



Administrative
Appeals Tribunal

**DECISION AND
REASONS FOR DECISION**

Division: GENERAL DIVISION

File Number(s): **2023/5667**

Re: **Yang Li**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member Hon J Rau SC**

Date: **18 October 2023**

Place: **Adelaide**

The decision under review is set aside.



[Sgnd]

Senior Member Hon J Rau SC

CATCHWORDS

MIGRATION – mandatory cancellation of Class SI Subclass 189 Skilled Independent visa, under section 501(3A)- where Applicant does not pass the character test – Applicant has substantial criminal record – whether the discretion to revoke the visa cancellation under section 501CA (4) should be exercised – consideration of Ministerial Direction No. 99 - decision under review is set aside.

LEGISLATION

MIGRATION ACT 1958 (CTH)

Migration Amendment (Aggregated Sentences) Act 2023 (Cth)

CASES

Uelese v Minister for Immigration and Border Protection [2016] FCA 348

YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

Afu v Minister for Home Affairs [2018] FCA 1311

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

FYBR v Minister for Home Affairs [2019] FCA 50

Pearson v Minister for Home Affairs (2022) FCAFC 203

SECONDARY MATERIAL

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

Senior Member Hon J Rau SC

18 October 2023

INTRODUCTION

1. The Applicant seeks a review of the decision by a delegate of the Minister for Home Affairs (“the Respondent”) made under section 501CA (4) of the *Migration Act 1958* (Cth) (“the Act”) on 3 August 2023, not to revoke the mandatory cancellation of his Class SI Subclass 189 Skilled Independent visa (“the Visa”).
2. The visa was cancelled on 2 June 2022 under section 501 (3A) on the basis that he did not pass the character test.
3. Sections 501(6)(a) and 501(7)(c) of the Act provide that a person does not pass the character test if they have been sentenced to a term of imprisonment of 12 months or more. The Applicant fails the character test on account of having been sentenced to an aggregate term of 12 months imprisonment, on 28 April 2022.
4. The Applicant concedes that he does not pass the character test. The issue before the Tribunal is whether there is ‘another reason’ to revoke the mandatory visa cancellation pursuant to s 501CA(4)(b)(ii) of the Act
5. The hearing was held on 9 October 2023. The Applicant was represented by Dr Jason Donnelly of Latham Chambers instructed by Mr Jack Li of Floraison Legal and the Respondent was represented by Ms Donaghy of HWL Ebsworth.
6. The Applicant gave evidence by Microsoft Teams from Yongala Hill Immigration Detention Centre.
7. The Applicant indicated a wish at the outset, to be assisted by a Mandarin interpreter. He generally used the interpreter. It was, however, obvious that his command of English was reasonable, as one would expect of a man who has lived in English-speaking communities, for the past 23 years. He answered some questions directly without the aid of a translation. The interposition of an interpreter, as is often the case, complicated the

task of properly assessing the Applicant's demeanour and reliability. He gave many lengthy, rambling answers to quite simple questions. Much of what he had to say was irrelevant or peripheral. This did not assist his cause. In general terms, he was a poor witness.

8. The Applicant called Ms Kwok, a psychologist as an expert witness. She prepared a report dated 27 September 2023¹ which was before the Tribunal. Her evidence was helpful.
9. This case is somewhat unusual. The Applicant was a law abiding, apparently hard-working family man, until his marriage broke down in 2020. He was 46 years old. Until that point, he had no criminal history. He had no history of gambling, or substance abuse. He had no history of anti-social behaviour. His offending is directly connected to his marriage breakdown, and his apparent incapacity to manage his emotional reaction to it. His former wife (Ms Lui) has been the sole target of his offending. The Applicant's failure to heed Court Orders made to protect her, has led to his present predicament. He has incidentally exposed his infant son to his misconduct. The future risk assessment in this case, is also focused on Ms Lui. There is no evidence to suggest that the community more broadly, is at any risk.

Background Facts

10. The Applicant was born in Beijing, China on May 1974. He is an only child. His father died in 2017 aged 89 years. His mother who is 83 years of age, lives in Beijing and has had some health problems.
11. The Applicant completed a Diploma in Computer Science in Beijing. At the age of 24, he moved to New Zealand in 2000, to continue his studies in Computer Science at the University of Auckland.
12. He is a New Zealand national, obtaining citizenship after moving there. He had to relinquish his Chinese citizenship at that time. Aside from his citizenship, the Applicant has very little connection with New Zealand.

¹ Exhibit 5, Bundle of Documents, Psychologist Report – Dr Kwok (27.09.2023).

13. The Applicant established a branch of an American company in New Zealand which supplied printer accessories.
14. In January 2007, he came to Australia and started another branch of the company called *Partsmart Australia Pty Ltd*. He told the Tribunal that he ran the business from his home garage.
15. The Applicant has travelled overseas on many occasions to visit his parents in China, since coming to Australia.²
16. In February 2014, the Applicant married his now ex-wife, Ms Liu, in Sydney. They met on a dating App. At the time he was 39 years old, and she was 27.³ She is a Chinese citizen.⁴
17. In November 2017, the Applicant's son, Child A was born. He is a New Zealand citizen.⁵
18. In May 2019, the Applicant was granted the Visa.⁶
19. In February 2020, the Applicant was involved in an act of family violence against Ms. Liu.
20. In 2020 the Applicant separated from Ms Liu.⁷
21. In March 2020, the Applicant entered a plea of guilty in relation to the 18 February 2020 offending. He was sentenced to an 18-month Community Corrections Order. The decision of Acting Magistrate Connell states:

"HIS HONOUR: Yang Li entered a plea of guilty to an offence against s 37(1A) of the Crimes Act 1900 on [date] February 2020 at Carlton. The offender did grab [Ms] Liu around the neck with both hands, squeezed her neck, causing swelling and red

² Exhibit 4, G-Documents, G19, Statement of Guanyu Kou, 111; G-Documents, G44, Movement History, 144-150.

³ Ibid, G20, Marriage Certificate, p 113.

⁴ Ibid, G15, Submission from Grace Guo (migration agent), 94.

⁵ Ibid, G2, Statement of Reasons for Decision under s 501CA of the Migration ACT 1958, 27 [86].

⁶ Ibid, G45, Notice of Visa Cancellation, 267.

⁷ Ibid, G22, Clinical Records, 152

marks. The offence is described as intensely choking a person without consent. There is a maximum term of imprisonment of five years for the offence. The jurisdictional limit of this Court is two years' imprisonment and the Court is required to consider alternatives to imprisonment, which is a sentence of last resort.

The Court takes into account the early plea of guilty; it does entitle the offender to an element of leniency from the Court.

The facts refer to the fact that the victim [Ms] Lu and the offender had been married for seven years and had a young child (Child A) together, aged 15 months at the time of the offence. They were living together at an address in Carlton and at about 10pm on [date] February 2020 they were in the front living room of the home, the child was also there at that time. There was a verbal argument, according to the facts, about the victim wanting a divorce and the victim was holding the child in her arms at the time.

The Court has been told, in the submissions to the Court, about what led to the incident which concerns the charge before the Court in relation to the victim leaving the home and the offender being concerned about the victim and the child. There is no doubt, from the written material before the Court, that the offender was concerned about the victim and the child.

Nevertheless, the argument that was occurring escalated whereby the offender grabbed the victim around her neck with both hands. The offender pushed the victim around her neck with both hands. The offender pushed the victim onto the lounge chair and squeezed the victim's neck. That caused the victim pain and prevented her from breathing. The victim suffered bruising and swelling, still holding the child, and a neighbour heard the argument and saw the victim run from the residence. The neighbour called police. The facts then go on to record what happened afterwards and conversations between the police and the victim where the police did observe marks and swelling to the victim's throat and neck.

The offences I have indicated is against s 1A of s 27 of the Crimes Act 1900 which provides that a person is guilty of an offence if the person intentionally chokes, suffocates or strangles another person without the other person's consent.

The full set of facts is part of the Court's file.

The Court takes into account the written submissions, which were amplified orally today before the Court by Ms Mo appearing for the offender. A number of matters are referred to.

One is the fact that the offender has no prior criminal history; the Court takes that into account. The offender has also apologised for his actions and promises not to reoffend. There are also persons who have written a reference for the offender; the Court takes that into account as well. Those references speak of the offender's good character and the fact that he is family orientated. Again, the Court would accept that that is so.

The offender also apologises to the victim, his wife, and there is a letter from the victim, which I must say is a very measured letter, setting out the fact that the offender has apologised to her through his lawyers and acknowledging that by the letter and the plea of guilty that the offender is remorseful, and accepting his apology, and I believe that he has learnt or will learn a lesson from what has happened. It refers also to the fact that the offender is the father of their very young son and would like the son to have continued support of his father. There is a request to exercise leniency for the offender and give him, to use the victim's words, an appropriate punishment that is not too harsh.

In relation to sentencing there are a number of provisions of the Crimes (Sentencing Procedure) Act that are relevant. They include s 3A of the Act which provides for the purposes of sentencing and ss 4A and 4B as this is a domestic violence offence. I have indicated s 5 of the Act essentially 40 provides that imprisonment is a sentence of last resort. The submissions conclude that the Court could exercise its discretion and not record a conviction by either dismissing the charge under s 10(1)(a) of the Sentencing Act or by not recording a conviction, but imposing a conditional release order.

The offence itself occurred in the family home where the victim was entitled to feel safe. There was a young child who was apparently present at the time.

The written submissions on behalf of the offender are very thorough, as were the oral submissions to the Court today. Ms Mo has covered everything that needed to be covered.

As I have said, I accept that this is out of character, but at the end of the day, the Court must impose a sentence which reflects the objective seriousness of the offence. In my view the Court should not deal with the matter pursuant to s 10, firstly, because the offence is too serious for that and would not reflect the objective seriousness of what is, on the facts before the Court, quite a serious example of this type of offence. General deterrence is also very important. As I have said, this is a domestic violence and,

sadly, domestic violence is all too prevalent and must be met by appropriate sentences in appropriate cases. This is a serious example of domestic violence, the Court finds.

The Court can deal with the matter by way of an alternative to imprisonment, but, as I have said, it is not appropriate to exercise the Court's discretion to not record a conviction.

FOR THOSE REASONS, YOU ARE CONVICTED OF THE OFFENCE. YOU ARE TO ENTER A COMMUNITY CORRECTION ORDER FOR A PERIOD OF 18 MONTHS. THAT ORDER IS TO BE SUPERVISED BY Community Corrections AT SUTHERLAND AND YOU ARE TO REPORT TO SUTHERLAND Community Corrections OFFICE WITHIN SEVEN DAYS, BY TELEPHONE INITIALLY.⁸

22. I note the Applicant's expression of remorse and his apology. This was considered and given weight by the sentencing magistrate. This is very similar to the Applicant's presently stated position. The fact that he continued to offend after this episode, raises the important issue of whether he is willing, or even able to control his behaviour. This is the central issue in this case.
23. In December 2021, there was another family violence incident. Documentation supporting an ADVO application states:

*"About 3pm on Friday [date] December 2021, the Defendant attended the PINOP's address at [address] after the PINOP dropped their child off to day-care. The Defendant had a heated conversation with the PINOP regarding the Defendant wanting to sell the PINOP's unit for money. The PINOP expressed that she did not want to sell her unit which made the Defendant angry, resulting in him yelling loudly at the PINOP. The PINOP became scared and feared for her safety, so she attempted to leave the unit. **The Defendant has then using both hands, pulled the PINOP from behind, by the neck area of her shirt effectively pulling her back into the unit and preventing her from leaving the unit.***

The Defendant has then gone into the kitchen area, opened a drawer and picked up a kitchen fork from the drawer. The Defendant has then, using his left hand, held the PINOP's head down with force onto the sofa cushion located in the living room, with

⁸ Ibid, G5, Attachment 3, 47-49.

the kitchen being located directly behind the living room. The Defendant has held the PINOP's held down with his left hand while holding the fork in his right hand and gesturing a stabbing motion towards the PINOP's head. The Accused did not say anything whilst doing this motion. This cause the PINOP to fear for her safety and so she did not move, resulting in her crying and begging the Defendant to stop, before agreeing to sell the unit and do whatever the Defendant asked. This incident occurred for about 5 minutes, before the Defendant let the PINOP go. The PINOP did not report the matter to Police at the time of the incident as the PINOP was afraid for her life after the actions of the Defendant.”⁹

24. In January 2022, there was another family violence incident. Documentation supporting an ADVO application states:

About 4pm on Friday [date] January 2022, the Defendant attended the PINOP's address to see their child. The Defendant began to yell at the PINOP as he found out that she had recently applied for a New Zealand passport for their child and the Defendant believed that the PINOP did this to try and leave the Country with their child. The PINOP was afraid due to the Defendant's behaviour and phone the agency to cancel the passport application immediately to avoid the Defendant's behaviour escalating.

A short time late the PINOP left her unit advising the defendant that she was taking their child to day-care, however she attended the Burwood Police Station with their child to make a Police report. The PINOP later provided Police was a Domestic Violence Evidence in Chief (DVEC) statement. During this statement she stated that the Defendant's behaviour made her feel “intimidated” and “afraid” and that she believed that “next time” the Defendant would “kill her” as he had said in the past, “if you go to the Police, I will kill you and commit suicide”. The PINOP also stated in her statement that she had been living at the Defendant's address [address] Five (5) days a week for their child and she was living at her Burwood address on Thursday and Fridays due to their child's day-care being in the same building. The PINOP stated to Police that she was afraid to go back home just in case the Defendant was still there.

About 7:30pm on Friday [date] January 2022, Police attended [address] with PINOP and child. Police activated their Body-Worn Video, and the PINOP began to open the door. The PINOP in fear, then immediately walked back pulling the child away with her as she heard

⁹ Ibid, G33, Apprehended Domestic Violence Order, 223-224.

the Defendant was inside. The Defendant then in an aggressive and angry manner, paced towards the front door where Police were standing and proceeded to swing open the door. When the Defendant realised Police were there he stood still. Police introduced themselves adhering to all Law Enforcement (Powers and Responsibilities) Act 2002 requirements and placed the Defendant under arrest for the offence of Breach of Apprehended Domestic Violence Order. The Defendant then tried to push past Police towards the PINOP and child, at which point the Police escorted him back inside the unit. Police cautioned the Defendant at which point he became argumentative and attempted to walk away from Police several times. Subsequently, the Defendant was placed in handcuffs to prevent him from escaping Police Custody and for the protection of Police due to his aggressive and argumentative behaviour.

A short time later, the Defendant was conveyed to Burwood Police Custody where his rights were explained to him under Part 9 of the Law Enforcement (Powers and Responsibilities) Act 2002 by the custody manager with use of a Mandarin interpreter.

The Defendant participated in an Electronically Recorded Interview with Suspect Person (ERISP) where Defendant denied all the allegation stating, "I can't remember", however stated that the PINOP has been staying at his address in Carlton but "staying in a different room with their child."

The Defendant is now charged to appear before the Court.

The PINOP holds fears for her safety as the Defendant's behaviour is makes her feel in fear for her life stating, "next time he will do the extreme and kill me". The PINOP also fears for her safety as the Defendant is controlling of her and uses their child as an excuse to control her life.

Police hold fears for PINOP's safety due to the apparent violent behaviour displayed by the Defendant not only during Police' interaction with the Defendant but due to the PINOP appearing to be terrified by the Defendant. Police fear that the Defendant's behaviour is progressively becoming worse and more physically violent and that he may suffer from underlying and undiagnosed mental health issues causing him to behave in an angry and hostile manner towards PINOP. Police believe the conditions of the AVO are necessary for the PINOP's protection and to restrict the Defendant's apparent escalating violent behaviour. Although there is a

current ADVO in place, a new order is sought for immediate victim protecting due to the increasing concerns for PINOP's safety.¹⁰

25. In January 2022 a provisional ADVO was issued by the Burwood Local Court.¹¹
26. In February 2022, the Applicant commenced counselling sessions with psychologist Mou In Li (Lois) for an adjustment disorder following upon his relationship conflicts.¹² He had a further appointment in February 2022.¹³
27. In February 2022 Ms Li recommended the following:

'Treatment Plan

- 1. He must attend counselling sessions for every 3-4 weeks in 6 months.*
- 2. He will learn anxiety and anger management skills through cognitive behaviour therapy, for example, identify triggers and calm down techniques.*
- 3. He will learn relaxation strategies to improve his mood in general.*
- 4. He will also explore and learn more appropriate strategies to deal with his relationship, parenting and family issues.*
- 5. He and his wife are recommended to attend couple counselling sessions to deal with their relationship, parenting and family issues together.*
- 6. His progress will be reassessed after 6 months.*

Availability of Treatment

I would be able and willing to treat and carry out this plan.

Expected Outcome of Treatment

- 1. He will be more aware of the triggers of his anxiety and anger issues.*
- 2. The frequency of his anger outburst will be reduced.*
- 3. He will cope with his emotions more appropriately.*
- 4. He will deal with his relationship and family issues more effectively.¹⁴*

¹⁰ Ibid, G33, Apprehended Domestic Violence Order, 224-225.

¹¹ Ibid, G32, Apprehended Domestic Violence Order, 218.

¹² Ibid, G21, LL Counselling Letter of Moun In Li (Lois), 114-115.

¹³ Ibid, G21, LL Counselling Letter of Moun In Li (Lois), 114.

¹⁴ Ibid, G21, LL Counselling Letter of Moun In Li (Lois), 114-115.

28. On 28 April 2022, the Applicant entered a plea of guilty in relation to various offences arising from his conduct in December 2021, January 2022, and between March and April 2022, including common assault, stalk intimidate and a breach of an AVO. The Decision of Magistrate Miller contains the following passages:

...HIS HONOUR: The defendant pleads guilty to two sets of charges. Firstly, a charge of common assault, on 3 December last year, and charges of intimidation, breach of AVO, and arm with intent from the same day.

PROSECUTOR: Sorry, your Honour. I believe the armed with intent was withdrawn on the last occasion.

HIS HONOUR: All right, thank you. Sorry, so common assault, stalk intimidate, and breach of AVO. The defendant also pleads guilty to four counts of breaching an apprehended domestic violence order between [date] March and [date] April this year. The maximum penalty for common assault is two years' imprisonment. Maximum penalty for intimidation is five years' imprisonment, and the maximum penalty for breach of AVO is two years' imprisonment. The facts have been tendered in relation to each matter. Firstly, in relation to the 3 December last year there was an apprehended violence order in place for the protection of the victim. There was an argument on that day about the complainant refusing to sell the unit that she was residing in. The defendant became angry, yelling at the complainant. She became scared and attempted to leave...

...HIS HONOUR: The complainant became scared and attempted to leave. The defendant has then used both hands to pull the complainant from behind by the neck area of her shirt, pulling her back into the 5 unit to prevent her from leaving. He has then gone to the kitchen and from the drawer picked up a fork. He has used his left hand to hold the complainant's head down with force onto the sofa cushion. The defendant has held the complainant's head down with his left hand while holding the fork with his right hand. This caused the complainant to fear for her safety, she began to cry and begged the accused to stop, before she agreed to sell the unit or do whatever the accused asked. When she agreed to do what the accused asked, the accused let her go--...

...HIS HONOUR: About 4pm on [date] January this year the victim left her address to see their child. The accused attended at their address and began to yell at the complainant as he had found out that she had applied for a passport for the child...

...HIS HONOUR: She had applied for a passport for the child. She went to the police and made a report saying that she was scared the accused will kill her as he had previously said to her, "If you go to the police I will kill you and commit suicide."

On [date] January the police attended at the complainant's unit. The complainant began to open the door. At this time the accused moved towards the door in an aggressive and angry manner, until he realised the police were in the doorway. He tried to push past the police to get to the victim. He was restrained and arrested and taken back to the police station. He was given bail, and on 19 March this year he approached the complainant and their three-year-old son in Burwood Plaza, attempting to speak to the complainant and his child. He was told by the complainant that she did not want to speak to him...

...HIS HONOUR: Sorry. He was told by the complainant that she did not want to speak to him, and he followed - continued to follow her and the group until they reached the restaurant. After they were in the restaurant he left. About 6pm on [date] March the victim attended the child care centre to pick up the child.

The victim collected the child from inside. When she exited she saw the defendant standing just outside the exit of the premises. The victim asked another child's mother if they could go downstairs and play so that they could get away from the accused. The accused followed them downstairs. He approached the victim, asking to come to her apartment. The victim said that he could not, that he was not supposed to speak to her and by speaking to her was breaching his apprehended violence order. She reminded him that if he wanted to speak to her it had to be through her lawyer. The defendant watched the victim walk with the child back to her apartment.

On [date] March, the defendant sent a message to the victim saying, "I will go to your area every day if you want to go to court. If you want to go to court, let's go. I am not scared." About an hour later he sent a further message to her. "I know your ex-boyfriend, I don't care about the things with your ex-boyfriend. I still married you, so why do you treat me like this?" The complainant went to the police station on 28 March to report the contact.

On [date] April, when the victim was walking with her son on Burwood Road, she noticed the accused was following her. He then approached her. She told him to leave and reminded him of the conditions of the apprehended violence order. He (as said) mentioned to the accused that he was breaching the conditions and that he could not contact her except through her lawyer. The defendant said, "I don't have money to go through the

lawyer. I am not breaching the conditions." This made the victim scared that the defendant would not comply with the court order. She then reported the matter to the police.

In terms of assessing the objective seriousness, the offences that occurred on [date]December happened in the home of the victim. That is a significant aggravating feature. Further, the assault that occurred involved the use of a weapon, and was in breach of an apprehended domestic violence order. Section 14 of the Crimes (Domestic and Personal Violence) Act says that where there is a breach of an apprehended violence order by violence the Court must impose a sentence of imprisonment unless there is good reason not to. The assault involved physical grabbing, pushing, and the holding down of the victim whilst holding a weapon.

The assault was motivated by the defendant's desire to make the victim sell her property. It is a serious example of that type of conduct, as was the intimidation. In terms of the second set of matters and the four breaches of apprehended domestic violence order, they demonstrate a consistent pattern of the defendant ignoring an order of this Court. An order that was put in place to protect the complainant from this defendant.

In those circumstances they are again, reasonably serious examples of that type of conduct. These offences are not committed in a vacuum. The couple had been in a relationship for seven years and married for three years. There was clearly a financial dispute between the couple and it has been submitted that that was, to an extent, a driving force for the offending conduct, as was the defendant's wanting to see his child.

The defendant has a history, though, of this type of conduct. He has previously been convicted of intentionally choking this victim in March of 2020. Clearly, the sentence imposed for that matter did not adequately deter him from this act of violence. The second set of matters were committed whilst on bail for the first set. That is a significant 10 aggravating factor in these circumstances.

*I accept that the defendant does not have English as a first language, but his comments to the Community Corrections officer are of significant concern. **The officer reports that the defendant did not comprehend the seriousness of his actions in terms of the assault, had minimal insight into his offending behaviour, blamed the victim, and tried to justify his behaviour. Those comments indicate that there is a strong need for specific deterrence for this offender. Clearly, the defendant is not a person of good character. His prospects of rehabilitation must be guarded based on his***

blatant disregard for the apprehended violence order and the bail conditions that were imposed.

The defendant has entered a plea of guilty, he is entitled to a 25% discount on the sentence I would otherwise impose. There is obviously a need for punishment but there is a very strong need for both general and specific deterrence. It was conceded that the section 5 threshold was crossed, but in my view there is no sentence that would adequately reflect the criminality other than a sentence of full-time imprisonment, particularly the need for general and specific deterrence.

*In those circumstances I am going to impose an aggregate sentence. The indicative sentences will be for the assault, six months; intimidation, four months; the breach of apprehended domestic violence order, six months. In relation to the second set of charges for sequences 1 and 2, the breaches of apprehended domestic violence order, three months each; for sequence 3, two months; and for sequence 4, one month.*¹⁵

29. A speech pathology report from May 2022, indicates that Child A has some problems with speech.¹⁶
30. In July 2022, Judge Williams SC of the District Court of NSW Criminal Division, upheld an appeal against sentence by the Applicant. He said:

*“HIS HONOUR: I propose to deal with the matter in the way suggested by Mr Park on the basis that **the aggregate term of imprisonment of ten months should be served by way of Intensive Corrections Order.** When one considers the purposes of sentencing and the requirements of s 66 of the Crimes (Sentencing Procedure) Act 1999, there is no evidence of danger to the community at present. He has been assessed as being at a low risk of reoffending and the subjective case put forward supports the proposition that **an Intensive Corrections Order is the appropriate way in which to serve the term of imprisonment that I have indicated.***

The orders that I will make are:

- 1) *The appeal is upheld.*

¹⁵ Ibid, G4, Decision of Magistrate Miller, 39-46.

¹⁶ Ibid, G32, Letter of GoTone Speech Pathology, 217.

2) *The convictions are confirmed.*

3) *The aggregate term of imprisonment of 12 months, with a non-parole period of six months is set aside.*

4) *The indicative sentences for each offence are confirmed.*

5) *I impose an aggregate term of imprisonment of ten months.*

6) *Pursuant to section 7(1) of the Crimes (Sentencing Procedure) Act 1999, the court directs the sentence to be served by way of an Intensive Corrections Order commencing today.*¹⁷

31. In October 2022 the Applicant and his wife divorced.¹⁸ He told the Tribunal that his property disputes with his former wife were resolved by way of consent orders at this time.

32. In December 2022, the Applicant was released from immigration detention consequent upon the decision in *Pearson v Minister for Home Affairs*.¹⁹

33. In March 2023, the following Orders were made by consent in the Family Court of Australia:

'BY CONSENT AND PENDING FURTHER ORDER:

1. *The child, [Child A], shall live with the mother.*

2. *That [Child A] spend time with the father on each Tuesday between 4:30pm and 6:30pm under indirect supervision by the mother at the [address].*

3. *That the father is hereby restrained from removing the child from the [address].*

4. *That the father is hereby restrained from approaching the mother at the [address].*

¹⁷ Ibid, G7, Decision of Justice Williams, 52.

¹⁸ Exhibit 7, Statement of Yang Li, 5 [24].

¹⁹ [2022] FCAFC 203.

5. The father shall communicate with [Child A] via telephone or electronically two times a week for up to 30 minutes per session at such times as may be agreed between the parties and failing agreement from 7pm to 7.30pm on Thursdays and Sundays.

6. That the parents shall communicate only about the parenting arrangements outlined in these Orders via text message and both parents shall provide to each other their current mobile telephone number for this purpose within 48 hours of the date of these Orders.

THE COURT NOTES THAT:

A. There is a current ADVO for the protection of the mother issued on [date] March 2022 for a period of two years, which includes a non-contact order, restraining the father from approaching or contacting the mother other than, relevantly, “as ordered by [the Local Court of NSW] or another court about contact with child/ren”, or “as agreed in writing between you and the parent(s) about contact with child/ren”.

B. The mother and father have previously agreed in writing through the mother’s legal representatives on similar terms as Order 2 herein.

C. That for the purpose of Order 5 herein, the parents acknowledge that due to [Child A] age, he may not engage with the father for the full 30 minutes of telephone or electronic communication.²⁰

34. In March 2023, the Applicant was returned to immigration detention consequent upon the passage of the *Migration Amendment (Aggregated Sentences) Act 2023* (Cth).

35. In August 2023, the Applicant prepared a statement regarding his circumstances and intentions if released into the community. This states:

‘Immigration Detention

3. I was placed in immigration detention for a total of about 5.5 months in 2022. I was subsequently released on [date] December 2022. On [date] March 2023, I was returned to the Villawood Immigration Detention Centre (VIDC). I was later transferred to the YHDC.

²⁰ Exhibit 4, G-Documents, G34, Order of Family Court of Australia, 227-228.

4. *When I was in the Australian community between December 2022 and March 2023, I had no adverse issues. This provides some evidence that I am not an unacceptable risk to the Australian community.*

5. *Being in immigration detention has been a deeply distressing and isolating experience. I have found myself separated from my family and loved ones, with no knowledge of when or if I would ever be released. The uncertainty surrounding my future is a constant source of anxiety and despair.*

6. *One of the most difficult aspects of detention is the feeling of being stripped of my dignity and humanity. The conditions in detention facilities are often overcrowded and unsanitary, making it incredibly challenging to maintain even a semblance of normalcy. The lack of privacy, limited access to basic amenities, and strict routines contribute to a sense of powerlessness and dehumanisation.*

7. *Perhaps the most painful part of my journey through immigration detention is the separation from my family. Being unable to see my son for an extended period is heartbreaking. Every day apart from him is a reminder of the profound loss and longing that detention has brought into my life.*

8. *Additionally, the legal processes and the wait for decisions on my immigration status has been agonisingly slow and convoluted. It has felt like my life is on hold, and the uncertainty has taken a toll on my mental health. I have witnessed the suffering of many detainees who, like me, are grappling with anxiety, depression, and hopelessness.*

9. *My time in immigration detention in Australia has been a profoundly difficult journey filled with uncertainty, isolation, and emotional turmoil.*

10. *During my time in immigration detention, no charges have been filed against me. I have kept my head down and avoided all forms of trouble.*

Prison

11. *I spent 2.5 months in prison with no reported issues. Being in prison was an incredibly trying and isolating ordeal. From the moment I entered the facility, I was confronted with a stark and harsh reality. The loss of freedom, the separation from my loved ones, and the confined living conditions were immediate and constant reminders of the gravity of my situation.*

12. One of the most difficult aspects of prison life was the profound sense of isolation. The separation from family and friends, the inability to freely interact with others, and the restrictive daily routines were all sources of loneliness and despair. It was agonising to know that life was continuing outside those prison walls while I remained confined.

13. The physical conditions within the prison were far from ideal. Limited personal space and the constant presence of correctional officers were aspects of daily life that took a toll on my mental and emotional well-being. The lack of privacy and the feeling of constantly being watched were particularly challenging to endure.

14. Moreover, the loss of autonomy over one's life is a profound hardship. Every decision, from daily routines to basic choices, was subject to the rules and regulations of the prison system. This loss of control over my own life was deeply disempowering and frustrating.

15. The separation from my son was one of the most painful aspects of my time in prison. Not being able to see my son was heartbreaking. The guilt and sorrow I felt for the burden my incarceration placed on him was overwhelming.

Risk of Reoffending

16. I would like to share my personal journey of rehabilitation following my experience of spending 2.5 months in prison. I want to express my sincere commitment to positive change and my remorse for my prior criminal offending in Australia.

17. Before this experience, I had never been to prison. The shock of incarceration was profound, and it made me reflect deeply on the choices I had made in my life. It was a wakeup call, and I realised the need to address the issues that had led me down the wrong path.

18. During my time in immigration detention, I decided to take proactive steps towards my rehabilitation. One of the most important decisions I made was to participate in an anger management program offered within the facility. This program has provided me with valuable insights into managing my emotions and responding to stressors in healthier ways. It is a transformative experience, and I am learning valuable techniques for self-control and conflict resolution.

19. *I am committed to continuing my anger management program if released from immigration detention. It has been a pivotal part of my rehabilitation journey, and I believe it will help me build a more positive and peaceful future.*

20. *Most importantly, I want to express my genuine remorse for my prior criminal offending in Australia. I deeply regret the actions that led to my incarceration and the harm they may have caused to others. I understand the consequences of my choices and the impact they have had on my own life and the lives of those around me.*

21. *My time in prison has given me the opportunity to reflect on the importance of accountability and personal growth. I am determined to make amends for my past mistakes and to become a responsible and contributing member of society. I have set clear goals for myself, including finding employment and becoming a positive role model for my community.*

22. *I want to emphasise my sincere commitment to rehabilitation and my eagerness to make positive changes in my life. My experience in prison has been a catalyst for self-improvement, and I am dedicated to a path of responsible and law-abiding living. I hope that my story can serve as an example of how individuals can transform their lives through rehabilitation and a genuine desire for change.*

Personal Circumstances

23. *Between December 2022 and continuing through March 2023, I resided in Carlton, Sydney. I lived alone in my 5-bedroom property, which I have owned since 2012. If I am returned to the Australian community, I will return to reside at my Carlton property.*

24. *I am divorced from Ms. Liu, with the court issuing a divorce order in or about October 2022.*

25. *My son, [Child A], was born on [date month] 2017, and he currently resides with Ms. Liu in Sydney.*

26. *I maintain contact with [Child A] through video chats, approximately two times per week, using WeChat. We have a close relationship, and I inquire about his well-being and educational progress. [Child A] is currently enrolled in childcare, recently turning five years old, and experiencing some language development issues.*

27. *My mother still resides in China, and I maintain contact with her.*

28. *I originally came to Australia in 2007, holding a New Zealand Passport.*

29. *I am a citizen of New Zealand. It is important to note that the Republic of China does not allow dual citizenship.*

30. *I held a Special Category visa (subclass 444) and was required to work in Australia for four years, ultimately aiming to obtain a Subclass 189 Skilled-Independent visa for my wife and son.*

31. *My property at [address], was entirely settled with my ex-wife. I continue to own this place of residence.*

32. *I am currently single.*

33. *An Apprehended Domestic Violence Order (ADVO) against me will expire in or about April 2024. This ADVO will also act as a deterrent against me committing further criminal offending in Australia.*

34. *I have been the owner of my own company, Partsmart Australia Pty Ltd, for about 16 years. My business involves selling laser printers and spare parts, with numerous customers in Australia. I conducted my business from my residence, utilising my garage space.*

35. *Partsmart Australia Pty Ltd is not currently operational and has been deregistered.*

36. *I currently have pending proceedings before the Federal Circuit and Family Court of Australia (the Court). A final hearing will be held in September 2023, where I am seeking custody of [Child A] to be shared equally with his mother, despite her initial request for sole custody.*

37. *I have been actively involved in my son's life through regular video chats during my time in immigration detention.*

38. *I have seen a psychologist. I had a session with a psychologist in January of this year before being brought back to detention.*

39. I have no family in New Zealand. Since 2008, I have not lived in New Zealand.

40. I have not returned to New Zealand since 2012 when I moved to Australia.

41. I pursued a degree in computer science in New Zealand, subsequently transferring to Australia.

42. If returned to the Australian community, I will continue with my rehabilitation, bring Partsmart Australia Pty Ltd back to life, return to my family home, spend quality time with [Child A] and comply with Australian laws.²¹

36. The Applicant has been self-employed in his own business since living in Australia.

37. His taxation records show that:²²

End of tax Period	Applicant's Taxable Income	Tax on Taxable or Net Income	Assessed Tax Payable	Less non-refundable tax offsets	Other Liabilities	Outcome of Notice
30 June 2013	79,515	17,389.37	17,389.37	-	-	17,389.35
30 June 2014	89,937	21,223.69	21,223.69	-	-	21,223.65
30 June 2015	88,879	20,832.23	20,832.23	-	Medicare Levy 1480.50	22,312.70
30 June 2016	82,944	18,636.28	18,636.28	-	Medicare Levy 1,658.88	20,295.15

²¹ Exhibit 7, Statement of Yang Li, 1-7.

²² Exhibit 6, Bundle of Documents, Tender Bundle 2, Tax Records, 1-18

30 June 2017	56,173	9,803.22	9,645.81	<i>Low Income offset calculated by ATO</i> 157.41	<i>Medicare Levy</i> 1,123,046	10,769.25
30 June 2018	44,681	6,068	5,738.53	<i>Low Income offset calculated by ATO</i> 329.79	<i>Medicare Levy</i> 893.62	3,407.15
30 June 2019	31,109	2,490.71	1,790.71	<i>Low Income offset calculated by ATO</i> 445.00 <i>Low- and middle-income tax offset</i> 255.00	<i>Medicare Levy</i> 626.18	2,416.85
30 June 2020	43,351	5,636.07	4,555.01	<i>Low Income offset calculated by ATO</i> 349.47 <i>Low- and middle-income tax offset</i>	<i>Medicare Levy</i> 867.02	5,422.00

				731.32		
--	--	--	--	--------	--	--

38. The Applicant denied ever using drugs. He first tried alcohol at age 14 or 15 years and did not drink much as a teenager. He doesn't like the taste of alcohol and says he drinks less than once per year.²³ There is no suggestion of any substance or alcohol abuse in his history, or his past offending.
39. The Applicant's clinical records show that he has a depressed mood and indicate he has symptoms of depression. He has undergone counselling for adjustment disorder which stems from his family conflicts. These include financial stressors and separation from his son.
40. The Applicant has an elderly, infirm mother, who is his only close connection in China. His former wife and his son, Child A, reside in Australia.
41. If the Applicant were to be released into the community, he would return to live in his home and attempt to restart his business. He would also attempt to obtain greater access to his son, Child A.
42. The Applicant's understandable wish to continue to actively engage with Child A, necessarily means that he will interact with Ms Liu, albeit, through their respective legal representatives. Given that Child A is only 6 years old, this potentially means another 12 years of managing a difficult relationship with Ms Liu. This factor above all others, looks to be a potential catalyst for future offending.
43. The Applicant 's record of convictions is annexed hereto and marked "B".

LEGISLATIVE FRAMEWORK

Does the Applicant Pass the Character Test?

²³ Exhibit 4, G-Documents, G22, Clinical Records, 144.

44. The Tribunal finds that the Applicant has a “*substantial criminal record*” and, therefore, he does not pass the character test. This is not disputed by the Applicant. The Tribunal must consider whether “there is another reason why the original decision should be revoked”.

Is there another reason why the original decision should be revoked under section 501CA(4) ?

45. In considering whether to exercise this discretion, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (“the Direction”) has application.²⁴

46. For the purposes of deciding whether to refuse or cancel a non-citizen’s visa or whether or not to revoke the mandatory cancellation of a non-citizen’s visa, paragraph 5.2 of the Direction contains several principles that must inform a decision maker’s application of the considerations identified in Part 2 where relevant to the decision.

47. The principles that are found in paragraph 5.2 of the Direction may be briefly stated as follows:

(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*

²⁴ On 15 April 2021, the former applicable direction, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 90, this in turn was replaced by Direction 99 on 3 March 2023.

Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

- (4) *Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time.*
- (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 measurable risk of causing physical harm to the Australian community.*

48. Paragraph 6 of the Direction provides that:

Informed by the principles in paragraph 5.2, a decision maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.

49. Paragraph 8 of the Direction sets out five Primary Considerations that the Tribunal must take into account and they are:

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

- (2) whether the conduct engaged in constituted family violence;
- (3) the strength, nature and duration of ties to Australia;
- (4) the best interests of minor children in Australia; and
- (5) expectations of the Australian community.

50. Paragraph 9 of the Direction sets out five Other Considerations which must be taken into account. These considerations are:

- a) Legal consequence of the decision;
- b) extent of impediments if removed;
- c) impact on victims; and
- d) impact on Australian business interests.

51. I note the importance of the Other Considerations being “*other*” considerations, as opposed to “*secondary*” considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*:²⁵

“...Direction 65 [now Direction 99] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the

²⁵ [2018] FCA 594.

consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.”²⁶

OFFENDING HISTORY

52. The Applicant’s criminal record as produced by the Australian Criminal Intelligence Commission is outlined at Annexure B.
53. The Applicant’s offending history is discussed in detail above.

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

54. In considering this Primary Consideration 1, paragraph 8.1 of the Direction requires decision-makers to keep in mind the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that this country confers on non-citizens in the expectation that they are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.
55. In determining the weight applicable to Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to give consideration 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

56. When assessing the nature and seriousness of a non-citizen’s criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction specifies that decision-makers must have regard to a number of factors. I will now turn to addressing these considerations.

²⁶ Ibid, [23].

57. **Sub-paragraph (a)** of paragraph 8.1.1(1) of the Direction provides that without limiting the range of conduct that may be considered very serious, violent and/or sexual crimes; crimes of a violent nature against women or children (regardless of the sentence imposed); or acts of family violence (regardless of whether there is a conviction for an offence or a sentence imposed) are viewed very seriously by the Australian Government and the Australian community.
58. The Applicant's offending is very serious. There have been several incidents. His initial offending was treated leniently. Rather than seeing this as an opportunity to change his conduct, the Applicant continued to engage in family violence. His breach of Court Orders adds to the serious nature of his offending.
59. **Sub-paragraph (b)** of paragraph 8.1.1(1) of the Direction provides that without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:
- (i) *causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;*
 - (ii) *crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;*
 - (iii) *any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));*
 - (iv) *where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, , or an offence against section 197A of the Act, which prohibits escape from immigration detention.*
60. The Applicant's conduct forms the basis for a finding that he does not pass an aspect of the character test.

61. **Sub-paragraph (c)** of paragraph 8.1.1(1) of the Direction requires a decision-maker (with the exception of the crimes or conduct mentioned in sub-paragraphs (a)(ii), (a)(iii) or (b)(i) of paragraph 8.1.1(1)) to have regard to the sentence(s) imposed by the Courts for a crime or crimes of a non-citizen/applicant. The imposition of a custodial term is regarded as the last resort in any reasonably and correctly applied sentencing process. Custodial terms are viewed as a reflection of the objective seriousness of an applicant's offending.
62. The Applicant was sentenced to a custodial term. This was however, reduced on appeal to a lesser period on an Intensive Community Corrections Order. The sentence nevertheless reflects the serious nature of his repeated offending.
63. **Sub-paragraph (d)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard to the frequency of a non-citizen's offending and whether there is any trend of increasing seriousness.
64. There was a pattern of escalating offending, including breaching an AVO. This is very concerning.
65. **Sub-paragraph (e)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard to the cumulative effect of an Applicant's repeated offending.
66. The cumulative effect on Ms Liu has been significant. She has expressed fear for her safety. Child A has also been exposed to family violence.
67. **Sub-paragraph (f)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard to whether a non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending.
68. There is no evidence of this.
69. **Sub-paragraph (g)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard to whether the non-citizen has re-offended since being formally warned about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).

70. This is not relevant in this case.

71. **Sub-paragraph (h)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard, where the offence or conduct was committed in another country, to whether that offence or conduct is classified as an offence in Australia.

72. This is not relevant in this case.

73. I do not consider factors (f), (g) and (h) of paragraph 8.1.1(1) of the Direction apply to the Applicant's offending or circumstances. The rest of the relevant sub-paragraphs of paragraph 8.1.1(1) of the Direction, in their totality, weigh against revocation of the cancellation of the Applicant's visa .

The Risk to the Australian Community Should the Applicant Commit Further Offences or Engage in Other Serious Conduct

74. Paragraph 8.1.2(1) provides that in considering the need to protect Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

75. Paragraph 8.1.2(2) provides that in assessing the risk that may be posted by the non-citizen to the Australian community, decision-makers must have regard to, 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;

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

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

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

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

76. Nature of harm should the Applicant engage in further criminal or other serious conduct

77. Assessing the nature of the harm to individuals or the Australian community that may occur if the Applicant were to engage in further criminal or other serious conduct, is informed by the nature of his offending to date, including any escalation in his offending. This assessment also notes that the Direction provides that the Australian community's tolerance for harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, is so serious that any risk that it may be repeated may be unacceptable. (Paragraph 8.1.2(1))

78. The evidence suggests that the Applicant is not a danger to the community generally, but he has repeatedly offended against Ms Liu. The risk of any further offending against her is the issue here. The harm that may occur if the Applicant were to reoffend against her, is very serious.

Likelihood of engaging in further criminal or other serious conduct

79. A consideration of the Applicant's past behaviour is a good place to start with an assessment of risk of reoffending. Unlike many offenders, the Applicant does not have a broad or lengthy criminal history. Until he was aged in his mid-40's, he was a very enterprising, law-abiding individual, running a successful business. He has his own home and is financially secure. If he returns to the community, he can restart his business and live comfortably. He does not have a history of substance abuse. His conduct, although serious, has occurred exclusively in the very particular context of the breakdown of his marriage. That is now some years in the past. A matrimonial property settlement has now resolved previously contentious financial issues. This does not excuse his behaviour, but it does place it in context.

80. The Applicant entered pleas of guilty to the charges brought against him. This is consistent with acceptance of responsibility.

81. The Applicant has now had the sobering experience of imprisonment and the visa cancellation process. He has engaged with appropriate professional help and has completed courses to assist him in dealing with anger management. Whether this has achieved the desired purpose, remains unknown. All we have to go on, is the Applicant's largely untested assurance.
82. There is a strong connection between the Applicant and Child A. The Applicant now understands the severe damage to that relationship which would flow from him reoffending. Aside from his aging mother in China, Child A is his only close relative. He is highly motivated to be around for Child A and to ensure his emotional and material security. This relationship with Child A however, is also a potential flash-point. He will need to interact with s Ms Liu in a constructive way, for over a decade to come, concerning Child A.
83. The Applicant now seems to comprehend that he has a lot to lose, if he reoffends. He is still the subject of an ADVO until March 2024, as well as detailed Family Court Orders. When viewed as a whole, the risk of the Applicant reoffending, may be assessed as low.

Conclusion: Primary Consideration 1

84. Primary consideration number one weighs moderately against revocation of the Applicant's visa cancellation.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

85. Paragraph 8.2 of the Direction provides:
- (1) *The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).*
 - (2) *This consideration is relevant in circumstances where:*
 - a) *a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or*
 - b) *there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of*

family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.

- (3) *In considering the seriousness of the family violence engaged in by the non-citizen, the following factors must be considered where relevant:*
- a) *the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;*
 - b) *the cumulative effect of repeated acts of family violence;*
 - c) *rehabilitation achieved at time of decision since the person's last known act of family violence, including:*
 - i. *the extent to which the person accepts responsibility for their family violence related conduct;*
 - ii. *the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);*
 - iii. *efforts to address factors which contributed to their conduct; and*
 - d) *Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status, should the non-citizen engage in further acts of family violence.*

86. This has been discussed in detail above. The Applicant's conduct, particularly in breaching AVO's is very serious.

Conclusion: Primary Consideration 2

87. This consideration weighs against revocation of the cancellation of the Applicant's visa.

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

88. Paragraph 8.3 of the Direction provides:

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

(2) In considering a non-citizen's ties to Australia, decision-makers should give more weight to a non-citizen's ties to his or her child and/or children who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

(3) The strength, duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

(4) Decision-makers must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:

a) the length of time the non-citizen has resided in the Australian community, noting that:

i. considerable weight should be given to the fact that a noncitizen has been ordinarily resident in Australia during and since their formative years, regardless of when their offending commenced and the level of that offending; and

ii. more weight should be given to the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and

iii. less weight should be given to the length of time spent in the Australian community where the non-citizen was not ordinarily resident in Australia during their formative years and the noncitizen began offending soon after arriving in Australia.

89. The Applicant's son, Child A and his former wife, live in Australia. Child A is a citizen of New Zealand and the Applicant's former wife is a citizen of China.²⁷ They are both entitled

²⁷ Exhibit 4, G-Documents, G15, Submission from Grace Guo (migration agent), 94; Exhibit 4, G-Documents, G2, Statement of Reasons for Decision under s 501CA of the Migration ACT 1958, 27 [86].

to be and to remain in Australia. These two relationships are interrelated and absolutely crucial to him. One does not exist without the other. He must maintain a civil relationship with Ms Liu, to manage and sustain his relationship with Child A.

90. His only other close relative is his elderly and infirm mother in China.
91. The Applicant came to Australia as a 33-year-old man. He has resided in Australia since 2007. The evidence suggests that he has contributed in a positive way to our community since then.

Conclusion: Primary Consideration 3

92. This consideration weighs in favour of revocation of the cancellation of the Applicant's visa.

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

93. Paragraph 8.4(1) of the Direction requires a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is in the best interests of a child affected by the decision.
94. Paragraphs 8.4(2) and 8.4(3) respectively contain further considerations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ
95. The Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia. Those include, relevantly:
- the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);

- the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;
 - the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;
 - the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;
 - whether there are other persons who already fulfil a parental role in relation to the child;
 - any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);
 - evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;
 - evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.
96. The Applicant is very close to his only child, Child A. Child A is 6 years old. He is a New Zealand citizen, but he has a right to remain indefinitely in Australia.
97. The Applicant has no siblings or other blood relatives other than his aged and infirm mother in China.
98. Child A has some developmental issues. He needs parental support, both financial and emotional.
99. He lives with his mother, since the separation of his parents. The Applicant has had electronic contact with Child A since his imprisonment. The Applicant wants to seek Family Court Orders granting him greater access to Child A if he remains here. The Applicant is highly motivated to support and assist his only child.
100. It is strongly in Child A's interests that the Applicant be returned to the community.
101. Having regard to all of the above, primary consideration 3 weighs strongly in favour of revocation of the Applicant's visa cancellation.

PRIMARY CONSIDERATION 5 – THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

102. In making the assessment for weight to be allocated to Primary Consideration 5, paragraph 8.5(1) of the Direction provides that the Australian community expects non-citizens to obey Australian laws while in Australia. I should consider whether the Applicant has breached, or whether there is an unacceptable risk that he would breach, this expectation by engaging in serious conduct.
103. Paragraph 8.5(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:
- a) *acts of family violence; or*
 - b) *causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
 - c) *commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;*
 - d) *commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or*
 - e) *involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or;*
 - f) *worker exploitation.*
104. Paragraph 8.5(3) of the Direction provides that the above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

105. Paragraph 8.5(4) of the Direction provides guidance on how the expectations of the Australian community are to be determined. This paragraph states:

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

106. Paragraph 8.5(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 ("FYBR") which affirmed the approach established in previous authorities that 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. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.²⁸

107. Paragraph 8.5 contains a statement of the Government's views as to the expectations of the Australian community, which operates to ascribe to the whole of the Australian community an expectation aligning with that of the executive government which the decision maker must have regard to.

Analysis – Allocation of Weight to Primary Consideration 5

108. Accordingly, in assessing the weight attributable to Primary Consideration 5, it is necessary to have regard to the following matters:

- (a) the Applicant's criminal record as set out in Annexure B.
- (b) The other matters set out above

Conclusion: Primary Consideration 5

109. Primary consideration 5 weighs moderately against revocation of the cancellation of the Applicant's visa.

²⁸ See *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; *Afu v Minister for Home Affairs* [2018] FCA 1311; *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 and *FYBR v Minister for Home Affairs* [2019] FCA 500.

OTHER CONSIDERATIONS

110. It is necessary to look at the Other Considerations listed at paragraph 9 of the Direction.

111. **(a) Legal consequence of the decision;**

112. This other consideration does not arise.

113. This consideration is neutral.

(b) Extent of impediments if removed

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

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

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

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

115. If the Applicant were to be returned to New Zealand, he would not be readily able to re-establish himself there. Aside from his citizenship, the Applicant has little connection with New Zealand. He would have to start from scratch with no assets and no existing business. He would however manage in time, as he has done once before.

116. English is his second language, and he is not a confident English speaker. The Culture of New Zealand is, having regard to the time he spent there, probably less familiar to him than that in Australia.

117. The social supports available to him in New Zealand are comparable to those available in Australia, although he may have better access in some respects there as a citizen, than he would have as a visa-holder here.

118. This consideration weighs moderately in favour of revocation.

(C) Impact on victims

119. There is no evidence relevant to this Other Consideration.

120. This Other Consideration (c) is neutral.

(c) Impact on Australian business interests

121. There is no evidence relevant to this Other Consideration.

122. This Other Consideration (d) is neutral

Findings: Other Considerations

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

- (a) Legal consequence of decision under s501 or s501CA: neutral.
- (b) extent of impediments if removed: weighs moderately in favour of revocation
- (c) impact on victims: neutral.
- (d) the impact on Australian business interests: neutral

CONCLUSION

124. It is necessary to weigh up all of the primary and other considerations.

125. In this case there is a tension between the risk of further harm, particularly to Ms Liu, (and incidentally perhaps Child A) on one hand, and the Applicant's otherwise good record as a father and community member on the other. A great deal swings on the sincerity of the Applicant's assurances that he is rehabilitated, and his claimed capacity to control his emotional stability. The Tribunal has been assured that he has engaged constructively rehabilitation services, and that he will continue to seek appropriate support in the community, if he is released.

126. His record of ignoring AVO's in the past is a major concern. The necessity of having ongoing interactions with his former wife in the context of managing his relationship with Child A, is also a major concern. The paradox is that the greatest incentive for him to behave, may also present the greatest stressors and opportunities, to do exactly the opposite.
127. I am persuaded that on balance, that the Applicant is an intelligent man and his desire to maintain a strong relationship with Child A is a sufficiently powerful incentive for him not to reoffend.
128. If he were to reoffend, he should be under no illusion, that he can expect another chance.
129. In my view, the proper application of the Direction favours the Tribunal exercising the discretion to revoke the cancellation of the Applicant's Visa. I find that there is "another reason" pursuant to s501CA (4)(b)(ii) to revoke the original decision.

DECISION

130. The decision under review is set aside.

I certify that the preceding one hundred and thirty (130) paragraphs are a true copy of the reasons for the decision herein of Senior Hon Member J Rau SC.

.....[Sgnd].....

Legal Associate

Dated: 18 October 2023

Date of hearing: **9 October 2023**

Advocate for the Applicant: **Jason Donnelly
Latham Chambers**

**Jack Li
Floraison Legal**

Advocate for the Respondent: **Naoimh Donaghy
HWL Ebsworth Lawyers**

Annexure A – List of Exhibits

Exhibit no.	Lodged by	Document
1	Respondent	Statement of Facts, Issues and Contentions
2	Applicant	Statement of Facts, Issues and Contentions
3	Respondent	Supplementary G-Documents
4	Respondent	Supplementary G-Documents
5	Applicant	<u>Bundle of Documents:</u> 1. Psychologist Report – Dr Kwok (27.09.2023) 2. Supplementary Statement of Applicant (15.09.2023)
6	Applicant	<u>Bundle of Documents:</u> 1. Tender Bundle 2 2. Reply to Respondent's SOFIC dated 22.09.2023
7	Applicant	Statement of Kon Guan Yu (16.09.2023)
8	Applicant	Tender Bundle 1
9	Applicant	Applicant Statement (21.08.2023)
10	Applicant	Counselling Report – Ms Mariane Fernando (04.10.2023)

Annexure B – Applicant's Offending History

Court	Court Date	Offence	Court Result
Burwood Local Court	28 April 2022	<i>Contravene prohibition/restriction in AVO (domestic)</i> <i>Stalk/intimidate intend fear physical etc harm (domestic)-T2</i>	12 Months imprisonment
			Note: On 6 July 2022,

		<i>Common assault (Dv)-T2</i>	the sentence was downgraded on appeal to a 10 month intensive correction order
Sutherland Local Court	25 March 2020	<i>Intentionally choke etc person without consent (DV)-T1</i>	18 month community corrections order