



Administrative
Appeals Tribunal

DECISION AND
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2023/2633**

Re: **Chompeay Kim**

APPLICANT

And **Minister for Immigration, Citizenship and Multicultural Affairs**

RESPONDENT

DECISION

Tribunal: **Member D. Cosgrave**

Date of Decision: **12 July 2023**

Date of Written Reasons: **28 July 2023**

Place: **Brisbane**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **sets aside** the decision under review dated 25 November 2021 and, in substitution, does not exercise the discretion in section 501(2) of the *Migration Act 1958* (Cth) to cancel the Applicant's visa.



Member D. Cosgrave

Catchwords

MIGRATION – Discretionary visa cancellation – Cambodian citizen – Class BB Five Year Resident Return (Subclass 155) visa - s 501(2) of the Migration Act 1958 (Cth) – failure to pass good character test – substantial criminal record – whether the Tribunal should exercise the discretion under s 501(2) of Migration Act 1958 (Cth) to cancel the visa – Ministerial Direction No. 99 applied – Respondent’s delegate’s decision set aside.

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)

Migration Act 1958 (Cth)

Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)

Migration Regulations 1994 (Cth)

Cases

Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 172

BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 99

Bushell v Repatriation Commission (1992) 175 CLR 408

Coker v Minister for Immigration and Border Protection (2017) 160 ALD 588

Dzik v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 78

EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 173

Frugtniet v Australian Securities and Investments Commission (2019) 266 CLR 250

FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 19

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

FYBR v Minister for Home Affairs and Anor [2020] HCA Trans 56

Gaspar v Minister for Immigration and Border Protection (2016) 153 ALD 337

GXXS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 468

Holloway v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCA 1126

Ibrahim v Minister for Home Affairs (2019) 270 FCR 12
Jagroop v Minister for Immigration and Border Protection (2016) 241 FCR 461
Matthews v Minister for Home Affairs [2020] FCAFC 146
Minister for Immigration and Ethnic Affairs v Baker (1997) 73 FCR 187
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19 [2021] FCAFC 133
Minister for Immigration and Ethnic Affairs v Guo [1997] HCA 22; (1997) 191 CLR 559
Minister for Immigration, Citizenship and Multicultural Affairs v HSRN [2023] FCAFC 68
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton [2023] HCA 17
Minister for Immigration and Border Protection v Sabharwal [2018] FCAFC 160
Murphy v Minister for Home Affairs [2018] FCA 1924
Nathanson v Minister for Home Affairs [2022] HCA 26
Sabharwal v Minister for Immigration and Border Protection [2018] FCA 10
Shi v Migration Agents Registration Authority (2008) 235 CLR 286
Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 174
Suleiman v Minister for Immigration and Border Protection (2018) 74 AAR 545
Tanielu v Minister for Immigration and Border Protection (2014) 225 FCR 424
Tera Euna and Minister for Immigration and Border Protection [2016] AATA 301
Thornton v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 23
Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 125
Roberts and Minister for Home Affairs (Migration) [2018] AATA 3970
Viane v Minister for Immigration and Border Protection (2018) 263 FCR 531

Secondary Materials

Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (3 March 2023)
Tracy W. Harachi, 'The Deportation of Cambodians: A Failure of Adjustment or a Failing of Society?', National Institute on Drug Abuse,
<<https://nida.nih.gov/international/abstracts/deportation-cambodians-failure-ofadjustment-or-failing-society>>.

REASONS FOR DECISION

Member D. Cosgrave

28 July 2023

INTRODUCTION

1. Mr Kim seeks review of the Respondent's delegate's 25 November 2021 decision to exercise the discretion expressed in s 501(2) of the *Migration Act 1958* (Cth) (**the Act**) to cancel Mr Kim's Class BB Five Year Resident Return (Subclass 155) visa (**the visa**).¹
2. The hearing was held by video from the Tribunal's Brisbane Registry on 29 and 30 June 2023. Dr Donnelly, instructed by Mr Zarifi of Zarifi Lawyers, represented Mr Kim. The Respondent was represented by Ms Zinn of Mills Oakley.
3. The Tribunal thanks Ms Zinn for the clarity and concision of her advocacy, which greatly facilitated the Tribunal's task.
4. Unless the context indicates otherwise, passages quoted in bold font have been emphasised by the Tribunal.

FACTS

5. Mr Kim is a 43 year old Cambodian citizen who arrived in Australia on 22 June 1987².
6. Mr Kim departed Australia on three brief occasions between 1999 and 2001. He has not departed Australia since 19 April 2001³.
7. On 24 May 2005, Mr Kim was notified that his visa may be liable for cancellation under s 501 of the Act.

¹ G documents, G2, page 13. G documents are so named because they are provided under s 501G of the *Migration Act 1958* (Cth). They consist of documents in the possession or control of the Respondent relevant to the making of a reviewable decision. They usually accompany the Minister's written notice regarding a visa cancellation, refusal, or non-revocation.

² G Documents, G2, page 95, 106.

³ G Documents, G16, pages 292-293.

8. On 1 September 2005, a delegate of the Respondent decided not to exercise the discretion under s 501(2) of the Act to cancel Mr Kim's visa⁴.
9. Mr Kim was notified of this decision by letter dated 7 September 2005⁵, acknowledged receipt of the accompanying warning (**the 2005 warning**) and confirmed his understanding that any further convictions for any offences would result in his visa being reconsidered for cancellation⁶. The receipt confirmation is undated⁷ but the Tribunal will assume that it was signed by Mr Kim reasonably soon after receiving the 7 September 2005 letter.
10. On 12 October 2011, Mr Kim was again notified that his visa may be liable for cancellation under s 501 of the Act.
11. On 29 March 2012, a decision was made not to cancel Mr Kim's visa⁸.
12. On 5 April 2012, Mr Kim signed an acknowledgment that he understood that he could again be considered for refusal or cancellation of his visa if further information of relevance came to the Respondent's attention in the future⁹ (**the 2012 warning**).
13. On 15 June 2019, Mr Kim was issued a Notice of Intention to Consider Cancellation (**NOICC**) under s 501(2) of the Act in relation to his visa and he was invited to comment or provide information on whether his visa should be cancelled¹⁰.
14. On 13 August 2019, Mr Kim responded to the NOICC through his then legal representative, Rizk and Associates¹¹.
15. On 25 November 2021, the Respondent's delegate (**the delegate**) cancelled Mr Kim's

⁴ G Documents, G2, page 100.

⁵ Op cit.

⁶ G Documents, G2, page 101.

⁷ Op cit.

⁸ G Documents, G2, pages 102-103.

⁹ G Documents, G2, page 104.

¹⁰ G Documents, G2, pages 96-99.

¹¹ G Documents, G2, page 129.

visa¹². Mr Kim received notification of this decision on 19 April 2023¹³.

16. On 24 April 2023, Mr Kim applied to the Tribunal for review of the delegate's decision¹⁴.

MR KIM'S OFFENDING HISTORY

17. Mr Kim has a significant adult criminal history in Australia spanning 23 years, with convictions running from August 1998 to July 2021.
18. His criminal history includes violent offences and drug, armed robbery and possession of pistol offences, in addition to other property, dishonesty, COVID administration and driving offences.
19. He has received multiple sentences of imprisonment, including sentences of imprisonment of five years and four years, respectively. He has also been the subject of multiple fines, community correction orders, supervision orders and licence disqualifications.
20. The following table is a chronological summary of his adult offending:

Offence	Year
Possess prohibited drug	1998
Goods in custody	1998
Break and enter commit felony (steal)	1998
Break and enter	1998
Goods given other not entitled reasonably suspected stolen	1998
Break and enter w/i (steal)	1998
Possess prohibited drug	1998
Affray	2000
Steal from the person	2002
Custody of knife in public place	2002
Robbery armed with offensive weapon	2002
Drive with low range PCA	2006

¹² G Documents, G2, pages 13-28.

¹³ The Respondent states that the delayed notification of the delegate's decision appears to be attributable to a miscommunication between the Department of Home Affairs and Australian Border Force regarding when and whether Mr Kim would be detained at the time of notification of the cancellation decision. Nothing turns on this delay and Mr Kim's representatives do not suggest otherwise.

¹⁴ G Documents, G1, pages 1-7.

Goods in personal custody suspected being stolen (not m/v)	2008
Driver/rider state false name/address	2008
Drive on road etc while licence suspended	2008
Use false instrument w/i	2008
Possess/use a prohibited weapon w/o permit	2009
Possess unauthorised pistol	2009
Possess ammunition w/o holding licence/permit/authority	2009
Possess unregistered firearm pistol	2009
Excluded person enter casino	2013
Excluded person enter casino	2013
Drive while licence cancelled 1st off	2016
Drive, licence suspended under s 66 Fines Act - 1st off	2016
Supply prohibited drug >indict. quantity	2017
Possess prohibited drug	2018
Possess prohibited drug	2020
Possess prohibited drug	2021
Shoplifting (less than \$2000)	2021
Goods in personal custody suspected being stolen	2021
Dishonestly obtain financial advantage etc by deception	2021
Not comply with COVID-19 direction	2021

21. The following aspects of his offending are pertinent to the Tribunal's consideration:

- a) In the period between 7 September 2005 and 28 November 2017, encompassing both the 2005 Warning and the 2012 Warning, Mr Kim was convicted of 13 offences¹⁵.
- b) After the 15 June 2019 NOICC and while the cancellation of Mr Kim's visa was under consideration, he was convicted of a further 6 offences.
- c) There are clear instances of violent offending in Mr Kim's history, including being found in possession of unauthorised firearms:
 - i. On 1 November 2002, he was convicted of *Robbery armed with offensive*

¹⁵ G Documents, G2, pages 30-31.

weapon. The further offences of *Custody of knife in public place* and *Steal from the person* were taken into account on Form 1. His Honour Judge Moore's sentencing remarks¹⁶ describe how, on 17 May 2002, Mr Kim, armed with a kitchen knife, approached two women who had withdrawn money from an ATM and demanded their wallets. On 26 May 2002, he snatched a woman's handbag. On 6 June 2002, he was apprehended and handcuffed in relation to the first offence and was found with a knife hidden in the front of his pants.

ii. On 19 June 2009, he was convicted of one count of *Possessing an unauthorised prohibited pistol* and one count of *Possessing an unregistered prohibited pistol*. His Honour Judge King SC sentenced him respectively for each conviction to five years and four months' imprisonment and two years and six months' imprisonment. The terms of imprisonment were later slightly reduced on appeal by the New South Wales Court of Criminal Appeal because of an '*oversight on the part of all involved*'¹⁷.

i. The *NSW Police Facts Sheet* states in connection with these offences that Mr Kim was '*extremely well known to Police for drug, violence, dishonesty and judicial offences*' and was a '*danger to the community*'¹⁸

d) Mr Kim has committed drug supply offences. On 14 December 2017, His Honour Judge Conlon SC convicted Mr Kim of *Supply prohibited drug* and sentenced him to two years' imprisonment with a non-parole period of 15 months¹⁹.

e) The seriousness of Mr Kim's offending is evidenced by his four separate sentences of imprisonment:

i. Four years for *Robbery armed with offensive weapon* on 1 November 2002

¹⁶ G Documents, G2, pages 81-86; Exhibit 1, Respondent's Tender Bundle, R1, pages 1-4.

¹⁷ G Documents, G2, pages 55-80.

¹⁸ Exhibit 1, Respondent's Tender Bundle, R7, page 26.

¹⁹ G Documents, G2, page 30.

at Campbelltown District Court;

- ii. Two years and six months for *Possess unregistered firearm pistol* on 19 June 2009 by Sydney District Court (reduced to two years and four months by the NSW Court of Criminal Appeal);
 - iii. Five years and four months for *Possess unauthorised pistol* on 19 June 2009 at Sydney District Court (reduced to five years by the NSW Court of Criminal Appeal); and
 - iv. Two years for *Supply prohibited drug* on 14 December 2017 at Downing Centre District Court.
- f) After the 15 June 2019 NOICC, on 16 February 2021 Mr Kim was convicted of *Dishonestly obtain financial advantage etc by deception* and sentenced to a nine-month Community Correction Order²⁰. The associated *NSW Police Facts Sheet* indicates that Mr Kim was involved in stealing two new credit cards from victims' mailboxes and withdrawing cash from ATMs. This offending behaviour involves deception and has a significant financial impact on members of the Australian community.

22. There is also evidence before the Tribunal that Mr Kim failed to disclose his criminal convictions on a passenger card when arriving in Australia on 19 April 2001²¹.

LEGISLATIVE FRAMEWORK

23. Section 25(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**the AAT Act**) and Section 500 of the Act are the relevant sources of the Tribunal's jurisdiction in this matter.
24. Section 501(2) of the Act provides that a decision-maker may cancel a visa that has been granted to a person if the decision-maker reasonably suspects that the person does not

²⁰ Op cit.

²¹ G Documents, G10, page 266.

pass the character test and the person also does not satisfy the decision-maker that they pass the character test.

25. Section 501(6) of the Act sets out the character test and explains that a person does not pass the character test if one or more of the circumstances set out in s 501(6) applies. Relevantly, this includes where a person has a substantial criminal record per s 501(6)(a).
26. If a person does not pass the character test, then a decision-maker, acting as the Minister's delegate, may cancel the visa under s 501(2) of the Act.
27. The exercise of that discretion is subject to *Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (the Direction)*.
28. The Tribunal, when considering whether to exercise the discretion expressed in s 501(2), must comply with the Direction²².
29. When considering whether to exercise the discretion, the Tribunal is required to 'do over again' the primary decision-maker's task²³.

MATTERS FOR CONSIDERATION

The Issues

30. Mr Kim's offending history includes violent crimes and drug offences.
31. His index conviction involved five years' imprisonment²⁴.
32. The parties agree that Mr Kim does not pass the character test.²⁵

²² S 499(2A) of the Act.

²³ *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, Kitto J at 502; cited in *Shi v Migration Agents Registration Authority* 235 CLR 286, at [134] (then Kiefel J); cited in *WQKK v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 535, Kennett J at [14].

²⁴ The 'character test' is defined in s 501(6) of the Act. A person fails the test if they have a 'substantial criminal record' defined by s 501(7) of the Act. Section 501(7)(c) of the Act defines a 'substantial criminal record' as including the situation where a person is sentenced to a term of imprisonment of 12 months or more.

²⁵ Exhibit 2, Respondent's Statement of Facts, Issues & Contentions, at [27]; Exhibit 4, Applicant's Statement of Facts, Issues & Contentions, at [9].

33. This is borne out by review of Mr Kim's criminal history²⁶ which meets the requirement of a 'substantial criminal record' as defined by s 501(7)(c) of the Act.
34. Section 499(2A) of the Act requires the Tribunal to comply with the Direction when it assesses and considers the factors weighing for and against setting aside a visa cancellation.²⁷

The Direction

35. The Direction contains mandatory and aspirational considerations guiding the exercise of statutory power under the Act.²⁸
36. The following principles in paragraph 5.2 of the Direction inform the decision-making process and provide a framework within which decision-makers should approach their task:²⁹

- 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 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*

²⁶ G Documents, G2, pages 29-32.

²⁷ See *Gaspar v Minister for Immigration and Border Protection* (2016) 153 ALD 337, [38].

²⁸ *BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 99, [22], citing with approval *Matthews v Minister for Home Affairs* [2020] FCAFC 146, [45].

²⁹ Paragraph 5.2 of the Direction.

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.*
- 5 *With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia will generally 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. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.*
- 6 *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 8.55(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.*

37. Paragraph 6 of the Direction provides that, informed by the above principles, a decision-maker must consider the primary and other considerations set out in Paragraphs 8 and 9 of the Direction where relevant to their decision making.

38. Paragraph 8 of the Direction provides the following primary considerations:

- 1 protection of the Australian community from criminal or other serious conduct;

- 2 whether the conduct engaged in constituted family violence;
 - 3 the strength, nature and duration of ties to Australia;
 - 4 the best interests of minor children in Australia; and
 - 5 expectations of the Australian community.
39. Paragraph 9 of the Direction identifies the following non-exhaustive list of other considerations to be considered where relevant:
- a. legal consequences of the decision;
 - b. extent of impediments if removed;
 - c. impact on victims; and
 - d. impact on Australian business interests.
40. Paragraph 7(1) of the Direction provides that appropriate weight should be given to 'information and evidence from independent and authoritative sources.'
41. Paragraphs 7(2)-(3) of the Direction state that '*Primary considerations should generally be given greater weight than the other considerations,*' and '*One or more primary considerations may outweigh other primary considerations.*'
42. The Tribunal is not precluded from finding that a consideration specified under Paragraph 9 of the Direction has equivalent or greater weight than a consideration specified under Paragraph 8 of the Direction. This depends on each case's specific circumstances³⁰. The weighing process is determined by decision-makers exercising the relevant power under the Act³¹.

³⁰ *Suleiman v Minister for Immigration and Border Protection* (2018) 74 AAR 545, [23], [28] (Colvin J); *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 19.

³¹ *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461, [57].

THE EVIDENCE

43. The following is a summary of the evidence adduced before the Tribunal and which the Tribunal has considered.
44. The evidence referred to below includes documentary evidence collated for the purposes of section 501G of the Act, documents tendered by the Respondent and the oral testimony given by the lay and expert witnesses named below.

Documentary evidence

45. The hearing received documentary evidence. This evidence is consolidated into an agreed Exhibit List and a true and correct copy is **attached** to this Decision and **marked** 'Annexure A'.

Oral testimony

46. The following individuals gave oral testimony in the hearing:
- a) Mr Kim.
 - b) Ms Chompa Kim, his sister.
 - c) Ms Lisa Van, his mother.
 - d) Ms Linda Malco, his sister.
 - e) Ms Lisa Van, his sister.
 - f) Dr Emily Kwok, a clinical and forensic psychologist.

Mr Kim's testimony

47. Relevant aspects of Mr Kim's testimony are extracted below.

Examination-in-chief

48. Addressing his insight into his offending:

Dr Donnelly: Having had the opportunity to reflect on the offending, how do you feel about the commission of those criminal offences in Australia?

Mr Kim: I feel ashamed and embarrassed in myself, and I caused my family a lot of – a lot of embarrassment. I brought myself a lot of harm, and of a lot of the community because of my – because of my behaviour.

Dr Donnelly: You mentioned causing harm to the community. What kind of harm do you think you have caused to the community?

Mr Kim: Well, instead of helping the community, I'm more contributing to more of the problems so not helping the community.³²

and

Dr Donnelly: Yes. So you have given evidence a short time ago about the harm that your offending had caused on the community, and I asked you just to expand on that. What kind of harm on the community are you talking about?

Mr Kim: Well, instead of me helping the community, I brought harm for my – for my trepidation and that instead of maybe helping the community – helping the community, I'm causing harm to community because I'm buying drugs for people, and then people are buying drugs, and they'll be on drugs. Instead of me stopping to – stopping people commit more crime, it's me contributing to harm more to – of the community. People who be unwell, and then go on to do more crime or do more bad in community from me.³³

49. Addressing his substance abuse and his current treatment for this abuse:

³² Transcript, page 6, lines 7-16.

³³ Transcript, page 6, lines 27-37.

Dr Donnelly: Is it your assessment then that you have used drugs for a significant portion of your life?

Mr Kim: Yes.

Dr Donnelly: You mentioned just a moment ago that, if I understood your evidence, that about two years ago you stopped using drugs, although on and off, about two years ago. Was that your evidence?

Mr Kim: Yes.

Dr Donnelly: I just want you to inform the tribunal what steps, if at all, have you taken to deal with your drug use or your – what you say is your previous drug use over the last two years?

Mr Kim: Last two years. I was tired of living my life controlled by drugs all the time. I wasn't able to do much. I joined the methadone program to help me with my addiction. I joined at the end of 2020. I was on methadone for about six months or so, but when I was on the methadone, like, it was helping me physically but, like, I kept on – it's helping with my – like, my sickness (indistinct) I won't be sick or anything, but I kept on getting cravings, so kept on relapsing whilst on methadone. And it wasn't – it wasn't fully helping me – helping me. Like, it stopped me from getting sick, but like my mind was constantly thinking about it and I kept on getting cravings about it, so during the six months that I was on the methadone, I was – I would relapse once or twice a week. And after a period of six months, I started – like, I was – like, I felt hopeless. Like, I tried – I tried getting off many times. I tried getting implants, I tried getting cream, I tried the methadone program, but I felt like – I felt hopeless at that time, you know. Felt hopeless, embarrassed, and I even had suddenly suicidal thoughts as well. I felt – I tried opiates, and nothing worked. So I contact my sister, ask her for – that I needed help, because I tried everything to do on my own, but I couldn't. I still couldn't do it. Like, I tried it once, I tried it many, many times, but every time I tried it, I've always relapsed and went back to same old, you know. Went back to relapse again, using again. And when I opened up to my sister, you know, the whole family got together and they help me to seek help. And whilst I – when I was on the methadone program, I spoke to a nurse about my –

the thing that was troubling me, and why I've – why I've – why I was – like, kept on relapsing, and she suggested that maybe the Buvidal injection will help me.

Dr Donnelly:?

Mr Kim: So I searched online for doctors that provide the fungal infection. I went to like four or five doctors. I went to the doctor at Optima, and the doctor assessed me. After assessing me, the doctor said to come back, make an appointment to come back another day. After I come back for the third time, he assessed me and he said that they can help me with that – the Buvidal injection, but each doctor can only receive a certain amount of patients (indistinct) patient, I have to wait – be on a waiting list and wait. But instead of waiting and waiting, I know I needed – I needed help, so I kept on searching for the next – another doctor that was available that can provide me the injection. And then on my fifth – on my fifth doctor, I found medical – the Bankstown Medical Centre, I found a doctor there that was able to help me. I got assessed. After I got assess, I have to wait for about five, six days, something like that, because they needed approval from the medical health and they needed approval from the government I can go on Buvidal injection. And then the doctor told me that five, six days later that, yes, I got approved, and went for the Buvidal injection. That was earlier this year. Once I started getting the (indistinct) injection, like it helped me a lot because I was able to go to work. And when I was on the methadone program, I wasn't able to go to work. I had to go to methadone every day about 9, 10 o'clock. Sometimes on the weekend, I'd have to go earlier. And by 9, 10 o'clock I wouldn't – I wasn't able to start work. Work starts early in the morning.

Dr Donnelly: I'll come to the work in a moment. How long have you been doing these injections for now?

Mr Kim: I've been doing it since beginning of this year³⁴.

and

³⁴ Transcript, page 7, line 6 – page 8, line 17.

Dr Donnelly: You mentioned a little bit that you've been doing these injections since the start of the year?

Mr Kim: Yes.

Dr Donnelly: Is that covered by Medicare, or do you pay for that?

Mr Kim: It's covered by Medicare³⁵.

Cross-examination

50. Addressing Mr Kim's remorse:

Ms Zinn: In your statement to the tribunal you say that you are extremely remorseful for your criminal offending. Can you explain why you say you are remorseful, particularly for this conviction?

Mr Kim: One, I was going through a lot - I was going through a lot. I wasn't thinking at the time. I was on drugs, and I needed to support myself for my addiction. That's why I had the methamphetamine. I got it on credit. I didn't sell it, I paid back the drug dealers (indistinct words) to support my habit.

Ms Zinn: But, Mr Kim, why do you say that you're remorseful for that offence?

Mr Kim: At the time that me selling methamphetamine, you know, the people that's buying the methamphetamines that - I do know what they do when they're high on methamphetamine, (indistinct) you know. Caused more crime, you know, more violent crimes, you know, hurt the community. That's why I'm feeling very remorseful for what I was doing, (indistinct).

Ms Zinn: And, Mr Kim, would you agree that the supplier of meth causes serious problems in the community and can have dire adverse consequences for the public health system?

Mr Kim: Yes, I do.³⁶

³⁵ Transcript, page 14, lines 35-39.

³⁶ Transcript, page 21, lines 20-37.

51. Addressing the similarities between Mr Kim's arguments in this matter and those used previously when his visa status was considered:

Ms. Zinn: So the lawyer prepared a quite lengthy submission there arguing why your visa should not be cancelled, and the submission discusses various courses that you've engaged in, and it submitted that with the appropriate support you pose a minimal risk of harm to the Australian community. And arguments were made about the significant hardship that it would cause your family if you were removed, and the significant ties that you have to the Australian community. But isn't all of that very similar to what you're arguing to the tribunal today some 11 years later?

Mr Kim: Yes, it is similar, but, you know, during that time that - I've never - I never thought I'd address my offending behaviour. The reasons why I've never had a chance to seek counselling for the help addressed with my - the reason why I keep going to drugs all the time. I've never addressed that before. I never seeked a psychologist to help me. I know that, you know, I understand exactly what you mean. You know if I was the government, I would deport me as well, you know? I know what I did was wrong. I'm not happy with myself either, you know?³⁷

52. Addressing Mr Kim's remorse and his risk of re-offending:

Ms Zinn: Mr Kim, to put it quite bluntly, why should the tribunal believe that you have now rehabilitated when your record shows two formal warnings in the past which, evidently, had no impact on your behaviour?

Mr Kim: That's (indistinct words). I've never addressed the reasons why I keep on running back all the time. Or, you know, like, I've never addressed it, all the triggers that, you know, (indistinct) some hardships or every time I, you know, get stuck and I couldn't do - like, I didn't know what to do anything or I always want to use drugs all the time. I never had a chance to address anything like that, you know. Before all I think about is, like, okay, if I get clean, I'm clean, I'm off the drugs now.

I don't - I won't come to use drugs anymore. This time when I got clean, you know, I actually seek help to address the reasons why I always reoffend, the reasons why I keep on running back to drugs. I never addressed that before.

Ms Zinn: Why didn't you take steps to address it?

³⁷ Transcript, page 24, line 40 – page 25, line 7.

Mr Kim: I didn't know - I didn't know that by seeing a psychologist or seek one-on-one counselling with a counsellor, I didn't know that I needed that help, or I didn't - I didn't know - I didn't think that - I thought I didn't needed help with that. I probably, just like, like once I get clean and just start going to work, I thought everything would be fine, right. It's not - that's not - that's not the case because I've been using drugs for a significant - or mostly - or really half my life. You know, just by getting clean and getting off the drugs doesn't mean that you're drug-free, that you're never going to use drugs again. You have to address all the things that - that's been - that - you have to address all the things that's been, I guess, (indistinct words). You have to address the triggers why, you know, you get all the urges and cravings. Why you keep on running to drugs every time. You have to address all that, you can't just get clean and then think you're off them. Just because you're clean for six months doesn't mean you're clean from drugs ever again. I can get clean as many times I want, but if I don't address all the reasons why I keep on running back to drugs, it's still going to be the same all the time, you know. From all my childhood days I keep on thinking, you know, 'Okay, if I use drugs, once I get clean, I'll do it, I'll go cold turkey, I'll go through all the pain for a couple weeks, and then I'll be clean and I'll start going to work. But because I haven't addressed why, you know, I keep on running back to drugs all the time, I'm not going to be able to stay clean or not going to be able to stop my reoffending behaviour. Like, for now I've been going to see counselling and I've been through one-on-one counselling. He's helping me understand the reasons why I keep on running back to drugs. The reasons why I keep on reoffending. And I understand that now. And because I've got a lot older, you know, I've got a chance to reflect on all my childhood history, and all the things I've been holding in, you know, holding in for all these years. I'm only now - I'm only now, like, really addressing all my problems and all my issues.

Ms Zinn: Mr Kim, given your very serious past offending and the extent of your criminal record, would you accept, and being entirely truthful, that there remains at least some risk that you will commit further offenses if your visa was reinstated?

Mr Kim: Before and now, look, I'm a completely different person now, because now I'm, look, I'm a lot more aware, I understand the risks, and I understand, like, before and now it's a whole lot different, you know. I got clean, you know, even though I got clean, I can't be 100 per cent sure of myself either. Because I've learned from the past, I've got clean - I've gotten clean before, but I still reoffended. That's why,

you know, that's why I got the Buvidal injection - the Buvidal injection it helped me, you know, it help - blocks my mind from thinking about drugs or any stuff - the urges, to even running back to drugs. Even if I did go to use drugs, I won't feel anything. Like, the drugs can be in front of me, I won't want it, and that's what the Buvidal injection has helped me, and I've got a chance to go back to work again, and the one-on-one counselling has helped me address all of the reasons why I keep using drugs and why it's led me to keep on re-offending.

Ms Zinn: Mr Kim, you said earlier when you were discussing that you've now addressed triggers, and you said you thought you didn't need help with this previously?

Mr Kim: Yes.

Ms Zinn: But surely after multiple sentences of imprisonment and the department considering cancelling your visa twice, there would be some realisation that there is a deeper problem that needs to be addressed?

Mr Kim: Yes.

Ms Zinn: So quite simply why weren't steps taken earlier?

Mr Kim: Before - I've taken steps before. Like, before I've gotten (indistinct) I've got onto the naltrexone implant. I've gotten that a few times. It's not the first time I've tried to get clean, I've tried to get clean many, many times. You know, I got the implant done. I've got the implant, it wears off because I didn't address - I didn't think I'd need to address all my - you know, the deeper issues, the deeper problems I was having inside. I thought I'd just have to address - just to - you know, I've got - okay, I stopped using drugs. I'll be fine. I realise that now that it's not fine. I can get clean, but without the medical help and without the physical help, I won't be able to stop my drug abuse or my re-offending behaviour. I understand that now. That's why, you know, I've gotten myself clean, and I did - I went and seek medical help that I know I needed because I've tried many times before, and it didn't work. I've been clean for one year, two years, and I still go back because I didn't address my - I didn't address the reason for why I keep on running back to drugs, or - I didn't address any of that before.

Ms Zinn: Mr Kim, you've spoken about having the support of your family, but haven't your family in Australia always been present over the years, but that hasn't deterred you from offending in the past?

*Mr Kim: Before - yes, my parents, they knew of my re-offending - my offending behaviour, but they never knew the extent of all my problems, you know. I've never opened - fully opened up to them, like, the reasons why I keep on doing it, the reasons why I keep on running back all the time. I've always, like, held that back all the time. I've never fully opened up to them and explained to them what - the reasons why. I've never opened up to them before.*³⁸

Ms Chompa Kim's Testimony

53. Relevant aspects of Ms Kim's testimony are extracted below.

Cross-examination

54. Addressing family support for Mr Kim:

Ms Zinn: In your statement you say that your brother needs a strong support network to fully rehabilitate. But hasn't he always had that available to him over the past 20 or so years but that hasn't made a difference to his drug use or his offending?

Ms Kim: During COVID - during COVID I tell him it was a good thing that during COVID we were locked down and we didn't have any support. We didn't know about the support. All we knew is we would go to the GP, ask for mental health. We didn't know that mental health that you would need a plan with you know different GPs they would ask for different types of blood tests, urine tests, before you do all this and during lockdown, I think that - I thought that he came out - I'm stuck in my room. He couldn't avoid me. Told me about the past where Chompaey, he bottles things up a lot and he goes into his room, and he doesn't talk about it. During COVID we more confronted from each other because it's just us five in the house. So during COVID you know he was in pain. He was in pain. He didn't know what to do. He couldn't avoid me. We were in the same household, and I know that he couldn't go out. Couldn't do things and during COVID times we have spoken

³⁸ Transcript, page 25, line 9 – page 27, line 10.

about him seeing a counsellor or seeing a psychologist. You know Chompaey wasn't acknowledging and admitting that he needs help. You know Cambodian culture being the only son and the eldest one he has that burden and during COVID I think it spoke to all of us - to all of us to face it. That he has a problem and reaching out and admitting that he needs help and, you know, Chompaey has not come up to you - Chompaey is not the type of person who will come up and, hey I need help with my addiction. I want - I need some help on my addiction. He's not that type. He's always bottled things up and he doesn't want to inflict that burden on me because you know I'm not well. You know our family is, you know, we go through a lot together. My dad divorce. My gran was passing. So a lot that he's bottled up - but in COVID he expressed it so much and I believe because he was trapped. He didn't know where turn and we even knew it when we were locked down it was a lot. It was a lot. And we tried calling places, there's a long waiting list. I'm glad that happened because he has expressed how he feels and how he needs help so I'm glad they were able to be there for him and help him along the way finding the resource and I'm glad that you're able to find resource. I think zoom meeting is the future and I think being comfortable finding a psychologist - right people in your comfort zone is so important. Because you know even talking about this, I feel a bit embarrassed. I feel a bit numb because I don't know you.³⁹

55. Addressing Mr Kim's relationship with her children:

Tribunal: You've spoken already about how your brother has become involved with your children. When did that start?

Ms Kim: He's always been involved with my children but since COVID I can see that he's like - he's - I can see that he's more emotional. He's more emotional. The kids are growing up. They're not kids anymore. My kids are all in high school. They're growing up. My daughters in year 11 and my son started high school this year, so he's approach to them was not as kiddy, is that a word 'kiddy'?

Tribunal: Yes, that's a word?

³⁹ Transcript, page 39, line 42 – page 40, line 31.

Ms Kim: It's a word right. When they were younger, you know, when you slap them on the hand, you're wrong. Now it's more different. Now he's more like these are life lessons. When you do these things he talks with them, why did you do these things? What makes you think - what makes you think that you do this, and you learn from it. So I can see him talking about his past more. He's open about his past more when he was younger, about how Mum would discipline him and how things are different now from when we were younger and now and how even like for example like kids now, they have TikTok and Instagram. So you talk about the technology that's affected us and the society and he will teach the kids the old school way. You know when you do something wrong you don't just admit it but you learn from it. You write lines. So I can see him, when my son [ED], he does something wrong he makes [ED] write lines, 'I must stop talking back', stuff like that. So he will show them the old school ways there are different ways of learning, and he talks a lot about his past and about our hardship and how lucky my kids are to have today's society and show them to appreciate more in life and the knowledge that I give them is to adapt to it because during our time we didn't have that. We didn't - we had a lot of hardship. So my kids are based on a lot of the stories that we tell them of our hardship, and we like to use this for our kids to learn that whatever aspect that you have look what you have then others.⁴⁰

Ms Linda Malco's Testimony

56. Relevant aspects of Ms Malco's testimony are extracted below.

Examination in chief

57. Addressing Mr Kim's relationship with her children:

Dr Donnelly: And how would you describe your relationship with your brother?

Ms Malco: Me and my brother are close. We get along fine. He's looked after my kids, so he's a good brother to me and family. He's a good son to my mum.

⁴⁰ Transcript, page 41, lines 5 – 33.

Dr Donnelly: And you mentioned you're children, how old are your children?

Ms Malco: My son, [MS], is two years old, and [AS] is six years old.

Dr Donnelly: And could you tell the tribunal more about the relationship that your brother has with [MS] and [AS]?

Ms Malco: My brother has spent a lot with [MS] and [AS]. They get along with him fine. He's always been there for them. When [AS] had a heart murmur in 2019 he was there every day at Westmead Hospital to help out with getting this help. And ever since then, they've always had a really close relationship, he sees her mostly – nearly every day. And [MS], it's also since he was born, he's always been there for them

Dr Donnelly: And when you say that he sees them almost every day, is there a particular time that he comes to see the children?

Ms Malco: Yes, he does. He tends to try and see them every day most of the time.

Dr Donnelly: And what time does he come, in the morning, in the midday afternoon, evening? When does he come to see the children?

Ms Malco: In the afternoon. Mostly in the afternoon. If it's weekends he'll come during the day.

Dr Donnelly: And how much time will he spend with them?

Ms Malco: A couple of hours. He sometimes helps babysit my kids as well.

Dr Donnelly: All right. And when you say he babysits them, is that because you obviously go out?

*Ms Malco: Sometimes I get tired and he gives me a break and he can help with – gives me a little break and he’s willing to help look after the kids so I can take a little break.*⁴¹

EXPERT EVIDENCE

58. The Tribunal had the benefit of both Dr Kwok’s report⁴² and her oral testimony, in addition to more historic expert reports about Mr Kim in the material.
59. While Dr Kwok acknowledged the limitations inherent in her choice of tests as applied to Mr Kim, the Tribunal noted her diagnosis of Mr Kim as suffering from a substance use disorder as well as a major depressive disorder with anxiety distress as well as her observations about the changes in his family support structure and its emergence as a dynamic risk management factor:

‘Although there was inadequate family support throughout Mr Kim’s childhood and adolescence, I note that this had changed after his younger siblings grew up and became independent. In other words, his siblings are now in a position where they can provide support. I acknowledge that Mr Kim could have reached out to his family, or his siblings, for help much earlier. Regardless, I accept that Mr Kim has now opened up to his family about his problems, and family support is now intact and available for him’⁴³.

60. It is useful to note her findings in her conclusion:

- *‘Mr Kim in sustained remission of Opioid Use Disorder, but continues to suffer Major Depressive Disorder with anxious distress. He currently attends counselling on a weekly/fortnightly basis, in addition to online recovery groups. He also receives monthly buprenorphine injections to treat substance abuse.*
- *Treatment for Mr Kim’s condition is available in the urban areas of Cambodia and mostly likely through non-government (sic) organisations. To my understanding, Mr Kim would be living in a rural area of Cambodia.*

⁴¹ Transcript, page 59, line 33 – page 60, line 15.

⁴² Exhibit 6, Applicant’s Supplementary Tender Bundle, pages 1-14.

⁴³ Exhibit 6, Applicant’s Supplementary Tender Bundle, pages 1-14 at [69].

- *If Mr Kim was forced to return to Cambodia, it is unlikely that he would have capacity to function in day-to-day living. Subsequently, he would likely relapse to substance abuse and other problematic behaviours.*
- *Substance Use Disorder (Opioid Use Disorder) had previously contributed to Mr Kim's criminal offending.⁴⁴*

THE TRIBUNAL'S ASSESSMENT OF THE LAY EVIDENCE

61. The Tribunal found Mr Kim to demonstrate a degree of honesty and insight in his oral testimony about his drug use, the seriousness of his offending and its impact on others, his rehabilitation history and his views on the risk that he will re-offend.
62. The passage of years appears to have given him a reflective perspective on how his past actions have led to this juncture in his life that may have not been apparent to him at the times of the 2005 and 2012 Warnings.
63. There is a likewise convincing tone in Mr Kim's evidence about the extent to which substance abuse has been singularly and primarily responsible for his unlawful conduct.
64. Considering the evidence of Mr Kim's mother and his sisters, the Tribunal finds that Mr Kim has a loving and welcoming family in Sydney whose long-held support for him has recently and dynamically increased for the better, together with giving him a stable place to reside.
65. The whole of the lay evidence supports a finding that there are now a range of positive and dynamic risk management factors militating against Mr Kim re-lapsing into a pattern of substance abuse and consequential criminal offending. Those factors, combined, point to a finding of him representing a low or, at worst, a low-moderate recidivist risk.

⁴⁴ Exhibit 6, Applicant's Supplementary Tender Bundle, pages 1-14 at [70].

PRIMARY CONSIDERATIONS

Primary consideration 1: Protection of the Australian community from criminal or other serious conduct

66. When considering Primary consideration 1, paragraph 8.1(1) of the Direction requires decision-makers to consider that the Australian Government is committed to protecting the Australian community from harm because of criminal activity or other serious conduct by non-citizens.
67. Paragraph 8.1(1) also directs decision-makers to have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens with the expectation that they are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.
68. In determining the weight applicable to 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.

Tribunal's consideration: the nature and seriousness of the non-citizen's conduct to date

Paragraph 8.1.1(1)

69. This paragraph states that: *'in considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following'*:
- (a) *without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:*
 - (i) *violent and/or sexual crimes;*

- (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 reoffended 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).*
- (h) *where the offence or conduct was committed in another country, whether that offence or conduct is classified as an offence in Australia.*

70. As directed, the Tribunal reviewed and considered the evidence, as well as both parties' respective submissions about Paragraph 8.1.1 of the Direction in relation to this matter. Both parties aver that Mr Kim has engaged in very serious offending.

Paragraphs 8.1.1(1)(a)(i), 8.1.1(1)(a)(ii) and 8.1.1(1)(a)(iii)

71. These paragraphs require the Tribunal, when considering this matter, to have regard to, and acknowledge that, violent and/or sexual crimes, crimes of a violent nature against women and acts of family violence are viewed very seriously.

72. Acting Judge Moore's 1 November 2002 sentencing decision⁴⁵ indicates that Mr Kim committed both violent crimes and crimes of a violent nature against women respectively on 17 May 2002 and 26 May 2002:

'The first offence occurred at 6.40pm on 17 May 2002. Two ladies, one of whom was the victim, were in a Westfield Shopping Centre where they

⁴⁵ G2, pages 82-83.

obtained some money from an ATM machine. He was watching them. After they had got their money out he approached them armed with a kitchen knife. The ladies were terrified and screamed.

When he demanded their wallets they were holding their wallets in their hand and one of them collided with him which resulted in her dropping the wallet which Kim bent down, picked up and ran away. The victim pursued him without success. He extracted \$330 being the cash she had just taken from the ATM and threw away the wallet and the rest of its contents. He used the money to purchase drugs and food.

The second offence occurred on 26 May 2002. He followed a lady noting that she had a handbag. As she went up the concourse to the Liverpool Railway Station he came from behind her, snatched her handbag and ran away. Once again he took the money that was in the wallet and threw it away with the rest of its contents.'

73. The Tribunal will treat these crimes as very serious when considering holistically the totality of Mr Kim's criminal offending and other conduct to date.

Paragraph 8.1.1(1)(b)

74. This paragraph directs the Tribunal, when considering the nature and seriousness of Mr Kim's criminal offending or other conduct to date, to have regard to the taxonomy set out in paragraphs 8.1.1(1)(b)(i)-(iv) as to specific crimes viewed very seriously by the Australian Government and the Australian community.

75. Each paragraph is addressed below.

Paragraph 8.1.1(1)(b)(i)

76. This paragraph is concerned with whether Mr Kim has committed any offences involving causing a person to enter into or to otherwise become a party to a forced marriage.
77. In the absence of evidence from Mr Kim or the Respondent, or any reference in the material before the Tribunal to any formal conviction for such offending or related conduct that

enlivens this paragraph, it is not relevant to any assessment of the nature and seriousness of Mr Kim's conduct.

Paragraph 8.1.1(1)(b)(ii)

78. This paragraph is concerned with whether Mr Kim has committed any offences against vulnerable members of the community, or government representatives or officials as defined in the Direction.
79. There is no reference in the material before the Tribunal to any formal conviction for such offending, nor is there any reference to such conduct.
80. In the absence of evidence from Mr Kim or the Respondent, or any reference in the material before the Tribunal to any formal conviction for such offending or related conduct that enlivens this paragraph, it is not relevant to any assessment of the nature and seriousness of Mr Kim's conduct.

Paragraph 8.1.1(1)(b)(iii)

81. This paragraph refers to conduct forming *'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'*.
82. The Tribunal finds, after considering Mr Kim's criminal history and applying s 501(6)(a), he has compiled a *'substantial criminal record'* (as defined by s 501(7)(c) of the Act).
83. This finding enlivens paragraph 8.1.1(1)(b)(iii) to the point where an attribution of *'serious'* can be applied to the nature and extent of Mr Kim's criminal history.

Paragraph 8.1.1(1)(b)(iv)

84. This paragraph is concerned with whether Mr Kim has committed any crimes while in immigration detention.
85. There is no evidence from Mr Kim or the Respondent, or any reference in the material before the Tribunal of any formal conviction for such offending in immigration detention or related

conduct that enlivens this paragraph. It is not relevant to any assessment of the nature and seriousness of Mr Kim's conduct.

Paragraph 8.1.1(1)(c)

86. In applying this paragraph, the Tribunal is precluded from considering sentences imposed on Mr Kim for:

- (a) any violent offending that he may have committed against women or children,
- (b) acts of family violence; and
- (c) any conduct whereby he caused a person to enter into (or to become a party to) a forced marriage.

87. At the start of the hearing on 29 June 2023, Ms Zinn applied to amend aspects of the Respondent's Statement of Facts, Issues & Contentions with reference to the recent High Court decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton*⁴⁶. The amendment's effect was to remove Mr Kim's juvenile offending from consideration⁴⁷.

88. In addition to the chronological offending summary of Mr Kim's offending set out at [20] above, the following is a summary of his prison sentences:

Offence	Year	Sentence
Robbery armed with offensive weapon	2002	4 years
Possess unauthorised pistol	2009	5 years and 4 months, reduced to 5 years by the NSW Court of Criminal Appeal
Possess unregistered firearm pistol	2009	2 years and 6 months, reduced to 2 years and 4 months by the NSW Court of Criminal Appeal
Supply prohibited drug >indict. quantity	2017	2 years with non-parole period of 15 months

⁴⁶ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17.

⁴⁷ Exhibit 2, Respondent's Statement of Facts, Issues & Contentions, [4], [37], [38].

89. In addition to the above, Mr Kim has been the subject of multiple fines, convictions, supervision orders, periods of imprisonment and licence disqualifications.
90. Imposing a custodial term upon an offender is seen as the last resort in the sentencing hierarchy.
91. Even after considering the suspended elements of the sentences imposed on Mr Kim, the balance of the custodial terms imposed on him have been both substantial and significant.
92. The Tribunal considers that the sentences imposed by the court for Mr Kim's non-precluded offending are significant. Paragraph 8.1.1(1)(c) supports a finding that the sentences imposed by the court on Mr Kim address and reflect the very serious nature of his offending.
93. The Tribunal finds that this paragraph carries weight in favour of affirming the delegate's decision.

Paragraph 8.1.1(1)(d)

94. This paragraph addresses two specific aspects of a non-citizen's offending: its frequency and/or whether there is any trend of increasing seriousness.

Frequency

95. The chronological offending summary table above at [20] indicates that Mr Kim's adult criminal conduct and offending has been frequent between 1998 and 2021. The main gaps in chronology are due largely to his imprisonment. Mr Kim has committed many criminal offences over a considerable period, making out a medium-to-high degree of frequency.

Trend of increasing seriousness

96. The Tribunal considers that Mr Kim's criminal conduct throughout the period between 1998 and 2021 can be viewed conservatively as all equally serious, rather than demonstrating a trend of increasing seriousness.

97. The Tribunal is satisfied that (1) historically, Mr Kim has frequently and repeatedly offended; and (2) his offending has not demonstrated **a trend** of increasing seriousness. One element of this sub-paragraph 8.1.1(1)(d) is satisfied.
98. Overall, the Tribunal's consideration of sub-paragraph 8.1.1(1)(d) is that it provides support in favour of a finding that the totality of Mr Kim's offending in this country has been of a very serious nature.

Paragraph 8.1.1(1)(e)

99. This paragraph addresses the cumulative effect of Mr Kim's repeated adult offending between 1998 and 2021.
100. Mr Kim's criminal offending taxonomy incorporates violence, theft, firearm offences, driving offences, drug possession and drug supply and what Dr Donnelly classifies as administrative offences.
101. The Tribunal will consider each of these given the breadth of Mr Kim's offending.
102. Dealing first with the drug possession and drug supply offences, the Tribunal has recognised the seriousness of crimes associated with drug trafficking and supply, and the significant harm it inflicts on the Australian community⁴⁸.
103. In *SCJD*, the Tribunal concisely summarised this harm⁴⁹:

The corrupting effect of drug trafficking on the community has many facets. In many instances such as with overdosing on heroin it leads to death. The heroin toll in this country is almost as high as the road toll but rarely rates the same attention. It destroys families. Parent and children relationships frequently cease as a result of a person's drug dependency. There is a massive toll on the nation's

⁴⁸ *Paeu and Minister for Immigration and Citizenship* [2011] AATA 792, [40] per Senior Member Taylor; *SCJD and Minister for Home Affairs* [2018] AATA 4020, [81]–[83] per Senior Member Cameron.

⁴⁹ *Op cit.*, at [81]–[83].

mental health system caused by consumption of drugs. Frequently, this leads to the triggering of or early onset of a variety of mental health afflictions. These can include anxiety, psychosis, schizophrenia, bipolar disorders and paranoia. Tragically, drugs are all too frequently trafficked to young people including secondary school pupils. It leads to lives and potential careers being derailed, if not finished. It places demands on hospitals, health care systems, disability support networks and agencies, ambulance services, police, courts and other associated organisations and entities.

In the course of ruining lives drug abuse leads to its victims often having to descend into crimes such as burglary, shoplifting and robbery (amongst others) to support their habit.

Innocent people going about their lives can be the subject of robbery and attack by drug affected persons.

There is also the organised crime element involved in drug trafficking. The insidious trade of drug trafficking generates vast amounts of cash upon which no tax is paid. This loss of the revenue which is enormous, means that society as a whole is deprived of income that could be provided towards and possibly improve essential public services such as schools, hospitals, police and emergency services.

104. Mr Kim's crimes involving violence, weapons and in one instance, the possession of a firearm and ammunition, were in public and involved transgressing against other individuals going about their daily life. His offending here has likely significantly and adversely affected their lives and, in the case of the victims of his thefts, their psychological outlook.
105. Mr Kim has stated that the impetus for these offences involved paying for his drugs. People are entitled to go about their business in the community without having to feel threatened by someone who is unable to control their predilection to abuse illicit drugs.
106. In this sense, the unreasonable and unlawful infringement of the personal rights of other people in the community is a readily discernible cumulative effect of his offending.

107. Mr Kim's driving offences show a disregard, indifference and a degree of recklessness towards the traffic laws and rules that go to the community's safety.
108. The cumulative effects of Mr Kim's sustained offending have also imposed significant costs and hardship – financial, psychological, emotional and social - on his family.
109. Mr Kim himself recognises these costs and hardships:

Dr Donnelly: So you have given evidence a short time ago about the harm that your offending had caused on the community, and I asked you just to expand on that. What kind of harm on the community are you talking about?

Mr Kim: Well, instead of me helping the community, I brought harm for my – for my trepidation and that instead of maybe helping the community – helping the community, I'm causing harm to community because I'm buying drugs for people, and then people are buying drugs, and they'll be on drugs. Instead of me stopping to – stopping people commit more crime, it's me contributing to harm more to – of the community. People who be unwell, and then go on to do more crime or do more bad in community from me.⁵⁰

110. Mr Kim's criminal conduct has also imposed significant costs on the policing, judicial and jail systems in terms of money and resources expended.
111. It is clear, once these perspectives are aggregated, that the cumulative effect of Mr Kim's repeated offending is substantial and supports a finding of the serious nature of his offending.

Paragraph 8.1.1(1)(f)

112. This paragraph is concerned with whether Mr Kim has provided false or misleading information to the Respondent Minister's Department, including by not disclosing criminal offending.

⁵⁰ Transcript, page 6, lines 28 – 37.

113. As noted above, there is evidence before the Tribunal that Mr Kim failed to disclose his criminal convictions on a passenger card when arriving in Australia on 19 April 2001⁵¹.
114. This carries additional weight when considering and assessing the nature and seriousness of Mr Kim's criminal offending and other conduct.

Paragraph 8.1.1(1)(g)

115. This paragraph involves the issue of whether Mr Kim has re-offended since being formally warned about the consequences of further offending in terms of his migration status.
116. The evidence before the Tribunal shows that Mr Kim received two such warnings – the 2005 Warning and the 2012 Warning.
117. Mr Kim received formal notification on 24 May 2005 that his visa may be liable for cancellation under s 501 of the Act. On 1 September 2005, a decision was made not to exercise the direction under s 501(2) to cancel his visa⁵².
118. Mr Kim acknowledged receipt of the subsequent warning letter and confirmed his understanding that any further convictions for any offences would result in his visa being reconsidered for cancellation⁵³.
119. After doing that, Mr Kim was convicted of 11 offences between 19 October 2006 and 21 April 2011⁵⁴.
120. Mr Kim received formal notification on 12 October 2011 that his visa may be liable for cancellation under s 501 of the Act. A delegate of the Respondent decided on 29 March 2012 not to cancel Mr Kim's visa⁵⁵.

⁵¹ G Documents, G10, page 266.

⁵² G Documents, G10, page 100.

⁵³ G Documents, G10, page 101.

⁵⁴ G Documents, G2, pages 30-31.

⁵⁵ G Documents, G2, pages 102-103.

121. Mr Kim acknowledged receipt of the subsequent warning letter on 5 April 2012 and signed an acknowledgment that he understood that he could again be considered for refusal or cancellation of his visa if further information of relevance came to the Respondent's attention in the future⁵⁶.
122. Mr Kim was subsequently convicted of four offences between 8 May 2013 and 28 November 2017⁵⁷.
123. On 14 December 2017, Mr Kim was convicted in the NSW District Court of *Supply prohibited drug* and sentenced to two years' imprisonment with a non-parole period of 15 months⁵⁸.
124. On 15 June 2019, Mr Kim was notified that consideration was being given to whether his visa ought to be cancelled on character grounds under s 501(2) of the Act. He was invited to make representations on whether his visa should be cancelled⁵⁹.
125. While the Respondent was considering whether to cancel Mr Kim's visa, Mr Kim was convicted of six offences.
126. Mr Kim's repeated disregard and defiance of the warnings about the consequences of further offending carries weight when considering and assessing the nature and seriousness of Mr Kim's criminal offending and other conduct.

Paragraph 8.1.1(1)(h)

127. This paragraph requires the Tribunal to have regard, where the offence or conduct was committed in another country, to whether that offence or conduct is classified as an offence in Australia.
128. There is no reference in either party's oral or written submissions propounding or mentioning this component of the Direction. The Tribunal finds that this paragraph of the

⁵⁶ G Documents, G2, page 104.

⁵⁷ G Documents, G2, page 30.

⁵⁸ G Documents, G2, pages 38 & 42.

⁵⁹ G Documents, G2, pages 96-99.

Direction is not relevant to any assessment of the nature and seriousness of Mr Kim's conduct.

Tribunal's finding: The nature and seriousness of the non-citizen's conduct

129. The Tribunal has applied and considered each of the relevant sub-paragraphs appearing in paragraph 8.1.1(1) of the Direction.
130. With reference to the relevant and applicable paragraphs addressed above, the Tribunal finds that the totality of Mr Kim's criminal offending and other conduct in Australia should be characterised as very serious.

Tribunal's consideration: Risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

131. This aspect of the Direction requires the Tribunal to assess the risk Mr Kim poses to the Australian community if he reoffends, taking into consideration the nature of any harm and its probability.

Paragraph 8.1.2(1)

132. This paragraph gives a framework for reference when assessing the risk:

In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

Paragraph 8.1.2(2)

133. This paragraph provides that, in considering the risk to the Australian community, a decision-maker must have regard to the following separate factors on a cumulative basis:

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

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

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

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

(c) 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.

134. In assessing the risk to the Australian community, the Tribunal has first considered the evidence and then the Applicant’s and Respondent’s submissions in relation to paragraphs 8.1.2(2)(a) – ***the nature of the harm should the non-citizen engage in further criminal or other serious conduct*** - and 8.1.2(2)(b) - ***the likelihood of the non-citizen engaging in further criminal or other serious conduct***.

The nature of the harm should the non-citizen engage in further criminal or other serious conduct

135. Both Ms Zinn and Dr Donnelly aver that, if Mr Kim engaged in further criminal or other serious conduct that mirrors his current offending history, it is highly likely that this would involve physical, financial, emotional and psychological harm on members of the Australian community by reason of his violence, theft and drug offences. There would also likely be adverse consequences for the public health system, police and the justice system.
136. In particular, drug offences of the kind committed by Mr Kim carry a real risk of harm to the broader community both in terms of its extent and consequences.⁶⁰
137. The Tribunal finds that were Mr Kim to re-offend in ways similar to his offending history, the nature of the harm to individuals and the Australian community would be very serious and

⁶⁰ *FTDN and Minister for Home Affairs (Migration)* [2019] AATA 1301, [99].

would involve physical, psychological and material harm to individual victims or the community at large.

The likelihood of the non-citizen engaging in further criminal or other serious conduct

138. Determining if a person constitutes an unacceptable risk requires an assessment of the likelihood of recidivism and its consequences.⁶¹
139. The Respondent contends that the cumulative effect of Mr Kim's repeated offending and the increasing seriousness of his offences indicates a strong likelihood of recidivism, contrary to Mr Kim's claim that he presents a '*very low risk of reoffending*'⁶².
140. The Respondent cites the following to support a finding that the risk of Mr Kim engaging in further criminal or other serious conduct is high:
 - (a) There is nothing in Mr Kim's criminal history to demonstrate that he has experienced any form of deterrent effect from the progressively more serious sentences imposed on him. His extensive criminal record demonstrates he has not respected Australian laws or been rehabilitated by the Australian criminal justice system. Despite the repeated cautioning, penalties and imprisonment, he has continued to persistently offend in a violent and serious manner.
 - (b) He was formally warned about the consequences of further offending on two separate occasions (in 2005 and 2012) yet ignored those warnings. His extensive criminal record and previous warnings do not entitle him to a *third* opportunity to rehabilitate and, to the contrary, indicates a high risk of recidivism.
 - (c) After being issued with the NOICC on 15 June 2019, Mr Kim proceeded to reoffend on six occasions between 14 October 2020 and 28 July 2021, which suggests a disregard for the consequences of his offending on his migration status.

⁶¹*Nigro v Secretary to the Department of Justice* (2013) 304 ALR 535; [2013] VSCA 213, [111], cited with approval in *Tanielu v Minister for Immigration & Border Protection* [2014] FCA 673; (2014) 225 FCR 424, [95] and *WAD230/2014 v Minister for Immigration & Border Protection (No 2)* [2015] FCA 705, [42]-[43].

⁶² Exhibit 5, Applicant's Statement at [27].

- (d) He has also shown disregard for the judicial process. A breach of parole report dated 9 August 2018 states that he had breached his parole order dated 14 December 2017 due to his arrest on 29 July 2018 for *Possess prohibited drug* and that he also failed to report as required⁶³. The report identified Mr Kim as being a '*medium risk offender with several criminogenic needs*' and recorded that his compliance with parole supervision was unsatisfactory⁶⁴. He also failed to report to Community Corrections in February 2021 in breach of his Community Correction Order⁶⁵.
- (e) Although Mr Kim maintains he has been in '*sustained drug remission for several years*' such that he is '*unlikely to reoffend*'⁶⁶, this contention cannot be accepted. The only evidence of recent treatment to address his prolonged substance abuse issues are documents from SMART AUSTRALIA that indicate he has attended ten online SMART Recovery meetings between April and May 2023⁶⁷. The timing of his attendance at these meetings coincides with him lodging his present application for review on 24 April 2023, which raises doubts that his motivation for and participation in such meeting was solely attributable to improving his prospects of obtaining a successful outcome in these proceedings, rather than genuinely addressing his substance abuse issues. Mr Kim has provided no explanation as to why he has only recently participated in these meetings, what the meetings involved or what he has gained from these meetings that may substantially reduce his risk of relapsing into drug use.
- (f) Mr Kim has also claimed⁶⁸ that he receives monthly injections of Buprenorphine at Bankstown Medical Centre but there is no evidence as to when these commenced, how long they have occurred or any details or expert evidence about their apparent benefit. In any event, such limited treatment appears entirely inadequate to address

⁶³ Exhibit 1, Respondent's Tender Bundle, R25, pages 112-115.

⁶⁴ Exhibit 1, Respondent's Tender Bundle, R25, page 113.

⁶⁵ Exhibit 1, Respondent's Tender Bundle, R32, pages 130-131.

⁶⁶ Exhibit 4, Applicant's Statement of Facts, Issues & Contentions, [33]-[35].

⁶⁷ Exhibit 3, Applicant's Tender Bundle, pages 18-28.

⁶⁸ Exhibit 5, Applicant's Statement.

his prolonged substance abuse issues, which raises serious concerns about the likelihood of him returning to drug use and associated further offending.

- (g) In sentencing remarks dated 14 December 2017 in connection with the 2017 convictions, His Honour Judge Conlon SC held the prospects of Mr Kim not re-offending would '*very much depend upon his ability to be able to undertake some rehabilitation program once he is released from custody*'⁶⁹. Mr Kim has not undertaken any such satisfactory rehabilitation program.
- (h) Whilst Mr Kim claims he has not taken illicit drugs for '*several years*' this is clearly undermined by his convictions on 14 October 2020 and 19 May 2021.
- (i) Whilst the evidence also indicates that he has made several attempts to address his substance abuse in the past, such attempts have clearly been unsuccessful given that he has repeatedly relapsed and engaged in further offending. For example, Mr Kim:
 - (i) attended drug and alcohol counselling in 2004⁷⁰;
 - (ii) received a Naltrexone implant in 2005⁷¹; and
 - (iii) completed the *Getting SMART (Self-Management and Recovery Treatment) program* in 2009⁷².
- (j) Mr Kim's longstanding drug addiction and unsuccessful attempts at rehabilitation in the past suggest that rehabilitation is highly unlikely, and that the Australian community should not be put to an unacceptable risk of harm to allow the Applicant yet a further opportunity to rehabilitate. This is particularly evident in circumstances where he was found with prohibited drugs as recently as 28 August 2020⁷³ and 25 March 2021⁷⁴.

⁶⁹ G Documents, G2, page 42.

⁷⁰ Exhibit 1, Respondent's Tender Bundle, R3, page 11.

⁷¹ Exhibit 1, Respondent's Tender Bundle, R8, page 31.

⁷² Exhibit 1, Respondent's Tender Bundle, R8, page 32.

⁷³ Exhibit 1, Respondent's Tender Bundle, R29, pages 123-125.

⁷⁴ Exhibit 1, Respondent's Tender Bundle, R34, pages 134-135.

- (k) The support of family members and his employment in the past have evidently not deterred him from offending in the past and have had no appreciable impact on deterring him from engaging in substance abuse. The weight to be afforded to the evidence from Mr Kim's family members is also impacted by the subjective bias family members may have to achieve a favourable outcome for an Applicant.

141. The Applicant's Statement of Facts, Issues & Contentions makes the following contentions to support a finding that the risk of Mr Kim engaging in further criminal or other serious conduct is not high:

- (a) Mr Kim was last in court in July 2021⁷⁵.
- (b) He is currently in full-time employment.
- (c) He enjoys strong support of his mother and extended family in Australia (including siblings, nieces, nephews, and other family members).
- (d) He has stable and safe accommodation with his sister.
- (e) He has been in sustained drug remission for several years⁷⁶.
- (f) He is remorseful for the full extent of his criminal offending and adverse conduct in Australia.
- (g) He is currently seeking mental health treatment for his health issues. Mr Kim is undertaking counselling with a mental health professional.
- (h) He has cut off anti-social peers from his life and changed his mobile telephone number.

⁷⁵ G Documents, G30.

⁷⁶ This claim was repeated to Dr Kwok, Exhibit 6, [27].

- (i) He is currently undertaking the SMART Recovery Program to further promote his rehabilitation in the Australian community.
- (j) He attends the local Buddhist temple.
- (k) His rehabilitation has been tested in the Australian community, rather than in prison or detention.
- (l) Overall, this primary consideration weighs against Mr Kim. However, the adverse attribution of weight should be moderated on account of his very low prospects of reoffending.

142. The Tribunal has considered the relevant evidence below:

- a) Punishment and deterrence: While the arguments based on Mr Kim's prior warnings are valid and demonstrate an apparent inability to learn from punishment, Dr Kwok's oral testimony in cross-examination added some nuance⁷⁷:

Ms Zinn: In circumstances where Mr Kim has already been afforded (indistinct) opportunities to rehabilitate, how can you reconcile this past conduct of ignoring these warnings to your assessment that he is at a low - that he faces a low risk of reoffending in the future?

Dr Kwok: Yes, I had questioned Mr Kim on that in the interview. In particular, I noted to him that he has received several warnings in the past, and how he can explain the reoffending. And at the time, Mr Kim had explained that he was on drugs; he wasn't thinking. When you are on drugs, you don't consider all of that; you don't worry about anything else. And those answers - although we understand, as part of the causes of his reoffending and his lack of consideration of the consequences - are consistent with the - his responses would be consistent with a diagnosis of severe substance use disorder, where, despite the social consequences, a person - an individual - is unable to stop those behaviours, to get the drugs

⁷⁷ Transcript, page 49, lines 19-40.

and to use the drugs. And so, at that time, I would understand that Mr Kim was - had a severe substance use disorder that contributed to - - -

Ms Zinn: Yes?

Dr Kwok: - - - the reoffending.

Ms Zinn: Sorry, Dr Kwok; could I ask you just to repeat that last sentence. It just cut out there as you were talking?

Dr Kwok: Yes. So, at the time, Mr Kim had a severe substance use disorder, which had contributed to the reoffending.

- b) Drug abuse: It is clear from a close review of the evidence and the oral testimony that Mr Kim's drug abuse, diagnosed by Dr Kwok as a substance use disorder, is a key driver in his offending. It is also clear from Mr Kim's current period of remission and his monthly buprenorphine injection that the latter are significant support factors that inhibit or prevent him from substance use and consequently the risk of subsequent offending. He also has insight into his risk of re-offending⁷⁸:

Ms Zinn: Mr Kim, given your very serious past offending and the extent of your criminal record, would you accept, and being entirely truthful, that there remains at least some risk that you will commit further offenses if your visa was reinstated?

Mr Kim: Before and now, look, I'm a completely different person now, because now I'm, look, I'm a lot more aware, I understand the risks, and I understand, like, before and now it's a whole lot different, you know. I got clean, you know, even though I got clean, I can't be 100 per cent sure of myself either. Because I've learned from the past, I've got clean - I've gotten clean before, but I still reoffended. That's why, you know, that's why I got the Buvidal injection - the Buvidal injection it helped me, you know, it help - blocks my mind from thinking about drugs or any stuff - the urges, to even running back to drugs. Even if I did go to use drugs, I won't feel anything. Like, the drugs can be in front of me, I won't want it, and that's what the Buvidal injection has helped me, and I've got a chance to go back

⁷⁸ Transcript, page 26, lines 7-22.

to work again, and the one-on-one counselling has helped me address all of the reasons why I keep using drugs and why it's led me to keep on re-offending.

- c) Remorse: Based on the Tribunal's observations of Mr Kim during his oral testimony, his concept of remorse appears to involve a retrospective examination of his wrongdoing and the experiencing of a resulting understanding that what he has done in his offending history was wrong and very serious, rather than an expression of something he feels appropriate to say as a means of achieving a desired outcome in the hearing before the Tribunal dealing with his visa status.
- d) Static and dynamic risk management and protective factors: While it is valid to suggest that Mr Kim's two previous warnings, his rehabilitation efforts and the presence of his family as support have not prevented further offending, scrutiny of the evidence and the oral testimony show a greater differentiation between Mr Kim's current position that his past circumstances. This is augmented by the addition of new dynamic risk protection factors, such as changing relationships with his siblings, nieces and nephews⁷⁹, his monthly injections, better diagnoses of and insight into his substance abuse issues and his change of residence. This is supported by the following extracts of Dr Kwok's report:

Mr Kim stated that he was living with his mother before his most recent incarceration. Upon his release, his family reportedly arranged for him to live with his sister "for a fresh start." He has reportedly been living with his sister for over six years. Mr Kim stated that he has very few social activities and he works five to six days a week. He reported no current interaction with antisocial peers and said he spends his free time with his nieces and nephews⁸⁰.

and

Although there was inadequate family support throughout Mr Kim's childhood and adolescence, I note that this had changed after his younger siblings grew up and became independent. In other words, his siblings are now in a

⁷⁹ Transcript, page 51, line 11 '*increased complexity of the relationships within his family.*'

⁸⁰ Exhibit 6, Applicant's Supplementary Tender Bundle, S1, Dr Kwok's report, [37].

*position where they can provide support. I acknowledge that Mr Kim could have reached out to his family, or his siblings, for help much earlier. Regardless, I accept that Mr Kim has now opened up to his family about his problems, and family support is now intact and available for him.*⁸¹

Dr Kwok's report is supported by Mr Kim's oral testimony during examination-in-chief:

Ms Zinn: You talk about having - relying upon Medicare, and you don't really have savings but your motor vehicle, which is old. Is that still the case?

Mr Kim: Yes, that's still the case because I am helping with my sister, I am helping her pay for rent, helping pay her rent with money I earn from my employment, and then I use the money for counselling, I use it for my psychologist to help benefit me.

- e) Time in the Community: The evidence shows that Mr Kim has now spent a sustained period in the community without any indication of drug or substance abuse or further offending.
- f) Risk Assessment: Giving due regard to the available expert evidence, Dr Kwok reported that in her opinion Mr Kim is '*currently a low risk to the Australian community in terms of his criminal offending and general behaviours*⁸².' The Tribunal has read Mr Watson-Munro's 31 January 2012 report⁸³ but notes that it does not contain a specific assessment of recidivism risk.

Tribunal's Consideration: the likelihood of the non-citizen engaging in further criminal or other serious conduct

- 143. The Tribunal has holistically considered the totality of the evidence addressing the likelihood of Mr Kim engaging in further criminal or serious conduct.

⁸¹ Exhibit 6, Applicant's Supplementary Tender Bundle, S1, Dr Kwok's report, [69].

⁸² Exhibit 6, Applicant's Supplementary Tender Bundle, S1, Dr Kwok's report, [69].

⁸³ G Documents, G10, page 267-276.

144. The issues surrounding the consideration of risk under s 501(6)(d) of the Act, from which paragraphs 8.1.2(1) and (2) are drawn, have been extensively considered by the Tribunal and superior courts.⁸⁴

145. The Full Court of the Federal Court in *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187, 194 stated that the reference to ‘criminal conduct’ is:

‘...not concerned with whether the conduct has had some temporal result, such as the incurring of a conviction, but with the light that the conduct throws on the actor’s character. Of course, in the absence of a prosecution and conviction, satisfaction that criminal conduct has occurred will not be attained on slight material.’

146. The clear legislative intention is that the threshold question is whether there is ‘a’ risk.⁸⁵ The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) specifically removed the word ‘significant’ from s 501(6)(d) leaving it as ‘a’ risk.⁸⁶ On this occasion the Explanatory Memorandum to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* stated (at [46]):

‘The purpose of this amendment is to clarify the threshold of risk that a decision maker can accept before making a finding that the person does not pass the character test in relation to paragraph 501(6)(d) of the Migration Act. The intention is that the level of risk required is more than a minimal or trivial likelihood of risk, without requiring the decision-maker to prove that it amounts to a significant risk.’

147. In *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 (**Sabharwal (FC)**), the Full Court of the Federal Court (Perram, Murphy and Lee JJ) stated at [2]:

⁸⁴ See, for example, *Rahman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 888 (20 April 2020); *QKVH and Minister for Home Affairs* [2020] AATA 4431 (**QKVH 2020**); *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; *GJJF and Minister for Home Affairs (Migration)* [2019] AATA 930 (17 May 2019); *Kayo Rerekura and Minister for Home Affairs (Migration)* [2019] AATA 153.

⁸⁵ See the discussion in *GJJF and Minister for Home Affairs (Migration)* [2019] AATA 930 (17 May 2019) at [48]–[52].

⁸⁶ See the discussion in *Roberts and Minister for Home Affairs (Migration)* [2018] AATA 3970 at [27].

'... Section 501(6)(d)(i) provides that a person does not pass the character test if "in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would ... engage in criminal conduct in Australia". The section requires an evaluative judgment by the decision-maker, in the present case the Minister personally, as to whether the decision-maker is satisfied that there is such "a risk." Then, if the decision-maker is so satisfied, the decision-maker has a discretion to refuse to grant a visa to the person.'

148. In *Sabharwal (FC)* the Full Court noted that the Minister said he 'could not rule out the possibility of further offending by Mr Sabharwal.'⁸⁷ The Full Court, citing Justice Moshinsky's decision in *Coker v Minister for Immigration and Border Protection* (2017) 160 ALD 588, 608 [62], found that the Minister's statement was, in substance, also a finding that there was a risk of the individual concerned re-offending.

149. In *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* [1997] HCA 22; (1997) 191 CLR 559 (**Guo**) Chief Justice Brennan, Justices Dawson, Toohey, Gaudron, McHugh and Gummow of the High Court observed as follows at [574]-[575]:

*'The course of the future is not predictable, but the degree of probability that an event will occur is often, perhaps usually, assessable. Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability – high or low – of their recurrence. **The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity.** In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry,*

⁸⁷ *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160, [58] ("**Sabharwal (FC)**").

that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future.'

(Added emphasis.)

150. Justice Mortimer explored the notion of risk and its nexus to future possibilities in *Murphy v Minister for Home Affairs* [2018] FCA 1924 at [37] where Her Honour noted:⁸⁸

'That is, part of the Tribunal's task was to decide not only whether the applicant might engage in further offending conduct if he were permitted to stay, but what level of risk any such conduct might pose to the Australian community, the possible level of violence of the conduct being at least one measure (but not the only measure) of how serious the risk was, or whether the risk should be "tolerated".'

151. Applying the reasoning in ***Sabharwal FC*** and ***Guo*** and assessing the evidence to ascertain the likelihood that Mr Kim might engage in further offending conduct, the Tribunal first finds that there is 'a risk' or a likelihood that Mr Kim will engage in further criminal or serious conduct. He acknowledges so himself⁸⁹.
152. Second, a consideration of the level of the risk or likelihood of Mr Kim engaging in further criminal or serious conduct should encompass the factors that facilitate the risk or, conversely, hinder or limit the risk. Doing so enables the Tribunal to consider Justice Mortimer's question as to '*whether the risk should be "tolerated"*'.
153. The Tribunal has considered the evidence and the oral testimony, as set out above, in terms of the factors that either facilitate the risk or, conversely, hinder or limit it, together with Dr Kwok's expert opinion, to assess the risk of Mr Kim re-offending.

⁸⁸ *Murphy v Minister for Home Affairs* [2018] FCA 1924, [37].

⁸⁹ Transcript, page 26, lines 7-22.

Tribunal's finding: Risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

154. The Tribunal finds that the likelihood of Mr Kim engaging in further criminal or other serious conduct exists but that the risk to the Australian community is low, given the effect of current static and dynamic risk management factors in his life.

Is the risk of harm affected by any of the factors referred to in Paragraph 8.1.2(2)(c) of the Direction?

155. Paragraph 8.1.2(2)(c) states:

'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.'

156. For the sake of completeness, the Tribunal acknowledges paragraph 8.1.2(2)(c) of the Direction. This matter does not involve a "refusal to grant a visa to a non-citizen". It involves the discretionary cancellation of Mr Kim's visa. This specific paragraph is not relevant to the determination of this application.

Conclusion - Primary consideration 1: Protection of the Australian community

157. With reference to the weight attributable to Primary consideration 1, the Tribunal:
- (a) finds that the totality of Mr Kim's criminal offending and other conduct in Australia should be characterised as very serious;
 - (b) finds that if Mr Kim were to reoffend, the nature of the harm to individuals or the Australian community would be very serious and would involve physical, psychological, and material harm to individual victims and the community at large; and
 - (c) has assessed Mr Kim's recidivist risk of engaging in further criminal or other serious conduct (upon return to the community) by taking into account (1) available information and

evidence before the Tribunal speaking to such risk and (2) the extant independent clinical and expert evidence. The Tribunal finds that his current recidivist risk is low, given the effect of current static and dynamic risk management factors in his life.

158. The Tribunal's analysis of the material before it leads to a finding that Primary consideration 1 carries a substantial weight in favour of affirming the delegate's decision to cancel Mr Kim's visa.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE COMMITTED BY THE NON-CITIZEN

159. Paragraph 8.2 of the Direction states:

*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.*

160. Paragraph 4 of the Direction contains this definition:

family violence means violent, threatening or other behaviour by a person that coerces or controls **a member of the person's family** (the ***family member***) or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:

(a) *an assault; or*

(b) *a sexual assault or other sexually abusive behaviour; or*

(c) *stalking; or*

(d) *repeated derogatory taunts; or*

(e) *intentionally damaging or destroying property; or*

- (f) *intentionally causing death or injury to an animal; or*
- (g) *unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
- (h) *unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or*
- (i) *preventing the family member from making or keeping connections with his or her family, friends or culture; or*
- (j) *unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.*

Tribunal's Consideration

- 161. There is no evidence before the Tribunal to suggest that Mr Kim has engaged in family violence.
- 162. The Tribunal considers that this paragraph is not relevant and is not enlivened.

Conclusion - Primary consideration 2: Family violence committed by the non-citizen

- 163. This consideration carries a neutral weight.

PRIMARY CONSIDERATION 3: THE STRENGTH, NATURE AND DURATION OF TIES TO AUSTRALIA

- 164. Paragraph 8.3 of the Direction provides:
 - (1) *Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.*

- (2) *In considering a non-citizen's ties to Australia, decision-makers should give more weight to a non-citizen's ties to his or her child and/or children who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.*
- (3) *The strength, duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.*
- (4) *Decision-makers must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:*
- a) *the length of time the non-citizen has resided in the Australian community, noting that:*
 - i. *considerable weight should be given to the fact that a noncitizen has been ordinarily resident in Australia during and since their formative years, regardless of when their offending commenced and the level of that offending; and*
 - ii. *more weight should be given to the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and*
 - iii. *less weight should be given to the length of time spent in the Australian community where the non-citizen was not ordinarily resident in Australia during their formative years and the noncitizen began offending soon after arriving in Australia.*

165. Before considering each paragraph of the above, it is useful to identify those individuals who are relevant to any consideration of these paragraphs:

- Mr Kim's immediate family⁹⁰:

⁹⁰ G Documents, G13, pages 26.

- Pok Van (mother).
- Chompa Duong (sister).
- Linda Ok (sister).
- Lisa Van (sister).
- Mr Kim's extended family⁹¹:
 - AD, niece, 15 years old.
 - ED, nephew, 12 years old.
 - AS, niece, 6 years old.
 - MS, nephew, 2 years old.
 - CV, cousin, 12 years old.
 - His sisters' partners.

Paragraph 8.3(1) Consideration of the impact of this decision on the non-citizen's immediate family members in Australia

166. The Tribunal has considered the oral testimony and recent statements of Mr Kim's mother and his three sisters in conjunction with the statement of Rany Sok⁹², Mr Kim's brother-in-law, which makes observations on the positive ties between Mr Kim and his sister Linda Ok.
167. All of Mr Kim's immediate family members reside in Australia and the evidence from his family members in Australia provide a detailed description of the impact and emotional distress that non-revocation of the visa cancellation decision would have on them.

⁹¹ Exhibit 4, Applicant's Statement of Facts, Issues and Contentions, page 16; G Documents, G2, page 114.

⁹² Exhibit 6, Applicant's Supplementary Tender Bundle, pages 20-21.

168. The Tribunal's consideration of this paragraph finds that it provides significant weight towards setting aside the delegate's decision to cancel Mr Kim's visa.

Paragraph 8.3(2): Consideration of the non-citizen's ties to Australia having regard to a child/ren who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely

169. In considering this paragraph, the Tribunal has paid particular attention to the statements of Mr Kim's niece and nephew, AD⁹³ and ED⁹⁴, which corroborate Mr Kim's oral testimony during his examination in chief:

Dr Donnelly: Now, I just want you to give the tribunal a brief summary of, in your words now, the nature of the relationship you have with your immediate family in Australia?---The nature?

Mr Kim: Yes.

Dr Donnelly: What kind of relationship would you say you have with your immediate family?

Mr Kim: Well, I am very close to all my family, I am very close to all my sisters. I am - I am more close to my nieces and nephews because I try to keep - like, I see my niece and nephew, [AD] and [ED], I see them every day, I help them with doing their homework, and when my sister and my brother in-law, they need to go out, I'll step in and do the parenting role. I'll help them with their cooking, make sure they're eating, make sure they're doing their homework. And on the weekends, if I'm not working, I help take them to - to their karate, or their kickboxing, and if I have free time, I will take them for a walk to the park. And I have my other niece and nephew from my other sister as well that's living with my mum. I go to help my mum every day after I work, I come back from work, I get back from work at about 5, I go and help her with some cooking, and then I will play with my nieces and nephew there too, that's [AS] and [MS]. And my mum, she's getting older now, and she's got high blood pressure, and I try to help out her as much as I can. And my sister, she's got -

⁹³ Exhibit 3, Applicant's Tender Bundle, pages 29-30.

⁹⁴ Exhibit 3, Applicant's Tender Bundle, pages 37-38.

*my sister, Anim, she's got Graves' disease, and I will try to do whatever I can to help my sister.*⁹⁵

170. There are also the following exchanges between Ms Chompa Kim and Dr Donnelly:

Dr Donnelly: Just give us an idea of - just, say, in a given week what would be the sort of physical contact, if at all, between your brother and yourself and the children?

Ms Kim: Could you repeat that again, sorry?

Dr Donnelly: Yes. So in a given week, how much physical contact would your brother have with you and your kids?

Ms Kim: A given week, you mean?

Dr Donnelly: Yes, in a given week?

Ms Kim: Well, we see each other every day. He helps me - Chompaey helps me with the supervision of my children. He takes them to karate lessons on the weekends for me, so we see - we see each other daily and help out with other (indistinct) like my son's sparring karate and my daughter is - my daughter's in Year 11, so my brother's really good at English, compared to what I am (indistinct) the work of assignments in English, so he's good at explaining more things⁹⁶.

and

Dr Donnelly: Has your brother assisted you at all in relation to your health?

Ms Kim: Yes. So a lot has been said about mum, mum's health issue and also myself. I suffer from severe depression. I say 'depression' because depression is also - my understanding, it's also anxiety as well. And me and my mum is very distraught and just (indistinct words) Chompaey. They are concerned about my condition and also mum's condition.

Dr Donnelly: Who looks after your children with these health issues?

⁹⁵ Transcript, page 12, lines 18-38.

⁹⁶ Transcript, Page 35, lines 25-38

Ms Kim: Chompaey lives with me so he helps me a lot with looking after the children. I work a very stressful job as a employment consultant for a non-profit organisation, Rise employment disabilities. So mostly my case load is firsthand with clients that haven't been working for - working before, and the case load I get is mainly from Centrelink referrals. And I work a stressful job where I - my job is to find a job for job seekers that haven't worked all their life. And they go for (indistinct) like addiction, domestic violence and he helps me with that because a lot of the clients they'll be placed at - we've got a place to work and we work. They ask me if I'm - when I'm out where - after hours to speak to employers, seeing clients, so Chompaey helps me with supervision of the kids, making dinner, take them to their activities. My husband as well works long hours, he works 10 hours a day. He's in logistics, so logistics is always busy. He works on weekends as well. But even if - and, as well, our - the cost of living is just - it's so much, now, and we can't afford not to work. We've got a mortgage that we need to pay off as well and the kids are growing up. My daughter's in Year 11, she needs more tutoring and the tutoring cost is - we do other tutoring which is more than the group one, because she is now in the senior and I'm not able to provide her the knowledge. And also even with the maths, I'm not able to show her because it's so technical to me. Like, the working out is different in my time. But so I've got to be fit to work and soldier on and work and not always be in my best condition. And I get asthma when the weather changes or when I'm stressed and - sorry. I'm not always - can always be at my best. I have had many asthma attacks, lung infection, so I'm not really that well. But he helps me out with that, looking after the kids when I recover in hospital and at home, so Chompaey has helped with me a lot with my family. And I just have to leave the kids with him and my husband drives me to the hospital. Both my son as well, they're asthmatic and you have to prepare for the worst sometimes to stay in hospital. I leave the hospital. My son and myself, he's not well with asthma⁹⁷.

⁹⁷ Transcript, Page 36, line 37 – page 37, line 29.

171. This evidence indicates that members of Mr Kim's extended family such as AD and ED will suffer an adverse impact in their lives and ensuing emotional distress if Mr Kim is returned to Cambodia.
172. The Tribunal's consideration of this paragraph finds that it provides weight towards setting aside the delegate's decision to cancel Mr Kim's visa.

Paragraph 8.3(3) Strength, duration and nature of ties with any family or social links generally

173. This paragraph looks at the strength, nature and duration of the extent of any ties Mr Kim may have with (a) other family members; or (b) social contacts and/or links in Australia.
174. The limiting qualification to this inquiry is that these two categories of people with whom Mr Kim may have ties must be Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.
175. This paragraph does not specifically offer or formulate a methodology as to the manner of how weight is to be allocated to these two categories of ties.
176. The Tribunal will consider Mr Kim's links with these two categories of people and allocate weight in his favour to the extent of whatever strength, duration and nature there may be found to be in those links.
177. Framing the Tribunal's consideration is the evidence that Mr Kim arrived in Australia on 22 June 1987, aged 7 years.
178. Apart from three brief absences between 1999 and 2001, he has lived continuously in Australia for almost 36 years. All his immediate family members reside in Australia and the statements from his family members in Australia describe the impact that non-revocation of the cancellation decision would have on them.
179. The Tribunal finds that the strength, duration and nature of Mr Kim's ties to his family is substantial and carries a weight against affirming the decision to cancel Mr Kim's visa.

180. However, balanced against this weight is the lack of evidence as to Mr Kim's social links in Australia.

181. Overall, the Tribunal considers that this paragraph provides some weight towards setting aside the delegate's decision to cancel Mr Kim's visa.

Paragraph 8.3(4): Consideration of the strength, nature and duration of the non-citizen's other ties to the Australian community having regard to the length of time he has resided in Australia

182. This paragraph requires the Tribunal to look at the time Mr Kim has spent in Australia and to take account of three elements:

a) Whether Mr Kim was ordinarily resident in Australia during his formative years?

b) Whether he positively contributed to the Australian community during his time here?

c) Can the weight allocable to the strength of Mr Kim's ties to Australia based on the length of time he has spent in the Australian community be lessened because (1) he did not spend his formative years here and (2) he began offending soon after arriving here?

183. Addressing a), Mr Kim has resided in Australia for 36 years, having arrived as a 7 year old. As the Respondent notes in its Statement of Facts, Issues & Contentions, considerable weight should be given to the fact that Mr Kim has been ordinarily residing in Australia during at least part of his formative years.

184. Addressing b), there is evidence of Mr Kim's employment at plant nurseries during periods when he was not imprisoned. Beyond this employment, there is no evidence that Mr Kim has contributed positively to the Australian community.

185. Addressing c), the facts that Mr Kim spent his formative years in Australia and began his adult criminal conduct approximately 11 years after his arrival makes it difficult to lessen the weight allocable to the strength and nature of his ties to Australia.

Tribunal's Consideration

186. The Tribunal considers, based on the above analysis, that this consideration provides weight in favour of setting aside the delegate's decision to cancel Mr Kim's visa.

Conclusion - Primary consideration 3: The strength, duration and nature of ties to Australia

187. This consideration carries a substantive degree of weight towards setting aside the delegate's decision to cancel Mr Kim's visa.

PRIMARY CONSIDERATION 4: BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA AFFECTED BY THE DECISION

188. Paragraph 8.4 of the Direction requires decision-makers to determine, where relevant, if the cancellation of Mr Kim's visa is in the best interests of any minor children in Australia.
189. This provision applies only if the child is, or would be, under 18 years old at the time when the application is decided.
190. If there are two or more relevant children, the best interests of each child affected by the decision whether to cancel a visa should be given individual consideration, to the extent that their interests may differ.⁹⁸
191. In considering the child's best interests, the Direction requires the following factors at paragraph 8.4(4) to be considered where relevant:

(a) the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long

⁹⁸ The Direction, para 8.3(3).

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.

Tribunal's Consideration

192. The Direction requires that the Tribunal determine whether non-revocation under section 501CA is, or is not, in the best interests of each child in Australia who will be affected by the decision.

193. The following minor children in Australia are relevant to this consideration:

- a) AD, niece, 15 years old.
 - b) ED, nephew, 12 years old.
 - c) AS, niece, 6 years old.
 - d) MS, nephew, 2 years old.
 - e) CV, cousin, 12 years old.
194. Mr Kim is the uncle of AD, ED, AS and MS and a cousin to CV.
195. AD and ED are the children of Mr Kim's older sister, Ms Kim.
196. AS and MS are the children of Mr Kim's younger step-sister, Ms Sok.
197. Ceteris paribus, Ms Kim and Ms Sok and their partners respectively fulfil a parental role in relation to each relevant minor child.
198. In his 2023 statement, Mr Kim claims he provides all his nieces and nephews with '*emotional and practical support*' and regularly asks them how their day was and assists them with their homework.
199. At this juncture, it is important to consider the High Court's reasoning in *Guo*:

*'The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity.'*⁹⁹

Applying the above reasoning, looking to the future, and the absence of evidence to the contrary are all factors which suggest that Mr Kim is likely to play a positive role into the future for each of the relevant minor children.

⁹⁹ *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574-575

200. There was limited evidence, arising from Ms Zinn's cross-examination of Mr Kim, before the Tribunal that indicates that his criminal offending had a negative impact on the minor children:

'Ms Zinn: Mr Kim, would you accept that your extensive criminal history has had some negative effect on your nieces and nephews?

Mr Kim: (Indistinct words).

Ms Zinn: In what way?

Mr Kim: Well, from my (indistinct words) that I disappear for a few years.

Ms Zinn: That's when you were using drugs?

Mr Kim: Yes, it was when I was using drugs or incarcerated.

Ms Zinn: So that affected your relationship with them?

Mr Kim: In a way it does, yes'.¹⁰⁰

201. Balancing this evidence was Ms Chompa Kim's oral testimony about the relationship between Mr Kim and her children:

'Dr Donnelly: To the extent you can answer this, what kind of relationship does your brother Mr Kim have with your children?

Ms Kim: Yes. My kids - both my kids, [AD] and [ED], have a close contact, I'd say a close relationship, with my brother. My brother has always been a part of my life and also with my children's life. He's - my kids are often - they are often with their uncle a lot. They share a lot of things together, my brother shares a lot of stories about our past, like, and also life lessons. So I rely heavily, a lot on my brother to be able to teach my kids life lessons. You know, so our society, there's not much of a life lesson, a lot of technology, but I don't want to go into more of this. But they have a really close relationship and they share a lot together. And a lot is they actually - like, they can - actually are more closer than myself as a mother with all the things that they'll probably hide from me, not tell me. They prefer to speak to my brother and ask, 'What should we do?' because, you know, the mother, we - as a mother, like, you have that guidance where you can't - where you can be close to them but

¹⁰⁰ Transcript, page 29, lines 37-46.

*also in a way we kind of step back because we are the parent and we're going to show them the ways of right and wrong or - Chompaey is - but we need him to understand them. I'm not as understanding as Chompaey because I'm more strict*¹⁰¹.

202. AD¹⁰² and ED¹⁰³ have provided statements that describe their views and how they would be adversely affected by Mr Kim's return to Cambodia.
203. There is no evidence before the Tribunal that any of the relevant minor children has been or is at risk of being exposed to family violence perpetrated by Mr Kim or that they have suffered any physical or emotional trauma arising from his conduct.

Conclusion - Primary consideration 4: Best interests of minor children in Australia affected by the decision

204. This consideration carries weight towards setting aside the delegate's decision to cancel Mr Kim's visa.

PRIMARY CONSIDERATION 5: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

205. Paragraph 8.5(1) of the Direction provides:

'The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.'

206. In addition to the guidance provided by paragraph 8.5(1) of the Direction, paragraph 8.5(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character

¹⁰¹ Transcript, page 35, lines 5-23.

¹⁰² Exhibit 3, Applicant's Tender Bundle, pages 29-30.

¹⁰³ Exhibit 3, Applicant's Tender Bundle, pages 37-38.

concerns or offences in question are such that the Australian community would expect that the person should not be granted or continue to hold a visa.

207. Paragraph 8.5(2) further stipulates that the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns because of conduct in Australia or elsewhere, of the following kinds:

- (a) acts of family violence;
- (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;
- (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.

208. Paragraph 8.5(3) of the Direction provides that the above expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

209. As per Paragraph 8.5(4) of the Direction, this consideration is '*about the expectations of the Australian community as a whole*', and decision makers are to proceed based on the Government's views as articulated in the Direction, without independently assessing the community's expectations in the particular case.

210. Paragraph 8.5(4) of the Direction correlates with the reasoning of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454 (*'FYBR'*).
211. Notwithstanding the different pathways in judicial reasoning, the plurality of the Court in *FYBR* held that *'Expectations of the Australian community'* is a deeming provision with normative principles, ascribing to the community an expectation aligning with that of the executive government.¹⁰⁴
212. The reasoning in *FYBR* establishes that the *'deemed community expectation'* will in most cases call for cancellation, but *'the question of whether it is appropriate to act in accordance with the deemed community expectation is in all cases left for the decision-maker to determine'*.¹⁰⁵
213. The Tribunal notes the High Court of Australia refused an application for special leave to appeal from the orders in *FYBR*, holding at [301]–[303] that *'there is no reason to doubt the correctness of the decision of the majority of the Full Court of the Federal Court.'*¹⁰⁶
214. Observing the norm stipulated in Paragraph 8.5(1), the Tribunal considers the guidance provided by Paragraphs 5.2(2) to (6) of the Direction, as reproduced at Paragraph [38] of this decision.
215. The Tribunal acknowledges the norm set out in paragraph 8.5(1) and considers that Mr Kim has breached this norm as he accrued his criminal history in Australia.

Tribunal's Consideration

216. The Tribunal finds that Mr Kim has committed one of the kinds of conduct enumerated at paragraph 8.5(2) of the Direction in his criminal offending. He committed serious crimes – in that they were crimes of a violent nature – against women in his 2002 theft offence.

¹⁰⁴ *FYBR* (2019) 272 FCR 454 (*"FYBR"*), at 471–2 [66] (Charlesworth J), and 476 [91] (Stewart J).

¹⁰⁵ *Ibid* at 473 [75]– [76] (Charlesworth J).

¹⁰⁶ *FYBR v Minister for Home Affairs and Anor* [2020] HCA Trans 56; see also *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68.

217. Acknowledging paragraph 8.5(3), the next question is whether there are any factors which modify the Australian community's expectations.

218. This question is informed by the principles in paragraphs 5.2(4) to (5) of the Direction.

219. The Direction further explains at Paragraph 8.5(4) that:

"This consideration is about the expectations of the Australian community as a whole, and in this respect, decision-makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case."

220. Sub-paragraph 5.2(4) uses the term '*limited stay visa*' which is not defined in the Act. The Act does however create a taxonomy of visas. Relevantly for present purposes, s 30 of the Act contemplates both (1) '*permanent visas*', which permit a right to remain, '*indefinitely*'; and (2) '*temporary visas*', which provide a conditional right to remain. '*Limited stay*', as used in the Direction, seems to be a reference to non-permanent or '*temporary*' visas.

221. Mr Kim held a Class BB Five Year Resident Return (Subclass 155) visa. This is a permanent visa allowing the visa holder to remain in Australia indefinitely.¹⁰⁷

222. This implies that paragraph 5.2(4)'s lower tolerance does not apply in the present case, given that Mr Kim was not holding what could be dubbed a '*limited stay visa*'.

223. Addressing paragraph 5.2(5), Mr Kim has lived in Australia for 36 years (approximately 83% of his life) since he arrived when he was 7. Taken together, these two facts suggest a higher level of tolerance of criminal or other serious conduct on Mr Kim's part, than in circumstances if his time in Australia was shorter.

Conclusion - Primary consideration 5: Expectations of the Australian community

224. The Tribunal has found Mr Kim's offending conduct to be very serious.

¹⁰⁷ *Migration Regulations 1994* (Cth), reg 200.511.

225. The Tribunal also observes the requirements of paragraph 8.5(3) of the Direction which dictate that the expectations of the Australian community apply regardless of whether a non-citizen poses a measurable risk of causing physical harm to the Australian community. The Tribunal has found above that Mr Kim poses a risk of re-offending.
226. The Tribunal is satisfied that Mr Kim has breached the Australian community's expectations by his criminal offending which involved serious breaches of Australian laws. Therefore, the Australian community, 'as a norm' expects the Australian Government not to allow him to remain in Australia.
227. This consideration carries significant weight in favour of affirming the delegate's decision to cancel Mr Kim's visa.

OTHER CONSIDERATIONS

228. The Tribunal now considers each of the four sub-paragraphs (a), (b), (c) and (d) set out as Other considerations in Paragraph 9 of the Direction.

Other consideration (a): Legal consequences of the decision

229. Paragraph 9.1 of the Direction directs a decision-maker to consider the following:
- (1) *Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.*
 - (2) *A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act,*

particularly the concept of 'protection obligations', reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing.

- (3) International non-refoulement obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a non-refoulement claim.*

9.1.1 Non-citizens covered by a protection finding

- (1) Where a protection finding (as defined in section 197C of the Act) has been made for a non-citizen in the course of considering a protection visa application made by the non-citizen, this indicates that non-refoulement obligations are engaged in relation to the non-citizen.*
- (2) Section 197C(3) ensures that, except in the limited circumstances specified in section 197C(3)(c), section 198 does not require or authorise the removal of an unlawful non-citizen to a country in respect of which a protection finding has been made for the non-citizen in the course of considering their application for a protection visa. This means the non-citizen cannot be removed to that country in breach of non-refoulement obligations, even if an adverse visa decision under section 501 or 501CA is made for the non-citizen and they become, or remain, an unlawful non-citizen as a result. Instead, the non-citizen must remain in immigration detention as required by section 189 unless and until they are granted another visa or they can be removed to a country other than the country by reference to which the protection finding was made.*
- (3) Decision-makers should also be mindful that where the refusal, cancellation or non-revocation decision concerns a protection visa, the person will be prevented by section 48A of the Act from making a further application for a protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them - see sections 48A and 48B of the Act). Further, as a result of a refusal or cancellation decision under section 501 or a non-revocation decision under section 501CA, the person will be prevented from applying for any other class of visa*

except a Bridging R (Class WR) visa (see section 501E of the Act and regulation 2.12AA of the Regulations).

9.1.2 Non-citizens not covered by a protection finding

- (1) *Claims which may give rise to international non-refoulement obligations can also be raised by a non-citizen who is **not** the subject of a protection finding, in responding to a notice of intention to consider cancellation or refusal of a visa under section 501 of the Act, or in seeking revocation of the mandatory cancellation of their visa under section 501CA. Where such claims are raised, they must be considered.*

- (2) *However, where it is open to the non-citizen to apply for a protection visa, it is not necessary at the section 501/section 501CA stage to consider non-refoulement issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of non-refoulement obligations as given effect by the Act and where it is open to the person to make such an application a decision-maker, in making a decision under section 501/section 501CA, is not required to determine whether non-refoulement obligations are engaged in respect of the person. Having considered the person's representations, the decision-maker may choose to proceed on the basis that if and when the person applies for a protection visa, any protection claims they have will be assessed, as required by section 36A of the Act, before consideration is given to any character or security concerns associated with them.*

- (3) *Non-refoulement obligations that have been identified for a non-citizen with respect to a country, via an International Treaties Obligations Assessment or some other process outside the protection visa process, would not engage section 197C(3) to preclude removal of the non-citizen to that country. In these circumstances, in making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. However, that does not mean an adverse decision under section 501 or 501CA cannot be made for the non-citizen. A refusal, cancellation or non-revocation decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement*

obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the noncitizen makes a valid application for a protection visa, the non-citizen would not be liable to be removed while their application is being determined.

230. Mr Kim has not identified any concerns or fears about returning to Cambodia that would engage Australia's international non-refoulement obligations.
231. Mr Kim is not a non-citizen who is covered by a protection finding for the purposes of paragraph 9.1.1 of the Direction.
232. The Tribunal acknowledges the legal consequences, described by Dr Donnelly, if the Tribunal affirms the delegate's decision to cancel Mr Kim's visa. These are:
- a) Mr Kim must be placed in immigration detention until he is removed from Australia.
 - b) Independent of a protection visa application, Mr Kim will be prohibited from applying for any other visa while in Australia.
 - c) When Mr Kim is removed from Australia, he will likely be permanently excluded from ever returning to Australia.
 - d) If Mr Kim makes an application for a protection visa, he must remain in immigration detention in the interim.
233. The Tribunal considers that these are pendant aspects of the result if the Tribunal affirms the delegate's decision to cancel Mr Kim's visa. In the absence of further evidence about what Mr Kim may do, the Tribunal cannot sustain additional consideration of these aspects or make a finding.

Tribunal's Finding: Other consideration (a): Legal consequences of the decision

234. The Tribunal considers that Other consideration (a) is not enlivened and carries neutral weight.

Other consideration (b): Extent of impediments if removed

235. Paragraph 9.2(1) of the Direction provides:

(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

- a) The non-citizen's age and health;*
- b) Whether there are substantial language or cultural barriers; and*
- c) Any social, medical and/or economic support available to them in that country.*

The Applicant's written submissions

236. Dr Donnelly has made the following submissions on this consideration:

- a) Mr Kim is 43 years of age.
- b) He has a history of drug addiction but is in sustained remission at the current time. He has a propensity to depression/mood disorder and is currently undertaking medical treatment with a medical professional.
- c) Mr Kim speaks very little Khmer, the Cambodian language. As such, there would be language barriers.
- d) He would suffer substantial cultural barriers in Cambodia. He has resided in Australia since he was a child and considers himself an Australian. If removed, he would be largely unfamiliar with local Cambodian customs and cultural traditions.

- e) He has no social ties in Cambodia and no known family in Cambodia with the possible exception of an elderly uncle.
- f) There is a prospect that Mr Kim's Australian criminal record would hinder his prospects of obtaining lawful employment in Cambodia. As a matter of ordinary human experience, a person with an extensive criminal history is likely to be the subject of discrimination by a potential employer. As a deportee from Australia, that would further function as a detriment.¹⁰⁸
- g) He would not be entitled to any unemployment benefits in Cambodia and would have no economic support in Cambodia. Collectively, these matters would cause Mr Kim significant hardship in Cambodia.
- h) The healthcare system in Cambodia is very poor. His mental health will very likely deteriorate, aggravated by being permanently separated from his family in Australia. This is likely to have devastating consequences for Mr Kim.¹⁰⁹

The Respondent's written submissions

237. With respect to this consideration, Ms Zinn contends that:

- a) In Mr Kim's *Personal circumstances form* completed on 23 December 2019, he confirmed that he does not have any diagnosed medical or psychological conditions¹¹⁰ but has since claimed (in the **2023 statement**¹¹¹) that he suffers from anxiety and depression and is undertaking counselling with *Bright Hope Australia*.
- b) Mr Kim's age and health therefore present no impediments if he was removed to Cambodia. In any event, Mr Kim would presumably have access to the same social, medical and economic support available to other citizens of Cambodia.

¹⁰⁸ Tracy W. Harachi, 'The Deportation of Cambodians: A Failure of Adjustment or a Failing of Society?', *National Institute on Drug Abuse*, <<https://nida.nih.gov/international/abstracts/deportation-cambodians-failure-of-adjustment-or-failing-society>>.

¹⁰⁹ *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225 [3].

¹¹⁰ G Documents, G2, page 117.

¹¹¹ Exhibit 5, Applicant's Statement.

- c) Mr Kim claims in the 2023 statement that he does not have any family or friends in Cambodia, will have nowhere to live and no job opportunity.
- d) Mr Kim also states that Cambodia has easy access to drugs and a high risk of criminal activity. His concerns about the availability of drugs in Cambodia is inconsistent with his claimed rehabilitation.
- e) Whilst he may experience some emotional, practical and financial hardship in his endeavours to resettle in Cambodia, as well as cultural barriers given the extended time he has spent in Australia, such difficulties are not insurmountable given that Mr Kim is relatively young; is generally of good health; and has employment experience as an assistant manager as a subcontractor for *Flower Power* that could be relied upon to assist him to obtain work in Cambodia.

Tribunal's Consideration

238. This aspect of the Direction requires the Tribunal to assess and consider the extent of any impediments that Mr Kim, if removed from Australia to Cambodia will face in establishing himself and maintaining basic living standards taking the specific factors below into account.

Sub-paragraph 9.2(1)(a) – the non-citizen's age and health

239. Mr Kim is 43 years old.

240. The uncontested¹¹² expert evidence before the Tribunal is that while Mr Kim is physically healthy, he suffers from *Major Depressive Disorder with anxious distress* and a diagnosed substance use disorder that is apparently being effectively treated with monthly buprenorphine injections.

241. Absent any evidence before the Tribunal that the Cambodian health system offers buprenorphine injections, the Tribunal considers from Dr Kwok's report and testimony that it is reasonably foreseeable that Mr Kim, if removed to Cambodia, would not have the

¹¹² Transcript, page 49, lines 42-47.

capacity to function in terms of day-to-day living and would likely relapse into serious drug misuse and his substance abuse disorder.

242. This would likely be due to the probable stress he would experience being separated from his family, thereby losing the increased support he has only relatively recently found and returned to a country where he had very limited to no social supports and of which he has only bad, if not traumatic, childhood memories.
243. This likely relapse scenario can be categorised as a 'health related issue'¹¹³ and forms part of Mr Kim's overall health.
244. Applying Colvin J's reasoning in *Holloway v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1126, this 'health related issue' and the associated evidence before the Tribunal supports a finding that there is a real risk of relapse by Mr Kim into substance use disorder, and that this risk constitutes a substantial and long-lasting impediment to him being able to establish himself and maintain basic living standards in Cambodia.

Sub-paragraph 9.2(1)(b) - any substantial language or cultural barriers

245. Assessing the evidence and observing that the Respondent's logic that Mr Kim spoke Khmer because an interpreter had been requested was not made out during the hearing, the Tribunal considers that Mr Kim would face significant linguistic difficulties and cultural barriers if he was removed to Cambodia.

Sub-paragraph 9.2(1)(c) - any social, medical and/or economic support available to them in that country

246. The Tribunal considers that Mr Kim would have access to the same level of social, medical and economic support as other Cambodian citizens.

¹¹³ *GXXS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 468 at [95], per Derrington J.

247. When considered in conjunction with Paragraph 9.2(1)(a), it is likely that this level of support would be inadequate and a significant long-lasting impediment to Mr Kim establishing himself and maintaining basic living standards in Cambodia.

248. Therefore, the Tribunal has considered the extent of any impediments that Mr Kim, if removed from Australia to Cambodia, will face in establishing himself and maintaining basic living standards, taking into account the specific factors set out in Paragraph 9.2(1).

Tribunal's finding - Other consideration (b) Extent of impediments if removed

249. Having regard to the analysis referable to each of the three sub-paragraph components of Other consideration (b), the Tribunal finds that Mr Kim would suffer significant impediment if he was removed to Cambodia.

250. Other consideration (b) carries significant and substantive weight against affirming the delegate's decision to cancel Mr Kim's visa.

Other consideration (c): Impact on victims

251. Paragraph 9.3(1) of the Direction states:

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

Tribunal's finding - Other consideration (c): Impact on victims

252. There is no relevant evidence before the Tribunal addressing the impact of a decision under s 501 of the Act on members of the Australian community, including any victim of Mr Kim's offending.

253. The Tribunal finds that Other consideration (c) carries a neutral weight.

Other consideration (d): Impact on Australian business interests if the non-citizen cannot remain in Australia

254. Paragraph 9.4 (1) requires the Tribunal to consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where an adverse decision would significantly compromise the delivery of a major project or important service.
255. There is no evidence before the Tribunal that Mr Kim's absence from his employment or his removal from Australia will significantly compromise the delivery of a major project or an important service. Mr Kim's employment skills and experience are not such that his unavailability as a potential employee would adversely affect Australian business interests more broadly.

Tribunal's finding - Other consideration (d): the impact on Australian business interests if the non-citizen cannot remain in Australia

256. The Tribunal finds that Other consideration (d) carries a neutral weight.

SUMMARY OF FINDINGS: OTHER CONSIDERATIONS

257. The Tribunal now summarises the respective weights it has allocated to each of the Other considerations specified in the Direction that are relevant to the present matter:

Other consideration (a) – legal consequences of the decision:

- Other consideration (a) is not enlivened and carries neutral weight.

Other consideration (b) - extent of impediments if removed:

- Other consideration (b) carries significant and substantive weight against affirming the delegate's decision to cancel Mr Kim's visa.

Other consideration (c) - impact on victims:

- Other consideration (c) carries a neutral weight.

Other consideration (d) – Impacts on Australian business interests:

- Other consideration (d) carries a neutral weight.

ADDITIONAL CONSIDERATIONS

258. The Direction does not limit the other considerations to those listed in paragraph 9(1) of the Direction.¹¹⁴
259. The High Court has held that the scheme found in section 501CA of the Act '*necessarily requires the Minister to consider and understand the representations received*' and emphasised the breadth of what may constitute '*another reason*' why the original decision should be revoked¹¹⁵.
260. In this matter, no additional considerations were raised.

CONCLUSION

261. Because of the combined effects of ss 501(6)(a) and 501(7)(c) of the Act, Mr Kim does not pass the character test.
262. The Tribunal finds as follows:

Primary consideration 1 - protection of the Australian community from criminal or other serious conduct:

- This consideration carries a substantial weight in favour of affirming the Respondent's delegate's decision to cancel Mr Kim's visa.

Primary consideration 2 - whether the conduct engaged in constituted family violence:

- This consideration carries a neutral weight.

¹¹⁴ Per *Fehoko v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1471.

¹¹⁵ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41 at [13], [15] per Keane, Gordon, Edelman, Steward and Gleeson JJ.

Primary consideration 3 - the strength, nature and duration of ties to Australia:

- This consideration carries a substantive degree of weight towards setting aside the Respondent's delegate's decision to cancel Mr Kim's visa.

Primary consideration 4 - best interests of minor children in Australia affected by the decision:

- This consideration carries weight towards setting aside the Respondent's delegate's decision to cancel Mr Kim's visa.

Primary consideration 5 – expectations of the Australian community:

- This consideration carries significant weight in favour of affirming the Respondent's delegate's decision to cancel Mr Kim's visa.

263. The Tribunal has also set out above the weight attributable to the other considerations and the additional considerations.

264. Having regard to the Direction and the totality of the evidence before the Tribunal, a comprehensive, holistic and integrated view of the primary considerations, the other considerations and the additional considerations leads this Tribunal to find that it is satisfied that it should not exercise the discretion under section 501(2) of the Act to cancel Mr Kim's visa.

265. Accordingly, the Tribunal sets aside the Respondent's delegate's decision to cancel Mr Kim's visa.

DECISION

266. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **sets aside** the decision under review.

I certify that the preceding two hundred and sixty six paragraphs (266) paragraphs are a true copy of the reasons for the decision herein of Member D. Cosgrave

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

Associate

Dated: 28 July 2023

Date of hearing:

29 & 30 June 2023

Legal Representative for the Applicant:

Dr Donnelly, instructed by Mr Zarifi of Zarifi Lawyers

Legal Representative for the Respondent:

Ms Zinn of Mills Oakley

ANNEXURE A – EXHIBIT REGISTER

Exhibit Number	Description of Exhibit	Party	Date of Document	Filing Date
1	Respondent's Tender Bundle	R	16 June 2023	16 June 2023
2	Respondent's Statement of Facts, Issues & Contentions	R	13 June 2023	13 June 2023
3	Applicant's Tender Bundle	A	28 May 2023	28 May 2023
4	Applicant's Statement of Facts, Issues & Contentions	A	28 May 2023	28 May 2023
5	Statement of Chompeay Kim	A	28 May 2023	28 May 2023
6	Applicant's Supplementary Bundle	A	Various	23 June 2023
7	Section 501G documents	T	5 May 2023	5 May 2023