a couple of factors, the Applicant has not physically met either of these two minor biological children. Although the Applicant's brother took his family[98] from Darwin to Perth to visit the Applicant's family about two years ago, the Applicant did not meet Child KY because he was incarcerated. Nor did the Applicant meet Child KA because she had not been born at that time. While the nature of the relationship between the Applicant and these two children has not been on a face-to-face basis, he nevertheless speaks to the elder child, Child KY (now aged four years) on a relatively regular basis. His relationship with Child KA is in its formative stages and is something that will obviously be encouraged by the Applicant's brother and his wife. This sub-paragraph moderately weighs in favour of a finding that it is in the best interests of the Applicant's minor nephew and niece for his visa status to remain in Australia being restored to him.

[98] Comprising the Applicant's brother, Mr Cleedon Nathanson, his wife, Ms Sarah Snowball and their firstborn child, [Child KY], who was then aged about two years.

143. **Sub-paragraph (b)**: it is not likely that the Applicant will play a positive *parental* role in the future lives of Child KY and KA. However, it is likely that he will play a positive *uncle-type* role into the future. Indeed, there is plenty of time for him to do so until both of the children attain the age of 18 years. This sub-paragraph moderately weighs in favour of a finding that it is in the best interests of the Applicant's minor nephew and niece for his visa status to remain in Australia being restored to him.

144. **Sub-paragraph (c)**: there is no evidence of the Applicant's past conduct adversely impacting either of the children and it is not possible to know the extent to which, if at all, they would be impacted by him returning to his offending ways. This sub-paragraph should be put to one side and rendered neutral for present purposes.

145. **Sub-paragraph (d)**: we do not know anything about any likely effect of ongoing separation of the Applicant from the lives of the minor niece and nephew. In his statement, the Applicant's brother speaks of the Applicant maintaining contact with Child KY '*…on the telephone and through video calls*.'[99] There is little to cavil with the suggestion that the Applicant would be able to maintain such contact with both of these children in this fashion were he removed to New Zealand. This sub-paragraph should be put to one side and rendered neutral for present purposes.

146. **Sub-paragraph (e)**: the Applicant's brother and his wife already fulfill a parental role in relation to both of these minor children. This sub-paragraph should be put to one side and rendered neutral for present purposes.

147. **Sub-paragraph (f)**: the children are plainly too young to be able to express any views about any ongoing physical separation from the Applicant. Neither of them have physically met him. This sub-paragraph should be put to one side and rendered neutral for present purposes.

148. **Sub-paragraph (g)**: there is nothing before the Tribunal pointing towards any suggestion that either of these children have ever been at risk of, or subject to, or exposed to, family violence perpetrated by the Applicant, nor that she has been adversely dealt with in any of the ways contemplated by this sub-paragraph. Both of them were born after the Applicant's

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[99] A2, p 1, [7].

removal from the community. This consideration is therefore not relevant, and no weight can be safely allocated to it.

149. **Sub-paragraph (h)**: likewise, I am not able to glean anything from the material pointing to either of these two children experiencing any of the trauma contemplated by this sub-paragraph as a consequence of the Applicant's unlawful conduct. This sub-paragraph is therefore also not relevant, and no weight can be safely allocated to it.

Findings about the relevant minor children

150. First, with reference to his three biological children, it can be found – after an application of the relevant sub-paragraphs at 8.3(4) of the Direction to the evidence – that the best interests of those children do very strongly weigh in favour of the allocation of a significant level of weight to this Primary Consideration 3 in favour of restoring the Applicant's visa status to remain in Australia. Second, with reference to the minor niece and nephew, an application of the relevant sub-paragraphs at 8.3(4) of the Direction points, at best, to a finding that the best interests of those children are moderately militative in favour of a finding that the Applicant's visa status to remain here should be restored to him.

Conclusion: Primary Consideration 3

151. Overall, the cumulative best interests of each of the five relevant minor children, when analysed through the lens of the relevant sub-paragraphs of 8.3(4) of the Direction, lead me to a finding that this Primary Consideration 3 is of *heavy weight* in favour of revoking the delegate's decision refusing to revoke the original mandatory cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 4: THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

152. The Direction makes clear that the expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.[100] The Direction further explains:

> *'This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated [in paragraph 8.4(1)–(3) of the Direction], without independently assessing the community's expectations in the particular case.'*[101]

153. With reference to the propositions in paragraph 8.4(1) of the Direction, the architecture of this sub-paragraph can, to my mind, be expressed thus:

(a) the Australian community expects non-citizens to obey Australian laws while in Australia; and

(b) as a norm, where a non-citizen has either:

- breached the expectation in the immediately preceding sub-paragraph (a); or
- there is an unacceptable risk that the non-citizen will breach the expectation in the immediately preceding sub-paragraph (a);

then, the Australian community expects that the Australian Government will not allow such a non-citizen to enter or remain in Australia.

154. This Applicant has breached the Australian community's expectations by his record of criminal offending in this country, which is evidenced by repeated breaches of Australian laws. Therefore, the Australian community, *'as a norm'* expects the Australian government not to allow him to remain in Australia.

155. In addition to the guidance provided by paragraph 8.4(1) of the Direction, paragraph 8.4(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory

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[100] Paragraph 8.4(3) of the Direction.

[101] Paragraph 8.4(4) of the Direction. Paragraph 8.4(4) codifies the position laid down by the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454.

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

> *(a) acts of family violence; or*
>
> *(b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
>
> *(c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;*
>
> *(d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or*
>
> *(e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or*
>
> *(f) worker exploitation.*

156. Earlier in these Reasons, I found that the Applicant has committed at least two acts of family violence.[102] In addition, he has convictions for crimes committed against a vulnerable member of the community comprising the 70 year old victim of his offending that came before Chief Justice Grant for sentencing in May 2018. The Applicant's conduct therefore engages paragraphs 8.4(2)(a) (acts of family violence) and 8.4(2)(c) (crimes against the elderly) of the Direction. This means the Australian community expects that the Australian Government can and should cancel this Applicant's visa.

157. The remaining question is whether there are any factors which modify the Australian community's expectations. This question is informed by the principles in paragraphs 5.2(4) and (5) of the Direction. In summary these are:

(a) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa;

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[102] Reference the above-described incidents that occurred on 20/21 June 2012 and 8 May 2016.

(b) the Australian community has a low tolerance of criminal or other serious conduct by non-citizens who have been participating in, and contributing to, the Australian community for only a short period of time;[103]

(c) Australia *may* afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life;[104] and

(d) the nature of a non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify a visa outcome that is not adverse to the non-citizen.[105]

158. In relation to sub-paragraph (a) of the immediately preceding paragraph [157], the term, '*limited stay visa*' is not defined in the Act. The Applicant in this case held a Class TY Subclass 444 Special Category (Temporary) visa since October 2013 until it was mandatorily cancelled on 6 August 2018. This visa permits a citizen of New Zealand to remain in Australia indefinitely.[106] As the visa permitted the Applicant to remain in Australia without any limit on the duration of his stay, the visa held by the Applicant cannot be classified as a limited stay visa.[107] Therefore the application of this sub-paragraph (a) is not applicable to the Applicant.

159. In relation to sub-paragraph (b) of the preceding paragraph [157], the has Applicant resided in Australia from 2010 when he was 26 years old. He is currently aged 39 years. His is a qualified tradesman as a mechanic and mechanical fitter.[108] He has a solid history of engagement in remunerative employment in Australia which speaks favourably about him having a steady work history in Australia during his time here. He has fathered two children in Australia (Child L, born in December 2011, Child and Child G, born in January 2016). Whatever participation in and contribution to the Australian community he may have made

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[103] Paragraph 5.2(4) of the Direction.

[104] Ibid.

[105] Paragraph [5.2(5)] of the Direction.

[106] Regulation 444.511 of the *Migration Regulation 1994* (Cth).

[107] *Walker v Minister of Home Affairs* [2020] FCA 909 at [29].

[108] G1, p 68.

during his time here cannot be safely found to have been, '*short'*. Therefore, the Australian community's tolerance is not lowered by this part of the principles in 5.2(4) of the Act.

160. In relation to sub-paragraph (c) of the preceding paragraph [157], I repeat that the Applicant resided in Australia from the age of 26. He is currently 39 years of age. He has resided in Australia since May 2010. He has spent a third of his life in Australia. This means that the Australian community has a higher than usual tolerance of criminal, or other serious conduct by the Applicant.

161. In relation to sub-paragraph (d) of the preceding paragraph [157], I am not of the view that the balancing exercise between (on the one hand) the harm that would be caused by him re-offending and (on the other hand), whatever countervailing considerations may work in his favour, is not necessarily a principle referable to the community's expectations for present purposes. This is because I am not of the view that the Applicant's conduct and the resulting harm from that conduct (thus far) has been of a sufficient magnitude such as to dispel any applicable countervailing considerations.

162. Having regard to the above discussion around the abovementioned sub-paragraphs (a)–(d) (inclusive) referenced in paragraph [157], I am of the view that the Australian community's expectations *are not* modified such that the community does not have a higher than usual tolerance of criminal conduct by the Applicant. Because of his very serious violent offending, I am of the view (and I find) that the community expects the Government can and should cancel his visa.[109]

Conclusion: Primary Consideration 4

163. Primary Consideration 4 carries a *certain, but not determinative*, level of weight against revocation of the mandatory cancellation of the Applicant's visa.

[109] Paragraph 5.2(3) of the Direction.

OTHER CONSIDERATIONS

Other Consideration (a): International non-refoulement obligations

164. The parties are ad idem that this Other Consideration (a) is not relevant to the instant determination.[110] I agree.

Other Consideration (b): Extent of Impediments if Removed

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

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

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

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

The Applicant's evidence

166. In his PCF, the Applicant was asked '*Do you have any diagnosed medical or psychological conditions?*' He ticked the '*Yes*' box and described his conditions thus: '*I currently suffer with lower back pain, do take medication for that.*'[111] In terms of medication he said that he had been prescribed '*amtitriptaline*' and that this medication had been prescribed for '*schuratic nerve pain. From back down left side.*'[112] The additional medication he nominated was '*mertizapane'* and that this had be prescribed for '*depression tablets*'.[113] The PCF does not nominate any doctor, clinician or other health professional to be treating the Applicant for his claimed conditions.

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[110] A1, p 25, [101]; R1, pp 15-16, [55].
[111] G1, p 69.
[112] Ibid.
[113] Ibid.

167. In his SFIC, it was contended that his lower back pain and depression, if those conditions recurred in New Zealand, '*would cause the Applicant very considerable emotional hardship.*'[114] It was also contended that the Applicant would experience difficulty in securing lodgings in New Zealand and that he would probably be '*living in the streets*'. A further contention was that separation from his children would cause him '*irreparable mental harm*'.

168. During his evidence-in-chief, the Applicant spoke of not having any type of family support network. He said that if he was returned to New Zealand he would suffer very significant emotional distress and that it would result in a downward spiral culminating in the return to use of illicit drugs. He spoke of developing suicidal ideation if returned to New Zealand:

> *'DR DONNELLY: All right now let's talk about another topic, and I've almost finished asking you my questions in chief, sir. I just want to finish on the topic of extent of impediments if you were removed to New Zealand. Now you've already given evidence that you said you don't have a family support network there, do you have any other concerns about returning to New Zealand?*
>
> *APPLICANT: Yes, I do.*
>
> *DR DONNELLY: What are those concerns?*
>
> *APPLICANT: If I did get returned to New Zealand I'll suffer very significant emotional distress, being away from my children and family members who all remain in Australia, it will just be a downward spiral of me probably returning back to drugs. To be honest with you, I'm afraid I will probably have thoughts of suicide. There's nothing there for me in New Zealand, there's no one there, I'd have no support at all which is opening every door for me to just fall back on everything I don't want to do and be. Which would be back to drug taking, you know, trying to support myself. Yes, I'd just feel hopeless, I'd feel worthless, I wouldn't want to be on the earth anymore if I go back to New Zealand. It would just completely - just break me to pieces.'*[115]

169. **Sub-paragraph 9.2(1)(a)**: I am not of the view that the Applicant's age and state of health represent anything in the way of significant impediments upon a return to New Zealand. At 39 years of age, he is in the prime of his life. His lower back pain and depression issues are capable of treatment and remediation in New Zealand which, broadly speaking, has a public health system analogous to that of Australia. His claimed mental health and substance abuse issues if returned to New Zealand derives from the evidence of the Applicant and him alone. Apart from his own family members, there is nothing of a clinical nature before

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[114] A1, p 28, [121].

[115] Transcript, p 11, lines 16-32.

the Tribunal demonstrating any likelihood of a return to illicit drug abuse in the event of his return to New Zealand.

170. **Sub-paragraph 9.2(1)(b)**: this Applicant is a citizen of New Zealand who came here in 2010. He has spent about a third of his life in this country. He was in his mid-twenties when he arrived in Australia. He was born in Zimbabwe and moved to New Zealand as a child.[116] It is thus difficult to accept that the Applicant will be confronted with any language or cultural barriers upon a return to New Zealand. Although not strictly binding for present purposes, this Tribunal (differently constituted) has previously found: *'New Zealand is culturally and linguistically similar to Australia. There are no significant linguistic or cultural barriers facing the applicant if he returns to New Zealand.[…]'*[117]*.* In the Applicant's SFIC, it is accepted that '*…New Zealand is culturally and linguistically similar to Australia.*'[118] I am therefore not of the view that the Applicant will face any significant or substantial language or cultural barriers impeding his return and re-settlement in New Zealand.

171. **Sub-paragraph 9.2(1)(c)**: this sub-paragraph looks for any social, medical and/or economic support that would be available to the Applicant in New Zealand were he returned to that country. In his PCF the Applicant said that if returned to New Zealand '*I would loose all and everything I have worked for and my family. Also would probably be living in the streets.*'[119] In terms of specific problems he would face if returned to New Zealand he said '*…I would have no place to stay and would be leaving all my family behind including my wife and children which just by me been [sic] here [i.e in prison/immigration detention] has already played such a big impact on me and my family*.'[120]

172. In his evidence-in-chief, the Applicant spoke about apparent difficulties he would face in terms of finding employment in New Zealand. According to his evidence, it is easier for him to find work in Australia compared to New Zealand because he has an established work history in this country:

> *'DR DONNELLY: Can I ask you this; do you think you'd be able to get work in New Zealand?*

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[116] G1, p 37.

[117] *Tera Euna and Minister for Immigration and Border Protection* [2016] AATA 301 ("*Tera Euna"*), [101].

[118] A1, p 29, [126].

[119] G1, p 69.

[120] Ibid, p 70.

APPLICANT: I don't, I don't think it would be easy for me to get work in New Zealand because most employers would be looking back on my - my crimes that I've committed here in Australia, all my wrongdoings, which would make it very difficult for me to get a job anywhere I think.

DR DONNELLY: Well, Mr Nathanson, could I ask you this; you said it will be very difficult for you to get a job anywhere, logically then if one accepts that evidence or takes it at face value rather, wouldn't that also be an issue for you in Australia?

APPLICANT: It won't - it won't be - I wouldn't be as hard as it would be in New Zealand, because of my previous work history here in Australia. I've got previous employers that I've worked for in the past that know my work ethic, they know my punctuation. And half of them are previous employees that are offering me new projects that have been starting up, yes, in Australia…'[121]

173. When cross-examined, the Applicant agreed that he had worked as a diesel and petrol engine mechanic in New Zealand. In particular, he confirmed he had worked as a diesel mechanic in New Zealand:

'MR KYRANIS: In addition to completing your apprenticeship as a diesel mechanic in New Zealand, you also worked in New Zealand as a diesel mechanic; is that right?

APPLICANT: Yes, diesel and petrol.

MR KYRANIS: How many years did you work in New Zealand as a diesel mechanic for?

APPLICANT: Only for a few years.

MR KYRANIS: And that was in Auckland; wasn't it?

APPLICANT: No, that was in Hamilton and also Tauranga. I worked in a few dealerships.'[122]

174. In the SFIC filed on his behalf, it is contended that '*…there will be little or no support for the Applicant in New Zealand and that the bulk of his family live in Australia.*'[123] Issue was taken with the delegate's finding under review that his qualifications as a diesel mechanic and mechanical fitter would assist him to find employment in New Zealand. The Applicant's SFIC says that he would have difficulty finding employment in New Zealand because of his criminal history in Australia and because of the likely state of his mental health if returned there which would, it is said, impede his capacity to engage in remunerative employment. The Applicant's SFIC concedes that New Zealand '*…has comparable standards of healthcare, education, and social welfare support.*'[124]

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[121] Transcript, p 11, lines 34-47.

[122] Transcript, p 13, lines 35-43.

[123] A1, p 29, [123].

[124] Ibid, [126].

175. I have misgivings about any suggestion that the Applicant would have difficulty in obtaining work in his trade(s) in New Zealand due to whatever criminal history he has compiled in Australia. I am not aware of any evidence suggesting that '*s 501 deportees*' have difficulty in obtaining employment in New Zealand. The same argument could be made about the Applicant's prospects of obtaining employment in Australia. Two further points can be made: (1) the Applicant had a conviction in New Zealand but it did not prevent him from working there; and (2) he confirmed in cross-examination that he had worked '*for a few years*' as a diesel mechanic in New Zealand '*in a few dealerships*'. I am not of the view that a claimed incapacity to find employment in New Zealand would present as any significant impediment to his return and resettlement there. I am likewise not convinced by a suggestion that mental health trouble will preclude him from working in New Zealand. Such symptoms are yet to manifest and, apart from the Applicant and some of his family, there is nothing of an independent nature before the Tribunal indicating that such symptoms will manifest.

176. The Applicant's SFIC concedes a relative commonality between New Zealand and Australia's standards of healthcare, education, and social welfare support. Where the Applicant might experience an impediment is in the absence of family and other social support that would be available to him in New Zealand. He was asked about whether he has relatives in New Zealand during cross-examination and this is what he said:

> *'MR KYRANIS: Do you have any relatives in New Zealand?*
>
> *APPLICANT: No, all my family's in Australia.*
>
> *MR KYRANIS: None whatsoever?*
>
> *APPLICANT: No.*
>
> *MR KYRANIS: Your aunty, your mum's sister; doesn't she live in New Zealand?*
>
> *APPLICANT: No, she's here now. They've all moved to Australia. And she's even come and visited me in the detention centre.*
>
> *MR KYRANIS: Are we talking about Belinda Lowe?*
>
> *APPLICANT: Yes. They live in Perth actually. So has my cousins come and seen me here, her sons.*
>
> *MR KYRANIS: So none of Belinda's family still live in New Zealand?*
>
> *APPLICANT: No, they're all here in Australia.'*[125]

[125] Transcript, p 13, lines 45-46; p 14, lines 1-11.

177. It can therefore be safely found that the Applicant would experience some measure of difficulty in sourcing social and familial support upon a return to New Zealand. The absence of such support is an important impediment because it has consequential effects in other areas of the Applicant's proposed life in New Zealand. For example, if he has little or no family or social contacts in New Zealand, he will have nowhere to stay, at least on a short-term basis, once he gets there. If he was no one to speak to or fraternize with, there is a possibility of an adverse impact on his mental health. A further consequence would be that he would be deprived of any helpful guidance that such a contact or family member could provide, be it in the form of sourcing employment or sourcing essential supports in the form of medical and governmental assistance.

178. I have found that the Applicant's age and health[126] will not act as impediments upon a return to New Zealand. I have found that he will not face any substantial language or cultural barriers[127] if returned to that country. The extent of any weight allocable to the Applicant's favour pursuant to this Other Consideration (b) is to be found in the absence of family and/or social support[128] he would have if returned to New Zealand. On the basis of this specific impediment, I am of the view that this Other Consideration (b) confers a *moderate, but not determinative,* level of weight in favour of setting aside the decision under review.

Other Consideration (c): Impact on victims

179. Paragraph 9.3(1) states that decision-makers must consider the impact of a s 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.

180. The Respondent has not called evidence about any impact the Applicant's continued presence in Australia would have on his victims. Without such evidence, it would be

[126] Paragraph 9.2(1)(a) of the Direction.
[127] Paragraph 9.2(1)(b) of the Direction.
[128] Paragraph 9.2(1)(c) of the Direction.

irresponsible of me to enter the realm of conjecture and speculate about the extent of any impact this Applicant's offending has had, or would have, on any of its victims.

181. I am mindful of the evidence from the Applicant's wife, Ms SN wherein she speaks *favourably* about the Applicant remaining in Australia. Such a statement could possibly attract discussion in these Reasons pursuant to the authority of *PGDX and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('PGDX')*.[129] There, Kerr J made the following comments:

> *"[57] I am satisfied that nothing in CGX20 as has settled the construction to be given to cl 14.4 [the precursor to paragraph 9.3(1) of Direction 90] requires, contrary to that guidance, a victim to be heard only as to such impacts as weigh in favour of the cancellation of a visa. I reject that DKN20 requires it.*
>
> *[58] It can be accepted that usually such impacts will weigh in favour of the cancellation of an offender's visa.*
>
> *[59] Usually, but not always."*[130]

182. On the authority of *PGDX*, I am of the view that is safe to refer to and take into account the statement of Ms SN which is dated 18 August 2018.[131] This statement post-dates both above-referred to incidents of domestic violence that occurred in June 2012 and May 2016. The Applicant's visa was mandatorily cancelled on 6 August 2018. Ms SN's abovementioned statement was provided in support of the Applicant's representations aimed at revocation of the initial mandatory cancellation decision. To the best of my understanding, Ms SN has not withdrawn the statement nor has she made a subsequent statement displacing or otherwise materially amending what she says in her subject statement. I am satisfied that her statement (of 18 August 2018) can be applied to the reasoning process for the instant determination.

183. In her statement, Ms SN says these things:

> *'I am writing in reference to my husband Narada William Nathanson. My name is [name redacted] ([name redacted] as in my passport) i am Narada William Nathansons wife.*
>
> *…*

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[129] [2021] FCA 1235.

[130] *PGDX and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1235, [57]-[59].

[131] G1, pp 104-105.

Narada and I have known each other for 18 years. We met through an acquaintance from school. We felt a deep connection with one another. It was more than love, it felt like to meant to be, ***Narada always respected me and treated me with dignity and worth****. He was my best Friend, I felt safe with him. We have lived together for 11 years and married for 9 years. Narada and I have 3 children together. [Child T], 9years of age. [Child L], 7 years of age and [Child G], 2years of age.*

I provide this reference in full knowledge of all Narada's charges*.* ***He has expressed to me his deep sense of remorse in making such a serious lack of judgement****.[sic]*

…

Narada comes from a loving and committed supportive family system and has learnt good family values and morals. Something I fell in love with, something I so deeply desired in my childhood. In saying this, during this very dark season in our life I have grown even more respect and love for Naradas family.

They have been our back done [sic]. Without their support i wouldn't have coped. Through this we have grown closer

We will do everything in our power to help Narada in his heartfelt desire to return to a positive life style.

Narada had always been the soul [sic] provider of our family. The best father to our 3 children who miss him so much who are finding it all very emotionally hard to cope. They have formed a healthy bond that father and children should form. Narada has always been an integral part of our life by providing the support and guidance of a good father and husband. *Our favourite time spent was going fishing, fixing cars along side their dad, swimming at the beach, reading books before bed, fixing and making things together, BBQs at nanas, picnics at the park.*

Our sons look up to their dad a great deal and I honestly can not imagine our boys and daughter without their father. It has and Is continuing to affect them. ***By separating our beloved family it would cause deeper devasting effects not only with our children but myself and my husband.***

Narada my beloved husband has always been there for me, I have never had to work because he granted me the absolute privilege to be home with our children. *I watched them grow and care for them as most mothers wish they could. I had that opportunity thanks to the loving husband he was. Always put us first and himself last. Always made sure we had everything we needed,* ***it is very hard emotionally and physically without him.*** *He is a family-person who is admired by many and has always presented himself with levelheadedness and Grace. My husband Narada has always had a strong personality with the desire for self-improvement****. Like every marriage/relationship have their complications we want to better our marriage and restore what was broken. We will do whatever it takes to make it as strong as it was when we first met.*** *Narada wants to come home and support his family and do what ever it takes to get the right help for himself and our family whom are waiting at home for him. We really looked forward to our phone calls from him in Darwin correctional centre. Now that he has been detained in Yongah Hill IDO its affected our children even more as they were expecting their dad to come out from OCC and have a normal life with their dad as every child needs in order to feel safe and natured.*

…

Sincerely
Ms SN
(Wife to Narada William Nathanson)'[132]
[My emphasis]

184. There is little to cavil with the proposition that Ms SN still regards herself as the Applicant's wife and that she would welcome his return to both her own life as her spouse but also to the life of their family unit as the father figure-provider. It is clear from her statement that Ms SN wants the marital relationship to return to what it was before the Applicant's removal from the community. There can be no question that she is supportive of the Applicant remaining in Australia even though she was a victim of certain family violence conduct perpetrated by the Applicant to which I have referred earlier in these Reasons. A contrarian element was that Ms SN was not produced to give oral evidence and thus the Respondent did not have any opportunity to test her evidence in cross-examination. The weight allocable to her written statement must thus be tempered accordingly.

185. With reference to this Other Consideration (c) I am of the view that as the victim of the Applicant's past family violence conduct, Ms SN's evidence about her willingness to resume and improve the marital relationship between them is significant. She is not an anonymous victim of the Applicant's conduct. By '*anonymous victim'* I mean someone against whom the Applicant offended but who, apart from that offending incident, will most likely never see the Applicant again. Ms SN is no such victim. She wants the Applicant to re-commence being a constant spousal presence in her life and that of the family of five they have. Accordingly, Ms SN's evidence causes this Tribunal to allocate a *strong level* of weight to this Other Consideration (c) in favour of revocation of the decision refusing to revoke the original mandatory cancellation of the Applicant's visa.

Other Consideration (d): Links to the Australian Community

186. Paragraph 9.4 of the Direction requires that decision-makers must have regard to an Applicant's links to the Australian community. There are two factors which I must assess in determining the level of weight allocable to Other Consideration (d). They comprise: (1) the

[132] G1, pp 104-105.

strength, nature, and duration of ties to Australia; and (2) the impact on Australian business interests if he cannot remain here. I will consider each in turn.

(1) Strength, nature and duration of ties

187. With reference to the first part of this Other Consideration, three elements require consideration. First, it is necessary to have regard to the impact of a non-revocation decision on the Applicant's 'immediate family members' where those people have a right to remain in Australia indefinitely. Second, it is necessary consider the impact of a non-revocation decision by taking into account the strength, nature, and duration of any 'other ties' the Applicant has to the Australian community. Third, it is necessary to assess the strength, nature, and duration of any other 'family or social links' the Applicant may have with people who have an indefinite right to remain in Australia. I will address each component in turn.

i. Impact of non-revocation on the Applicant's immediate family

188. It is necessary to identify the Applicant's immediate family in Australia. In an attachment to his PCF, the Applicant records the following immediate family members in Australia:

- Father – Mr Leonard Nathanson;
- Mother – Ms Miranda Nathanson;
- Brother – Mr Cleedon Nathanson;
- Sister – Ms Aslyn Nathanson;
- Wife – Ms SN.

189. I have earlier recounted the extent to which the Applicant's family is a close, tight knit and loving one. As also mentioned earlier, this finding parallels that of Chief Justice Grant who found the Applicant came from '*…a stable, caring and loving home.*' With the exception of Ms SN, each of these family members gave oral evidence at the Hearing. One does not need to travel far into the material to accept that each of the Applicant's immediate family members would be adversely impacted by his removal. For example:

- the Applicant's father says: '*In circumstances where my son is deported to New Zealand, I would be extremely unhappy. All our family has moved to Australia. My*

wife, children and other extended family members would be absolutely devastated. It makes no sense at all.';[133]

- the Applicant's mother says: '*In circumstances where my son is deported to New Zealand, I will be absolutely devastated. It will break my heart. My son is like my best friend. When I have had considerable issues in life, I would always call my son for advice. He always gave me excellent advice and showed genuine care for me.*';[134]
- the Applicant's brother says: '*If my brother were to be deported to New Zealand, I would be absolutely devastated. I would take it extremely hard to be honest. I also know that my parents and sister would be shattered. They all love my brother very much. There is no question about that.*';[135]
- the Applicant's sister says: '*In circumstances where my brother is deported from Australia, I would be absolutely devastated beyond words. I would be heartbroken and shattered. My family has already been through a great deal with my brother's very prolonged immigration detention.*'[136]
- the Applicant's wife says: '*Narada has always been an integral part of our life by providing the support and guidance of a good father and husband… Our sons look up to their dad a great deal and I honestly can not imagine our boys and daughter without their father. It has and Is continuing to affect them. By separating our beloved family it would cause deeper devasting effects not only with our children but myself and my husband.*'[137]

190. Having regard to the evidence of the Applicant's immediate family members, I am safely led to the view (and finding) that each of them would be adversely impacted by his removal. Accordingly, the strength, nature and duration of the Applicant's ties to his immediate family members in Australia carries a heavy level of weight in favour of this Tribunal setting aside the decision under review to cancel the Applicant's visa. I make this finding conditional on the presumption that each of the above-listed immediate family members are Australian

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[133] A3, p 2, [14].
[134] A4, p 2, [15].
[135] A2, p 3, [17].
[136] A6, p 1, [9].
[137] G1, p 105.

citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

ii. Strength, nature, and duration of "other ties" – length of residence

191. There are two necessary enquiries referable to the extent of the Applicant's, '*other ties*' to Australia. The first of those involves the question of how long he has resided in Australia, including whether he came here as a young child. As mentioned earlier, the Applicant migrated to Australia with his family on a permanent basis in May 2010. Since his arrival, although he did not arrive here as a young child, it can be safely found that he has spent something like one third of his life in Australia.

192. I will now make reference to the two tempering sub-elements in paragraph 9.4.1(2)(a) of the Direction. The first of those compels me to allocate less weight if the Applicant began offending soon after arriving here. He arrived and settled in Australia, with his family, on 11 May 2010. He committed his first offence in Australia on 30 May 2010. This is barely three weeks after he arrived here. The commission of his first Australian offence such a very short time after arriving here must surely be construed as being '*soon after arriving in Australia*'. The first of these two tempering sub-elements does not assist the Applicant.

193. The second of the two tempering sub-elements at 9.4.1(2)(a) of the Direction compels an assessment of the extent of the Applicant's positive contributions to the Australian community. As I have mentioned earlier, he has a solid history of engagement in remunerative employment in Australia which speaks favourably about him having a steady work history in Australia during his time here. In his PCF the Applicant refers to him working he said '*I have always worked hard in every job I have obtained being honest and reliable and trustworthy worker*.' The PCF refers to his work as both a mechanic and mechanical fitter in '*dealership workshops*' and as a '*fly-in-fly-out*' worker.[138] He will have paid taxation on the income he derived from that employment and would thus have made a contribution towards this country's coffers from which the Australian community is sustained.

194. This second of the two tempering sub-elements also looks for positive contributions to the Australian community. As we know, the Applicant has been removed from that community

[138] G1, p 68.

for about six years. However, within the '*community*' of the closed confines of either prison or immigration detention, there is reliable evidence that he has acted as a '*Quicksmart*' Assistant Tutor with responsibility for supporting students to attain basic skills in numeracy and literacy.[139] Further, the Applicant's sister spoke of the Applicant's role in leading a Bible study group while in immigration detention.[140]

195. I am of the view (and I find) that this tempering sub-element can be applied in favour of the Applicant due to his positive contributions to the Australian community via his engagement in remunerative employment. To perhaps a lesser extent, a similar finding can be made in relation to his contributions to the much smaller communities in which he has found himself over the last six years in both prison and immigration detention. Therefore, while the first tempering sub-element does not assist the Applicant, the second one can be applied in his favour to attract weight to this Other Consideration (d) in favour of this Tribunal restoring his visa status to remain here.

iii. Strength, nature, and duration of "other ties" – family and other social links

196. In terms of 'other ties' to Australia the Applicant does, in his PCF, refer to the following extended family members:

- Mr Quinn Bent – uncle;
- Ms Fiona Jeremiah – aunt;
- Helen May – aunt;
- Estelle Adams – aunt;
- Clifford May – uncle;
- Janine Kinnear – cousin;
- Freddie Adams – uncle.

197. None of the above extended family members gave oral evidence at the Hearing. I have looked through the material for any statements from any of them:

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[139] See [66] of these Reasons.
[140] Ibid.

- Mr Quinn Bent has provided two statements. In the first of them[141] Mr Bent says he is aware of the Applicant's offending but regards the Applicant as a '*…kind, generous and loving family person*.'[142] He says that if returned to the community the Applicant will '*return to being a good law abiding citizen.*'[143] In his second statement[144] Mr Bent speaks of the importance of the Applicant returning to his immediate family. He talks about allowing the Applicant's '…*family especially his immediate family [to] take him in and provide this platform on which he can rebuild his life*.'[145]

- Ms Fiona Jeramiah is a cousin of the Applicant's mother and has provided one statement.[146] She speaks positively of the Applicant (in a personal sense) and also speaks positively about the '*supportive, loving and stable home*'[147] provided to him by his immediate family. She is aware of the Applicant's criminal offending and believes the Applicant has '*…great potential to being a good example and a positive influence in the community*.'[148]

- Ms Helen May is a friend of the Applicant's parents. Her singular statement appears in the material.[149] She has known the Applicant for all of his life and is aware of his criminal offending in this country. She thinks he is now reformed to the point where '*…he is willing and ready to fit into society as responsible and upstanding*.'[150]

- Ms Estelle Adams is the Applicant's maternal aunt and his godmother. Her singular statement appears in the material.[151] She is tremendously saddened as a result of the Applicant's current circumstances. She has known him since birth and regards him as a loving father and husband to his immediate family. She refers to the

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[141] G1, pp 82-83.
[142] Ibid.
[143] Ibid, p 83.
[144] Ibid, pp 101-102.
[145] Ibid, p 101.
[146] Ibid, p 84.
[147] Ibid.
[148] Ibid.
[149] Ibid, p 89.
[150] G1, p 89.
[151] Ibid, p 99.

'*…close relationship I had the privilege to have with [the Applicant]…*'[152] and as his godmother she wants to provide him with '*…all the love and support he needs*'.[153]

- Mr Clifford May appears to have met the Applicant via the Applicant's work as a fly-in-fly-out worker in the mines. His singular statement appears in the material.[154] He says '*…we found him to be honest, trust worthy and respectable young gentleman.*'[155] He says that if returned to the community '*…I would not hesitate to rehire him again.*'[156] He refers to the Applicant's positive qualities as a family man. He concludes his statement with saying the Applicant is a '*…good young lad with a lot of potential that went off track unfortunately.*'[157]
- Ms Janine Kinnear has provided a statement which appears in the material.[158] She appears to be a resident of New Zealand. As such, I cannot take her statement into account she is not an Australian citizen, Australian permanent resident and/or a person who has an indefinite right to remain in Australia.
- Mr Freddie Adams – although this person is named in the Applicant's PCF, I am not able to locate any written statement from him in the material.

198. With specific reference to the Applicant's 'other ties' to these extended family members, I am safely led to the view (and finding) that each of them (with the exception of the final two) would be adversely impacted by his removal. Accordingly, the strength, nature and duration of the Applicant's ties to his immediate family members in Australia carries a heavy level of weight in favour of this Tribunal setting aside the decision under review to cancel the Applicant's visa. I make this finding conditional on the presumption that each of the above-listed immediate family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

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[152] Ibid.

[153] Ibid.

[154] Ibid, p 103.

[155] Ibid.

[156] Ibid.

[157] Ibid.

[158] Ibid, pp 106-107.Note: This letter from Ms Kinnear is dated 2018 and she states in the letter that she will be moving to Perth, WA in Australia at the end of August 2018. I cannot be certain from the material before me that Ms Kinnear ever made the move from New Zealand to Perth, Australia and I therefore deal with this letter as it presently appears in the material.

199. There is some evidence in the material of the Applicant having '*other ties*' in Australia beyond immediate and extended family. I will refer only to those statements in the material made by people in Australia, none of whom were called to give oral evidence at the Hearing:

- Petrus Botha has known the Applicant for the past six years (as of 2018). They met while both working as mechanical fitters on a construction project on an iron ore mine site in the Pilbara. His singular statement appears in the material.[159] He is aware of the Applicant's criminal offending but nevertheless regards the Applicant as a '*respectful young man.'*[160] He refers to the loving family environment from which the Applicant has emerged as well as the Applicant's commitment to his own immediate family. He describes the Applicant as '*…a good young man and not many people win me over like he has*.'[161]
- Zane Patel has known the applicant for about 4/5 years (as of 2018). They met while working together at mine sites are mechanical fitters. His singular statement appears in the material.[162] During their work time together, Mr Patel says he '*…found him to be hard working and pleasant to work alongside*.'[163] Mr Patel says he found the Applicant to be '*family oriented [and] always there if one need [sic] to chat and was forthcoming with encouragement and advice*.'[164]
- Ms Jenny Fox (as of 2018) had known the Applicant's family for approximately three years. She has mainly had contact with the applicant through their mutual attendances at church. Her singular statement appears in the material.[165] She refers to the Applicant's strong family ethic both towards his own immediate family and his parents and siblings. She is aware of the Applicant's difficulties with the law in Australia. She refers to the Applicant's unlawful conduct in Australia '*regrettable hiccup*'.[166] She thinks the applicant has a bright future in this country provided he can be reunited with his wife and children.

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[159] G1, p 80.
[160] Ibid.
[161] Ibid.
[162] Ibid, p 90.
[163] Ibid.
[164] Ibid.
[165] G1, p 96.
[166] Ibid.

- Ms Alexis Paternoster has been friends with the Applicant and his family since 2013-14. Her singular statement appears in the material.[167] She describes the Applicant as a '*good and honest man*.'[168] She thinks he '*…has always navigated his way through life with dignity and grace; often putting the needs of others ahead of his own.*'[169] She is aware of his criminal offending. She suggests that the Applicant's '*…actions may make him a criminal in the eyes of our government but to us he is still a loving father…*'[170] She concludes her statement by saying '*Don't let this innocent family carry the weight of the consequences of your decision to deport their Dad and husband.*'[171]

- John Bezuidenhout has provided a short-written statement which appears in the material.[172] He has known the Applicant since birth and has been close to his family and has observed him grow up '*to be a good hardworking and family man*'.[173] He says that the Applicant '*…is needed in our workforce, he's [sic] expertise should not be lost as he could be an asset to our industry*.'[174]

- Ms Diana Heynes has provided a short statement (dating from August 2018) which appears in the material.[175] She regards the Applicant as '*…a fine young man.*'[176] She thinks his lengthy incarceration has taught the applicant '*a bitter lesson*'. She says she has known him all his life and that he '*…has the strength of character to reform*.'[177]

- Ms Naomi Bent is a childcare educator who runs her own family day care business in Perth, Western Australia, she provided a singular statement (dating from August 2018) appearing in the material.[178] She has known the Applicant and his immediate family for over eight years. She speaks of the Applicant's positive

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[167] Ibid, pp 97-98.
[168] Ibid p 97.
[169] Ibid, p 97.
[170] Ibid, p 97.
[171] Ibid.
[172] Ibid, p 100.
[173] Ibid.
[174] Ibid.
[175] G1, p 110.
[176] Ibid.
[177] Ibid.
[178] Ibid, p 111.

qualities as a husband and a father. She believes the Applicant needs to be situated in Perth where he will be able to derive support from his immediate family.

- Mr and Ms Ian and Anna Butler have provided a joint statement which dates from August 2018 and appears in the material.[179] As of 2018 they say they have known the Applicant, his wife and their three biological children who attend the same school as their own children. They speak of the Applicant's close ties to his family and of his qualities as a father/parent. They also have a common connection with the Applicant and wife via the network of their local church. Any removal of the Applicant from Australia as '*a tragedy*'.[180] They think it is imperative that the Applicant and his immediate family unit should stay together in Australian.
- Mr Heremaia Mackenzie has provided a statement which appears in the material.[181] He is a small business proprietor in Western Australia and he met the Applicant via their church network three-four years ago (as of 2018). He is aware of the Applicant's history of offending in Australia and considers he should not be removed for three reasons: (1) he is rehabilitated; (2) his immediate family; and (3) his potential to contribute to the community. He concludes '*I would love to be a part and walk along side [the Applicant] in integrating him back into the community*.'[182]

200. With specific reference to the Applicant's '*social links'* to the Australian community, I am safely led to the view (and finding) that each of them would be adversely impacted by his removal. Accordingly, the strength, nature and duration of the Applicant's social ties to Australia carries a heavy level of weight in favour of this Tribunal setting aside the decision under review to cancel the Applicant's visa. I make this finding conditional on the presumption that each of the above-listed immediate family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

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[179] Ibid, p 112.
[180] Ibid.
[181] Ibid, pp 116-117.
[182] Ibid, p 117.

(2) Impact on Australian business interests

201. Paragraph 9.4.2(3) compels an assessment of the Applicant's employment links to Australia with particular reference to any impact his removal may have on, *'Australian business interests'*. I am of the view (and I find) that this component of Other Consideration (d) is not relevant.

Weight allocable to Other Consideration (d): links to the Australian community

202. With reference to the first part of this Other Consideration (d) (the strength, nature and duration of the Applicant's ties to Australia), I am of the view – after having analysed its three above referred elements – that the totality of the evidence points to the allocation of a *heavy* level of weight in favour of the Applicant. The second part of this Other Consideration (impact on Australian business interests) is not relevant. Overall, the Applicant's links to the Australian community carry a *heavy* level of weight in favour of a finding that this Tribunal restoring his visa status to remain here.

Findings: Other Considerations

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

(a) international non-refoulement obligations: ***not relevant***;

(b) extent of impediments if removed: is of a ***moderate, but not determinative*****,** level of weight in favour of setting aside the decision under review;

(c) impact on victims: is of a ***strong*** level of weight in favour of setting aside the decision under review; and

(d) links to the Australian community including the strength, nature, and duration of ties to Australia: is of ***heavy*** weight in favour of setting aside the decision under review.

CONCLUSION

204. Under s 501CA(4)(b) of the Act, there are two alternate conditions precedent to the exercise of the discretion to revoke the mandatory cancellation of the Applicant's visa: either the Applicant must be found to pass the character test; or I must be satisfied that there is

another reason, pursuant to the Direction, to revoke the cancellation. As noted above, the Applicant does not pass the character test.

205. In considering whether there is another reason to exercise the discretion afforded by s 501CA(4) of the Act to revoke the mandatory visa cancellation decision, I have had regard to the considerations referred to in the Direction. I find as follows:

- Primary Consideration 1: carries a *certain, but not determinative* weight in favour of **affirming** the decision under review;
- Primary Consideration 2: carries a *moderate, but not determinative* weight in favour of **affirming** the decision under review;
- Primary Consideration 3: is of a *heavy level* of weight in favour of **setting aside** the decision under review;
- Primary Consideration 4: carries a *certain, but not determinative* weight in favour of **affirming** the decision under review;

206. I have outlined the weight attributable to each of the Other Considerations. I am of the view (and I find) that the combined weights I have allocated to Primary Consideration 3 and Other Considerations (b), (c) and (d) respectively, are sufficient to outweigh the combined weights I have allocated to Primary Considerations 1, 2 and 4.

207. A holistic view of the evidence relevant to the Primary and Other Considerations in the Direction therefore favours setting aside of the Respondent's decision under review made on 8 January 2019.[183]

DECISION

208. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **sets aside** the decision made by the delegate of the Respondent dated 8 January 2019 and **substitutes** it with a decision to revoke the cancellation of the Applicant's visa.

[183] Notified to the Applicant on 10 January 2019.

I certify that the preceding 208 (two hundred and eight) paragraphs are a true copy of the reasons for the decision herein of Senior Member Theodore Tavoularis

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

Associate

Dated: 31 March 2023

Date(s) of hearing:	**16 and 17 January 2023**
Counsel for the Applicant:	**Dr Jason Donnelly**
	(Latham Chambers; Direct brief)
Solicitor for the Respondent:	**Mr Jake Kyranis (Senior Associate)**
	Sparke Helmore Lawyers

ANNEXURE A

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED
G1	Remittal Bundle (Paged 1-830, Numbered 1-5)	R	Various	7 Nov 2022
R1	Respondent's Statement of Facts, Issues and Contentions (Paged 1-18)	R	9 Jan 2023	9 Jan 2023
R1.1	Annexure to Respondent's SFIC	R	7 Jan 2019	9 Jan 2023
A1	Applicant's Statement of Facts, Issues and Contention (Paged 1-31)	A	13 Dec 2022	16 Dec 2022
A2	Statement of Cleedon Nathanson (Paged 1-3)	A	16 Dec 2022	16 Dec 2022
A3	Statement of Leonard Nathanson (Paged 1-3)	A	15 Dec 2022	16 Dec 2022
A4	Statement of Miranda Bernadette Nathanson (Paged 1-12)	A	15 Dec 2022	16 Dec 2022
A5	Statement of the Applicant	A	15 Dec 2022	16 Dec 2022
A6	Statement of Aslyn Nathanson	A	21 Dec 2022	21 Dec 2022