Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2023/5965**
Re:	**LMRD**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Deputy President Antoinette Younes**
Date:	**3 November 2023**
Place:	**Sydney**

The Tribunal affirms the decision under review.

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

Deputy President Antoinette Younes

CATCHWORDS

MIGRATION *– mandatory visa cancellation – failure to pass the character test – whether there is another reason why the visa cancellation should be revoked – Ministerial Direction No. 99 – nature and seriousness of offending conduct – protection of the Australian community – strength nature and duration of ties to Australia – best interest of minor children in Australia – expectations of the Australian community – legal consequences of the decision – impediments to removal – decision affirmed*

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth) s 43

Criminal Code (Cth) s 11.1

Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 303DD

Migration Act 1958 (Cth) ss 36, 189, 197C, 198, 499, 501, 501CA

Migration Regulations 1994 (Cth) cl 500.212

CASES

Ali v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 559

BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96

CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 69

Demir v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 870

FYBR v Minister for Home Affairs [2019] FCA 500

FYBR v Minister for Home Affairs [2019] FCAFC 185

FYBR v Minister for Home Affairs [2020] HCATrans 056

GBV18 v Minister for Home Affairs [2020] FCAFC 17

Howells v Minister for Immigration and Multicultural and Indigenous Affairs (2004) 139 FCR 580

Ibrahim v Minister for Home Affairs [2019] FCAFC 89

Jagroop v Minister for Immigration and Border Protection (2016) 241 FCR 461

Minister for Immigration and Border Protection v Lesianawai (2014) 227 FCR 562

Minister for Immigration and Border Protection v Sabharwal [2018] FCAFC 160

Nepata v Minister for Home Affairs [2019] FCA 1197

Tanielu v Minister for Immigration and Border Protection [2014] FCA 673

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

SECONDARY MATERIALS

Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2001, 28751-28753 (Sharman Stone, Parliamentary Secretary to the Minister for the Environment and Heritage)

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

Deputy President Antoinette Younes

3 November 2023

BACKGROUND

1. The Applicant was born in the People's Republic of China (**China**) in 1986. He arrived in Australia in 2004 as a student. He initially studied English and later commenced secondary studies. Between 2004 and 2012, he obtained certificates in cookery and a Diploma in Business Management. On 7 January 2019, he was granted a further Class BB Subclass 155 Five Year Resident Return visa (**the Applicant's visa**).[1] He is a citizen of China.

2. On 18 May 2021, the Applicant was sentenced to a three year and six months term of imprisonment for two counts of offences contrary to subsection 11.1(1) of the *Criminal Code* (Cth), and subsection 303DD(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**), for attempting to export regulated native specimens. On 16 May 2017, the Applicant attempted to export five Eastern Blue-tongue lizards, three Shingleback lizards, three Smooth knob-tailed geckos, and nine Eastern Pilbara spiny-tailed skinks.[2] On 4 July 2018, the Applicant attempted to export two Blue-tongued lizards and one Shingleback lizard.[3] On 22 June 2021, the Applicant's visa was mandatorily cancelled on the basis that he had a 'substantial criminal record' as he was serving a full-time custodial sentence. On 10 August 2023, a delegate of the Minister refused to revoke that decision.[4]

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[1] G15, 81, Ex 6.

[2] G15, 31, Ex 6; TB2, 26, Ex 5.

[3] G15, 33, Ex 6; TB2, 26, Ex 5.

[4] G2, 3-24, Ex 6.

3. The Applicant applied to the Administrative Appeals Tribunal (**the Tribunal**) for review of the decision.

LEGISLATION

4. Section 501(3A) of the *Migration Act 1958* (Cth) (**the Act**) compels the Respondent to cancel a visa in certain circumstances:

> *(3A) The Minister must cancel a visa that has been granted to a person if:*
>
> *(a) the Minister is satisfied that the person does not pass the character test because of the operation of:*
>
> *(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or*
>
> *(ii) …; and*
>
> *(b) the person is 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.*

5. Section 501(6)(a) of the Act relevantly provides that a person does not pass the 'character test' if the person has a 'substantial criminal record.'

6. Section 501(7) of the Act provides:

> *(7) For the purposes of the character test, a person has a **substantial criminal record** if:*
>
> *(a) the person has been sentenced to death; or*
>
> *(b) the person has been sentenced to imprisonment for life; or*
>
> *(c) the person has been sentenced to a term of imprisonment of 12 months or more; or*
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> *(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or*
>
> *(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or*
>
> *(f) the person has:*
>
> *(i) been found by a court to not be fit to plead, in relation to an offence; and*

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution.

7. Section 501CA of the Act applies if the Respondent makes a decision under subsection 501(3A) of the Act to cancel a visa that has been granted to a person.

8. Section 501CA(4) of the Act confers on the Respondent the discretion to revoke the Mandatory Visa Cancellation Decision under s 501(3A).

9. Section 501CA(4) provides:

(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.

MINISTERIAL DIRECTION NO. 99

10. The Respondent is empowered by s 499(1) of the Act to give written directions to a person or body having functions or powers under the Act. Except for the Respondent acting personally, the Direction must be applied by all decision-makers, such as the Respondent's delegates and the Tribunal.[5]

11. On 23 January 2023, the Respondent signed *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**). The Direction commenced on 3 March 2023 and revoked the previous Direction 90.

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[5] Section 499(2A) of the Act; *CGX20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 69 [4].

12. The preamble in Direction No 99 sets out the objectives[6] and the overarching principles[7] that provide the framework within which decision-makers should approach their task under ss 501 and 501CA.

13. The following principles in paragraph 5.2 of the Direction provide a framework within which decision-makers *should approach their task*, including whether to revoke a mandatory cancellation:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
>
> *(3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a 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 noncitizens who have been participating in, and contributing to, the Australian community only for a short period of time.*
>
> *(5) With respect to decisions to refuse, cancel and revoke cancellation of a visa, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.*
>
> *(6) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be*

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[6] Direction 99 [5.1].

[7] Direction 99 [5.2].

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.

14. A decision-maker must take into account the considerations identified in paragraphs 8 and 9, where relevant to the decision.

15. Paragraph 8 of the Direction identifies the following as primary considerations:

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

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

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

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

(5) Expectations of the Australian community.

16. Paragraph 9 of the Direction identifies the non-exhaustive list of Other considerations:

a) Legal consequences of the decision;

b) Extent of impediments if removed;

c) Impact on victims; and

d) Impact on Australian business interests.

17. Paragraph 7(1) provides that, when taking the relevant considerations into account, "*information and evidence from independent and authoritative sources should be given appropriate weight*." Paragraph 7(2) provides that primary considerations "*should generally be given greater weight than the other considerations*."

MATERIAL BEFORE THE TRIBUNAL

18. The Tribunal has the following material before it:

- The Applicant's Statement of Facts, Issues, and Contentions (**SOFIC**), filed on 17 September 2023 (Exhibit 1);
- The Respondent's SOFIC, filed on 29 September 2023 (Exhibit 2);
- Applicant's Tender Bundle (**ATB**), filed on 17 September 2023 (Exhibit 3);
- Applicant's Supplementary Tender Bundle (**ASTB**), filed on 17 October 2023 (Exhibit 4);
- Respondent's Tender Bundle, filed on 29 September 2023 (Exhibit 5); and
- G-Documents, filed on 25 August 2023 (Exhibit 6).

FINDINGS AND REASONS

19. The character test is defined in s 501(6) of the Act. It is fair to say that the character test is generally concerned with the protection of the Australian community from the risk of harm. The character test deems persons to be of bad character if they fit any of the criteria listed.

20. A person does not pass the character test only if one of the paragraphs in s 501(6) applies to that person. In this case, the delegate determined that the Applicant did not meet the character test under s 501(6)(a) because the Applicant has a 'substantial criminal record' on the basis of having been sentenced to a term of imprisonment of 12 months or more and was 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.

21. It is not in dispute that the Applicant does not meet the character test. On 18 May 2021, the Applicant was sentenced to an aggregate three year and six months term of imprisonment for two counts of offences contrary to subsection 11.1(1) of the *Criminal Code* (Cth), and subsection 303DD(1) of the EPBC Act, for attempting to export regulated native specimens. On 16 May 2017, the Applicant attempted to export five Eastern Blue-tongue lizards, three Shingleback lizards, three Smooth knob-tailed geckos, and nine Eastern Pilbara spiny-tailed

skinks. On 4 July 2018, the Applicant attempted to export two Blue-tongued lizards and one Shingleback lizard. As a sentence of 12 months or more is 'a term of imprisonment for 12 months or more' within the meaning of s 501(7)(c) of the Act, the Applicant has a 'substantial criminal record' and he does not pass the character test.

22. The issue before the Tribunal is whether the cancellation of the visa should be revoked.

23. The purpose of the Direction is to *guide decision-makers* exercising powers under the Act. Delegates and the Tribunal must generally follow the Minister's Direction. However, the Direction does not dictate the way in which the discretion is to be exercised, but rather it creates a framework within which the discretion vested in the decision-maker is lawfully exercised. The Direction identifies certain principles which provide a framework within which decision-makers should approach their task.[8] It prescribes relevant considerations which must be taken into account. It provides guidance only as to the manner in which they are to be balanced. The Direction assists decision-makers with a width of discretion that enables them to take into account different circumstances that may arise in order to reach a finding that is fair and rational in all the circumstances, taking into account crucial considerations.[9]

24. The Direction does not determine rules of general application, but gives directions to the decision-maker, including the Tribunal, as to the policy to be applied in the exercise of the discretion conferred on it by s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) in exercising the power conferred by ss 501 and 501CA of the Act. The Direction does not derogate from the Tribunal's duty to reach the correct or preferable decision in the particular case before it; the Direction has that end as its purpose.[10]

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[8] *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562 [80]–[81]. The Court was discussing Direction No 55, but the reasoning applies equally to Direction No 99.

[9] *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562 [83].

[10] *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348 [50].

25. While decision-makers are bound to take into account certain considerations, they are not limited to those set out in the Direction.[11] The Direction specifies the relative, but not the actual, weight to be given to those considerations. To that extent, it imposes requirements on the exercise of the Tribunal's discretion, but the Tribunal is obliged to examine the merits of the case and decide for itself.[12] The weight to be given to any particular matter is a matter for the decision-maker and cannot be the subject of some formulaic approach.[13] Phrases such as 'should generally be given greater weight than the other considerations' and 'one or more primary considerations may outweigh other primary considerations' have been interpreted as provisions that are intended to provide guidance to the decision-maker as to how the balancing exercise required by the Direction should be approached. These phrases leave it open to the decision-maker to adopt a different approach in the exercise of discretion in the individual case.[14] It is not the content of the Direction which determines the outcome of the exercise of the discretion, but rather it is the application by a decision-maker to the evidence and material in an individual case.[15]

THE PRIMARY CONSIDERATIONS

Protection of the Australian community from criminal or other serious conduct

26. The Direction contemplates that decision-makers should have particular regard to the principle that '*entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community*.'[16] It indicates that decision-makers should also give consideration to the nature

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[11] *GBV18 v Minister for Home Affairs* [2020] FCAFC 17.

[12] See *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562 [21].

[13] *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580 [127].

[14] *Minister for Immigration and Border Protection v Lesianawai* (2014) 227 FCR 562 [83].

[15] *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461 [78].

[16] Direction 99 [8.1(1)].

and seriousness of the non-citizen's conduct to date and the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.[17]

27. Whether there is a risk that a person would engage in specified conduct requires an evaluative judgement by the decision-maker. If the decision-maker is so satisfied, they have a discretion to refuse or cancel a visa, or revoke a visa cancellation.[18]

The seriousness of the Applicant's conduct

The Applicant's criminal history

28. The Applicant's criminal history is that on 18 May 2021 at the Paramatta District Court, the Applicant was convicted and sentenced to an aggregate term of three years and six months for two counts of offences contrary to subsection 11.1(1) of the *Criminal Code* (Cth), and subsection 303DD(1) of the EPBC Act, for attempting to export regulated native specimens. On 16 May 2017, the Applicant attempted to export five Eastern Blue-tongue lizards, three Shingleback lizards, three Smooth knob-tailed geckos, and nine Eastern Pilbara spiny-tailed skinks.[19] On 4 July 2018, the Applicant attempted to export two Blue-tongued lizards and one Shingleback lizard.[20] The non-parole period was for two years and three months.

29. In the relation to the nature and seriousness of conduct, Direction 99 sets out the types of conduct that may be considered *very serious*, including violent and sexual crimes, crimes against women and children, acts of family violence.[21] However, the Direction does not limit

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[17] Direction 99 [8.1(2)].

[18] See *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 [2]. The Court considered s 501(1), but the reasoning also applies to ss 501(2) and 501(3A).

[19] G15, 31, Ex 6; TB2, 26, Ex 5.

[20] G15, 33, Ex 6; TB2, 26, Ex 5.

[21] Direction 99 [8.1.1(1)].

the range of conduct that may be considered to be very serious or serious; the Direction at paragraphs 8.1.1(a) and (b) clearly states "*without limiting the range of conduct*" that may be considered *very serious* or *serious*, indicating that the list of offences is not an exhaustive list.

30. The facts are that in 2012, the Applicant had established a business of an aquarium and pet shop in a suburb in NSW.[22] Importantly, he was the holder of an R2 category reptile keeper's license, which authorised him to keep basic and advanced reptiles within Australia. However, this license expressly prohibited the export of regulated native specimens.

31. On 16 May 2017, the Applicant visited the local post office, used a false identity and paid cash to send an Express Mail Service (**EMS**) International package to a recipient in Hong Kong. The Customs Declaration falsely indicated that the package contained clothing valued at $100. On 17 May 2017, the package was intercepted by Australian Border Force Officers who deconstructed the package, revealing 20 live lizards of various species, packed in Calico bags within Sistema containers secured with cables through small holes in the plastic. The reptiles were examined by a supervisor at Taronga Zoo and he identified five Eastern blue-tongue lizards, three Shingleback lizards, three Smooth knob-tailed geckos, and nine Eastern Pilbara spiny-tailed skinks. Each specimen is defined as a regulated native specimen under s 303DA of the EPBC Act.

32. The specimens were seized and assessed by a senior veterinarian of the National Zoo and Aquarium, who found the reptiles should not be without water for more than 24 hours and as such, there was a "*failure to provide proper and sufficient water*" and "*the reptiles were not otherwise transported appropriately, which would have caused them pain, suffering and death*."[23] The parcels were not marked as live animals and fragile, which meant that the reptiles could have been killed if the parcels were thrown around, and/or being transported

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[22] G8, 29-48, Ex 6.

[23] G8, 32, Ex 6.

in a manner with inadequate climate control or oxygenation, potentially causing the animals to suffer cold, stress and hypoxia. The senior veterinarian observed that there had been a "*failure to properly provide sufficient food to the animals in the fortnight before shipment...the albino blue tongued lizard had a spinal deformity due to either traumatic injury or calcium deficiency that warranted further veterinary treatment*."[24]

33. In relation to the second offence, the facts are that on 4 July 2018, the Applicant used a false identity to send an EMS International package from the Royal Exchange Post Office in Sydney to Hong Kong.[25] CCTV in the post office identified the Applicant. The Customs Declaration inaccurately stated that the package contained toys in the value of $58. The package was intercepted by Australian Border Force officers who deconstructed the package, revealing three live lizards, packed in three small Calico bags within a Sistema container with shredded newspaper. The Calico bags were tied with cable ties and rubber bands. There were a number of small holes cut in the bag. Expert examination revealed that the reptiles were two Blue-tongued lizards, and one Shingleback lizard. All of the reptiles were defined and regulated as such under the EPBC Act.

34. In relation to the objective seriousness of the offending behaviour, the Sentencing Court on 18 May 2021, made the following observations:[26]

> *Considering and assessing the objective seriousness of the offending behaviour, the Crown submits they fall at the midrange or above the objective seriousness for such offences. The Crown submitted it is agreed, as set out in the agreed facts, it is not in dispute the offender was engaged in the attempted exports as a principal offender and the offences were committed for financial gain. In that respect I do not accept the*

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[24] G8, 32, Ex 6.

[25] G8, 32-34, Ex 6.

[26] G8, 35-38, Ex 6.

financial gain was that nominated by him in his record of interview and I note in the agreed facts that those statements are accepted as false.

The offending involved a considerable degree of premeditation and planning and I accept the submission they were each carried out with a callous disregard for the welfare and humane treatment of the specimens involved. In addition, it strikes at the heart of the regime introduced by the Commonwealth Parliament to protect Australian and international wildlife. The EPBC Act is set up with certain objects to protect the environment, promote the conservation of biodiversity and assist in cooperation, implementation of Australia's international environment responsibilities. It relevantly deals with the international movement of wildlife specimens. Those particulars are set out in s 303BA(1) of the Act.

I accept, in that regard, general deterrence has significance in the sentencing process for dealing with offences of this kind, to the extent that it must be clearly held out to those who would commit similar offences that significant penalties will result. I acknowledge various observations and quotations by the Crown in their submissions of superior courts in relation to the policy underlying the Act and what it is directed to ensure does not occur and that such animals are protected.

In assessing the nature and circumstances of the offence and the objective seriousness, I adopt those factors that are set out in [26] of the Crown submissions, in that those factors identify, with some clarity, the relevant factors to be taken into account in this assessment. The offender's role and degree of sophistication, I am satisfied, included a considerable amount of premeditation, organising and planning, as set out in [27] of the Crown submissions.

The offender attempted to export a total number of 23 live native specimens and utilised his R2 licence to transfer them from interstate into his possession. I accept he did so, at least in relation to these specimens, for the purpose of international exportation and sale, and he prepared them for export, by using the Sistema plastic

container with cut holes in the lids. I note also there were enclosures for other reptiles found in his possession.

The specimens were concealed in packages with false names to disguise the purpose of the consignment. They used false consigner details to conceal his identity and falsely declared the contents of the packages to avoid detection. They were lodged by him personally at the various post offices. They were addressed to different persons and addresses in Hong Kong. He had packed the specimens in the manner described as set out in the photographs that are attached to the facts. He had done so in an attempt to avoid detection if the outer packaging of the consignment was opened.

I am satisfied he gave false information to the police in relation to his income, the fate of the reptiles he imported into New South Wales and his knowledge of and role in the attempted exports, and that is an agreed fact. In providing false information concerning the exports he was attempting to minimise his role in the offences and financial gain he derived from it. He was aware it was illegal to export the specimens. He played a principal role in the attempted export of the native specimens and I am satisfied on the material before me he had an expectation of receiving some considerable financial benefit. There is a large amount of money he received between June and May 2016 and 17, from a person who has a similar name to the second addressee of the package. I note it is an agreed fact he received that amount.

I interpolate I am to infer from that agreed inclusion in the facts that it represents part or total payment for his participation in the offence. There is no alternative hypothesis put to me by Mr Moran on his behalf. There is no direct evidence those funds were received in relation to the commission of these two offences. I accept those specific funds were accepted on that basis it would be an adverse finding in respect to the offender and I would need to be satisfied of that beyond reasonable doubt.

Irrespective, in view of the values of the animals and the fact that is set out in the attached statement of Murray Fisher at tab 12 that the global value in wildlife crime is

between A$5 and 29 billion, and provides reference to the value of these specimens, I am satisfied any payment that would have been received for his participation in the offence would have been significant, particularly in light of the income he claimed he received from his casual employment and the operation of his own business.

In addition, I take into account the fact the animals were kept in such a condition there was a degree of cruelty with the possibility of them suffering pain, suffering and death as a result of the manner in which they were packaged. That was verified by their poor body condition, the fact there was no water or food available for them for the journey and the fact they would have been transported in an aeroplane without appropriate ventilation and climate control. In that regard, I accept the Crown submission that part of the objective seriousness of the offence is that the offender appeared to be callously indifferent to the risks, the safety and welfare of the native specimens being packaged in that way, and the potential for the harm was significant.

I take into account the number of specimens, 23 in total; 20 in relation to the first count and three in respect of the second and they comprised those lizards and skinks as identified in my earlier recitation of the facts. I accept the Crown's submission the offending behaviour in relation to both offences, distinguishable only by the number of specimens to be exported, does fall within the midrange of objective seriousness for offences of this kind.

35. The Court accepted that although no actual harm was done to the environment, or a threat of extinction or otherwise, the Court noted that there was a possibility of the reptiles suffering considerably.[27]

[27] G8, 39, Ex 6.

36. On the day of the trial, the Applicant entered a plea of guilty in relation to two of the three counts on the indictment in full satisfaction, although the Court had been advised prior to that date that would occur.[28]

37. As such, the Court did not accept that the plea was entered at an early time within the criminal justice process. The Court found that the pleas had occurred at late time and shortly before the trial.[29] Relevantly, the Applicant gave evidence during the Tribunal hearing that he pleaded guilty to the two charges in return for the prosecution dropping the third charge. He gave evidence that he got to keep $121,000 he received from a friend.[30]

38. The Tribunal notes that the third charge on the indictment was the following:

> "*Between 16 June 2014 and 6 February 2018 at Sydney in the State of New South Wales and elsewhere did deal with money or other property, and it is reasonable to suspect the money or properly is the proceeds of crime, and at the time of dealing the money or property was $100,000 or more…Contrary to subsection 400.9(1) of the Criminal Code."*[31]

39. The Respondent contended that the Applicant's offending should be viewed "*seriously*."[32]

40. In the Applicant's SOFIC, the Applicant accepted that these offences are deemed:

> *"serious violations under both the Criminal Code Act 1995 (Cth) and the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (the EPBC Act) …The EPBC Act is designed to protect the environment, conserve biodiversity,*

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[28] G8, 39, Ex 6.

[29] G8, 39, Ex 6.

[30] Transcript, 27, [5]-[10].

[31] TB2, 26, Ex 5,

[32] Respondent's SOFIC, [15], Ex 2.

and facilitate Australia's international environmental responsibilities, including the regulation of the international movement of wildlife specimens."[33]

41. The Applicant contended he acknowledges the seriousness of his offending, but it is "*imperative to distinguish them from those categorised as "very serious' by the Australian government*."[34] The Applicant contended that the subjective gravity falls within the low to medium range; the Applicant's offending did not involve violence, physical or mental harm to individuals and did not result in death or permanent harm to the animals or intended abuse.

42. The Tribunal is of the view and as previously mentioned, the types of harm referred to in Direction is not exhaustive and there is no persuasive reason as to why animal cruelty would not be considered very serious. Moreover, just because the animals did not die, or suffer permanent harm does not lessen the gravity of his offending. The Applicant's conduct was callous and cruel. As to the contention that the Applicant's behaviour did not involve violence physical or mental harm to individuals, although correct that no individuals were harmed, the callous disregard for the welfare and humane treatment of the animals elevates the Applicant's offending.

43. It was further contended that the Applicant recognises the gravity of the offences and the need for environmental protection, but one needs to consider the comprehensive context of his actions. Punishments has already been imposed, and the Applicant has a clean prior criminal record. The Applicant's actions were not driven by violence or harm to individuals, but rather by misguided financial gain. There is need to evaluate the case with due consideration to proportionality and the principles of justice.

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[33] Applicant's SOFIC, [9]-[10], Ex 1.

[34] Applicant's SOFIC, [19], Ex 1.

44. The Tribunal acknowledges the Applicant's prior clean record, and the principles of justice and proportionality. The Tribunal notes that the cancellation scheme is not intended to be punitive, although there are potential adverse consequences in case of an adverse outcome, including deportation. However, as identified in the Direction, protection of the Australian community, not punishment, is an inherent consideration in making a decision such as the current review.

45. The Tribunal gives significant weight to the Court's remarks that the Applicant's conduct was premeditated and could have led to pain, suffering, and potential death of the reptiles. On the evidence, the Tribunal is satisfied that the Applicant's conduct demonstrates a callous disregard for the welfare of the reptiles, and for his own personal financial gain. The Tribunal is of the view that it was cruel to have subjected the reptiles to inadequate food, water, and air. His offending also contributes to the illegal animal trade that perpetuates cruelty, suffering, and exploitation of animals. The second reading speech of the EPBC Act's Bill on 27 June 2001, mentions *"on a global scale, the illegal trade in wildlife is horrific. In dollar terms, it is likely to be second only to illicit drug trade … animal welfare considerations are a higher priority*."[35]

46. Although the Applicant has no prior convictions, the seriousness of his conduct is reflected in the custodial sentence that he received; the imposition of a custodial term upon an offender is considered to be the last resort in the sentencing hierarchy.

47. For those reasons and on balance, the Tribunal is satisfied that the nature and seriousness of the Applicant's criminal offending weigh heavily against revocation.

The risk to the Australian community should the Applicant commit further offences or engage in other serious conduct

[35] Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2001, 28751-28753 (Sharman Stone, Parliamentary Secretary to the Minister for the Environment and Heritage); TB2, 47-50, Ex 5.

48. The Direction states that decision-makers must have regard to the following considerations 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*
>
> *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 noncitizen 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 (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).*
>
> *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.*

49. The Direction contemplates that 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.[36] In some circumstances, it may be permissible to conclude that any type of

[36] Direction 99 [8.1.2(1)].

continued offending increases the risk of further *violent* offending.[37] The Tribunal needs to consider the likelihood and consequences of further offending.[38]

50. In the Applicant's SOFIC,[39] it was argued that one needs to consider the Applicant's background, including:

- The unexpected death of his mother had a profound impact on the Applicant.

- The Applicant worked diligently as a chef from 2008 to 2012, at various eateries and later established his own business, which provided him with financial stability. The Applicant's life took a downturn between 2013 and 2018 when he experienced four unsuccessful relationships. These personal setbacks likely exacerbated his psychological distress.

- In 2013, the Applicant developed a gambling addiction, largely influenced by his then-girlfriend. This addiction led to severe financial hardship and ultimately contributed to his criminal conduct.

- The Applicant suffered from adjustment disorder combined with severe depression and anxiety. These conditions are directly linked to his struggles with relationships, gambling, and financial instability.

- While it is acknowledged that the Applicant did not enter a guilty plea at an early stage, during an interview with investigators from the Department of Environment, he expressed awareness of the illegality of exporting native

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[37] *Nepata v Minister for Home Affairs* [2019] FCA 1197 [30].

[38] *Tanielu v Minister for Immigration and Border Protection* [2014] FCA 673 [95].

[39] Ex 1.

wildlife. He claimed to have posted the parcels for someone else, distancing himself from direct involvement. As pointed out in the Applicant's SOFIC, the Court questioned the veracity of the Applicant's statements during the investigation and found several inconsistencies, characterising them as a series of "*lies*" intended to evade prosecution.

- The Applicant has actively participated in counselling and has sought psychological support from Dr Yan Jiang. Dr Jiang's report acknowledges the Applicant's remorse and his commitment to never reoffend.

- The Applicant has continued with mental health treatment in immigration detention, consulting with a mental health nurse, a psychologist and a psychiatrist. The Applicant has also undertaken rehabilitation and actively engaged with the Smart Recovery Program. The Applicant has recognised the role of gambling in his offending and eliminated his gambling activities. He is committed to further counselling and participating in gambling programs when available.

- The Applicant has been incarcerated since 18 May 2021, and there is no information indicating any adverse incidents during his imprisonment, demonstrating his ability to abide by the rules and maintain good behaviour in a controlled environment.

- The Applicant's last criminal offending occurred on 4 July 2018. The Applicant remained at large in the Australian community since that date without further adverse incident. He was not sentenced until 18 May 2021. He remains on parole until 17 November 2024, which is an additional deterrent, as well as the prospect of future visa cancellation.

- The Applicant has been sentenced to prison, with the important function of deterrence.

- The Applicant is now in a stable and loving relationship. His partner is studying at the University of Sydney. She has been a strong emotional and practical support for the Applicant, standing by him during his time in prison and immigration detention.

- Despite the serious nature of the Applicant's offending, several factors mean that he poses a low likelihood of reoffending. He has shown remorse and actively engaged in rehabilitation. His behaviour during incarceration has been exemplary, indicating an ability to adhere to regulations. His age, qualifications, transferable skills, and work experience provide him with employment prospects upon release in Australia. He has an existing support network within the local community, particularly his partner. The Applicant has lost his licence to keep his aquarium and pet business, and as such, he would no longer have easy access to reptiles and other animals. The Applicant states that this "*is an important factor in this case (which seems to have been forgotten by the delegate)*."[40]

51. The Applicant contended that although this primary consideration weighs against revocation, the "*adverse attribution of weight should be considerably reduced on account of the applicant's very low prospects of reoffending*."[41]

52. The Respondent argued that the Applicant's contentions should not be accepted and that the Applicant remains at risk of reoffending. The Respondent raised a number of matters in support of those contentions.

53. In relation to remorse, the Tribunal acknowledges the Applicant's expressed remorse during the hearing but is of the view that the expressed remorse needs to be understood in the

[40] Applicant's SOFIC, [41], Ex 1.

[41] Applicant's SOFIC, [42], Ex 1.

context of other relevant matters. In a Case Note from the NSW Department of Corrective Services dated 1 November 2021, it was recorded that the Applicant "*comprehensively explained his offence denying his involvement in smuggling animals*."[42]

54. In a Case Note dated 17 November 2022, it was recorded that the Applicant:

> "*…denies the offences. He said that aside from his pet shop business … which he ran from 2012 to when he entered custody, he would also run a parcel delivery service. He said someone paid him some money to take a package to the post office and this is what had reptiles in it. He said he did not know and that it was just a coincidence that he worked with reptiles that someone got him to post some illegally.*
>
> *He argued that he had a track record of legally buying and selling reptiles so why would he do it illegally? He said his business was doing well; he was making enough money to cover living and business costs and to save.*
>
> *He said the second offence was almost identical … a different person also got him to post reptiles unbeknownst to him. Again, he claimed it was a coincidence that he had reptile experience and some relative stranger had him post reptiles*."[43]

55. In a recent Case Note dated 2 March 2023, a staff member from Nowra Community Corrections, Bradley, recorded that:

> *"At SAR stage he was recorded as stating he 'made a mistake' and it read as though he was admitted guilt. However, in interviews with me he maintains his innocence.*

[42] TB1, 2, Ex 5.

[43] TB1, 5, EX 5.

He said the mistake he was referring to was not checking what was in the packages - he did not know there were animals in there."[44]

56. In a more recent Case note, dated 10 March 2023, the same staff member, Bradley, recorded that the Applicant "*reiterated he did not know what was in the packages*."[45]

57. During the hearing, the Applicant accepted that he had "*lied*" to the staff member concerned, Bradley, although he also claimed that his English is limited, which the Tribunal finds unpersuasive.

58. In a Sentencing Assessment Report dated 14 May 2021, it was noted that the Applicant "*took responsibility for the offences and accepted he had broken the law and made "the biggest mistake in [his] life*."[46] The Applicant was assessed to be at a low risk of reoffending.[47]

59. In a Pre-Release Report dated 13 April 2023,[48] the Applicant was assessed at a low risk of reoffending. However, the following matters were noted:

> "*[The Applicant's] attitude towards the offence is poor. Despite his guilty plea, conviction and the evidence against him, he continues to deny knowing reptiles were contained in the packages he claims he mailed on behalf of others. He reported he was provided poor legal advice and that the evidence against him is coincidental.*
>
> *[The Applicant] is recorded as admitting he made 'a mistake' at various stages since his arrest, but when clarification of this admission was sought, he claimed his mistake*

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[44] TB1, 6, Ex 5.

[45] TB1, 8, Ex 5.

[46] TB1, 11, Ex 5.

[47] TB1, 12, Ex 5.

[48] TB1, 14-20, Ex 5.

was not checking what was contained in the packages he mailed for what could be termed a small administrative fee.

…

The sentencing remarks described [the Applicant's] *actions as callous and with disregard for the welfare and humane treatment of the specimens involved. Further, his conduct strikes at the heart of the regime introduced by the Commonwealth Parliament to protect Australian and international wildlife. By continuing to deny the offences*, [the Applicant] *demonstrated ongoing poor regard for the welfare of the animals and the environment.*

…

Through his ongoing denial of his offences, [the Applicant] has demonstrated no insight into his offending behaviour."

60. Dr Jiang, Psychologist, provided a report dated 11 May 2021.[49] Dr Jiang noted that the Applicant had expressed remorse on several occasions, and that the Applicant nevertheless indicated that "*he sent the parcels on behalf of two friends/customers to earn a commission or tips. Additionally, he explains he could not refuse to do a favour because he did not want to offend his customers as he relied on them to do business.*"[50] Dr Jiang concluded that by completing planned treatment, and "*given his remorse*," the Applicant is unlikely to commit a similar offence.[51] During the hearing, the Applicant accepted that he had "*lied*" to Dr Jiang.[52]

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[49] TB2, 83-89, Ex 5.

[50] TB2, 86, Ex 5.

[51] TB2, 89, Ex 5.

[52] Transcript, 25, [5].

61. Mr Watson-Munro, Consultant Psychologist, provided a report dated 11 October 2023. Mr Watson-Munro noted the Applicant's expression of remorse and other factors and concluded that the Applicant's likelihood of reoffending is low. Although the Tribunal does not wish to take comments out of their context, the Tribunal observes that in oral evidence, Mr Watson-Munro stated "*I've examined somewhere between 20 and 30 thousand offenders over the last 45 years in this jurisdiction and others, and I could say just about all of them express remorse*."[53] Mr Watson-Munro qualified that answer by stating that he looks for what steps the individual has taken to address the factors that have led to their offending conduct, and what insight the offender has. He noted that the Applicant had expressed "*deep regret*" in terms of the impact of his actions on the reptiles and recognised it was cruel.[54]

62. The Tribunal is satisfied that a fair appraisal of the evidence supports a conclusion that the Applicant has expressed some remorse and the Court accepted that "*inherent in any plea of guilty, there is some degree of contrition.*"[55] However, the Court gave little weight to various statements of contrition.[56] The Tribunal is satisfied that the Applicant has given false information to the police and others about matters including his role in the attempted exports of the reptiles. In providing false information concerning the exports, he was attempting to minimise his role in the offences and the financial gain he derived from it. The Applicant knew that it was illegal to export the specimens. On multiple occasions, and as recently as March 2023, he denied his involvement in the export of the reptiles to officers from Corrective Services. As such, the Tribunal has decided to give his expressed remorse limited weight.

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[53] Transcript, 54, [25].

[54] Transcript, 54, [25]-[30].

[55] G8, 12-13, Ex 6.

[56] G8, 13, Ex 6.

63. Dr Jian diagnosed the Applicant with Adjustment Disorder, with mixed anxiety and depressed mood, and the Tribunal accepts that the Applicant suffers from those clinical conditions.

64. In relation to the claim of gambling, there is limited probative evidence before the Tribunal regarding the Applicant's claims to have had a gambling addiction that was a driver of his offending, as was noted by the Sentencing Court.[57] Relevantly, the Court observed:

> "*He informed the psychologist he had a gambling addiction that had been encouraged by a girlfriend he was going out with in 2013, and that by 2016 it was out of control. On occasions he would spend all the money in his bank account and would have to borrow money from friends to pay bills. There is no objective evidence before me in relation to verifying those claims such as from any bank statements or any gambling facilities where he has gambled the money, either at casinos or hotels where such facilities are available. The psychologist formed the view he suffered extreme symptoms of anxiety and depression, stress and these were relevant between 2013 and 18, as a result of his unsuccessful relationships, problematic gambling, financial hardship and unmet life prospects in Australia. The psychologist opined he was experiencing a gambling disorder up until 2018 and that he had some unhelpful beliefs that a relationship success may depend upon him becoming rich.*
>
> *The offender advised the psychologist and the author of the Sentencing Assessment Report he has mitigated his gambling but still continues to gamble. There is no evidence before me he is addressing this addiction in any specific way, nor does it form any part of the so called plan as devised by the psychologist to address and rehabilitate him. This omission seems somewhat extraordinary, in view of the fact it is said to be a catalyst for this offending, and it may well have explained why someone*

[57] G8, 43, Ex 6.

would be involved in seeking to obtain large quantities of money to service and fuel such an addiction.

There is no suggestion by the psychologist he should attend organisations such as Gambling Anonymous or their affiliates in various religious organisations throughout New South Wales, which are well known to the courts and, one would have expected, to most psychologists and psychiatrists.

The report has also been criticised by Ms James in that it does not appear to have complied with any acknowledgment of the Code of Conduct by the psychologist, nor is there any CV provided to any way confirm whether that person has the appropriate qualifications to provide any diagnosis as purported during the report. Despite those limitations, I accept it has provided a perfunctory outline of his personal history.

I have considerable doubts in relation to whether he is suffering from the degree of depression or gambling addiction he claims in relation to that condition being a possible catalyst underlying his participation in this offending behaviour. The report is limited in that regard and also the fact there has been no capacity to test any of the statements made in it."[58]

65. The Tribunal has some doubts about the extent of the Applicant's gambling behaviour and/or its impact on his offending. But in any event, the Applicant appears to have continued to gamble until at least March 2021, shortly before being imprisoned, as reported by Dr Jiang.[59] As such, the Tribunal is persuaded by the Respondent's submissions that any abstinence achieved while imprisoned or in detention has been untested in the community.

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[58] G8, 42-43, Ex 6.

[59] G26, 132, Ex 6.

66. The Applicant has provided evidence of engaging in rehabilitation.[60] The Tribunal is satisfied that the Applicant has sought support from various mental health professionals, including Dr Jiang, a psychologist. The Tribunal is satisfied that the Applicant has participated in a Mood Management Program whilst incarcerated, the Smart Recovery Program, and the Getting Equip'd Workbook.

67. The Tribunal acknowledges the Applicant's efforts in rehabilitation; however, those efforts do not overcome the Tribunal's concerns about the risk of reoffending. Similarly, the Tribunal gives some weight to other matters, including the Applicant's relationship with his partner, having a support network, good behaviour in custody/detention, no prior convictions, the role of deterrence through incarceration, potential visa cancellation in case of reoffending, efforts to address mental health challenges, being on parole and no longer possessing a licence to keep the pet and aquarium business. However, the Tribunal is satisfied that the cumulative and probative evidence does not support the Applicant's contention that the risk is *very low*. A fair appraisal of the evidence supports a conclusion that there is a low risk of reoffending and given the seriousness of the offending, the Tribunal is satisfied that any risk is unacceptable.

68. For those reasons, the protection of the Australian community consideration weighs heavily against revocation of the cancellation decision.

Whether the conduct engaged in constituted family violence

69. The Direction refers to the Australian Government having "*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*."[61]

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[60] ATB, 34-40, Ex 3.

[61] Direction 99 [8.2(1)].

70. The Direction contemplates that in considering the seriousness of the family violence engaged in by the non-citizen, the factors that must be considered are:

- the frequency of the offending conduct;
- any trend of increasing seriousness;
- the cumulative effect of repeated acts of family violence;
- rehabilitation achieved at time of the decision since the person's last known act of family violence (including the acceptance of responsibility, understanding of the impact of the behaviour on the victim/witness of that abuse (particularly children) and the efforts to address factors which contributed to the conduct); and
- whether the person 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.[62]

71. There is no evidence in this case that the Applicant's conduct relates to family violence.

72. The Tribunal gives this consideration neutral weight.

The strength, nature and duration of ties to Australia

73. The Direction at paragraph 8.3(1) contemplates that 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. In considering a non-citizen's ties to

[62] Direction 99 [8.2(3)].

Australia, the Direction provides, among other things, that 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.[63]

74. Paragraph 8.3(4) of the Direction requires the Tribunal to consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community and in doing so 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 non-citizen has been ordinarily resident in Australia during and since their formative years, regardless of when their offending commenced and the level of that offending;*
>
> *(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 non-citizen began offending soon after arriving in Australia.*

75. The Applicant has been in Australia since 2004. He has studied and worked in Australia. Although the Tribunal acknowledges the period of the Applicant's residence in Australia, the substantial portion of that time was not during his formative years. During his time in Australia, the Applicant completed his education, obtained certificates and diplomas, and contributed to the workforce. He was granted permanent residency and established a

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[63] Direction 99 [8.3(2)].

successful business. He has participated in community activities, including educational programs and fundraising efforts. The Applicant has undertaken considerable volunteer work in the community, including the local council, library, shopping centre, correctional centre, and community hall.

76. The Applicant has been in a romantic relationship with Ms Z, and they began living together as de facto partners in March 2021. Although their relationship has been described as "*complicated*" and of a relatively short duration, the Tribunal accepts the submissions that they are a committed and supportive couple, and that Ms Z has remained in the relationship with the Applicant during both his time in prison and immigration detention.

77. The Tribunal accepts that Ms Z is a full-time law student, that she intends to remain in Australia after graduation, and that she suffers from depression. The Tribunal accepts that the law studies in Australia would not easily be transferable skills and/or qualifications in China. The Tribunal accepts that in case of non-revocation, the relationship could come to an end, as Ms Z does not to return to China.

78. The Applicant does not have immediate family members in Australia. He has established strong ties within the Australian community including, friendships with persons who are Australian citizens and/or permanent residents. He has provided documents in support from individuals who described the Applicant as being trustworthy, reliable, decent, and a valuable member of the community. The property manager of the Applicant's former business has provided a letter of support attesting to the Applicant's good character, although there is no suggestion that the property manager would be impacted by in case of the Applicant's removal.

79. The Applicant has a close relationship with his landlord, to whom he refers as "*aunt*." Prior to his incarceration, he regularly visited her.

80. The Respondent contends that Ms Z is the holder of a student (temporary) visa, and therefore she is not an Australian citizen, a permanent resident, or has a permanent right to remain in Australia indefinitely. As such, and regardless of her intention to remain in

Australia after her studies, the Applicant's ties to her do not represent any significant ties to Australia, for the purpose of this consideration.[64] The Tribunal is persuaded by the submissions that although Ms Z wishes to remain in Australia on completion of her studies, the premise of a student visa is that the holder intends to stay in Australia temporarily.[65] Although arguably, the Applicant's relationship with Ms Z is his strongest tie, that relationship needs to be considered in the context of the fact that she holds a temporary visa, and consistent with paragraph 8.3(1)-(2) of the Direction, has no right to remain in Australia indefinitely. The Tribunal can only speculate that even if she were to apply for another visa, whether permanent or temporary, she would meet the relevant criteria. What is certain, is that currently she has a temporary visa, and as such, she might have to return to China.

On balance, the Tribunal gives this consideration weight in favour of revocation. However, that weight in favour does not outweigh the primary considerations weighing in favour of non-revocation.

The best interests of minor children in Australia

81. The Direction requires decision-makers to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is, or is not, in the best interests of a child affected by the decision.[66]

82. In considering the best interests of the child, the Direction states at paragraph 8.4(4) that the following factors must be considered where relevant:

> *a) the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or*

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[64] Direction 99 [8.3(1)-(2)].

[65] *Migration Regulations 1994* (Cth) cl 500.212.

[66] Direction 99 [8.4(1)].

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);

b) the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;

c) the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

d) the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;

e) whether there are other persons who already fulfil a parental role in relation to the child;

f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

g) evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;

h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

83. The Applicant does not have any children of his own, but he has identified five minor children as relevant to this consideration. The children include a male aged 6 years, a female aged 9 years, a male aged 11 years, a female aged 11 years, and a female aged 12 years. The Applicant contends that he has played a significant role in their lives. A parent of one of the

children has provided a Statutory Declaration in support of the Applicant.[67] He detailed the Applicant's relationship with the child. The parent noted that his son has a "*great relationship*" with the Applicant to whom he refers as a "*respectable uncle*."[68] In a statement to the Tribunal dated 19 September 2023, the parent reiterated his remarks that his son has a "*great relationship*" with the Applicant, to whom he refers to as a "*respectable uncle*."[69] Another parent of the two daughters aged 9 and 12 years provided a statement to the Tribunal, who also referred to the children having a "*strong relationship*" with the Applicant, whom they consider to be a "*respectable uncle*."[70] There is limited information about the Applicant's relationship with the other two children. The Tribunal observes that in his statement to the Tribunal dated 16 September 2023, the Applicant makes no mention of the five children in terms of his future plans.[71]

84. In his SOFIC, the Applicant contended that he has been an integral part of the children's lives, fulfilling the role of an uncle, and that he has "*consistently provided emotional support*" to the minor children.[72]

85. In oral evidence to the Tribunal, the Applicant indicated that he has not spoken to three of the children since his incarceration. He gave evidence that:

> "*because that's our Chinese culture. We don't normally talk to kids on a mobile, because a mobile phone is not good for the kids. If they were holding it or playing it for too long. And also there was, like, they were starting at the school and they have to attend the social activity on the school, and they … lots of thing to do.*

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[67] G17, 114-115, Ex 6.

[68] G17, 114, Ex 6.

[69] ASTB, 1-3, Ex 4.

[70] ATB, 14-15, Ex 3.

[71] ATB, 1-9, Ex 3.

[72] Applicant's SOFIC, [59]-[61], Ex 1.

Because it's like an uncle, with them, for them, I don't want to interrupt their life too much by telling them, 'I was pretty sad I was in detention centre, I want to see your kids around me and please come and see me.' It's not what I wanted to do."[73]

86. In oral closing submissions, the Applicant's counsel argued the following:

> "…*the applicant has not had an opportunity to maintain a very close relationship with his children in more recent times because of his period of imprisonment and in immigration detention. But the applicant says that he considers himself as an uncle to the children and there is no reason to doubt that the applicant would take that role seriously in the future where he could provide particularly practical and emotional guidance and assistance to those children. In my respectful submission, that then weighs in favour of the applicant, although of course I don't submit by any stretch of the imagine that it's a determinative matter*."[74]

87. The Respondent in closing submissions contended that there has not been any recent engagement with those children and that the Applicant does not play a parental role in the children's lives. The Respondent argued the following:

> "…*it's somewhat questionable what sort of positive role he would play in their lives given the doubts about his character and the risk of further dishonest and unlawful conduct. So, again, we accept that it weighs in his favour but we say that the Tribunal should give limited weight to the best interests of the children*."[75]

88. The Tribunal is satisfied that the cumulative evidence indicates that whilst the Applicant has a connection with the five minor children, that connection is limited and cannot be

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[73] Transcript, 44, [5].

[74] Transcript, 65, [40]-[45].

[75] Transcript, 73, [40]-[45].

categorised as close or an integral part of their lives. Moreover, the Tribunal is persuaded by the Respondent's submissions that it is "*somewhat questionable what sort of positive role he would play in their lives given the doubts about his character and the risk of further dishonest and unlawful conduct*."

89. On balance and having regard to the cumulative evidence, the Tribunal is satisfied that this consideration weighs in favour of revocation, but that it should be moderated and does not outweigh the considerations weighing against revocation.

Expectations of the Australian community

90. The Direction at paragraph 8.5(1) indicates that the Australian community expects non-citizens to obey Australian laws. It states that where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.

91. The Direction refers to non-revocation of the mandatory cancellation of a visa, being potentially appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa.[76]

92. The Tribunal observes that the Direction contemplates that the expectations of the Australian community apply regardless of whether the Applicant poses a measurable risk of causing physical harm to the community.[77]

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[76] Direction 99 [8.5(2)].

[77] Direction 99 [8.5(3)].

93. The Federal Court of Australia decision in *FYBR v Minister for Home Affairs*[78] (***FYBR***) is significant. In *FYBR*, the applicant argued that the Tribunal had erred in its approach that paragraph 11.3 of the then of Direction 65 as being *deeming* of what community expectations are, irrespective of the individual's personal circumstances. The applicant argued that the Tribunal did not appreciate that it was permissible for it to assess whether community expectations would have been the same in relation to the applicant, given that he had already spent so much time in immigration detention.[79] In rejecting the applicant's argument, Perry J concluded:

> *It follows, in line with the authorities, that cl 11.3 of Direction 65 is a statement of the Government's view as to the expectations of the Australian community for the purposes of determining whether or not to refuse a visa. Contrary to the applicant's submissions, 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 Tribunal must give effect to the "norm" stipulated in cl 11(3) which will of its nature weigh in favour of refusal, at least in most cases.*[80]

94. On appeal to the Full Federal Court, the majority of the Court (Charlesworth and Stewart JJ) essentially concluded that paragraph 11.3 contained a statement of the Australian Government's views as to the expectations of the Australian community that must be applied,[81] that it is not for the decision-maker to make his or her own assessment of the community expectations,[82] and that in the context of Direction 65, community expectations as expressed normatively are what the Government says that they are (even though

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[78] *FYBR v Minister for Home Affairs* [2019] FCA 500.

[79] *FYBR v Minister for Home Affairs* [2019] FCA 500 [21].

[80] *FYBR v Minister for Home Affairs* [2019] FCA 500 [42].

[81] *FYBR v Minister for Home Affairs* [2019] FCAFC 185 [66].

[82] *FYBR v Minister for Home Affairs* [2019] FCAFC 185 [67].

ascertainable community expectations might be quite different).[83] In essence, the judgment is authority for the proposition that it is not the decision-maker to make an assessment of community values on behalf of the community, and that those values are expressed as norms in Direction 65. The applicant's special leave application to the High Court of Australia was dismissed.[84]

95. In the SOFIC and in referring to *Ali v Minister for Immigration, Citizenship and Multicultural Affairs*,[85] the Applicant contended that in attributing weight, the Tribunal should take into account the Applicant's specific circumstances such as the Applicant's lengthy residence, his positive contribution to the Australian community, *very low* risk of reoffending, and considerable ties. As previously mentioned, the Tribunal has found that risk is low – not *very low*. The Applicant came to Australia in 2004 at the age of 17 years and 8 months. The Tribunal does not consider that age to be a "*very young*" age or that the length of time the Applicant has spent in Australia was during his formative years, although a small portion of the Applicant's time may constitute his formative years. The Tribunal is satisfied that the Applicant is not entitled to the higher level of tolerance stipulated by the principle in paragraph 5.2(5) of the Direction. The Tribunal has considered the other matters elsewhere in the Decision.

96. The Tribunal is satisfied that the Applicant's criminal conduct is serious and it involves disregard for the welfare of animals. The Tribunal is satisfied that the Australian community expects that the Australian Government should not revoke the cancelation of the Applicant's visa because his conduct is serious and involves the inhumane treatment of animals.

97. The Tribunal gives this consideration significant weight against revocation.

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[83] *FYBR v Minister for Home Affairs* [2019] FCAFC 185 [91].

[84] *FYBR v Minister for Home Affairs* [2020] HCATrans 056.

[85] *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559.

THE OTHER CONSIDERATIONS

Legal consequences of the decision

98. At paragraph 9.1, the Direction indicates that decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

99. The Direction divides the considerations to be applied in this paragraph into two sections:

    (1) non-citizens covered by a protection finding; and

    (2) non-citizens not covered by a protection finding.

100. Australia is a signatory to several international instruments which give rise to non-refoulement obligations. Australia is a signatory to the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR).

101. Non-refoulement obligations are obligations not to forcibly return, deport or expel a person to a place where there would be a risk of harm.

102. Non-refoulement obligations is not confined to the protection obligations to which s 36(2) of the Act refers.[86] It is defined in the Act to include non-refoulement obligations that may arise

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[86] See *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89 [103].

because Australia is a party to one of the instruments mentioned above, or any obligations accorded by customary international law that are of a similar kind.

103. If the Applicant is unsuccessful before the Tribunal and/or any appeal, he remains unlawful and he will be liable for detention and removal from Australia. The Tribunal acknowledges that those outcomes are adverse, they are nevertheless lawful consequences.

104. The Applicant has recently made a protection claim. He has not made an application for a protection visa, and the Tribunal is mindful that it could defer assessment. However, the Tribunal considers it appropriate to deal with the Applicant's claims in this review.

105. In his statement to the Tribunal,[87] the Applicant claimed that his primary concerns about returning to China relate to the $50,000 debt he owes to loan sharks. He claimed that due to interest on the loan, the debt would have significantly increased. He claimed that the debt had originated during a period when he struggled with the gambling addiction and also because he had to pay for his former partner's expenses in China. He claimed that he is unable to repay the debt, and in case of his return to China, he is extremely concerned that he would be killed or seriously harmed by the loan sharks.

106. In the Applicant's SOFIC,[88] the Applicant made the following submissions:

- The Applicant has borrowed monies from loan sharks who are related to the Chinese triad, and that as a result, he has an outstanding debt of $50,000. He holds *"real concerns that if he is deported to China, he will face the prospect of real harm from the loan sharks. The applicant is not able to pay back the monies*."

[87] ATB, 1-9, Ex 3.

[88] Applicant's SOFIC, [81]-[88], Ex 1.

- The claims are capable of falling within s 36(2)(aa) of the Act, in that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the Applicant being removed from Australia to China, there is a real risk he would suffer significant harm in the context of either being arbitrarily deprived of his life, being subjected to torture, being subjected to cruel or inhuman treatment or punishment, or being subjected to degrading treatment or punishment.

- The triads have traditionally made their money through drug trafficking, loan sharking, prostitution, smuggling, gunrunning, and extortion and protection rackets. At times, triad members are involved in extorting money from rich businessmen and contract murders. The signature triad instrument of torture, punishment and execution is the kitchen meat cleaver.

- In the alternative, the Applicant's advances the triad harm claim independent of Australia's non-refoulement obligations. The Applicant submits that as the Full Court made plain in *BCR16 v Minister for Immigration and Border Protection*,[89] in the process for the exercise of the s 501CA(4) power, the Minister or his delegate is able to give greater weight to a small risk, if on the material the decision-maker reasonably determines that is justified. The Applicant submits that such is the nature of a discretionary power. It is quite distinct from the task in s 65 of the Act.

107. During the hearing, the Applicant gave evidence that he borrowed the money between 2017 and 2018. He said he has not returned to China for almost five years out of fear, since around May 2018. He said he is unable to pay and as such, they would threaten his life.[90] The Applicant provided further information about the amount of the debt in the hearing, as follows:

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[89] *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 [49].

[90] Transcript, 19, [10]-[15].

Ms DONALD: *All right, now the last thing I wanted to ask you about was – you said you borrowed $50,000 from loan sharks in China?*

APPLICANT: *Yes, correct.*

Ms DONALD: *And how much of that do you still owe?*

APPLICANT: *Because in the very last when I spoke to them and they say the interest is like double every – once every … and every few days it would double … Because I don't really know how to calculate the interest, and they was being really scary, and the feeling was terrifying and – because I don't know what they were going to do to me if I was making return to China, because I haven't been back to China since May 2018, and … been away for five years I haven't been going back.*[91]

108. The Respondent's representative noted to the Applicant that he was interviewed by the investigators in August 2018 for his offending, charged and been in gaol since 2021. The Applicant responded as follows:

"*Yes. Yes, and also that during 2018 until I was being sentenced imprisonment … I didn't go back as well, because they would add up together this is almost more than five and a half years already I haven't gone back since May 2018, and that was before the interview with the investigator.*"[92]

109. The Respondent's representative asked if the Applicant knows how much he still owes to the loan sharks. The Applicant responded as follows:

"*No, I honestly I don't want to know. Either way it's not the money that I'm able to pay them back. That's the only thing I'm sure if I do go back I'm pretty sure they will find*

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[91] Transcript, 46, [30]-[45].

[92] Transcript, 46-47.

me at the minute they can and first they will probably chase me, usually for the money if, yes, I'm able to pay them back. If I'm unable to pay them back, they will probably find a way for me to pay them back, and obviously … because this has almost been over five years interest now, I don't know how much it was right now, because I just feel scared, I feel really scared. I don't know what to do with it. And, like I say, I have like a really bad depression and anxiety, even with the help of the medication and the skills that I have learned from the past, they can only help me to stabilise with the life that I have in Australia. If I get sent back to China, it's not going to help."[93]

110. In response to the Respondent's representative's question on the last time he spoke to the loan sharks, the Applicant stated:

"*In between 2017 and mid-2018, because I do remember I went back around February and May 2018, because I would try to go back to finalise, to get his problem solved. And after I speak to him, because I did pay them some money at that point of time, but after they have mentioned the interest that I'm going to pay, I just – I just scared, because I can't – I can't pay. Because the best thing is just fly back to Australia and never go back, because they did tell me if you come back we will definitely find you. And if you're in Australia, there's nothing we can do about it, but just be careful if you do come back, and we will make sure you pay the money. Because I really don't know what they're going to do, because I hear lots of bad things from these group of people and how they treated the person who have borrowed money from them, and probably asked them to sell their organs or made to … send you to somewhere to work as like a – you know those people that's working in overseas … in the telephone stuff, like the scam, which I don't want to do that either.*"[94]

[93] Transcript, 47, [10]-[20].

[94] Transcript, 47, [25]-[40].

111. In relation to whether the Applicant has been contacted by the loan sharks, an exchange occurred between the Applicant and the Respondent's representative, as follows:

> Ms DONALD: *Now you haven't spoken to them since?*
>
> APPLICANT: *Yes. After I came back to Australia I have never making any contact with them, because I was scared to make any contact with them or let them to find me where I am and – I always say I don't want to get into trouble, I mean.*
>
> Ms DONALD: *And they haven't tried to contact you? They haven't contacted you?*
>
> APPLICANT: *No. Because we're in two different country, with Australia and there's really good places, and I believe it's a lot safer than it was in China.*[95]

112. The Respondent representative asked the Applicant if the loan sharks contacted his father for any money. The Applicant replied "*no, they [have] not. Because they go directly to the person who borrowed their money from.*"[96]

113. During the hearing, an exchange occurred between the Respondent's representative and the Applicant in cross-examination, as follows:

> Ms DONALD: *So you've owed them money since 2018, and you haven't received any threats from them, they haven't contacted your father, and they don't even know where you are. That's correct, isn't it?*

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[95] Transcript, 47-48.

[96] Transcript, 48, [5].

APPLICANT: *Yes, but before I came back – come back from China, in late 2018, they have made close contact with me. They have warned me, and that's why I have never went back to China since May 2018.*

Ms DONALD: *Well I'm putting to you that you didn't? … I'm putting to you that you didn't go back to China since May 2018 because you were embroiled in a criminal investigation, you were then defending yourself against those charges, and then after that you were taken into gaol and then you've been in detention. So I'm putting to you that you didn't – well that there was no fear of returning to China, it was you were here for those reasons?*

APPLICANT: *No, because if I do want to go back to China, obviously I can go back any time before March 2021. There's no issue. The only reason I didn't go back within these three year is the reason that I have fear of these loan shark and I was not knowing what they going to do to me and how much money they were asking me to pay them. But obviously I know that it's not the money that I can pay them back, I'm not able to pay it with the interest*.[97]

114. The Applicant was asked, and he confirmed, that he had not told Dr Jiang, Corrective Services, or his former legal representatives about this claimed debt. The Tribunal observes that in fact in a Case Note Report from Corrective Services dated 20 April 2021, it recorded that he "…*has no loans*…", contrary to his claims.[98] Moreover, Mr Watson-Munro confirmed during the hearing that the Applicant had not mentioned anything to him about the loan.[99]

115. The Applicant provided a number of explanations for why he did not mention this claim previously. He stated that it was not a consideration when he was speaking to Dr Jiang. He

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[97] Transcript, 48, [10]-[25].

[98] TB1, 4, Ex 5.

[99] Transcript, 57, [15].

also stated that he did not mention the claim to Corrective Services because it has nothing to do with them, or that he thought they were asking about debt in Australia. In response to a question as to why he did not mention this claim to his previous lawyers, the Applicant explained at the hearing, as follows:

> "*At that point of that time I have been really stressed out, as you can see from my mental health report*. *And my plan was to discuss that, and I can't even think about anything that would be bothering me anymore. Because I would try to focus in the life that I have in the prison. Because obviously I have … most of the contact from outside the work, and to stable – to make my mind stable, it is best to less worry. It's something you can't worry about too much. Because I know there's nothing I can do about it. There's nothing I can change about it. And this is just one of the issues that I have in the past, but this is not related to that point of the timeline we're preparing the written submission by my lawyer, Ms … and because we have several telephone conferences with her, and she is preparing all these document on the phone. I have mentioned a loss of … that I can remember, that I can recall it. I tell her as much as I can. And she had also arranged, like, an appointment for me with Dr Jiang, and get like another report*."[100]

116. The Tribunal has expressed some doubts about the extent of the Applicant's gambling behaviour and/or its impact on his offending, but in any event the Tribunal accepted that the Applicant appears to have continued to gamble until at least March 2021, shortly before being imprisoned, as reported by Dr Jiang. The gambling claim is relevant to the debt claim, as it is one of the reasons advanced by the Applicant for having to borrow money. The Tribunal has considered the Applicant's explanations for not raising this claim previously and finds them unconvincing and unpersuasive. The Applicant had lawyers acting for him when he made submissions requesting revocation, and there is no mention of the debt claim in those comprehensive submissions. The Applicant did not mention the claim to Dr Jiang

[100] Transcript, 49, [20-30].

or Mr Watson-Munro, or Corrective Services. The Tribunal is of the view that given the significance of the claim and the potential harm he claims to fear, failure to have mentioned this claim previously indicates that it is fabricated. The Tribunal is satisfied that the delay in making the claim raises significant doubts about its genuineness. Moreover, the Applicant's evidence about the debt, particularly regarding the interest, was vague, raising more doubt. Further, he is not suggesting that his father who lives in China has been threatened, or that in the last five years, he has personally received any threats.

117. In consideration of the evidence as a whole, and for those reasons, the Tribunal does not accept that the Applicant has borrowed any money of any amount from those associated with the triad, or that he would be harmed if he returned to China on that ground. The Tribunal does not accept that he has any genuine fear of harm on that basis, or that he has not returned to China in the last five years for that reason.

118. For those reasons, the Tribunal finds that there is not a real risk or a real chance of serious or significant harm occurring to the Applicant on that basis (or on any other ground).

119. As the submissions based on *BCR16 v Minister for Immigration and Border Protection,*[101] given the Tribunal's rejection that the Applicant has any of the claimed debt, the Tribunal is not satisfied that there is any risk of harm on that basis, warranting the Tribunal's exercise of discretion.

120. Considering the above, the Tribunal is satisfied that in case of removal, Australia would not be in breach of its non-refoulment obligations.

121. The Tribunal therefore gives this consideration neutral weight.

Extent of impediments if removed

[101] *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 [49].

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

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

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

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

123. The Applicant is 37 years old. The Applicant has had a lengthy employment history in Australia and has skills as a chef in the hospitality industry that would assist him in finding work. There are no cultural or linguistic barriers. He does however have mental health challenges including Adjustment Disorder, severe depression, and anxiety. There is no evidence that the Applicant would be unable to obtain the required treatment in China, although he has claimed that due to financial constraints, he would not be able to access qualified psychological treatment.[102]

124. The Applicant's father is in another relationship. The Applicant's main emotional support is in Australia, namely Ms Z. He does also have the support of friends and colleagues, as evidenced by the statements provided. The absence of that support would cause him a degree of personal hardship, and as Mr Watson-Munro pointed out, would be a risk factor. He would also miss the opportunity to develop his relationship with the five minor children.

125. The Tribunal acknowledges and accepts that if returned to China, the Applicant would face challenges including limited family/social support, finding accommodation, access to health care, and employment, particularly given his criminal history and being a deportee from

[102] G15, 89, Ex 6.

Australia. His potential separation from Ms Z would result in emotional distress and may worsen his clinical challenges.

126. Given the Tribunal's finding about the debt claim, the Tribunal does not accept that there is any impediment on that basis.

127. The Tribunal has considered the Applicant's circumstances very carefully and whilst there are challenges, given his age, and the lack of linguistic and cultural barriers, the Tribunal does not consider them to be insurmountable.

128. On balance, the Tribunal gives this consideration weight in favour of revocation.

Impact on victims

129. The Direction requires decision-makers to consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.[103]

130. There is no evidence of the impact of the decision on victims, and as such, the Tribunal gives neutral weight to this consideration.

Impact on Australian business interests

131. At paragraph 9.4 of the Direction, it is noted that decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the

[103] Direction 99 [9.3].

decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

132. Although the Applicant's previous representatives made submissions in relation to this consideration, in the Applicant's SOFIC, it was conceded that this consideration is not relevant.[104]

133. The Tribunal gives this consideration neutral weight.

Other matters for consideration

134. Paragraph 9 of the Direction expressly states the other considerations *'are not limited'* to the matters listed therein.

135. There are no other matters for consideration.

CONCLUSION

136. The Tribunal recognises the significance and complexity of a visa cancellation. The Tribunal gives regard to the Applicant's submissions and reliance on *Demir v Minister for Immigration, Citizenship and Multicultural Affairs*,[105] that the process is not intended to be a mathematical, or a simple aggregation of the relevant considerations. On balance, although there are aspects in favour of revocation, the aspects against revocation outweigh those in favour. The protection of the Australian community, which encompasses the seriousness and nature of the Applicant's offending conduct and the risk of reoffending, as well as the expectations of the Australian community, weigh heavily against revocation. The considerations in favour of revocation, including strength, nature, and ties to Australia, the

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[104] Applicant's SOFIC, [103], Ex 1.

[105] *Demir v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 870; Applicant's SOFIC, [104], Ex 1.

best interest of minor children in Australia, and the extent of impediments, do not outweigh the considerations against revocation.

137. Having regard to all relevant material before it, the Tribunal is satisfied that the correct and preferable decision is not to revoke the cancellation of the Applicant's visa.

DECISION

138. The Tribunal affirms the decision under review.

I certify that the preceding one-hundred and thirty-eight (138) paragraphs are a true copy of the reasons for the decision herein of Deputy President Antoinette Younes.

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

Associate

Dated: 3 November 2023

Date of hearing(s):	**23 October 2023**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitor for the Applicant:	**Mr Z Zarifi, Zarifi Lawyers**
Solicitor for the Respondent:	**Ms M Donald, Sparke Helmore Lawyers**