Administrative
Appeals Tribunal

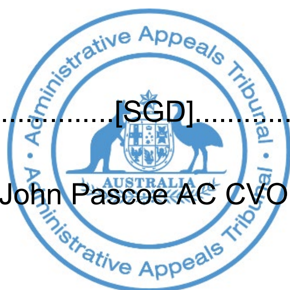
DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2021/0433**
Re:	**SFPH**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**The Hon. John Pascoe AC CVO, Deputy President**
Date:	**29 August 2023**
Place:	**Sydney**

The correct and preferable decision is that the reviewable decision of 25 January 2021, not to revoke the cancellation of the Applicant's visa, is affirmed



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The Hon. John Pascoe AC CVO, Deputy President

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CATCHWORDS

MIGRATION – visa cancellation – mandatory cancellation under s 501(3A) of the Migration Act 1958 – where Applicant does not pass the character test – whether there is 'another reason' to revoke the cancellation – consideration of Direction No. 99 – protection of the Australian community – links to the Australian community – the best interests of minor children in Australia – expectations of the Australian community – legal consequences of decision – impediments to removal – reviewable decision affirmed

LEGISLATION

Migration Act 1958 (Cth) s 499, 501

CASES

FYBR v Minister for Home Affairs [2019] FCAFC 185

Plaintiff M1 v Minister for Home Affairs [2022] HCA 17

SECONDARY MATERIALS

Direction No. 99 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA

REASONS FOR DECISION

The Hon. John Pascoe AC CVO, Deputy President

29 August 2023

BACKGROUND:

1. The Applicant is 37 year old man who was born in Afghanistan. He arrived in Australia on 20 June 2003 on a Global Special Humanitarian (Subclass 202) visa.

2. The Applicant's criminal history is as follows:

Date of conviction	Offence	Sentence
8 July 2004	Invite/solicit prostitution/prostitute	Without conviction, Adjourned to 8 July 2005
22 June 2006	Intentionally cause injury	Without conviction, Adjourned to 21 June 2007. $500 fine.
22 June 2006	- Handle/receive/retention stolen goods - Use cannabis - Fail to answer bail (2 charges)	Without conviction, fined an aggregate of $500
17 October 2006	- Theft of motor vehicle - Fail to answer bail(2 charges)	Without conviction, aggregate fine of $500
10 October 2008	- Drive while disqualified (2 charges)	Aggregate sentence 2 months imprisonment, concurrent. Sentence wholly suspended under s 27 of the Sentencing Act 1991. 12 months operational period

28 May 2009	- Behave in offensive manner in public place	Conviction, $200
29 June 2011	- Obtain property by deception - Make a false document to prejudice of other	Convicted, community based order for 6 months 60 hours unpaid community work over 6 months
29 August 2011	- Unlicenced driving - State false name	Convicted, 12 months community based order, 50 hours unpaid community work over 3 months
29 August 2011	- Ex. Prescribed concentration 3 hrs – blood - Fraudulently alter notice auth/req – RSA	On each charge: - Convicted and community based order for 12 months, 50 hours of unpaid community work over 3 months - Licence cancelled and disqualified for 24 months
26 April 2012	- Breach re; 29/8/11	Varied order: - Convicted - Community based order for 12 months,

		50 hours of unpaid community work over 3 months
26 April 2012	- Contravene community-based order	Proven, with conviction, fined $250
19 February 2014	- Recklessly cause injury - Attempt commit indictable offence - Criminal damage by fire (arson)	- Convicted and a Community Correction Order for 12 months
3 September 2014	- Burglary - Theft - Unlicensed driving - Fail to answer bail	- Convicted, community correction order for 12 months. - Unpaid community work, 150 hours.
20 October 2015	- Criminal damage (intent damage/destroy)	- With conviction, fined $500 - Pay compensation $1500
7 December 2016	- Contravene community correction order	- Proven
7 December 2016	- Contravene community correction order	- Proven

7 December 2016	- Make threat to kill	- Convicted and community correction order for 18 months - Unpaid community work, 250 hours
7 December 2016	- State false name - Drive while suspended - Driver fail wear seatbelt - Breach alcohol interlock condition - Drive in breach of licence condition - Stalk another person - Contra interim personal safety intervention order - Unlawful assault	- Convicted - Community correction order for 18 months. - Unpaid community work, 250 hours
25 May 2018	- Contravene community correction order	- Proven
14 September 2018	- Common law assault - Robbery - Common law assault	- Aggregate sentence 3 years, 10 months imprisonment

	- Sexual assault - Indecent assault	- Compensation $6000

3. On 14 September 2018, the Applicant was convicted for:

   (a) Common law assault (two counts);

   (b) Robbery;

   (c) Sexual assault; and

   (d) Indecent assault.

4. He was sentenced to an aggregate term of 3 years and 10 months' imprisonment.

5. On 10 December 2018, the Applicant's visa was mandatorily cancelled under s 501(3A) of the *Migration Act 1958* (Cth) (the Act).

6. On 21 December 2018, the Applicant requested revocation of the visa cancellation under s 501CA of the Act. On 9 October 2019, the Applicant made further submissions seeking revocation of the visa cancellation.

7. On 25 January 2021 a delegate of the Respondent decided not to revoke the cancellation of the Applicant's visa.

8. On 27 January 2021, the Applicant applied to the Administrative Appeals Tribunal for review of the decision not to revoke the cancellation of his visa.

9. On 14 April 2021, the Tribunal, differently constituted, affirmed the decision under review.

10. On 16 March 2022, the Federal Court of Australia quashed the 14 April 2021 decision of the Tribunal. The matter was remitted back to the Tribunal for reconsideration.

LAW:

11. The relevant legislation and policy is outlined below.

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

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

13. In exercising the power under s 501CA(4) of the Act, the Tribunal must comply with Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (Direction 99).

14. On 23 January 2023 the Minister made Direction 99 pursuant to s 499 of the Act to guide decision-makers in the exercise of the power in s 501CA(4). The Direction came into effect on 3 March 2023.

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

> *1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-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 the Australian community applies regardless of whether the non-citizen poses a measureable 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.

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

17. Section 8 of the Direction provides that the five primary considerations are:

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

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

    (c) The strength, nature and duration of ties to Australia (Primary Consideration 3);

    (d) The best interests of minor children in Australia (Primary Consideration 4); and

    (e) Expectations of the Australian community (Primary Consideration 5).

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

    (a) Legal consequences of the decision;

(b) Extent of impediments if removed;

(c) Impact on victims; and

(d) Impact on Australian business interests.

ISSUE:

19. The parties are agreed that the Applicant does not pass the character test as defined in section 501(6). The only issue before the Tribunal is whether there is ‘another reason’ why the cancellation of the Applicant’s visa should be revoked under section 501CA(4) of the Act.

EVIDENCE:

Evidence of SFPH:

20. The Applicant affirmed his statement of 1 June 2023 and his supplementary statement of 3 August 2023.

21. The Applicant arrived in Australia on a Special Humanitarian visa in 2003, he does not have a protection visa.

22. The Applicant said that his family had fled Afghanistan at the age of 5, during the takeover of the Taliban, as his family had worked with the prior Government, and his father had been murdered. He said he was the one who identified his father’s body in the hospital. His family had fled to a UN refugee camp on the Pakistani border where he lived for a long time. He came to Australia at age 16/17. He said that he suffered from PTSD as a result of his upbringing.

23. The Applicant said that he spoke Dari, but that he was unable to read or write in that language. He had no family in Afghanistan and had very serious concerns about returning to this country, including concerns for his personal safety and concerns about the lack of healthcare.

24. He had learned English in Australia and after spending a couple of years at high school, he went to TAFE. He completed a 4 year apprenticeship and worked as a panel beater. He lived with his mother and sister whilst he was doing his apprenticeship and, eventually, had been able to purchase a property.

25. The Applicant had started using drugs around the 2006, including 'ice'.

26. The Applicant, when taken through his criminal record, accepted that it was very serious, with frequent offending and offenses against a minor. He expressed remorse for his offending and said he was a 'changed man'. He said that his time in prison, together with his time in detention, had a significant effect on him and had made him determined not to be in such a situation again. He himself had been the victim of a knife attack in prison.

27. The Applicant had also been stabbed in 2010, in an altercation with another man who was trying to break into a family member's car.

28. The Applicant said that he had been using drugs and alcohol at the time of his sexual offending. The Applicant said that he took responsibility for his crimes and that he was determined not to re-offend.

29. When questioned about whether he had sought to minimise his offences to Ms Spencer, who was a psychiatrist at Villawood, including pleading guilty to lesser offences in order to avoid more serious charges, the Applicant said that he may have been misheard, and had taken '100% responsibility' for all his crimes, that he had entered a guilty plea so as to spare the victims the ordeal of giving evidence, and that he was a 'changed man'.

30. When questioned about the frequency of his offending the Applicant said that he accepted that his offending was frequent, and when it was put to him that his convictions, including 'contravene court orders', showed a disregard for the law, the Applicant said that he takes responsibility and that he is now a different man.

31. The Applicant said that his family was a very supportive influence in his life. His brother, sister and his mother were in Australia along with various aunts, uncles, nieces, and nephews. The entire family live in Melbourne. He said he had a very close relationship with his nieces and nephews.

32. His mother was said to have chronic pain, psychological health issues and limited knowledge of English. Prior to incarceration he was her full-time carer.

33. The Applicant said that he was in a close and loving relationship with Ms RC. He said that she had three children, the youngest was JO, the middle, her daughter SO, and he said that her oldest child, 17 was 'Steven'. He confirmed that the eldest son had another name, but that 'we call him Steven'.

34. He said that his relationship with Ms RC had developed into a romantic one more than eight months ago. He said that he was very close to Ms RC and to her children, and that he was trying to be a father figure for SO, and to be there for her. He had never met RC face to face, but they had discussed meeting each other face to face. He said that RC was very vulnerable.

35. The Applicant said that he had understood his obligations as a registered sex offender and that he had signed an acknowledgement to this effect whilst he was in prison in Victoria. He said that he would need to review the conditions to ensure he was aware of them all if he was released.

36. The Applicant said that he had not been well treated in detention, that he had concerns about the food, the effect on his mental health and threats from other inmates, including threats to kill him. He also expressed concern about officers of SERCO.

37. He said that he was surrounded by drug use in detention, and that it was 'very dangerous'. The Applicant had threatened self-harm/suicide whilst in detention and said that it was basically a cry for help as he was away from family and had no certainty about his future.

38. The Applicant had been seeing mental health professionals over the last 6 or 7 months and said that he saw a psychologist every couple of weeks. Each consultation was said to last about one hour. The Applicant had been free from drugs for approximately 6 years since being incarcerated and undertook the SMART recovery program and had also completed a number of other courses including:

    (a) Stress Management dated 23 March 2023;

    (b) Problem Solving Strategies Certificate dated 24 March 2023;

(c) Critical Thinking Certificate dated 21 March 2023;

(d) Drug and Alcohol Abuse 101 Certificate dated 28 March 2023.

(e) Domestic Violence Certificate, 20 March 2023;

(f) STARTTS Report, 28 April 2023.

39. The Applicant believed that he was the biological father of a daughter, JD, born in Australia, to a woman he referred to as 'MS' and with whom he said he had had a short relationship. He said the child would be 11 or 12 at this stage, that he had never had any contact with that child but that he would like to get to know her and be a father to her. He said that he had learned about the existence of the child through social media and that he would 'get contact somehow'. The Applicant said he did not know whether the mother would want him to have contact with the child. He had no contact details for the mother.

Evidence of Ms RC:

40. Ms RC affirmed her statement of 3 June 2023.

41. She said she was in a close, loving relationship with the Applicant, whom she had met via TikTok, some 11-12 months ago. She said it took a number of messages and conversations before the Applicant told her that he was in detention, he later told her why.

42. The relationship changed in nature about 9 months ago. RC said she had very frequent contact with the Applicant, at least on a daily basis.

43. RC said she had three biological children, a son – SA, aged 17, a daughter SO – aged 14, and another son JO aged 11. The two older children lived with RC, and the youngest child lives with her former husband. RC said that her former husband had 'abducted' him from school, contrary to contact arrangements.

44. When asked whether her older son had been known by any other name, RC said that he had only ever been known as '[SA]'.

45. Ms RC said that the children were not close to their biological father. She said that her divorce and separation from her former husband had been traumatic, that she had been

homeless, had lived in a number of refuges and was currently living with the children in 'transitional housing' provided by a domestic violence support service.

46. RC said that she suffered from severe anxiety and complex PTSD. SA was described as 'withdrawn' and SO was said to suffer from a range of health issues including 'developmental delay' and severe anxiety. Both children had social workers.

47. RC said that she was aware of the Applicant's offending but said that she thought that he was a different man now, and that he had taken steps to change. RC said that the Applicant had always been straightforward and upfront with her and that they helped each other 'calm down'. She said she had no concerns about the Applicant having contact with her children.

48. The Applicant was said to be in contact with SA and SO every day but had limited contact with JO. The Applicant was said to be very important to RC's daughter, SO, who was said to look to him for guidance. Ms RC gave evidence that the uncertainty of the Applicant's migration status had been hard on the children, and said that whenever they ended their video calls with the Applicant, SO would be sad and say 'Mum, I love him'.

49. RC was not aware of the actual details of the Applicant's offending, and when asked whether she felt obliged to find out what had happened she said yes, but there was a 'time and place for everything'. She also said 'I believe there are always two sides to the story, and I know how the actual justice system works (…) I'm sure [the Applicant] did get charged or sentenced for whatever they found'.

50. RC said that she and the Applicant had been talking about marriage, and that she was excited about the prospect of moving with the Applicant to Melbourne where she said the Applicant had a big, loving family, and 'cute little' nieces and nephews. She said that the Applicant missed his family. RC had not discussed the prospect of moving to Melbourne with the Applicant with the children's social workers, who it would appear, are not aware of the Applicant's offences.

51. RC said that she had never seen the Applicant in person until the day of the hearing where she said it was 'very exciting' to see him in the hearing room. She said she had been unable to visit him in Villawood because it had been difficult to arrange convenient times for her to travel.

52. She said that she thought that if released, the Applicant would go straight to Melbourne and that she would be able to follow him and that it was ‘a perfect time to move’.

53. This would mean she was separated from JO who she said ‘misses his brother and sister’. However, she was confident JO would return to her custody eventually, and in the meantime was pursuing orders in the Family Court.

54. Although RC had never met or spoken to any member of the Applicant’s family, she believed that they will accept her and her children.

55. RC said ‘my kids are my world’ and that she had ‘been to hell and back’.

56. RC said that the Applicant had not seen his biological daughter JD and did not know where she is.

Evidence of AM:

57. The Applicant’s sister affirmed her statement of 3 June 2023. The Applicant is her brother and she has a positive relationship with him.

58. She said that she has another brother Ahmed who is close to the Applicant, and that the Applicant also has a close relationship with her older brother’s family. AM said that the Applicant’s nephews and nieces had a good relationship with the Applicant and that they were looking forward to his release. The Applicant also had a close relationship with his sister-in-law.

59. Their mother was said to have had a very bad life, and the Applicant was said to have been very connected to his mother, and to have provided a lot of support. He was said to have ‘always been there’ for his mother.

60. AM said that the uncertainty around the Applicant’s future had had an adverse effect on the family and that she did not think they would be able to live a normal life if the Applicant was ‘sent back’.

61. AM referred to the Applicant’s difficult childhood and said that she believed that he was now a ‘changed man’.

Evidence of SM:

62. The Applicant's brother SM affirmed his statement of 2 June 2023. He said he has a good relationship with his brother and that he loves him very much.

63. SM is the father of 3 children, two boys and a girl and said that the Applicant has a relationship with all of his children and speak to them every day, sometimes twice a day.

64. He said that the Applicant has a good relationship with his wife and that he would be heartbroken if the Applicant were to remain in detention.

65. He referred to the Applicant's relationship with his mother and said that with the death of his father, the Applicant was 'the man of the house'.

66. SM said that his youngest Y, was not well.

67. SM said that the Applicant was now a 'better man'.

DECISION

CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

68. In considering this primary consideration, I have had regard to paragraph 8.1 of Direction 99.

69. There are two limbs to this consideration:

    (a) the nature and seriousness of the conduct of the non-citizen; and

    (b) the risk to the Australian community should the non-citizen re-offend.

Nature and Seriousness of the Applicant's conduct

70. The Applicant's criminal offending began shortly after he arrived in Australia, and essentially continued until he was incarcerated in 2018. The extent, serious nature, and continuity of the Applicant's offending as detailed in the background to this decision needs no further elaboration.

71. It was accepted by the Applicant's counsel that his criminal history is very serious. The Applicant's criminal history shows frequent offending, failure to comply with court orders and a general disrespect for authority. A number of the crimes for which he was convicted involve violence, including violence against women and sexual offences against a minor.

72. Looked at objectively, the Applicant's criminal record demonstrates clearly that his offending was very serious, in particular violent crimes women, and crimes involving the sexual abuse of a minor must be given very serious weight. The Applicant sought to explain at least some of his behaviour as being related to his use of illicit drugs. In this regard I note the remarks of Judge Fox when sentencing the Applicant, as follows:

> *You were introduced to methamphetamine after the 2012 stabbing. However you began to notice the effects of this drug use on you and ceased after approximately 12 to 18 months.*

73. I accept that there is at least a possibility that drug use played a role in the Applicant's offending. Nevertheless, the Applicant's offending must be regarded as very serious.

Risk to the Australian community, should the non-citizen re-offend

74. It was put to the Tribunal that the Applicant was at low risk of reoffending. The various factors which supported such an assessment included:

(a) the length of time since the Applicant's previous offending;

(b) the support of his immediate family;

(c) the deterrent effect of possible future visa cancellation;

(d) the Applicant's engagement with mental health treatment and rehabilitative courses; and

(e) the relationship with Ms RC.

75. At the hearing the Applicant emphasised on a number of occasions that he was a 'changed man'. I accept that his experiences in prison and in immigration detention have been very negative for him, and that he is determined, if released, not to return to prison or immigration detention. I accept that he has strong family support, and that he has exercised initiative in accessing and completing a number of relevant courses.

76. The Applicant has not offended since 2018 but it must be taken into account that he has been in prison or detention since that time. I also give weight to the fact that the Applicant has engaged with mental health treatment during his time in detention. This is important given the evidence as to the Applicant suffering from PTSD as a result of his very negative experiences as a child.

77. I take into account the fact that the Applicant is very important to his mother, who is likely to rely on him for support if he were to be released into the community. Taking care of his mother and being there for her is an important protective factor.

78. I also give weight to the Applicant's evidence that he has been drug free for a number of years.

79. I place less weight on the Applicant's relationship with Ms RC and her children, given that the relationship developed whilst the Applicant was in detention and that until the day of the hearing, neither Ms RC nor her children had met the Applicant in person. The future of that relationship must be seen as uncertain.

80. All of the above must be weighed against the potential harm to the community if he were to reoffend, and in particular, if he were to reoffend in relation to sexual crimes against minors. In this regard I had some concern about whether the Applicant fully understood his obligations as a registered sex offender.

81. When asked about his obligations, the Applicant said that he would need to review them, as he was uncertain about them. He said he understood his obligation to report but was not aware of the detail of his obligations. There was no evidence that he had reported his frequent and ongoing contact with minor children, or that he had ever sought any advice prior to initiating contact with minor children. Nor was there any evidence that he had advised the authorities of such contact. This seemed to indicate a lack of understanding of the seriousness of the obligations placed upon him, as someone who had been convicted of a sexual offence against a minor.

82. In relation to any pre-existing mental health issues, I note the remarks of the sentencing judge in 2018 as follows:

> *Your Counsel did not place any reliance on Verdins, and it is difficult to see any link between any pre-existing mental health issues and these offences before me.*

83. It was of concern that the Applicant, rather than focusing on the impact of his offending on his victims, concentrated on his own discomfort and sense of injustice in relation to his incarceration. This was of particular relevance, given the texts the Applicant sent to his victim after the assault occurred. Which said:

> *Victim: I did say stop many time I said lets talk stop and I tried many times to sit up and you just pushed me back down (…)*
>
> *Applicant: Hahah…pushing you down OMG you are exactly like your sister now wonder why you single ugly and ur life is fucked. You sister always talk to me in private number but if she call me this time I'm going to tell her everything. Looks like not only you but ur all entire family is a low life. You sister meet me only once and got pregnant an kept the baby no self respect lol. you meet the first time and suck my dick have some respect seriously you freak*

84. There was no indication that the Applicant regretted sending such text messages. The text was only one of a number of text messages in a similar vein. I do, however, take into account that the Applicant was not directly asked whether he regretted sending such texts, and that he has had a considerable time in prison and detention to reflect upon them. However, the existence of such texts did reinforce my concern about the Applicant's tendency to focus on himself, rather than his victims. It is a positive factor for the Applicant that at least one of the courses he completed related to domestic violence.

85. Overall, in considering the totality of the evidence, and in particular given what I consider the Applicant's very strong motivation not to reoffend, I find the Applicant to be at low to moderate risk of reoffending.

86. On the basis of the seriousness of his offences, and the potential harm to the community if the Applicant were to reoffend, I give this first consideration heavy weight against revocation.

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

87. The Applicant has no ties to any country other than Australia. He fled Afghanistan at the age of 5 with his family, after his father was killed by the Taliban, and lived in a refugee camp in Pakistan. He has no existing ties of any kind to either Pakistan or Afghanistan.

88. All of the Applicant's family live in Australia. I find that he has a very close relationship with his mother in particular, but also with his sister and brother, and members of his extended family. Their ongoing support is important to him.

89. In the past the Applicant has been the primary carer for his mother who is currently said to be unwell and has very limited English.

90. The Applicant has some work history in Australia and speaks English fluently. There was also evidence he had or has purchased a house in Australia.

91. There is no evidence that the Applicant has ever travelled overseas since coming to Australia.

92. The Applicant is on the sex offender register. This would make it much more difficult for him to leave Australia, and freely enter a third country, even if he were inclined to do so, which is unlikely given that all of his support, both mental and physical is in Australia.

93. There is also the Applicant's relationship with Ms RC, although this relationship must be seen as somewhat problematic. The plans outlined to the Tribunal by both the Applicant and Ms RC are contingent on the Applicant remaining in Australia.

94. I give this consideration heavy weight in favour of revocation of the delegates decision.

PRIMARY CONSIDERATION 4: BEST INTERESTS OF MINOR CHILDREN

95. The Applicant gave evidence that he was the biological father of a daughter, JD, whom he thought was about 11 or 12 years of age. He said he became aware of the existence of JD through social media.

96. He said that if released into the community he would try to establish a relationship with JD but there was no evidence that JD's mother would facilitate such a relationship.

97. In the absence of any other evidence, even if the Tribunal accepts that the Applicant is the biological father of JD, the evidence is clear that he has never had any relationship with the child. Further, on the basis of the evidence, and the reference to the child's mother in the

text above, it must be seen as very problematic whether or not he is likely to have any relationship with JD in the future.

98. It is highly relevant that the sentencing judge referred to the Applicant's biological child when she said 'you briefly dated [victim]'s sister [MS] and she became pregnant. It seems she had the child, although she blocked all contact with you, and you thought that she had terminated the pregnancy. I infer you have nothing do with her or the child, assuming it is in fact yours'.

99. The Applicant gave evidence that he was in a short relationship with MS in 2013. In the context of the Judge's sentencing remarks, I reject the attempt to characterise the Applicant's relationship with the mother of JD as simply a 'short relationship'.

100. The Applicant said that he was unable to find the child's mother on Facebook, and that he was unable to access her telephone number. I found the Applicant's evidence in relation to MS and the child JD somewhat evasive. Given the text messages between the Applicant and MS's sister, who was the victim of his sexual offending against a minor. The following excerpt of the text speaks for itself:

> *'you sister always talk to me in private number but if she call me this time I'm going to tell her everything (…) ur all entire family is a low life. You sister meet Me only once and got pregnant and kept the baby no self respect lol'.*

101. I note that the Applicant failed to mention to the Tribunal that MS was the sister of the minor against whom he committed sexual offences. Although the Tribunal may have expected the Respondent to explore this issue thoroughly with the Applicant, this did not occur and accordingly, I take into account that the Applicant was not directly questioned in relation to the evidence outlined above, even though it was before the Tribunal.

102. On the basis of the evidence above however, there appears little prospect of the Applicant having a relationship with JD. I accept the Applicant's evidence that he has never spoken to JD and has no contact details for JD or her mother.

103. Accordingly, I cannot give any weight to any relationship between the Applicant and JD.

104. The next group of children who are relevant is the Applicant's nieces and nephews. The evidence given to the Tribunal was that the Applicant has a close relationship with his nieces

and nephews, particularly Y, who has had some health issues, and relies upon the Applicant for support.

105. I accept that it may be in the best interests of the Applicant's nieces and nephews to have an ongoing relationship with him. However, this is subject always, to any restrictions that may be placed upon him as a registered sexual offender.

106. It is also relevant that the Applicant has only had communication with his nieces and nephews via social media for several years, and certainly since the time of his incarceration. The two youngest of his nieces and nephews, have either not met the Applicant or were newborns at the time of his incarceration.

107. In relation to this group of children, I find it is in their best interests to have an ongoing relationship with their uncle, within the bounds of any restrictions placed upon him as a registered sex offender.

108. The next category of children is the children of Ms RC.

109. I accept the evidence that the Applicant has little relationship with the youngest child, JO, who lives with his biological father. However, the evidence of both the Applicant and Ms RC was that he has a very close relationship with Ms RC's eldest child SA, who is 17, and her daughter SO, who is 14. This relationship has been established via social media.

110. The Applicant was said to speak to these children on at least a daily basis, and to play an important role in their lives. However, this was somewhat at odds with the Applicant's failure to properly recall the name of Ms RC's eldest son. He explained this by saying that although the child's name was SA, he was often referred to as Steven. This was contrary to the evidence of Ms RC, who said that he had only ever been referred to as SA.

111. The Applicant was said to have discussed the possibility of going into business with SA in an area of shared interest, and was particularly important in the life of Ms RC's daughter SO, who suffers from developmental delay and other health issues. SO was said to have previously been the victim of sexual assault.

112. It is clear from the evidence that both children have suffered very significant trauma. They were both said to receiving the support of social workers, although it was not clear who employed the social workers. They appear to have been homeless for part of their lives, and to have lived with their mother in a range of short-term refuges.

113. It was of concern that, on her evidence, Ms RC had told the socials workers about the Applicant, but did not appear to have given any detailed information, including details as to the Applicant's offending history. In her evidence Ms RC when questioned on this issue said 'it's not their business'. At the very least, given the evidence that SO had previously been a victim of sexual abuse, it is questionable that the Applicant's offending history was not something directly relevant to the interaction between the social workers and the children.

114. A secure environment, which is important to all children, is clearly of great ongoing importance to these children. Any further instability and trauma would almost certainly be very damaging to them.

115. On the evidence, Ms RC was proposing to relocate to Melbourne with the children to live with the Applicant. Ms RC said that she looked forward to being part of the Applicant's family, but there was no evidence that she had ever had any communication of any kind with any member of the Applicant's family. It is hard to accept that a sudden move to Melbourne, effectively to live with strangers, away from any support could, or would, be in the best interests of these children. At the least, it would be reasonable to expect the children to have been introduced to the Applicant's family, proper supports to be in place for them, and some certainty as to future stability, especially given that the Applicant and Ms RC have met in person only once, and this was at the hearing.

116. It was of concern that when questioned, Ms RC did not know the details of the crimes for which the Applicant had been convicted, and sought to minimise the seriousness of the Applicant's offending, including saying 'I believe there are always two sides to the story, and I know how the actual justice system works (…) I'm sure [the Applicant] did get charged or sentenced for whatever they found'. It was not clear whether Ms RC was aware of the Applicant's guilty plea in relation to the sexual offending.

117. There was also no evidence as to what the attitude of the children's biological father would be if the mother wished to relocate to Melbourne with the children to live with a registered

sex offender. Ms RC referred to family court proceedings but gave no details of any such proceedings. It must be regarded as problematic as to what the attitude of the Family Court would be to Ms RC taking her children, especially her daughter, who is said to be vulnerable, to live with a convicted child sex offender. At the very least, Ms RC's evidence in relation to the care arrangements for the children between herself and her former husband were vague, and any evidence in this regard was very broadly expressed and lacking in detail.

118. It is of concern that neither the Applicant, nor Ms RC seemed to have considered any issues which would weigh against Ms RC and her children moving from Sydney to Melbourne with the Applicant. The evidence was that Ms RC's children had not met the Applicant prior to the hearing.

119. Overall, it is very difficult on the basis of the evidence to place any positive weight on the Applicant having an ongoing, positive role in the lives of Ms RC's children, beyond the regular communication they have with him now, via social media. In fact, given the vulnerabilities of Ms RC's children, some of the evidence would indicate that any relationship with the Applicant is not in their best interests. There are simply too many factors which remain unknown.

120. On the basis of the evidence, it is in my view, appropriate for the Tribunal to express concern as to the future welfare of Ms RC's children if they were to be removed to Victoria to live with the Applicant. Ms RC, no doubt because of her love and affection for the Applicant, appeared to give disproportionate weight to what the Applicant might say, as opposed to more objective evidence, such as the convictions to which he entered a guilty plea. No doubt this is in part due Ms RC's desire to find a better life for herself and her children. It is noteworthy that the judge, in sentencing the Applicant, made the following remarks:

> *the offences of indecent assault and sexual assault both involved the use of force by you (…) the victims were in a vulnerable position, given they were in your car and you were effectively a stranger (…) punching the victim multiple times in the face after she said has said 'no' is a nasty common assault (…) the fact that the offences occurred nearly two years apart suggests that your attitude to women and rejection did not improve between June 2014 and March 2016.*

121. Accordingly, I am unable to make any finding that would enable me to give positive weight to the relationship between the Applicant and the children of Ms RC.

122. It was of concern that the Applicant was not aware of whether there were any conditions as a registered a sex offender that may affect or restrict his interaction, either with his nieces and nephews or the children of Ms RC.

123. Overall, although this consideration would usually be strongly positive for an Applicant, I give this consideration minimal to low weight in favour of revocation.

PRIMARY CONSIDERATION 5: EXPECTATIONS OF AUSTRALIAN COMMUNITY

124. Direction 99 sets out the expectations of the Australian community. Broadly, these encapsulate the findings of the Federal Court in *FYBR v Minister for Home Affairs* FCAFC 185, where the Full Court decided by majority that it is not for the decision-maker to assess the expectations of the Australian community for the purpose of applying this consideration. Rather, the expectations of the community that decision-makers are required to consider are set out in direction at paragraph 8.5.

125. In assessing the weight to be given to this consideration, it is relevant to take into account the circumstances of the Applicant's arrival into Australia and his traumatic early childhood. He was diagnosed with PTSD and also was for a period took drugs, although he denied being addicted. I accept the findings of the sentencing judge, that he was ashamed of his drug use. It is also relevant that the Applicant was the primary carer for his mother, who herself suffered significant trauma.

126. Against this however, I note the Australian community has very little tolerance for violent offending, offences against women and offences involving the sexual assault of a minor. In particular, I note the words of the sentencing judge referred to in paragraph 118 above. It is also relevant that his offending commenced shortly after arriving in Australia and continued until his imprisonment in 2018.

127. Overall, I find that this consideration weighs heavily against revocation.

OTHER CONSIDERATIONS:

Legal Consequences of the decision:

128. There is no finding that the Applicant is owed protection. However, I note that he arrived in Australia on a Global Special Humanitarian (subclass 202) visa, and that he expressed grave fears as to his safety if he were to be returned to Afghanistan. It was put to the Tribunal that he would be at risk of violence/persecution as a 'westerner' as well as the fact that he would have no safety net and no access to healthcare. In addition, the Applicant is unable to read or write in the local language, and has no familiarity with Afghanistan, having fled the country at 5 years of age.

129. I accept the Applicant may face an indeterminate period of detention, and I also accept his evidence as to the hardship he continues to experience whilst in detention.

130. Considerable material was filed with the Tribunal to support the granting of a protection finding. The Applicant is able to apply for a protection visa, and it is not the role of this Tribunal to make findings in relation to such an application.

131. I give this consideration neutral weight.

Extent of Impediments to removal:

132. The Applicant came to Australia at the age of 16/17 having fled Afghanistan at the age of 5 and in the interim, living in a refugee camp in Pakistan.

133. The Applicant said that he is able to speak some Dari, but he is unable to read or write in that language. He learned English after arriving in Australia.

134. All of the Applicant's family live in Australia.

135. I accept that the Applicant has no family, friends or contacts in Afghanistan, having fled that country because of the Taliban. He is highly unlikely to be able to resettle in that country without very grave difficulties. It is also likely that he would face a great deal of scrutiny and possible danger if he were to return to that country. There is no evidence the Applicant has any ongoing connection to Pakistan.

136. The Applicant put to the Tribunal during the hearing that he would not have access to the same healthcare if he were to be returned to Afghanistan, and I accept that submission, including that the Applicant needs ongoing mental health treatment.

137. I am also of the opinion that the Applicant would find it very difficult to find employment and housing if he were to be returned to Afghanistan.

138. A considerable amount of general material as to the situation in Afghanistan was placed before the Tribunal, which indicated the very high level of risk of violence and economic instability in that country. I accept these factors would adversely impact the Applicant if he were to be returned.

139. Both Ms RC and the Applicant gave evidence that they were in a 'close and loving relationship', and Ms RC's evidence was that she would not move to Afghanistan. To the extent that that relationship is likely to endure, I accept that it would be more unlikely to continue, even by means of social media, if the Applicant were to be removed from Australia.

140. Any opportunity, however unlikely, that the Applicant will be able to establish contact with his biological daughter and to continue a relationship with his nieces and nephews would be much more difficult if he were to be removed from Australia.

141. The fact that the Applicant has been convicted of sexual offences against a child and is a registered sex offender would also make it much more difficult for him to relocate to another country. Even if he were able to do so, it is likely that he would face discrimination.

142. Considering the evidence overall, I find this consideration weighs heavily in favour of revocation.

CONCLUSION:

143. It is not necessary for me to repeat the findings I have made on the evidence in relation to each of the primary and secondary considerations under Direction 99.

144. In weighing all of the relevant considerations, I am of the opinion that the overall balance weighs in favour of non-revocation of the delegates decision.

145. Accordingly, the reviewable decision of 25 January 2021 is affirmed.

I certify that the preceding 145 (one hundred and forty - five) paragraphs are a true copy of the reasons for the decision herein of The Hon. John Pascoe AC CVO, Deputy President

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

Associate

Dated: 29 August 2023

Date(s) of hearing:	**8 August**
Counsel for the Applicant:	**Dr Jason Donnelly**
Counsel for the Respondent:	**Mr Greg Johnson**
Solicitors for the Respondent:	**Ms Michelle Harradine**