Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	**GENERAL DIVISION**
File Number(s):	**2023/5631**
Re:	**Andrew Blake**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Mr S. Webb, Member**
Date:	**2 February 2024**
Place:	**Canberra**

The Minister's decision on 23 May 2023 is set aside and in substitution the Tribunal revokes the original decision on 27 July 2020 to mandatorily cancel Mr Blake's visa.

……[SGD]……

Mr S. Webb, Member

Catchwords

MIGRATION – mandatory visa cancellation – cancellation decision not revoked – Ministerial Direction No. 99 – failure to pass character test – revocation – primary and other relevant considerations – protection of Australian community – very serious conduct – family violence – risk of re-offending – rehabilitation – strength, nature and duration of ties to Australia – family and social links to Australia – Australian citizen adult children – time residing in Australia – positive contribution to Australian community – adverse impact – expectations of the Australian community – legal consequences of decision – impact on victims – balance of considerations – another reason – decision set aside and substituted

Legislation

Migration Act 1958, ss 499, 500, 501, 501CA

Migration Regulations 1994, Schedule 2, Schedule 5

Cases

Ali v Minister for Home Affairs [2020] FCAFC 109

Assistant Minister for Immigration and Border Protection v Splendido [2019] FCAFC 132

Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 125

Bettencourt v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCAFC 172

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

DKXY v Minister for Home Affairs [2019] FCA 495

Falzon v Minister for Immigration and Border Protection [2018] HCA 2.

Finance Facilities Pty Ltd v Federal Commissioner of Taxation [1971] HCA 12

FYBR v Minister for Home Affairs [2019] FCAFC 185

Gaspar v Minister for Immigration and Border Protection [2016] FCA 1166

Guclukol v Minister for Home Affairs [2020] FCAFC 148

Julius v Lord Bishop of Oxford (1880) 5 App Cas 214

Leach v The Queen [2007] HCA 3

Lum and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] AATA 792

Marzano v Minister for Immigration & Border Protection [2017] FCAFC 66

Minister for Home Affairs v Buadromo [2018] FCAFC 151

Minister for Immigration, Citizenship and Multicultural Affairs v HSRN [2023] FCAFC 63

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton [2023] HCA 17
Muzika and Minister for Home Affairs [2019] AATA 445
Nathanson v Minister for Home Affairs [2022] HCA 26
Plaintiff M1-2021v Minister for Home Affairs [2021] HCA 17
Tanielu v Minister for Immigration and Border Protection [2014] FCA 673
Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 125.
Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2018] FCAFC 116
XFKR and Minister for Immigration and Border Protection [2017] AATA 2385
YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

Secondary Materials
Direction No 99: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (23 January 2023).

REASONS FOR DECISION

Mr S. Webb, Member

2 February 2024

1. Andrew Blake (**Mr Blake**) applied for review of the decision of a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs not to revoke (**non-revocation decision**) the mandatory cancellation of his Special Category (Temporary) (Class TY)(Subclass 444) visa (**Visa**) under s 501(3A) of the *Migration Act 1958* (**Act**).

2. I note in passing the legislative procedure set out in s 500(6A) to (6L) of the Act is not applicable as Mr Blake presently resides in New Zealand and he is not in the *migration zone*.

Facts

3. The following facts are established by the documentary and oral evidence before the Tribunal.

4. Mr Blake was born in December 1968 at Papakura, New Zealand.

5. He is a citizen of New Zealand, where he presently resides.

6. At the age of 17, on 22 June 1986, Mr Blake first entered Australia.

7. He obtained employment in the mining sector in Western Australia and subsequently as a labourer in Perth.

8. As will appear, Mr Blake committed a number of minor drug and driving offences in the period from 6 January 1987 to 14 November 1989.[1] In each case, fines were imposed.

9. In or about 1988, Mr Blake commenced a personal relationship with Chelsey Campbell.

10. On 30 August 1992, Mr Blake departed from Australia and entered New Zealand. He was found to be carrying a small amount of cannabis for which he was charged, convicted and fined.[2] He returned to Australia on 18 September 1992.[3]

11. Mr Blake undertook a carpentry apprenticeship in which he won a number of awards in 1997 and 1998.[4] He commenced a home maintenance business and purchased a house.

12. His relationship with Ms Campbell produced 3 children: a son born in 1998 (**J. Blake**); a daughter born in 2001 (**L. Blake**); and a second daughter born in 2003 (**S. Blake**) (collectively, **the children**). The children are Australian citizens.

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[1] T6, folio 49.
[2] T7, folio 50.
[3] T43, folio 175.
[4] T35.

13. In or about 2001, the family relocated to the Kyogle area in New South Wales. Mr Blake was without employment for a period of years and he home-schooled the children. He subsequently obtained employment as a carpenter and, later, he commenced an earthworks business.

14. In or about 2009, Ms Campbell separated from Mr Blake. Thereafter they lived in separate residences. Mr Blake was actively involved in caring for the children who moved between their parent's homes. For several years Mr Blake and Ms Campbell maintained an "*on and off*" relationship.

15. On 4 November 2012, Mr Blake departed from Australia and returned on 11 November 2012.[5] He completed an Incoming Passenger Card in which he stated he had no criminal convictions.[6]

16. In or about September 2018, Ms Campbell informed Mr Blake their *on and off* relationship was over as she had commenced a new relationship with someone else, David McConchie.

17. After hosting his daughter's (L Blake) 18th birthday party, by his own admission Mr Blake consumed beer, cannabis and 4 tablets of Valium before retiring to bed. He awoke a few hours later and, in the early hours of 31 March 2019, he retrieved a pump action .22 calibre rifle (for which he held a NSW firearms licence) from a secure safe and drove at speed to Mr McConchie's property. On arrival, Mr Blake entered the property carrying the rifle. He entered Mr McConchie's house. He found and entered the bedroom in which Mr McConchie and Ms Campbell were sleeping. He switched the light on and woke them, shouting abuse. He engaged in violent, threatening and abusive conduct, pointing the rifle at Mr McConchie and Ms Campbell, threatening to kill them, threatening to kill himself and terrifying them. He forced them to move into the lounge room, where he continued his abusive tirade. At some point he placed the rifle in his car and then returned and continued to berate, threaten and humiliate Ms Campbell and Mr McConchie. After more than 1 hour he left the scene. Mr Blake asserts he adopted a conciliatory tone and apologised before leaving, but this is controversial as it does not align with police and court records of what occurred.

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[5] T43, folio 175.
[6] T42, folio 174.

18. As will appear, Mr Blake was charged with a number of criminal offences relating to this conduct. He entered guilty pleas and was sentenced to an aggregate 5-year term of imprisonment, commencing on 1 April 2019, with a non-parole period of 3 years and 4 months, ending on 31 July 2022.

19. On 27 July 2020, Mr Blake's Visa was mandatorily cancelled under s 501(3A) of the Act (**original decision**) and he was issued a notice of the cancellation.[7]

20. On 1 August 2020, Mr Blake requested revocation of the original decision and provided additional materials and information.[8] He provided further materials on 24 November 2021[9] and on 13 December 2022[10].

21. On 31 July 2022, Mr Blake was released on parole,[11] whereupon on 1 August 2022 he departed from Australia and returned to New Zealand rather than entering immigration detention.[12]

22. On 23 May 2023, a delegate of the Minister considered Mr Blake's representations and decided under s 501CA(4) not to revoke the original decision.[13]

23. On 30 May 2023, Mr Blake lodged an application for review of this decision by the Tribunal.

Serious and criminal conduct

24. Mr Blake has the following cannabis-related offences, convictions and penalties.

    (a) On 6 January 1987, Mr Blake was found guilty of possessing a quantity of cannabis for which he was given a $200 fine.[14] This offence was committed when Mr Blake was a minor child.

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[7] T11.
[8] T12-T35.
[9] T36-T39.
[10] T41.
[11] T9, folio 54.
[12] T43, folio 175.
[13] T3.
[14] T6, folio 49.

(b) On 18 January 1989, he was convicted of offences relating to the possession and cultivation of cannabis for which fines of $50 and $150 were imposed.[15]

(c) He was convicted of a further *Cannabis used/smoked* offence on 14 November 1989 and was fined $250.[16]

(d) On 1 September 1992, Mr Blake was convicted of possession of cannabis on entry to New Zealand and he was fined $200.[17]

25. In evidence, Mr Blake admitted to using cannabis in the evenings and on weekends over many years. By his account, his cannabis usage increased after 2009 even though he engaged in rehabilitation programs. On 1 April 2019, a single cannabis plant was found growing in a pot on the back porch of Mr Blake's house.[18] While Mr Blake was not charged or convicted of further cannabis-related offences, his use of cannabis amounts to serious conduct.

26. Mr Blake has the following traffic offences, convictions and penalties.

(a) On 21 September 1988, he drove under the influence of alcohol in excess of 0.08%. He was fined $200 and was disqualified from driving for 3 months.[19]

(b) On 3 February 1989, he was fined $50 for driving with a passenger not wearing a seat belt and a further $150 for careless driving.[20]

(c) On 19 September 1989, Mr Blake drove while under the influence of alcohol in excess of 0.08%. He was fined $600 and disqualified from driving for 9 months. He was also fined $60 for driving without a licence.[21]

(d) On 23 July 1990, Mr Blake was fined $200 for driving without a licence under suspension.[22]

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[15] Ibid.
[16] Ibid.
[17] T7, folio 50.
[18] Exhibit 4, page 7.
[19] T6, folio 49.
[20] Ibid.
[21] Ibid.
[22] Ibid, folio 48.

27. Mr Blake's traffic offences are of a relatively minor nature and they all occurred many years ago. While offending conduct of this kind poses a risk of harm to members of the community and, for that reasons is considered to be serious, the seriousness is diminished by the age of the offences and the passage of many years without further offending of this kind.

28. Mr Blake has the following offences, convictions and penalties involving violence.

29. At approximately 1.00am on 31 March 2019, Mr Blake committed violent offences against Ms Campbell and Mr McConchie, aggravated by his use of a firearm.[23] At approximately 5.25pm on 31 March 2019, Mr Blake was arrested and taken into custody.[24] He was refused bail.

30. On 18 June 2020, Mr Blake was convicted and sentences in respect of the following offences:

    (a) 2 counts of *Take/detain person w/I to obtain advantage (DV)-S1*;[25] the indicative sentence on each count was a 3 year term of imprisonment;[26]

    (b) 1 count of *Use unauthorised firearm-T2*;[27] the indicative sentence for this offence was a 12 month term of imprisonment; [28]and

    (c) 1 count of *Specially aggravated enter dwelling w/i- dangerous weapon-S1*;[29] the indicative sentence for this offence was a 4 year term of imprisonment.[30]

31. He was sentenced to an aggregate term of imprisonment of 5 years commencing on 1 April 2019 with a non-parole period of 3 years and 4 months.[31] Leave to appeal was refused.[32]

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[23] Ibid, pages 13-16; T10 refers.
[24] Ibid, pages 4 and 7.
[25] T6, folio 48 and T8, folio 51.
[26] T10, folio 67.
[27] T6, folio 48 and T8, folio 51.
[28] T10, folios 67-68.
[29] T6, folio 48 and T8, folio 51.
[30] T10, folio 67.
[31] T8, folio 52; T10, folio 68.
[32] T9, folio 54.

Issues

32. The Tribunal review is in respect of the Minister's decision not to revoke the original decision under s 501CA(4) of the Act:

> *(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.*

33. Mr Blake made representations in response to the invitation to do so.

34. Consequently, the issues for decision in this review are whether the original decision should be revoked on grounds:

(a) Mr Blake passes the character test; or

(b) there is another reason to revoke the original decision.

35. Should the Tribunal be satisfied there is another reason to revoke the original decision, there is a question whether the legislation confers a residual discretion in respect of the exercise of power to revoke the mandatory cancellation decision which requires further consideration. When this question was raised at the outset of the hearing, the parties were in agreement the correct approach requires the Tribunal to determine if it is satisfied another reason exists to revoke the original decision, weighing up factors for and against revocation, and, if so satisfied, to exercise the power to do so.

36. There are divergent Federal Court authorities on this point. In *Ali v Minister for Home Affairs* (***Ali***)*,* [33] Collier, Reeves and Derrington JJ concluded formulation of the satisfaction required by s 501CA(4)(b) conditions but does not involve exercise of the power to revoke.[34] In *Guclukol v Minister for Home Affairs*,[35] Katzmann, O'Callaghan and Derrington JJ came to a similar conclusion.[36] In *Tohi v Minister for Immigration, Citizenship, Migrant Services and*

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[33] [2020] FCAFC 109.
[34] Ibid at [39]-[49].
[35] [2020] FCAFC 148.
[36] Ibid at [16].

Multicultural Affairs (***Tohi***), [37] Derrington J (in minority) rejected the proposition *the obligation to form a relevant state of satisfaction and the discretionary power should be assimilated into the one exercise of power*.[38] Katzmann and O'Bryan JJ did not agree and relied on prior binding authorities addressing the point, [39] although Katzmann J agreed the matter was not argued and the correctness of prior authorities could be revisited in a suitable case.[40] The High Court refused an application for special leave to appeal in *Tohi.* Derrington J returned to the issue in *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (***Au***) [41] and highlighted a distinction between the finding of a jurisdictional fact and the exercise of the power to revoke, raising but not dealing finally with the meaning of the word 'may' in s 501CA(4) of the Act.[42] In that case, Perry J observed:

> *… argument on the appeal proceeded on the basis that there is no residual discretion once the criteria prescribed by ss 501CA(4)(a) and (b) are met. This construction accords with the weight of authority of this Court (as O'Sullivan J explains at [82]–[87]), although the majority's reasons in Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17; (2022) 96 ALJR 497 at [22] indicate that the High Court may take a different view. In any event, I agree with Derrington J at [62] that the result on this appeal would be the same irrespective of which construction of s 501CA(4) is correct and, in those circumstances, would refrain from making any further observations as to the proper construction of the provision.*[43]

37. I note Gageler and Gordon JJ touched on this issue in *Falzon v Minister for Immigration and Border Protection* (***Falzon***),[44] stating:

> *… If the person makes representations in accordance with the invitation, and the Minister is satisfied that the person passes the character test or that there is another reason why the cancellation decision should be revoked, the Minister* may *revoke the cancellation decision.*[45]
>
> [Original emphasis.]

38. The issue of a two-stage approach to s 501CA(4) was argued and rejected in *Gaspar v Minister for Immigration and Border Protection*.[46] This construction was re-affirmed in

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[37] [2021] FCAFC 125.
[38] Ibid at [51].
[39] Ibid at [3]-[4] and [100], respectively.
[40] Ibid at [7].
[41] [2022] FCAFC 125.
[42] Ibid at [57]-[62].
[43] Ibid at [3].
[44] [2018] HCA 2.
[45] Ibid at [74].
[46] [2016] FCA 1166 at [26]-[38].

Marzano v Minister for Immigration & Border Protection (***Marzano***),[47] *Viane v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (***Viane***),[48] *Minister for Home Affairs v Buadromo* (***Buadromo***)[49] and *Bettencourt v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* (***Bettencourt***).[50]

39. In *Viane*,[51] Colvin J (Reeves J agreeing) made the following observations:

> *73. Finally, if the Minister is satisfied that there is a reason why the cancellation decision should be revoked then, given the way in which s 501CA(4)(b) is expressed, the Minister* ***must revoke****. As the failure to meet the character test will be the only reason why a person's visa will be revoked under s 501(3A), it would be strange if the Minister was satisfied for the purposes of s 501CA(4)(b)(i) that the person passed the character test, yet there remained a discretion whether to revoke. Such a construction would mean that the power to revoke could be withheld even though the Minister was satisfied that the basis on which the visa had been cancelled was not actually satisfied. Equally, it would be strange if the Minister found that there was another reason for the purposes of s 501CA(4)(b)(ii) why the original decision should be revoked, but nevertheless retained a discretion to refrain from revoking the cancellation of the visa.*
>
> *74. Therefore, the opening words to s 501CA(4) are in all likelihood an example of those cases where* ***'may' means 'must'****: Marzano at [31]; Julius v Lord Bishop of Oxford (1880) 5 App Cas 214; Finance Facilities Pty Ltd v Federal Commissioner of Taxation [1971] HCA 12; (1971) 127 CLR 106 at 134135, 138139 and Leach v The Queen [2007] HCA 3; (2007) 230 CLR 1 at [38]. If there remains a discretion once the Minister is satisfied as to one of the matters in s 501CA(4)(b) it would be a very narrow one that, in most circumstances, could not be reasonably exercised by refusing to revoke the original decision to cancel the visa.*
>
> [Emphasis added.]

40. On appeal, in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane*,[52] the High Court did not squarely address this point but set out the statutory scheme:

> *The relevant statutory scheme mandated by s 501CA of the Act comprises: the giving of relevant information to a person whose visa has been cancelled; inviting that person to make representations about why that cancellation decision should be revoked; the receipt of representations by the Minister made in accordance with that invitation; and, thereafter, the formation of a state of satisfaction, or not, by the Minister that the cancellation decision should be revoked. That scheme necessarily*

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[47] [2017] FCAFC 66, per Collier J at [31], Logan and Murphy JJ agreeing.

[48] [2018] FCAFC 116, per Colvin J at [73]-[74], Reeves J agreeing.

[49] [2018] FCAFC 151 at [21].

[50] [2021] FCAFC 172 at [27]-[28].

[51] [2018] FCAFC 116.

[52] [2021] HCA 41.

> *requires the Minister to consider and understand the representations received. What is "another reason" is a matter for the Minister. Under this scheme, Parliament has not, in any way, mandated or prescribed the reasons which might justify revocation, or not, of a cancellation decision in a given case.*[53]

41. Gordon J adopted this approach in *Nathanson v Minister for Home Affairs*,[54] and the High Court reiterated the construction in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton*.[55]

42. The matter is further illuminated by variation of the Objectives set out in previous iterations of the Direction (Ministerial Direction 65 and Ministerial Direction 79), which were considered in the cases I have referred to, included:

> *6.1 (3) … Where the discretion to consider revocation is enlivened, the decision-maker must consider whether to revoke the cancellation given the specific circumstances of the case.*

These words do not appear in Ministerial Direction 90 and the present Direction which, instead, include the following:

> *5.1 (3) …Where the decision-maker considering the request is not satisfied that the non-citizen passes the character test the decision-maker must consider whether there is another reason to revoke the cancellation given the specific circumstances of the case.*

43. Having regard to these matters, and as the matter was not fully ventilated and argued by the parties, I am prepared to accept the basis briefly outlined by the parties which accords with the weight of authority. The power to revoke a mandatory cancellation decision under s 501(3A) is conditioned by a state of satisfaction under s 510CA(4)(b) and where that state is achieved, weighing up relevant materials and considerations, exercise of the power is mandated. I will proceed accordingly without further consideration of the construction point.

44. There is one further point to raise in this context. In a review of this kind, by operation of s 499(2A), the Tribunal must comply with directions issued by the Minister under s 499(1) of the Act,[56] presently *Direction no. 99: Visa refusal and cancellation under section 501 and*

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[53] Ibid at [13].
[54] [2022] HCA 26 at [71].
[55] [2023] HCA 17 at [52] and [100]-[101].
[56] *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 168 at [19].

revocation of a mandatory cancellation of a visa under section 501CA (**Direction**). The Direction provides *no more than guidance on the exercise of discretionary powers* by the administrative decision-maker.[57]

45. I note the Objectives in paragraph 5.1 of the Direction and the following Applicable Principles in paragraph 5.2:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
>
> *(3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.*
>
> *(4) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time.*
>
> *(5) With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.*
>
> *(6) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.55(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.*

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[57] Ibid.

46. The Direction sets out the following instructions and guidance:

> *6. Making a decision*
>
> *Informed by the principles in paragraph 5.2, a decision-maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.*
>
> *7. Taking the relevant considerations into account*
>
> *(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.*
>
> *(2) Primary considerations should generally be given greater weight than the other considerations.*
>
> *(3) One or more primary considerations may outweigh other primary considerations.*
>
> *8. Primary considerations*
>
> *In making a decision under section 501(1), 501(2) or 501CA(4), the following are 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;*
>
> *(5) expectations of the Australian community.*
>
> *…*
>
> *9. Other considerations*
>
> *(1) In making a decision under section 501(1), 501(2) or 501CA(4), the considerations below must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):*
>
> *a) legal consequences of the decision;*
>
> *b) extent of impediments if removed;*
>
> *c) impact on victims;*
>
> *d) impact on Australian business interests*

Character test

47. With regard to the character test set out in s 501(6) of the Act and the alternative grounds set out therein, the sole ground raised in the delegate's decision and in these proceedings is set out in s 501(6)(a):

> *(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)); or

…

*(7) For the purposes of the character test, a person has a **substantial criminal record** if:*

…

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

…

48. Mr Blake concedes he does not pass the character test on this ground.

49. Mr Blake's concession is consistent with evidence he was sentenced in aggregate to a 5 year term of imprisonment in respect of convictions for the criminal offences he committed on 31 March 2019. Having regard to s 5AB of the Act, the aggregate sentence means Mr Blake has a *substantial criminal record* and he does not pass the character test for the purposes of s 501CA(4)(b)(i) of the Act.

Another reason

50. Mr Blake asserts there is another reason to revoke the mandatory cancellation of his Visa. He argues the serious conduct he engaged in is out of character and it was contributed to by a dysfunctional relationship breakdown, painful symptoms of a physical injury which prevented him from working, accumulated mental health difficulties stemming, at least in part, from traumatic childhood experiences, including a major depressive episode, and substance abuse over many years. The risk of him re-engaging is such conduct is very low, so the argument goes, as he is managing his mental health, which has improved with treatment, and his substance use disorder is in remission. Furthermore, Mr Blake asserts he has insight into and is remorseful for his previous serious offending conduct. He submits the risk of him re-offending is further reduced by powerful disincentives stemming from his deep desire to avoid further incarceration (having strong negative experiences while incarcerated in maximum security during the term of his imprisonment), and his strong desire to re-establish life in Australia, and to engage physically in family life with his children and immediate family members in Australia, which would be put at risk by further serious offending conduct.

51. Having spent many years residing in Australia from the age of 17, Mr Blake asserts he has developed strong, enduring ties to Australia which include family, social and financial ties. Mr Blake alleges members of his family who are Australian citizens or who have a permanent right to reside in Australia are adversely affected by the cancellation of his Visa. In this context, he contends the legal consequence of the cancellation of his Visa preclude him from obtaining any further visa to visit and physically engage with his family members in Australia. Mr Blake argues this has a life-long effect which is not justified in the circumstances of his case. The lack of justification is underscored by his poor mental health at the time of his most serious offending conduct which, he asserts, should be taken into account when weighing up the relevant considerations.

52. It is Mr Blake's submission, when relevant considerations are weighed, those in favour of revoking the original decision outweigh those against doing so.

53. The Minister does not agree. In the Minister's submission, considerations relating to protection of the Australian community and Australian community expectations are reinforced by the seriousness of the family violence Mr Blake engaged in, and these considerations out-weigh other considerations, including the strength, nature and duration of Mr Blake's ties to Australia.

54. The Minister asserts the very serious nature of Mr Blake's conduct is reinforced by a pattern of disregard for Australian laws and his history of persistent substance use and untreated mental illness. In the Minister's submission, these considerations add to the risk Mr Blake would engage in further serious offending conduct should the original decision be revoked and he be permitted to return to Australia. The Minister alleges further similar conduct would result in physical, emotional, psychological and financial harm to members of the Australian community and the risk thus posed cannot be tolerated. To the extent Mr Blake's mental illness was a factor in his offending conduct on 31 March 2019, the Minister argues any consequent diminution of his culpability should be considered in the context of protection of the Australian community rather than as an additional consideration, as was done in *Muzika and Minister for Home Affairs* (***Muzika***)[58].

[58] [2019] AATA 445.

55. At the time of Mr Blake's offences on 31 March 2019, the Minister contends Ms Campbell was a member of Mr Blake's family for the purposes of the definition of *family violence* in s 4(1) of the Direction and points to the Government's serious concerns about conferring on non-citizens who engage in family violence the privilege of entering Australia. The Minister submits Mr Blake's family violence offending is abhorrent and relies on *Lum and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[59] in which the Tribunal said:

> *139. The Tribunal has consistently found that family violence is abhorrent. It has been described as 'a corrosive blight on the Australian community', 'plainly abhorrent' and an offence which 'warps and destroys the healthy bonds that should exist between partners and within families.' As the Tribunal observed in XFKR [*XFKR and Minister for Immigration and Border Protection *[2017] AATA 2385 at [45]], family violence 'normalises ... socially enforced gender imbalances that allow sex based inequalities and violence to arise in the first place. The impact this has, socially, on systemic equality between the sexes cannot be underestimated.'*

56. While the Minister concedes Mr Blake has ties to Australia, the Minister asserts Mr Blake has put members of the Australian community at risk and he has consumed a significant amount of law enforcement and court resources at the expense of the Australian community. Mr Blake is a non-citizen who failed to comply with Australian laws and, the Minister submits, the Australian community would not expect such a person to hold a visa.

57. The Minister accepts Mr Blake would not be eligible to for a further Special Category (Temporary) (Class TY) (Subclass 444) visa if the original decision is not revoked and any further visa application would be unlikely to succeed on character grounds or by operation of item 5001 of Schedule 2 of the *Migration Regulations 1994* (**Regulations**). The Minister argues these are the legal consequences of the mandatory cancellation of Mr Blake's Visa consequent to his criminal conduct in Australia as a non-citizen and the policy given expression in s 501(3A) of the Act.

58. The primary considerations are set out in s 8 of the Direction:

> *(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;*

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[59] [2022] AATA 792 at [139].

(5) expectations of the Australian community.

59. Other considerations include, but are not limited to, the matters set out in s 9(1):

(a) legal consequences of the decision;
(b) extent of impediments if removed;
(c) impact on victims;
(d) impact on Australian business interests.

60. The Minister is in broad agreement with Mr Blake that considerations relating to the best interests of minor children and the extent of impediments if removed do not arise in the circumstances of this case.

61. I agree. I am satisfied the primary consideration in respect of the best interests of minor children in Australia, and the other consideration in respect of the extent of impediments if removed do not arise in the circumstances of this case. There is no evidence or suggestion of any minor children whose best interests should be considered. Mr Blake returned to New Zealand on 1 August 2022 where he presently resides.

Protection of the Australian community

62. The primary consideration of protection of the Australian community from criminal or other serious conduct requires consideration of the nature and seriousness of Mr Blake's conduct under s 8.1.1 of the Direction and the risk of harm to the Australian community should he commit further offences or engage in other serious conduct under s 8.1.2. When considering these matters, the Government's commitment to protect the community from harm resulting from criminal conduct or other serious conduct by non-citizens should be kept squarely in mind. Additionally, s 8.1 of the Direction states:

> *… 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 they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*

Nature and seriousness of conduct

63. Decision-makers must have regard to the matters set out in s 8.1.1:

> *(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:*

a) *without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:*

   i. *violent and/or sexual crimes;*

   ii. *crimes of a violent nature against women or children, regardless of the sentence imposed;*

   iii. *acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;*

b) *without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:*

   i. *causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;*

   ii. *crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;*

   iii. *any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));*

   iv. *where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;*

c) *with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;*

d) *the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;*

e) *the cumulative effect of repeated offending;*

f) *whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;*

g) *whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).*

h) *where the offence or conduct was committed in another country, whether that offence or conduct is classified as an offence in Australia.*

64. Mr Blake engaged in serious criminal conduct on 31 March 2019. At approximately 1.00am on 31 March 2019, without invitation or authority, he entered Mr McConchie's home while armed with a rifle. He searched through the premises until he located the bedroom in which Mr McConchie and Ms Campbell were sleeping. What then occurred is set out in police reports and a statement of agreed facts.[60] Mr Blake switched the light on and yelled abuse at Ms Campbell and Mr McConchie. In all likelihood, Mr Blake pointed the gun at Ms Campbell and Mr McConchie, and threatened to kill them and then kill himself. He demanded they move to the lounge room where he ranted at Ms Campbell about things she had done wrong in their relationship and threatened Mr McConchie with violence – "*I will smash your fucking face in*".[61] Mr Blake engaged in this conduct for just over one hour. The victims were terrified and were unable to call for assistance as the property was in a rural area without telephone reception. At some point, Mr Blake said words to the effect "*This is ridiculous*" he then placed the rifle in his car.[62] Mr Blake re-entered the house and continued ranting at Ms Campbell and Mr McConchie. He finally left the premises and drove away.

65. Mr Blake gave evidence he does not recall pointing the gun at Ms Campbell and Mr McConchie or threatening to kill them. He explained he spent only 5 to 10 minutes in the house with the gun and the whole incident lasted approximately 20 minutes, although he does not have a clear recollection. Mr Blake informed the Tribunal, he was very angry but calmed down. He alleges he apologised to Mr McConchie and shook his hand, and he was assisted to his car by Ms Campbell who then spoke with him for 5 minutes at his motor vehicle, after which he departed the scene.

66. Mr Blake's evidence on this point is not corroborated and it does not sit well with evidence Ms Campbell and Mr McConchie were very fearful when Mr Blake left and they retreated to a shed on the property until driving to report the matter to police in Kyogle. His account does not align with the agreed facts placed before the NSW District Court[63] and with accounts of the incident reported by police.[64] Mr Blake's current version of the incident does not squarely align with the account he gave Dr Kwok,[65] a clinical and forensic psychologist, in

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[60] Exhibit 4, pages 1-12 and 13-16.
[61] Ibid, page 15.
[62] Ibid.
[63] Ibid, pages 15-16.
[64] Ibid, pages 4 and 7.
[65] Exhibit 2, pages 8-9.

respect of pointing the firearm at the victims and threatening to kill them. The details raised in these accounts were not raised in the 24 May 2020 report of Dr Chew,[66] a consultant general and forensic psychiatrist, or in Mr Blake's 11 June 2020 affidavit[67] in reply for the purposes of sentencing proceedings.

67. The inconsistencies were put to Mr Blake, who explained he did not raise these matters at the time because he was so *torn, ashamed and guilty* and he *deserved what was coming*.

68. While I accept Mr Blake's remorse is genuine, I consider his evidence in respect of these matters to be unreliable. I accept Mr Blake does not have a clear recollection of what occurred. In all likelihood, his mind was affected by the substances he had consumed. It is probable Mr Blake consumed beer, cannabis and benzodiazepine (Valium) prior to the 31 March 2019 incident.

69. I also accept Mr Blake's actions and his recollection are likely to have been affected by mental illness at the time. Dr Kwok gave evidence Mr Blake was probably suffering from a Major Depressive Episode in the context of long-term Persistent Depressive Disorder at the time.[68] She gave oral evidence, in her opinion Mr Blake was also suffering from a Substance Use Disorder.

70. While these factors might have had a disinhibiting effect on Mr Blake and they might reduce his moral culpability to some degree, they were taken into account in sentencing by Judge McLennan SC.[69] The Judge found Mr Blake's *Offence is just below the midrange of objective seriousness*.[70]

71. Considering the facts of Mr Blake's background, including his childhood experience of domestic violence and his father's suicide when he was 12 years old and his early exposure to and use of cannabis from the age of 13, as well as his record of offending, I agree with McLennan J's assessment:

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[66] T26.
[67] Exhibit 4, pages 27-29.
[68] Exhibit 2, page 12.
[69] T10, folio 65.
[70] Ibid, folio 59.

> *This extraordinary and criminal series of events [on 31 March 2019], at the home of Mr McConnachie [sic], were committed by someone whose past would give no indication that they would behave in a way which Mr Blake did.*
>
> *Mr Blake has a minor criminal history, essentially for driving matters and cannabis, which confirm his drug addiction, to cannabis, from a very young age, which I will come to shortly but beyond that, there are no episodes of violence in his past and those who have provided character references, on his behalf, indicate that it is completely out of character for him…*[71]

72. While Mr Blake's offending on 31 March 2019 was substantially more serious than his previous record of offending, I am not persuaded this can properly be considered as a *trend of increasing seriousness*. It is better described as a singular, extraordinary incident of serious violent offending on a background of minor, non-violent unlawful conduct and earlier minor offending. Prior to 31 March 2019, Mr Blake's previous offence was committed in 1992, a gap of 27 years. During this intervening period, by his own admission and consistent with the Substance Use Disorder Dr Kwok and McLennan J referred to, Mr Blake engaged in unlawful conduct relating to his frequent use of cannabis in respect of which no charges were raised. I note police found cannabis growing at Mr Blake's property when he was arrested on 31 March 2019.

73. Evidence of an altercation with a neighbour over an incident in which the neighbour's dogs chased and terrified Mr Blake's children on his property does not disclose any tendency to violent conduct. The fact that Mr Blake threatened to shoot the dogs if they entered his property again discloses a desire to protect his children from harm rather than a tendency to violence. Mr Blake accepts the threat was ill-considered and police did not proceed with any charges.

74. On 11 November 2012, Mr Blake provided false information on an Incoming Passenger Card in respect of having no prior criminal convictions.[72] He explained this as an error in respect of previous minor cannabis convictions.

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[71] Ibid, folio 62.
[72] T42.

75. No doubt, the cumulative effect of Mr Blake's offending on 31 March 2019 had a significant adverse impact on Mr McConchie and Ms Campbell, as the 19 December 2019 report of Ms Chui[73] and the victim impact statement of Ms Campbell[74] clearly reveal.

76. Mr Blake has not committed further offences since 31 March 2019.

77. The seriousness of Mr Blake's serious offending conduct weighs against revocation of the original decision.

Risk to the Australian community

78. In considering the need to protect the Australian community from harm, regard should be had to:

> *… the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.*

79. In assessing the risk posed, it is necessary to have regard to the matters set out in 8.1.2 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 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 (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.*

[73] Exhibit 4, pages 18-19.

[74] Ibid, page 17.

80. The term 'serious conduct' includes behaviour or conduct of concern that does not constitute a criminal offence.

81. Mortimer J (as her Honour then was) discussed the assessment of risk in *Assistant Minister for Immigration and Border Protection v Splendido*[75] at [78]):

> *The nature and circumstances of past offending are integral to any assessment of the risk, or likelihood, also of relevance are a range of other factors about the present circumstances of an individual which may bear on a risk of whether past offending conduct might or might not be repeated. It is these matters, and not the mere specification of a criminal record, which provide the probative basis for assessment about the nature and extent of any risk of further offending.*

82. Her Honour discussed the assessment of risk and the legal conception of 'unacceptable risk' in *Tanielu v Minister for Immigration and Border Protection*[76] at [102]:

> *102. It is well established that, where the harm which might be caused by future conduct is particularly serious, a lesser likelihood of the conduct occurring may be required for the risk to be identified at a level requiring a particular decision to be made. It is also well established that the likelihood of a person engaging in conduct in the future is affected by both static and dynamic factors: that is, factors which can be assessed objectively against statistical models to predict the risk category a person falls into, and dynamic factors personal to an individual which may moderate or exacerbate the risk the person otherwise could be said to pose. Those factors might include family support, alcohol and drug abuse patterns, employment and the like.*

83. The harm which would result should Mr Blake commit further violent offences of the kind he committed on 31 March 2019 includes serious physical and psychological harm to individual members of the Australian community, especially women, and the community at large. The kind of offences Mr Blake committed undermine public safety and contribute to a broader sense of insecurity and fear of harm in the community. They pose public health risks relating to drug use and economic costs relating to drug addiction, public health and the administration of justice.

84. In May 2020, Dr Chew reported:

> *39. Mr Blake appears to express genuine remorse. His expressions of remorse were frequent and included multiple statements to the effect of "I am extremely sorry for my behaviours".*

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[75] [2019] FCAFC 132.

[76] [2014] FCA 673

40. Mr Blake has been in treatment for his Major Depression and his symptoms have improved significantly with mirtazapine.

41. His treatment requirements should address both the Major Depression and the substance use disorder and involves:

a. Ongoing medication

b. Ongoing psychological therapy

42. …

43. With treatment his prognosis is good and his risk of reoffending much lowered.

44. Deportation would be detrimental to his mental health and likely affect other significant family members negatively.[77]

85. On 18 June 2020, McLennan J accepted Mr Blake's remorse was genuine and considered he had good prospects of rehabilitation. These considerations and the ongoing support of his family led the Judge to conclude "*it is unlikely, in my view, that he will reoffend*".[78]

86. More recently, on 19 December 2023, Dr Kwok reported:

80. According to the available information, Mr Blake's score on the ODARA [Ontario Domestic Assault Risk Assessment] places him in the risk category of 4. Approximately 34% of individuals in this risk category commit another assault against their partner (or, a future partner) that comes to the attention of police within an average of about five years.

…

99. On the basis of my assessment, it is concluded that:

- *Mr Blake was suffering from a* Major Depressive Episode *at the time of his offending in March 2019. His emotional symptoms and problems with cognitive functioning were exacerbated by his substance use.*

- *Mr Blake presents as having a low risk of re-offending within a domestic setting and a low risk of general re-offending.*

- *Mr Blake's current symptoms meet the criteria for* Persistent Depressive Disorder with anxious distress*. If he is denied re-entry to Australia, his depression and anxiety will likely persist due to his ongoing separation from his children. This includes persistent feelings of loneliness, exclusion, and helplessness.*[79]

87. Dr Kwok gave oral evidence the ODARA risk assessment timeframe applies after release from prison and her assessment that Mr Blake presents a low risk of re-offending is based on her professional judgment, balancing factors for and against. She also explained Mr

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[77] T26, folios 128-129.

[78] T10, folio 66.

[79] Exhibit 2, page 14.

Blake's dispute with Ms Campbell over property might increase the risk if he chooses to resolve the matter on his own, whereas if he engages in mediation no increase in risk is likely. On this point, Mr Blake gave evidence the property is on the market and he would expect to receive 45% of the value at sale, although he also expects Ms Campbell to take legal action against him in respect of his share of the proceeds. He explained all his other property, including earth-moving machinery and vehicles, was left on the property and this has either been sold, taken or trashed.

88. When examined about the account Mr Blake gave her of his offences on 31 March 2019 and inconsistencies with details previously agreed and placed before the District Court, in respect of ending the incident on a conciliatory note, Dr Kwok did not consider it necessary to revise her opinion and risk assessment, rather she explained it might be something to consider in a treatment context. In her opinion, Mr Blake's acceptance of responsibility for his criminal behaviour and the impact of his offences on victims is of greater significance than his description of events when assessing the risk of him re-offending.

89. Dr Kwok gave evidence Mr Blake's substance use disorder is in sustained remission as he has been abstinent from drug use for more than 12 months. She explained substance use can be an anxiety avoidant behaviour and the risk of re-emergence might be affected by Mr Blake's *characteristic anxiety about travel and moving away from familiar surroundings*,[80] although the statistical risk of re-emergence in Mr Blake's case, with more than 2 years abstaining from drug use, is that he is highly likely to remain abstinent for 5 years. I note Mr Blake's uncontested evidence, after returning to New Zealand, he left his first employment in order to avoid co-worker substance use and he avoids 2 cousins who reside in New Zealand because they use alcohol.

90. Mr Blake obtained treatment for his depressive disorder during the early part of his imprisonment, and he engaged in 4 psychological treatment sessions following his return to New Zealand. I accept he suffers from social anxiety in New Zealand and this has remitted somewhat with treatment and insightful efforts by Mr Blake. It is notable Mr Blake has been residing in the community in New Zealand since 1 August 2022 without evidence

[80] Exhibit 2, page 11.

of any further serious or offending conduct and no evidence of any further major depressive episodes or a relapse in his substance use disorder.

91. There is no evidence of any plans or arrangements in Australia for treatment of Mr Blake's mental disorders should the original decision be revoked. That said, I accept Mr Blake's submission that such arrangements would presently be premature as he is presently residing in New Zealand and treatment options in Australia can be explored should he be allowed to return.

92. In the period from 17 May 2019 to 13 August 2019, while in custody, Mr Blake completed a domestic abuse rehabilitation course.[81] In 2021, Mr Blake completed a Certificate II in Skills for Work and Vocational Pathways.[82] There is no evidence of plans for Mr Blake to engage in further rehabilitation in Australia should the original decision be revoked.

93. Mr Blake has ongoing support from his children, his brother, mother and long term friends Cheryl Baker and Dr Maggie May, all of whom reside in Australia. In New Zealand, he is in employment and he gave evidence of developing friendship with work colleagues, to go fishing for example. In New Zealand he also has befriended and the support of a mental health nurse.

94. Mr Blake's unchallenged evidence is his brother has offered him a place to live and a job should he be permitted to re-enter Australia and he would attempt to resume his romantic friendship with a female friend, Lyn, he met in New Zealand who resides in Perth.

95. Having regard to these matters separately and cumulatively, the likelihood of Mr Blake re-offending or relapsing into further substance use is not great. While the offences he committed were serious and he has breached the privilege of entering Australia as a non-citizen, the risk he poses to the Australian community is low. While the seriousness of the offences he committed reduces the tolerance of risk, I am satisfied the causal factors which contributed to the singular incident in which his most serious offences occurred are offset by the harm he caused. This surpasses the risk tolerance of the Australian community.

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[81] T33.
[82] T34.

96. This consideration weighs against revoking the original decision.

Family Violence

97. Under s 4(1) of the Direction the following terms are defined:

> ***family violence*** *means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the* ***family member****), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:*
>
> *a) an assault; or*
>
> *b) a sexual assault or other sexually abusive behaviour; or*
>
> *c) stalking; or*
>
> *d) repeated derogatory taunts; or*
>
> *e) intentionally damaging or destroying property; or*
>
> *f) intentionally causing death or injury to an animal; or*
>
> *g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
>
> *h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or*
>
> *i) preventing the family member from making or keeping connections with his or her family, friends or culture; or*
>
> *j) unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.*
>
> ***member of the person's family****, for the purposes of the definition of the definition of* ***family violence****, includes a person who has, or has had, an intimate personal relationship with the relevant person.*

98. The preamble to s 8.2 includes a statement of the Government's 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. Under s 8.2(3), when considering the seriousness of family violence committed by the non-citizen, the following factors must be considered where relevant:

> *a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;*
>
> *b) the cumulative effect of repeated acts of family violence;*
>
> *c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:*

i. the extent to which the person accepts responsibility for their family violence related conduct;

ii. the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);

iii. efforts to address factors which contributed to their conduct; and

d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence, noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non-citizen's migration status, should the non-citizen engage in further acts of family violence.

99. When addressing this primary consideration, the principle is s 5.2(6) guides consideration to the extent that the inherent nature of family violence is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.

100. There can be no doubt the family violence consideration is relevant in Mr Blake's case. He was in an intimate personal relationship with Ms Campbell for 30 years, albeit an on and off relationship since 2009. On 31 March 2019, Mr Blake invaded a private dwelling with a gun and intimidated, threatened, abused and held Ms Campbell against her will for at least 1 hour. This amounts to *family violence* for the purposes of the Direction. There is evidence prior to this occurrence, Mr Blake called and sent text messages to Ms Campbell in which he expressed displeasure about family issues [83] and threatened self-harm. [84] These occurrences do not amount to *family violence*.

101. The *family violence* Mr Blake committed occurred on a single night. There is no evidence Mr Blake committed other family violence prior to 31 March 2019. It follows, and the Minister accepts, his family violence offences are not frequent or repeated in a pattern of increasing seriousness.

102. Mr Blake has repeated expressed remorse, guilt and shame for his actions on 31 March 2019. I accept his remonstrations are genuine.

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[83] Exhibit 4, page 4.

[84] Ibid, page 6.

103. Mr Blake completed a rehabilitation course targeting domestic violence while he was in custody in 2020. The course included remand domestic abuse sessions in respect of *coping: managing emotions*, *identifying abuse*, *caring: healthy lifestyle*, *communication* and *choices: action plans*.[85] He obtained mental health treatment for his depressive disorder and he has been abstinent from substance use, including alcohol, cannabis and benzodiazapines, since April 2019.

104. These considerations bear upon the relative seriousness of Mr Blake's family violence offence.

105. The particular circumstances of Mr Blake's family violence and the strong harmful effect of this conduct on victims are matters of serious concern. The level of concern is informed by the inherently abhorrent nature of family violence and its corrosive effects in the community. The level of concern is reduced by Mr Blake's remorse and his mental health treatment and rehabilitation. The singular incident of such serious conduct in Mr Blake's history also reduces the level of concern in respect of any risk of re-offending and the potential for harm.

106. Nevertheless, this consideration weighs against revoking the original decision.

Ties to Australia

107. This consideration is explained in s 8.3 of the Direction:

> *8.3 The strength, nature and duration of ties to Australia*
>
> *(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.*

[85] T33, folio 151.

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

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

i. considerable weight should be given to the fact that a 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; and

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

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

108. Members of Mr Blake's immediate family residing in Australia include his 3 children who are Australian citizens, his mother, Beverley Blake, and his brother, Daryl Blake, both of whom have a right to remain in Australia indefinitely. Each of these immediate family members gave evidence of the strength of their family relationships with Mr Blake and the and enduring qualities of his family bonds.

109. Mr Blake's (now adult) children gave evidence addressing the adverse impact on them of the cancellation of his visa.

(a) J. Blake stated:

Often, I must go through moments I would like to share or need assistance in and must deal with it without his input. His distance often leaves me with a feeling of something missing and it causes me anxiety. I struggle knowing that a lot of time has already been lost and more will be lost with the distance and the time apart.[86]

(b) L. Blake stated:

[86] Exhibit 1, statement of J. Blake, 5 October 2023.

I have found it very hard being apart from dad, not being able to see him and hug him for almost 5 years now.[87]

(c) S. Blake stated:

I missed so many opportunities to spend time with my father, whether its sharing holiday's [sic] together, introducing him to my partner, or leaning on him for guidance and support as I navigate the complexities of this world.[88]

110. Beverly Blake stated:

The separation of the children from [Mr Blake] is badly affecting their mental health and wellbeing.[89]

111. Darryl Blake stated:

10. It has been difficult conversing with my brother most days as he struggles to come to terms with how being deported has changed his life so much…

11. I crave spending time with my brother, and I know his kids feel the same…[90]

112. Mr Blake has ties with members of his extended family and long-standing friends residing in Australia, including Helana Kertmuller (J. Blake's partner), Deanne Baker (Darryl Blake's partner), Craig Woodroffe (Mr Blake's uncle), Cheryl Baker (a life-long childhood friend of Mr Blake, who is god-father to her 3 children), Dr Maggie May (a friend and previous client of Mr Blake over 12 years), Kerri Hayes (a friend and previous client of Mr Blake over 18 years) and Peter Fish (a friend and previous client of Mr Blake over 15 years). The statements from each of these people in evidence were not challenged and disclose the nature of the relationship and the bonds each has with Mr Blake over an extended period.

113. Mr Blake has spent his entire adult life residing in Australia. He first arrived in Australia at the age of 17 in 1986 and he has departed for short trips on 2 occasions. I understand he completed an application for conferral of Australian citizenship 3 years prior to the offences he committed in March 2019, but no decision had been made prior to the original decision to cancel his visa.

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[87] Ibid, statement of L. Blake, 17 September 2023.

[88] Ibid, undated statement of S. Blake, filed on 6 October 2023.

[89] Ibid, undated letter of Beverly Blake, filed on 6 October 2023.

[90] Ibid, statement of Darryl Blake, 5 October 2023.

114. Mr Blake's first conviction was in respect of a cannabis offence on 6 January 1987. Clearly enough, Mr Blake commenced offending shortly after arriving in Australia as a minor child.

115. The evidence of Dr May, Mr Fish and Darryl Blake, in particular, point to the positive contributions Mr Blake made to the Australian community, in employment and running his private home improvement and earthworks businesses during the period he resided in Australia. Furthermore, the evidence of Mr Blake's children confirms his role educating them.

116. I note Mr Blake sustained an injury to his back which prevented him from working and resulted in pain symptomatology which was initially treated with opioid medications and subsequently Valium from 2014. I accept there were lengthy periods during which Mr Blake was not in paid employment, although he contributed to the Australian economy directly and indirectly by home-schooling his children and purchasing goods, services, property and machinery.

117. While Mr Blake's record of offending and serious conduct soon after arriving in Australia might reduce the weight to be given to that period of his residence in Australia, the strength duration and nature of his family and social links are given greater weight, noting the thresholds of tolerance set out in principle 5.2(5) of the Direction.

118. This consideration weighs in favour of revoking the original decision.

Expectations of the Australian community

119. Matters to be considered in respect of the expectations of the Australian community are set out in s 8.5 of the Direction:

> *(1) 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.*
>
> *(2) In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:*

a) acts of family violence; or

b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;

c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;

d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or

e) involvement or reasonably suspected involvement in human trafficking or people smuggling, or in crimes that are of serious international concern including, but not limited to, war crimes, crimes against humanity and slavery; or

f) worker exploitation.

(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.

(4) 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.

120. The Government's statement of Australian community expectations 'as a norm' in s 8.5(1) has been construed as adverse to any visa applicant who has engaged in serious conduct and failed to pass the character test in s 501(6), giving rise to character concerns in breach of those expectations.[91] Stewart J discussed the attribution of weight to an adverse character assessment and the evaluation of what is appropriate in the particular circumstances in *FBYR* and observed:

> *It is difficult to conceive of a case where an unfavourable character assessment, whether on the basis of the commission of an offence or the risk that an offence will be committed, will be other than against the grant of a visa. In any particular case, the weight to be attached to that consideration because of the particular circumstances of the character assessment may be slight. In another case, because of the severity of the character assessment, the weight may be substantial. Thus, the character assessment, even through the prism of community expectations, may not be decisively against the applicant. In many cases it will not be. That is why the decision-maker must assess what is "appropriate" in the particular circumstances. Nevertheless, an adverse character assessment is necessarily against a visa*

[91] *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 at [76]; *FYBR v Minister for Home Affairs* [2019] FCAFC 185 ('***FBYR'***), per Charlesworth J at [75] and Stewart at [89].

applicant, to some degree or other; no one will be awarded a visa because they are of bad character.[92]

121. Even though Stewart J was addressing a previous iteration of Direction 99 (Direction 65), these comments remain apposite. While there might be argument whether the Government's statement always weighs against revocation,[93] it is clear enough the 'norm' should not be construed as directing the decision to be made under s 501CA(4)(b)(ii) in any particular case.[94] The statement of expectations is not inimical to consideration of the facts in each case and weighing concerns about the adverse character assessment with other relevant considerations (noting that primary considerations generally are to be given more weight than other considerations) when deciding if there is another reason to revoke the cancellation of the non-citizen's visa.[95] Nevertheless, the requirement in s 8.5(4) that the decision-maker *should proceed on the basis of the Government's views* is not optional; it is mandatory.[96]

122. Mr Blake committed serious family violence offences on 31 March 2019 and several minor cannabis and traffic offences in the period from 1987 to 1992. By his own admission, he engaged in serious conduct relating to cannabis use without charge or conviction for many years, increasingly from 2009.

123. It was on the basis of the offending conduct on 31 March 2019 the adverse character assessment arose on substantial criminal record grounds, resulting in mandatory cancellation of his visa.

124. The character concerns arising from this offending conduct hinge on the harm Mr Blake's offending conduct caused and the risk of Mr Blake re-offending and causing further harm to individuals or the Australian community.

125. Considering these concerns and the weight to be given to the adverse character assessment in the circumstances of Mr Blake's case, three important considerations arise.

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[92] Ibid at [102].
[93] *DKXY v Minister for Home Affairs* [2019] FCA 495 at [30]-[31].
[94] *FBYR*, per Charlesworth J and [73] and Stewart J at [103].
[95] *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 63 at [34]-[35].
[96] Ibid at [40].

126. Firstly, Mr Blake's offences in March 2019 involved serious acts of family violence against Ms Campbell. Of this, McLennan J observed:

> *… I make it clear that in this case the sentence is specifically concerned to denounce the offender's conduct and to make it clear that men's use of violence against women, consequent upon the cessation of a relationship is not to be tolerated. The harm to the victims must be acknowledged. The terrorising of women, at gunpoint, in their homes or in the homes of their partners, their new partners, is an outrage to be condemned.*[97]

This is indubitably correct. The abhorrent and intolerable nature of Mr Blake's family violence conduct increases the seriousness of the character concerns in his case.

127. Secondly, Mr Blake does not have any other record of family violence or offences involving violence. As McLennan J observed, the offences on 31 March 2019 were *extraordinary* and considered to be out of character by people who have known Mr Blake for many years and family members who describe him as a caring and responsible family man.[98] I have reached a similar conclusion on the evidence before the Tribunal. This mitigates the seriousness of the character concerns somewhat.

128. Thirdly, Mr Blake was mentally unwell and suffering from a Major Depressive Episode when the offences were committed in March 2019. He was also disinhibited by the substances he consumed before committing the offences, including alcohol, cannabis and benzodiazepine. McLennan J took these considerations and Mr Blake's ready admissions of guilt and expressions of remorse into account when sentencing him to an aggregate 5-year term of imprisonment. These factors might serve to reduce Mr Blake's moral culpability to some extent, which I have already taken into account. The evidence establishes Mr Blake has a long-standing Persistent Depressive Disorder and he became depressed in 2009 after his relationship with Ms Campbell initially broke down. He sought treatment but this was not successful in the context of his Substance Use Disorder and habitual use of cannabis and Valium (a treatment prescribed for chronic back pain following a work injury). He denies being warned about the risks of addiction. There is evidence his mental condition deteriorated in 2018[99] when Ms Campbell informed him she had commenced a new

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[97] T10, folio 67.

[98] Ibid, folios 62-63.

[99] Exhibit 3, pages 25-28.

relationship.[100] He became suicidal and presented at Lismore Base Hospital on 17 August 2018 with deliberate benzodiazepine poisoning.[101] He obtained treatment with Heal for Life and Dr Freeman, a psychiatrist, who recorded on 7 December 2018 Mr Blake had *persistent emotional turbulence* and:

> *He and the kids are all in low grade crisis and it is clear his therapists have reinforced his rage at abandonment, and victim sensibility.*[102]

129. His symptoms persisted and he obtained treatment from Neal Dark, a psychologist on 5, 12 and 19 March 2019. On 21 March 2019, police attended Mr Blake's property *after the ex partner of [Mr Blake] contacted police to state [Mr Blake] had been making threats of self harm*.[103] The police officer noted:

> *It is of concern to police that [Mr Blake] is in possession of a firearm if he is struggling with mental health related issues.*[104]

130. On 26 March 2019, Mr Blake consulted Dr Sudhir Mudunuri who noted Mr Blake was experiencing low self-esteem, depressed mood and anxiety, as well as irritability, irrational fears, suicidal thoughts and other psychological symptoms.[105]

131. It was on this mental health background Mr Blake committed serious violence offences on 31 March 2019.

132. Subsequently, Mr Blake obtained mental health treatment and he abstained from substance use during the period of his incarceration. The symptoms of Major Depressive Episode and his substance use disorder have remitted. There is no evidence he has engaged in further serious conduct since being released from custody and returning to New Zealand on 1 August 2022.

133. The fact Mr Blake committed his most serious criminal offences while affected by an episode of mental illness and while affected by use of substances consequent to a substance use disorder lessens the gravity of concerns about his otherwise serious violent conduct. The

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[100] Ibid, pages 50 and 170.
[101] Ibid, pages 158-171.
[102] Ibid, pages 61-62.
[103] Exhibit 4, page 8.
[104] Ibid.
[105] Exhibit 3, page 27.

expert evidence of Dr Chew and Dr Kwok establishes the risk of Mr Blake re-offending is low.

134. These factors reduce the seriousness of the character concerns consequent to the adverse character assessment in his case, but only so long as his mental health and substance use disorders are well managed and do not re-emerge.

135. Viewing these considerations through the prism of Australian community expectations as expressed in s 8.5 of the Direction and considering what is appropriate in the circumstances, on balance, I am satisfied the weight to be given to the adverse character assessment is reduced to the extent it weighs against revocation of the original decision but not heavily.

Other considerations

136. Under s 9 of the Direction the other relevant considerations must be taken into account, including:

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

Legal consequences

137. Decision-makers are directed in s 9.1 of the Direction to be mindful that Decision-makers should be mindful that unlawful non-citizens are, in accordance with s 198 of the Act, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under s 189.

138. Mr Blake asserts if the original decision is not revoked he will be barred from re-entering Australia by operation of item 5001 in Schedule 5 of the Regulations, which typically mandates permanent exclusion from Australia of a non-citizen in Mr Blake's circumstances. The Minister accepts any further visa application by Mr Blake is likely to be unsuccessful due to the operation of item 5001 or due to character criteria.

139. In the circumstances of this case, Mr Blake removed himself from Australia in order to avoid being taken into immigration detention on being released from gaol. Had this not occurred,

once the Minister decided not to revoke the original decision, the obligation to remove him from Australia would otherwise have arisen under s 198(2B) of the Act.

140. As Mr Blake is outside Australia, it is likely any further application for a visa to return to Australia would be subject to operation of relevant parts of item 5001, including the resident return criteria which require that the visa applicant is not a person whose visa has been cancelled under section 501 of the Act and, if the cancellation has not been revoked under subsection 501CA(4), after cancelling the visa, the Minister has not, acting personally, granted a permanent visa to the person.

141. In all likelihood, the legal consequence of a decision not to revoke the original decision will exclude Mr Blake from re-entering Australia. This will have the effect of precluding Mr Blake for physical contact and physical engagement with members of his immediate family in Australia. I have taken account of the adverse impact on those people. The additional consideration turns not on the point of policy in respect of removal of non-citizens who have a substantial criminal record from Australia, but on the particular facts of this case in which Mr Blake and his immediate family will in all likelihood be permanently precluded from meeting together physically in Australia.

142. This legal consequence weighs for revoking the original decision but it does not carry as much weight as the primary considerations.

Impact on victims

143. There is scant evidence of the impact of the original decision or the decision to be made presently on victims of Mr Blake's criminal behaviour.

144. I note Ms Campbell's victim impact statement in which she stated:

> *This experience has ruined my life.*
>
> *I am not sure I will ever feel safe in my own home again wondering whether [Mr Blake] will come again to finish what he started.*[106]

[106] Exhibit 4, page, 17.

145. I also note Ms Chiu's report, in which she diagnosed Mr McConchie was suffering from anxiety disorders and reported:

> *[Mr McConchie] feels convinced that the safety of himself and [Ms Campbell], and perhaps even [Ms Campbell's] children is never going to be certain, once [Mr Blake] is released from jail one day.*[107]

146. These materials were before the Court when Mr Blake was sentenced.

147. The significance of the impact of his criminal behaviour on the victims is very clear. The anxiety and insecurity each expressed may well arise again should the original decision be revoked.

148. This weighs against revocation, although it carries less weight than primary considerations.

Impact on Australian business interests

149. There is no evidence of the impact of the original decision or the decision to be made under s 501CA(4) on Australian business interests.

Additional consideration

150. Mr Blake's submissions in respect of the role mental illness played in his offending conduct hinge on the extent to which his ability to discern right from wrong was compromised.

151. I have taken related matters into account when addressing relevant primary considerations, particularly in respect of protection of the Australian community from harm and the expectations of the Australian community.

Conclusion

152. In *Demir v Minister for Immigration, Citizenship and Multicultural Affairs*,[108] Kennett J made the following observations which are presently apposite:

> *21. The metaphor of "weighing" relevant considerations should not be taken too literally. The exercise is not mathematical and cannot depend on the simple*

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[107] Ibid, page 19.
[108] [2023] FCA 870.

> *aggregation of factors on each side of a ledger. The conclusion … necessarily involves persuasion of a human decision-maker, whose thought processes cannot be reflected in lines of code, as to what is the right result in the circumstances. That persuasion flows from the decision-maker's personal understanding as to the significance of each of the factors they are required or permitted to take into account, in the light of all the material they have considered. So much is consistent with the decision-maker's duty to "call his own attention to the matters which he is bound to consider" and to give "proper, genuine and realistic consideration to the merits of the case". Correspondingly, the statutory specification of mandatory considerations requires those considerations to be taken into account, but not necessarily to be given any particular degree of weight.*
>
> [Citations removed.]

153. Considerations relating to the protection of the Australian community, family violence and the expectations of the Australian community weigh against revoking the original decision. So, too, does the impact on victims of his criminal conduct.

154. The weight given to the seriousness of Mr Blake's offending conduct is reduced by the singular occurrence of violence in the context of mental illness and substance use, preceded by only minor cannabis and traffic offences. The family violence element increases the weight, whereas Mr Blake's remorse, insight, treatment and rehabilitation underpin the low risk of him engaging in further such serious conduct and this lessens the weight given.

155. Nevertheless, these considerations weigh against revoking the original decision.

156. Conversely, considerations relating to the strength and nature of Mr Blake's ties to Australia and the legal consequence of the decision weigh for revocation of the original decision. The weight given to these considerations is increased by the length of time Mr Blake resided in Australia from the age of 17. The adverse impact of the original mandatory decision to cancel his visa if not revoked upon members of Mr Blake's immediate family, and his children who are Australian citizens in particular, also increases the weight given.

157. On balance, taking all relevant considerations into account, I am satisfied the balance tips in favour of finding there is another reason to revoke the original mandatory decision to cancel Mr Blake's Visa.

158. That being so, the original decision under s 501(3A) of the Act must be revoked under s 501CA(4).

159. I note in closing, if, contrary to authorities to which I have referred above, there is a residual discretion enlivened by the finding of *another reason* under s 501CA(4)(b)(ii) of the Act, it would be reasonable and appropriate to exercise it in the circumstances of this case.

Decision

160. The Minister's decision on 23 May 2023 is set aside and in substitution the Tribunal revokes the original decision on 27 July 2020 to mandatorily cancel Mr Blake's visa.

I certify that the preceding 160 (one hundred and sixty) paragraphs are a true copy of the reasons for the decision herein of Mr S. Webb, Member.

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

Associate

Dated: 2 February 2024

Date of hearing:	**23 January 2024**
For the Applicant:	**Dr Jason Donnelly**
For the Respondent:	**Mr Zachary McCaughan, MinterEllison**