



# Administrative Appeals Tribunal

## DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2023/6566**

Re: **LK**

APPLICANT

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

RESPONDENT

### DECISION

Tribunal: **Senior Member K Raif**

Date: **16 November 2023**

Place: **Sydney**

The Tribunal affirms the decision not to revoke the cancellation of the Applicant's Special Category Class TY visa.



Senior Member K Raif

## **CATCHWORDS**

*MIGRATION – mandatory visa cancellation - character test - substantial criminal record - whether another reason to revoke the cancellation - protection of Australian community - nature and seriousness of Applicant's conduct - whether conduct engaged in constitutes family violence - strength, nature and duration of ties to Australia - bests interest of minor children - expectations of Australian community - legal consequences of the decision - extent of impediments if removed - impact on victims - decision under review affirmed*

## **LEGISLATION**

*Migration Act 1958 (Cth)*

## **CASES**

*CRRN v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1050

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

*Ripley and Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 3250

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

## **SECONDARY MATERIALS**

*Direction No. 99 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*

## **REASONS FOR DECISION**

**Senior Member K Raif**

**16 November 2023**

## **BACKGROUND**

1. This is an application for review of a decision of the delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ('the Respondent') not to revoke the mandatory cancellation of a Special Category (Temporary) Class TY Subclass 444 visa previously held by the Applicant.
2. The Applicant is a national of New Zealand, born in July 1996. She migrated to Australia in 2003 and made several short trips overseas from that time. The Applicant last re-entered

Australia in August 2017, when her most recent Special Category visa was granted. The Applicant was convicted of a number of offences described below.

3. On 4 December 2022, the Applicant's visa was mandatorily cancelled. The Applicant made a request to revoke the cancellation, and on 31 August 2023 a decision was made under subsection 501CA(4) not to revoke the mandatory cancellation of the visa. The Applicant seeks review of that decision.
4. The hearing before the Tribunal was held on 7 November 2023. The Applicant appeared in person, in addition to her spouse and mother. Her sister gave oral evidence to the Tribunal via telephone (and had provided written statements).
5. For the following reasons, the Tribunal has concluded that the decision dated 31 August 2023 not to revoke the cancellation of the Applicant's visa should be affirmed.

## **RELEVANT LAW**

Subsection 501(3A) of the Act relevantly states:

6. *(3A) The Minister must cancel a visa that has been granted to a person if:*
  - (i) 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*
7. Subsection 501CA(3) provides that as soon as practicable after making a decision under subsection 501(3A), the Minister must, among other things, notify the person of the decision, provide particulars of relevant information and invite the person to make representations to the Respondent, 'within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision'.
8. Subsection 501CA(4) allows for a revocation of a decision under subsection 501(3A) and relevantly states as follows:

(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.*

9. Subparagraph 501CA(4)(b)(ii) of the Act requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision. If the Tribunal is satisfied that the cancellation should be revoked following that evaluative exercise, the Tribunal must revoke the original visa cancellation decision.

10. The 'character test' is defined in subsection 501(6) of the Act. Relevantly, paragraph 501(6)(a) provides in part:

(6) *For the purposes of this section, a person does not pass the character test*  
*if:*

(a) *the person has a substantial criminal record (as defined by subsection*  
*(7))...*

11. Paragraph 501(7)(c) relevantly provides that a person has a '*substantial criminal record*' if the person has been sentenced to a term of imprisonment of 12 months or more.

12. On 23 January 2023, Direction No. 99 *Visa refusal and Cancellation under s. 501 and revocation of a mandatory cancellation of a visa under s. 501CA* ('Direction 99') was signed, coming into effect on 3 March 2023. Direction 99 is binding on the Tribunal in performing its functions or exercising powers under section 501 of the Act.

13. Direction 99 sets out the principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to refuse to grant a visa or revoke mandatory cancellation decisions. The principle set out at paragraph 5.2(2) of Direction 99 states that:

*'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.'*

14. The primary considerations which are set out in clause 8 of Part 2 of Direction 99 are:

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

15. The other considerations, which are not exhaustive, are set out of clause 9 of Direction 99:

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

16. Decision-makers should 'generally' give greater weight to primary considerations than other considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*:<sup>1</sup>

*'Direction 65 [now Direction 99] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply'”*<sup>2</sup>

17. While these comments were made in relation to the earlier Direction, they apply equally in the present case.
18. In this case, it is not in dispute that the Applicant had made representations about the revocation of the cancellation of her visa. The requirements of paragraph 501CA(4)(a) are met. The issues before the Tribunal are:

(a) does the Applicant pass the character test, as defined by section 501 and, if not;

(b) is there another reason why the original decision should be revoked.

### **DOES THE APPLICANT PASS THE CHARACTER TEST?**

19. The character test is defined in subsection 501(6) of the Act. Relevantly, paragraph 501(6)(a) states that a person does not pass the character test if the person has a substantial criminal record, as defined in subsection 501(7). Paragraph 501(7)(c) provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

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<sup>1</sup> [2018] FCA 594.

<sup>2</sup> Ibid, [23].

20. The Tribunal has been provided with the Criminal Intelligence Commission Check Results Report. Information before the Tribunal indicates that the Applicant had been convicted of the following offences:

08/08/16	Drive, licence suspended (1 <sup>st</sup> offence)	\$300 fine and license disqualified for 3 months
16/08/16	Possession of prohibited drug	Conviction recorded
31/03/17	<ul style="list-style-type: none"> <li>• Fail to appear in accordance with bail acknowledgement</li> <li>• Possession of forged prescription</li> <li>• Possession of a prohibited weapon without permit (2 counts)</li> <li>• Drive while license cancelled (1<sup>st</sup> offence)</li> </ul>	Conviction recorded  \$400 fine \$400 fine and a 9 months bond \$800 fined, license disqualified 12 months
08/08/18	License expired less than 2 years before	\$700 fine
16/10/18	Destroy or damage property <= 2000 (DV)	6 months community corrections order
06/02/19	License expired less than 2 years before	\$1200 fine and disqualified from driving 12 months
26/03/19	<ul style="list-style-type: none"> <li>• License expired less than 2 years before</li> <li>• Class A m/v exceed speed &lt;30 km/h</li> <li>• Use unregistered registrable class A m/v on road</li> <li>• Use light vehicle not comply with standard</li> </ul>	\$1100 fine, disqualified from driving \$880 fine, disqualified from driving \$550 fine \$330 fine

	<ul style="list-style-type: none"> <li>• Driver or rider state false name or home add</li> <li>• Driver or rider state false name or home add</li> </ul>	<p>\$660 fine</p> <p>\$440</p>
27/03/19	<ul style="list-style-type: none"> <li>• Drive vehicle, illicit drugs present in blood (1<sup>st</sup> offence)</li> <li>• Unlicensed driver</li> <li>• Driver or rider state false name or home add</li> </ul>	<p>\$600 fine, disqualified from driving</p> <p>\$700 fine</p> <p>\$400 fine</p>
18/04/19	<ul style="list-style-type: none"> <li>• Possess prohibited drug</li> <li>• Supply prohibited drug &lt;= small quantity</li> <li>• Supply prohibited drug &gt; indictable and &lt; commercial quantity</li> <li>• Possess prohibited drug</li> <li>• License expired less than 2 years before</li> </ul>	<p>Community corrections order, supervision order and a service abstention order 12 months</p> <p>Community correction order, supervision order and a supervision by community corrections service—3 years</p> <p>Community corrections order, supervision order and supervised treatment program order 3 years</p> <p>\$200 fine</p>
24/07/19	<ul style="list-style-type: none"> <li>• Possession of prohibited drug (2 counts)</li> <li>• Supply prohibited drug &gt; indictable and &lt; commercial quantity</li> <li>• Supply prohibited drug &lt;= small quantity</li> </ul>	<p>3 years community corrections order</p>



02/10/19	<ul style="list-style-type: none"> <li>• Destroy or damage property</li> <li>• Assault occasioning actual bodily harm (DV) – 2 counts</li> </ul>	<p>\$200 fine and a community corrections order and supervision – 12 months</p> <p>Fined \$550 and \$220 respectively and given a community correction orders</p>
23/03/22	<ul style="list-style-type: none"> <li>• Destroy or damage property (2 counts)</li> <li>• Assault occasioning actual bodily harm</li> <li>• Not give particulars to other driver</li> </ul>	<p>3-year community corrections order</p> <p>Conviction recorded</p>
17/11/22	Reckless grievous bodily harm	3 years imprisonment
07/12/22	<ul style="list-style-type: none"> <li>• Not give particulars to other driver</li> <li>• License expired 2 years or more before</li> <li>• Proceed through red traffic light</li> </ul>	Conviction recorded

21. The Tribunal finds that in March 2022 the Applicant was sentenced to a term of imprisonment of 3 years. The Tribunal finds that the Applicant has a substantial criminal record as defined in paragraph 501(7)(c) of the Act. As the Applicant has a substantial criminal record, she does not pass the character test. The Applicant concedes that she does not pass the character test. The requirements of subparagraph 501CA(4)(b)(i) are therefore not met.

**IS THERE ANOTHER REASON WHY THE ORIGINAL DECISION SHOULD BE REVOKED?**

22. The Applicant concedes that she does not pass the character test, but states that there is another reason why the cancellation should be revoked. In addressing the exercise of discretion, the Applicant concedes that consideration of protection of the community weighs against the revocation. The Applicant concedes that her offending was very serious and

involved physical violence against family members and others. The Applicant states that if she were to reoffend, it could cause significant harm to others, but she claims that in assessing the risk of reoffending, it is relevant that she has expressed remorse and shame about her offending and that is consistent with the evidence of her husband who told the Tribunal that she had expressed remorse and insight in their communications. The Applicant refers to the protective factors, such as the positive influence and support of her husband. The Applicant submits that the effect of prison is a significant deterrent, as is the prospect of a future visa cancellation if she were to reoffend. The Applicant refers to her strengthening Christian beliefs as a protective factor. The Applicant refers to her rehabilitation in the form of regular counselling at the detention centre and her intention to see counsellors in the community (as she did prior to her detention). The Applicant states that she recognises that spending time with those who have had a bad influence on her affected her behaviour and she claims she no longer wishes to have any contact with the anti-social peers. The Applicant submits that there is only a low risk of reoffending.

23. The Applicant concedes that she had committed family violence offences and that this weighs against her. With respect to the nature of her ties to Australia, the Applicant submits that she has spent formative years in Australia, and has a close relationship with family members in Australia who are Australian citizens or permanent residents, and she has other friends in this country, demonstrating substantial ties to Australia. The Applicant submits that this consideration should be given significant weight in her favour. The Applicant refers to the evidence of her husband and the impact her removal from Australia would have on him, as well as the evidence of her mother and sister, who are both close to the Applicant and referred to the significantly adverse impact that separation from the Applicant would have on them. This includes adverse impact on their mental health and emotional well-being. The Applicant refers to the wellbeing of her grandmother who has been diagnosed with a serious illness.
24. The Applicant refers to the best interests of her nephew and her ongoing relationship with the child. The Applicant submits that it is in the best interests of that child for her visa to be reinstated.
25. With respect to the impediment of removal, the Applicant claims this consideration weighs heavily in her favour. The Applicant states that she has no one and nothing in New Zealand,

she would be separated from her family if removed from Australia and she expressed concern about her mental health, lack of accommodation and employment.

26. The Applicant states that she conceded drug use while in detention, which is consistent with the diagnosis of substance use disorder, and given her diagnoses of anxiety and depression, she may relapse into drugs without the support of family in New Zealand. The Applicant states that these matters constitute a powerful impediment if removed as she would not have the family support in New Zealand that she needs.
27. With respect to the effect on victims, the Applicant refers to the evidence of her mother who stated that she wanted to support her daughter, took the blame for not knowing how to provide that support and not wanting to involve the police.
28. The Respondent submits that the Applicant does not pass the character test. The Respondent submits that the primary considerations 1, 2 and 5 should be given such strong weight against the Applicant that any weight given to other considerations is outweighed.
29. With respect to the protection of the community, the Respondent submits that the Applicant concedes the seriousness of her offending, noting in particular the violent offending and the domestic violence offending. The Respondent notes that some offending occurred as the Applicant breached the community correction orders and there are also drug offending and traffic offences. The Respondent submits that it is open to the Tribunal to find that there is increasing seriousness to the offending and that the criminal history taken cumulatively weighs heavily against the Applicant.
30. The Respondent submits that the Applicant concedes that the use of drugs may have caused the violent offending and if the Tribunal were to find that the Applicant may relapse into drug use, there may be a finding that she will reoffend. The Respondent submits that the nature of the harm, if the Applicant was to reoffend (noting in particular, the shooting offence), is such as to be effectively dispositive so that the primary consideration 1 outweighs all other considerations.
31. The Respondent submits that the Applicant has a level of insight into her offending and has sought some help and rehabilitation and acknowledges that the presence of the Applicant's husband is a positive influence. However, the Respondent submits that the Applicant took

an illicit substance in August 2023 and had been involved with drugs while in detention. She also admitted to other incidents in detention (such as having a lighter). The Applicant's recent use of drugs should raise concern about her capacity to abstain in the future. The Respondent notes that some of the claimed protective factors had been in existence before – such as the presence of Applicant's mother and the fact that the Applicant's husband had not been able to prevent the Applicant's drug use in August 2023. The Respondent refers to the remarks of the sentencing judge that it was easier for the Applicant to abstain from drugs while she was in prison and this level of structure in her life would not be available to her in the community. The Respondent submits that there remains a risk of the Applicant relapsing into drug use and a risk of reoffending.

32. The Respondent submits that protection of the community weighs against the Applicant. The Respondent concedes that all of the Applicant's family are in Australia, and the effect of her removal from Australia on the relationship. The Respondent concedes that the length of the Applicant's stay in Australia, her past employment history and other factors in consideration 3 weigh in her favour.
33. With respect to the best interests of a child, the Respondent accepts there is a positive relationship with the Applicant's nephew G and that it is in his best interests for the Applicant to remain in Australia, moderated by the fact that the Applicant has never been the child's primary carer or provided the child with financial support. The Respondent accepts that there would be some impediment to the Applicant if she is removed, including lack of family and social support. The Respondent concedes that the Applicant would suffer emotional hardship, due to separation from her husband and family in Australia. There is no evidence to indicate the Applicant would suffer social or language barriers and she would be entitled to the same support as any other citizen.
34. With respect to the impact on victims, the Respondent notes that the victims who gave evidence (the Applicant's mother and aunt) spoke of adverse effect of the Applicant's removal on them and this can weigh in favour of the Applicant, while the Tribunal had not heard from other victims.
35. The Respondent submits that there is a real risk of the Applicant reoffending and that the primary considerations that weigh against the Applicant outweigh other considerations that are in the Applicant's favour.

36. The Tribunal's considerations are set out below with regard to Direction 99.

## **PRIMARY CONSIDERATIONS**

### ***Protection of the Australian Community***

37. Paragraph 8.1 of Direction 99 provides in part as follows:

#### **8.1 Protection of the Australian community**

- (1) *When considering protection of the Australian community, decision-makers should keep in mind that the government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens....*
- (2) *Decision-makers should also give consideration to:*
- a) *the nature and seriousness of the non-citizen's conduct to date; and*
  - b) *the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.*

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

38. The Direction provides that violent and/or sexual crimes; crimes of a violent nature against women or children (regardless of the sentence imposed); or acts of family violence (regardless of whether there is a conviction for an offence, or a sentence imposed) are viewed very seriously by the Australian Government and the Australian community.
39. Sub-paragraph (c) of paragraph 8.1.1(1) of the Direction requires a decision-maker (with the exception of the crimes or conduct mentioned in sub-paragraphs (a)(ii), (a)(iii) or (b)(i) of paragraph 8.1.1(1)) to have regard to the sentence(s) imposed by the Courts for a crime or crimes of a non-citizen. The imposition of a custodial term is regarded as the last resort in any reasonably and correctly applied sentencing process. Custodial terms are viewed as a reflection of the objective seriousness of an Applicant's offending.

40. In considering the nature and seriousness of the Applicant's criminal offending and other conduct to date, the Tribunal has had regard to the police facts sheets and the sentencing remarks.
41. The Applicant's offending is set out in the above table. It is a lengthy history of offending that spans many years. The Applicant concedes in her oral evidence that she has a lengthy history of offending.
42. The Tribunal has had regard to the sentencing remarks of Judge Pickering made on 17 November 2022 in relation to the offence of causing grievous bodily harm. His Honour describes the offending as follows. The victim and the offender were friends. During the incident in question, the Applicant seemed concerned whether the victim was doing things behind her back and started to become paranoid, which may have been linked to the fact that she was doing a lot of drugs, was not sleeping, had been suffering from anxiety and adjustment disorder. The Applicant and another person walked to the bedroom and after about five minutes the Applicant called for someone to bring her cigarettes. The victim brought the cigarettes into the room, the Applicant appeared angry and then heard a loud bang. The Applicant had fired a shot into the victim's leg. The victim was ultimately taken to hospital and received treatment. The Applicant pleaded guilty in the Local Court. His Honour noted that the injuries clearly amount to grievous bodily harm but at the lower range. His Honour noted that the offence was not planned but was a spontaneous and an utterly irrational act and noted a significant degree of recklessness. His Honour found that the Applicant is not someone who could be said to be of good character at the time of offence. She was on bail at the time of offending and has a criminal history. His Honour suggested that the Applicant had some issues in relation to drugs and has some issues in relation to violence. His Honour acknowledged that the Applicant had expressed remorse and had shown insight into her behaviour. His Honour noted excellent prospects of rehabilitation if the Applicant could overcome the issue of depression, anxiety and drugs.
43. In her revocation request, the Applicant refers to daily drug and alcohol use and lack of sleep in the days leading to the offence. The Applicant stated that her drug addiction has now resolved.
44. In her submission to the delegate, the Applicant refers to the circumstances surrounding the commission of the offence of recklessly causing grievous bodily harm. The Applicant

refers to the comments that the Crown was not able to exclude the fact that the offender was aiming to simply nick the complainant's leg, stating that her moral culpability was significantly diminished. The Tribunal notes that this concession was the subject of strong criticism of Pickering J, who had indicated that it was not the role of the prosecutor to minimise the nature of the offending or to come to a 'lowest common denominator' when describing the offending. The Tribunal does not accept that in circumstances where the Applicant was in possession of a firearm and had discharged it towards another person in circumstances where there was no provocation and no threat to the Applicant, the circumstances of the offending could be described as supporting the revocation request.

45. In her evidence to the Tribunal, the Applicant stated that prior to the offending she had been taking drugs and had not slept for several days. She claims she could not recall the offending and could not (or would not) explain where she obtained the firearm. The Applicant told the Tribunal that she has not used drugs since August 2023 and no longer has the addiction as she did before. However, she also admitted to the Tribunal to using drugs while in VIDC and, when asked why she used drugs on that occasion in August 2023, the Applicant explained to the Tribunal that she just 'felt like it'. In the Tribunal's view, recent drug taking because she felt like it contradicts the Applicant's claim that her drug addiction has resolved.
46. The Tribunal has considered the Police Facts Sheet in relation to the 2020 offending. It is stated that on 23 June 2020 the victim was filming the Applicant as she was getting out of the shower and they had a verbal argument, the victim deleted the video. The relationship ended. Later that evening, the victim drove his car to the home of the Applicant in an attempt to reconcile. The Applicant walked to the front door of the house holding a kitchen knife and followed the victim as he walked away. They continue to argue. The victim asked the Applicant to put the knife down. The Applicant is said to have stabbed the victim once to his left buttock. As they walked towards home, the Applicant again stabbed the victim on his shoulder. The Applicant then got into the victim's car and reversed the victim into the neighbouring car, causing damage to the car. During the police interview, the Applicant denied the allegations and had showed no remorse.
47. There is before the Tribunal a Police Fact Sheet in relation to the 2019 offending. The victims have been identified as the Applicant's mother and grandfather. It is reported that the Applicant and her mother engaged in a verbal argument about a friend's visit to the

family home. The Applicant threw a bottle of soft drink, resulting in a hole in the wall. As the verbal argument continued, the Applicant threw various kitchen items around the room, causing glassware and other items to smash on the floor, she caused the front door of the oven to smash and she threw a cigarette lighter at the victim, causing bleeding and swelling. The Applicant then continued the argument with her grandfather and threw a glass cup at him, causing a laceration on his lip. When the police called the Applicant, she refused to give her location and stated that she would attend a local police station but she failed to do so on the day. She attended the police station two days later and was placed under arrest. In oral evidence, the Applicant's mother agreed that the Applicant had damaged some property but claims it was her fault as she did not know how to support her daughter. The Applicant's mother states that she regrets calling the police.

48. There is before the Tribunal a Police Facts Sheet in relation to the 2018 offending. The victim has been identified as the Applicant's aunt. It is stated that on 13 August 2018 they had a verbal argument and the victim demanded that the Applicant leave the residence. The Applicant refused to leave the premises, causing the victim to become extremely distressed and yell at the Applicant. The Applicant stated that she would burn the victim's house, car and kill the victim. As the victim left the premises and was standing in the backyard, the Applicant threw an object at the glass door panel, causing the glass panel to shatter.
49. The Tribunal finds that many of the incidents involved violence towards others, including the 2022 conviction for causing grievous bodily harm and the 2019 and 2022 convictions for assault. There was also a multitude of drug related offences, including a supply offence in 2019. It is well recognised that drugs can have a significantly detrimental effect on the community and individuals and the supply of drugs is a serious offence. There were also multiple driving offences which could have endangered other road users. The Tribunal also notes that the offending involved multiple instances which occurred over a lengthy period of time. The fact that the Applicant was given a custodial sentence reflects the serious nature of her most recent offending.
50. In her submission in support of the revocation request, the Applicant submitted that she was not convicted of offences that may be regarded as being very serious (such as sexual crimes, crimes against children or family violence). The Tribunal does not accept that submission, noting that some of the offending was in relation to family members including



her mother, grandfather, aunt and ex-partner and these could be considered as being family violence offences. The Direction provides that such offending is serious.

51. The Tribunal has formed the view that the offending was very serious and the Applicant seems to concede that in her evidence to the Tribunal.

**The risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct**

52. The Tribunal has considered the risk to the community, should the Applicant reoffend. Paragraph 8.1.2(1) provides that in considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some of the 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.

53. Paragraph 8.1.2(2) provides that in assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

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

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

*i. information and evidence on the risk of the non-citizen re-offending; and*

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

54. Assessing the nature of the harm to individuals or the Australian community that may occur if the Applicant were to engage in further criminal or other serious conduct, is informed by the nature of her offending to date, including any escalation in her offending. This assessment also notes that the Direction provides that the Australian community's tolerance for harm becomes lower as the seriousness of the potential harm increases. Some conduct

and the harm that would be caused, is so serious that any risk that it may be repeated may be unacceptable.

55. As noted elsewhere, a considerable part of the Applicant's offending involved violence towards others. The most recent offending involved discharging a firearm, unprovoked, towards another person. On an earlier occasion the Applicant inflicted a knife wound on her ex-partner. On another occasion, she caused wounds to her mother and grandfather and damage to property. On another occasion, the Applicant threatened her aunt and caused damage to property. In the Tribunal's view, the nature of harm to individuals, should the Applicant engage in further criminal conduct of similar nature, would be very significant.
56. The Tribunal has considered the risk of the Applicant reoffending and the evidence of rehabilitation achieved.
57. In her submission to the delegate dated 15 December 2022, the Applicant states that she does not pose an ongoing risk to the Australian community. The Applicant describes her upbringing and the violence perpetrated by her father against her mother. (She referred on multiple occasions to an incident where mirrors were smashed in the house and shouting between her parents but in oral evidence the Applicant was not able to provide more detail about the violent conduct of her parents.) The Applicant refers to her past relationships which influenced her drug and alcohol use and had a 'bad influence' on her. There are statements from the Applicant's family members including her mother, sister, aunt and her partner, as well as statements from her friends, which suggest that the offending was out of character and due to drug use.
58. In her submission to the delegate, the Applicant refers to her drug history and claims that the offence was a one off aberration and supports the claim that she does not pose a risk to the community. She states that she was of good character prior to the offending and has good prospects of rehabilitation. The Applicant states that her offending occurred 'within a particular paradigm or circumstance which appears to be resolved', being severe drug addiction which is now in remission given her abstinence from drugs. In her later submission to the delegate, the Applicant suggests that she is not a recidivist offender, that she does not have a history of serious reoffending and her record does not demonstrate an escalating trend of seriousness. It is unclear how these claims could be made on the facts set out above, which refer to multiple and repeated offending over a number of years. In the

Tribunal's view, these submissions fail to have regard to the totality of the Applicant's conduct and seek to portray the Applicant's 2022 offending as an isolated incident. That is not an accurate description of the Applicant's circumstances.

59. It is significant that the 2022 offending was not a one off. It was one in a very long series of offending which commenced in 2016 and continued over the years. It is not correct, in the Tribunal's view, to have regard to the most recent offending (which resulted in a finding that the Applicant does not pass the character test) in isolation and to disregard or place little or no weight on prior offending. Rather, it is appropriate to have regard to the totality of the Applicant's conduct. While the November 2022 offending could be considered most serious, given the lengthy custodial sentence imposed, it is a culmination of other conduct which involved multiple violent offending and drug offending. The Tribunal does not accept the Applicant's claim that the offence was a 'one-off aberration'. The Tribunal does not accept her claim that prior to the 2022 offending she was a person of good character (in the general sense, rather than by reference to the definition in the *Migration Act*). Her persistent and frequent offending which commenced in 2016 and continued until the most recent offending which resulted in the substantial term of imprisonment, does not support the Applicant's claim that she was previously of good character and that her most recent offending was out of character.
60. The Applicant's mother told the Tribunal that her daughter was 'in the wrong place' when the shooting and the stabbing offences occurred. The Applicant's sister in oral evidence also suggested that the Applicant was 'at the wrong place at the wrong time' during the offending. These statements do not seem to take account of the seriousness of the offending, nor reflect any acknowledgement of the Applicant's responsibility and culpability. However, the Tribunal acknowledges that these are not statements made by the Applicant herself and may not reflect the Applicant's own views.
61. The Tribunal has considered the likelihood of the Applicant reoffending.
62. The Applicant states in her submission to the delegate that she is remorseful and contrite for her conduct. She refers to the comments of His Honour Pickering J that suggest that the Applicant was remorseful for her offence. The Applicant refers to her own comments, statements from her partner, sister and her friends. The Applicant also refers to the comments made by Mr Borenstein (addressed elsewhere). The Applicant submits that she

is genuinely remorseful and contrite for the criminal conduct (having pleaded guilty to the offence and engaging in pro-social conduct) and she states that she does not pose an ongoing risk to Australian community.

63. In her submission to the delegate, the Applicant also refers to the steps she had taken toward rehabilitation. She notes that His Honour Pickering J found that she had good prospects of rehabilitation and was unlikely to offend if the underlying mental health and substance abuse issues were treated. The Applicant notes that she had attended a drug and alcohol treatment program at Odyssey House, intends to live with her family upon release and has no intention of associating with the same group of people who used drugs. There are multiple statements from the Applicant's immediate family and friends who refer to their close relationships and the support they have provided, and intend to continue to provide, to the Applicant. The Applicant refers to the support from the local community and her positive engagement with the community, as well as her plans for the future, which include working in her mother's business and opening her own business. The Applicant refers to a supportive relationship with her present partner who does not use drugs and will be a positive influence on her. The Applicant refers to the treatment she sought with Dr Goonniah in 2020 and the treatment at Odyssey House in 2020, stating that she wants to resume the treatment which she did not take seriously before.
64. In her evidence to the Tribunal, the Applicant also outlined her plans for the future, including living with her parents, employment, establishing a mental health treatment plan, her relationship with her partner and having children. However, the Applicant also told the Tribunal that she has not made any contact with any counselling service or any other support service outside of detention. She stated that she wanted to return to the same psychologist she saw before but had not made contact with him or anyone else. This absence of any firm plans for ongoing rehabilitation and formal supports in the community is of some concern to the Tribunal.
65. In her submission to the Tribunal, the Applicant refers to a number of factors that had contributed to her past conduct, including witnessing violence by her father towards her mother during her early childhood, her own drug use, poor mental health, the lengthy imprisonment of her fiancé and her own experience of domestic violence. In oral evidence, the Applicant referred to regular drug use since the age of 18, stating that it had affected her mental health. The Applicant states that she has insight into her conduct, feels genuinely

remorseful and has taken steps towards rehabilitation. The Applicant refers to her participation in a drug addiction course and engagement in a program at Odyssey House, as well as the positive experience arising from her detention. The Applicant refers to the counselling she had completed with Dr Goonniah in 2020, although she claims at the time she did not fully commit to this process but intends to revisit it. She refers to the counselling she had completed during her immigration detention. In her written submission to the Tribunal, the Applicant states that she genuinely regrets her past actions and has demonstrated some understanding of the gravity of her offences and these submissions were accepted by the delegate.

66. The Applicant provided to the delegate a statement from her partner, MB who states that being in prison has been a 'wake up call' for the Applicant and changed her mindset and attitude. MB states that he would support and guidance to the Applicant upon her release. The Applicant's partner has also provided a statement to the Tribunal dated 12 October 2023. He refers to the Applicant's insight into her conduct and remorse for her actions.
67. In her oral evidence to the Tribunal, the Applicant stated that she was remorseful and embarrassed about her conduct. However, she had difficulties elaborating or explaining what that meant to her and generally was unable or unwilling to answer questions posed to her about remorse. The Tribunal had formed the view that the Applicant's expressions of remorse, particularly in her various written submissions, may not necessarily be an accurate reflection of her state of mind. It is also significant that the Applicant referred to the most recent offending as a 'silly mistake'. The Applicant refused to explain where she obtained a gun that was used in the shooting. Given the seriousness of the offence (shooting another person with a firearm, causing bodily harm), the Applicant's reference to it being a 'silly mistake' does not suggest to the Tribunal that she appreciates the seriousness of her actions or has real insight into her conduct. It also brings into question the genuineness of her expressed remorse.
68. The Tribunal has had regard to the statement of Sam Borenstein dated 6 November 2022. Mr Borenstein reports, in relation to the 2022 offending, that the Applicant had little memory of what had occurred and did not know where the gun came from. It is stated that the Applicant had been using drugs and alcohol on a regular basis and was mixing with friends who were using drugs. The Applicant reported a deterioration in her mental state when her fiancé was sentenced to 15 years in prison and the increased drug use when the

relationship ended. The Applicant reported that she was no longer using drugs in prison and being 'a different person', she reported to sometimes experiencing symptoms of depressed mood or anxiety, but Mr Borenstein notes that the Applicant had not received any psychiatric or psychological treatment in prison. Mr Borenstein states that the Applicant denied any history of trauma, abuse or domestic violence (which appears to contradict other statements which suggest that the Applicant was subjected to domestic violence in her personal relationships.) Mr Borenstein refers to a Personality Assessment Screener with the score of 24, indicating marked potential for emotional and / or behavioural problems of clinical significance. It is stated that results on the DASS indicate mild to moderate symptoms of depression, moderate to severe symptoms of anxiety and mild symptoms of stress. Mr Borenstein refers to the Applicant's background and history of drug use, stating that her diagnosis is that of substance use disorder currently in sustained remission due to incarceration. He notes that the Applicant had participated in psychological treatment and drug and alcohol programs (Odyssey House) prior to imprisonment. Mr Borenstein states that the Applicant had expressed guilt, remorse and contribution and said she intends to remain alcohol and drug free and will return to psychological treatment and drug and alcohol programs and these matters will, Mr Borenstein opines, means the likelihood of her reoffending in similar fashion will be significantly reduced.

69. The Applicant's partner MB in oral evidence told the Tribunal that the offending was not in the Applicant's character or nature. MB refers to his support for the Applicant and his view on drugs. MB told the Tribunal that he will support the Applicant if she has an urge, they will be together all the time and the Applicant would be 'under his supervision'. MB told the Tribunal that if the Applicant has an urge to use drugs, he will take appropriate steps to take her to see a doctor and ensure she does not use drugs. MB concedes that the Applicant had used drugs in VIDC recently but states that she was in a 'bad space' and he was not in close physical proximity. MB seems to suggest that he will be able to control the Applicant's urges and ensure she does not take drugs in the future. The Tribunal is not confident this is a realistic assessment of the circumstances or of MB's capability to control the Applicant's future conduct.
70. The Tribunal also notes MB's oral evidence that in the past he was aware of the Applicant's 'bender' (as she described her drug use immediately prior to the 2022 offence) and that conduct resulted in a short breakup of the relationship. He was unable to prevent the Applicant's drug use and the subsequent criminal offending. MB told the Tribunal that in the

future, the situation would be different as he has done his research, knows how to handle the situation and he will not have the same extensive work commitments that he did in the past. It may be that MB will be better prepared in the future but, as noted above, the Tribunal is not convinced that he could effectively 'control' the Applicant's behaviour, should she choose to return to drug use.

71. In oral evidence, the Applicant also told the Tribunal that she is 'a whole different person' and her past offending was caused by drugs but she is now committed to not using drugs. She refers to her family, her recent marriage, commitment to stay in Australia, a job offer and finding God as protective factors. The Tribunal finds much of that evidence unpersuasive. In particular, the Tribunal notes that the Applicant's family was available and supportive throughout the time when her offending took place. The Applicant's relationship with her partner has also been in existence for some time prior to their recent marriage in September 2023 and at the time of the most recent offending (although MB referred to a short break up for a couple of days prior to the offence taking place). The Tribunal does not accept that the presence of the family and her relationship with her partner will act as protective mechanisms enabling the Applicant to avoid further offending. The Applicant's evidence to the Tribunal is that she has found God. She told the Tribunal that she had a commitment to Christianity for a long time but did not think about it before when taking drugs but she is taking it more seriously now. There is very little evidence before the Tribunal about the Applicant's claimed commitment to God and her intention to continue with that commitment (for example, she told the Tribunal that she does not attend any religious functions at Villawood IDC and is not aware of any).
72. The Applicant told the Tribunal that she was only taking drugs when she was with other people and she no longer wants to see these people and will not see them. That commitment has not been tested, given the time the Applicant has now spent in detention and, as noted above, the Applicant's drug use as recently as in August 2023, when the Applicant was not subject to the influences of her friends, is of concern.
73. The Tribunal also notes that the Applicant sought treatment on 2020 but it is significant, in the Tribunal's view, that she had committed multiple offences after that treatment took place and on her own evidence, she did not take it as seriously as she should have. Thus, the availability of treatment in the future (even if the Tribunal were to accept that future treatment will take place, given the paucity of any arrangements or information about it), and the

Applicant's present stated desire to engage in such treatment, do not necessary establish that the Applicant will not reoffend or that she will take the treatment more seriously than she did in the past. The Tribunal is mindful that in his remarks Pickering J found that the Applicant had good prospects of rehabilitation and was unlikely to reoffend *if the underlying mental health and substance abuse issues had been treated*. At present, the Tribunal is not persuaded by the Applicant's claim that she will obtain (and will continue to engage) in effective treatment to address these issues.

74. The Applicant told the Tribunal that being in prison was an 'eye opener' and if it was not for that, she would have continued with drug use. In her written statement to the Tribunal, the Applicant also refers to the effect of detention on her and her family, referring to emotional distress and anxiety, financial hardship and disruption to many lives. The Tribunal accepts that the Applicant may have felt that way but is mindful that it did not prevent further drug use in immigration detention.
75. As noted above, the Tribunal also considers it problematic that the Applicant claims to have used drugs as recently as in August 2023. This was well after her multiple assertions that she is no longer using drugs, is remorseful and ashamed about her past conduct which was caused by drugs and her undertakings not to engage in the same conduct in the future. The Applicant concedes in oral evidence that when she is using drugs, she is at an increased risk of violent offending. The Applicant's recent use of drugs, while in detention, suggests to the Tribunal that the Applicant may be unable to control her impulses and does not support her claims that due to her rehabilitation and commitment not to reoffend, she will not return to drug use. If the Applicant was to return to drug use, the Tribunal is of the view that there is a real risk she will reoffend and may engage in violent offending.
76. As for the Applicant's claims that prison has been a 'wake up' call for her, the Tribunal notes that the records indicate that on some occasions contraband was found upon the Applicant during her detention. In her written submission to the Tribunal, the Applicant explains that in March 2023 she was found to be in possession of a lighter. She assumed responsibility for that offence which was of minor significance. The Applicant also explains that in March 2023 staff at the detention centre inspected a package addressed to her, discovering plastic bags with green vegetable matters and assorted lighters inside shampoo bottles. The Applicant claims she was unaware of the content and had no connection to the sender and was not charged. The Applicant refers to another incident in March 2023 where it was



recorded that the Applicant was involved in an altercation with another detainee who sustained minor scratches. The Applicant states that in another incident on the same day, another detainee reported that the Applicant and others confronted her and the detainee reported she was verbally abused, slapped and spat on. The Applicant denied her role in these incidents and states that no adverse findings were made against her.

77. The Applicant states that in April 2023 a fire alarm was triggered in the detention centre and the Applicant confessed to smoking in her room. Later in April another detainee reported to being assaulted by other detainees and her phone being taken away while the Applicant stood by the door. (Again, the Applicant denied involvement). The Applicant submits that the evidence is hearsay and the allegations against her should not be accepted. In oral evidence, the Applicant refused to provide comments in relation to these matters and submits that these are mere suspicions, and no adverse inferences can be drawn from this untested evidence.
78. The Tribunal acknowledges that no adverse findings had been made against the Applicant as a result of any evidence gathering process, but the Tribunal is also mindful that the Applicant seems to have admitted her involvement in at least some of the incidents, such as the possession of the lighter and smoking in her room. The Tribunal also finds the Applicant's explanation that she could have been simply walking past the door when the assault was taking place, unpersuasive. The Tribunal considers these breaches (even if minor) to be significant because the Applicant had engaged in that conduct well after she had expressed her remorse, stated that she is rehabilitated and undertook not to engage in criminal or anti-social conduct again. In the Tribunal's view, these incidents, to which the Applicant had admitted her involvement, undermine the Applicant's undertakings and bring into question her willingness, or ability, to avoid criminal and anti-social behaviour in the future.
79. In her statement to the Tribunal dated 12 October 2023, the Applicant states that she had participated in the Smart Recovery program demonstrating her commitment to addressing the root cause of her struggles and making improvement of her life. The Applicant refers to her commitment to rehabilitation and desire to overcome the past challenges. She states that she believes she had made considerable program in addressing her mental health issues, drug dependency and personal growth. In her written evidence, the Applicant also refers to counselling she received while in detention and other rehabilitation programs she

had engaged in. In oral evidence, the Applicant told the Tribunal that she has seen a counsellor regularly in relation to her mental health and she had also seen a doctor a few times. She claims to have also attended a few sessions of the Smart Recovery program but she 'chose to stop going' as she did not like group sessions.

80. The Tribunal accepts that the Applicant had participated in rehabilitation programs and is prepared to accept that she genuinely believes she has made progress. However, the effectiveness of her treatment, and the success of her stated commitment can only be truly tested when the Applicant is in the community with ready access to drugs and alcohol and to the various stressors in life that may influence her ability to cope. Indeed, in her evidence to the Tribunal the Applicant suggests that if she is left without family or social support in New Zealand, she fears relapse into drug use. The Applicant told the Tribunal in oral evidence that if she was to return to New Zealand, she is like to take up drugs again. The Applicant appears to suggest that, if faced with life's difficulties, she may not be able to cope without resorting to drugs as she did in the past. The Applicant also admits to using drugs while in immigration detention and states that on one occasion in August 2023 she used drugs simply because she felt like it. (The Applicant seems to suggest multiple occasions of drug use while in detention.) That claim does not support the Applicant's evidence that she has addressed the root cause of her struggles and will be drug free in the future.
81. As noted above, the Tribunal is concerned that the Applicant may relapse into drug use when she is in the community, and she herself admits recent drug use that occurred after her claimed rehabilitation. In oral evidence, the Applicant concedes that there is concern about ongoing drug use in the community but she claims there is a lower chance of that occurring given the supports around her. The Tribunal is of the view that there remains a real risk of the Applicant relapsing into drug use and the Tribunal also finds that if the Applicant does relapse into drug use, the risk of her reoffending will be heightened. The Applicant herself has expressed a strong link between drug use and her violent offending. The Tribunal finds that there remains a real risk of the Applicant reoffending.
82. Having regard to the nature of the Applicant's past convictions involving violence, including domestic violence, damage to property and drug related offences, and the fact that her offending had posed, or had the potential of causing, significant harm to others, and the Tribunal's view that there remains a real risk of the Applicant reoffending, the Tribunal has

formed the view that the protection of the Australian community weighs very heavily against the revocation.

### **Whether the conduct engaged in constituted family violence**

83. Paragraph 8.2 of the Direction provides:

*(1) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen*

84. The Applicant states in her submission to the delegate that the offending did not involve family violence. The Tribunal accepts that the 2022 offence which resulted in the custodial term did not involve family violence. However, the information cited above indicates that the June 2020 offending was in relation to her then partner while the 2019 offending was in relation to family members. These circumstances suggest that the past offending did involve family violence. As noted above, the Tribunal is of the view that its consideration is not limited to the November 2022 offending which led to the finding that the Applicant does not pass the character test.

85. In her written and oral evidence to the Tribunal, the Applicant appears to concede that some of her offending involved family violence. The Applicant notes that the March 2022 offence involved her using a knife to stab her ex-partner. The Applicant refers to the October 2019 offending when she threw a lighter to her mother's head during an argument, causing bleeding, and threw a glass at her grandfather's head, causing a wound. The Applicant also refers to the October 2018 offending in which she had an argument with her aunt, slammed the door resulting in breakage of the glass. The Applicant concedes that her actions meet the definition of family violence.

86. In her written statement of 12 October 2023, the Applicant states that due to the incarceration, she realised that family violence is unacceptable and she has learned the importance of respecting and nurturing relationships within families. The Tribunal has considerable difficulty accepting the evidence that prior to her incarceration the Applicant failed to appreciate that family violence was unacceptable.

87. The Tribunal finds that some of the conduct engaged in constitutes family violence. The Tribunal notes that the family violence offending was repeated and resulted in physical injuries to the victims. The Tribunal is of the view that this factor weighs heavily against the revocation.

**The strength, nature, and duration of ties to Australia**

88. Paragraph 8.3 of the Direction provides:

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

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

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

89. The Applicant submits that she has been residing in Australia for over 20 years, since the age of 6. Her immediate family, including her grandparents, mother, sister and spouse, reside in Australia and are Australian citizens or permanent residents. She also referred to having close friends in Australia. The Applicant refers to her settlement in Australia and her charitable contributions.

90. In her submission to the delegate (a statement provided by the Applicant's mother), the Applicant refers to a close relationship with her grandmother, stating that her grandmother has a number of health issues. The Applicant submits that prior to her incarceration, she always looked after her grandmother and provided comfort to her and the Applicant submits that her grandmother is getting sick as a result of what happened to her. The Applicant's mother also provided a detailed statement which outlined the Applicant's past circumstances and hardships. The Applicant's mother refers to the impact that the

separation from the daughter would have on her and the family and she refers to hardship of being separated from her daughter.

91. In oral evidence to the Tribunal, the Applicant's mother also refers to a close relationship with the Applicant and the Applicant's close relationship and support for her grandmother and sister. The Applicant's mother refers to the hardship the Applicant would experience being on her own in New Zealand and the devastating effect the Applicant's removal to New Zealand would have on the family. The Tribunal is prepared to accept that evidence.
92. There is also before the Tribunal a statement from the Applicant's sister who refers to their strong bond, including emotional and financial support. The Applicant's sister refers to the Applicant's feeling of shame and remorse and also refers to the hardship the family would experience of the Applicant was to leave Australia. The Tribunal has also had regard to the statement from the Applicant's aunt who supports the Applicant being able to remain in Australia. The Tribunal is prepared to accept that evidence.
93. The Applicant told the Tribunal that she maintains regular contact with her grandmother and has a close relationship with her.
94. In her written statement to the Tribunal, the Applicant refers to her long standing and supportive relationship with her husband MB and states that the possibility of separation is causing them distress. The Applicant refers to her other links to Australia, including friendships (as noted above, the Applicant's friend had provided evidence to the Tribunal) and the presence here of her extended family including grandmother, aunt and nephew. The Applicant told the Tribunal that she is now married, has turned to God, wants to have children and open a business.
95. The Tribunal accepts that that the Applicant's immediate and extended family, as well as friends, live in Australia and are Australian permanent residents or citizens. The Tribunal accepts that the Applicant had registered her marriage in September 2023. The Tribunal accepts that the Applicant has significant family and social ties in Australia. The Tribunal is prepared to accept that the Applicant's family, and her partner, may be adversely affected if the Applicant was to leave Australia.
96. These factors weigh heavily in favour of the revocation.

### **The best interests of minor children in Australia**

97. Paragraph 8.4(1) of the Direction requires a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is in the best interests of a child affected by the decision.
98. Paragraphs 8.4(2) and 8.4(3) respectively contain further considerations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.
99. The Applicant does not have children of her own but refers to her relationship with her nephew, G. (She explained to the Tribunal that G is the child of her aunt rather than her sister). She claims that she speaks to G a few times a week, whenever he is with her mother. In her submission to the Tribunal the Applicant submits that it is in G's best interests to revoke the cancellation of her visa, although she notes that she does not have any parental duties or obligations towards this child. The Applicant told the Tribunal that she used to look after the child and wants to maintain a relationship with him and be there for him.
100. The Tribunal is prepared to accept the Applicant's evidence about her contact and her relationship with G. The Tribunal notes, however, that at least for several months, the Applicant's contact with G has been by electronic means only and that type of contact can continue wherever the Applicant lives. There is no evidence before the Tribunal to suggest that the Applicant's relationship with G is a close one (even accepting the entirety of the Applicant's evidence about that relationship), nor is there evidence to suggest that the Applicant has ever had any parental responsibilities in relation to that child.
101. The Tribunal is prepared to accept that it may be in the best interests of G that the Applicant is able to remain in Australia. The Tribunal finds that this consideration weighs in favour of the revocation but only to a limited degree.

## **Expectation of the Australian Community**

102. Sub-clause 8.5 of Direction 99 provides that the Australian community expects non-citizens to obey Australian laws while in Australia. Paragraph 8.5(1) of the Direction sets out the government's view in relation to community expectations:

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

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

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

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

105. Paragraph 8.5(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs*,<sup>3</sup> which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or evidence about those expectations. Instead, the Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.<sup>4</sup>

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<sup>3</sup> [2019] FCAFC 185 ('FYBR')

<sup>4</sup> See *Ueese v Minister for Immigration and Border Protection* [2016] FCA 348; *Afu v Minister for Home Affairs* [2018] FCA 1311; *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 and *FYBR v Minister for Home Affairs* [2019] FCA 500.

106. Paragraph 8.5(2) contains a statement of the Government's views as to the expectations of the Australian community, which operates to ascribe to the whole of the Australian community an expectation aligning with that of the executive government which the decision maker must have regard to.
107. The Tribunal has formed the view that, given the seriousness and repeated nature of the Applicant's conduct, and in light of the harm her conduct had caused to others, the community expectations would weigh very heavily against the revocation.

## **OTHER CONSIDERATIONS**

### **Legal consequences of the decision**

108. Paragraph 9.1 of the Direction directs a decision-maker to take into account the following:
- (1) Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful noncitizen...*
109. The Applicant is not a person who is covered by a protection finding.
110. The Applicant does not claim that Australia's protection obligations are engaged in this case and there is nothing in her evidence that would suggest to the Tribunal that protection obligations arise. In her evidence to the Tribunal the Applicant confirms that she does not raise any non-refoulement claims in these proceedings.
111. As a consequence of the decision not to revoke the cancellation, the Applicant will be precluded from applying for further Australian visas and is unlikely to be able to return to Australia.
112. This consideration weighs somewhat in favour of the revocation.



### **Extent of impediments if removed**

113. Paragraph 9.2 of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:
- a) the non-citizen's age and health;*
  - b) whether there are any substantial language or cultural barriers; and*
  - c) any social, medical and/or economic support available to that non-citizen in that country.*
114. The Applicant is 27 years of age. With respect to her health, she refers to substance misuse disorder and depression which, she claims are in remission. The Applicant states that if she is to return to New Zealand, her mental health might be affected. The Applicant does not suggest that she would be unable to access adequate and appropriate health services in New Zealand and she told the Tribunal that she has not explored what treatments and mental health support might be available to her in New Zealand.
115. There do not appear to be any cultural or language barriers for the Applicant if she is to return to her home country.
116. In terms of support available to her in New Zealand, the Applicant claim that she will have no place to live, no money, no job and no car. The Applicant submits that she has no family and no support in New Zealand. She told the Tribunal she does not have anyone in New Zealand and has no ties to that country and does not wish to re-establish contact with her father. She states that she would be away from her family and her husband if she is to relocate to New Zealand. The Tribunal accepts that evidence.
117. The Applicant's mother provided a statement to the delegate, stating that the Applicant has no family or friends in New Zealand and her whole family is in Australia where the family has made its home. The Applicant's mother states that the Applicant had left New Zealand due to her father being abusive, was distraught after her one visit to New Zealand and sending her back would trigger this and heighten her depression and anxiety. The

Applicant's mother states that the Applicant had never lived on her own and would not be able to survive on her own and that may cause the Applicant to return to drug use. Given that the Applicant is now an adult, the Tribunal does not accept that is the case, even if the Tribunal accepts that there may be some hardship to the Applicant (and her family in Australia) if the Applicant was to return to New Zealand.

118. The Applicant claims that she has ongoing treatment in Australia which may be compromised if she was returned to New Zealand. The Tribunal notes, however, that the Applicant's evidence to the Tribunal is that she is receiving treatment while in detention but has not made any arrangements for treatment in the community. In the absence of any evidence as to what treatment may be available (or why appropriate treatment may not be available) to the Applicant in New Zealand, the Tribunal is not satisfied on the evidence before it that the Applicant's ongoing treatment may be compromised if she was to live in New Zealand. If the Applicant needs to make arrangements for further treatment in the community in Australia, she would equally need to make arrangements for such treatment in New Zealand.
119. In her written statement to the Tribunal, the Applicant claims that she has no family and no social ties in New Zealand and her deportation will likely end her marriage as her husband has a full time job in Australia and provides for his parents. This is consistent with the oral evidence before the Tribunal as MB told the Tribunal he has not considered what the future of the relationship would be if the Applicant was to leave Australia. The Tribunal accepts that if the applicant's visa remains cancelled, there is a possibility that separation may result in the applicant's relationship with MB ceasing.
120. The Applicant expressed concern that without practical support, she may relapse into drug use and claims that deporting her to a 'foreign land' will cause her heartbreak and sadness.
121. The Tribunal has also considered the statement of MB, who refers to the anxiety and sorrow he feels at the prospect of the Applicant's deportation and their separation. MB refers to his work commitment and responsibilities towards his parents, as well as the deterioration in the Applicant's mental state if she is removed.
122. In oral evidence, MB refers to his love for the Applicant and their ongoing commitment and the impact of her removal would have on him and his family and friends in Australia. MB

told the Tribunal that he would not accompany the Applicant in New Zealand, noting his work and family commitment, and his desire to be with his wife in Australia, maintain the relationship and start a family. The Applicant's mother and sister gave oral evidence to the Tribunal referring to the close relationship between them and the significant impact that the Applicant's deportation would have on her. The Applicant's sister refers to her own mental health issues. She told the Tribunal that the family would have to relocate to New Zealand and lose everything they have if the Applicant was to leave Australia and she refers to the impact on their mental health if the Applicant is to be removed.

123. The Tribunal is prepared to accept that significant hardship would be caused to the Applicant and her partner and family if the Applicant was deported as a result of her visa being cancelled.
124. The Applicant told the Tribunal that she might not be able to find a place to live and a job if she was to move to New Zealand. She claims that disclosing her criminal convictions and deportations may preclude her from being able to find a job in New Zealand. The Tribunal is of the view that these claims are entirely unsupported by any probative evidence. The Applicant's assertions are speculative, particularly given the fact that the Applicant's evidence is that she has not sought employment in New Zealand and there appears to be nothing to support her claim that she would not be able to find employment. The Tribunal finds that such generalised and unsupported statements unpersuasive.
125. The Applicant refers to the reasoning in *Ripley and Minister for Immigration, Citizenship and Multicultural Affairs*, where the Tribunal held that a person with drug and alcohol disuse disorder may experience impediment for the reasons of that disorder and health issues.<sup>5</sup> The Tribunal is generally prepared to accept that the Applicant's particular circumstances (including her health issues) may create additional impediment if she is removed. The Tribunal accepts that the Applicant may not have family or social support in her home country. The Tribunal is prepared to accept that, at least initially, the Applicant may find it difficult to re-establish herself in that country on her own as she would have to find accommodation, work and establish means of supporting herself. She may also have to find

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<sup>5</sup> (2022) AATA 3250.

support for her mental health. The evidence does not establish that the Applicant will be unable to do that, with the passage of time.

126. The Tribunal finds that this consideration weighs heavily in favour of the revocation.

### **Impact on victims**

127. Paragraph 9.3 of the Direction directs a decision-maker to take into account 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.
128. In her submission to the delegate, the Applicant states that the impact on the victim might not rise to an unacceptable level since she has had no contact with the victim and has no ongoing association with her and has demonstrated remorse and insight.
129. In her submission to the Tribunal, the Applicant states that her mother was a victim of her offending and she has forgiven the Applicant for her adverse conduct and wants the Applicant to remain in Australia. The Applicant's mother gave evidence to the Tribunal about the incident when she was the victim of the violent conduct perpetrated by the Applicant. The Applicant's mother took some blame for the Applicant's conduct and described the devastation she would feel if the Applicant was removed from Australia. The Tribunal accepts this is the case and has given this some weight in favour of the Applicant. There is no evidence in relation to the other victims of the Applicant's conduct.
130. Having heard the evidence from the Applicant's family members who had been victims of her conduct, the Tribunal views this consideration as weighing in favour of the revocation.

### **Impact on Australian business interests**

131. Paragraph 9.4 of the Direction directs a decision-maker to take into account the following:

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

132. There is no evidence before the Tribunal concerning any business interests. This consideration is neutral.

### **Other**

133. In her submission to the Tribunal the Applicant states, by reference to the reasoning in *CRRN v Minister for Immigration, Citizenship and Multicultural Affairs*,<sup>6</sup> that if the cancellation of her visa is not revoked, she will remain in immigration detention until removed from Australia and this should be taken into account. The Tribunal accepts that this is the case, however, unlike the situation in *CRRN*, there is no suggestion that the Applicant's detention would be indefinite. There are no apparent reasons why the Applicant's removal from Australia (if her visa remains cancelled) would be delayed, resulting in prolonged or lengthy detention. There is certainly no suggestion of indefinite detention.

### **CONCLUSION**

134. The Tribunal has found that the Applicant has a substantial criminal record and that she does not pass the character test. The Tribunal has considered if there is another reason why the decision to cancel her visa should be revoked.
135. The Applicant has a long history of offending that spanned over a number of years. The Tribunal finds that the Applicant's offending was very serious and there are several incidents of violence towards family members and members of the community. The Applicant had committed offences that can be considered as family violence offences. The Tribunal has formed the view that there is a real risk that the Applicant could relapse into drug use and, if she does, that she may again engage in serious criminal (and potentially violent) conduct. This poses an unacceptable risk to the community and to those around the Applicant. The Tribunal finds that the protection of the Australian community and the expectations of the

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<sup>6</sup> [2023] FCA 1050 ('CRRN')

community weigh very strongly against the revocation. The fact that the Applicant engaged in family violence also weighs against the revocation.

136. There are several factors that weigh in favour of the revocation. Most notably, the nature and duration of the Applicant's ties to Australia. The Tribunal accepts that the Applicant has extensive family and social ties to this country, that her entire family live here and that she has the support of family and friends. The Tribunal also accepts that there may be significant impediment to the Applicant, but also to her partner and family, if she is removed from Australia. These factors weigh heavily in favour of the revocation. Also in favour of the revocation, although to a fairly limited extent in the Tribunal's view, are the best interests of the applicant's nephew G and the impact on victims such as the Applicant's mother and aunt. The legal consequence of the decision and, in particular, the Applicant's inability to seek other visas in the future and the period of detention until her removal, weigh in favour of the revocation.
137. Having carefully considered all the circumstances, the Tribunal has decided to give greatest weight to the primary considerations of protection of the Australian community, the fact that some of the offending conduct constitutes family violence, and the expectations of the Australian community. In the particular circumstances of this case, the Tribunal has decided that these considerations outweigh other considerations.
138. The Tribunal has decided that the decision under review should be affirmed.

## **DECISION**

139. The Tribunal affirms the decision not to revoke the cancellation of the Applicant's Special Category Class TY visa.

*I certify that the preceding 139 (one hundred and thirty-nine) paragraphs are a true copy of the reasons for the decision herein of Senior Member K Raif*

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

Associate

Dated: 16 November 2023

Date of hearing:	<b>7 November 2023</b>
Counsel for the Applicant	<b>Dr Jason Donnelly</b>
Solicitor for the Applicant	<b>Mr Abbas Soukie</b>
Solicitor for the Respondent	<b>Mr Ingmar Duldig</b>