Administrative Appeals Tribunal

**DECISION AND REASONS FOR DECISION**

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| Division: | GENERAL DIVISION |
| File Number(s): | **2022/10338** |
| Re: | **QBQS** |
| | APPLICANT |
| And | **Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs** |
| | RESPONDENT |

**DECISION**

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| Tribunal: | **The Hon. John Pascoe AC CVO, Deputy President** |
| Date: | **2 March 2023** |
| Place: | **Sydney** |

The correct or preferable decision is to set aside the delegate's decision dated 15 December 2022 not to revoke the mandatory cancellation of the Applicant's Protection (subclass 866) visa, and in substitution it is decided that the mandatory cancellation of the Applicant's visa is revoked.

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

The Hon. John Pascoe AC CVO, Deputy President

**CATCHWORDS**

*MIGRATION – visa cancellation – mandatory cancellation under s 501(3A) of the Migration Act 1958 – where the applicant does not pass the character test – whether there is 'another reason' to revoke the cancellation – consideration of Direction No. 90 – protection of the Australian community – expectations of the Australian community – international non-refoulement obligations – links to the Australian community – legal effect of decision – reviewable decision set aside.*

**LEGISLATION**

*Migration Act 1958* (Cth) s 499, 501

**CASES**

*FYBR v Minister for Home Affairs* [2019] FCAFC 185

**SECONDARY MATERIALS**

*Direction No. 90 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*

**REASONS FOR DECISION**

**The Hon. John Pascoe AC CVO, Deputy President**

**2 March 2023**

**BACKGROUND**

1. By way of an application filed on 19 December 2022, the Applicant seeks review of the decision of a delegate of the Respondent dated 15 December 2022 not to revoke the mandatory cancellation of the Applicant's visa pursuant to subsection 501CA(4) of the *Migration Act 1958* (Cth) (the Act). The decision not to revoke the cancellation was made under subsection 501CA(4) on the basis that the delegate was neither satisfied that the Applicant passed the character test nor that there was another reason why the cancellation decision should be revoked.

2. I note that the Respondent's Statement of Facts, Issues and Contentions contain a helpful factual summary of this application, much of which is replicated below.

3. The Applicant is an Iraqi national who first arrived in Australia on 17 April 2011. He was granted a Protection (Class XA) (subclass 866) visa on 15 December 2011.

4. On 27 August 2019, the Applicant was convicted in the District Court of New South Wales of *'commit act of indecency with victim under 10 years*'; '*take/detain person w/i to obtain advantage*', and '*indecent assault person under 16 years of age*', for which he was sentenced to an aggregate term of four years and six months imprisonment.

5. On 30 August 2019, the Minister cancelled the Applicant's visa under subsection 501(3A) of the Act on the following bases:

   (a) he did not pass the character test under paragraphs 501(6)(a) because he had a '*substantial criminal record*' for the purposes of paragraph 501(7)(c) of the Act (see subparagraph 501(3A)(a)(i)); and

   (b) the Applicant was serving a full-time sentence of imprisonment in a custodial institution because he committed an offence or offences against Australian law (paragraph 501(3A)(b)).

6. On 27 September 2019, the Applicant made representations seeking revocation of the cancellation decision in accordance with the Minister's invitation, pursuant to paragraph 501CA(4)(a) of the Act.

7. On 21 January 2022, the Court of Criminal Appeal of the Supreme Court of New South Wales quashed the verdicts and ordered a re-trial for the '*commit act of indecency with victim under 10 years*' offence and the '*take/detain person w/i to obtain advantage offence*'. The Applicant was found not guilty of the '*indecent assault person under 16 years of age*' offence.

8. On 2 September 2022 in the District Court of New South Wales, the Applicant was again convicted of '*commit act of indecency with victim under 10 years*' and '*take/detain person w/i to obtain advantage*' and was sentenced to an aggregate four year term of imprisonment. Indicative sentences were recorded against each of the Applicant's offences, with an aggregate term imposed for both offences in compliance with section 53A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

9. On 15 December 2022, a delegate of the Minister (the delegate) refused to revoke the cancellation decision on the basis that the delegate was not satisfied the Applicant passed the character test under section 501 and there was not another reason why the cancellation decision should be revoked pursuant to subsection 501CA(4) of the Act.

**THE ISSUE**

10. It is agreed by the parties that the Applicant does not pass the 'character test' as defined by section s 501(6) of the Act as he has a substantial criminal record under s 501(7)(c) of the Act. Therefore, the only issue before the Tribunal is where there is 'another reason' why the original decision, being the mandatory cancellation of the Applicant's visa, should be revoked pursuant to s 501CA(4) of the Act.

**THE LAW**

11. The relevant legislation and policy is outlined below.

12. Section 501CA(4) of the Act states:

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

13. On 8 March 2021 the Minister made the Direction pursuant to s 499 of the Act to guide decision-makers in the exercise of the power in s 501CA(4). The Direction came into effect on 15 April 2021.

14. Paragraph 5.2 of the Direction sets out the following principles relevant to the exercise of the discretion:

> *(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-biding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*

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

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

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

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

15. Section 6 of the Direction provides that, informed by the principles in paragraph 5.2 of the Direction, a decision-maker must take into account the considerations identified in section 8 and 9, where relevant to the decision.

16. Section 8 of the Direction provides that the four primary considerations are:

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

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

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

(d) expectations of the Australian community (Primary Consideration 4).

17. Section 9 of the Direction provides that the four other considerations which must be taken into account where relevant are:

(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.

**ORAL EVIDENCE**

**Oral Evidence of the Applicant**

18. The Applicant affirmed his statement of 18 February 2023. He gave evidence that his parents were born in Iraq and were Iraqi citizens. They fled to Iran in 1980, where the Applicant was born in 1989. He lived with his family as a refugee in Iran and attended school in Iran. His first language was Farsi.

19. The family returned to Iraq in 2004, he was unable to speak Arabic. He was given Iraqi citizenship in 2004 and later, because of unrest in Iraq, fled to Iran with his family.

20. He started university in Iran, but later had to abandon his studies, as the Iranian government had introduced new restrictions on the ability of refugees to attend university and obtaining a student visa would prevent his long-term residence in the country.

21. The Applicant and his elder brother subsequently left Iran for Australia, where he arrived by boat on Christmas Island on 17 April 2011. He was 22 years old.

22. The Applicant's mother and younger brother stayed in Iran, where they have a 'white card'. There was some evidence that the mother had sought visas to relocate to Sweden, where the Applicant had an uncle living.

23. The Applicant said that it would not be possible for him to return to Iran, and that he had tried to get a white card three years ago and was told that it was not possible. It was unlikely the Applicant would be able to go to Sweden, even if his mother and brother were there, because he had been convicted of very serious criminal charges in Australia. The Applicant's main support in Australia came from his brother. His brother maintained regular contact with the Applicant and spoke with him in detention almost every day.

24. The Applicant met LB in 2015, to whom he became engaged. But the relationship ended, due to LB and the Applicant being aware that her relationship with him may have adverse consequences for her.

25. At the time of the offences for which the Applicant was convicted he was working in a department store. His original trial was aborted, his second trial which resulted in a guilty verdict on 27 August 2019 date had been overturned by the Court of Criminal Appeal, and his third trial resulted in him being convicted of the offences of 'Take/detain person w/i to obtain advantage' and 'commit act of indecency with victim under 10 years', on 2 September 2022. The Applicant was released on bail for a period of some two years, with strict bail conditions, and went to jail on 12 January 2019. He was moved to immigration detention following his release from prison.

26. The Applicant maintained his innocence in relation to the offences committed. It was explained very clearly to him that the Tribunal could not go behind the convictions and the findings of the New South Wales District Court. It was noted that the Applicant has filed a Notice of Intention to Appeal with the New South Wales Court of Criminal Appeal.

27. When asked why he continued to maintain his innocence, even though it may be detrimental to him, the Applicant explained that right from the beginning there had been a benefit to him for entering a plea of guilty – namely a 25% reduction in any likely sentence, but he did not plead guilty as he believed he was innocent. He felt it was most important to him not to abandon his claim of innocence, despite any adverse inference that may be drawn.

28. The Applicant gave evidence that he had completed a number of programs in prison and in detention, including the R.U.S.H program, which helped with a number of mental health issues, including PTSD, anger control, understanding consequences and helping to deal

with stress. The program ran for 12 weeks and there were 24 sessions. The Applicant had tried to enrol in the MISOP sex offender rehabilitation program but was unable to do so.

29. The Applicant had sought psychiatric assistance and had been given medication whilst in prison for anxiety and depression. He saw a psychologist at least monthly and a psychiatrist every three months. He continued to see a psychiatrist and a psychologist in immigration detention.

30. He was being treated for a range of illnesses including, anxiety, depression, PTSD, diabetes, and high cholesterol.

31. The Applicant had attempted to commit suicide shortly after his arrival on Christmas Island when he found out that his father was dead. He had subsequently witnessed another attempted suicide while in Villawood Detention Centre. He said he found living in immigration detention very hard, and that if he were not released into the Australian community he could not return to Iran, and he could not return to Iraq which he said was 'not my country' and he could not speak the language.

32. If he were to be released, the Applicant gave evidence that he would live with his brother, and that his previous employer was willing to offer him immediate employment. He had previously worked at the company as a production manager.

33. His brother, with whom he has a very close relationship, works for the same employer.

34. The relationship with his brother was of primary importance to the Applicant. He said that they 'only had each other' when they came to Australia, and that his brother would be destroyed if he were to remain in immigration detention. His brother had his own mental health issues as a result of the terrible events they had experienced as children, including an incident where they had been kidnapped, witnessed a beheading, and the Applicant was shot in the foot, and had to have the bullet removed.

35. The Applicant had converted to Christianity in 2016, after studying the Christian religion since 2013. He intended to continue to live as a Christian.

36. Prior to his convictions the Applicant was working full time, owned a successful business and he also owned a home.

**Oral Evidence of BA:**

37. The Applicant's brother, BA, affirmed his statements made on 26 September 2019 and 16 February 2023.

38. BA said that he and his brother grew up in circumstances where 'everyone hated us'. In Iran they were seen as Iraqi, and in Iraq they were seen as not belonging, as they did not speak Arabic and had primarily lived in Iran.

39. BA said that his mother and youngest brother still lived in Iran and had white cards. He last visited his mother in 2016.

40. The brothers had lived together after their arrival in Australia and had a very close relationship. For the period they had lived apart, they had lived very close to each other. BA said that he believed in his brother's innocence based on the evidence he had heard at his brother's trials and as someone who knew his brother very well.

41. BA said that he would look after his brother if he were to be released into the Australian community. He had his own flat and would be able to keep a close eye on his brother and give him every support possible.

42. BA said that he had to sell his brother's house, car, and business when his brother went to gaol.

43. He would be devastated if his brother were to remain in immigration detention on an indefinite basis and said that he had always believed it was a matter of time before his brother would be released. The brothers spoke almost every day. He had visited the Applicant when he was in gaol 'a lot' and maintained a very close relationship with his brother. That relationship would continue even if the Applicant remained in detention, but BA was concerned he could not take care of his brother if he were to live in another country.

**PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY**

44. In considering this primary consideration, I have had regard to paragraph 8.1 of Direction 90.

45. There are two aspects to this consideration – the nature and seriousness of the conduct of the non-citizen, and the risk to the Australian community should the non-citizen re-offend.

46. The Applicant is 32 years old and has been in Australia for 11 years.

47. In considering the matter the Tribunal takes into account the provisions of Direction 90. In particular I note section 8.1.1(1) and 8.1.2(2), in relation to violent and/or sexual crimes, and crimes of a violent nature against women or children, regardless of the sentence imposed.

**Nature and seriousness of the offending**

48. In the current case the Applicant was convicted of two sexual offences against a child, namely 'commit act of indecency with victim under 10 years' and 'take/detain person w/I to obtain advantage'. The matter had a lengthy history in the District Court. The first trial was aborted, the second verdict was overturned by the Criminal Court of Appeal and the Applicant was ultimately convicted at his third trial.

49. At the time of his conviction Judge Robinson made the following comments which are relevant:

> *At any event, having carefully reflected upon the competing submissions, I am of the view that the objective seriousness of each of the two counts on the indictment, falls fairly and squarely at the mid-range of objective seriousness.*
>
> *(…) As to the moral culpability and this brings into play the background of the offender which has been set forth in the psychologist's report in a lot of detail, I do think that there is a need for the Court to take that into account when comes to the overall background of the offender. I have had difficulty endeavouring to see any connection between the deprived background and what he did on that day.*
>
> *Perhaps, given those subjective matters which were addressed by the psychologist, that his thought processes were not really engaged in the way they should have been, namely taking the child to the desk rather than doing what he did. I do not agree that there should be a significant reduction in his moral culpability, although I*

*am prepared to allow some reduction taking that into account. I would agree that there is an issue as to his mental health and that it would be somewhat onerous for him in custody and indeed, he has spent a long time in custody.*

50. At the hearing the Applicant maintained his innocence, and there was evidence that he had filed a notice of intention to appeal against his conviction. It was explained to the Applicant that the Tribunal does not have the power to go behind the convictions recorded against him, and that it may be that an adverse inference could be drawn from his continued protestations of innocence. The Applicant said that he understood, and that right from the beginning, even though there was the prospect of a more lenient sentence if a guilty plea was entered, he did not want to plead guilty as he believed he was innocent.

51. In all of the circumstances, and particularly given the history of the matter. I draw no adverse inference from the Applicant's protestations of innocence, particularly as he accepted without hesitation that he had been convicted of the offences in a properly conducted jury trial.

52. It is not necessary for the purposes of this decision to go into the details of the Applicant's offending. What is relevant is that the victim was a young girl, who had gone with the Applicant on the basis that she was lost and that she needed to find her mother. The Applicant had ignored his employer's instructions as to what should be done in these circumstances and had taken the girl into an unsurveilled area of the department store, and this is where the offences occurred.

53. In my opinion it is impossible to regard the Applicant's convictions as other than very serious.

**Risk to the Australian community should the Applicant reoffend**

54. Any risk of harm to children must be taken very seriously and falls within a category of offending for which the community would have very little tolerance.

55. Offending of this kind can have very adverse and long-term consequences, both for the child, and for the child's family.

56. In this case there has only been one psychological assessment made regarding the Applicant's likelihood of reoffending. The report is dated 13 August 2019, and the

psychologist, in her report assessed the Applicant's chances of re-offending as 'Above Average' on the basis that:

> *(a) Mr [QBQS] was in a position of psychological power over the victim, given their age difference, his role as a [REDACTED] and her being separated from her mother;*
>
> *(b) He denies his index offending and this has implications for his engagement in offence-specific treatment;*
>
> *(c) On the basis of the current interview, he appears to have some symptoms of major mental illness, including hallucinations;*
>
> *(d) Mr [QBQS] has a history of suicidal ideation.*

57. It was put to the Tribunal by counsel for the Applicant that there were limitations to the methodology used. However, I accept the findings of the psychologist based on the test which is an objective test and well established as an assessment tool. The psychologist also noted in paragraph 29 of her report that in the case of this type of offending the risk of recidivism was much lower. Her report said:

> *It should be noted that in routine samples of sexual offenders used to develop the Static-99R, the average five-year sexual recidivism rate (for offenders of mixed risk levels) is between 5% and 15%. This means that out of 100 sexual offenders of mixed risk levels, between 5 and 15 would be charged or convicted of a new sexual offence after five years in the community. Conversely, between 85 and 95 would not be charged or convicted of a new sexual offence during that time period. Thus, reoffending rates for sexual offences in general are substantially lower than for general offending.*

58. I note that the Applicant has had significant counselling and mental health treatment including appropriate medication to treat his psychological conditions which include PTSD, anxiety and depression, since 2019 whilst he was in gaol and in detention.

59. The Applicant has also completed a number of courses to assist him in dealing with conduct issues, but I note that he was, through no fault of his own, unable to complete the sex offenders rehabilitation program whilst in gaol, despite his asking to do so.

60. It was noted that there are a number of protective factors if the Applicant were to be released into the community, including the support of his brother, and gainful employment.

61. It is, in my view, unfortunate that the Tribunal did not have a more up to date psychological assessment of the Applicant.

62. Overall, having considered all of the relevant factors the Tribunal finds that this consideration weighs very heavily against revocation of the delegate's decision.

**PRIMARY CONSIDERATION 4 – EXPECTATIONS OF AUSTRALIAN COMMUNITY:**

63. Direction 90 sets out the expectations of the Australian Community. Broadly, these encapsulate the findings of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185, where the Full Court decided by majority that it is not for the decision-maker to assess the expectations of the Australian community for the purpose of applying this consideration. Rather, the expectations of the community that decision-makers are required to consider are those set out in Direction 90 at paragraph 8.4.

64. There is clear authority that it is not the Tribunal's role to determine for itself the expectations of the Australian community. The Tribunal's role is to determine the weight to be given to this consideration.

65. In assessing the weight to be given to this consideration, I take into account the Applicant's traumatic history before his arrival in Australia, and the fact that he had made a contribution to the community through hard work prior to his imprisonment. He has embraced the Christian faith, and did so prior to his offending, and continues to be part of an active bible study group.

66. Nevertheless, after considering all relevant aspects I find that this consideration weighs heavily against revocation of the delegate's decision.

**OTHER CONSIDERATIONS:**

**INTERNATIONAL NON REFOULMENT OBLIGATIONS:**

67. It was accepted by both parties that Australia has non-refoulment obligations in relation to the Applicant.

68. As agreed by both parties I give this consideration neutral weight.

**IMPEDIMENTS TO REMOVAL**

69. The Applicant has serious mental health issues which need ongoing treatment. Given the nature of his offending he is unlikely to be accepted by any third country.

70. If in the future he were to be returned to Iraq, the Tribunal accepts that he would be unlikely to receive appropriate mental health treatment.

71. Further, when asked about Iraq he said ‘it is not my country’. Although the Applicant received Iraqi citizenship by descent, he was actually born in Iran and speaks Farsi. His education was in Iran. He does not speak or understand Arabic.

72. The Applicant’s brother, when asked about his and the Applicant’s childhood in Iran and Iraq, said ‘everyone hated us’. They were outcasts in Iran, because they were seen as Iraqi, and they were outcasts in Iraq, where they were seen as Iranian.

73. The brothers were kidnapped, tortured, and witnessed a beheading in Iraq when the Applicant was about 15 years old.

74. The Applicant has no family, friends, or access to any support network of any kind anywhere other than Australia. There was evidence that the Applicant’s mother and younger brother remained in Iran, but are looking to emigrate to Sweden where the Applicant’s Uncle is resident. It was conceded that it would be impossible for the Applicant to go to Iran and that given the nature of his convictions, he is unlikely to be accepted in Sweden even if his mother and brother were successful in moving to that country.

75. His brother, when giving evidence, said that if the Applicant were removed from Australia, he would not be able to help him.

76. It was put to the Tribunal by both parties in their written submissions that this consideration should be given neutral weight, as it was accepted that as a result of Australia’s non-refoulment obligations, he would not be removed from Australia. However, I note that at the hearing the Respondent’s counsel referred, on a number of occasions, to the possibility of relocation to a third country. In other circumstances, this consideration would weigh heavily in favour of revocation of the delegates decision. However, in light of the submissions of both parties, I give it neutral weight.

**IMPACT ON VICTIMS:**

77. A previous victim impact statement by the parents of the child, who was the subject of the Applicant's offending makes very clear the terrible consequences for the child and her family.

78. The Applicant's offending effectively upended the lives of the children's family and is likely to adversely impact them for many years. Although the criminal proceedings and the Applicant's conviction might properly be seen as the primary decision affecting the victim and her family.

79. There was no evidence put before the Tribunal as to the likely impact of its decision on the victim and her family. Nor is there any evidence that they are aware of these proceedings. Accordingly, as agreed by the parties, I give this consideration neutral weight.

**LINKS TO THE AUSTRALIA COMMUNITY**

**Strength, nature and duration of ties**

80. It is quite clear from the evidence that the most important and stabilising person in the Applicant's life is his brother, an Australian citizen, who gave evidence to the Tribunal.

81. Especially given the terrible trauma the brothers experienced it must be accepted that they are the most important people in each other's lives. They have either lived together or close to each other all of the time they have been in Australia. The Applicant's brother visited him regularly in gaol and speaks to him virtually every day in detention.

82. The Applicant has a firm offer of employment if he is to be released into the Australian community. The offer is from his former employer, with whom he has a positive work history.

83. The Applicant's friends, and his bible study group, which is important to him are all in Australia.

84. Prior to his convictions the Applicant had established a successful business and had worked very long hours. He owned a house and a car.

85. His brother gave evidence that he had had to sell all of the Applicant's assets when he went to gaol.

86. The Applicant's brother said that he would be able to help the Applicant in every way, including with accommodation, financial assistance, emotional support and monitoring of behaviour, if the Applicant was living with him in Australia.

87. In light of the history of the brothers, and their undoubted importance to each other, I give this consideration very heavy weight in favour of revocation of the delegate's decision.

**Impact of Australian business interests**

**88.** There is no evidence as to any impact on Australian business.

**ADDITIONAL CONSIDERATIONS:**

**Legal consequences of decision**

89. At the hearing it was accepted that an adverse decision was highly likely to result in the Applicant remaining in detention for an indefinite period of time.

90. The Applicant is unlikely to find a third country which would accept him, and although there may be alternatives available to the Minister, there was no evidence that the Minister would be likely to exercise any discretion that might see the Applicant removed from detention.

91. The was strong evidence, which the Tribunal accepts, that prolonged detention would have a very deleterious effect on the Applicant's mental health. I note that during a previous period in immigration detention, the Applicant attempted to hang himself, and that he also witnessed at least one, and possibly more, suicide attempts during his current period in detention.

92. Although his brother said that he would continue to support the Applicant if he were in detention, it is clear that the Applicant would be engulfed by a sense of hopelessness which would exacerbate his anxiety and depression, I accept that he would be at serious risk of suicide and/or self-harm.

93. I note that the Applicant also suffers from other health issues, including diabetes and high cholesterol, which are being treated in detention.

94. The Applicant is 32 years old and has lived in Australia for more than 10 years. He has served the sentence imposed on him under the criminal justice system. He had no previous convictions. He spent a lengthy period on bail, during which he did not re-offend, he also has had a lengthy parole period. If released into the community he will be placed on a sex offenders register and will have to live with the restrictions, the effect on his reputation, and acceptance in the wider community that may result.

95. In all of the circumstances of this case, I consider that the prospect of indefinite detention weighs very heavily in favour of revocation of the delegates decision.

**DECISION**

96. Cases of this kind are finely balanced. The Applicant's offending is very serious, but he has completed the sentence imposed upon him by the criminal justice system. He is a registered sex offender and has to live with the consequences of that.

97. In considering the matter overall, I am very mindful that the relevant primary considerations weigh very heavily against the Applicant. However, the prospect of any person, however unattractive they may appear, being indefinitely detained must be considered very seriously, and given very heavy weight, especially when they have already served the sentence imposed upon them by the criminal justice system. Of course, this must be balanced against the risk of future offending and subsequent harm to the community.

98. In the current case, the sentencing judge saw the Applicant's offending as mid-range and took into account the Applicant's mental health issues, for which the Applicant is currently receiving treatment. The Applicant's sentence was not at the higher end of the scale for the relevant offending. Unfortunately, there was no recent psychological report on the Applicant.

99. In some regards, this is not a case that should properly be considered under the Migration Act. It primarily belongs in the criminal justice system and the mental health system. The evidence clearly shows that the Applicant arrived in Australia, having suffered very significant trauma, and with a range of mental health issues. There is no evidence that he ever received treatment prior to going to prison.

100. His crime is very serious, but it does not carry a life sentence under Australian criminal law. In my view, such a sentence, if it were to be imposed, properly belongs in the criminal justice system. Overall, the Tribunal is in a very unsatisfactory position indeed. However, in considering all of the relevant factors I find, somewhat reluctantly, that the weight is finely balanced in favour of revocation of the delegates decision. It is in my view, unfortunate that the Tribunal has no power to impose any conditions on the Applicant, including a requirement as to ongoing mental health treatment.

101. The Applicant will have strong support from his brother, who gave evidence that he is in a position to closely supervise the Applicant. The Applicant should be in no doubt about the consequences of any further offending.

102. Accordingly, the correct and preferable decision is to set aside the delegates decision dated 15 December 2022 not to revoke the mandatory cancellation of the Applicant's Protection (subclass 866) visa, and in substitution it is decided that the mandatory cancellation of the Applicant's visa is revoked

*I certify that the preceding 102 (one hundred and two) paragraphs are a true copy of the reasons for the decision herein of The Hon. John Pascoe AC CVO, Deputy President*

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

Associate

Dated: 2 March 2023

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| Date(s) of hearing: | **23 February 2023** |
| Counsel for the Applicant: | **Dr Jason Donnelly** |
| Solicitors for the Joined Party: | **Mr Harry McLaurin** |