



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

Division: GENERAL DIVISION

File Number: **2022/2946**

Re: **VZSJ**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Mr S Evans, Member**

Date: **20 October 2023**

Place: **Sydney**

Pursuant to section 43 of *the Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal decides that the decision under review, being the decision of a delegate of the Minister dated 1 April 2022 not to revoke the mandatory cancellation of the Applicant's visa is affirmed.



Catchwords

Decision of delegate of Minister not to revoke mandatory cancellation of the Applicant's Visa — Character test — Substantial criminal record — Direction No 99 — Primary and other considerations — Applicant Chinese national – Financial Crimes - Protection of the Australian community — Strength, nature and duration of ties to Australian Community — Best interests of Applicant's minor children and nephew — Legal Consequences of decision – triads - claims of re-prosecution if returned – Impediments to Removal – Impact on Australian Business – Reviewable Decision Affirmed.

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)

Migration Act 1958 (Cth)

Cases

FYBR v Minister for Home Affairs [2019] FCAFC 185

Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17

Suleiman and Minister for Immigration, and Border Protection [2018] FCA 594

Secondary Materials

Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA

REASONS FOR DECISION

20 October 2023

INTRODUCTION

1. The applicant, VZSJ, is a citizen of the People's Republic of China who seeks review of decision of a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs

(the Respondent) made on 1 April 2022 not to revoke the cancellation of his Resident Return (Class BB) (subclass 155) visa (resident return visa) (the **visa**) pursuant to subsection 501CA(4) of the *Migration Act 1958* (Cth) (the **Act**).¹

2. On 21 November 2019 the Applicant was sentenced to two years imprisonment in the District Court of NSW for offences including *deal with property intend to be an instrument of crime*.²
3. On 17 January 2020 the Applicant's resident return visa was cancelled pursuant to subsection 501(3A) of the Act as he had a 'substantial criminal record' on the basis of having been sentenced to a term of imprisonment of 12 months or more and serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth, a State or a Territory.³

FACTUAL BACKGROUND

4. The Applicant was born in November 1977 and is now 45 years old.⁴ He arrived in Australia age 21 in December 1998 as the holder of a Temporary Work (Skilled) (Class UC) (subclass 457) visa.⁵ He departed and returned 25 times between first arriving in Australia and August 2015 during which he held a variety of visas⁶ The Applicant, his parents and sister currently reside in Australia.⁷
5. The Applicant studied business and English in Australia and obtained a graduate diploma at a local university in 2003.⁸ In September 2003 the Applicant married Ms GG and they had two children together – Mr CP who is age 19 and Miss AP age 14.⁹ The Applicant and Ms GG separated and in 2013 the Applicant began a relationship with Ms WW. The

¹ Respondent's Remittal Bundle of Relevant Documents (**BD**)1/20

² BD1/46

³ BD3/1731

⁴ BD1/82

⁵ BD1/91

⁶ BD2/849-845

⁷ BD1/97

⁸ Applicant's Statement of Facts, Issues and Contentions (**ASFIC**), [22] – [23]

⁹ BD1/93

Applicant, Ms WW and her child from a previous relationship, Miss IW, resided together from 2015. In 2017 the couple had a child together, Master JP, who is currently age 6.¹⁰

6. In Australia the Applicant held various parttime jobs while he completed his studies. After graduating he ran various businesses including his own computer company, a mobile phone store, karaoke restaurant and was part owner of a pub. Between his arrest in December 2016 and imprisonment in November 2019, he worked in construction.¹¹
7. The Applicant was imprisoned on 11 March 2020.¹² In 2021 he was transferred to immigration detention where he has remained since.¹³

The Applicant's offending

8. The National Criminal History Check in respect of the Applicant shows that he has been convicted of the following offences:

Financial crimes

9. On 21 November 2019 the Applicant appeared before the Downing Centre District Court and sentenced to a term of imprisonment of 2 years with a non-parole period of 9 months for *Deal with property intend it to be instrument of crime-S1* and multiple counts of *CTH-Give false or misleading information to specified person/entities*, for which he was sentenced to 12 months imprisonment.¹⁴

Driving offences

10. On 11 September 2000 the Applicant was found guilty of *Drive with middle range PCA* and fined \$750 and disqualified from driving for 12 months.
11. On 14 May 2003 he was found guilty of *Drive with low range PCA* and fined \$1500 and disqualified from driving for 12 months.

¹⁰ ASFIC, [34] – [35]

¹¹ Applicant's Tender Bundle (**ATB**)/18-19

¹² BD1/46

¹³ Applicant's Further Supplementary Tender Bundle (**AFSTB**)/206

¹⁴ BD1/46-47

12. On 25 September 2003 the Applicant was found guilty of *Drive while disqualified from holding a license* and fined \$800 and disqualified from driving for 2 years.
13. On 9 March 2006 he was found guilty of *Drive uninsured vehicle, Use unregistered vehicle on road or road related area* and *Drive while disqualified from holding a licence* and given a community service order for 150 hours and disqualified from driving for 2 years and further disqualified from driving for 2 years as a habitual offender.
14. On 3 April 2007 the Applicant was found guilty of *Drive while disqualified from holding a license* and given a community service order for 250 hours and disqualified from driving for 3 years and a further 5 years as a habitual offender.
15. On 9 April 2018 the Applicant was found guilty of various driving offences including *Never licensed person drive vehicle on road – first offence* and *Driver or rider state false name or home address and Drive while licence cancelled – first offence* for which he was fined and disqualified from driving for 6 months.¹⁵

Domestic violence

16. On 30 May 2019 the Applicant was convicted of *Common assault (DV)-T2* and *stalk/intimidate intend fear physical etc harm (domestic)-T2* and sentenced to a conditional release order of 12 months for each offence.¹⁶

RELEVANT LAW AND MINISTERIAL DIRECTION 99

17. Section 501CA of the Act applies where the Minister makes a decision under subsection 501(3A) to cancel a visa that has been granted to a person.
18. Subsection 501(3A) of the Act requires the Minister to cancel a visa that has been granted to a person if the Minister is satisfied that the person does not pass the character test due to the operation of paragraphs 501(6)(a) and 501(7)(c).

¹⁵ BD1/48

¹⁶ BD1/48

19. Paragraph 501(6)(a) provides that a person does not pass the character test if they have a 'substantial criminal record'. Paragraph 501(7)(c) provides that a person has a substantial criminal record if the person has been sentenced to a term of 12 months imprisonment or more.
20. The Minister may revoke the original cancellation decision pursuant to subsection 501CA(4) of the Act which provides that:
- (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.
21. Paragraph 500(1)(ba) of the Act provides the Tribunal with the power to review decisions of a delegate of the Minister under subsection 501CA(4) not to revoke a decision to cancel a visa.
22. The Minister has made written directions under section 499 of the Act which apply to decision-makers in the exercise of power under subsection 501CA(4). The relevant direction is *Direction no. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (the Direction or Direction 99)*.
23. Paragraph 5.2 of Direction 99 provides overarching principles which I have considered when reviewing the Applicant's application. It relevantly provides:
- (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 noncitizens 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 noncitizen'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 [sic] risk of causing physical harm to the Australian community.

24. Part 2 of the Direction identifies the considerations the Tribunal must have regard to when determining whether to exercise the discretion to revoke the mandatory cancellation of a visa. The primary considerations should generally be given greater weight than the other considerations, and one or more primary consideration may outweigh other primary considerations. However, other considerations should not be considered 'secondary' or of inherently less importance than primary considerations, and in certain circumstances one or more other considerations may outweigh primary considerations.¹⁷

25. The primary considerations in the Direction are:

- (1) protection of the Australian community from criminal and other serious conduct;
- (2) family violence committed by the non-citizen;
- (3) strength, nature and duration of ties of the non-citizen to Australia;
- (4) best interests of minor children in Australia affected by the decision; and
- (5) expectations of the Australian community.

¹⁷ *Suleiman and Minister for Immigration, and Border Protection* [2018] FCA 594, [23] per Colvin J

26. The other considerations set out in Direction 99 which must be taken into account where relevant include but are not limited to:
- a) legal consequences of the decision;
 - b) extent of impediments if removed;
 - c) impact on victims; and
 - d) impact on Australian business interests.

ISSUE TO BE DETERMINED

27. The issue for the Tribunal to consider is whether to revoke the original decision to cancel the Applicant's visa pursuant to subsection 501CA(4) of the Act.
28. Subparagraph 501CA(4)(b) of the Act provides that the Tribunal may revoke the original decision if it is satisfied:
- (a) that the Applicant passes the character test; or
 - (b) that there is another reason why the original decision should be revoked.
29. It is not in dispute that the Applicant does not pass the character test set out in the Act. Accordingly, the issue to be determined is whether there is another reason why the cancellation of the Applicant's visa should be revoked.

EVIDENCE

30. During the hearing the Applicant stated he accepted his criminal record as recorded in the National Criminal History Check and expressed regret for his past actions.
31. It was the Applicant's evidence at the hearing that he started gambling approximately 10 years ago but may have been as early as 2007. He gambled socially at first and only 4 or 5 times a year. After losing a lot of money he began chasing his losses. By the time he stopped gambling in 2016 he was gambling 5 times each week.¹⁸
32. As his losses mounted the Applicant began borrowing from his family and friends and then moneylenders or 'loan sharks' based in Sydney and China. The Applicant travelled regularly

¹⁸ Transcript of proceedings dated 27 July 2023 (**Transcript Day 1**), 15

to China including to Macau to gamble. It was his evidence that he borrowed over \$4 million dollars to fund his gambling, much of it borrowed from loan sharks.¹⁹

33. In December 2016 the Applicant was arrested and later released on bail.²⁰ One of the conditions of his bail was that he did not gamble. It was the Applicant's evidence that until his arrest he believed he could win money gambling. After being arrested, he began to appreciate the damage gambling had caused.²¹ He said he came to this understanding with the help of a psychologist. During the hearing he gave a detailed explanation of his experience gambling:

Firstly if just talking in general I want to help you understand the mind of a gambler. Firstly to a lot of gambling addicts they would think that is sometimes you can win a lot of money using this little principal. And that's the fundamental reason that causes people to go gambling. But I personally don't have that mindset anymore. Because I've come to a realisation that even if you win a lot of money one day you will definitely lose it another day. Now I won't have the hope or the expectation to win a lot of money using just a little principal. And second thing about casinos and gambling is that when you are in a casino it's like you are a different person now. Your mind is in a totally different mode. But now I've got the chance to shun away from that world, from the casinos. I've come to a realisation that that behaviour is very silly. But when you are, like, in the casino, fully involved, your mind is all about gambling. But now I've got the chance to stay away from that and look at it from a different point of view. And I can see that now that that kind of thinking is silly. Because now at night I sometimes think to myself that I've lost all that money – that large amount of money. That's too silly. That was very silly of me. Now this kind of thought comes to me at night. Thirdly I realise that once you start gambling the detrimental effect is irreversible. That's basically my understanding towards casinos and gambling. And now I am committed to this SMART recovery program and I want to continue to go to these programs. And in these programs there are people helping me. And now I can also have the ability to help some other people as well. Because I can see for some people they truly want to quit this addiction and I'm willing to help them as well. And I can see that there are some people quite sincerely wanting to quit the addiction. And personally I can use my own experience to help them because I walked in their shoes. I just – sometimes I will tell them that you just need time because this used to be a habit. In order to change a habit, it takes time because everything I can – I know about casinos and gambling.²²

34. The Applicant has a history of occasional drug use excessive alcohol consumption leading him to experience 'blackouts'. His drug and alcohol use was most problematic between

¹⁹ Transcript Day 1, 7

²⁰ BD1/52

²¹ Transcript Day 1, 11-12

²² Transcript of proceedings dated 28 July 2023 (**Transcript Day 2**), 86

2004 and 2007. After 2007 the Applicant realised he was unable to stop drinking alcohol if he had more than six bottles of beer.²³ He has not used drugs since 2016.²⁴

35. Since 2017 the Applicant has sought to cut ties with his gambling associates and intends to continue to do so should he return to the community. If his visa is returned he intends to reside with his elderly parents in Sydney. He has employment arranged as a site labour manager with a property development company. He plans to spend time with his children and other family members and provide them with emotional, financial and practical support. He is committed to continuing his rehabilitation.²⁵

Dr Emily Kwok, forensic psychologist

36. Forensic psychologist Dr Emily Kwok completed a psychological assessment report of the Applicant dated 17 July 2023. The report followed a 1.5 hour interview with the Applicant and consideration of written materials related to his application. He was also asked to complete an assessment.²⁶
37. Dr Kwok she sets out the Applicant's background including that he was born in China and had an unremarkable childhood during which he was properly cared for. There were no problems with drug use, gambling or violence at home. She reports the Applicant did not share his emotions with his parents but they maintain a normal and respectful relationship.²⁷
38. The Applicant experienced depression for the first time in 2017 when he was held in remand for three months. He felt like life was hopeless, his wife was pregnant and his mother was 'sad', causing him to be disappointed in himself.²⁸
39. Upon being released from remand, the Applicant's general practitioner referred him to a psychologist to address his depression and gambling problems. He saw 3 different counsellors and reported attending 'a few sessions' in total.²⁹

²³ AFSTB/207

²⁴ AFSTB/207

²⁵ Applicant's Tender Bundle (**ATB**)/5

²⁶ AFSTB/204

²⁷ AFSTB/205-206

²⁸ AFSTB/206

²⁹ AFSTB/206

40. The Applicant reports not having received psychological treatment in prison and denies being addicted to drugs or alcohol. Upon being taken to immigration detention in 2021, he was seen by a clinical nurse and appears to have attended fortnightly mental health consultations for a period.³⁰
41. When he was held in immigration detention the Applicant sought treatment for gambling addiction. As this specific treatment was not available, he instead attended drug and alcohol intervention.³¹
42. Dr Kwok gave evidence at the hearing in which she confirmed a diagnosis of Adjustment Disorder with Depressed mood as defined by the DSM-5. Left untreated, she anticipates the Applicant's condition may develop into a Major Depressive Disorder or Persistent Depressive Disorder, in which case the duration and intensity of the symptoms would be greater and there is a higher risk of self-harm or suicide compared with Adjustment Disorder.³²
43. The Applicant has reported experiencing depression in immigration detention with his symptoms becoming more severe in 2023.³³ Dr Kwok expects the Applicant's symptoms will persist should he remain in immigration detention. She considers that his psychological symptoms are likely to reduce should he be removed from detention and allowing him to remain in Australia. Until then, the Applicant is likely to benefit from regular psychological counselling to help him cope with his stressors.³⁴
44. Dr Kwok considers the Applicant's depressive symptoms - and their effect on his self-esteem, self-confidence and interactions - likely contributed to the domestic violence incident which occurred in March 2019. She does not consider that the Applicant's mental health condition contributed to his criminal offending prior to 2017.

³⁰ AFSTB/206-207

³¹ AFSTB/207

³² Transcript Day 1, 34

³³ AFSTB/210

³⁴ AFSTB/211

45. Dr Kwok considers the Applicant is at low risk of reoffending as his criminal offending was primarily due to his pathological gambling.³⁵ The indicators pathological gambling included the Applicant's need to gamble with increasing amounts of money, irritability and impulsiveness when he could not gamble, repeated unsuccessful efforts to control or cut back gambling, use of gambling to cope with stressors, perceived need to 'chase' his losses and relying on others to provide money, even when doing so may cause further problems. She regards any drug and alcohol use disorder to be in full remission and identifies the Applicant's future employment and his stable accommodation situation with his parents and children to be protective factors.³⁶
46. Dr Kwok regards the Applicant as a low risk to the community in terms of his general behaviour. Regarding the domestic violence offences, Dr Kwok assessed the Applicant against the *Ontario Domestic Assault Risk Assessment* (ODARA) which is an actuarial risk assessment that calculates how a man who has committed domestic violence against his female partner ranks among similar perpetrators with respect to risk. The assessment also calculates the likelihood of assaulting a female partner again in the future.

The Ontario Domestic Assault Risk Assessment (ODARA) was used to measure [the Applicant's] likelihood of further domestic violence offence. This is an actuarial risk assessment that calculates how a man who has committed domestic violence against his female partner ranks among similar perpetrators with respect to risk. It also calculates the likelihood that he will assault a female partner again in the future. The 13 items include domestic and non-domestic criminal history, threats and confinement during the index incident, children in the relationship, substance abuse, and barriers to victim support. The ODARA is known to be valid when predicting violence in marriage and intimate relationships and has been cross-validated in studies using police, probation, and criminal record files.

According to the available information, [the Applicant's] score on the ODARA places him in the risk category of 3. Approximately 22% of individuals within this risk category commit another assault against their partner that comes to the attention of the police within an average of about five years.

The ODARA does not cover all the risk factors that contribute to domestic violence, nor consider the static protective factors that reduce an individual's risk of further violence. In [the Applicant's] instance, I note that the incident of domestic violence was triggered by his gambling problem at the time, and this is no longer a presenting issue for [the Applicant]. I further take into consideration that his partner did not express a current fear of [the Applicant] in her statement dated 4 July 2023. She expressed her desire for [the Applicant] to return to living with her and their children.

³⁵ AFSTB/212

³⁶ AFSTB/213

In consideration of both risk and protective factors, it is my opinion that [the Applicant] has a low risk of further domestic violence offences upon the condition that he 1) does not return to gambling, and 2) engage with a psychologist/counsellor in the community for at least 6 months to help him regulate emotions and behaviours while he re-adjusts to living in the community.³⁷

47. Overall, Dr Kwok considers the Applicant has a low risk of further domestic violence offending provided he does not return to gambling and follows her recommendation that he undertake psychological counselling for at least six months to help him cope with stressors and assist with emotional regulation, relapse prevention, reintegration and establishing a prosocial lifestyle.³⁸

Statements of support for the Applicant

48. In statements dated 9 May 2022³⁹ and 28 May 2023⁴⁰ the Applicant's sister Ms MP writes that her brother is a successful businessman who lost his businesses because of his gambling disorder. She writes that their parents depend on the Applicant and need him to help with financial debts including their mortgage. She fears for the character and growth of the Applicant's children should he return to China.
49. Dong Wang owns a property development company. In a statement dated 30 May 2023 he writes he has known the Applicant for 20 years. Mr Wang is prepared to offer the Applicant a job as site labour manager should he be returned to the community.⁴¹
50. In a statement lodged 29 May 2023 the Applicant's Australian citizen parents write they are 'old and sick' and need the Applicant to take care of them.⁴² Notably, they have lent the Applicant a significant amount of money to fund his business and gambling debts, which has not been repaid. They are concerned he will be unable to repay them unless his visa is returned.⁴³

³⁷ AFSTB/213-214

³⁸ AFSTB/207-215

³⁹ BD4/1776-1777

⁴⁰ ATB/13

⁴¹ ATB/21

⁴² ATB/9

⁴³ ATB/10

CONSIDERATION

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

51. The Tribunal must have regard to the protection of the Australian community from criminal or other serious conduct. When considering the protection of the Australian community, Direction 99 requires decision-makers to have regard to:
- 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.

The nature and seriousness of the Applicant's conduct to date

52. In considering the nature and seriousness of the Applicant's conduct I am required to have regard to the factors set out in paragraph 8.1.1 of the Direction.
53. The Applicant's most serious offences involved the use of a false identity to deal with substantial amounts of money through banks, casinos and money transfer services to overseas recipients in China which the Minister contends should be viewed very seriously.⁴⁴
54. In sentencing the Applicant to a 2 year term of imprisonment, His Honour Judge McClintock SC found that the offender at one time was a 'high roller' who wished to retain that status and had become significantly addicted to gambling, which placed him in a vulnerable position.⁴⁵ I consider the imposition of a term of custodial imprisonment is a reflection of the objective seriousness of these offences.⁴⁶
55. The Applicant's 2019 domestic violence offending related to an incident between the Applicant and his partner Ms WW in their home. Magistrate Keady sets out the details in his sentencing remarks. There was an argument during which the Applicant became angry and punched Ms WW in the arm three times below the shoulder. He then took a kitchen knife and drew it across his wrists and told Ms WW that he wanted to kill himself. Two minor

⁴⁴ RSFIC, [26]

⁴⁵ BD1/67

⁴⁶ BD1/68

children were home at the time. Before issuing an apprehended violence order, Magistrate Keady observed in relation to the Applicant's attempt at self-harm:

That might indicate a mental health condition. It might also indicate, in the light of the assault that had just occurred, the knowledge the police were coming, an attempt by the defendant in some sense to make a victim of himself and in that way to create in the mind of the complainant a sense of guilt albeit she was the original victim.

The psychology of these situations ultimately admit to more than one interpretation. I take it that as a form of intimidation, it is a rather unusual one, where the threat was to himself rather than to the complainant, albeit it had the effect of intimidating the complainant.⁴⁷

56. The Applicant's general pattern of offending is made more serious by the frequency of his driving offences, particularly during the period from 2000 to 2007. I accept the Respondent's contention that the frequency of his offending demonstrates a blasé attitude to the requirements imposed on him and a cavalier attitude towards the law.⁴⁸
57. I also take into account that by failing to declare his criminal record on incoming passenger cards dated 7 November 2014, 2 May 2015 and 9 August 2015, the Applicant provided false or misleading information to the Department.⁴⁹
58. Overall, I consider the Applicant's conduct to date to be very serious.

The likelihood of the Applicant engaging in further criminal or other serious conduct

59. Subparagraph 8.1.2(1) of Direction 99 provides that in considering the protection of the Australian community, I should have regard to the Government's view that the Australian community's tolerance for any risk of future harm lessens as the seriousness of the potential harm increases. Subparagraph 8.1.2(2) provides that in assessing the risk posed by a non-citizen to the Australian community, I should consider, cumulatively:
- (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

⁴⁷ BD1/49

⁴⁸ RSFIC, [30]

⁴⁹ BD2/842-844

- (b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen reoffending and evidence of rehabilitation achieved by the time of decision, with weight to be given to the time spent in the community since the non-citizen's most recent offending.
60. Should the Applicant commit similar domestic violence or driving offences in the future, the nature of the harm would be very serious, having the potential to cause physical or psychological harm to the Australian community including members of his own family.
61. Future offending of a similar nature to his financial crimes has the potential to cause financial harm to the Australian community.
62. The Applicant contends that there is a low risk he will reoffend and draws my attention to His Honour Judge McClintock SC's observation in sentencing that he had good prospects of rehabilitation.⁵⁰ The Applicant submits that his most serious criminal offending occurred in the context of a gambling addiction, which he has taken steps to address. In his statement of June 2023 the Applicant sets out the reasons why he believes he is unlikely to reoffend:

As outlined above, I have completed substantial rehabilitation during my time in immigration detention. The rehabilitation has been targeted to deal with my previous gambling addiction and other issues.

If my visa is restored to me, I have safe and stable accommodation with my parents in [suburb]; I have the support of my family in Australia. All my family are in Australia.

I am sincerely remorseful for my prior criminal offending. I understand that my criminality was very serious.

The prospect of future visa cancellation will act as a significant deterrent against me reoffending. Having my visa cancelled, fighting for the restoration of my visa and my time in immigration detention has been a massive wake-up call for me.

During my time in prison, which is a place of rehabilitation, I had no serious charges or contraventions.

I have not gambled since about 2016. As such, I have been in remission from my previous gambling addiction for many years. As I have a mobile telephone, I could easily gamble in immigration detention. However, I have not.⁵¹

⁵⁰ BD1/68

⁵¹ ATB/3-4

I have plans to continue with my rehabilitation in the Australian community. For example, I will consult with forensic psychologist Dr Emily Kwok. Dr Kwok's practice is near my parents' home. Dr Kwok speaks Chinese.

I have ceased contact with old bad friends. I have no intention to reconnect with these people ever again.

I am focused on my family in Australia.

63. Dr Kwok considers that the Applicant is a low risk of reoffending should he maintain treatment for at least six months after being released back into the community,⁵² which the Applicant says he is committed to doing.
64. The Applicant has provided evidence of having engaged in rehabilitation efforts, particularly focused on his gambling addiction. While in prison and detention he has attended 12 step programs to treat his gambling addiction and claims to have attended over 50 sessions of SMART recovery online.⁵³ He submits he has 'completed substantial rehabilitation in immigration detention' following the first hearing into his application, and evidence has been presented of him having participated regularly in a Saturday night SMART recovery while in detention throughout March, April and May of 2023.⁵⁴
65. The Applicant concedes he did not he did not seek treatment for his compulsive gambling between his arrest in 2016 and June 2019. Between 29 June and 17 August 2019 he attended four sessions with gambling counsellor Sha Mi. Between 12 June and 21 August 2019 he received treatment from psychologist Amy Ng over 3 sessions.⁵⁵
66. Ms Ng produced a psychological consultation report in which she assessed the Applicant as having a *Major Depressive Disorder with anxious and depressed mood* and a *Gambling Disorder – ongoing and chronic*.⁵⁶ She 'highly recommended' the Applicant be referred to a psychiatrist to attend monthly consultations for medication management, be referred to rehabilitation for gambling addiction and continue to attend individual psychological consultation a weekly basis.⁵⁷

⁵² AFSTB/213-214

⁵³ ATB/3

⁵⁴ ATB/24

⁵⁵ BD1/269

⁵⁶ BD1/268

⁵⁷ BD1/269

67. Although his rehabilitation has been focussed on addressing his gambling addiction, the Applicant had in the past stated that the root cause of his financial crimes was 'mostly money'.⁵⁸ Given the nature of his gambling addiction, it is accepted that the treatment he has undertaken is appropriate and would be expected to reduce the risk of further financial crimes. There is no evidence to suggest that he has gambled in the period following his arrest in December 2016.
68. In a natural justice letter dated 18 May 2021 the Applicant was asked by the Respondent to provide further information in response to an AUSTRAC financial transactions report and financial intelligence information.⁵⁹ The Applicant was asked to provide 'a detailed explanation of the source and composition of ... amounts totalling \$1,449,015.70' identified in an AFP Statement of Agreed Facts and a 'detailed explanation of the source of the money for the transactions totalling approximately \$9,000,000.00 since 2014' identified in an AUSTRAC report.⁶⁰
69. In a written response dated 30 June 2021⁶¹ the Applicant stated that the reported amount identified in the AFP statement was greatly inflated as money would be the same capital recycled through losses and wins while gambling 'and generate a huge turnover'.⁶²
70. In listing the explanation for the source of the money for transactions totalling approximately 9,000,000 since 2014 he stated:

*I sold two properties worth about 1.2m I got 600k from [redacted].
I got 400k from my father's friend I got 350k from [redacted]
I got 280k from [redacted] I got 200k from [redacted]
I got 200k from my father's housing loan.
I got 150k from [redacted]
I got 80k from [redacted] [bank] personal loan
I got 70k from [redacted]
I got 30k from [redacted]
I got 30k from [redacted]*

⁵⁸ BD4/1766

⁵⁹ BD3/1723-1726

⁶⁰ BD3/1723

⁶¹ BD1/224

⁶² BD1/228

I got 30k from [redacted]

I got unknown amounts from loan sharks and many people. e.g., [redacted], my ex-wife, my mother-in-law, my sister, my brother-in-law, my cousin, all my business partners and friends. There are too many people, I cannot remember all of them and the amounts, but it must be more than \$500,000 (i.e, Each person gave me \$20,000, by 30 people, which is already totally about \$600,000). The total amount listed above was \$4.12 million, but the actual amount was definitely more than \$4.12 million. The judge said in the judgment report:

"I accept that he almost certainly borrowed money from people he referred to as 'loan sharks'".⁶³

71. The Applicant gave evidence that some of the individuals he had borrowed money from had not been repaid. However, he said that he had lent them money previously and 'everyone' understood that sometimes repayment is difficult. He explained that in the 'special environment' of a casino, it was possible to borrow money when needed. He conceded some of those he had borrowed from would not have forgotten his debts, but he indicated that the sums of money were not as large as they appeared in the context of what he and his creditors regularly spent when gambling.⁶⁴
72. Should he return to the community the Applicant gave evidence he intends to work for three days a week, and expects he will be able to generate a basic salary of approximately \$1,000 per week. From this he anticipates paying child support, the remainder of a loan given to him by his father, support Ms WW and pay his own expenses.⁶⁵ By his own calculation, his loan repayments, financial support for his family and his personal expenses will amount to \$1,250, which is already beyond his anticipated earning capacity. Even if I were to accept that the Applicant would be able to work additional days to earn additional income and was not required to repay gambling debts he has identified, it is difficult to conceive of him not facing straightened financial circumstances in the community. I accept the Respondent's contention that should he find himself in a position where he is unable to repay debts he may revert to gambling and risk committing further financial crimes.
73. In a statutory declaration made on 21 May 2020 the Applicant writes that he intended to appeal the 21 November 2019 conviction as he had been encouraged by his lawyer to

⁶³ BD1/227-228

⁶⁴ Day 1 Transcript, 29

⁶⁵ Transcript Day 1, 57

'confess to get a lenient sentence', despite his belief that the charges were inappropriate.⁶⁶ In the same statement he writes that due to his 'ignorance of the law' he thought that using a false passport would not result in a severe punishment.⁶⁷ Regarding the 'argument' with Ms WW and subsequent common assault conviction he writes that he regrets pleading guilty to the charges which he mistakenly understood 'were not a big deal'.

74. Regarding his driving offences, the Applicant wrote in a statement of facts lodged 15 May 2022:

*I am deeply sorry and deeply regret my illegal driving behavior in 2000-2007 and 2018. At that time, I was young and had just arrived in Australia. I drove here with China's wrong driving cognition. I didn't realize that Australian laws are very strict on illegal driving, and I didn't realize that illegal driving may bring serious consequences.*⁶⁸

[Errors in original]

75. Having been fined and disqualified from driving for 12 months in September 2000, I do not accept the Applicant was unaware of the seriousness of his subsequent driving offences. This is particularly serious as notwithstanding the increasingly severe fines and disqualifications meted out to the Applicant, his traffic offences continued until 2018.

Protection of the Australian community – conclusion

76. The Applicant's offending to date has been serious and further offending poses a risk of serious harm to the Australian community. The Applicant's strong prospects of rehabilitation were acknowledged by the court and in her recent report Dr Kwok concludes he is at low risk of reoffending provided he continues treatment. There are significant protective factors in place, including the Applicant's family support, stable accommodation, the prospect of his visa being cancelled again and his ceasing contact with bad influences.⁶⁹
77. The Applicant's has a demonstrated pattern of deflecting blame for his offending which casts considerable doubt on the sincerity of his remorse. However, it is not in question that he regrets the impact the offending has had upon him particularly his imprisonment and the

⁶⁶ BD1/213

⁶⁷ BD1/214

⁶⁸ BD4/1761

⁶⁹ ATB2-4

cancellation of his visa. His evidence that he is not obliged to repay the bulk of his Australian gambling debts was not persuasive. Should he be released into the community he will have significant financial commitments. Financial stress will challenge his resolve to not to gamble and I consider there is a medium risk that the Applicant may reoffend.

78. For these reasons, this primary consideration weighs against revoking the cancellation of the Applicant's visa and is afforded significant weight.

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

79. The second primary consideration is whether the conduct engaged in by the Applicant constituted family violence. Family violence is defined in Section 4 of Direction 99 to include violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful. Paragraph 8.2(3) of the Direction sets out a list of factors that the Tribunal must consider in assessing the weight to be given to this consideration. They relevantly include the frequency of the conduct, the cumulative effect of repeated acts of family violence and the rehabilitation achieved since the person's last known act of family violence.
80. The Applicant concedes the offending for which he was sentenced on 30 May 2019 constitutes family violence. The details of the offending are set out in the NSW Police Fact Sheets dated 30 May 2019.⁷⁰
81. In May 2020 the Applicant wrote that the argument with Ms WW was the result of Ms WW experiencing stress which caused her to say 'hurtful things' about his parents. He wrote in part:

The argument escalated and I felt hopeless. I was extremely stressed and feeling very sad. I do believe at that point I was suicidal. I then told [Ms WW] that I am going to kill myself and walked to the kitchen. [Ms WW] followed me and blocked the entrance to the kitchen and then I pushed her to get through. I did not at any time punch her as it states on the police report. I was not even aware of this police report until my immigration lawyer brought it to my attention. My criminal lawyer did not tell me. I have never got physical in my life and there is no way that I would have punched [Ms WW].⁷¹

⁷⁰ BD8/1843-1847

⁷¹ BD1/213

82. He stated he was 'convinced' by his barrister to plead guilty to the common assault and stalking and intimidation charge 'on the day of the hearing' and he thought he 'was referring to the AVO charge'. He writes:

*If I had known that common assault meant that I punched my partner, I would not have pleaded [sic] guilty.*⁷²

83. Nonetheless, in the same statement the Applicant writes that he and Ms WW had 'weekly visits with a social worker who assisted us to help us realize [sic] that any argument is bad for a family with children'.⁷³

84. There remains some dispute as to whether the Applicant punched Ms WW or whether she was pushed and I acknowledge Ms WW's evidence that she was not physically hurt by the Applicant.

85. The Applicant now accepts the findings of the Court but it is of concern that he initially sought to downplay and deny aspects of his offending, which indicates a lack of insight into the seriousness nature of family violence.

86. This consideration weighs against revocation of the cancellation decision, but is afforded limited weight in recognition of the family violence being an isolated incident.

Primary consideration 3 – The strength, nature and duration of ties to Australia

87. I am required to consider the impact of the decision on the Applicant's immediate family members in Australia as well as the strength, duration and nature of any family or social links with Australian citizens, permanent residents and people who have a right to remain in Australia indefinitely. Subparagraph 8.3(4) provides that consideration weight should be given to the fact that a non-citizen has been ordinarily resident in Australia during and since their formative years.

88. The Applicant has resided in Australia for 24 years having arrived when he was 21 years old. He has both immediate and extended family in Australia which include his three minor

⁷² BD1/213

⁷³ BD1/214

children, 19 year-old adult son Mr CP, nephew, both his parents and one of his sisters.⁷⁴ His ex-wife, brothers and sisters-in-law are also reside in Australia.⁷⁵ The Applicant has identified a large number of Australian citizen friends.⁷⁶

89. The Applicant submits that it would cause his family very significant emotional hardship should he be required to return to China. He particularly notes the impact on his parents, who require his care and wish him to remain in Australia so he can help support them financially.⁷⁷
90. The Applicant's adult son Mr CP has provided a statement dated 10 July 2023. CP fears for his father, himself and his sister should the Applicant not be able to return to the Australian community. He writes that he will suffer financially should his father be returned to China and that his father's guidance and support has been invaluable. He fears that he and his sister will struggle to visit their father in China due to academic commitments.⁷⁸
91. The Applicant gave evidence that he was in a relationship with Ms WW, which is contrary to his 6 June 2023 submission that they were 'currently separated' but maintained a personal relationship. Ms WW suffers from mental health issues which the Applicant identifies as anxiety, depression and schizophrenia.⁷⁹ She is unable to work and has struggled financially in the Applicant's absence. Regardless of the nature of their relationship, the Applicant intends to provide Ms WW with emotional financial and practical support. He writes that she has found it particularly difficult while he is being held in immigration detention.⁸⁰ He explained at the hearing:

APPLICANT: The relationship now I have with [Ms WW] is that I still need to take care of her and also her children. While I was in the – in custody, I had argument with [Ms WW] about the pressure that she's been suffering since we got separated. We are both attending counselling sessions now. After this has happened, we have all realised that there's a big problem between us. We're open to work, like make efforts just for the children and for our family. In the future if I'm released back into the community, if we have an argument or things like this, and even if we have – if we have to live separately, we will still share the responsibility of taking our children.

⁷⁴ ATB/16

⁷⁵ ATB/15

⁷⁶ ATB/17

⁷⁷ ATB/4-5

⁷⁸ AFSTB/217-218

⁷⁹ ATB/7

⁸⁰ Day 2 Transcript, 65

MEMBER: Okay, it's a bit uncertain, but it's possible you may reconcile?

APPLICANT: Yes, I think I would say that we have reconciled, but there is a possibility that if we have a problem in the future we will be separated again.⁸¹

92. Despite the uncertainty regarding their relationship, the impact of the Applicant's removal on Ms WW is of particular note. As Dr Kwok observed in her report:

I did not perform a mental health assessment on [Ms WW] but she indicated in her statement that she suffers from depression and anxiety, and is prescribed antidepressants. Due to the family's financial hardship, she has not sought psychological intervention despite the ongoing stressors. I take into consideration that it would also be difficult for her to make time to attend treatment as a single parent. I do not anticipate that [Ms WW] will seek treatment for her mental health conditions as long as [the Applicant] remains in detention or is deported. Her psychological symptoms will, therefore, become persistent if [the Applicant] cannot return to the family and provide her with emotional, financial and parenting support.⁸²

93. Should he be released into the community the Applicant plans to divide his time living with his parents and Ms WW. While he has been in prison and detention they have been cared for by his younger sister.⁸³

94. Ms WW gave evidence it was her understanding that should the Applicant be released from detention, they would reside together with the two children 'like a normal family'.⁸⁴ She conceded that they had not discussed the arrangements in detail, but noted the Applicant's parents reside nearby. I accept that Ms WW is finding it difficult to manage her mental health and financial commitments along with caring for her two children. Regardless of the exact nature of their relationship, I accept Ms WW's evidence that she and the Applicant speak every other day and it would be of considerable benefit to her if the Applicant remains in Australia where he can support her emotionally and financially and held care for her two children.⁸⁵

⁸¹ Day 2 Transcript, 65

⁸² ATB/214

⁸³ Day 2 Transcript, 63

⁸⁴ Day 2 Transcript, 100

⁸⁵ Day 2 Transcript, 93-94

95. The Applicant submits he performed volunteer work at various organizations, including at the Chinese Student Society between 2002 and 2004 and most recently was a volunteer with the Australia Karaoke Industry Society.⁸⁶
96. Throughout his time in Australia the Applicant has worked various hospitality roles prior to starting his own businesses and beginning work in the construction industry from 2017.⁸⁷ The Respondent notes that despite his employment history and having run a number of businesses, the Applicant did not lodge a personal tax return in Australia between 2009 to 2016.⁸⁸
97. There is no doubt the Applicant has close family ties in Australia and his elderly parents would benefit from having him remain in Australia, as would Mr CP and his sister. Despite the uncertain status of their relationship, I accept it is also in Ms WW's best interests that the Applicant remains in Australia. While I acknowledge there is minimal evidence to support the Applicant having significant community connections beyond those outlined above, or of having made a broader contribution to the Australian community, this primary consideration is afforded considerable weight in favour of revocation.

Primary consideration 4 – Best interests of minor children affected by the decision

98. Direction 99 requires the Tribunal make a determination about whether the cancellation of the Applicant's visa is in the best interests of any minor children in Australia affected by the decision. The Direction at subparagraph 8.4(4) sets out a number of factors to be considered in assessing the best interests of minor children. These include the nature and duration of the relationship between the child and the person, the extent to which the person is likely to play a positive parental role in relation to the child, the likely effect that any separation from the person would have on the child, whether there are any other people who fulfil parental roles with the child, any known views of the child, and any evidence that the person abused or has neglected the child or that the child has otherwise suffered from trauma from the person's actions including through exposure to family violence.

⁸⁶ ATB/20

⁸⁷ ATB/18-19

⁸⁸ BD1/55

99. The Applicant has identified four minor children who will be affected by the decision. Miss AP age 14, his stepdaughter Miss IW age 14, Master JP age 6 and his nephew, Master JW age 13.⁸⁹
100. Master JP is currently jointly cared for by his mother and the Applicant's parents.⁹⁰ The Applicant has previously indicated that he intends to be the primary carer for Master JP should he return to the community. Due to her poor mental health, Ms WW has struggled to fulfill her parental responsibilities towards both Miss IW and Master JP.⁹¹ The Applicant has expressed concerns about the long-term viability of having his parents provide care for Master JP given their health and age.⁹²
101. The Applicant claims he has cared for Master JP since his birth and Ms WW is jealous of their relationship. Regardless of his relationship with Ms WW, he intends that Master JP will live with him if he is released into the community.⁹³ Ms WW gave evidence that Master JP has been diagnosed with Attention Deficit Disorder and has a lot of energy and does not sleep a lot, which makes his care difficult. It is her evidence that the Applicant has played an important role in handling the challenges of Master JP's care due to his condition prior to the Applicant entering prison.⁹⁴
102. Miss AP lives with her mother Ms SS who wrote on 10 February 2022 that the Applicant had been a good father to their two children and had contributed to the cost of their education despite being unable to pay regular child support.⁹⁵
103. Dr Kwok reports there is a relationship between maternal psychopathology and the development of child psychopathology. She considers that Ms WW's mental health problems will have greater impact on Master JP because he is at an age where he relies on his mother for all his physical, emotional and social needs and his sense of security is based around his perception of his mother's well-being. Dr Kwok regards Ms WW's emotional and

⁸⁹ ATB/16

⁹⁰ Day 2 Transcript, 100

⁹¹ Day 2 Transcript, 65-66

⁹² Day 2 Transcript, 66

⁹³ Day 2 Transcript, 66

⁹⁴ Day 2 Transcript, 101

⁹⁵ BD1/594

physical health problems will affect her attentiveness and responsiveness to Master JP's needs.⁹⁶

104. Regarding Miss IW, Dr Kwok writes:

[Miss IW's] background history, particularly the absence of her biological father during the critical years when children form bonds with their caregivers, placed her at risk of psychopathology. However, [the Applicant] entering [Miss IW's] life was a major protective factor, because [the Applicant] became a consistent and reliable father figure for her. His parenting with [Miss IW] was marked by positive engagement, warmth, responsiveness and appropriate discipline. If [the Applicant] continues to be detained, or is deported, the impact of his removal from [Miss IW's] life will be the same as removing a biological parent from a child's life. That is, the loss of [the Applicant] will place [Miss IW] at higher risk of internalising problems (e.g. depression, anxiety).⁹⁷

105. At the hearing Ms WW gave evidence that the Applicant and Miss IW's relationship is 'just like a real father and daughter'.⁹⁸

106. Should he be removed from Australia, the Applicant would be prevented from having regular in-person contact with the children. Dr Kwok gave evidence that with a young child the relationship is built mostly on physical interaction and that video contact is better than no contact at all but the relationship will be different than if physically present.⁹⁹

107. Master JW is reported to respect the Applicant and grew up with him from the day he was born until he was 8 years old.¹⁰⁰ He plays the role of uncle to the child and maintains a close relationship with the child.¹⁰¹

108. The Applicant gave evidence he has not maintained regular in person contact with the minor children while in prison and immigration detention because he did not want his children to see him in prison or detention. Based on the messages and screenshots in evidence, it is apparent he has maintained regular contact with them through electronic communication.

⁹⁶ AFSTB/214

⁹⁷ AFSTB/214

⁹⁸ Day 2 Transcript, 92

⁹⁹ Day 1 Transcript, 35

¹⁰⁰ Day 1 Transcript, 19

¹⁰¹ Day 1 Transcript, 18

109. Children were present when the family violence offending took place in 2019, but the evidence does not support a finding that the children are at risk of being exposed to further family violence.¹⁰² Miss AP is cared for by her mother who separated from the Applicant in 2013.
110. I accept that the Applicant has a relationship with each of the minor children he has identified and has communicated with them through electronic means since 2019. It would be open to him to continue to do so should he return to China.
111. The concerns for Ms WW's mental health and her ability to care for and provide a nurturing home for Miss IW and Master JP is given significant weight, particularly in light of Master JP's special needs.
112. However, I also recognise that the Applicant has been physically absent the lives of the minor children since his imprisonment in 2019. It does not appear that the Applicant has previously or expects in the future to have a parental role for his nephew Master JW. The evidence suggests that the Applicant has maintained involvement in the lives of all his children, but that responsibility for their care has primarily fallen to the children's mothers or his parents, even prior to his imprisonment.
113. Although this primary consideration weighs in favour of the Applicant, it is afforded less weight on account of limited role that the Applicant has played in the lives of the children since 2019 when he was imprisoned.
114. Overall, this primary consideration is afforded significant weight in favour of revocation, primarily on account of the interests of Master JP and Miss IW.

Primary consideration 5 - Expectations of the Australian community

115. Paragraph 8.5 of Direction 99 requires me to consider the expectations of the Australian community. Subparagraph 8.5(1) relevantly states:

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

¹⁰² BD1/49

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

116. In *FYBR v Minister for Home Affairs*¹⁰³ (**FYBR**) the Full Federal Court decided by majority that it is not for the decision-maker to assess what the expectations of the Australian community are for the purpose of applying this consideration. That is, it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an applicant's circumstances or evidence about those expectations. Rather, the expectations of the community that decision makers are required to consider are those set out at paragraph 11.3 of Direction 65, the direction considered in that case which is analogous to paragraph 8.5 of Direction 99.
117. The Direction lists specific conduct which the Australian community as a whole expects would raise serious character concerns and an expectation that the person would not hold an Australian visa. I accept that the Applicant's criminal conduct and acts of family violence is inconsistent with the values of the Australian community and the Australian community as a norm expects his visa to be cancelled.
118. Given the nature of the Applicant's offending, the age at which he arrived in Australia and his family connections in the community, having regard to the provisions of Direction 99, I afford this consideration medium weight against exercising the discretion to revoke the cancellation of the Applicant's visa.

Other consideration A - Legal consequences of the decision

119. I am required to consider the legal consequences of my decision having regard to Australia's non-refoulement obligations. Should the Applicant's visa remain cancelled, by operation of sections 189 and 198 of the Act, he will be expected to remain in detention and will be liable for removal from Australia as soon as reasonably practicable.
120. Subparagraph 9.1(2) of Direction 99 explains that 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 as well

¹⁰³ [2019] FCAFC 185, [75]

as other international conventions. The Act, particularly the concept of ‘protection obligations’, reflects Australia’s interpretation of the obligations that Australia is committed to implementing as a party to these conventions.

121. Subparagraph 9.1(3) provides that 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.
122. There is no finding that the Applicant is owed protection,¹⁰⁴ but he has raised claims giving rise to international non-refoulement obligations which I am required to consider.¹⁰⁵ Direction 99, which was issued after the High Court’s decision in *Plaintiff M1/2021 v Minister for Home Affairs*,¹⁰⁶ provides guidance on how the Tribunal should consider these claims. The Direction at subparagraph 9.1.2.(2) provides the choice whether to defer consideration of non-refoulement issues or to proceed to consider them:

(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.

123. Should the Applicant be returned to China he fears he will be harmed or threatened by loan sharks he owes money to and that he may be re-prosecuted in relation to his criminal offending in Australia.¹⁰⁷
124. In a written submission dated June 2023 the Applicant writes that he has debts of more than \$200,000 outstanding to ‘triads based in China’. He writes:

¹⁰⁴ BD1/39

¹⁰⁵ ASFIC, [139]

¹⁰⁶ [2022] HCA 17, [30] *per* Kiefel CJ, Keane, Gordon and Steward JJ

¹⁰⁷ ATB/5-6

*The Chinese triads would provide me with gambling tokens to gamble. The triads were part of a group of individuals that funded high level gambling. I have not paid back the debt to the triads, because I simply do not have that kind of money. I am extremely concerned that if I am deported to China, these Chinese triads will seriously harm and/or kill me. They had threatened me previously. They are very powerful in China and have networks in various parts of the world.*¹⁰⁸

125. He also fears being re-prosecuted in China for his criminal offending:

*I understand that China does not have a double jeopardy rule. As such, I am very concerned that I could be re-prosecuted in China in relation to my criminal offending in Australia. This is a very big concern for me. I am also concerned because my prior criminal offending was linked to China. My criminal conduct related to money-laundering, with money being sent back to China to the Chinese triads.*¹⁰⁹

126. The Applicant claims that he is known by the loan sharks and they have connections which mean he would not be safe if he is returned to China. On his previous visits to China, he was fearful of loan sharks and made sure to have some money with him so he could repay his loans when he returned.¹¹⁰

127. Despite not having had contact with the loan sharks since 2016 or 2017, the Applicant maintains it remained 'really dangerous' for him to return to China because he does not intend to repay his debts.¹¹¹ He does not know exactly how much danger he would face should he be returned, but indicated he feared having his organs 'harvested' to repay his debts.¹¹²

128. The Applicant gave evidence that loan sharks use a particular language when they communicate the consequences of not repaying loans to Chinese gamblers. When asked if this was based on a general understanding or something specific the Applicant said that when loan sharks chase him for repayment they will tell him which organisation they belong to and what branch. They will imply they are acting for the triads, but do not say so outright as their activities are illegal.¹¹³

¹⁰⁸ ATB/6

¹⁰⁹ ATB/6

¹¹⁰ Day 1 Transcript, 8

¹¹¹ Day 1 Transcript, 8

¹¹² Day 1 Transcript, 9

¹¹³ Day 2 Transcript, 51

129. The Applicant explained that Chinese triads operate in both Sydney and China and claims he did not know if there was a connection between. However, he maintains that the loan sharks he borrowed money from in Australia are different organisations to those he borrowed from in China.¹¹⁴ The Applicant was asked if he was concerned he may be pressured by Australian based triads to repay loans should he remain in the community. The Applicant gave evidence he was concerned about this possibility when he was in the community between 2017 and 2019 but that he is no longer concerned as he thought the triad may have figured out that he 'got involved with crime activity and I also determined that I won't be gambling again'.¹¹⁵ When he was asked to repay loans, he said he was always contacted by people who were based overseas. He explained:

*In 2015 I did borrow money from an Australian loan shark. But when they chased me up to pay the loan back with the help of my sister and my parents I've already paid those debts from the Australian loan sharks back in full. And then in 2016 I borrowed some money from overseas but that has not been paid back. And also in 2015 I borrowed money from loan sharks overseas as well and not paid back as well. Some paid back, but not (indistinct).*¹¹⁶

130. The Applicant maintains that he has repaid money borrowed from loan sharks in Australia but some of his overseas debts to loan sharks remain outstanding.¹¹⁷
131. The Respondent contends there is very limited evidence to substantiate the Applicant's claimed risk of harm, particularly where no such claim was raised previously.¹¹⁸
132. The DFAT Country Information Report on the People's Republic of China (the **country report**) states that loan sharks are active in China but that state protection is available. DFAT assess that victims of loan sharks have a plausible fear of violence in China but overall the risk is low.¹¹⁹
133. Regarding double jeopardy, the country reports states that it is specifically allowed in China under the Criminal Law (article 10), but whether or not it occurs in practice is not clear.

¹¹⁴ Day 2 Transcript, 53

¹¹⁵ Day 2 Transcript, 54

¹¹⁶ Day 2 Transcript, 54

¹¹⁷ Day 2 Transcript, 55

¹¹⁸ Day 2 Transcript, 121

¹¹⁹ Respondent's Supplementary Bundle of Documents (STB)3/75

DFAT assess that re-prosecution is possible but unlikely unless the alleged crime relates to a sensitive issue, such as a political issue, or attracted significant media attention.¹²⁰

134. Having considered the available evidence, I am not satisfied there is sufficient evidence to make a determination whether non-refoulment obligations are owed to the Applicant. The Applicant has indicated he intends to make an application for protection should his current application be unsuccessful. Should he choose to do so, it will allow a proper assessment of his claims to be made. However, I acknowledge that consideration of a protection claim may take some time during which the Applicant can expect to remain in immigration detention. Given the stated impact of his being held in immigration detention on his mental health condition, I afford this consideration some weight in favour of revocation.

Other consideration B - Extent of Impediments if removed

135. I am required to consider the extent of any impediments the Applicant may face if removed from Australia in establishing himself and maintaining basic living standards in China in the context of what is generally available to other citizens of that country.
136. The Applicant has received a diagnosis of Major Depressive Disorder and Gambling Disorder.¹²¹ He gave evidence of having resumed taking medication to treat his depression and having previously taken medication to aid in his sleep and digestion.¹²² The Applicant's mental health condition is longstanding having been acknowledged by psychologists including forensic psychologist Jason Borkowski in his report dated 29 March 2019.¹²³
137. The Applicant has expressed concerns about his mental health should he return to China. In the June 2023 statement he wrote:

I am extremely concerned that my mental health will deteriorate if removed to China. I will be extremely depressed on account of being permanently separated from my family in Australia. I will be very sad and suffer lifelong sadness, particularly given I have no one left in China. I am also concerned that I would be suicidal in China.

¹²⁰ STB3/84

¹²¹ BD1/268

¹²² Day 2 Transcript, 79-80

¹²³ BD1/259

... I have no accommodation. I would likely be homeless.¹²⁴

138. Dr Kwok gave evidence that should he return to China and his family remain in Australia it would pose a problem for the Applicant. She observed in her report that:

[The Applicant's] immediate family members all reside in Australia and he, therefore, will not have adequate family support if he is forced to return to China. With regards to treatment, the psychological treatment which [the Applicant] requires is available in China. More specifically, the Chinese government has a national Mental Health Plan and Mental Health Law which mandate that mental health services are available to all people with mental disorders, including people living in rural communities. China also has a three-tier mental health service which covers hospital and community rehabilitation.

One of the main challenges faced by China's mental health system, however, is that it does not have enough licensed psychiatrists and allied mental health professionals to meet the mental health needs of the nation. There is often a waiting period for people to access treatment in the community.¹²⁵

139. The Applicant gave evidence that he has a cousin in China but they do not maintain contact with each other and he has not seen him for 15 years.¹²⁶ Between his arrival in Australia and 2017 the Applicant travelled in or out of the country on 55 occasions, travelling primarily to China, Macau and Hong Kong.¹²⁷ It was his evidence that he initially visited friends and family when he travelled but later he travelled only for the purpose of gambling.¹²⁸ The Applicant plans to reconnect with friends but not until he has re-established himself. Until then, he fears he will be ignored.¹²⁹
140. If he is returned to China the Applicant does not know what he would do to survive without the support of his family. He fears the exceptionally competitive job market in China would make it very difficult for someone who is over 35 years of age to find a job. If he does find employment, he fears having to work for a minimum wage and would be unable to support his family in Australia.¹³⁰

¹²⁴ ATB/7

¹²⁵ AFSTB/211-212

¹²⁶ Day 2 Transcript, 68

¹²⁷ BD2/845-849

¹²⁸ Day 2 Transcript, 79

¹²⁹ Day 2 Transcript, 68

¹³⁰ ATB/6

141. The Applicant contends that he owes money to loan sharks in China. Should he be required to repay gambling debts in China or threatened by triads it may be significantly more difficult for him to re-establish himself.¹³¹
142. Despite not having resided in China since 1998, I do not expect he would face any substantial language or cultural barriers. Apart from his mental health, he appears to be fit, employable and capable of securing paid employment.
143. I accept that being separated from his parents, children, extended family and Ms WW would place additional stress on the Applicant and based on Dr Kwok's evidence it may lead to a deterioration in his mental health. Should he seek treatment for his mental health in China, he would be expected to have access to the same level of support available to other citizens in China. However, the country report states that the COVID-19 pandemic challenged China's health care system and despite having increased investment in mental health services, they remain inadequate.¹³²
144. Overall, I expect that the Applicant will face significant impediments should he return to China, particularly in the short term as he establishes himself. He will be required to overcome these difficulties with only limited family and social support to rely on while also treating his mental health. I consider this consideration weighs in favour of revoking the cancellation decision and is afforded significant weight.

Other consideration C - Impact on victims

145. Paragraph 9.3 of the Direction requires me to consider the impact of a decision not to revoke the mandatory cancellation of an Applicant's visa on the victims of the non-citizen's criminal behaviour and the family members of the victims where information in this regard is available.

¹³¹ ATB/6

¹³² STB3/53

146. Ms WW is the victim of the Applicant's domestic violence offence. She has forgiven the Applicant and outlined the adverse impact the Applicant's removal would have on her. I have taken these concerns into account in primary consideration 3.¹³³
147. I acknowledge that Ms WW gave evidence in which she sought to downplay aspects of the offending in which she was the victim. I cannot look behind that conviction and have no cause to, but it appears Ms WW feels that in calling police to attend she bears some responsibility for the Applicant's current predicament.¹³⁴ Taking this into account, I afford this consideration very limited weight in favour of the Applicant.

Other consideration D – Impact on Australia business interests

148. I am required to consider any impact on Australian business interests should the Applicant not be allowed to remain in Australia, noting that an employment link would generally only be given weight where the decision would significantly compromise the delivery of a major project of important service in Australia.
149. In correspondence dated 30 March 2020 Wei Liang states that the Applicant is a very important part of his small construction company.¹³⁵ In a letter dated 30 May 2023 Dong Wang confirms he has a job for the Applicant as a site labour manager should he return to the community.¹³⁶
150. There is no suggestion that the delivery of a major project or important service in Australia would be significantly compromised by his removal to China and this consideration is afforded neutral weight.

CONCLUSION

151. In balancing the considerations in the Direction, the protection of the Australian community weights strongly in favour of not revoking the cancellation of the Applicant's visa. It is in his favour that he has only a single conviction for which he was sentenced to a term of

¹³³ Day 2 Transcript, 98

¹³⁴ Day 2 Transcript, 105

¹³⁵ BD2/830

¹³⁶ ATB/21

imprisonment. However, it is of concern that his offending – albeit different in nature – continued between his arrest and being sentenced for the financial crimes for which he was imprisoned. Though he has been assessed as a being at low risk of reoffending, for the reasons I have explained, I consider there remains a real risk he may reoffend. The Applicant’s explanation regarding his gambling debts and financial commitments should he return to the community in my view pose a significant risk factor. The expectations of the Australian community also weigh against revocation of the cancellation decision and is afforded medium weight.

152. The Applicant does not dispute that his 2018 offending constituted family violence. This consideration is afforded medium weight against revocation in recognition of the fact it was an isolated, if relatively serious, incident.
153. The Applicant’s ties to the Australian community weigh very heavily in favour of revocation of the cancellation decision, particularly on account of his adult son, his partner Ms WW and his parents and sister who continue to reside in Australia. The best interests of the minor children effected by this decision also weigh in favour of revocation. However, I take into account the limited role he has played in their lives owing to his incarceration and detention since 2019. I also take into account that for the most part, the care of the Applicant’s children was primarily the responsibility of others, including when he was at liberty and gambling.
154. Should he return to China, the Applicant will be required to rebuild his life with minimal support while managing his mental health condition and the impediments he is likely to face weighs heavily in support of revocation. I afford the impact on the victims of his offending and the legal consequences of the decision minimal weight in favour of revocation.
155. Having weighed the considerations, I am not satisfied that there is another reason to revoke the cancellation of the Applicant’s visa and the reviewable decision will be affirmed.

DECISION

156. Pursuant to section 43 of *the Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal decides that the decision under review, being the decision of a delegate of the Minister dated 1 April 2022 not to revoke the mandatory cancellation of the Applicant’s visa is affirmed.

*I certify that the preceding 156
(one hundred and fifty - six)
paragraphs are a true copy of
the reasons for the decision
herein of*

.....[Sgd].....

Associate

Dated: 20 October 2023

Date(s) of hearing:	27 and 28 July 2023
Counsel for the Applicant:	Dr J Donnelly
Solicitors for the Applicant:	Ms M Zarifi, Zarifi Lawyers
Solicitors for the Respondent:	Mr H McLaurin, Minter Ellison